

LAW OFFICES

601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

CHRISTOPHER H. MEYER
DIRECT DIAL: (208) 388-1236
CELL: (208) 407-2792
EMAIL: ChrisMeyer@givenspursley.com

Gary G. Allen
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Christopher J. Beeson
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May 16, 2011

DEPARTMENT OF
WATER RESOURCES

Mathew Weaver, P.E.
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
mathew.weaver@idwr.idaho.gov

Re: *City of Nampa - Water Right Nos. 63-12474, 63-12506, and 63-31243*

Dear Mr. Weaver:

I am writing on behalf of the City of Nampa ("Nampa" or the "City") in response to your letter of April 19, 2011. Thank you for allowing me additional time to respond. Your letter addresses two broad issues, reasonably anticipated future needs ("RAFN") and supplemental use conditions. I will address each in turn.

RAFN

I very much appreciate the time and thought that you and other staff at the Idaho Department of Water Resources ("IDWR" or the "Department") have put into consideration of the RAFN question posed here as well as broader policies implementing the Municipal Water Rights Act of 1996 ("1996 Act"). The Department's guidance in Application Processing Memorandum No. 18 ("APM18"), in particular, is instructive and helpful in articulating the Department's policy on this important subject.

Although the 1996 Act has been with us for fifteen years now, it remains something of a new concept in Idaho. Only a handful of these RAFN rights have been approved. With each one, I believe we learn a little more about how best to approach the subject of effective long-term water planning.

That emerging thinking is reflected sometimes in the words we use. Many of us (including myself) have fallen into the habit of referring to "RAFN rights" versus "non-RAFN rights." Upon reflection, however, I believe it is important to keep in mind that a municipal

provider's planning horizon ("PH") and RAFN do not apply to individual water rights but to the provider's entire portfolio of rights. In considering whether to approve a request for even a single new RAFN right, the Department must review the provider's entire portfolio of rights (or relevant portion thereof).¹ This is true regardless of whether the application for RAFN processing arises under section 42-202(2), 42-219, or 42-222(1). For that matter, under AP18 the Department will look at the provider's entire relevant portfolio even if the application is for a non-RAFN right. Doing so is necessary to evaluate whether the municipal provider can justify adding the additional diversion quantity associated with the new water right.

This need to evaluate the entire portfolio is reflected in the Department's AP18 guidance at page 3: "The applicant must also demonstrate that the new appropriation is not intended for RAFN by providing total system capacity and existing demand within the municipal service area and comparing that capacity and demand to the entire municipal portfolio of water rights. If existing municipal water rights exceed existing demand and short-term needs, then an application for RAFN would be necessary for an additional appropriation of water." In other words, under the guidance, the Department will look at a municipal provider's entire portfolio in either event—whether the application is for current needs or to meet RAFN. The difference is that if the new right is sought for RAFN, the portfolio quantity will be compared against a demand number that includes not just current needs but future needs too.²

The AP18 guidance, of course, addresses RAFN only indirectly. It does not describe how RAFN applications are processed. Rather, it explains how the Department will handle applications by municipal providers who do not elect to carry the "additional evidentiary burden to establish a planning horizon and to submit population and other planning data in support of the anticipated needs within the planning horizon." AP18 at 2.

As I see it, AP18 accomplishes an important policy objective. If a municipal provider has never established a PH/RAFN framework, and the provider then files a new application for appropriation or transfer, AP18 requires the applicant to declare at the outset whether or not its application is intended to serve RAFN. If it is not an RAFN application, the provider is relieved of the additional evidentiary burden under the 1996 Act. However, the provider's need for the new right will be measured against the provider's current demand—without an artificial increase

¹ In some instances, it may be appropriate to exclude from consideration certain water rights held by a provider. For example, water rights used for special purposes, such as fire flows, should not be considered as part of the supply available to meet RAFN. There may be other examples of rights that should be excluded from the RAFN calculation. For instance, a city might hold non-municipal rights associated with an operating farm or other enterprise outside the city's service area. Likewise, a portfolio also might be divided where a provider has distinct water supplies and delivery systems. For example, Nampa has viewed its rights as belonging to two separate portfolios, one for potable water delivered to homes and businesses and one for irrigation water delivered via a separate delivery system from separate sources. In this letter, I use the term "relevant portfolio" to describe whatever the Department determines to be the correct rights to consider for RAFN purposes.

