



Washington Water Utilities Council

Memorandum

Date: May 16, 2016

To: Washington Water Utilities Council Members & Washington Water Utilities

From: WWUC Executive Committee

RE: Water System Consolidation & Water Rights Risk Management

The Washington Water Utilities Council (WWUC) urges you to review the following information regarding potential risks involved with water rights related to water system consolidation and the water right change process.

Introduction

State law and regulation encourage consolidation of water systems to enable systems to furnish a safe and reliable supply of drinking water, to encourage water systems that serve the public generally, and to promote sustainable water systems. Also, consolidation or acquisition of small or failing water systems can improve water use efficiency and drinking water quality. The WWUC supports activities of its Member municipal water suppliers to consolidate or acquire small or failing water systems because of the human health, environmental, and utility planning benefits. The WWUC encourages its Members to explore system consolidation and to coordinate with state agencies when and where system consolidation makes sense. Depending on the circumstances, however, the water system acquisition or consolidation process can pose risks to the water rights involved. The purpose of this memo is not to discourage WWUC Members from pursuing water system consolidation as a general matter, but to encourage Members to make fully-informed decisions.

This memo advises early investigation of water rights and evaluation of potential water right risks before committing to acquire responsibility for another water system. Commonly, however, water rights matters are not addressed until late in the process. When the Department of Health requests help from larger Group A water systems to address technical or financial problems of smaller Group A or Group B water systems within or adjacent to the larger system's service areas, water utilities are responsive and try to assist one another and find a workable solution. Most often, however, these smaller systems have limited resources and the

only remaining asset is a water right. These water rights may or may not be of sufficient value to be considered as an "asset" in the consolidation process.

Problem Statement

In water system consolidation or acquisition, small water system water rights are at risk of reduction in quantity even if they are deemed to be "municipal" in purpose. The 2003 Municipal Water Law (MWL) prohibits the Department of Ecology (Ecology) from revoking or diminishing municipal-purpose water rights that were certificated on a system capacity or "pumps and pipes" basis. The MWL provides that such certificates are "rights in good standing." The MWL, however, provides that Ecology may reduce such a certificate in connection with "issuance of a certificate following the approval of a change, transfer, or amendment [of a water right] under RCW 90.03.380 or 90.44.100." In a common system consolidation scenario, it is the change application to amend a water right certificate to change the point of diversion (surface water intake) or point of withdrawal (well site) that presents the risk of a reduction in quantity. In contrast, changes to service area and place of use generally do not require a change application to Ecology and can be accomplished through water system planning with the Department of Health.

Ecology asserts broad authority to revoke or diminish municipal water rights that are in "good standing" and that are the subject of a change application. In its MWL guidance document, POL 2030, Ecology states that the inchoate (the as-yet unused) quantity may not be in "good standing" because of the water right's "original intent" or a lack of "reasonable diligence" in completing the project or developing the water right. In addition, POL 2030 states that Ecology, when processing a change application, may revoke or diminish municipal-purpose certificates in good standing based on its review of the subject water right's validity and extent, to prevent impairment of other rights, or to prevent detriment to the public interest or public welfare.

Ecology has recently exercised the authority it claims in POL 2030 to reduce inchoate quantities in water rights that go through change or amendment. In recent actions, Ecology reduced the quantity of municipal certificates to the highest level of metered or recorded pumping in the recent past. Ecology's reasons for diminishment of a municipal certificate could include:

- Full build-out or development of the project or fulfillment of the water right's "original intent."
- To prevent impairment of other water rights (including instream flow rules) or to prevent detriment to the public welfare, in Ecology's judgment on a case-by-case basis.
- Failure to physically extract and use water or otherwise comply with Ecology's "active compliance" policy.

Conclusion: When you are looking at taking over responsibility for a small, failing, or other water system, do not assume that the full quantity on the water right certificate or other document will transfer.

Recommendations

The WWUC offers the following recommendations:

1. Early in the process inquire into and investigate a small water system's water right(s), its status, and its beneficial use history.
2. Consider a transaction structure that avoids an application to Ecology to change or amend a water right. As noted above, a change application presents a risk of quantity reduction, so approaches that avoid a change application can help manage the risk. Typically, a change application is driven by well relocation. For example, consider whether it is necessary to move the authorized well location, or if existing infrastructure can be used.
3. In the event a water right change application is necessary, consider a transaction structure that frontloads the application so that the outcome is known before closing or commitment. The time for Ecology (and possibly a county water conservancy board) to process a change application varies, but at a minimum it takes several months, usually lasts a year or more, and is subject to delay or extension. Also, all applications are subject to appeal and time for filing an appeal adds to the overall application timeline. A helpful step is to prepare a chronological master task list for a consolidation project, including the change application, so that the final result of the application is a contingency or is known before final decisions or commitments are made.
4. In planning discussions or negotiations with agencies and small water systems, take into account and provide for risks and benefits of the water rights to be acquired.

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