

GIVENS PURSLEY LLP

Attorneys and Counselors at Law

601 W. Bannock Street
PO Box 2720
Boise, ID 83701
Telephone: 208-388-1200
Facsimile: 208-388-1300
www.givenspursley.com

Gary G. Allen
Christopher J. Beeson
Jason J. Blakley
Clint R. Bolinder
Jeff W. Bower
Preston N. Carter
Jeremy C. Chou
William C. Cole
Michael C. Creamer
Amber N. Dina
Bradley J. Dixon
Thomas E. Dvorak
Jeffrey C. Fereday
Martin C. Hendrickson
Brian J. Holleran
Kersti H. Kennedy

RECEIVED
OCT 17 2018
WATER RESOURCES
WESTERN REGION

Neal A. Koskella
Debora K. Kristensen
Michael P. Lawrence
Franklin G. Lee
David R. Lombardi
Kimberly D. Maloney
Kenneth R. McClure
Kelly Greene McConnell
Alex P. McLaughlin
Melodie A. McQuade
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Emily G. Mueller
Deborah E. Nelson

RECEIVED
OCT 16 2018
DEPARTMENT OF
WATER RESOURCES

W. Hugh O'Riordan, LL.M.
Randall A. Peterman
Jack W. Relf
Michael O. Roe
Jamie Caplan Smith
P. Mark Thompson
Jeffrey A. Warr
Robert B. White

Donald E. Knickrehm (retired)

Kenneth L. Pursley (1940-2015)
James A. McClure (1924-2011)
Raymond D. Givens (1917-2008)

October 16, 2018

Via Hand Delivery

Idaho Department of Water Resources
The Idaho Water Center
322 E Front St.
Boise, ID 83702

Re: *Transfer No. 81844*

To Whom It May Concern:

Enclosed please find the attached Memorandum for filing under Transfer No.: 81844 with the Department. Please return a conformed copy to us for our records.

Should you have any questions concerning the enclosed document please contact me at (208) 388-1256. Thank you.

Sincerely,



Tina Marie Adornetto
Legal Assistant

/tma

Enclosures
14385022_1.DOC

MEMORANDUM

TO: City of Kuna

FROM: Christopher H. Meyer *CHM*

RE: APOD issues bearing on the City of Kuna's Transfer No. 81844

DATE: October 16, 2018

Introduction and executive summary

This memorandum addresses the City of Kuna's ("Kuna" or "City") Transfer Application No. 81844. The transfer seeks to add alternate points of diversion ("APODs") to six water rights.¹ After transfer, each of these six water rights will be allowed to divert from any or all of 14 APODs. Eleven of these APODs are existing wells owned by Kuna that already are associated with one or more of the six rights to be transferred. The other three APODs are yet-to-be constructed wells in the proposed Falcon Crest development that currently have no water rights at this time. The Falcon Crest development is located within Kuna's area of city impact, east of the current city limits.

As explained below, Kuna's transfer should be subject to APOD condition language. However, the standard APOD condition language must be expanded to specify a priority date and quantity for each of the new Falcon Crest wells for purposes of injury analysis.

Alternatively, and preferably, Kuna should apply for three new appropriations of water to serve each of its Falcon Crest wells, presumably subject to a combined use condition. Doing so would provide a priority date and quantity for each well. The new appropriations could be

¹ The transfer application would modify the following six municipal water rights:

Water Right Number	cfs
63-3266	1.34
63-8215	3.90
63-11970	3.78
63-12394	3.34
63-12552	3.00
63-31481	4.00
TOTAL	19.36

coupled with one or more transfers to achieve APOD flexibility. This combination of transfers and appropriations would allow the standard APOD condition language to be employed on the transferred rights. Moreover, the appropriations would allow the City up to 15 years to develop the new wells. In contrast, if the City proceeds only with the pending transfer, it must complete all three wells within one year.

Our client, SUEZ Water Idaho Inc. ("SUEZ"), has protested the transfer application. SUEZ is not opposed to this transfer. SUEZ seeks to work cooperatively with Kuna and other municipal providers, and fully supports Kuna's objective of securing municipal water rights that will allow efficient and reliable service to Kuna's customers. SUEZ's protest is limited to the following: (1) ensuring that the APODs are appropriately conditioned, and (2) ensuring that an effective monitoring plan is put into place. SUEZ also is interested in working with Kuna to ensure that mechanisms are put into place that will allow overlapping service areas to be avoided or resolved through cooperative agreements.

This memorandum addresses only the first item above (the APOD issue). Items 2 and 3 will be addressed separately.

