



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

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BY: .....

August 27, 2008

Randall D. Fife  
City Attorney  
City of Moscow  
P.O. Box 9203  
Moscow, ID 83843-1703

Re: Our File No. 08-22560 – Sale of Water / Joint Powers Agreement

Dear Mr. Fife:

This letter responds to your question regarding the City of Moscow's desire to provide water across the Idaho-Washington border to private developer Hawkins Development, LLC ("Hawkins"). Specifically, you have asked whether Moscow may do so absent a joint powers agreement with a political subdivision of the State of Washington.

This issue has been addressed by Deputy Attorney General Steven Strack. In his June 16, 2005, letter to you (copy enclosed), Deputy Attorney General Strack stated that, "[a]side from the implied authority derived from the Joint Exercise of Powers Act and Idaho Code §§ 50-1022 through -1025, we have found no authority in the Idaho Code allowing a city to provide water and sewer services to out-of-state customers." Three years after the writing of that letter, this is still the case.

Idaho cities, as subdivisions of the State, may "exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho."<sup>1</sup> Idaho Code § 50-323 specifically grants to cities the power to provide domestic water to the inhabitants of the city.<sup>2</sup> Cities, as municipal water providers, may provide water for municipal purposes (i.e. residential, commercial, industrial, irrigation of parks and open space, and related purposes) to users within a service area.<sup>3</sup> For a municipality, its

<sup>1</sup> Idaho Code § 50-301.

<sup>2</sup> Idaho Code § 50-323.

<sup>3</sup> See Idaho Code § 42-202B.

service area corresponds to its corporate limits and may also include 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.<sup>4</sup> When processing an application for water use, the Director of the Idaho Department of Water Resources is required to condition the license issued to prohibit any transfer of the place of use outside the service area.<sup>5</sup>

To facilitate supplying water to users within its service area, cities are specifically empowered to purchase, lease, maintain, or jointly operate, in cooperation with adjoining cities in bordering states, a privately owned water distribution system from an out of state source.<sup>6</sup> There is, however, no corresponding authority empowering cities to provide water to users outside of its service area or across state lines. The absence of this specific authority, together with the rule of statutory construction that inclusion of one is the exclusion of all others, supports the conclusion that cities do not possess independent authority to sell water outside their service area.<sup>7</sup> Additionally, were such authority recognized, the "service area" language contained in Chapter 2 of Title 42 would be rendered meaningless, a result which is disfavored.<sup>8</sup>

In short, a city contracting to provide water to an out of state private entity is an activity that conflicts with general Idaho law and is therefore impermissible. However, Idaho statutes do provide that two or more cities may join in the construction or purchase of a water, power, or sewer plant to service each city from a single plant or system when it is practicable and convenient.<sup>9</sup> Additionally, a joint services arrangement with cities outside the State of Idaho may be possible under Idaho's Joint Exercise of Powers Act ("the Act").<sup>10</sup> The purpose of the Act is to permit the state and its public agencies to cooperate with public agencies of other states to their mutual advantage in providing services and facilities and performing functions.<sup>11</sup> Deputy Attorney General Strack, when mentioning this joint services authority, quoted the Act in cautioning:

[N]othing in this act shall be construed to extend the jurisdiction, power, privilege or authority of the state or public agency thereof, beyond the power, privilege or authority said state or public agency might have if acting alone.<sup>12</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> See Idaho Code § 42-219.

<sup>6</sup> See Idaho Code § 50-324.

<sup>7</sup> See *D&M Country Estates, Homeowners Ass'n v. Romriell*, 138 Idaho 160, 59 P.3d 965 (2002). See also *Poison Creek Pub., Inc. v. Central Idaho Pub., Inc.*, 134 Idaho 426, 3 P.3d 1254 (2000).

<sup>8</sup> See *AG Serv. Of Am., Inc. v. Kechter*, 137 Idaho 62, 44 P.3d 1117 (2002).

<sup>9</sup> See Idaho Code §§ 50-1022 – 50-1025.

<sup>10</sup> Idaho Code §§ 67-2326 – 67-2333.

<sup>11</sup> Idaho Code § 67-2326.

<sup>12</sup> Idaho Code § 67-2328(a).

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Consequently, a joint powers agreement between Moscow and a county in Washington State that extends the jurisdiction, power, privilege, or authority that the State has conferred upon cities would be disallowed. An agreement that did not would be permissible.

In 1989, Idaho Department of Water Resources Director Keith Higginson asked the Attorney General whether Idaho counties have the authority to enter into an agreement with counties in Utah and Wyoming to develop a joint water project on the Bear River.<sup>13</sup> The Attorney General concluded that counties could enter into such an agreement but that the purposes of the water project must be limited to the irrigation or drainage of lands in the respective counties and could not include the production and sale of hydroelectric power since there were no Idaho statutes conferring this power upon counties. The Attorney General declared that "[t]he absence of statutory authority for counties to engage in power projects is important since counties have only such powers as are specifically delegated by law or reasonably implied from powers delegated."<sup>14 15</sup>

In summary, supplying water to an out of state user absent a joint powers agreement is not within the power of an Idaho city.

This letter is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author.

Sincerely,

  
MITCHELL E. TORYANSKI  
Deputy Attorney General

MET/mdw

Enclosure

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<sup>13</sup> See Idaho Op. Atty. Gen. No. 89-1.

<sup>14</sup> Id.

<sup>15</sup> The legality of a joint powers agreement implementing the Moscow-Hawkins deal is an issue that would be examined as a part of any review of Moscow's Application for Transfer of Water Right.