

IMAP WRAP-UP NOTES

TO: Manuel Rauhut

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RE: Key background information, explanation, and procedural history

DATE: October 9, 2023

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I. PURPOSE OF THE TWO WRAP-UP MEMORANDA

Veolia has entered into settlements with all IMAP protestants. Accordingly, we are now in informal proceedings under IDWR's rules of procedure, and there is no longer a hearing officer assigned to this matter. Veolia has responded to all outstanding inquiries posed by IDWR staff, and IDWR staff are in the process of creating draft approvals.

Veolia has prepared two memoranda that are intended to facilitate that process:

- *IMAP Wrap-Up Notes* (this memorandum) is a reference document summarizing key background information and procedural history relevant to IMAP approval. It includes a point-by-point response to the issues raised on pages 24-27 of the *Staff Memo* (see section XII on page 13). Attached to this memorandum are copies of four IMAP documents that are particularly relevant to the proposed conditions of approval.
- *Proposed Conditions for IMAP Approval* ("*Proposed Conditions*") lays out Veolia's proposed conditions to appear on the face of the transferred rights.

The two memoranda are intended to be used together.

II. NAME OF APPLICANT

The applicant's corporate name has changed over time. Per notice of 4/22/2022, the applicant's name is now Veolia Water Idaho, Inc. (or Veolia for short).

For purposes of consistency and simplicity, both memoranda generally use the name Veolia irrespective of the entity name used during the relevant timeframe, except where the name appears in a quotation or the name of a document.

III. STAFF REVIEW OF IMAP

On 1/14/2019, IDWR staff (Manuel Rauhut, et al.) submitted to the Hearing Officer a memorandum entitled *Staff Review of Suez Water Idaho, Inc.'s Integrated Municipal Application Package* ("*Staff Memo*"). This analysis included notes that IDWR should seek additional information from Veolia on various subjects. Eleven information requests were summarized in bullet points on pages 27-28 of the *Staff Memo*.

Veolia responded by submitting two IMAP pleadings on 11/30/2020. The delay in responding was necessitated by the need to re-engage its expert, Prof. John Church, who was dealing with family illnesses at the time. Veolia's submission consisted of the following:

- (1) “*Response Memo*”: A pleading entitled *SUEZ’s Response to IDWR’s Staff Memo*. The *Response Memo* addressed the issues relating to the quantification of future demand, among other issues raised in the *Staff Memo*.
- (2) “*Side Memo*”: A memo entitled *Analysis of Staff Memo Attachments 1 and 2*. It was submitted to IDWR by way of a pleading in the form of a declaration. The *Side Memo* was a technical analysis of the quantification of Veolia’s portfolio of water rights and related issues.

IDWR responded to Veolia’s submissions on 5/12/2023 in the form of the *Rauhut Memo*. The *Rauhut Memo* analyzed Veolia’s submission for each of the 11 requests set out in the *Staff Memo*. For each item, IDWR included an express or implied conclusion as to whether Veolia’s submission was acceptable or whether there are remaining disagreements.

In a few instances, the *Rauhut Memo* concluded that there are still minor disagreements over quantities of particular rights. Most of them do not require resolution for purposes of IMAP approval.¹ The only exception is for nos. 63-10945 and 63-11990. Those quantities must be resolved as part of the transfer approval because they are being transferred to a new purpose of use (municipal), which requires re-quantification based on historic consumptive use. On 6/7/2023, Chris Meyer sent a letter on behalf of Veolia to Manuel Rauhut agreeing to accept the quantities for these rights as called for in the *Rauhut Memo*.

The *Rauhut Memo* includes the statement that IDWR is not prepared to recognize that RAFN quantification may include future demand outside the existing certificated area. This is a surprising and disturbing reversal of IDWR policy.² However, that issue

¹ Most of the minor disagreements on quantification need not be resolved for IMAP approval purposes (because the only elements being changed are the addition of APODs, the place of use, and/or the elimination of the volume component). In other cases, the discrepancies involve rights that are not in the IMAP at all. In those cases, their quantification is addressed solely for gap analysis purposes—and the issue is mooted given the more than adequate size of the gap. Whatever the quantities eventually turn out to be, the differences are so small that they might reduce the gap, but will not eliminate it. All that is needed is proof that there is a gap of zero or any positive number.

² The suggestion that the RAFN quantity is geographically limited to the existing service area is contrary to express language in IDWR’s longstanding RAFN guidance. It is also contrary to the whole point of IDWR’s inquiries in the *Staff Memo* about how Veolia can show that it is likely to grow into the portion of its planning area that lies outside its current certificated area.

need not be resolved in order to secure IMAP approval (because the large “gap” does not require inclusion of expanded service areas). But this policy should be addressed at some point.

IV. ELIMINATION OF COMBINED USE AND VOLUME LIMITS

One of the important accomplishments of the IMAP is the elimination of combined use and volume limits on all IMAP water rights. This was undertaken to reduce the complexity of administering Veolia’s large portfolio of rights in times of curtailment. It also simplified the gap analysis and facilitates water supply planning by Veolia. Finally, it simplifies reporting of diversion quantities to IDWR by eliminating the need to allocate total pumping to individual rights. See discussion of condition 9 (Documentation of Quantity) in the *Proposed Conditions* memo.

In the case of combined use limits applicable to the diversion rate, the elimination of the condition was accomplished by allocating the total combined diversion rate among the rights sharing the combined use condition. In the case of combined use limits on volume, the volume was similarly allocated among the rights sharing the condition. Finally, volume limits were eliminated by reducing the diversion rate to correspond to pumping 24/7/365.

As discussed in the section above, there were a few minor discrepancies between the calculations made by Veolia and the Department. As noted, Veolia has agreed to the Department’s calculation for the two water rights (63-10945 and 63-11990) that need to be resolved as part of the IMAP transfer approval. The others will be resolved in due course (at time of licensing, etc.). The bottom line is that, going forward, there will be no combined use or volume limit on any of the IMAP rights.

Please see the discussion that follows Veolia’s proposed condition 5 in the *Proposed Conditions* memo. This explains how rights whose diversion rates have been reduced would be administered under the APOD administration condition in the event of a well interference claim.

V. WATER RIGHTS INCLUDED IN THE IMAP

Until recently, the IMAP now included 101 ground water rights (94 water rights and 7 permits) and no surface water rights.³

Indeed, it is contrary to everything Veolia and IDWR have undertaken in putting together the RAFN analysis for the IMAP over the last two decades.

³ SUEZ’s 2017 Update Report on IMAP and 2065 Master Water Plan (4/28/2017) at page 10 tallies 103 water rights in the IMAP as of that date. Two of those rights (those associated

In response to the third bullet point beginning on page 24 of the *Staff Memo*, Veolia agrees to abandon decreed rights 63-8385 and 63-10150 upon approval of the IMAP transfer. See Veolia's *Response Memo* at page 23. Those rights will have an authorized diversion rate of zero as a result of the process of removing combined use and volume limits (discussed in section IV on page 6 of this memorandum).

In addition, Veolia now proposes to abandon water right no. 63-12362 (a 2.22 cfs right authorized solely for fire protection). See discussion in section VII on page 8 of this memorandum.

Finally, Veolia now proposes to withdraw water right no. 63-11558 from the IMAP. See discussion in section VI on page 8 of this memorandum.

The result will be a total of 97 ground water rights (92 water rights and 7 permits).

Over the course of the IMAP proceeding, several other water rights have been withdrawn from the IMAP for a variety of reasons. (Withdrawn means that they are no longer included in the collection of transfer applications.) Most, but not all, remain in Veolia's portfolio. These withdrawals have no effect on the gap analysis. This is because the gap analysis is based on Veolia's entire portfolio of rights, permits, and entitlements.

On 12/30/2021, Veolia acquired all assets of Eagle Water Company, including six water rights and the wells from which they are pumped. Veolia now serves the customers in the territory formerly served by Eagle Water Company. This acquisition had no impact on the IMAP's APODs or gap analysis. The Eagle Water Company's system is not physically integrated with Veolia's. Per Veolia's Transfer No. 85719 (approved on 12/30/2021), the former Eagle Water Company rights now have their own "mini-APOD list." Even if the Eagle Water Company delivery system were to be integrated into the larger Veolia system, there is no need to revise the gap analysis. This is because the Eagle Water Company rights are not sufficient to serve the Eagle Water Company territory today. That is the reason Veolia added existing Eagle Water Company wells as additional points of diversion to one of Veolia's non-IMAP rights (right no. 63-7066, transfer no. 85720 on 1/9/2023). As a result of this transfer, the IMAP's gap analysis slightly understates the size of the gap, because a small portion of one right in the portfolio will now be shifted to serve the newly acquired Eagle Water Company area. The purpose of the gap analysis is simply to show that there is a gap in 2065—i.e., that

with the Marden Treatment Plant) were withdrawn on 12/1/2017: ground water right no. 63-2892 and surface water right 63-12055. They remain in Veolia's portfolio. See discussion in *Stipulation for Withdrawal of Protests and Request to Change Status to Intervenor by Nampa & Meridian Irrigation District and Settlers Irrigation District* (4/18/2018) at page 2.

all RAFN water will be put to use by the end of the planning horizon. The size of the gap does not matter, so long as it is zero or a positive number. Thus, it is inconsequential that the size of the gap may have been slightly understated in Veolia's *Master Water Plan*.

In some cases, this resulted in an effective diversion rate of zero for some rights, in which case, Veolia agreed to relinquish the right as part of the IMAP approval.

VI. WATER RIGHT NOS. 63-11558 AND 63-12363

This discussion responds to the first bullet point on page 25 of the *Staff Memo*. Veolia has sought to eliminate the combined use limit on nos. 63-11558 and 63-12363. The problem is that the senior right (63-11558) is in the IMAP and the junior right (63-12363) was removed from the IMAP for procedural reasons. IDWR has determined that it cannot reduce the quantity of the non-IMAP right in order to eliminate the combined use condition.

On page 25 of Veolia's *Response Memo*, Veolia proposed dropping its request to eliminate the combined use limitation on these rights, while leaving 63-11558 in the IMAP.

Upon reflection, Veolia believes the wiser course is to withdraw 63-11558 from the IMAP. It is important that all IMAP rights be free of combined use limits. See discussion in section IV on page 6 of this memorandum and the discussion of proposed condition 9 in the *Proposed Conditions* memo.

By the way, the *Staff Memo* incorrectly states that no. 63-12363 is limited to fire protection purposes. No. 63-12363 has no fire protection component and may be used for any municipal purpose. This was probably a mistaken reference to no. 63-12362, which is limited to fire protection purposes.

VII. FIRE PROTECTION

This discussion responds to the third bullet point on page 25 of the *Staff Memo*.

Veolia holds two water rights that include a fire protection component (63-10945 and 63-11990) and one right that is authorized solely for fire protection (63-12362).

Veolia had previously sought to retain the fire protection components of these rights. (See Veolia's *Response Memo* at pages 12-17.) Upon reflection, Veolia now proposes to eliminate the fire protection component in 63-10945 and 63-11990, and to abandon no. 63-12362 altogether.

Retaining fire protection rights in its portfolio is of no benefit to Veolia (given that a water right is not required to divert water to fight an existing fire), and adds to the complexity of evaluating the effective size of Veolia's portfolio.⁴

We note that no. 63-12362 now has a single point of diversion (Foxtail #2), which is included in the list of 81 APODs. Thus, abandoning this right will not affect Veolia's ability to pump from that well.