In order to facilitate productive discussion and resolution of the protest, courtesy copies of this memorandum will be provided to IDWR staff for inclusion in the record and to representatives of the developer, whom we understand to be affiliated with The M3 Companies, LLC ("M3").² This memorandum is addressed to the City, rather than the City Attorney, because we have been informed that the City Attorney recently was dismissed.

Transfer vs. amendment of permit

As noted, Transfer No. 81844 seeks to transfer six of Kuna's licensed or decreed municipal water rights, totaling 19.34 cfs. (Kuna holds other licensed or decreed water rights for irrigation, which are not subject to the transfer.) In addition, Kuna holds permit No. 63-31741, authorizing diversion of 18.00 cfs for municipal purposes.

In other words, the largest of Kuna's rights, by far, is not included in the pending transfer. Kuna may wish to consider amending this permit to add APODs as it has under the transfer of its licensed and decreed municipal rights. If so, the reasoning set out in this memorandum would apply to such an amendment.

² From time to time, Givens Pursley LLP has represented M3 and/or its subsidiaries or affiliates on water right issues in other unrelated matters. Those representations (1) have noted the firm's longstanding and ongoing representation of SUEZ on water right issues, (2) have obtained consent as to that representation, and (3) have recognized that this firm would continue represent SUEZ if a conflict between M3 and SUEZ were to arise. In any event, we represent SUEZ in this matter and do not, and have not been asked to, represent M3 or any of its subsidiaries or affiliates with respect to the Falcon Crest development. M3 is not a party to Kuna's Transfer Application No. 81844.

Background on APODs

For many years, until recently, it was the standard practice of municipal providers to obtain a new water right appropriation each time the provider drilled a well. Thus, traditionally, each municipal water right had a single point of diversion; there were no APODs.

The absence of APODs is not ordinarily a problem, so long as there is no administration of the water right (*i.e.*, curtailment). However, in the event of a region-wide curtailment (*e.g.*, a conjunctive management call affecting all or most of the Treasure Valley), a municipal provider's junior water rights would be curtailed, and the provider would have no ability to "move" water from its senior rights to those wells.

To remedy this, many municipal providers have added APODs to their existing water rights. Doing so provides flexibility. In times of region-wide curtailment, the provider may continue to divert its senior rights (those that are not curtailed) from any of its wells—even rotating them from well to well, if needed. Ideally, each water right in a provider's portfolio of water rights should have APODs allowing that right to be diverted from any well in the provider's integrated system.

APODs also allow the provider to improve the pumping capacity of an existing well beyond the quantity originally stated on the water right and to pump water from the improved well under other water rights, without obtaining a transfer.

APODs have always been allowed under Idaho water law. As a practical matter, however, they were on virtually no one's radar until the Snake River Basin Adjudication ("SRBA"). In the SRBA, the water right portfolios of municipal providers were subjected to evaluation on a system-wide basis for the first time. During that process, municipal providers generally sought system-wide APODs based on what is known as "accomplished transfers" (pursuant to Idaho Code § 42-1425). These are transfers that can be recognized (*i.e.*, made lawful) in a basin-wide adjudication where the right holder simply implemented the change on the ground without seeking a formal transfer.

The standard APOD condition

In the SRBA, IDWR generally recommended approval of system-wide APODs for municipal providers.³ However, each water right with newly recognized APODs was conditioned allowing the Department to take into account the history of the development of the APODs under certain circumstances.

³ Systems connected by APODs may be physically integrated through pipes or, in some cases, through administration that employs system-wide instantaneous monitoring and reporting (*e.g.*, SCADA systems).

This “APOD condition” was imposed not just as a matter of practice or policy, but was legally mandated to avoid injury, as established by two Idaho Supreme Court cases.⁴

Except in the early years of the SRBA, IDWR consistently imposed the following “standard APOD condition” on all water rights that included newly added APODs:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from [name of well] located in [quarter-quarter description].

This language is obtuse. Nevertheless it has a relatively clear meaning based on Department practice and interpretation. Indeed, this standard APOD language is now employed routinely in all transfers that add APODs.

Essentially, the APOD condition serves as a sort of “flag” notifying all concerned that, in the event of future administration, the APODs included in the right are not original to the water right and may, under some circumstances, be “rolled back.” Thus, where appropriate, the APOD condition allows the Department to “undo” the transfer solely for purposes of injury analysis. In other words, the APOD condition allows the Department to evaluate the positions of the parties based on the water rights prior to the addition of APODs.

