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August 18, 2011

Garrick L. Baxter  
Deputy Attorney General  
Idaho Department of Water Resources  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Garrick:

Thank you for taking my call the other day inquiring as to whether my client, the City of McCall, has authority to land apply water it collects as municipal effluent on lands outside of the city limits under its existing municipal water rights. You suggested that I provide a letter to the Idaho Department of Water Resources ("IDWR" or "Department") setting out the City's understanding of the governing law and seeking confirmation that the City has this authority. This letter is intended to serve that purpose.

The City serves customers within its service area with municipal water rights including the following:

No. 65-10344 (5.13 cfs, 1918 priority, Payette Lake)  
No. 65-10345 (2.31 cfs, 1968 priority, Payette Lake)  
No. 65-12607 (3.88 cfs, 1983 priority, Payette Lake)  
No. 65-13476 (2.23 cfs, 1993 priority, ground water)  
No. 65-13796 (6.4 cfs, 1998 priority, ground water)

The Municipal Water Rights Act of 1996 ("1996 Act") defines three categories of municipal provider. The first is "[a] municipality that provides water for municipal purposes to

its residents and other users within its service area.” Idaho Code § 42-202B(5)(a). The City plainly meets this definition.

It is a well established principle under the Prior Appropriation Doctrine that an appropriator may recapture water that he or she has applied to beneficial use while it is still under the appropriator’s control and re-use that water on lands authorized within the original right. “It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use.” *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950). See also *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); and *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952).

This is true even if the re-use reduces the water available to other water users downstream. As Mr. Hutchins noted in his seminal article, an irrigator “is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste.” Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

A natural extension of this principle is that cities may recapture their sewage effluent before it reaches a natural water body and may apply that water to additional municipal uses within the original water right. A city’s right to recapture and reuse municipal effluent was recognized in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). In reaching its decision, the *Reynolds* Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction—in this case by land application. “It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different plans, and in the selection of the plan to be followed we think it should be permitted to exercise a wide discretion.” *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 772 (Wyo. 1925). This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent and sell it for cooling water to a nuclear power plant. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).

The next question is whether land application is a proper municipal use. The 1996 Act defines municipal purposes broadly:

“Municipal purposes” refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 42-202B(6). Although this definition does not expressly identify land application as a municipal purpose, it does include the broad catch-all phrase, “related purposes.”

Consistent with this broad definition, the Department’s guidance recognizes that land application of effluent may be treated as part of the original water right.<sup>1</sup> This guidance is aimed primarily at land application of industrial effluent. However, the same broad principles would apply to municipal effluent. Indeed, the 2009 guidance expressly references municipal land application, as well as land application of industrial and other effluent. Transfer Processing Memo No. 24, § 5d(9) at 31.

Other parts of the guidance specifically provide that in order to be considered part of the same beneficial use as the underlying water right, the land application must be undertaken to meet mandatory regulatory requirements. “Waste water treatment necessary to meet adopted state water quality requirements will be considered to be part of the use authorized under the industrial right.” Application Processing Memo No. 61, § 1 at 3.<sup>2</sup> The City’s land application was undertaken as a direct result of compliance obligations under section 402 of the federal Clean Water Act.<sup>3</sup> Accordingly, land application by the City of McCall is a proper municipal purpose encompassed by its municipal water rights.

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<sup>1</sup> Two guidance documents were issued by the Department in 1996. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996); Norm Young, IDWR, *Administrator’s Memorandum – Application Processing No. 61* (“Application Processing Memo No. 61”) (Sept. 27, 1996). This guidance has been modified to some extent by a broader guidance document, *Transfer Processing Policies & Procedures* (“Transfer Processing Memo No. 24”) (revised Dec. 21, 2009).

<sup>2</sup> Note that the requirement for a transfer application stated in Application Processing Memo No. 61, § 3 at 3 has been overridden by the more recent guidance in Transfer Processing Memo No. 24, at 3 n.1. Accordingly, no transfer application is required where the land application occurs on lands that were previously cultivated with a full existing water right. Transfer Processing Memo No. 24, § 1 at 3, § 2 at 7, § 3(6)(g)(ii). Such is the case here.

<sup>3</sup> In 1996, the Environmental Protection Agency (“EPA”) issued an NPDES permit to the City and the Idaho Department of Environmental Quality (“DEQ”) issued a section 401 certification for that permit, both of which imposed a zero discharge limit for phosphorous. The zero discharge was driven by the Cascade Reservoir Watershed Management Plan issued by DEQ on October 1, 1995. This plan was the functional equivalent of a TMDL (total maximum daily load) required by section 303(d) of the Clean Water Act. EPA approved the TMDL in May of 1996. The TMDL requires a 37% reduction in the overall phosphorous load, with the City’s load allocation set to zero.