VIII. MEANING OF RAFN

The term RAFN (an acronym for reasonably anticipated future needs) is sometimes used informally (and incorrectly) to describe the portion of a RAFN right that is in excess of current peak demand and is held to meet future demand. That is not the correct meaning of the term. The quantity element of a RAFN right is not divided into current and future demand components (which are constantly changing). It includes both. Likewise, the gap analysis is based on a single number reflecting both current use and the anticipated increment of additional future demand—in other words, total anticipated demand at the end of the planning horizon.

Accordingly, care must be taken in drafting conditions of the water rights to avoid ambiguity. See discussion of condition 3 (Planning horizon) and condition 8 (Transfer to new place or nature of use) in the *Proposed Conditions* memo.

IX. APOD NOMENCLATURE

The meaning of the APOD acronym is not consistent. It may refer to "Alternate Point of Diversion" or "Alternative Point of Diversion." Director Spackman employed the former in his orders of 10/4/2016.⁵ Accordingly, we have adopted that form in this memorandum and in the *Proposed Conditions* memo.

There is also inconsistency as to whether the term APODs refers to all authorized points of diversion or only to those added after the water right was established. We use the term APODs to refer to all points of diversion authorized for a water right. Thus, the

⁴ The three rights containing fire protection quantities were not initiated by Veolia, but were later acquired by Veolia. The rights were initiated by land owners seeking non-municipal rights for land development. The original right holders may have sought the fire protection components to demonstrate to IDEQ or other governmental entities that they had sufficient capacity to provide fire protection.

⁵ Transfer 79778 (City of Meridian, see backfile for No. 63-2893) and Transfer 80621 (City of Ketchum, see backfile for No. 37-2628).

global APOD list (below) includes both the original well(s) for each right and those added at various stages later in time.

X. APOD CONDITION

Veolia suggests an expanded APOD administration condition. See proposed condition 5 and 6 in the *Proposed Conditions* memo.

XI. APOD LIST (81 WELLS)

The APOD list set out below lists 81 wells as points of diversion for the 101 ground water rights included in the IMAP.

	Well Name (for informational purposes only)	TwN	Rge	Sec	Tract
1	Amity (aka Amity #2)	3N	1E	36	NW,NW,NE
2	Arctic #1	3N	2E	8	NE,NE,NE
3	B.I.F.	3N	2E	27	SE,NW,SE
4	Bali Hai #1	3N	1E	3	SW,SE,NE
5	Barber #2 (now Licorice)	3N	3E	28	SW,NW
6	Barber #1 (now Durham)	3N	3E	29	SE,NE
7	Beacon	3N	2E	14	NW,SE,NW
8	Bergeson	3N	2E	26	NW,NE,SE
9	Bethel	3N	2E	7	NE,SW,SW
10	Broadway	3N	2E	22	SE,SE,SE
11	Brookhollow No. 1	3N	1E	15	SE,NE
12	Byrd	3N	2E	33	SW,NE,NW
13	Cassia	3N	2E	16	NE,NE,SE
14	Cassia #2	3N	2E	16	NE,NE,SE
15	Centennial	3N	2E	25	NW,NW,SE
16	Central Park	3N	2E	2	NW,NE,NW
17	Chamberlin #1	3N	2E	22	SE,NW,NE
18	Chamberlin #2	3N	2E	22	SE,NW,NE
19	Cliffside	3N	2E	15	SW,NW,NW
20	Clinton	3N	2E	8	SW,NE,SW
21	Cole	3N	1E	24	NE,NE,SE
22	Country Club	3N	2E	28	SE,NW,NW
23	Country Square	3N	1E	23	NW,NW
24	Countryman Estates	3N	1E	23	SE,NW
25	Edgeview	3N	1E	16	SE,NE
26	Fisk	3N	2E	6	SW,SE,SE

27	Five Mile West #12	3N	1E	27	NW,SW
28	Floating Feather	4N	1E	5	SESW
29	Foxtail (aka Fox Tail #2)	4N	1W	24	SE,SW,SE
30	Franklin Park	3N	2E	18	SW,NW,NE
31	Frontier	4N	1E	34	SE,NE,SW
32	Goddard	4N	1E	36	SW,NE,NW
33	H.P.	4N	1E	27	SW,SE,NE
34	Hidden Valley Estates #1	2N	1E	3	SE,SE
35	Hidden Valley Estates #2	2N	1E	3	NE,SW
36	Hillcrest	3N	2E	20	SE,SE,NE
37	Hilton	3N	2E	17	SE,NE,SW
38	Hummel	3N	2E	18	SW,NE,SW
39	Idaho	3N	2E	4	NE,SW,SW
40	Island Woods #1	4N	1E	16	NE,NW,SW (lot 5)
41	Island Woods #2	4N	1E	21	NW,NW,NW
42	J.R. Flat	2N	2E	2	SW,NW,NW
43	Kirkwood	3N	2E	19	SW,NE,NE
44	La Grange	3N	1E	34	NE,SW
45	Logger	3N	2E	24	NW,SW,NW
46	Longmeadow	3N	2E	13	NW,SW,NW
47	Mac	3N	2E	32	SW,NW,NW
48	Maple Hills #1	3N	1E	14	SW,NE,NE
49	Maple Hills #2	3N	1E	14	SE,NE,NE
50	Market	3N	2E	35	NE,NE,NW
51	McMillan	4N	1E	28	SE,SW,SW
52	Mesa #2 (aka Warm Springs Mesa #2)	3N	2E	24	NE,SW,NE
53	Mesa #3 (aka Warm Springs Mesa #3)	3N	2E	24	NE,SW,NE
54	Overland #6	3N	2E	19	NW,NE,NW
55	Paradise North	3N	1E	15	NE,SE
56	Pioneer	2N	2E	22	NE,NW,NE
57	Pleasant Valley	2N	2E	21	NW,NE,NW
58	Raptor	2N	2E	17	NW,NW,NW
59	Redwood Creek (aka Redwood Creek #1)	4N	1E	7	SWNW (lot 2)
60	River Run	3N	2E	24	NE,SW,SE
61	Roosevelt #1	3N	2E	16	SW,NW,NW
62	Roosevelt #3	3N	2E	16	SW,NW,NW
63	Settlers	4N	1E	35	NW,NE,NW
64	Sherman Oaks	3N	1E	23	SE, SE
65	Sixteenth St.	3N	2E	9	SW,SE,NW
66	Spurwing	4N	1W	23	NE,SW

67	Sunset West #1	3N	1E	36	SE,NE,SE
68	Swift #1	3N	2E	30	SE,SW,SE
69	Swift #2	4N	2E	30	SE,SW,SE
70	Taggart #1	3N	2E	21	SW,NE,NE
71	Taggart #2	3N	2E	21	SW,NE,NE
72	Tenmile	2N	2E	17	NE,SE,NE
73	Terteling	3N	2E	36	NE,SW,NE
74	Twenty-seventh	3N	2E	4	SW,SW
75	Veterans well	4N	2E	32	SW,SE,SE
76	Victory	3N	1E	27	NE,NE
77	Vista	3N	2E	28	NE,NE,NE
78	Westmoreland	4N	2E	31	NE,NW,SW
79	Willow Lane #1	4N	2E	32	NW,NW,NW
80	Willow Lane #2	4N	2E	32	NW,SW,NW
81	Willow Lane #3	4N	2E	32	NW,SW,NW

The APOD list does not include wells acquired from Eagle Water Company. See discussion in in section V on page 6.

Nor does this APOD list include the Ranney Collector points of diversion for the Marden Treatment Plant. Originally, two of the Marden Treatment Plant rights were included in the IMAP, but they were withdrawn from the IMAP transfer on 12/1/2017. The other Marden Treatment Plant rights were never included in the IMAP. (See footnote 3 on page 6 of this memorandum.)

Veolia stopped using the Sherman Oaks well, as noted in *SUEZ's 2017 Supplement to the Update Report, addressing APODs* at page 6 (6/26/2017). That would have reduced the number of APODs to 80 wells, which is the number stated in IDWR's *Staff Memo* at page 20 (1/14/2019). However, as noted in *SUEZ's Response to IDWR's Staff Memo* (11/30/2020), Veolia later determined that the Sherman Oaks well would be reconstructed and put back into service. Veolia obtained a drilling permit for Sherman Oaks in 2022 and expects production to resume in the next few months. Accordingly, Veolia wishes to retain this well as an APOD.

Note that in all previous APOD lists, Swift #2 was listed as being in section 31. That is incorrect. It is listed correctly here as being in section 30. See discussion of Swift #2 on page 18.

This APOD list has some new "aka" clarifications on well names.

In all other respects, this list of ground water APODs is identical to (1) Exhibit F to *SUEZ's Response to IDWR's Staff Memo* (dated 11/30/2020), (2) Attachment B to

United Water's Further Submission in Compliance with the Director's January 11, 2013 Order (dated 2/13/2013), and (3) the spreadsheet Mike Lawrence emailed to Angie Hansen on 6/26/2023.

Over the course of the IMAP proceedings, some APODs have been dropped for various reasons. All APODs on the current APOD list may be found on the original 2003 IMAP submission, although in a couple of cases well names have changed.

SUEZ's 2017 Supplement to the Update Report, Addressing APODs (dated 6/26/2017) contained a discussion of "mini-APOD lists" for ground water right no. 63-2892 and surface water right 63-12055 (both of which are associated with the Marden Treatment Plant). That discussion is now obsolete, because those rights were withdrawn from the IMAP on 12/1/2017. That withdrawal does not change the list of 81 APODs, because their points of diversion were never included in the APOD list.

XII. RESPONSE TO "CONSIDERATIONS FOR SPECIFIC WATER RIGHTS AND PERMITS" IN *STAFF MEMO*

Pages 22-27 of the *Staff Memo* identify a variety of "Considerations for Specific Water Rights and Permits." The bullet points beginning on page 24 are reproduced below, followed by Veolia's comments.

Staff Report:

- The Keen memo suggests that all the IMAP water rights and permits should receive standard condition number 01Q, which requires measurement and reporting upon future notification. IDWR is authorized to require installation of measuring devices. *Idaho Code § 42-701*. There is no water district administering ground water rights in the area of the IMAP APOD wells. Nevertheless, Rights 63-2500, 63-2874, 63-7067, 63-11467, 63-12334, 63-12192, and 63-19456 already have existing conditions requiring installation and ongoing maintenance of measuring devices. Given that these water rights already contain measuring device requirements and that Suez is seeking consistency among its water rights, all IMAP water rights and permits should be conditioned to require installation and maintenance of measuring devices.

Veolia response:

See proposed condition 9 (Documentation of quantity) and proposed condition 14 (Measuring devices) in the *Proposed Conditions* memo.

Staff Report:

- 53 of the 80 proposed APODs are within the Boise Front GWMA/Boise Front Moratorium Area. The moratorium limits the development of new water rights for the use of the LTG resource in this area. Several Suez ground water rights currently authorize at least one of these 53 wells as their original point of diversion. Permit 63-12310 is the only right in the IMAP proceeding with standard condition 073, which prohibits the use of water greater than 85°F. To avoid injury to LTG water users within the restricted area, IDWR should include standard condition 073 on all the IMAP rights and permits, unless the right or permit historically diverted LTG water. Also, IDWR should consider limiting the use of cold water (<85 degrees Fahrenheit) below 300 ft, the additional use of which may impact the LTG resource. If the right or permit historically diverted LTG water, a condition like 073 should be crafted to prevent Suez from increasing its use of the LTG resource. Note also that Idaho Code § 42-202B(6) states that municipal purposes excludes “use of water from geothermal sources for heating.” As a first step, it may be necessary to require Suez to submit information about which of its wells, if any, results in diversion of the LTG resource and which wells divert water from deeper than 300 ft in the Boise Front GWMA.

