

REVIEW MEMO

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

322 E. FRONT STREET, P.O. BOX 83720, BOISE, IDAHO 83720-0098

PHONE: (208) 287-4800 FAX: (208) 287-6700

DATE: SEPTEMBER 23, 2008

TO: Jeff Peppersack

FROM: Mat Weaver 

CC: GARY SPACKMAN

SUBJECT: REVIEW OF PERMITS 95-9055 AND 95-9248 AND GENERATION OF RESPONSES TO QUESTIONS PERTAINING TO THESE PERMITS FROM CHRISTOPHER MEYER OF GIVEN PURSLEY, LLP RECEIVED IN A LETTER DATED SEPTEMBER 2, 2008.

INTRODUCTION

On September 3, 2008 the Idaho Department of Water Resources (IDWR) received a letter from Christopher Meyer pertaining to the status and conditions of permits 95-9055 and 95-9248 and the impact, if any, that the current state of the permits will have on the Permit Holder's desired ability to land apply treated wastewater resulting from water previously diverted and used for municipal purposes under these permits. This memorandum is an attempt to summarize the state of the permits, specifically address Mr. Meyer's questions, and provide background on the suitability and legality of the land application of wastewater generated under the permits in question.

PERMIT 95-9055

Permit 95-9055 was approved on August 8, 2001 with a priority date of November 13, 2000 for the diversion of 1.00 CFS of groundwater for municipal use on ground specifically identified by quarter-quarter description on the permit. The permit described seven different points of diversion. The application indicates that the desired uses included the following: domestic use in 381 homes, potable services to a golf course clubhouse and restrooms, potable services to an equestrian center, potable services to a maintenance center, potable services to the subdivision's sales center, potable services to a fire station, and potables services to the subdivision's recreation areas. Irrigation was not requested as a beneficial use. On January 12, 2006 the permit was assigned to Black Rock Utilities, Inc. from the applicant CAG Investments, LLC. On September 20, 2006

an extension of time was awarded to the permit holder extending the proof of beneficial use due date to August 1, 2011.

A review of the place of use (POU) shape in the Water Rights data base indicates a discrepancy between the description on the permit and the shape file. The shape file does not include the NW quarter of the NE quarter of Section 16, T48N, R04W, but is the same in all other regards. Further confusion in the POU is found when comparing the POU description of the “proof report” (Water Permit Report) to the description of the actual permit. The POU legal descriptions are identical between the two documents, however, the proof report contains a condition not found on the actual permit stating, *“Place of use is within the service area of CAG Investments, LLC”*. In a memo to the file dated July 25, 2001 Sharla Curtis specifically states that *“the permit will be issued with the place of [use] spelled out like the application instead of with a general remark allowing the use with in a service area.”* From this memo it seems clear that the intent at the time the permit was issued and approved was to describe the POU for permit 95-9055 specifically by quarter-quarter legal description and not generally by “service area”.

PERMIT 95-9248

Permit 95-9248 was approved on March 9, 2005 with a priority date of October 25, 2004 for the diversion of 0.25 CFS of groundwater for municipal use on ground described by condition six as, *“Place of use is within the area served by the public water supply system of The Ridge of Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of section 9, T48N, R04W.”* The permit described a single point of diversion. The only use described on the approved application is municipal. However, the original application¹ that was submitted indicates domestic, fire protection, and irrigation as the requested beneficial uses. On October 11, 2007 the permit was assigned to Black Rock Utilities, Inc. from the applicant Ridge at Black Rock Bay Homes, Inc.

Review of the POU shape file in the Water Rights data base and on the POU described by the proof report indicates a slight discrepancy in regards to the proof report. Unlike the actual permit, and the POU shape file, the proof report includes government lot 4 as part of the general description in condition one (128).

Refer to Exhibit 1, attached, for a graphical depiction of permits 95-9055 and 95-9248.

BACKGROUND AND DISCUSSION

Municipal Purpose and Municipal Provider

The beneficial use described under both permits is for “municipal purposes”. Municipal Purposes as defined in Idaho Statute § 42-202B (6) refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purpose, 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 Statute § 42-202B (5, c) recognizes any 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, as a Municipal Provider. Review of the permits and the permit holder indicates that it is justifiable and appropriate to call the permit holder a Municipal Provider and to describe the beneficial use as for municipal purposes.