When is it appropriate to roll back the transfer that added the APODs? That depends, first, on the nature of the administration. As will be discussed further below, evaluation of APODs may arise in three administrative contexts: (1) localized well interference, (2) a geographically limited curtailment covering a portion of the municipal provider’s service area, and (3) a larger curtailment covering the municipal provider’s entire service area.

In the context of a localized well interference dispute, the question of rollback is simple. If the injured right has a priority date later than the date of the transfer, there is no rollback. In other words, the APOD condition does not come into play, and the holder of the APODs is allowed to use its APODs without restriction. This is because water rights created after the transfer (or acquired and transferred after the transfer) take their position within the priority system subject to the existing transfer. Rollback occurs only with respect to rights created (or transferred) prior to the APOD transfer.⁵

⁴ *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.* (“Basin-Wide Issue 4”), 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996); *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012).

⁵ This is my view as to how the APOD condition should be administered vis-à-vis an after acquired (or later transferred) water right. As discussed below, IDWR has yet to establish a rule or practice on this issue.

A hypothetical in three parts

Let's work this out in a hypothetical. Assume there are three municipal rights, each for 4 cfs, with priority dates of 1920, 1950, and 2005 (corresponding to wells added in those years). Each has a single point of diversion corresponding to the respective well. Assume that in 2015, the municipal provider transfers all three rights to add APODs for all three wells, thus allowing any right to be pumped from any well in any combination totaling up to 12 cfs.

Now assume that there are three wells owned by neighbors very close to the 2005 municipal well, and that pumping from the 2005 municipal well injures each of the neighbors. The neighbor's wells have priority dates of 1970, 2010, and 2018. Thus, one neighbor is senior to the 2005 municipal well, and two are senior to the 2015 transfer date.

In two cases (the 1970 and 2018 neighbor wells), the interference contest is resolved purely on the basis of priority. We will take those in turn.

As to the 1970 neighbor well, the municipal provider loses (*i.e.*, all injurious diversion from the 2005 municipal well will be curtailed). The 2005 right loses on its face to the 1970 right, and the rollback under the APOD condition prevents the municipal provider from relying on its 1920 or 1950 rights to defeat the injury claim.

Analyzing injury to the 2018 well is also simple, but with the opposite result: the 2005 municipal well wins. There is no rollback (*i.e.*, the APOD condition does not come into play), because the transfer predates the 2018 neighbor right. All three municipal water rights are senior to the 2018 right, so the municipal provider may pump as much as it desires (up to 12 cfs) from the 2005 well irrespective of injury to the 2018 neighbor well.

The 2010 neighbor well is a bit trickier. This neighbor well is in the unusual posture of being senior to the date of the APOD transfer but junior to the 2005 municipal well that is causing the injury. Thus, the municipal provider may continue to divert 4 cfs under the 2005 right, despite injury to the 2010 neighbor well. There will be a rollback, however, because the injured well predates the 2015 transfer. Thus, the municipal provider will not be allowed to pump under its 1920 and 1950 rights if doing so causes injury to the neighbor. Thus, the municipal provider "wins," but only up to the 4 cfs authorized under the 2005 right. If pumping more than 4 cfs creates or materially worsens the injury, the APOD condition will limit the municipal provider to 4 cfs.

When does the quantity element come into play?

Note that in the first two examples (the 1970 well and the 2018 well), the injury dispute was resolved solely on the basis of priority. Quantity was not a factor. In the 2010 well example, quantity comes into play. The municipal provider "wins" up to a particular quantity of its diversion and "loses" above that quantity.

Note further that this third example (where quantity matters) arises only where the date of the transfer is later than the priority date of the water right associated with the well causing the

injury. If the transfer adds water rights with the same date as the transfer, quantity does not factor into the injury analysis in a well interference claim.

This is not immediately intuitive. To illustrate, let's switch up the hypothetical above so that the transfer occurred in 2005 (the same date as the well causing the injury). Now, the municipal provider would "win" against both the 2010 and 2018 neighbor wells; the municipal provider could pump up to 12 cfs out of its 2005 well irrespective of injury caused. And, as before, the municipal provider would "lose" as to the 1970 neighbor well, irrespective of the quantity pumped. *I.e.*, any pumping that causes injury to the 1970 well could be curtailed.

As discussed below, this has implications for the Kuna transfer, because it seeks to add APODs with the same "APOD priority" as the date of the transfer.

No IDWR rule or policy as to rollback in the case of after-acquired water rights

It bears emphasis, however, that no one knows with certainty how IDWR will implement the APOD condition in future well interference cases. I have posited there should be no rollback when injury is asserted by post-transfer water rights (because they take the aquifer and existing APOD authority as they find it). But IDWR has never clearly spelled out its thinking on this. And, in any event, the Department's thinking (or the law) could change by the time the well interference occurs.

