

GIVENS PURSLEY^{LLP}

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

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Peter G. Barton
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Clint R. Bolinder
Erik J. Bolinder
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Raymond D. Givens (1917-2008)

July 10, 2013

Via Email and U.S. Mail

Daniel A. Nelson
Staff Hydrogeologist
Idaho Department of Water Resources
322 E Front St
Boise ID 83702
dan.nelson@idwr.idaho.gov

Re: North Kootenai Water District, Water Right Permit Nos. 95-9129, 95-9244,
and 95-10019

Dear Mr. Nelson:

My client, the North Kootenai Water District ("NKWD" or "District"), has asked me to address issues raised in your letter dated June 10, 2013 to Mike Galante.¹ (By the way, the letter's caption incorrectly identified Water Right Permit No. 95-9244 as 95-8244.)

The June 10 letter concerns the licensing of the three above-referenced water right permits held by the District. Each permit was issued with no annual volume limit. Two provide a single place of use corresponding to the District's entire expanding service area; they also authorize use of alternative points of diversion ("APODs") located throughout the service area.² The June 10 letter announces that the Department intends to impose annual volume limits, to

¹ The District also goes by the name North Kootenai Water & Sewer District and the acronym NKWSD. Its water rights, however, are held in the name of the North Kootenai Water District in accordance with the judicial order creating the entity. In any event, the two are one and the same, as reflected on the District's website.

² One of the permits, No. 95-9129, was issued to Sylte Development LLC. It identified a single point of diversion, and its place of use was limited to the Selkirk Meadows Subdivision. I recognize that this presents a separate issue, because the permit has not been amended. The concern I have, however, is that the Department's position described in the June 10 letter appears to preclude this right from being transferred to secure a broader place of use and APODs.

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limit the service areas to specific delivery systems (including, in one case, the splitting of a right into multiple rights with different service areas), and to allow APODs only within discrete delivery systems. I will address these issues in turn.

Annual volume limits

In your letter, you stated that the District's municipal water permits will be subject to an annual volume limit at licensing based on Idaho Code § 42-202B(9). I do not understand why this would be the case.

Your letter explains the Department's reasoning as follows:

. . . I was informed that unless you are the primary provider for the City of Hayden, then a volume is required for all of your water rights. . . . This decision was made based on Idaho Code 42-202b, Section 9, which says the following:

The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits.

The key phrase here is "if the constructed delivery system for the area shares a common water distribution system."

Letter of June 10, 2013 at 1.

I am troubled by this for two reasons. First, there is no requirement in the Idaho Code that an entity be the "primary provider" of municipal water in order to qualify as a municipal provider. The provision you quoted makes no reference to primary providers. Nor, for that matter, does it say anything about volume limits.

NKWD plainly qualifies as a municipal provider. The terms "municipality" and "municipal provider" are defined in the Municipal Water Rights Act of 1996 ("1996 Act") as follows:

"Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.

Idaho Code § 42-202B(4).

“Municipal provider” means:

- (a) A municipality that provides water for municipal purposes to its residents and other users within its service area;
- (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or
- (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a “public water supply” as described in section 39-103(12), Idaho Code.

Idaho Code § 42-202B(5).

Subsections (a) and (b) describe what are informally known as “traditional” municipal providers—that is, local governmental entities and water utilities that are obligated to provide municipal water to their customers. Subsection (c) addresses municipal water rights for what are termed “non-traditional” municipal providers—typically land developers or homeowners associations that develop a water supply in conjunction with a residential development.

NKWD is not a municipality, because it is not an incorporated city, county, or a department or entity within the state of Idaho. For that reason, it does not qualify as a municipal provider under Idaho Code § 42-202B(5)(a).

This does not mean, however, that NKWD is not a traditional municipal provider. The District qualifies as a traditional municipal provider under Idaho Code § 42-202B(5)(b) because it is a political subdivision of the state of Idaho authorized to supply water for municipal purposes and it does supply such water.

There is no doubt that the District is a “political subdivision” of the state. This is expressly provided in the Idaho Water Code:

The judges of election shall certify the returns of the election to the district court having jurisdiction. If a majority of the votes cast at said election are in favor of the organization, the district court shall declare the [water or sewer] district organized and give it a corporate name by which, in all proceedings, it shall thereafter be known, and designated the first board of directors elected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation.

Idaho Code § 42-3207 (providing for the creation of water and sewer districts) (emphasis provided).³ Indeed, it is recited in the judicial order creating the District that it is “hereby organized as a governmental subdivision of the State of Idaho and a body corporate with all the powers of a public or quasi-public corporation.” *In the matter of North Kootenai Water District*, No. 74989 (Idaho, First Judicial Dist.) (June 28, 1991) (on file with the Department under Water Right No. 95-8639).⁴ See, *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013) (holding that an irrigation district is a political subdivision within the meaning of section 12-117).

