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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE ("IMAP") OF SUEZ WATER IDAHO INC., BEING A COLLECTION OF INDIVIDUAL APPLICATIONS FOR TRANSFERS OF WATER RIGHTS AND APPLICATIONS FOR AMENDMENT OF PERMITS.	**SUEZ'S DISCUSSION OF RAFN VERSUS NON-RAFN RIGHTS**

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DISCUSSION

I. QUESTION PRESENTED

This discussion is provided by Applicant SUEZ Water Idaho Inc. ("SUEZ") in response to questions raised by the Hearing Officer and Parties at the August 24, 2017 status conference. SUEZ included nearly all of its ground water rights[1] in this IMAP proceeding which, among other things, seeks forfeiture protection under the 1996 Municipal Water Rights Act ("1996 Act").[2] (For the convenience of the reader, a copy of the relevant provisions of the 1996 Act, as amended, are set out as Exhibit A.) SUEZ was asked whether all of the IMAP rights should be designated as so-called "RAFN rights" or whether only the portion of SUEZ's portfolio (those rights held for future use) requires protection from forfeiture.

II. "RAFN RIGHT" IS NOT A DEFINED TERM, AND MAY MEAN DIFFERENT THINGS.

The term "RAFN right" is not employed in the 1996 Act. SUEZ believes that labeling rights as "RAFN rights" can lead to confusion. It means different things to different people.

It might mean a water right that is not currently in use, but is held solely to meet future needs. SUEZ contends that this is an incorrect, and unnecessary, approach. The main problem with this is that it is very difficult to say which rights (or portions of) are in use and which are not. Moreover, that changes constantly. As discussed below, the 1996 Act expressly recognizes

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[1] SUEZ has chosen to include 102 of its 112 ground rights and one of its 13 surface rights and other entitlements in the IMAP. The others were excluded for a variety of reasons described in *Suez's 2017 Update Report on IMAP and 2065 Master Water Plan* (Apr. 28, 2017). For example, some were not identified until after the IMAP was launched. Others were withdrawn to facilitate transfers.

[2] 1996 Idaho Sess. Laws ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). These sections have been amended from time to time. This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 Act. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 Act but came a year later.

that a single water right may include a quantity that meets current need and an additional quantity held to serve future needs. What would we call that, a "Half-RAFN right"?

III. SUEZ SUGGESTS USING THE TERM TO DESCRIBE ANY WATER RIGHT THAT HAS BEEN APPROVED IN AN APPLICATION SUBJECTED TO A LONG-TERM, SYSTEM-WIDE GAP ANALYSIS.

SUEZ urges that the more helpful approach is to use the term "RAFN right" to describe a water right or permit that has passed muster under the rigorous evaluations set out in the 1996 Act. The focus of the 1996 Act is to determine whether the provider's entire portfolio (including any new appropriation) will be needed to meet total projected future demand (the sum of present demand and present RAFN) by the end of the planning horizon. This is called a "gap analysis."[3] Once a right has been approved by IDWR under such an evaluation (either by way of a new appropriation or, as here, by way of transfer or amendment of permit), that right has earned the label "RAFN right." This is so irrespective of whether one might deem some, all, or none of the right to be currently "in use."

Understood in this way, a RAFN right is simply a water right that is part of a portfolio that is reasonably expected to be needed in the future and is entitled to the benefits and burdens of the 1996 Act. What are those benefits and burdens? For a new appropriation, the benefit is the ability to obtain a water right that is in excess of short term needs. (IDWR will not approve a non-RAFN municipal water right unless the municipal provider shows the new appropriation will be fully utilized by the end of the development period.[4]) In the context of a transfer or

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[3] Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29*, at pages 17-18, 20 (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*RAFN Guidance*").

[4] Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights* (Application Processing No. 18; Licensing No. 1) (Oct. 19, 2009) ("*Non-RAFN Guidance*").

permit amendment, there is only one benefit—express, statutory protection from forfeiture.[5] Those benefits are counterbalanced by the burden of the statutory prohibition on the transfer a water right (or portion thereof) serving future needs.[6]

In other words, while the statute accords substantial leeway to a municipal provider to hold water rights for future needs, the *quid pro quo* is that the municipal provider may not profit from this arrangement by hoarding water rights and later selling unused rights (or the unused portion thereof) to another user who would change the nature of use or place of use.

To re-cap, a "RAFN right" is a water right that has been determined by IDWR under a 1996 Act proceeding to be part of a water right portfolio that, at least in part, is held to meet future needs. It's that simple.

IV. THIS APPEARS TO BE CONSISTENT WITH IDWR GUIDANCE, WHICH FOCUSES ON THE APPLICANT'S CHOICE IN PROCEEDING UNDER THE 1996 ACT OR NOT.