If IDWR were to decide that rollback should occur (*i.e.*, the APOD condition should apply) where the injured water right is acquired after the APOD transfer, then answers to the hypothetical above would be different. Specifically, if there is rollback, the municipal provider would not be allowed to use its APODs to increase diversions from the well if doing so causes injury to the after-acquired water right. In other words, the quantity assigned to the well would matter.

Due to this uncertainty in IDWR policy, it is essential that a quantity be established for each of the yet-to-be constructed wells, for purposes of the resolving any future interference claim.

Applying the APOD condition in a geographically limited curtailment

In addition to localized well interference (discussed above), the APOD condition comes into play in instances of geographically limited pumping restrictions (*e.g.*, curtailments limited to a ground water management area) that apply only to a portion of the municipal provider's service area.

The APOD condition is employed to prevent the municipal provider from circumventing such a curtailment by bringing senior water rights "into" the curtailment area. In other words, the APOD transfer is "rolled back," and the municipal provider is only allowed to divert from a well within the curtailment area using water right(s) that were historically (pre-transfer) associated with that well and are senior to the curtailment date.

On the other hand, the APOD condition does not prohibit the municipal provider from diverting water rights that are subject to curtailment within curtailment area from the provider's APODs located outside the curtailment area. In other words, "moving" curtailed junior water rights to wells outside the limited curtailment area (where they are not curtailed) does nothing to undermine the curtailment and is, therefore, not restricted by the APOD condition.

A more detailed explanation of how the APOD condition operates in the context of a geographically limited curtailment is set out in the attached documents submitted to IDWR in SUEZ's pending Integrated Municipal Application Package ("IMAP").

The APOD condition does not apply in the case of a geographically broad curtailment

It bears emphasis that the APOD condition does not come into play at all during times of region-wide curtailment affecting a municipal water provider's entire service area. In other words, a municipal provider may divert water from any APOD under any of its water rights that are not curtailed. Indeed, this is the whole point of the getting APOD authority in the first place.

Applying the APOD condition to a well that does not have a previously associated right

As noted above, the standard APOD condition language was developed in the context of the SRBA to facilitate the accomplished transfer of multiple APODs to water rights created with only a single point of diversion. When "rollback" occurs under the APOD condition, each well will have some water right historically associated with it (prior to the transfer) whose priority date and quantity may be employed for purposes of resolving the injury claim.

The problem we face in Kuna's transfer is that Kuna is seeking to add as APODs three new wells that have not yet been constructed and have no water right associated with them. If, in the future, pumping from one of the new Falcon Crest wells were alleged to be causing injury to another water right, how would that be administered under the standard APOD condition? If the Department "rolls back" the transfer, there is no priority date or quantity associated with the Falcon Crest wells.

Accordingly, it is important that the Department do more than add the standard APOD condition language to the approval of Kuna's transfer. The Department must also identify a priority date and establish a quantity for each new APOD (which will operate solely for purposes of administration under the APOD condition).

There are two ways of accomplishing this: (1) new appropriations and (2) a modified APOD condition.

Plan A - New appropriations

The simplest and cleanest approach would be for Kuna to seek a new appropriation of water for each of the Falcon Crest wells (in addition to pursuing a transfer application). We understand that seeking a new appropriation may present a "gap analysis" problem (absent a "reasonably anticipated future needs" filing), because Kuna already has a portfolio of water rights

that exceeds its short term demand. If that is indeed the case, the simple solution would be for Kuna to agree to combined use condition that allows zero incremental diversion authority on a system-wide basis.

New appropriations would cause each new Falcon Crest well to have both a priority date and quantity associated with it. Moreover, the quantity would not be just a “guess” made at the time of transfer, but would be subject to being trued-up at the time of proof. This approach would also allow the City up to 15 years (5 years plus a 10-year extension) to develop the wells.

This is a potentially significant issue. IDWR generally imposes a condition on transfers requiring that the use authorized by the transfer be accomplished within one year. In the event that Kuna and/or the developer of Falcon Crest do not expect to have all three wells constructed and in use within one year, this could be a problem. New appropriations (coupled with one or more transfers) would give the City more time to develop the wells while also achieving full APOD flexibility.⁶

Under this approach (new appropriations coupled with the pending transfer), the standard APOD language could be attached to the transferred rights. The standard language works because the new wells will have priority dates and quantities that could be employed, if necessary, in any future administration under an “APOD rollback.”⁷

Plan B - Modified APOD condition

The alternative to Kuna seeking new appropriations would be for the City to proceed only with the current transfer application, and for the Department to modify and expand the standard APOD condition language to specify a priority date for the new APODs in the event of a “rollback.” If so, the priority date should be the date of transfer approval. That is a no-brainer.