Veolia response:

See proposed condition 14 (Low temperature geothermal #1) and proposed condition 15 (Low temperature geothermal #2) in the *Proposed Conditions* memo. In short, Veolia agrees not to pump LTG water under the IMAP rights. However, Veolia does not believe it is appropriate or necessary to go beyond these standard conditions to impose new limitations on pumping of cold water under existing IMAP rights within the Boise Front GWMA. Diversion under these rights is already authorized and will not increase as a result of the transfer. As for the suggestion that Veolia submit additional information about its wells, Veolia is happy to do so on an informal basis, but this should not be tied to IMAP approval.

Staff Report:

- Suez requests volume limitation removal via reduction of the diversion rate for rights; 63-3411, 63-3457, 63-7979, 63-7998, 63-8011, 63-8248, 63-8385, 63-8405, 63-8635, 63-9384, 63-10150, 63-10391, 63-10945, 63-11090A, 63-11467, 63-11990, 63-12334, and permit 63-11878. Suez also requests removal of combined limit conditions on rights 63-3457, 63-4395, 63-7641, 63-8385, 63-8405, 63-10150, 63-10945, and 63-11558.. Suez proposes removing combined limits by assigning the rate and/or volume to the most senior right. For Rights 63-8385 and 63-10150, this process results in a diversion rate of 0 cfs, rendering them useless. IDWR should require Suez to state whether it intends to abandon Rights 63-8385

and 63-10150. Attachment 2: IMAP Rights table summarizes the rights proposed diversion rates after removal of volumes and combined use limitations.

Veolia response:

Veolia has agreed to abandon 63-8385 and 63-10150. See discussion in section V on page 6 of this memorandum. Regarding the removal of volume and combined use limits, note the discussion that follows Veolia's proposed condition 5 in the *Proposed Conditions* memo. This explains how these rights would be administered under the APOD administration condition in the event of a well interference claim.

Staff Report:

- Suez requests the removal of combined use limits on Rights 63-11558 and 63-12363. Right 63-12363 is not included in the IMAP, possibly because it is limited to Fire Protection purposes. In order to modify Right 63-12363 as requested, Suez needs to include this right in the IMAP proceeding as an associated water right or submit a separate transfer application to IDWR. However, Suez's proposal for eliminating combined use limits would result in a diversion rate reduction for Right 63-12363, which IDWR would not usually do to an associated right. IDWR should consult Suez regarding its intent for Right 63-12363. See Note 13 of Attachment 2: IMAP Rights table for further information regarding this proposal and combined limit.

Veolia response:

Veolia now proposes to withdraw water right no. 63-11558 from the IMAP. See discussion in section VI on page 8 of this memorandum.

Staff Report:

- As noted in the enlargement analysis above, Suez requests a nature of use change for Rights 63-10945, 63-11990, and 63-12362. Limited information is currently available regarding the historic extent of consumptive use associated with the rights, especially Right 63-11990. See Note 4, 6, and 7 in attachment 2: IMAP Rights table for additional considerations regarding changes proposed to these rights. This table also shows the rights' proposed post-transfer rates and beneficial uses based on the information currently available and IDWR policy. These rates and beneficial uses differ from those proposed by the applicant per the 2013 Further Submission.

Veolia response:

On 6/7/2023, Chris Meyer sent a letter on behalf of Veolia to Manuel Rauhut agreeing to accept the quantities for nos. 63-10945, 63-11990 as called for in the *Rauhut Memo*. Veolia now proposes to abandon no. 63-12362 (used solely for fire protection). See discussion in section VII on page 8 of this memorandum.

Staff Report:

- If the Fire Protection use remains on Rights 63-10945, 63-11990, and 63-12362, standard condition 077 (stating fire protection use is restricted to fighting or repelling an existing fire) should be included on the rights.

Veolia response:

Although Veolia would agree to the standard fire protection condition on any water right with a separate fire protection component, the issue is mooted by Veolia's request to eliminate the fire protection components of nos. 63-10945 and 63-11990 and to abandon no. 63-12362.

Staff Report:

- The IMAP proposes to change the diversion rate, volume, and/or nature of use for the following rights: 63-3411, 63-3457, 63-4395, 63-7979, 63-7998, 63-8011, 63-8248, 63-8405, 63-8635, 63-9384, 63-10391, 63-10945, 63-11090A, 63-11467, 63-11990, 63-12334, and for permit 63-11878.⁶ IDWR standard condition 205 should be added to these rights confirming that the changes to the elements of the rights was intended. Condition 205 states: "The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right."

Veolia response:

See proposed condition 16 (Redefinition of elements) in the *Proposed Conditions* memo.

Staff Report:

- Right 63-10945 has a condition stating, "The right holder shall provide streamflow augmentation water or other action determined to be appropriate to protect prior surface water or ground water rights. Such streamflow augmentation or other

⁶ This list of rights does not include rights likely rendered obsolete (63-8385 and 63-10150) as mentioned above. [This is footnote 16 in the *Staff Memo*.]

action will be required only upon a determination of need and applicability by the Director.” The condition is vague and should be removed from the right.

Veolia response:

Veolia agrees. The condition should be dropped from No. 63-10945 (and any other right on which it appears).

Staff Report:

- Right 63-11090A has a condition stating well(s) previously used for the right shall be properly abandoned. IDWR should consider whether the applicant is in compliance with this condition and if the condition can be removed.

Veolia response:

This condition should be removed. Veolia never acquired the other wells associated with the parent right, and cannot physically abandon them. There were three “Crandlemire wells” originally associated with parent right 63-11090. Veolia acquired a portion of that right and one of the three wells—the one known as “Crandlemire 3” (the irrigation well in the SESW of Section 5). Crandlemire 3 was later replaced by Veolia’s Floating Feather well. Parent right 63-11090 had a point of diversion authorized in the SWSW of Section 5, but Veolia never acquired any interest in points of diversion in that quarter-quarter (Crandlemire 1 and 2). It appears that the other two wells are in use by someone other than Veolia. Specifically, Kurt Newbry (Veolia’s hydrogeologist) found two 8-inch wells in the SWSW of Section 5 that have not been abandoned and are still in use by a home. Veolia has never had any ownership or control over these wells, and cannot comply with the condition to abandon them.

Staff Report:

- Rights 63-10386, 63-10688, and 63-11232 currently authorize a single point of diversion. Their unique diversion points are not included in the 80 APODs proposed in the IMAP proceeding. Right 63-11467 and permit 63-11878 currently authorize two points of diversion, only one of which is included in the 80 APODS proposed in the IMAP proceeding. IDWR should contemplate stating the original point of diversion for administration purposes.

Veolia response:

Right 63-10386 was originally associated with a well at the Marden Treatment Plant, but that well was abandoned in 1992 which is why it is not in the APOD list.

Right 63-10688 is associated with the Swift #2 well, which is incorrectly listed in the APOD list as being in Section 31, T4N, R2E. It is actually in Section 30. (This has been corrected on the APOD list set out in section XI on page 10.)

Right 63-11232 was originally associated with the Hope well, but that well was abandoned in 2016 which is why it is not in the APOD list.

Right 63-11467 is associated with two wells (Island Woods #1 and #2). Island Woods #1 is correctly identified in NWSW (Lot 5) of Section 16, T4N, R1E. Island Woods #2 in the SWSW of the same section, and is so identified in the APOD list. However, Right 63-11467 incorrectly identifies the second unnamed well (which is Island Woods #2) as being located in the NWNW of Section 21, about 200 feet south of the boundary with the SWSW of Section 16. Thus, it appears that the point of diversion listed in the SWSW of Section 16 is in error, and it should be the NWNW of Section 21 (corresponding to the correct location of Island Woods #2). In other words, there is no missing well; both are included in the APOD list.

Concerning right 63-11878, it is unclear whether it is authorized for one or two points of diversion. IDWR's online database shows only one point of diversion in the SWNW of Section 7, T4N, R1E (which is known as the Redwood Creek well, aka Redwood Creek #1). However, an additional point of diversion in the SENW of Section 7 is listed in the September 3, 1998 Amendment of Permit included in Appendix H to the August 1, 2002 beneficial use field exam report submitted to IDWR by Ed Squires. In any event, Mr. Squires' narrative to the report explains that "Redwood Creek Well #2 (point of diversion in the SE 1/4, NW 1/4, Section 7) was never developed and should be dropped from the License."

In sum, the rights referenced in the bullet point above identify wells (sometimes inaccurately) that are in the APOD list or they identify wells that were never built or have been abandoned. This moots the concern raised in the bullet point. There is no need to add any descriptions of additional original points of diversion (which were never constructed or have been abandoned) for APOD administration purposes, because these non-existent wells cannot cause injury.

Staff Report:

- IDWR practice is to include standard condition T19 on Snake River Basin Adjudication ("SRBA") decreed rights. Condition T19 states that the right is subject to the general provisions of the SRBA *Final Unified Decree*. Condition T19 should be included on SRBA decreed rights.

Veolia response:

See proposed condition 17 (SRBA general provisions) in the *Proposed Conditions* memo.

Staff Report:

- IDWR has completed or nearly completed beneficial use field reports and draft licenses for Permits 63-11878, 63-12140, and 63-12310. For these three permits, the elements (including approval conditions) in the draft licenses should form the basis for any IMAP approval of the amendments proposed for the permits.

Veolia response:

Veolia has not seen the draft licenses for these rights. We do not see anything in these permits that suggests the need for any conditioning beyond the conditions set out in the *Proposed Conditions* memo. By the way, how the IMAP permits will now be licensed (in light of the 2020 amendment providing for incremental licensing of RAFN permits) raises some interesting questions.⁷ To further complicate things, proof already has been submitted for these permits, but that proof was based on the prior licensing protocol (installed capacity) rather than the new protocol (actual, system-wide use). Fortunately, we do not need to resolve these licensing questions before IMAP approval.

Staff Report:

- Permit 63-12192 currently has a condition stating the right holder should ensure use of the permit does not result in a prior right's well exceeding a reasonable pumping level without compensation or mitigation. Additionally, this permit is conditioned to require collection and future reporting of ground water level and production data. Any IMAP approval should address whether these requirements should be carried forward on permit 63-12192 or on all rights and permits authorized to use this permit's points of diversion.

Veolia response:

These conditions are specific to the original wells this right was associated with in the SESW of Section 5 (the Floating Feather well) and in the SWNW of Section 7 (the

⁷ The process would be straightforward for a municipal provider with a single RAFN permit. Things get more complicated where a provider holds multiple RAFN permits (or, worse yet, a combination of RAFN and non-RAFN permits). Where multiple RAFN permits are involved, the incremental licensing will need to occur on a systemwide basis (for all rights serving the same system) with the incremental use allocated, presumably, to the most senior permits.

Redwood Creek well), both in T4N, R1E. If these conditions continue after the IMAP, they should be limited to the Floating Feather and Redwood Creek wells.

Staff Report:

- Permit 63-12452 is conditioned to require monitoring of water levels in the production well and nearby domestic wells. Additionally, this permit has a condition requiring the owner to report water diversions and water levels from the production well. IDWR should consider whether to include these conditions on all permits and rights that authorize use of these points of diversion as part of the IMAP approval.

Veolia response:

See proposed condition 18 (Floating Feather well) in the *Proposed Conditions* memo.