In sum, the 1996 Act contains no limitation requiring that a political subdivision must be the primary provider to a city to qualify as a traditional municipal provider. Instead, the 1996 Act requires simply that the political subdivision be “authorized to supply water for municipal purposes” and that it “does supply water.” Idaho Code § 42-202B(5). The District plainly meets this test—the only one required to qualify as a municipal provider.⁵

The second reason I am troubled is this. The sentence selectively quoted from Idaho Code § 42-202B(9) in the June 10 letter is not applicable to NKWD. The entire subsection reads as follows:

³ See also, Idaho Code § 42-3218C (providing that subdistricts of water and sewer districts are political subdivisions). This is consistent with other broad definitions of “political subdivision” found throughout the Idaho Code. *E.g.*, Idaho Code §§ 6-902(2), 7-1303(6), 12-117(5)(b), 44-2013(2)(a), 46-1002(5), 56-1402(5), 58-1102(c), 59-802(5); 63-3622O(2)(j), 67-2809(2)(b)(i), 72-720(2)(b). Only a few definitions, which are not applicable here, provide a more restrictive scope. *E.g.*, The Idaho Video Services Act, Idaho Code § 50-3002(12).

⁴ This is not the first time this question has been addressed. A decade ago, on November 19, 2003, the District’s counsel (Robert E. Covington, III) responded to a Departmental inquiry, explaining that the District qualifies as a municipal provider based on its status as a political subdivision of the State of Idaho.

⁵ Perhaps the “primary provider” reference in your letter derives from a provision of the Department’s Beneficial Use Examination Rules amended on March 29, 2012 which exempts municipal providers from the annual volume requirement if the provider is “an incorporated city or other entity serving users throughout an incorporated city.” IDAPA 37.03.02.035.01.j.vii. I do not know how the Department goes about determining which municipal providers serve users “throughout” a city. Does this mean that neither the Eagle Water Company nor the City of Eagle qualifies as a traditional municipal provider because each serves only serves a portion of the City of Eagle? Is United Water Idaho not a traditional municipal provider to the extent that it serves only portions of some cities as well as customers outside of any city at all? Such a reading would, of course, conflict with the 1996 Act. The ambiguously worded regulation should not be read to deny traditional municipal provider status to NKWD because it serves only portions of the City Hayden and the City of Hayden Lake, as well as portions of the area of city impact of Post Falls. The Department should consider amending the rule to provide clear guidance on the subject that is consistent with the controlling statutes. This is academic here, however. The 2012 amendment to the rule does not apply retroactively to NKWD. “It is well established that an applicant’s rights are determined by the ordinance in existence at the time of filing an application for the permit.” *Chisholm v. Twin Falls Cnty*, 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003). “Idaho law is well established that an applicant’s rights are determined by the ordinance in existence at the time of filing an application.” *Urrutia v. Blaine Cnty*, 134 Idaho 353, 359, 2 P.3d 738, 744 (2000) (citing *Payette River Property Owners Ass’n v. Bd. of Comm’rs of Valley Co.*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999)). The principle was upheld again in *Taylor v. Canyon Cnty Bd. of Comm’rs*, 147 Idaho 424, 436, 210 P.3d 532, 544 (2009).

“Service area” means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality’s established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code § 42-202B(9) (emphasis supplied).

The problem is that the portion in single underlining (which was quoted in the June 10 letter) is applicable only to municipalities. The district is not a municipality, so the quoted portion is irrelevant to it. Thus, it makes no difference whether the constructed delivery system shares a common water distribution system.

Instead, the portion in double underlining is applicable to municipal providers that are not municipalities. It expressly authorizes such providers to serve “the area it is authorized or obligated to serve.” It says nothing about a “common water distribution system” nor anything about the entity being the “primary provider.”

Thus, the statute provides no basis for the Department to treat the District differently than other traditional municipal providers. After all, water districts have been authorized to provide water to municipal customers for many decades. They were created by the Legislature with full appreciation and encouragement of this function. There is no statutory basis for distinguishing among the roles of cities, utilities, and water districts, each of which fulfill the same vital role in providing municipal water to a growing population. NKWD and other water districts work closely and cooperatively with cities in this function. Sometimes it makes sense for a city or utility to serve a growing community. Other times, it makes sense for a water district to perform this function. Our Legislature has provided effective mechanisms for resolving the few disputes that arise over service areas. The Legislature has not called upon the Department to play a role in this by declaring which entity is the “primary provider.”

In sum, NKWD is a traditional municipal provider providing a service identical to that provided by cities and water utilities. This is confirmed by the 1996 Act, which classifies both water utilities and water districts in the same category of municipal provider (Idaho Code § 42-202B(5)(b)). Consistent with this legislative direction, common sense, and the Department’s prior administrative permitting of these rights and licensing of others, the Department should license NKWD’s three permits without a volume limitation.

This is true as to water that serves municipal customers within the cities of Hayden and Hayden Lake, municipal customers within Post Falls' area of city impact, and municipal customers who happen to be located just outside of a city or area of city impact. They are all municipal customers, and the municipal nature of the service is the same in each case. All serve the same function of ensuring that the water needs of growing communities will be met so that Idaho's economy may thrive.