² This may be a simple comparison of (1) the sum of the authorized diversion rates for each right in the relevant portfolio to (2) the total peak diversion rate required to meet current and future demand. In other cases, this quantification of available rights may need to take into account overlapping rights and other special considerations (e.g., primary and secondary rights, flood flow rights, rental rights, exchanges, etc.).

based on fire flows. The result of choosing a non-RAFN application may be to get a water right with no additional system-wide quantity (essentially a new point of diversion to serve its existing portfolio of rights).

That is sound policy. It brings to an end a hundred years of allowing municipal providers to stack water right on water right without any consideration of the overall size of its growing portfolio vis-à-vis its current or future needs. Given the opportunity, a provider now has to establish a PH/RAFN framework under the 1996 Act that should be the sole means for expanding a provider's portfolio beyond its current needs.

Here is the key point. Once a municipal provider chooses to carry the extra evidentiary burden required to establish a PH/RAFN framework and once the Department approves that quantification, there is no going back. The provider no longer has the option of adding new non-RAFN water rights to an RAFN-approved portfolio. This is no hardship. It simply means that any new water rights acquired by that provider by appropriation or transfer will be measured against the previously quantified RAFN needs. (Presumably that RAFN quantification may need to be updated from time to time, perhaps every decade or two, while at the same time pushing out the PH.) In other words, there can be no such thing as a mix of RAFN and non-RAFN rights in a provider's relevant portfolio.

Thus, when the Department completes the process of approving an RAFN quantification and determines that an additional quantity under the new permit, license, or transferred right is justified, the Department necessarily has found that the entire relevant portfolio is needed to serve RAFN. From that point forward, the entire relevant portfolio (that is, every right whose quantity was evaluated in the context of the RAFN evaluation and approval) is now "RAFN-approved," if you will. Accordingly, each of the rights in the relevant portfolio (not just the new right that triggered the RAFN process) falls within the protection of Idaho Code § 42-223(2).³

This just makes sense. It strikes me as redundant and a waste of agency resources to require a municipal provider who has completed the PH/RAFN exercise as to an individual right to then repeat the exercise for each other water right in the relevant portfolio. After all, the Department has already looked at the entire relevant portfolio and determined that it is insufficient to meet RAFN.

Given this, you might ask, why did United Water Idaho ("UWID") go through the exercise of subjecting its entire portfolio of rights to transfer in its Integrated Municipal Application Package ("IMAP")? The reason was that the IMAP predated the SRBA review of UWID's water rights. At that time, there was considerable controversy and disagreement about the validity of UWID's water rights. Recall that protestants at the time stated their intent to

³ Idaho Code § 42-223(2) provides that water rights held for RAFN are deemed a beneficial use and are protected from forfeiture: "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."

Mathew Weaver, P.E.
May 16, 2011
Page 4

mount a forfeiture-based challenge to rights held by UWID. Accordingly, we thought it made sense to put the entire portfolio before the Department as part of the IMAP so that every right could be evaluated and, if necessary, cut back or eliminated.

Nampa is in a different situation. The City's water rights have undergone SRBA scrutiny. Its portfolio has been pared down to some extent, and the job of evaluating individual rights is done. Accordingly, in evaluating Nampa's RAFN application, it was unnecessary for the Department to repeat the gargantuan task of evaluating the validity of individual water rights in Nampa's portfolio.

On October 5, 2009, the Department issued permits for Water Right Nos. 63-32835 and 63-33022 (Coyote Springs and Well #16 second right) expressly recognizing these as being held for RAFN purposes under a 21-year PH through the year 2030. In securing these rights, the City shouldered the additional burden under the 1996 Act as described in AP18. In approving these rights for RAFN purposes, the Department met its obligation under the 1996 Act to evaluate the City's entire portfolio of potable-system rights and to confirm that they are all needed for RAFN. Accordingly, it seems clear to me that each of those rights has now earned the protection from forfeiture provided by the 1996 Act.⁴

Needless to say, the City needs assurance that the Department sees this the same way. If the Department sees it differently, then it may be necessary to go through yet another transfer proceeding of some sort in order to "bless" each of its water rights with statutory forfeiture protection under the 1996 Act. Obviously, this is the Department's call.⁵

Thus, as I see it, the Department's action in approving permits for Water Right Nos. 63-32835 and 63-33022 had the effect of converting the City's entire potable-system portfolio to RAFN status. I do not see this as inconsistent with AP18. I read AP18 as being directed to municipal providers who have not previously gone through the RAFN approval process.⁶

⁴ As noted in your letter, even non-RAFN municipal rights acquired prior to the 1996 Act are protected from forfeiture under the common law Growing Communities Doctrine. However, the City desires to secure the statutory forfeiture protection for its entire portfolio available under the 1996 Act because it views that protection as more precisely defined, stable, and immune to alteration by future court decisions. That is why it has taken on this "additional evidentiary burden."