Staff Report:

- Permit 63-12464 has standard condition 120, which authorizes IDWR to require the right holder to off-set its depletions to the Lower Snake River flows when needed for salmon migration purposes. IDWR practice is to retain a version of the condition (standard condition 103) when licensing a permit previously conditioned in this manner.

Veolia response:

See proposed condition 19 (Salmon flow mitigation) in *Proposed Conditions Memo*.

Staff Report:

- Permit 63-12464 is conditioned to clarify that the water right permit does not authorize the construction of any new well, or the deepening or enlargement of any existing well. IDWR practice is to remove this condition at licensing.

Veolia response:

Veolia agrees. The condition should be dropped from No. 63-12464 (and any other right on which it appears).

Staff Report:

- Permits 63-12452, 63-12464, and 63-12516 currently have a condition limiting the water-bearing zone ("WBZ") from which water can be diverted under the water rights. The points of diversion for all three of these permits are within the area

where IDWR would normally keep the WBZ condition when licensing permits. To avoid injury to senior Boise River water rights, IDWR should restrict the points of diversion for these permits to the established water bearing zones. The restriction should be placed on all the IMAP rights if the points of diversion developed for these permits will be included among the APODs on all the IMAP rights and permits. If the water bearing zones actually developed have not yet been recorded by IDWR in a beneficial use field report, IDWR may need to seek the information from Suez.

Veolia response:

See proposed condition 20 (Water bearing zone) in in the *Proposed Conditions* memo.

XIII. STATUS OF COUNSEL

Note that Christopher Yorgason no longer represents the City of Middleton. It is Veolia's understanding that in 2021 Mr. Yorgason was replaced by Mark Hilty. However, no notice of substitution of counsel has been filed in the IMAP proceeding.

It is likely that others have changed as well.

XIV. STATUS OF PROTESTS AND PARTICIPANTS

All protests to the IMAP have been resolved. In some cases, prior parties have withdrawn completely from the IMAP proceedings. In other cases, they remain either interested parties or full parties. Only two of the protest withdrawals are conditional—those of (1) NMID and Settlers and (2) Boise Project et al.

The discussion below is largely consistent with that in *SUEZ's Summary of Parties, Settlements, and Conditions* dated 5/23/2018, except for some minor inaccuracies in the prior document and to the extent that subsequent events have occurred. For example, the description of what was then a proposed settlement with Boise Project is now obsolete and inaccurate to some extent.⁸

⁸ On 5/21/2018 counsel for Veolia shared via email a draft settlement document (which had been informally agreed to by counsel). That version, which contained no side agreement, was discussed in *SUEZ's Summary of Parties, Settlements, and Conditions* dated 5/23/2018. At a status conference on 5/31/2018, IDWR staff informed the parties that it is unlikely that IDWR would be able to include some of the proposed conditions in the draft Boise Project settlement, and recommended that the parties enter into a side agreement to implement the provisions limiting how Veolia would be allowed to "fill the gap." This is documented in paragraph 7 of the *2018 BP Side Agreement*. At that status conference, the Hearing Officer asked staff to prepare an outline of potential conditions that IDWR had authority to impose, which led to the

A. Protest withdrawn unconditionally; no longer a participant

(1) Eleanor Chase

On 3/11/2003, Veolia entered into an agreement with the Estate of Eleanor I. Chase to resolve its protest. On 3/18/2003, the Estate withdrew its protest unilaterally and unconditionally. The withdrawal of protest made no reference to the side agreement. The Estate is no longer a participant in the IMAP proceedings.

(2) Terteling

On 10/20/2004, the Terteling Company and T-7, LLC (collectively “Terteling”) withdrew their petition to intervene. Terteling is no longer a participant in the IMAP proceedings. A side agreement was entered into by the parties, but it was not made part of the record in these proceedings and is not intended to be enforceable by IDWR. Nor does it give rise to third party rights. It was discovered in 2011 that the withdrawal was not on file with IDWR. Accordingly, Veolia submitted a copy of the withdrawal on 10/19/2011.

(3) BuRec

On 7/19/2012, the U.S. Bureau of Reclamation unilaterally and unconditionally withdrew its protest. The Bureau is no longer a participant in the IMAP proceedings. Veolia has no agreement with the Bureau with respect to the IMAP.

(4) Pioneer

Pioneer Irrigation District unconditionally and unilaterally withdrew its protest on 12/5/2012. It is no longer a participant in the IMAP proceedings.

(5) City of Star

On 1/28/2013, the City of Star unilaterally and unconditionally withdrew its protest and stated that it no longer wished to participate in the IMAP proceeding.

(6) City of Pocatello

The City of Pocatello never filed a protest or motion to intervene in the IMAP. Its first appearance was *City of Pocatello's Notice Reaffirming Participation* (dated

memorandum from Shelley Keen dated 6/29/2018. In response to IDWR feedback, the 5/21/2018 draft was modified to become the 6/11/2012 *Stipulated and Conditional Withdrawal of Protest* and the 7/9/2018 side agreement.

7/18/2012), in which the City incorrectly stated that “it intends to maintain its status as a party.” IDWR thereafter listed Pocatello as an “interested party” in the IMAP. On 6/5/2017, Pocatello filed its request to withdraw entirely from proceedings. The filing acknowledged that Pocatello never filed a motion to intervene and stated that it “no longer wishes to participate in the matter.” 6/5/2017 Withdrawal, ¶ 3.

B. Protest withdrawn unconditionally; remain an interested party

In response to Veolia’s request for clarification of party status, the Hearing Officer issued an order on 9/11/2017 setting the party status for all IMAP participants. Some entities were listed as “interested parties,” giving them the right to remain on the service list but not to participate as parties to the proceeding.

(1) City of Eagle

Eagle unilaterally and unconditionally withdrew its protest to the IMAP on 7/31/2007. Eagle has continued to be listed as an interested party in the IMAP. There is no agreement in place between Veolia and Eagle respecting the IMAP.

(2) City of Kuna

Kuna unilaterally and unconditionally withdrew its protest to the IMAP on 1/11/2008. Kuna has continued to be listed as an interested party in the IMAP. Veolia and Kuna have entered into private agreements respecting their service territories, and they have entered into a stipulation resolving Veolia’s protest of a transfer application by Kuna. There is no agreement in place between them respecting the IMAP.

C. Protests withdrawn unconditionally; remain a full party

(1) City of Boise

On 7/17/2012, Boise unilaterally and unconditionally withdrew its protest, and requested that its party status be changed to Intervenor in support of the IMAP.

(2) City of Meridian

On 12/10/2013, the City of Meridian entered into a mutual cooperation agreement with Veolia (“*2014 Meridian MCA*”). In paragraph 11 of that agreement, Meridian agreed to withdraw its protest and request to designation as an intervenor in “general support of the IMAP.”

In accordance with that agreement, Meridian formally withdrew its protest unconditionally on 12/30/2013 (“*2013 Meridian Protest Withdrawal*”). The city

requested that it be designated “an independent intervenor in general support of the IMAP.” *2013 Meridian Protest Withdrawal*, p. 1.

Veolia submitted a copy of the *2013 Meridian MCA* in the IMAP proceeding on 1/9/2014. The *2014 Meridian MCA* is not intended to be enforceable by IDWR. Nor does it give rise to third party rights.

(3) City of Caldwell

On 2/28/2014, the City of Caldwell entered into a mutual cooperation agreement with Veolia (“*2014 Caldwell MCA*”). In paragraph 11 of that agreement, Caldwell agreed to withdraw its protest and to request designation as an intervenor in “general support of the IMAP.”

Although Caldwell never filed a paper to that effect, its obligation to withdraw its protest was fulfilled by Veolia’s submission of a copy of the *2014 Caldwell MCA* on 3/14/2014. The *2014 Caldwell MCA* is not intended to be enforceable by IDWR. Nor does it give rise to third party rights.

(4) Star Sewer & Water District

On 2/14/2018, Star Sewer & Water District unconditionally withdrew its protest but remains a party. Specifically, it requested “that its status be changed to that of an independent intervenor in general support of the IMAP.” *2018 Star Protest Withdrawal*, p. 1.

The withdrawal of protest included as an exhibit a copy of a mutual cooperation agreement entered into by the District and the applicant. This agreement was submitted for the purpose of documenting the District’s general support for long-term planning. It is not intended to be enforceable by IDWR. Nor does it give rise to third party rights.

(5) City of Middleton

On 6/21/2018, Middleton unconditionally withdrew its protest and sought designation as an independent intervenor in general support of the IMAP.

Middleton’s withdrawal of protest included as an exhibit a copy of a mutual cooperation agreement entered into by Middleton and the applicant. This agreement was submitted for the purpose of documenting the city’s general support for long-term planning. It is not intended to be enforceable by IDWR. Nor does it give rise to third party rights.

D. Protests withdrawn with conditions; remain a party

(1) NMID and Settlers

On 4/18/2018, Veolia's predecessor entered into separate but identical side agreements (memorandums of understanding) with NMID and Settlers Irrigation District. Those agreements are private and have not been submitted for the record in the IMAP or any other proceeding. Nor were these agreements referenced in the withdrawal of protests. However, the agreements were referenced in *SUEZ's Summary of Parties, Settlements, and Conditions* (dated 5/23/2018).

On the same day, NMID and Settlers filed a joint withdrawal of their protests and requested a change in their status from protestants to intervenors.

The stipulated withdrawal of protest included three conditions related to the IMAP:

First, approval of the IMAP will include an APOD condition on the face of each right that is along the lines of various submissions and descriptions of APODs provided by Veolia. *2018 NMID/Settlers Protest Withdrawal*, ¶ 4, p. 2.

Second, withdrawal of the protests is "based on the inclusion of such a reopener condition" in IDWR's approval of the IMAP. *2018 NMID/Settlers Protest Withdrawal*, ¶ 7, p. 3.

Third, the "understanding" that NMID and Settlers would be allowed to intervene in any future reopening of the IMAP pursuant to the reopener condition. *2018 NMID/Settlers Protest Withdrawal*, ¶ 8, p. 3.

(2) Boise Project et al.

On 6/11/2018, Boise Project Board of Control, Big Bend Irrigation District, Boise-Kuna Irrigation District, and Wilder Irrigation District (collectively, "Boise Project") filed a *Stipulated and Conditional Withdrawal of Protest*. The stipulation referenced, but did not attach, a private side agreement among the parties (which was subsequently executed on 4/26/2018). That side agreement is not part of the record in the IMAP proceedings.

The withdrawal of the Boise Project protests is contingent on two actions by IDWR in its approval of the IMAP.

First, IDWR must approve the IMAP with a 50-year planning horizon and a total quantity of 370.87 cfs (as set out in Veolia's *Master Water Plan*). *2018 BP Protest*

Withdrawal at p. 2 (4th paragraph); *2018 BP Side Agreement* at p. 3 (first paragraph under “Terms of Agreement”).

The settlement agreement does not specify what happens if the IMAP is approved with a shorter planning period or for a smaller total quantity. Given that these terms were included for Veolia’s benefit, the provision should be understood to mean that the agreements become effective if the IMAP is approved under either these terms or for a smaller quantity or duration that Veolia finds acceptable. In other words, if the IMAP were approved for a smaller quantity or duration, Veolia would have the option to back out, but Boise Project does not. In the event that the IMAP were approved for a larger quantity or duration than that sought by the applicant (which, of course, will not happen), Boise Project would have the option to back out of its protest withdrawal.