Review of the files associated with both permits and the letter sent by Mr. Meyer, makes obvious that one of the municipal purposes that will be provided for under these permits is irrigation. Idaho Statute § 42-219 (2) has the following to say in regards to irrigation under municipal rights, *"If the [irrigation] use is for municipal purposes, the license shall describe the service area and shall state the planning horizon for that portion of the right, if any, to be used for reasonably anticipated future needs."* This statute would seem to place requirements regarding the inclusion of the delineation of the place of use on the issuance of future licenses. In the case of municipal uses the place of use is synonymous with the "service area", Idaho Statute § 42-202B (9) describes the service area for a municipal provider that is not a municipality, as the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued. If we recognize the permit holder as a Municipal Provider, and in light of the municipal use authorized under the permits, it would seem that the permit holder is within their rights as described under the law to irrigate anywhere within their place of use, even if that place of use is modified after the issuance of a permit or the license. Provided the place of use is within the area that the permit holder is "authorized or obligated to serve" and is seemingly described in some manner under the planning horizon for reasonably anticipated future needs.

Land Application and the Reuse of Municipal Water

In regards to the land application of treated municipal waters to the Black Rock project I have recognized and addressed two issues: (1) is this use allowed for under the municipal use umbrella, and (2) would the land application represent a historical enlargement of actual consumptive use associated with the permit.

In regards to issue number one, Idaho Statute § 42-202(2) states the following, *"The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made."* It seems clear from this language that every intended use need not be described in the application. In addition, the land application of wastewater is going to be used as a source of irrigation for the golf course and irrigation is expressly listed as a municipal purpose under § 42-202B (6). It therefore can be concluded that land application for the intent of irrigation can and should be allowed for under the general heading of municipal purposes.

The second issue deals with the enlargement of the historical consumptive use of the water diverted under the permit. The municipal use is recognized by IDWR as being completely consumptive, in actuality this may or may not be the case. Certainly the uses of water under the general heading of municipal use are varied enough that it is not unreasonable to assume that some of that water is in fact returned to the surrounding environment. Especially in the instance of the Black Rock project which is a stand alone

community with water treatment, wastewater treatment, and irrigation all occurring and being contained within the development. By this reasoning land application, a fully consumptive process, would represent some additional volume of consumption, or loss of water from the development, over and above the historical quantity of water lost from the development under the previous practices, which did not include land application. So should this enlargement of consumptive water be allowed?

If we consider the Administrator's Application Processing Memorandum No. 61 regarding industrial waste water and take forward the reasoning and direction put forth in that memo and apply it to municipal waste water, then the "consumptive use" associated with the use can increase (over the historical base line value) up to the amount determined to be consistent with the original water rights as reasonably necessary to meet treatment (land application) requirements. In addition, the reuse of this water may represent an increase in actual water depletion from the system, but were it not used the irrigation would still take place, simply under another permit (95-9045) applied for expressly for that use, which would divert surface water. Finally, the permit holder has not submitted proof of beneficial use to IDWR, and is not required to do so for some 2-3 years, so it would seem premature to evaluate the total beneficial use of water at this interim time. For all these reasons it would seem that any enlargement of the consumptive component of the permit associated with the new practice of land application, can and should be allowed by IDWR.

QUESTIONS

In Mr. Meyer's letter dated September 2, 2008 there were five explicit questions put to IDWR for response. Find below the questions recreated from his letter in italics followed by my response based upon the finding outlined above and my experience at IDWR.

1. *The condition on Water Right No. 95-5055 stating "Place of use is within the service area of CAG Investments, LLC." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc.*

A basic premise at IDWR is that the Water Right database is a representation of the actual records it reflects and is not in actuality an official record in it of itself. Ideally, the data base would be an exact simulacrum of the official record. However, this is not always the case, as is illustrated with permit 95-9055. As explained above in detail there is a discrepancy between the place of use described upon the actual signed permit and the proof report document generated from information contained in the data base. The signed permit represents the governing document in describing the nature of the permit, and as such there is currently no recognized "service area" associated with this permit. Instead the place of use is described in full on the permit by the traditional means of a specific quarter-quarter delineation. Due to this fact, IDWR does not recognize any service area associated with this permit, in the name of Black Rock Utilities, Inc. or otherwise.