⁵ I noted on page 1 of my letter of May 6, 2010 to John Westra and Garrick Baxter: "The City is contemplating filing an application to establish and quantify needs for a longer-term planning horizon, probably fifty years. Supporting studies have not yet been undertaken and such an application would not be filed in the immediate future. Nevertheless, it is appropriate that we begin laying the procedural foundation for such an application." The City is continuing to explore this. In my view, however, such a filing is not necessary to bring Nampa's potable-system portfolio under the protection of RAFN for its existing 2030 PH. Instead, such an application would be aimed at extending the PH and enlarging the RAFN quantification.

⁶ AP18 states on page 1: "There are times when a municipal provider will choose to file an application to appropriate water solely for water needed in the short-term without the burden of demonstrating future needs over an established planning horizon. This memorandum provides guidance to Department staff when permitting and determining the extent of beneficial use for licensing purposes for non-RAFN municipal water right permits."

Accordingly, the statement in AP18 prohibiting amendment of a permit⁷ does not apply to Nampa's permits because the entire guidance does not apply to Nampa once it has shouldered the burden of obtaining RAFN approval of its relevant portfolio.

No other water right holder or potential objector will be harmed by allowing these permits to be licensed on the basis of their need to serve RAFN. People were put on notice from the outset that water under these rights may be pumped at 3.5 cfs, 3.5 cfs, and 2.6 cfs, respectively. Whether that pumping begins today or 20 years from now should not make any difference. Indeed, if it is pushed out 20 years because the right is held for RAFN purposes, other users are benefited in the interim.

Moreover, the City expressly called out these permits (Water Right Nos. 63-12474, 63-12506, and 63-31243) and the quantities associated with them when it sought RAFN approval of the permits for Water Right Nos. 63-32835 and 63-33022.⁸ No one is in a position to be surprised.

I can appreciate the Department's concern, as reflected in AP18, that applicants should be required to decide one way or the other as to RAFN and not switch horses half way through the permitting process. But that concern should be limited, as I believe AP18 is, to the providers who have not previously established RAFN in some proceeding.

If the Department, nevertheless, concludes that AP18 applies to these permits, even after Nampa secured its RAFN approval, then I would urge that AP18 not be applied retroactively. Indeed, the guidance itself recognizes the need for flexibility on a case-by-case basis:

This guidance provided in this memo pertains to the review and processing of permits to be issued after the date of this memorandum. Existing permits issued prior to the date of this memorandum should be handled on a case-by-case basis when determining beneficial use for licensing purposes. Determination of beneficial use for permits pre-dating this memorandum may depend on the date the permit was issued in relation to the 1996 Municipal Water Rights Act and/or any specific intent to limit the

⁷ AP18 provides at page 5: "A permit issued to a municipal provider that does not provide for RAFN cannot be later amended to gain the benefit of an RAFN permit."

⁸ My letter of July 28, 2009 to John Westra stated at page 2 "This number [the portfolio total] assumes that licenses ultimately will be issued for the two existing permits (Nos. 63-12474 and 63-12506) at the full permitted diversion rates." On the same page, the letter also addressed Water Right No. 63-31243 which, at the time, was not part of the City's integrated delivery system: "Arguably, three rights totaling 2.68 cfs (excluding 0.04 cfs for stockwater) owned by the City but not currently serving the City's integrated potable water system (Nos. 63-31243, 63-11339, and 63-20264) should be included within the portfolio of rights available for RAFN. In theory, the wells served by these rights could be joined to the City's integrated delivery system in the future. Without conceding that these rights should be included, we have displayed them here nonetheless for purposes of the analysis presented with this letter. The addition of these three rights brings the City's current portfolio of potable rights to 46.63 cfs (not including Nos. 63-33022 and 63-32835)."

beneficial use that could be developed under the permit at the time it was issued.”

AP18 at page 1 (emphasis supplied).

The City has demonstrated that its “specific intent” was to hold these permits to meet its long term needs. The City provided two affidavits documenting this intent (accompanying my letters to John Westra). Your letter states at page 1: “Although the intent may have been for the applications to be processed as RAFN, the Idaho Department of Water Resources’ (Department) records do not support that use.” Given the affidavits we have provided, it seems to me that the City has met the standard provided in the guidance highlighted above.