Second, IDWR must include a reference to the *2018 BP Side Agreement* in each water right approved as part of the IMAP. The agreement makes clear, however, that it is not a part of those water rights and is enforceable only by the parties. Section 20 of the *2018 BP Side Agreement* provides that it is judicially enforceable by way of specific performance or other appropriate relief, but not by nullification of IDWR’s approval of the IMAP.

The *2018 BP Protest Withdrawal* is not contingent upon the imposition of a reopener condition. However, it expresses support for such a condition: “The Irrigation Entities do not oppose, and would welcome, the imposition by IDWR of a reopener condition on the approval of the IMAP allowing IDWR to re-evaluate SUEZ’s future water needs prior to the conclusion of the 50-year planning horizon.” *2018 BP Protest Withdrawal*, p. 3.

XV. TIMELINE OF KEY EVENTS

Note: Words in italics are actual document names. Words not in italics are descriptions or comments.

Date	Player	Document or event	Description / comment
1928	Veolia	Boise Water Corporation founded	
1995	Veolia	Boise Water Corporation became United Water Idaho Inc.	
5/4/2001	Veolia	Original IMAP filed	The planning horizon ran from 2000 to 2050. The planning horizon was changed to 2015 to 2065 in the <i>2065 Master Water Plan</i> dated 4/28/2017.
3/20/2002, errata on 7/15/2002	Veolia	Amended IMAP filed	This amendment and the errata pre-dated publication of the applications by IDWR.

4/4/2002 and 4/11/2002	IDWR	Notice of IMAP published in various newspapers	
3/18/2003	Chase	Estate of Eleanor Chase withdrew protest	The Chase Estate withdrew its protest unconditionally and is no longer a participant in the IMAP.
4/9/2003	Veolia	Further amendments to IMAP ("2003 IMAP")	These updates and corrections were entered by hand by the Applicant on the prior application at the direction of IDWR. The 2003 IMAP (as updated from time to time) is the current, pending IMAP application.
9/25/2003	Veolia	<i>UWID's Submission of Proposed Conditions</i>	Although submitted unilaterally by Veolia, this proposal was based on discussions with municipal protestants, notably the cities of Meridian and Caldwell. These proposed conditions were made obsolete by a side agreement entered into the 2003 <i>Meridian/Caldwell Withdrawal</i> and were formally withdrawn by Veolia on 11/25/2003.
11/24/2003	Meridian and Caldwell	<i>Stipulation and Withdrawal of Protests of the City of Meridian and the City of Caldwell</i>	This withdrawal was conditioned upon IDWR's agreement to certain conditions for IMAP approval. Those conditions were not agreed to by IDWR, so this withdrawal (and associated side agreements) never went into effect. Instead, this withdrawal was superseded by the 12/10/2013 MCA with Meridian and the 2/28/2014 MCA with Caldwell, which led to the unconditional withdrawal of their protests.
11/25/2003	Veolia	<i>Withdrawal of Proposed Conditions of September 25, 2003</i>	The 11/24/2003 stipulation with Meridian and Caldwell included new proposed conditions that superseded those proposed by Veolia on 9/25/2003. Accordingly, the 9/25/2003 proposed conditions were withdrawn.
12/18/2003	IDWR	<i>Order Re Motion for Stay</i>	IDWR stayed the IMAP proceeding pending resolution of Veolia's claims in the SRBA. The stay remained in effect for 8 ½ years.
10/20/2004	Terteling	Terteling withdrew petition to intervene	Terteling withdrew its protest unconditionally and is no longer a participant in the IMAP. For some reason, this withdrawal was not placed in the IMAP record by Terteling. On 10/19/2011, Veolia submitted a copy of the withdrawal.
7/31/2007	Eagle	City of Eagle withdrew its protest	Eagle withdrew its protest unconditionally, but remains an interested party.
1/11/2008	Kuna	City of Kuna withdrew its protest	Kuna withdrew its protest unconditionally, but remains an interested party.
10/6/2011	Veolia	UWID's motion to lift stay	Following issuance of partial decrees for all Veolia water rights, Veolia asked that the IMAP stay be lifted.
6/6/2012	IDWR	Order lifting stay	This began the phase of the proceeding informally referred to as the "IMAP Relaunch."

7/17/2012	Boise	<i>Notice Reaffirming Participation and Declaration of Party Status</i>	The City of Boise withdrew its protest unconditionally and requested that its party status be realigned as intervenor in support.
7/18/2012	Pocatello	<i>City of Pocatello's Notice Reaffirming Participation</i>	This was Pocatello's first appearance in the IMAP; it never filed a protest or motion to intervene. Pocatello withdrew on 6/5/2017.
7/19/2012	BuRec	The Bureau of Reclamation withdrew its protest	The Bureau withdrew its protest unconditionally and is no longer a participant in the IMAP.
8/8/2012	IDWR	<i>Order Affirming Party Status and Notice of Status Conference</i>	Director Spackman's order established the party status of each participant in the IMAP proceedings.
8/14/2012	Veolia	<i>United Water's Statement Updating and Explaining the IMAP Relaunch</i>	This was filed in response to a request by IDWR in a 7/24/2012 status conference that Veolia update information in the original IMAP. Errata to this submission were filed on 8/28/2012.
11/14/2012	Boise Project	Boise Project et al. filed motion to dismiss IMAP	Boise Project argued that the IMAP should be dismissed because it is obsolete.
12/5/2012	Pioneer	<i>Pioneer Irrigation District's Withdrawal of Protest</i>	This was an unconditional withdrawal of protest. Pioneer is no longer a participant in the IMAP.
1/11/2013	IDWR	<i>Order Denying Motion to Dismiss Integrated Municipal Application Package (IMAP)</i>	Director Spackman denied Boise Project's 11/14/2012 motion to dismiss IMAP, but declared that original IMAP information is stale and needs to be updated.
1/28/2013	Star	City of Star withdrew its protest	Star withdrew its protest unconditionally and is no longer a participant in the IMAP.
2/13/2013	Veolia	<i>United Water's Further Submission in Compliance with the Director's January 11, 2013 Order</i>	This was Veolia's attempt to comply with the Director's request for more information about changes in circumstances between the initial filing of the IMAP and the Relaunch. Ultimately, it became necessary for Veolia to employ Professor Church to undertake a multi-year reevaluation of RAFN, leading to the 2065 Master Water Plan submitted on 4/28/2017.
12/10/2013	Meridian and Veolia	<i>2013 Mutual Cooperation Agreement Between the City of Meridian and United Water Idaho Inc.</i>	In this MCA, Meridian agreed to withdraw its protest unconditionally and request to realign its party status to an intervenor in support of the IMAP. This private agreement contains no provisions bearing on IDWR's approval of the IMAP.
12/30/2013	Meridian	<i>City of Meridian's Notice of Withdrawal of Protest and Request to Change Status to Intervenor</i>	This was an unconditional withdrawal of protest. Meridian remains in the IMAP as a party in support of the IMAP.
1/9/2014	Veolia	<i>United Water's Submission of 2013 Mutual Cooperation Agreement with the City of Meridian</i>	This is the agreement referenced in Meridian's 12/30/2013 withdrawal of protest.

2/28/2014	Caldwell and Veolia	<i>2014 Mutual Cooperation Agreement Between the City of Caldwell and United Water Idaho Inc.</i>	In this MCA, Caldwell agreed to withdraw its protest unconditionally and request to realign its party status to an intervenor in support of the IMAP.
3/14/2014	Veolia	<i>United Water's Submission of 2014 Mutual Cooperation Agreement with the City of Caldwell</i>	Caldwell's promise to withdraw its protest (in the 2/28/2014 MCA) was accomplished through Veolia's submission of this agreement to IDWR. This was done with Caldwell's approval.
10/1/2015	Veolia	United Water Idaho Inc. became SUEZ Water Idaho Inc.	Articles of Amendment filed with Idaho Secretary of State.
4/28/2017	Veolia	<i>Master Water Plan for the Years 2015 to 2065 aka 2065 Master Water Plan</i>	In response to the Order of 1/11/2013, Veolia undertook a new, comprehensive 50-year RAFN projection, pushing out the start and end of the planning horizon by 15 years. The document was initially signed on 9/23/2016, with errata on 4/28/2017 (the day it was submitted to IDWR). Exhibit 2 is a spreadsheet of all IMAP and non-IMAP water rights in Veolia's portfolio (as of that date), including their associated pre-IMAP APODs, if any.
4/28/2017	Veolia	Submission of 2065 Master Water Plan to IDWR	This placed the <i>2065 Master Water Plan</i> into the IMAP record.
4/28/2017	Veolia	<i>SUEZ's 2017 Update Report on IMAP and 2065 Master Water Plan</i>	This explained the changes reflected in the <i>2065 Master Water Plan</i> .
6/5/2017	Pocatello	<i>Pocatello's Entry of Appearance and Request to Withdraw from Proceedings</i>	Pocatello never filed a protest or motion to intervene. Pocatello is no longer a participant in the IMAP proceedings.
6/26/2017	Veolia	<i>SUEZ's 2017 Supplement to the Update Report, Addressing APODs</i>	This supplement said that the Sherman Oaks well had been abandoned and was no longer an APOD. Veolia's 11/30/2020 response noted that Sherman Oaks may be reconstructed and should be kept on the APOD list. Note: The discussion of "mini-APODs" in this supplement is now obsolete. The Ranney collector rights in the IMAP (one ground water right and one surface right) were withdrawn on 12/1/2017 (corrected version, initially filed 11/28/2017).
8/24/2017	IDWR	Status conference	APODs were discussed at this status conference, giving rise to Veolia's submissions of 9/11/2017 and 11/3/2017.
9/11/2017	Veolia	<i>SUEZ's Further Explanation of APOD condition language</i>	This was a broad overview discussion of APODs. It did not address the specific issue of whether a curtailed original well may be diverted from APODs outside the curtailment zone.

9/11/2017	IDWR	<i>Order Amending Caption to Reflect Name Change and Updating Party Status and Service List; Notice of Status Conference</i>	Hearing Officer Cefalo's order established the party status of each participant in the IMAP proceedings.
10/5/2017	Veolia	<i>SUEZ's discussion of RAFN versus non-RAFN rights</i>	Veolia urged that the term "RAFN right" should apply to any water right that has been subjected to a gap analysis in a new appropriation or transfer proceeding. Thus every IMAP right is a RAFN right. Dividing IMAP rights (or portions thereof) into those "used now" vs. "reserved for future needs" is unworkable and inconsistent with the statute and guidance.
11/3/2017	Veolia	<i>SUEZ's Discussion of Surface Water APODs</i>	This is now obsolete. As of 12/1/2017, all surface rights have been withdrawn from the IMAP.
11/9/2017	IDWR	Status conference	APODs were discussed at this status conference, giving rise to Veolia's submission of 11/28/2017.
11/28/2017	Veolia	<i>SUEZ's Submission of Supplemental Authority on APODs</i>	This explains why water under a right whose original well is subject to curtailment because it is within the curtailment zone may be diverted at APODs outside the curtailment zone.
12/1/2017	Veolia	<i>SUEZ's Notice of Withdrawal of Water Right Nos. 63-2892 and 63-12055 (Corrected)</i>	This is the withdrawal of the only Ranney collector ground water right and the only surface water right in the IMAP. This filing corrected a typographical error in the footer of an identical withdrawal on 11/28/2017.
2/14/2018	Star Sewer	Star Sewer & Water District withdrew its protest	The sewer district withdrew its protest unconditionally, but remains a party.
4/18/2018	NMID, Settlers, and Veolia	MOU between NMID and SUEZ and MOU between Settlers Irrigation District and SUEZ	These MOUs are two identical side agreements entered into in conjunction with the 4/18/2018 stipulation for withdrawal of Settlers' and NMID's protests. These private agreements are not in the IMAP record. They were not referenced in the 4/18/2018 stipulation, and need not be referenced in the IMAP approval. (This is in contrast to the side agreement with Boise Project.)
4/18/2018	NMID, Settlers, and Veolia	<i>Stipulation for Withdrawal of Protests and Request to Change Status to Intervenor by Nampa & Meridian Irrigation District and Settlers Irrigation District</i>	The withdrawal of the Marden Treatment Plant water rights on 12/1/2017 paved the way for the MOUs and this stipulation with NMID and Settlers. They withdrew their protests unconditionally, but remain parties. The withdrawals of protest were conditioned upon (1) the inclusion of a reopener in IDWR's approval of the IMAP and (2) the understanding that they would be allowed to intervene in any future IMAP proceeding.