Multiple delivery systems

The second issue identified in the June 10 letter relates to the fact that the District does not have a single delivery system but instead operates several discrete delivery systems. This, in turn, presents two sub-issues. (a) Is a municipal provider prohibited from obtaining water rights with APODs in different delivery systems? (b) For such a municipal provider, must the service area for each right be limited to the area served by a single distribution system?

The June 10 letter answers both questions in the affirmative:

A water right can only be issued to a single delivery system and not to multiple delivery systems. Therefore, we have changed our position on how the three water rights I am working on will need to be licensed.

Letter of June 10, 2013 at 2.

I appreciate the honest recognition that the Department has "changed our position" on this subject. Indeed, my client advises me that this reflects a substantial departure from the consistent advice that the District has received from the Department until recently recognizing and encouraging the use of APODs throughout its service system. NKWD has relied on and followed that advice for years.

This pattern is reflected, for example, in the licenses for Water Right Nos. 95-8639, 95-9199, 95-9217, each issued on January 7, 2010. These licenses reflected a single, combined service area for the District and APODs allowing the rights to be exercised out of 23 APODs located in each of the District's delivery systems. Indeed, this recognition for these three rights dates back to October 10, 2003 (Amendment of Permit for No. 95-8639), January 4, 2004 (Permit for No. 95-9199), and August 30, 2006 (Amendment of Permit for No. 95-9217). The Department's prior support for this approach is also reflected in its approval of Transfer Application No. 70394 on January 26, 2004, which approved a single, combined service and 20 APODs for Nos. 95-7138, 95-7713, 95-7827, and 95-8522.

The June 10 letter acknowledges just one of these, the license for No. 95-8639, but states, incorrectly, that the license was based on representations and/or conditions to the effect that "your systems were interconnected." Letter of June 10, 2013 at 2. I have not found anything in the record to support this. To the contrary, the record reflects that the Department was aware of

the separate locations of the District's various delivery systems and did not condition the rights or permits on their being interconnected.

In any event, as with the first issue discussed above, I have difficulty reconciling the Department's new position with the governing statute. For that matter, I have difficulty in reconciling it with sound policy that promotes efficiency and simplicity of administration. It seems, instead, to be a step in the direction of unnecessary complication and expense—both for the water right holder and for the Department. Especially in times of severe fiscal constraint, this is difficult to understand.

The 1996 Act speaks directly to the service area of municipal providers. I quote, again, the relevant provision:

“Service area” means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. . . . For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code § 42-202B(9).

This could not be clearer. NKWD's service area is the area it is authorized to serve. The statute says nothing about discrete distribution systems. Indeed, the whole idea of an evolving service area is that it is likely to change over time. This is why the statute says that the area includes “changes therein after the permit or license is issued.” Other water rights are confined to a fixed location which may only be changed by departmental approval of a transfer. Municipal rights are not so constrained. Changes in where municipal water is used ordinarily require no departmental approval. That is the whole point.

Just like other municipal providers, the District's service area is constantly evolving. As the population served by the District grows, it will add new service areas and expand existing ones. Discrete distribution systems may merge or morph in the future. Or they may not. It does not matter. The Legislature made it clear in the 1996 Act that this is not a concern of the Department. If it becomes appropriate for the District to move a senior water right from one portion of its service territory to another—including from one distribution system to another—that is a decision the District is allowed to make without departmental oversight (other than under unique constraints such as those related to ground water management areas). The 1996 Act cannot be read any other way.

The issue of APODs is closely related to this. The 1996 Act does not expressly discuss APODs, but the Act's unequivocal statement that municipal providers are entitled to an evolving service area without administrative oversight implies the use of APODs. If a municipal provider cannot move water rights throughout its service area—which often entails moving from one well

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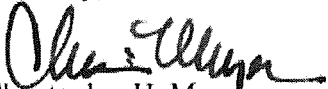
to another—there is little point in having a simplified, evolving service area. The whole idea of the 1996 Act is to promote flexibility, to allow municipal providers to focus on engineering efficiency rather than water rights paperwork, and to free the Department's staff from needless accounting oversight.

In sum, so long as each APOD diverts from the same source, there is no statutory or logical reason why a municipal provider should not be authorized to obtain APODs anywhere in its service area. The Department has recognized this for at least a decade. Its actions have advanced the goals of the 1996 Act and resulted in no problems or disputes of which I am aware. There is no justification for an about-face.

Accordingly, I respectfully request that the Department reconsider the change in position described in the June 10 letter. I also ask that you stay the July 31, 2013 deadline set in that letter for NKWD to provide information on its distribution systems. The licensing process for these permits has been underway for years. Expecting the District to respond instantly on a complex subject to a last minute change in direction by the Department is unrealistic.

I look forward to working with you and the rest of the Department's team on this important subject. I can sense from your letter that you share and appreciate the frustration felt by the District. I feel confident that we can get past this if we put our heads together.

Sincerely,



Christopher H. Meyer

cc: Garrick L. Baxter, Idaho Department of Water Resources
Mike Galante, North Kootenai Water & Sewer District
Necia Maiani, Welch Comer Engineers
Brian M. Werst, K&L Gates