

MEMORANDUM

DATE: September 10, 2009

TO: Water Right File 25-7467

FROM: Shelley W. Keen *SWK*

RE: Licensed diversion rate

The City of Idaho Falls submitted proof of beneficial use for Permit 25-7467 in 1995. Information submitted to the Department of Water Resources in 2004 shows that in 1995 the City of Idaho Falls had a peak day pumping rate of 59.27 cfs, down from 81.03 cfs in 2004. The 2004 and 2005 peak rates are significantly less than the 115.16 cfs of water rights held by the City of Idaho Falls for municipal purposes at the time. An argument could be made that the City of Idaho Falls had not established a water right in connection with Permit 25-7467 by 1995 because it had not diverted more water than authorized by existing water rights.

However, prior to the 1996 Municipal Water Rights Act, the Department's policy, in recognition of common law practice, was:

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.¹

The field examination for Permit 25-7467 shows that the City of Idaho Falls had installed the permitted capacity over and above 115.16 cfs by 1995. To be consistent with the policy in place at the time Permit 25-7467 was issued, the Department should issue a license for the permitted diversion rate. The result will be a license allowing the City of Idaho Falls "to increase water use under an existing right."²

The Municipal Water Rights Act of 1996 changed the opportunity for a municipal provider to increase water use under an existing right. Rather than simply obtaining a permit and installing the authorized diversion capacity, a municipal provider must now indicate whether an application is for immediate needs or for "reasonably anticipated future needs" (RAFN). The Department is currently revising its policy to implement the 1996 act. Under the draft policy memorandum, if the application is for immediate needs, the Department will issue a license only for the amount of beneficial use in excess of existing water rights. If the application is for RAFN, the municipal provider must justify the request based on reasonable planning data over an established planning horizon. Only when the municipal provider requests water for RAFN, justifies the request, and

¹ Application Processing Memorandum No. 18. Norm Young. November 5, 1979.

² Ibid.

Memo to Water Right File 25-7467
September 10, 2009
Page 2

installs the requested capacity will the Department issue a license for an amount beyond actual beneficial use.

As in the case of Permit 25-7467, existing permits should be evaluated on a case-by-case basis to determine if the license should be issued in accordance with the policy in effect prior to the Municipal Water Rights Act or in accordance with the revised policy. Applications for RAFN must be processed in accordance with the Municipal Water Rights Act and in accordance with the new policy memorandum, when it is issued. In general, a non-RAFN permit should be licensed in accordance with the pre-1996 policy unless it carries a condition requiring the right holder to demonstrate that the permit represents an increment of actual beneficial use.