5/21/2018	Veolia	Draft version of: <i>Stipulated and Conditional Withdrawal of Protest</i>	Chris Meyer sent this draft via email to the Hearing Officer and IMAP participants. This version contained no side agreement. In response to IDWR feedback at the 5/31/2018 status conference, this version was modified into what became the 6/11/2018 withdrawal of protest and the 7/9/2018 side agreement.
5/23/2018	Veolia	<i>SUEZ's Summary of Parties, Settlements, and Conditions</i>	Note that the description of the anticipated settlement with Boise Project describes the 5/21/2018 draft which predated the final settlement documents of 6/11/2018 and 7/9/2018. Consequently, that discussion is obsolete and inaccurate in some respects.
5/31/2018	IDWR	Status conference	At this status conference, the parties were informed that it is unlikely that IDWR would be able to impose a condition limiting how Veolia would be allowed to "fill the gap." The Hearing Officer asked staff to prepare an outline of acceptable potential conditions for IMAP approval.
6/11/2018	Boise Project and Veolia	<i>Stipulated and Conditional Withdrawal of Protest</i>	Boise Project conditionally withdrew its protest, but remained a party. The stipulation references a side agreement limiting Veolia's ability to "fill the gap" through new appropriations. The withdrawal is conditioned on (1) approval of the IMAP with a 50-year planning horizon and the RAFN quantification of 370.87 cfs and (2) inclusion of a provision referencing the side agreement. The stipulation "welcomes" but does not require a reopener provision.
6/21/2018	Middleton	City of Middleton withdrew its protest	Middleton withdrew its protest unconditionally, but remains a party.
6/29/2018	IDWR	Memo from Shelley Keen setting out proposed IMAP conditions (" <i>Keen Memo</i> ")	This memo was requested by the Hearing Officer on 5/31/2018. It provided the framework for discussion at the status conference on 7/10/2018.
7/9/2018	Boise Project and Veolia	<i>IMAP Settlement Agreement Between Boise Project et al. and SUEZ</i>	This is the side agreement referenced in the 6/18/2018 stipulated withdrawal of the Boise Project. (For logistical reasons, signatures of the principals were not collected until 7/9/2018.) This private agreement is not in the IMAP record. Although it will be referenced in the IMAP approval, the side agreement is not enforceable by IDWR or third parties.

7/9/2018	Veolia	Chris Meyer memorandum to Hearing Officer, Parties, and IDWR Staff regarding APOD condition language (<i>"APOD Memo"</i>)	This memo is consistent with but less comprehensive than the detailed APOD submission on 11/28/2017. It included a proposed explanation of the APOD condition to be included in the order approving the IMAP. It noted at page 2 that water under a water right whose original well is subject to curtailment may still be diverted from APODs outside the curtailment area.
7/9/2018	Veolia	Email to IDWR and parties from Chris Meyer forwarding (1) email thread with Phil Rassier and (2) the 7/9/2018 <i>APOD Memo</i>	The email included Phil Rassier's (former chief counsel to IDWR, retained by SUEZ) evaluation of reopener options. The email also forwarded a copy of the 7/9/2018 <i>APOD Memo</i> . Both were discussed at the 7/10/2018 status conference.
7/10/2018	IDWR	Status conference	Discussed Keen memo of 6/29/2018.
10/16/2018	Veolia	<i>SUEZ's Submission of APOD Memorandum Prepared in Connection with Kuna's Transfer No. 81844</i>	Veolia submitted to the IMAP proceeding a memorandum (also dated 10/16/2018) prepared in the context of a transfer by the City of Kuna (<i>"Kuna Memo"</i>). Consistent with the APOD submissions of 11/28/2017 and 7/9/2018, the <i>Kuna Memo</i> noted (at pages 6-7) that water under a water right whose original well is subject to curtailment may still be diverted from APODs outside the curtailment area.
1/14/2019	IDWR	Memo from IDWR staff (Manuel Rauhut, et al.) to James Cefalo requesting additional information regarding IMAP (<i>"Staff Memo"</i>)	IDWR's <i>Staff Memo</i> included notes that IDWR should seek additional information from Veolia. The memo was conveyed to Veolia via email from the Hearing Officer on 1/31/2019. Attached to the memo were two spreadsheets: all portfolio water rights and all IMAP water rights.
11/30/2020	Veolia	<i>SUEZ's Response to IDWR's Staff Memo</i>	This responds to the 1/14/2019 <i>Staff Memo</i> (following a nearly two-year of analysis by Veolia's economic consultant). Exhibit F sets out the 81 APODs (including the Sherman Oaks well). This response was supplemented by the <i>"Side Memo"</i> submitted on the same day.
11/30/2020	Veolia	Side Memo by Michael Lawrence to James Cefalo	This memo addressed technical portfolio quantification issues responsive to the <i>Staff Memo</i> of 1/14/2019. It was submitted to the record via a declaration. The memo was mistakenly addressed to James Cefalo. Mr. Cefalo no longer serves as hearing officer during this informal stage of proceedings.
12/9/2021	IPUC	IPUC approved Veolia's purchase of Eagle Water Company's assets including water rights	Veolia will continue to serve the territory previously served by Eagle Water Company using the water rights acquired from the company.

12/30/2021	Veolia	Veolia acquired all of Eagle Water Company's assets including its water rights and facilities	A copy of the deed to SUEZ expressly conveying water right nos. 63-7368, 63-7618, 63-9245, 63-11798, 63-12147, and 63-12559 was included with SUEZ's 1/19/2022 Application for Transfer No. 85719.
1/9/2023	IDWR	Transfer No. 85720 (Water Right No. 63-7066)	This non-IMAP water right was changed to add APODs covering the former Eagle Water Company service area. This was necessary because the Eagle Water Company rights (acquired by Veolia) were slightly inadequate to meet current demand.
2/2/2023	IDWR	<i>Order on Petition for Reconsideration</i>	IDWR approved Veolia's Transfer No. 85719 which created set of "mini-APODs" for the water rights acquired from Eagle Water Company. These Eagle Water Company rights are not part of the IMAP transfer and the new APODs are distinct from the "global APODs" sought for the IMAP rights.
3/28/2022	Veolia	SUEZ Water Idaho Inc. became Veolia Water Idaho, Inc.	Articles of Amendment filed with Idaho Secretary of State.
4/22/2022	Veolia	Notice to IDWR changing name to Veolia Water Idaho, Inc.	Submitted on IDWR's "Change In Address" form. It also addressed change in ownership of rights acquired from Eagle Water Company, Inc.
5/12/2023	IDWR	Memo by Manuel Rauhut evaluating Veolia's response of 11/30/2020 (" <i>Rauhut Memo</i> ")	This memo, dated May 2023, was emailed to Veolia on 5/12/2023. It confirms that all outstanding information requests have been addressed satisfactorily. It also identified some unresolved issues that IDWR will need to decide.
6/7/2023	Veolia	Letter from Chris Meyer to Manuel Rauhut	In this letter, Veolia agreed to the smaller quantities for water right nos. 63-10945 and 63-11990, as called for in the <i>Rauhut Memo</i> .

EXHIBITS

The following exhibits are copies of documents that are particularly pertinent to the proposed conditions for IMAP approval. They are attached for the convenience of the reader.

Exhibit A **SUEZ'S SUBMISSION OF SUPPLEMENTAL AUTHORITY ON APODs**
(11/28/2017)

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NOV 28 2017
DEPARTMENT OF
WATER RESOURCES

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**

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

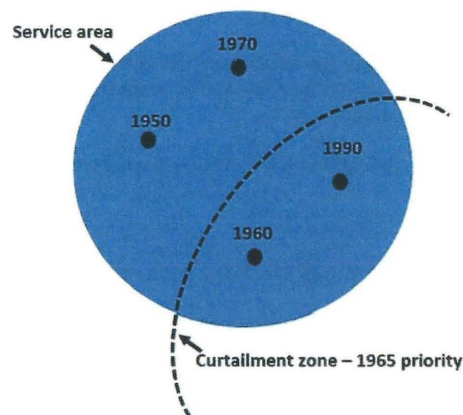
DISCUSSION

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

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

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.

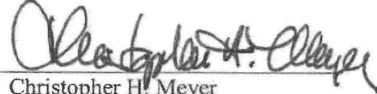
Idaho Brief at *8-9 (Appendix D at p. 43) (emphasis supplied). In other words, the APOD condition is intended to prevent water rights from being brought into the curtailment area. It is not intended to bar water rights from being moved out of the curtailment area.

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 
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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 2017, the foregoing was filed, served, and copied as shown below. Service by email is authorized by the Hearing Officer's Order of September 11, 2017 at page 3.

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Boise, ID 83701-0500
Facsimile: (208) 433-5650
jroldan@cityofboise.org
Hand delivery or overnight mail:
150 N Capitol Blvd
Boise, ID 83702
(For the City of Boise, intervenor in support)

☐ U. S. Mail
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Garrick Nelson, P.E.
Staff Engineer II
Public Works Department
CITY OF MERIDIAN
33 E Broadway Ave, Ste 200
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Facsimile: (208) 898-9551
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(For the City of Meridian, intervenor in support)

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☐ Overnight Mail
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Bob Bachman
Public Works Director
CITY OF KUNA
PO Box 13
Kuna, ID 83634
Facsimile: None
bbachman@kunaID.gov
Hand delivery or overnight mail:
6950 S Ten Mile Rd
Meridian, ID 83634
(For the City of Kuna, interested party)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Kathleen Marion Carr, Esq.
Office of the Field Solicitor
U.S. DEPARTMENT OF THE INTERIOR
960 Broadway Ave, Ste 400
Boise, ID 83706
Facsimile: (208) 334-1918
kathleenmarion.carr@sol.doi.gov

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E. Gail McGarry
Program Manager, Water Rights & Acquisitions
U.S. BUREAU OF RECLAMATION
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Facsimile: (208) 378-5305
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Water Rights Analyst
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Paul L. Arrington, Esq.
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Facsimile: (208) 344-2744
paul@iwua.org

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☐ Facsimile
☒ E-mail


Christopher H. Meyer

Appendix A EMAILS FROM HEARING OFFICER

Christopher H Meyer

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Tuesday, September 5, 2017 12:53 PM
To: Christopher H Meyer; Chris M. Bromley Esq. (cbromley@mchughbromley.com); John Roldan - City of Boise (Business Fax); Charles L. Honsinger Esq. (honsingerlaw@gmail.com); Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Brent Orton; Bryce Farris; Charles Honsinger; Cherese McLain; Christopher E. Yorgason; Gail McGarry; Gordon Law; Kathleen Carr; Kyle Radek; Matt Howard; Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunaID.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart
Cc: Pat Hughes (pchendley@comcast.net); Lori Gibson; Michael P. Lawrence; Baxter, Garrick; Peppersack, Jeff; White, Kim; Miller, Nick; Cox, Sharla; Keen, Shelley; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com)
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [JWOV-GPDMS.FID508386]

Chris,

I appreciate your reminder. An informal email with all of the parties included works just fine. The condition language quoted in your email is still the language used by the Department for APODs. We have a couple of different versions of the condition, depending on the complexity of the original water rights. Conditions 208 thru 211 refer back to the original point of diversion(s) for the water right. Condition 226 accomplishes the same goal as conditions 208 thru 211, but instead refers back to a previous approval or decree.