Adding a “date of transfer” priority date to the new APODs might be implicit under the standard APOD language. But that conclusion requires assumptions about how the obscure APOD condition language will be interpreted in the future. The better approach is to spell it out.

Accordingly, if Kuna declines to seek new appropriations for the Falcon Crest wells, we recommend that the APOD condition language be modified along the following lines (using Water Right No. 63-3266 as an example):

⁶ We will need to discuss with the Department how the transfer(s) and appropriation(s) might be timed. If Kuna proceeds with permit applications, SUEZ would have no objection to the pending transfer being approved without delay subject to an APOD condition tying into those permits (and, ultimately, licenses). In other words, SUEZ would agree that the transfer has been “accomplished” for purposes of the one-year deadline if permits are obtained authorizing use of all APODs. This would eliminate the need for sequential transfer applications (each within a year of well construction).

⁷ In our view, no APOD condition should be attached for the new appropriations, because all rights junior to the 2018 would take subject to the appropriation that includes APODs. As noted above, however, this policy has not yet been firmly established by IDWR. Thus, IDWR needs to take a position with respect to water rights acquired after APOD approval, and follow that policy consistently with respect to all municipal providers.

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Well 2, located in SESE, Sec 23, T2N R1W, Ada County, Well 3, located in SWNE, Sec 23, T2N R1W, Ada County, Well 4, located in SWSW, Sec 23, T2N R1W, Ada County, and Well 9, located in SWSW, Sec 23, T2N R1W, Ada County. Other points of diversion associated with other water rights were added by Transfer No. 75059 (in 2008) and Transfer No. 81844 (in 2018). The points of diversion known as Well 12, located in SESW, Sec 15, T2N R1W, Ada County, Well 13, located in SWNW, Sec 15, T2N R1W, Ada County, and Well 14, located in SENW, Sec 15, T2N R1W, Ada County were added by Transfer No. 81844 (in 2018).

In addition, the Department needs to establish a mechanism to set a quantity for each of the three new APODs. Presumably, this would entail some sort of monitoring and reporting by Kuna once the wells are developed (subject to a “not to exceed” number set at the time of transfer approval).

In sum

The Department needs to impose an APOD condition here, just as it does whenever APODs are added. However, because the new APODs are not associated with any existing water right, the Department needs to take this a step further. One way or the other, a priority date and quantity need to be established for the new APODs.

This could be done in either of two ways.

- Kuna could obtain new water right appropriations for the Falcon Crest wells, allowing any APOD transfer to key into the corresponding priority and quantity associated with new wells.
- IDWR could expand the APOD condition to assign a 2018 priority date and establish a mechanism to fix the quantity for the Falcon Crest wells as they are constructed and put to use.

Kuna should expect IDWR to require that the use authorized by the transfer be accomplished within one year of approval. Accordingly, seeking new appropriations would seem to provide more latitude to Kuna in the development of the wells. See footnote 6 at page 8 for details on the timing and linkage of the transfers and the permit applications.

Mike Lawrence and I very much look forward to discussing this with you further. SUEZ’s aim is facilitate a speedy and effective resolution of these issues, and to establish APOD precedents that all municipal providers can live with.

Attachments:

1. SUEZ's Submission of Supplemental Authority on APODs (Nov. 28, 2017) (appendices omitted)
2. Memorandum from Christopher H. Meyer to Hearing Officer, et al. (July 9, 2018)

cc: Nick Miller, Regional Manager, Western Regional Office, IDWR
Shelley W. Keen, IDWR
Mathew D. Weaver, Deputy Director, IDWR
Garrick L. Baxter, Deputy Attorney General, IDWR
Mark Tate, General Manager, M3 Companies
William I. Brownlee, M3 Companies LLC
Ed Squires, Hydro Logic, Inc.

Attachment 1

**SUEZ'S SUBMISSION OF SUPPLEMENTAL AUTHORITY ON APODS
(NOV. 28, 2017) (APPENDICES OMITTED)**

Christopher H. Meyer [ISB No. 4461]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 W Bannock St
Boise, Idaho 83702
PO Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for Applicant SUEZ Water Idaho Inc.