I appreciate the need for bright line rules going forward. But I fail to see the need for such strict application of this provision retroactively. This is particularly so where, as here, no one would be made any worse off and the 1996 Act’s goal of encouraging long-term water planning would be advanced. The AP18 guidance was aimed at encouraging cities to step up to the plate and shoulder the “additional evidentiary burden” imposed by the 1996 Act. Nampa has done so.

Supplemental Use Condition

As noted in our prior correspondence, each of the referenced rights contains a “supplemental use only” condition.⁹ In my prior letters, I suggested that this condition is inappropriate for these municipal rights, was added to the permits in error, and should be removed at licensing.

I do not entirely understand the Department’s concern that removing the condition would result in enlargement. The City may use and reuse this municipal right to extinction. In your letter you postulate that, in the future, the City might elect to use this right within its non-potable irrigation water delivery system. (You note that this could be accomplished by a simple transfer. Indeed, not even a transfer would be required if the point of diversion was not changed.) But I do not see how this would result in injury. The irrigation use might be somewhere in the vicinity of 50 percent consumptive; that is less than 100 percent consumptive. All other water users are on notice that the City may grow into more intensive consumptive use of its rights over time. If one of those uses along the way happens to be irrigation, so be it. This is not enlargement.

In any event, if the condition was initially imposed in error, or if the reasons for the limitation are no longer relevant, there is no enlargement in removing the condition. For example, the Department has removed a number of “domestic use only” (aka “no irrigation use”) conditions that were imposed during prior moratoriums.

⁹ You identify this as “condition code 102.” It reads: “The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.”

Mathew Weaver, P.E.
May 16, 2011
Page 7

I am uncertain as to the Department's reasoning for imposing the condition in the first instance. In my experience, this is a condition that is ordinarily associated with irrigation rights where it is intended to ensure that ground water be used only during the shoulder season or at other times when surface supplies are unavailable. For a municipal right that may be used for all manner of uses and at any time of the year, this condition seems inappropriate.

Perhaps, the Department's motivation for imposing this condition was based on compliance with Idaho Code § 67-6537. If so, I believe that concern is misplaced. That statute is an amendment to the Local Land Use Planning Act ("LLUPA") enacted in 2005.¹⁰ It requires that developers use appurtenant surface water when reasonably available. The statute does not impose any requirement on IDWR to condition or otherwise restrict the use of water rights. Nor does it impose any obligation on municipal providers to keep track of how developers design their water delivery systems, how they are modified over time, or what customers ultimately do with their municipal water. The Legislature has recognized a policy of encouraging continued use of surface supplies, but that policy is implemented at the local level through LLUPA. Simply put, it is not IDWR's responsibility to enforce this land use requirement through the administration of water rights.

While the removal of this condition would do no harm to other water users, retention of this condition could add confusion and uncertainty in the administration of water rights. Does it mean that Nampa's right to use these water rights should be curtailed if it were shown that some of its customers were using this water to irrigate lawns? What is the City supposed to do? Should it send patrol cars in search of sprinklers and garden hoses connected to domestic taps? If some of the City's rights have this condition and others do not, how is the Department to determine which right is being used to illegally sprinkle someone's garden? All this may sound silly, and it is, but in times of water scarcity and active administration, neither the City nor the Department should have to spend time and resources arguing about what this condition means. The condition makes no sense for a municipal provider, and it should be removed now.

Once again, I thank you, the Director, and other Department staff for the thought and care that has gone into this discussion. I believe this is time well spent, and I look forward to hearing back from you. If you care to meet to discuss this further, I would happy to do so.

Sincerely,



Christopher H. Meyer

¹⁰ Idaho Code § 67-6537 was first enacted as a part of the Ground Water Quality Protection Act of 1989, 1989 Idaho Sess. Laws, ch. 421. At that time, it merely required local comprehensive plans to consider ground water protection. It was not until 2005 (2005 Idaho Sess. Laws, ch. 338) that the provision was amended to add the substantive mandate to developers to use surface water when available.

Mathew Weaver, P.E.

May 16, 2011

Page 8

cc: John Westra, Manager, Western Regional Office
Garrick L. Baxter, Deputy Attorney General
Michael J. Fuss, Director, Public Works Department
Lenard Grady, City Engineer, Engineering Division
Kim Lord, Water Superintendent, Waterworks Division
Roxanne Brown, Stuart Hurley, and Terry Scanlan, SPF Water Engineering, LLC

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