Condition 208: "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 No. _ located in T____, R____, S____."

Condition 209: "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 No. _ located in T____, R____, S____, _____ Well No. _ located in T____, R____, S____, and _____ Well No. _ located in T____, R____, S____."

Condition 210: "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 No. _ located in T____, R____, S____, which was replaced by _____ Well No. _ located in T____, R____, S____."

Condition 211: "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 No. _ located in T____, R____, S____, _____ Well No. _ located in T____, R____, S____, and _____ Well No. _ located in T____, R____, S____. _____ Well Nos. _ and _ were replaced by _____ Well No. _ located in T____, R____, S____."

Condition 226: "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, this right retains its original priority for well locations authorized under this right as identified in <decree, license or Transfer XXXXX> dated <XX-XX-20XX>."

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

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I hope this information is useful for your ongoing discussions. I hope to have an order out by the end of next week, addressing the pending procedural motions and setting the November 9th status conference.

James Cefalo

From: Christopher H Meyer [mailto:ChrisMeyer@givenspursley.com]
Sent: Tuesday, September 05, 2017 11:26 AM
To: Chris M. Bromley Esq. (cbromley@mchughbromley.com) <cbromley@mchughbromley.com>; John Roldan - City of Boise (Business Fax) <IMCEAFAX-John+20Roldan+20P+2EE+2E+40+2B1+20+28208+29+20433-5650@givenspursley.com>; Charles L. Honsinger Esq. (honsingerlaw@gmail.com) <honsingerlaw@gmail.com>; Abigail R. Germaine Esq. (agermaine@cityofboise.org) <agermaine@cityofboise.org>; Barker, Albert (IWRB Member) <apb@idahowaters.com>; Andrew Waldera <andy@sawtoothlaw.com>; Brent Orton <borton@cityofcaldwell.com>; Bryce Farris <bryce@sawtoothlaw.com>; Charles Honsinger <honsingerlaw@gmail.com>; Cherese McLain <cdm@msbtlaw.com>; Christopher E. Yorgason <chris@yorgasonlaw.com>; Gail McGarry <emcgarry@usbr.gov>; Gordon Law <gordon@cityofkuna.com>; Kathleen Carr <kathleenmarion.carr@sol.doi.gov>; Kyle Radek <kradek@meridiancity.org>; Matt Howard <mhoward@usbr.gov>; Richard T. Roats (kunaattorney@icloud.com) <kunaattorney@icloud.com>; Richard T. Roats Esq. (rroats@kunalD.gov) <rroats@kunalD.gov>; Sarah A. Klahn Esq. (sarahk@white-jankowski.com) <sarahk@white-jankowski.com>; Shelley Davis <smd@idahowaters.com>; Stephan Burgos <sburgos@cityofboise.org>; Warren Stewart <wstewart@meridiancity.org>; Cefalo, James <James.Cefalo@idwr.idaho.gov>
Cc: Pat Hughes (pchendley@comcast.net) <pchendley@comcast.net>; Lori Gibson <lorigibson@givenspursley.com>; Michael P. Lawrence <mpl@givenspursley.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Peppersack, Jeff <Jeff.Peppersack@idwr.idaho.gov>; White, Kimi <Kimi.White@idwr.idaho.gov>; Miller, Nick <Nick.Miller@idwr.idaho.gov>; Cox, Sharla <Sharla.Cox@idwr.idaho.gov>; Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Roger D. Dittus (roger.dittus@suez-na.com) <roger.dittus@suez-na.com>
Subject: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Special Master Cefalo,

I am writing as a follow-up to the IMAP status conference on August 24, 2017. Some questions were asked about the standard "APOD condition language," which Suez has agreed would be acceptable. As I recall, you said that would look into whether the language used in the past is still the "standard" language.

The language which appears in IDWR's existing municipal rights via the SRBA process is:

"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 at [name of well] located in [quarter-quarter description]."

This is the same language litigated (and approved) in *In Re SRBA*, Case No. 39576, Subcase Nos. 29-00271 et al. (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).

I am happy to provide some further comment on how this language (which was developed in the context of accomplished transfers) might be employed in the IMAP. But first I wanted to confirm that this is still the Department's preferred or "standard" language.

I trust you do not object to this informal communication.
I am copying all parties.
I have no objection to your adding this email to the administrative file, if you deem appropriate.

2

-Chris

CHRISTOPHER H. MEYER

GIVENS PURSLEY LLP

601 W Bannock St, Boise, ID 83702 / PO Box 2720, Boise, ID 83701
direct 208-388-1236 / cell 208-407-2792 / assistant 208-388-1227 (Lisa Hughes)
chrismeyer@givenspursley.com / www.givenspursley.com

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3

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

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IMAP WRAP-UP NOTES (10/9/2023)

30-147: IMAP Wrap-Up Notes (10-9-2023) (sent to IDWR)(18020877.1).docx

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Printed 10/9/2023 4:55 PM

Christopher H Meyer

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Monday, September 11, 2017 3:38 PM
To: Christopher H Meyer; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Charles L. Honsinger Esq. (honsingerlaw@gmail.com); Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Brent Orton; Bryce Farris; Charles Honsinger; Cherese McLain; Christopher E. Yorgason; Gordon Law; Kyle Radek; Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunalD.gov); Shelley Davis; Stephan Burgos; Warren Stewart
Cc: Pat Hughes (pchendley@comcast.net); Lori Gibson; Michael P. Lawrence; Baxter, Garrick; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com); White, Kimi
Subject: Additional information regarding APOD conditions (Suez - IMAP)

Dear Parties,

After sending my last email, Department staff reminded me that an additional condition has been included on APOD water rights. The condition describes the points of diversion which are being added through a transfer application. The condition states: "Transfer _____ authorizes additional Well No(s) _____ located in T _____, R _____, Sec. _____, QQ _____ as a point(s) of diversion under this right as of the date of approval." Some recent examples of where this condition has been used are Transfer 79778 (City of Meridian) and Transfer 80621 (City of Ketchum).

I also wanted to provide you a brief update on the eight permits included in the IMAP (63-11878, 63-12055, 63-12140, 63-12192, 63-12310, 63-12452, 63-12464 and 63-12516). Proof of beneficial use has been filed for all eight permits. Field exams have already been completed for four of the permits (63-11878, 63-12055, 63-12140 and 63-12192). A field exam is still needed for the other four permits. Department staff in Boise have agreed to move the licensing review for these eight permits higher up on the priority list. I hope to provide a more detailed update on the licensing process when we meet in November.

James Cefalo
Hearing Officer

1

Christopher H Meyer

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Monday, November 13, 2017 9:37 AM
To: Christopher H Meyer; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Charles L. Honsinger Esq. (honsingerlaw@gmail.com); Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Brent Orton; Bryce Farris; Charles Honsinger; Cheresse McLain; Christopher E. Yorgason; Gail McGarry; Gordon Law; Kathleen Carr; Kyle Radek; Matt Howard; Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunalD.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart; Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Bob Bachman (bbachman@kunaid.gov); Brent Orton; Bryce Farris; Charles Honsinger; Cheresse McLain; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Christopher E. Yorgason; Douglas Strickling; Gail McGarry; Garrick Nelson P.E. (gnelson@meridiandcity.org); John Roldan - City of Boise (jroldan@cityofboise.org); Kathleen Carr; Kyle Radek; Matt Howard; Paul L. Arrington (paul@iwua.org); Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunalD.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart
Cc: Lori Gibson; Michael P. Lawrence; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com); Blades, Emmi; White, Kimi
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPOMS.FID508386]

Chris,

The two transfers referenced in a previous email (dated 9/11/2017) were Transfer 79778 (City of Meridian) and Transfer 80621 (City of Ketchum). The Meridian documents can be found in the backfile for water right 63-2893. The Ketchum documents can be found in the backfile for water right 37-2628.

James

From: Christopher H Meyer [mailto:ChrisMeyer@givenspursley.com]
Sent: Friday, November 10, 2017 4:05 PM
To: Cefalo, James; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Charles L. Honsinger Esq. (honsingerlaw@gmail.com); Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Brent Orton; Bryce Farris; Charles Honsinger; Cheresse McLain; Christopher E. Yorgason; Gail McGarry; Gordon Law; Kathleen Carr; Kyle Radek; Matt Howard; Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunalD.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart; Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Bob Bachman (bbachman@kunaid.gov); Brent Orton; Bryce Farris; Charles Honsinger; Cheresse McLain; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Christopher E. Yorgason; Douglas Strickling; Gail McGarry; Garrick Nelson P.E. (gnelson@meridiandcity.org); John Roldan - City of Boise (jroldan@cityofboise.org); Kathleen Carr; Kyle Radek; Matt Howard; Paul L. Arrington (paul@iwua.org); Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunalD.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart
Cc: Lori Gibson; Michael P. Lawrence; Baxter, Garrick; Peppersack, Jeff; White, Kimi; Miller, Nick; Cox, Sharla; Keen, Shelley; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com); Blades, Emmi;

1

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

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White, Kimi

Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Mr. Cefalo,

In the IMAP status conference yesterday, I mentioned recently discovering the decision by Director Spackman on 10-4-2016 (In the Matter of Application for Transfer No. 79778 in the Name of City of Meridian). I understood you to say that you had referenced that case and another in a prior email. The email below is the only one I have found from you and, unless this is another case of Meyer Pattern Blindness, I don't see the cases referenced.

In any event, if there are other APOD decisions (or guidance, etc.) that you are aware of (other than this Meridian decision and the original Pocatello decision that was appealed), I would very much appreciate your sharing them with Suez and the other parties.

Thank you.