This approach appears to be consistent with IDWR guidance on the subject. For example, the Department's *Non-RAFN Guidance* describes a "non-RAFN municipal water right permit" as one arising when "a municipal provider will choose to file an application to

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[5] "A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs." Idaho Code § 42-223(2). "The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided . . . the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter." Idaho Code §§ 42-222(1).

[6] "The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate." Idaho Code § 42-219(1). "When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use." Idaho Code § 42-222(1).

appropriate water solely for water needed in the short term without the burden of demonstrating future needs over an established planning horizon." *Non-RAFN Guidance* at 1 (see footnote 4).

Similarly, the Department's *RAFN Guidance* provides:

> There are times when a municipal provider will choose to file an application to appropriate water solely for use to meet needs in the near-term (up to five years) without the burden of demonstrating future needs over an established planning horizon. This type of municipal water right has been termed a non-RAFN municipal right. Municipal water rights that are not defined as RAFN in conditional language are by default non-RAFN water rights.

RAFN Guidance at 4 (see footnote 3).

In other words, the designation of a water right as a "RAFN right" or "non-RAFN right" depends on the applicant's decision to proceed under the 1996 Act or not.

V. DESCRIBING "RAFN RIGHTS" AS THOSE APPROVED IN A PROCEEDING INVOLVING A GAP ANALYSIS IS CONSISTENT WITH THE STATUTE.

The alternative is to use the term "RAFN rights" to describe only water rights (or portions thereof) that are not needed today. Under that completely different meaning of the term, SUEZ would be expected to divide its portfolio of water rights into two groups—those in use now and those held for future use. For reasons discussed below, this is unworkable. Nor does it conform to the statute.

Although the 1996 Act does not use the term "RAFN right," it does contain this definition of RAFN:

> "Reasonably anticipated future needs" refers to <u>future uses of water</u> by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are <u>reasonably expected to be required within the planning horizon</u> of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

Idaho Code § 42-202B(8) (emphasis supplied).

Standing alone, this reference to "future uses of water" is ambiguous. It might refer to the total future demand at the end of the planning horizon. Or it might describe the portion of total future demand that is in excess of what is in use today.

Other provisions of the act, however, expressly contemplate that a single municipal water right may be used in part to meet current needs while another portion of the same right is held to meet RAFN.[7] Thus, the ambiguity in the definition of the RAFN seems to have been resolved. RAFN refers to the portion of total future demand above and beyond current peak demand. In other words, an individual right can serve existing needs and also RAFN.

Obviously, the division between what is "used today" versus "held for the future" is constantly in flux. Current peak demand will trend upward, but will fall occasionally (as it did in the Great Recession). As the years go by, it is expected that water rights once held for future use will become 100% devoted to meeting then present demand. In short, the RAFN component of any individual right is dynamic—it may be anywhere from zero to 100%.

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[7] Here are four examples:

"A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use." Idaho Code § 42-219(1) (emphasis supplied).

"The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate." Idaho Code § 42-219(1) (emphasis supplied).

"If the 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." Idaho Code § 42-219(2) (emphasis supplied).

"When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use." Idaho Code § 42-222(1) (emphasis supplied).

If a single water right may be approved to be held to meet future demand as well as current demand, is that a "RAFN right" or a "non-RAFN right"? The answer is that we should not define "RAFN right" in terms of whether a right is held only for future use. Rather, a water right is a "RAFN right" if it has been put through the crucible of proof under the 1996 Act in which total system-wide demand at the end of the planning horizon is compared to the size of the system-wide portfolio. That is, a long-term gap analysis.

SUEZ urges that all water rights included in an approved application subjected to a system-wide RAFN analysis under the 1996 Act are "RAFN rights." They should be identified as such in a condition or remark on the face of the right.[8] This recognition brings with it within the 1996 Act's express statutory protection from forfeiture. It also subjects the right to the statute's limitation on transfers.[9]

VI. SUEZ IS ENTITLED TO ACROSS-THE-BOARD PROTECTION FOR ALL IMAP APPROVED RIGHTS.

SUEZ has gone to considerable expense in this IMAP, and it seeks the broadest possible coverage under the 1996 Act. SUEZ was not obligated to proceed under the 1996 Act. It elected to do so, and it is entitled to do so. Given the nascent state of the law and administrative practice on the subject of rights held for future use, seeking express statutory protection (rather than relying on a common law doctrine) for as many rights as possible is neither unreasonable nor irrational.