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 SUBMISSION OF
SUPPLEMENTAL AUTHORITY ON
APODS**

TABLE OF CONTENTS

ADDITIONAL AUTHORITIES	3
DISCUSSION	3
CONCLUSION.....	8
CERTIFICATE OF SERVICE	9
APPENDIX A EMAILS FROM HEARING OFFICER	16
APPENDIX B MERIDIAN ORDER	24
APPENDIX C KETCHUM ORDER	30
APPENDIX D IDAHO BRIEF	36

ADDITIONAL AUTHORITIES

During the Status Conference on November 9, 2017, reference was made to the APOD conditions added to two recent water right transfers by the Cities of Meridian and Ketchum. These and other APOD conditions are discussed as well in emails from the Hearing Officer dated September 5, 2017, September 11, 2017, and November 13, 2017. Copies of these emails are attached as Appendix A.

The transfers resulted in two orders issued by IDWR Director Gary Spackman:

- Order Addressing Exceptions and Amending Transfer Approval, *In the Matter of Application for Transfer No. 79778 in the Name of the City of Meridian* (Oct. 4, 2016) (“*Meridian Order*”).
- Order Addressing Exceptions and Amending Transfer Approval, *In the Matter of Application for Transfer No. 80621 in the Name of the City of Ketchum* (Oct. 27, 2016) (“*Ketchum Order*”).

Copies of these orders (collectively, “*Spackman Orders*”) are attached as Appendix B and C.

These orders reference a brief submitted by State of Idaho to the Idaho Supreme Court in the case of *City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012). A copy of the brief (“*Idaho Brief*”) is attached as Appendix D.

DISCUSSION

The *Spackman Orders* contain a detailed explanation of how the Department’s standard APOD condition language operates under various curtailment situations. Because the condition language itself is somewhat abstruse, the Director’s explanations are helpful in stepping through how the condition will be applied.

In short, the APOD condition language comes into play in localized well interference contexts and in geographically limited curtailments. But it imposes no restriction on the use of

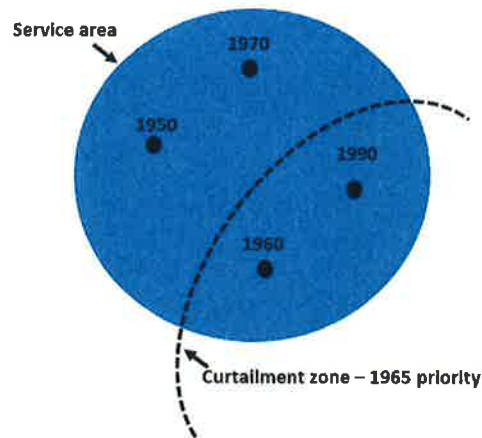
SUEZ’s SUBMISSION OF SUPPLEMENTAL AUTHORITY ON APODS (NOV. 28, 2017)

14379180_1 / 30-147

Page 3 of 53

APODs in the event of a region-wide curtailment covering the municipal provider's entire service area.

There is, however, one point that requires some attention. This deals with the circumstance of a limited curtailment in which only a portion of a municipal provider's service area (including a fraction of its wells) is curtailed. This is a fairly remote hypothetical. But it could arise in the context of a "trim line" passing through the middle of a service area or other circumstances in which some but not all of a provider's wells fall within the area subject to curtailment.



Consider the simplified hypothetical illustrated above. A municipal provider has four wells and four water rights. As each well was constructed, the municipal provider obtained a municipal water right authorizing diversion of 3 cfs from the well associated with that right. They have priority dates of 1950, 1960, 1970, and 1990. The provider later transferred the rights so that each water right may be diverted from any of the four wells, and each right was made subject to the standard APOD condition language. *See, e.g.,* Appendix A, p. 22 (Condition 208).

A curtailment then goes into effect curtailing all wells junior to 1965. If this were a region-wide curtailment, the 1970 and 1990 water rights would be curtailed, and the provider could pump the 1950 and 1960 water rights from any of its four wells in any combination it chooses (so long as there is no local well interference or other injury).

Now suppose it is a geographically limited curtailment applying only to the land that includes the 1960 and 1990 wells. The 1950 and 1970 wells are located outside of the curtailment area. The APOD condition would allow the 1960 water right to continue to pump (from any well), because it is senior to the curtailment cutoff date. The curtailment would prevent the 1990 water right from being pumped from the 1990 well within the curtailment area.

The provider is allowed to continue to divert under its 1950 and 1970 water rights from either its 1950 and 1970 wells (which are outside the curtailment area) in any combination it chooses. However, the APOD condition prevents the provider from diverting water under the 1950 or 1970 water rights from either the 1960 or the 1990 well (which are within the curtailment area). That is because doing so would undermine the purpose of the curtailment.

