

Weaver, Mathew

From: Christopher H Meyer [ChrisMeyer@givenspursley.com]
Sent: Friday, December 23, 2011 1:27 PM
To: Weaver, Mathew
Cc: 'Roxanne Brown'; Saxton, Craig; Michael Fuss (fussm@cityofnampa.us); Sheri Murray (murrays@cityofnampa.us)
Subject: RE: City of Nampa Municipal Permits 63-12474, 63-12506, & 63-31243 [IWOV-GPDMS.FID388186]

Mat,
Thank you very much for getting back to me on these issues.
I appreciate that you are juggling a lot of work with limited staff.

I am working under a deadline on a brief due in the Idaho Supreme Court on New Year's Eve (my Merry Christmas present, I guess).
So please give me a little breathing room in getting back to you.
I will follow up shortly.
Thanks, and my best to you for the holidays.

Christopher H. Meyer
Givens Pursley LLP

From: Weaver, Mathew [mailto:Mathew.Weaver@idwr.idaho.gov]
Sent: Friday, December 23, 2011 1:24 PM
To: Christopher H Meyer
Cc: Roxanne Brown; Saxton, Craig
Subject: City of Nampa Municipal Permits 63-12474, 63-12506, & 63-31243

Chris,

Let me first apologize for the lengthy delay between your previous correspondence letter dated May 16, 2011 and my reply. Part of that delay was necessary, as myself and the Department worked through arguably, relevant RAFN issues on the City of Eagle/M3 matter and part of it was due to my inability to get the licensing of these outstanding permits back to the top of my 'to do' list. At any rate, I am currently revisiting this matter with the hope of getting draft licenses to Craig Saxton for review and signature next week.

Non-RAFN vs. RAFN Classification

Let me first comment on the classification of these municipal water rights. Your previous letter champions a perspective in which once a municipal provider makes the argument and provides sufficient evidence for RAFN consideration then all subsequent and future water rights should be classified as RAFN. I remain unconvinced of the validity of this perspective. I can certainly think of hypothetical scenarios in which a municipality might pursue a non-RAFN water right after previously obtaining a RAFN water right. As for water right permits issued prior to a showing of RAFN, it is contrary to the guidance provided in the revised AP Memo #18 (Peppersack 2009), which clearly requires that RAFN status be declared at application and that all required support material be provided at application. For these reasons I plan to issue these three licenses as non-RAFN municipal water rights.

Additional Increment of Beneficial Use Analysis

As you are no doubt aware, the previous standard in establishing the licensed diversion rate associated with municipal water rights was 'installed capacity' as set forth in the original AP Memo #18 (Young 1979). This standard was changed to one of 'beneficial use' for non-RAFN water rights and 'reasonably anticipated future needs' for RAFN water rights with the adoption of the revised AP Memo #18 (Peppersack) in October of 2009. As you have pointed out, for permits that predate October 2009, and I would add for permits that do not specifically contain condition 190 (see below), beneficial use for permits should be determined on a 'case-by-base' basis arguably under the 'installed capacity' standard of the original AP Memo #18 (Young 1979). The original version of AP Memo #18 states that *'a municipal right should not be quantified by rate of flow beneficially used at the time of examination, but rather by the capacity of the diversion works.'* With this understanding I am prepared to issue the water rights with the installed capacity diversion rates identified and recommended in the field examination reports sans the limiting conditional language I previously proposed in my letter dated April 19, 2011.

Water Right Condition 102

In your previous correspondence you continued your call for the removal of condition 102 (see below) from the licenses. In that letter you argued that the condition was either erroneously added to the permits, or if not added in error, that they did not apply. The following 'usage description' is associated with condition 102 and provides guidance to staff in applying this condition. *Added 1/21/1999 for use on municipal rights in areas with surface water historically and currently available for irrigation use. The intent is to discourage the replacement of surface water use with the use of groundwater for irrigation.* This hopefully makes clear that the condition was not added in error, and that it in fact is intended to address the very issue at hand. By utilizing this condition the Department hopes to prevent the enlargement of a municipal water right to encompass a beneficial use (i.e. irrigation) for which water has already been allocated and historically used. For these reasons I plan to leave condition 102 on the water right licenses.

If you would like to discuss this matter further please give me a call or email today or next week at your convenience. Craig is out all next week so it will be the first week of January before the licenses will get a final review and signature. I hope you have an enjoyable holiday season.

Cheers,

Mat Weaver, P.E.
Engineer, Technical 2
Idaho Department of Water Resources
(208) 287-4914

Condition 190: In connection with the proof of beneficial use submitted for this permit, the permit holder shall also submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the point of diversion authorized for this permit during the development period. The report shall also show the maximum instantaneous rate of diversion, either measured or reasonably estimated by a qualified professional engineer, geologist, or certified water rights examiner, for the entire City of Nampa municipal water system. The report shall also describe and explain how water diverted under this permit provides an additional increment of beneficial use of water for the City of <Nampa> municipal water system as opposed to an alternative point of diversion for prior water rights already held and used by the City of <Nampa> for its municipal water system.

Condition 102: 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 <or where the use of surface water was replaced by the use of water diverted in connection with this right before the approval of Transfer 73425>. 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.