The permit established a compliance schedule for the zero discharge limit. The City filed an administrative appeal of the 401 certification with DEQ. This resulted in the first of four consent orders being issued on July 27, 1998.

The City then went to work on a land application system to achieve the requirements imposed by the permit and the consent orders. This effort resulted in a *Three-Way Agreement* among the City, the Lake Irrigation District (which owns legal title to the water rights used for mixing), and the J-Ditch Pipeline Association (which I believe was responsible for constructing and maintaining the distribution system that leaves the mixing station to deliver enhanced irrigation water to the farmers). The *Three-Way Agreement* contemplated individual contracts between the farmers and the City. A series of 20-year *Water User and Supply Agreements* were executed in 1997, which remain effective through 2016.

The next question is whether the land application may occur beyond McCall's city limits. This is addressed by the 1996 Act which expressly authorizes municipal providers to serve within a flexibly-defined service area. That authority is found in two places.

First, it is noted in the definition of "municipal purposes" quoted above, which states that the municipal purposes include uses "located outside the boundaries of a municipality served by a municipal provider." Idaho Code § 42-202B(6).

Second, the term "service area" is defined by the 1996 Act as follows:

"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). This definition expressly authorizes service outside of a city's service area so long as two conditions are met.

First, the land application must be "within the municipality's established planning area." "Planning area," however, is not a defined term. It is an informal term generally understood to refer to the area used by a city for water rights planning purposes as it plans for current and future water requirements.<sup>4</sup> In other words, the 1996 Act requires that land application outside the city limits must be undertaken as part of a city's long-term water planning effort. Given the long history of development of this project within the context of environmental regulatory requirements (see footnote 3), this condition is satisfied.

Second, in order to satisfy the requirement that "the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits," it should be sufficient to demonstrate that the land application is physically connected via pipeline or other artificial conveyance with the City's wastewater collection and treatment system. For example, it could not be viewed as part of the original water right if the effluent

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<sup>4</sup> The term "planning area" in the 1996 Act should not be confused with the city's "area of city impact." The latter is a distinct term meaningful in the context of annexation rules under the Local Land Use Planning Act, Idaho Code § 67-6526.

were placed into a natural stream and diverted later for land application.<sup>5</sup> McCall's treated effluent is completely contained and controlled within a series of pipes or other artificial conveyances from the place where the sewage is captured to the place where it is land applied. It is of no consequence that some or all of these conveyance and delivery systems are owned by others so long as the land application is undertaken pursuant to contract or other agreement with the City. Accordingly, this condition is satisfied as well.

The only other statute potentially bearing on the question of municipal water uses outside of the City's city limits is Idaho Code § 50-323. It provides:

Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis supplied). This does not impose any limitation. The authorizing clause ("Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems") is not limited to the city limits. Moreover, treatment of municipal effluent through land application would fall under the final clause ("to do all things necessary to protect the source of water from contamination"), which is not limited geographically.

For these reasons, it is my conclusion that the City of McCall is authorized to land apply its captured municipal effluent on lands outside of the city limits, and such use is authorized under the City's existing municipal water rights without need for transfer. This conclusion is premised on my representations to you in this letter that the land application is mandated by environmental requirements, that the lands on which the land application occurs were previously served by full existing water rights, and that the City has authority via contract or otherwise to land apply on these lands.

The City believes that these conclusions are fully consistent with the principles of optimum utilization embodied in Idaho's constitution. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). It is in the public interest to encourage well-designed land application projects that enable cities to meet increasingly strict environmental requirements at

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<sup>5</sup> This is consistent with the law elsewhere in the West. In *City of San Marcos v. Texas Comm'n on Env'tl Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant.

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lower cost while promoting water conservation and facilitating additional beneficial use of water. Idaho's water law fully accommodates such undertakings.

As we discussed, I would very much appreciate your review, on behalf of the Department, of the conclusions reached in this letter. I look forward to hearing back from you in that regard. Thank you in advance for the time and effort you, the Acting Director, and others at the Department have invested in this review. It is important to the City to have clarity on these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris", followed by a horizontal line.

Christopher H. Meyer

cc: Gary Spackman  
Jeff Peppersack  
John Westra  
Steve Lester  
Lindley Kirkpatrick

CHM:ch