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October 17, 2016

Shelley W. Keen
Water Right Section Manager
Idaho Department of Water Resources
The Idaho Water Center
322 E Front St
Boise, ID 83702

Re: City of Nampa – Water Right No. 63-32835

Dear Shelley:

Thank you for taking my call on September 29, 2016 to discuss issues of proof for Water Right No. 63-32835. That call prompted additional discussions and investigations involving City of Nampa staff and its water engineers. I am now writing to follow up with some further information and a request for additional time (until April 29, 2017) to provide updated water demand projections to the Department.

Here are the circumstances. No. 63-32835 is a permit for 5.0 cfs. This is a municipal water right based on reasonably anticipated future needs (“RAFN”).¹ It has a planning horizon of 21 years, ending on December 30, 2030 (see condition No. 9 on the permit, condition No. 8 on the amended permit, condition No. 6 on the web summary).

The original proof date was October 1, 2014. Following an amendment of permit (to add a well site), the City sought and received a one-year extension of the proof date to October 1, 2015. That extension was necessary to provide time to construct the new well. The well is now fully operational and is providing water to the City’s municipal customers with a production capacity consistent with the permit.

¹ This is one of two RAFN permits issued to the City on the same day. The other, No. 63-33022, was licensed on June 15, 2012. This license is discussed further below.

The City filed its proof on the form provided by the Department (*Statement of Completion for Submitting Proof of Beneficial Use* or “*Statement of Completion*”) on September 28, 2015. The *Statement of Completion* did not contain updated information on future demand projections or the future service area. Instead, it provided the information required by the form. The form also states: “Do the approval conditions on your permit require you to submit additional information in connection with our proof of beneficial use? If yes, list the conditions below and attach documents with the required information.” The City responded, “None required.” That was accurate. Neither the original permit nor the amendment of permit contain any conditions regarding additional information or documentation to be provided at the time of proof.

The City’s water rights consultant, Roxanne Brown of SPF Water Engineering (“SPF”), recently spoke with you regarding the timing of the *Beneficial Use Field Report* (“*BUFR*”) for this water right. During the course of that discussion, you noted that Idaho Code § 42-217(4) requires the holder of a RAFN permit to provide updated information about demand projections and service area at the time proof is submitted. That information was not included in the submission on September 28, 2015, because it was not called for on the Department’s form or in the permit’s conditions. Instead, SPF reasonably assumed that such information would be provided at the time it submitted a *BUFR*, as it had done in connection with the licensing of Water Right No. 63-33022. That conclusion, seemingly, was confirmed by the Department’s issuance of its *Proof Acknowledgment Letter* on October 30, 2015.

This raises the question as to how, when, and in what form this additional information should be provided to the Department. Information regarding construction, pumping capacity, operational status, and application to beneficial use is available now. Indeed, the City has retained SPF to prepare a *BUFR*. However, the City requires some additional time—six months should suffice—to update its RAFN projections and description of place of use. No change is requested in the duration of the planning horizon.

I have reviewed the Department’s rules and have found nothing that addresses these timing issues. The Department has no rules governing licensing of water rights. Nothing in the Department’s rules governing conditioning of permits (IDAPA 37.03.08.050) or rules governing *BUFRs* (IDAPA 37.03.02) speaks to the subject. Nor do I find anything on point in your informal guidance memorandum of May 21, 2013 entitled “Explanation of changes to Idaho Code § 42-204 addressing Extensions of Time to Submit Proof of Beneficial Use.”

Given the absence of guidance on the subject and the fact that neither the Department’s form nor conditions on the permit call for submission of revised RAFN projections at the time of proof, it would seem to be within the Department’s discretion to allow such information to be submitted at the same time as the *BUFR* or as otherwise directed during the course of the licensing process.

This would be analogous to the permitting process wherein permit applicants often are required to provide additional documentation during the course of the permitting process. So long as the permit was accepted for filing, the subsequent submission of additional information necessary to permit approval does not make the application defective or result in advancement of the priority date. The analog here would be to the Department's issuance of the *Proof Acknowledgment Letter*. That letter reflects the Department's determination that the filing of proof was minimally sufficient to meet the statutory requirement of filing by the proof date, and that additional information necessary to secure the license may be submitted as required by the Department thereafter.

Indeed, this was the pattern followed by the City and the Department during the course of licensing No. 63-33022. In that case, the proof date was October 1, 2011. On November 30, 2010, SPF submitted the City's *Statement of Completion* and its *BUFR*.² Neither the *Statement of Completion* nor the *BUFR* contained updated RAFN projections. This was noted in a memorandum from Mat Weaver to the file dated January 17, 2011. Notwithstanding the absence of updated RAFN information, the Department issued a *Proof Acknowledgment Letter* on September 28, 2011. After extensive further discussions, communications, and submissions, the right was licensed on June 15, 2012.

Of particular note is Mat Weaver's memorandum of April 18, 2012 summarizing the interactions with the City's representatives and the documentation provided by the City. That memorandum concludes that the permit should be licensed on the basis of information provided by the City on April 12, 2012 (via a letter from me dated April 9, 2012), which is subsequent to both the *Statement of Completion* and the proof date.

I believe that the Department acted appropriately and within its discretion in its handling of the licensing of No. 63-33022. Likewise, the City was not unreasonable in presuming that this course of action (*i.e.*, submission of RAFN update documentation subsequent to the submission of proof) is permissible and appropriate.

Accordingly, the City requests the opportunity to submit the required revisions to RAFN projection and any other explanation or documentation required to satisfy Idaho Code § 42-217(4) by April 29, 2017.

I am at your service, if you would like to discuss this further. If it would be helpful, I would be pleased to arrange a meeting including representatives of the City and its consultants at your convenience. Indeed, one of the reasons that this letter to you has been delayed is that the City has undertaken further investigation of its future water demand. The City would be pleased

² The cover letter from SFP was dated November 26, 2010 enclosing *Statement of Completion* dated September 21, 2010 and *BUFR* dated November 26, 2010. These were received by the Department on November 30, 2010.

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to provide staff with an informal preview of how that is shaping up and the approach the City anticipates taking. Your further guidance would be most welcome.

Sincerely,



Christopher H. Meyer

cc: Michael J. Fuss, P.E., MBA, Director, Public Works Department, City of Nampa
Nate W. Runyan, P.E., Deputy Director, Public Works Department, City of Nampa
Roxanne Brown, Water Rights Specialist, SPF Water Engineering, LLC