Essentially, the APOD condition rolls the clock back to before the transfer that added the APODs and allows only that pumping that would have been allowed prior to the transfer.¹ In other words, the APOD condition prevents the provider from “bringing in” water from water rights historically associated with wells outside of the curtailment area.

We noted above that the provider cannot pump the 1990 water right from either well within the curtailment area. Now here is the tricky question. Can the provider pump its 1990 water right from its 1950 or 1970 wells? SUEZ believes that answer must be “yes.” Indeed, the

¹ One could argue that this APOD condition limitation should apply only in the context of accomplished transfers (where the APOD language was first developed), and not to formal transfers. SUEZ understands, however, that the Department takes the position that even a formal transfer requires the APOD condition. SUEZ has agreed not to oppose the Department’s position on this.

curtailment is intended to encourage that very behavior. It is desirable that users move their diversions to locations that do not contribute to the stress that caused the curtailment. By definition, the geographically limited curtailment means that diversion from outside the curtailment area does not contribute to whatever injury caused the curtailment. Hence, it should not be restricted.

This point may be illustrated in another way. Suppose a water user held a water right for a well at Point A. The user becomes concerned that in the future there might be curtailment in the vicinity of Point A. Accordingly, the user seeks to transfer its water right to a location accessing the same aquifer but unlikely to be subject to curtailment. Should that be allowed? Of course, it should. There is no injury or enlargement. Indeed, the user might seek a transfer to the other well while maintaining the first well at Point A as an APOD. That way the user could continue to pump from the Point A well until curtailment occurred, and then switch over to the new well outside the curtailment area. Should that be allowed? Of course, it should. Again, there is no injury or enlargement. The APOD scenario described above with municipal APODs is no different.

Thus, under the municipal hypothetical above (limited curtailment and a 1965 cutoff date), the APOD condition would allow the provider to pump its 1960 water right from any of its four wells. And it could pump its 1950, 1970, and 1990 water rights but only from the 1950 and 1970 wells, which are outside the curtailment area. (This assumes, of course, that the 1950 and 1970 wells have been improved to allow them to pump all 9 cfs.)

SUEZ believes that the *Spackman Orders* are consistent with this. However, in fairness, there is some ambiguity. Here is what the *Spackman Orders* say:

In a limited curtailment action by the Department that does not encompass all the points of diversion in the Meridian system, the

SUEZ'S SUBMISSION OF SUPPLEMENTAL AUTHORITY ON APODS (NOV. 28, 2017)

14379180_1 / 30-147

Page 6 of 53

alternate point of diversion conditions only serve to identify the original locations for points of diversion associated with the priority date under each right to ensure that Meridian does not attempt to avoid curtailment of its junior priority water rights by moving them outside the curtailment area and moving its senior water rights into the curtailment area to undermine the curtailment.

Meridian Order at 3 (essentially identical statement in *Ketchum Order* at 4) (emphasis supplied).

The problematical part of this statement is underlined. Read alone, that language suggests that, in the municipal hypothetical above, the provider could not divert its 1990 water right at its 1950 or 1970 APODs (outside the curtailment area). SUEZ does not believe that is what was intended by this statement in the *Spackman Orders*. SUEZ urges that the statement be read as a whole to prevent the combination of (1) moving senior water into the curtailment area and (2) moving junior water out to replace it. In other words, it prohibits swapping the 1990 and 1950 water rights as a way of avoiding and undermining the curtailment action.

SUEZ agrees that such a swap is prohibited by the APOD condition. But SUEZ believes that, so long as no water is brought into the curtailment area via the APODs (*i.e.*, only the 3 cfs 1960 right is pumped from wells within the curtailment area), the provider should be allowed to pump any of its water rights from the APODs outside the curtailment area.

This conclusion is reinforced by the brief of the State of Idaho attached as Appendix D.

In explaining a limited curtailment, it states:

Pocatello's agreement with SWC also fails to address the need for the [APOD] condition in times of regional administration, where there is geographically limited curtailment affecting some of the City's wells, but not others. This might occur, for example, where curtailment is limited to wells within a discrete ground water management area. In that event, the condition would restrict the City from transferring a senior water right from outside the curtailment to a well inside the curtailment area. The necessity for the condition in this scenario is clear; without it, the City could use alternative points of diversion to undermine curtailment.

Idaho Brief at *8-9 (Appendix D at p. 43) (emphasis supplied). In other words, the APOD condition is intended to prevent water rights from being brought into the curtailment area. It is not intended to bar water rights from being moved out of the curtailment area.