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[8] For example, water right no. 63-33022 owned by the City of Nampa has a condition stating: "This right authorizes 4.50 cfs for reasonably anticipated future needs for a planning horizon that ends in 2030 within the service area pursuant to Chapter 2, Title 42, Idaho Code." The quantity 4.50 cfs is the full quantity stated on the right, not a portion thereof deemed to be held for future use.

[9] "Finally, all RAFN transfers shall include an approval condition limiting the RAFN to use within the service area and restricting change in the purpose of use." *RAFN Guidance* at 21.

VII. DIVIDING RIGHTS INTO "USED NOW" AND "FUTURE USE" CATEGORIES IS UNWORKABLE.

Moreover, seeking across-the-board protection from forfeiture (rather than for just a portion of the IMAP portfolio) is the only practical solution. To say that a right is "in use" today (and therefore needs no forfeiture protection) fails to recognize the shifting use of the rights included in a water right portfolio. This is particularly so in the context of a municipal provider like SUEZ whose portfolio is a complex and ever-changing mix of ground water rights and permits, surface water rights and permits, and a host of other entitlements of varying nature and permanency.

In any event, is it unclear how one should divide a portfolio of water rights between those in use today and those held for the future. There are at least three ways to approach this.

1. One might say that the most senior rights (or portions thereof) are necessarily the ones in use today, while the most junior are the ones held for the future.
2. Alternatively, one might say that the water right holder has the authority to choose, at any given time, which of its in-priority water rights are "in use." Indeed, a municipal provider might choose to use its most junior rights first in order to save any senior rights with volume limits for use during times of curtailment.
3. Then again, one might deem that all rights then in priority and available for use via APODs are used simultaneously and proportionally. Indeed, the Department has taken that position preliminarily in the case of a municipal provider in North Idaho. If this view prevails, then all water rights will go partly "unused" (and in need of forfeiture protection) for many years into the future.

No one today knows which of these three is the correct answer. Even if the Department provided an answer today, that may not be the way things are viewed by the Department or a court twenty years from now.

It is hard enough to divvy up ground water rights into "used" and "future" categories. Add to this the fact that SUEZ supplies its customers with a mix of ground and surface rights and other entitlements that is constantly shifting—literally on a day-to-day basis. Indeed, in the coming years, the mix of ground and surface water components of its system could change considerably.

VIII. CONCLUSION

No one knows precisely how the various individual water rights and entitlements in SUEZ's portfolio will change and be used in the future. Nor do we know how questions of water rights accounting will evolve in the years ahead. A decision that arbitrarily designates some rights (or portions) as protected from forfeiture and others as not (because they are deemed in use today) is unwise, unfair, and pointless. Designating all IMAP rights as RAFN rights protected from forfeiture eliminates an accounting headache and disadvantages no one since, if water rights currently used are not at risk of forfeiture, protection under the 1996 Act is at worse superfluous. The whole point of the 1996 Act is to allow municipal providers to secure a long-term supply, and allow them to focus on safely and efficiently providing that water to their customers.

If the IMAP is approved, all water rights included in the application package should be protected from forfeiture—either because they are in use or under the statutory protection for RAFN. It does not matter which. If SUEZ—or any other municipal provider—goes the distance to prove that its long term needs exceed its current portfolio, it is entitled to that express protection along with the burdens imposed by the 1996 Act.

Respectfully submitted this 5th day of October, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2017, the foregoing was filed, served, and copied as shown below. Service by email is authorized by the Hearing Officer's Order of September 11, 2017 at page 3.

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Christopher H. Meyer

Exhibit A KEY DEFINITIONS AND PROVISIONS FROM 1996 MUNICIPAL WATER RIGHTS ACT

References to "reasonably anticipated future needs" are shown in yellow highlight.

Idaho Code § 42-202(2)	An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. 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.
Idaho Code § 42-202(11)	Provided further, that water rights held by municipal providers prior to July 1, 1996, shall not be limited thereby.
Idaho Code § 42-202B(4)	"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(5)	"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(6)	"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(7)	"Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.
Idaho Code § 42-202B(8)	"Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

Idaho Code § 42-202B(9)	"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 § 42-217	On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit. The statement shall include: . . . 4. In the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation. . . .
Idaho Code § 42-219(1)	Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall state the name and post-office address of such user, the purpose for which such water is used and the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied. A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.
Idaho Code § 42-219(2)	If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land which is irrigated by such water, except that the general description of a place of use described in accordance with subsection (5) or (6) of this section may be described using a digital boundary, as defined in section 42-202B, Idaho Code. If the 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.
Idaho Code § 42-222(1)	Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights

	by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate. When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description or 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. When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use. The director of the department of water resources shall examine all the evidence and available information and shall approve the change in

	whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.
Idaho Code § 42-223(2)	A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.