2. *The place of use for Water Right No. 95-9055 describes an expanding municipal service area and is not limited to the specific forty-acre tracts identified in the Water Permit Report.*

No, the place of use described on permit 95-9055 does not describe an expanding municipal service area; instead it delineates a specific place of use by quarter-quarter description.

3. *The condition of Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.*

Mr. Meyer is correct in this regard. This condition is speaking to the primary or first use the diverted groundwater is put to. IDWR recognizes Municipal Use as being fully consumptive, as such, once the groundwater has served its initial purpose the Municipal Provider is free to use or reuse the reclaimed water at their discretion².

4. *The condition on Water Right No. 95-9248 stating "Place of use is within the area served by the public water supply system of the Ridge at Blackrock Bay Homes, Inc. The place of use is generally located within Government Lot Numbers 1, 2, and 3 of section 9, Township 48N, Range 4W." will be understood to apply to the service area of the current owner and municipal provider, Black Rock Utilities, Inc..*

Permit 95-9248 is clear in its recognition of a service area as the beneficial place of use of the water diverted under the permit. With the assignment of the permit from The Ridge at Blackrock Bay Homes, Inc. to Black Rock Utilities, Inc., and with the understanding that the intent to beneficially use the water under the new ownership is at essence the same as under the previous ownership, it seems reasonable and prudent that the purpose of the permit is to serve the service area associated with the physical lands that comprise the Black Rock project, regardless of the name attached to the service area or Municipal Provider on the permit.

5. *The place of use for Water right No. 95-9248 describes an expanding municipal service area and is not limited to the lots identified in the condition quoted above.*

Based upon Idaho Statutes § 42-202(B) and § 42-219, as previously described in greater detail in the BACKGROUND section of this memo, the place of use for Water Right 95-9248 describes an expanding municipal service area and is not limited to the lots identified in condition number six of the actual water permit.

GENERAL QUESTIONS

The expressed purpose of Mr. Meyer's letter is to determine whether any amendment of permits 95-9055 and 95-9248 are required in order for the Black Rock development to apply treated effluent derived from these rights to golf courses within The Club at Black Rock and Black Rock North projects. The essence of this question is two fold, one is land application a use recognized under the current municipal use umbrella, and two do either permits need to be amended to accommodate this goal.

LAND APPLICATION

Based upon my discussion in the BACKGROUND section of this memo it seems to me that not only is the land application of treated wastewater allowed for under the municipal use general heading, but should be encouraged as a valid and worth while conservation effort.

PERMIT AMENDMENTS

As addressed earlier permit 95-9055 does not have a general “service area” description of its place of use. With this understanding any land application of treated wastewater would have to be applied to those portions of the golf course(s) that are within the described place of use on the actual permit document. A cursory review of aerial imagery from 2006 associated with the place of use of permit 95-9055 seems to indicate that the existing golf course at that time was completely contained within the boundary. However, I’m not sure where the “Black Rock North” development or any future golf course expansions may be in respect to the permit’s place of use.

In the event that the permit holder desires to land apply water outside the current place of use, a permit amendment would be required to modify the place of use. Rather than modify the existing delineation it would be recommended that the permit holder amend their permit so that the place of use is described generally by a “service area”. In regards to public advertisement of the proposed amendment, it is at the discretion of the Director. In light of the fact that the original public notice for this permit used the language “*municipal use is within the service area of the applicant*” it does not seem necessary for IDWR to require an additional public advertisement of the amendment, assuming the only change would be in describing the place of use by a service area.

In the case of permit 95-9248 the place of use is generally described as a “service area” and as such the place of use may be modified as needed by the permit holder at any time. Therefore an amendment for this permit would not be required to accommodate the land application of reclaimed municipal water.

¹ Review of the file indicates two applications were submitted. One was submitted by Blue Diamond Investment, LLC on June 9, 2004 and does not appear to have been the basis of the permit. The second was also submitted on June 9, 2004 by The Ridge at Black Rocks Bay Homes, Inc. and appears to be the basis of the issued permit. To my knowledge there is no discussion or indication in the file as to why there were two applications or why the Blue Diamond application was not used.

² This position does not seem to be explicitly articulated in any Idaho Statute or IDWR Administrator’s Memorandum that I reviewed. However, this position does seem to have been regularly upheld in case law, although not completely with out rulings in the opposite, and is well summarized by Mr. Phil Rassier in his Memo to Norm Young from September 5, 1996 titled “Land Application of Industrial Effluent”.