CONCLUSION

In sum, SUEZ has no objection to the imposition of the Department's APOD condition as a condition of approval of the IMAP. However, it believes that there ought to be clarification (either in the condition language or in the IMAP approval order) as to how this works, particularly with respect to limited curtailments. Specifically, the condition should only prohibit use of APODs to pump from within the limited curtailment area those water rights historically associated with wells located outside of the curtailment area.

Respectfully submitted this 28th day of November, 2017.

GIVENS PURSLEY LLP

By


Christopher H. Meyer

By


Michael P. Lawrence

Attorneys for SUEZ Water Idaho Inc.

Attachment 2

**MEMORANDUM FROM CHRISTOPHER H. MEYER TO HEARING
OFFICER, ET AL. (JULY 9, 2018)**

GIVENS PURSLEY LLP
Attorneys and Counselors at Law

Attorney-Client Communication
Attorney Work Product
Privileged and Confidential

MEMORANDUM

TO: Hearing Officer, Parties, and IDWR Staff
FROM: Christopher H. Meyer *CHM*
RE: APOD condition language for IMAP approval
DATE: July 9, 2018

On June 29, 2018, Shelley Keen of IDWR provided a memorandum setting out proposed language for conditions of approval for the IMAP. SUEZ thanks Mr. Keen and the Department staff for providing that memorandum. This memorandum addresses proposed condition no. 5, the APOD condition.

Mr. Keen proposed the standard APOD condition language, which has been employed by the Department for years and has been scrutinized approvingly by the Idaho Supreme Court:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from [name of well] located in [quarter-quarter description].

SUEZ has stated repeatedly that it is comfortable with this language, but believes that some additional explanation (presumably in the order approving the IMAP transfers) is important. This is discussed at some length in *SUEZ's Submission of Supplemental Authority on APODs* filed on November 28, 2017 in this IMAP proceeding. Let me emphasize that I am offering nothing in this memorandum that departs from that discussion.

For purposes of discussion at tomorrow's status conference or at some time thereafter, I offer the following explanation for inclusion in the order of approval. I have endeavored to keep this to one page. I wish it could be done in less space, but I believe this is the minimum required to be clear.

MEMORANDUM
30-147: 14258787_2

Page 1 of 2

PROPOSED EXPLANATION OF APOD CONDITION LANGUAGE

The APOD condition is intended to prevent a municipal provider (or any water right holder, for that matter) from using its APOD authority to divert water from a municipal well when the water right (or water rights) historically associated with that municipal well is causing injury to another water right and would be curtailed based on its junior priority. In other words, the municipal provider may not rely on the senior priority or diversion quantity of another water right not historically associated with the well causing the injury to defeat the injury claim.

The phrase "historically associated" refers to the time prior to the transfer or permit amendment (or general adjudication decree) that added new APODs. Three illustrative examples follow.

The first example involves a large-scale curtailment covering the entire geographic area in which the municipal provider's wells are located (e.g., a region-wide conjunctive management delivery call). In this case, every water right junior to the cut-off date for the curtailment would be curtailed. This is because all junior water rights of the municipal provider are subject to curtailment irrespective of which well is used. In other words, it makes no difference in terms of injury whether the junior water right is diverted from the original well(s) or the new APODs. Thus, in this regional curtailment scenario, the APOD condition does not come into play, and APODs may be used freely. Municipal rights senior to the cut-off date may be diverted from any well under the APOD authority.

The second example involves a geographically limited curtailment covering only a fraction of the municipal provider's wells (e.g., a curtailment limited to a ground water management area or a conjunctive management call whose trim line crosses the municipal provider's service area). In this case, all junior water rights historically associated with wells within the curtailment area would be curtailed from diverting from those wells. However, those junior water rights could still be diverted under their APOD authority from wells outside of the curtailment area. Meanwhile, water rights historically associated with wells outside of the curtailment area could not be diverted from within the curtailment area even if they are senior to the curtailment cut-off date. In sum, the APOD condition prohibits bringing junior or senior water rights to the well causing the injury; it does not prohibit use of the APOD authority to divert water from wells outside of a curtailment area. This does not undercut the goal of the curtailment. The goal is to encourage water users to find ways of meeting their water needs from locations outside of the sensitive area.

The third example involves localized well interference where a municipal provider's well is causing injury to another user's water right (e.g., the cone of depression from the municipal well is causing injury to a neighbor's senior water right). This is the most likely situation in which the APOD condition would apply. In this case, the Department would look to the priority date and quantity of the water right(s) historically associated with the well causing the injury. Once again, the municipal provider would not be allowed to use its APOD authority to defeat an injury claim by relying on a more senior or larger right that could be diverted out of the municipal well causing the injury.