-Chris

CHRISTOPHER H. MEYER
Givens Pursley LLP
chrismeyer@givenspursley.com / www.givenspursley.com

From: Cefalo, James [<mailto:James.Cefalo@idwr.idaho.gov>]

Sent: Tuesday, September 5, 2017 12:53 PM

To: Christopher H Meyer <ChrisMeyer@givenspursley.com>; Chris M. Bromley Esq. (<cbromley@mchughbromley.com>); John Roldan - City of Boise (Business Fax); Charles L. Honsinger Esq. (<honsingerlaw@gmail.com>); Abigail R. Germaine Esq. (<agermaine@cityofboise.org>); Barker, Albert (IWRB Member) (<apb@idahowaters.com>); Andrew Waldera (<andy@sawtoothlaw.com>); Brent Orton (<borton@cityofcaldwell.com>); Bryce Farris (<bryce@sawtoothlaw.com>); Charles Honsinger (<honsingerlaw@gmail.com>); Cherese McLain (<cdm@msbtlaw.com>); Christopher E. Yorgason (<chris@yorgasonlaw.com>); Gail McGarry (<emcgarry@usbr.gov>); Gordon Law (<gordon@cityofkuna.com>); Kathleen Carr (<kathleenmarion.carr@sol.doi.gov>); Kyle Radek (<kradek@meridiancity.org>); Matt Howard (<mhoward@usbr.gov>); Richard T. Roats (<kunaattorney@icloud.com>); Richard T. Roats Esq. (<rroats@kunalD.gov>); Sarah A. Klahn Esq. (<sarahk@white-jankowski.com>); Shelley Davis (<smd@idahowaters.com>); Stephan Burgos (<sburgos@cityofboise.org>); Warren Stewart (<wstewart@meridiancity.org>); Pat Hughes (<pchendley@comcast.net>); Lori Gibson (<lorigibson@givenspursley.com>); Michael P. Lawrence (<mpl@givenspursley.com>); Baxter, Garrick (<Garrick.Baxter@idwr.idaho.gov>); Peppersack, Jeff (<Jeff.Peppersack@idwr.idaho.gov>); White, Kimi (<Kimi.White@idwr.idaho.gov>); Miller, Nick (<Nick.Miller@idwr.idaho.gov>); Cox, Sharla (<Sharla.Cox@idwr.idaho.gov>); Keen, Shelley (<Shelley.Keen@idwr.idaho.gov>); Gregory P. Wyatt (<greg.wyatt@suez-na.com>); Roger D. Dittus (<roger.dittus@suez-na.com>);
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

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2

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

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Condition 208: "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 No. _____ located in T____, R____, S____."

Condition 209: "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 No. _____ located in T____, R____, S____, _____ Well No. _____ located in T____, R____, S____ and _____ Well No. _____ located in T____, R____, S____."

Condition 210: "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 No. _____ located in T____, R____, S____ which was replaced by _____ Well No. _____ located in T____, R____, S____."

Condition 211: "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 No. _____ located in T____, R____, S____, _____ Well No. _____ located in T____, R____, S____ and _____ Well No. _____ located in T____, R____, S____, _____ Well Nos. _____ and _____ were replaced by _____ Well No. _____ located in T____, R____, S____."

Condition 226: "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, this right retains its original priority for well locations authorized under this right as identified in dated _____."

I hope this information is useful for your ongoing discussions. I hope to have an order out by the end of next week, addressing the pending procedural motions and setting the November 9th status conference.

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Cc: Pat Hughes (pchendlev@comcast.net) <pchendlev@comcast.net>; Lori Gibson <lorigibson@givenspurslevy.com>; Michael P. Lawrence <mpl@givenspurslevy.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Peppersack, Jeff <Jeff.Peppersack@idwr.idaho.gov>; White, Kimi <Kimi.White@idwr.idaho.gov>; Miller, Nick <Nick.Miller@idwr.idaho.gov>; Cox, Sharla <Sharla.Cox@idwr.idaho.gov>; Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Roger D. Dittus (roger.dittus@suez-na.com) <roger.dittus@suez-na.com>
Subject: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

3

SUEZ'S SUBMISSION OF SUPPLEMENTAL AUTHORITY ON APODs (Nov. 28, 2017)

13971518_10 / 30-147

Page 22 of 53

Special Master Cefalo,

I am writing as a follow-up to the IMAP status conference on August 24, 2017. Some questions were asked about the standard "APOD condition language," which Suez has agreed would be acceptable. As I recall, you said that would look into whether the language used in the past is still the "standard" language.

The language which appears in IDWR's existing municipal rights via the SRBA process is:

"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 at [name of well] located in [quarter-quarter description]."

This is the same language litigated (and approved) in *In Re SRBA*, Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).

I am happy to provide some further comment on how this language (which was developed in the context of accomplished transfers) might be employed in the IMAP. But first I wanted to confirm that this is still the Department's preferred or "standard" language.

I trust you do not object to this informal communication.
I am copying all parties.
I have no objection to your adding this email to the administrative file, if you deem appropriate.

-Chris

CHRISTOPHER H. MEYER
Givens Pursley llp
601 W Bannock St, Boise, ID 83702 / PO Box 2720, Boise, ID 83701
direct 208-388-1236 / cell 208-407-2792 / assistant 208-388-1227 (Lisa Hughes)
chrismeyer@givenspursley.com / www.givenspursley.com

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Appendix B MERIDIAN ORDER

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79778 IN THE NAME OF
CITY OF MERIDIAN**

**ORDER ADDRESSING
EXCEPTIONS AND AMENDING
TRANSFER APPROVAL**

PROCEDURAL HISTORY

On March 17, 2016, the Idaho Department of Water Resources ("Department") issued a preliminary order approving Transfer No. 79778 ("Transfer") authorizing the City of Meridian ("Meridian") to divert ground water for municipal purposes from twenty-seven wells under each of their twenty-six water rights. The Transfer included the following condition of approval:

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, this right retains its original priority for well locations authorized under this right as identified in the [decree or license] dated [decree or license date].

This condition is hereafter referred to as the "administration condition." The Transfer included an additional condition of approval:

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 79778. 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.

This condition is hereafter referred to as the "surface water first condition."

On April 1, 2016, Meridian filed a petition for reconsideration of the order. After communication between Meridian and the Department to clarify the administration condition and the surface water first condition, the Department issued an order denying the petition for reconsideration on April 22, 2016.

Order Addressing Exceptions and Amending Transfer Approval - 1

On May 5, 2016, Meridian filed its *Exceptions to Order Denying Petition for Reconsideration* ("Exceptions").

EXCEPTIONS TO PRELIMINARY ORDER

Meridian takes exception with the administration condition and the surface water first condition. Meridian argues the administration condition "is vague and confusing and may result in unintended and negative impacts to the City." *Exceptions* at 1. Meridian also argues:

[T]he [transfer approval] failed to recognize the potential consequences of [the surface water first condition] regarding the use of surface water for irrigation purposes prior to the use of water under any of the rights subject to transfer that was added to the rights even though it was not present in the conditions prior to approval of the transfer.

Id.

Administration Condition

Meridian argues that the administration condition is "vague and confusing" and that "[i]t is unknown exactly what is meant by the word 'administration.'" *Exceptions* at 3. Meridian suggests that in a basin wide administration action by the Department, the administration condition "requires that the City's water rights be limited to only one single diversion point for the majority of its water rights, ..." *Exceptions* at 4-5. In another example, Meridian suggests that "under the administration condition, a junior priority water right holder can insist that the water right be limited to its original point of diversion..." *Exceptions* at 6.

The Transfer authorizes Meridian to use its city wells as alternate points of diversion for each of its municipal water rights. The effect of the Transfer is that Meridian can divert its most senior rights from any of its wells. This raises the potential for injury to other water rights existing prior to the Transfer, either due to local interference between wells or due to a geographically limited¹ delivery call. The administration condition was applied to each right in the Transfer to identify well locations associated with the priority date under each right in the event administration of rights becomes necessary.

The language in the administration condition is substantially similar to language used by the Department in an alternate point of diversion condition which was upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830 (2012). In that case, the Court agreed with the Department that the condition was necessary to assist in the administration of water rights and to avoid injury to other water rights. *Id.* at 835. The Court recognized that the key consideration is injury to the priority of the water rights. As the Court recognized, "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *City of Pocatello*, 152 Idaho at 835.

¹ The condition helps ensure that a municipality cannot circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area to protect junior priority wells within the curtailment area.

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From the Department's perspective, there is no substantive difference between the language in the administrative condition and the language in the condition upheld by the Idaho Supreme Court in *City of Pocatello*. Meridian seems to believe otherwise, however. To remove any question regarding the language, the Director will modify the administration condition. Those water rights decreed in the SRBA with an alternate point of diversion condition (for example, water right no. 63-08332) will retain the decreed condition. A condition similar to the SRBA decreed alternate point of diversion condition will be added to those water rights which previously did not include an alternate point of diversion condition if the location information is available to the Department.

The administration condition does not identify which points of diversion are alternate points of diversion, which is pertinent information for a transfer with regard to potential injury claims by other water rights. The Department will also include the following condition for each right in the Transfer as follows:

Transfer _____ authorizes additional Well No(s) _____ located in T _____, R _____, S _____, _____ as a point(s) of diversion under this right as of the date of approval.

In a basin wide curtailment action by the Department encompassing all the points of diversion in the entire Meridian system, the alternate point of diversion conditions would have no impact on Meridian because the city would only be required to curtail its junior water rights, but would retain flexibility to use its remaining senior water rights at alternate locations. *See* Brief for Respondent at 9, fn. 2, *City of Pocatello v. State of Idaho*, (S.Ct. Doc. No. 37723-2010).² In a limited curtailment action by the Department that does not encompass all the points of diversion in the Meridian system, the 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. *See id.*

With regards to well-to-well interference issues, the alternate point of diversion conditions ensure that if, at some time in the future, a well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the Meridian well, alleges injury from pumping water from the Meridian well, and Meridian's increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, Meridian will be required to reduce pumping to not cause interference. *See Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights in SRBA* subcase 29-271 *et al* (April 17, 2006), at 14. Meridian cannot pump water from alternate points of diversion to the detriment of other existing well owners. But this condition does not mean "the City will never be able to assert the priority dates of its water rights at the new points of diversion approved under the transfer against any other water right" as suggested by Meridian. *Exceptions* at 6.

² Available on Westlaw at 2011 WL 3512891.

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Surface Water First Condition

Meridian suggests the Director lacks the authority to impose the Surface Water First condition on water rights on which the condition was not imposed prior to the approval of the Transfer. *Exceptions* at 8. Meridian argues "the 'Surface Water First' condition constitutes the impermissible restriction of a valid property right, and should be removed from those rights where it was not present prior to approval of Transfer no. 79778." *Id.* at 9.

Idaho Code § 42-222 requires that the Department "examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided...the change does not constitute an enlargement in use of the original right, [and] the change is consistent with the conservation of water resources within the state of Idaho..." Idaho Code § 42-222(1). Prior to the Transfer approval, six of the city's 26 water rights involved in the Transfer included a condition requiring the use of available surface water to be used prior to the diversion of ground water. The condition helps conserve Idaho's ground water (which is a limited resource in certain areas and which is generally a higher quality water source) by requiring that surface water be used first when available for irrigation use.³ The Transfer authorizes Meridian to use its city wells as alternate points of diversion for each of its 26 water rights. The effect of the Transfer is that Meridian can more easily divert ground water at any location under any of its water rights. This raises the potential for Meridian to circumvent the requirement to use surface water first on lands historically irrigated under the six water rights with the condition because Meridian could assert that the water is diverted under a right without the Surface Water First condition. It also raises the potential to enlarge the use of ground water under Meridian's rights in lieu of available surface water because Meridian could use ground water in situations where it had been restricted to using surface water in the past. The Surface Water First condition is necessary to ensure that approval of the Transfer will not be inconsistent with the conservation of water resources within the State and will not enlarge the water rights being transferred. The Department is not limited in its use of conditions to those that existed under each right prior to the Transfer so long as conditions are added to ensure statutory criteria for a transfer can be met. The Surface Water First condition is necessary to ensure that the statutory criteria of Idaho Code 42-222 are met.

Meridian argues that "imposition of the 'Surface Water First' condition may prevent the City from flexibly using its water rights to ensure compliance under future water quality regulations." *Exceptions* at 8. Meridian desires to use lower quality water from certain wells for irrigation use to ensure higher quality water is available for culinary purposes. Additionally, Meridian desires to maintain natural ground water pressure gradients in the aquifer by continuing to pump the lower quality water for irrigation to reduce migration of the lower quality water into other areas. *Exceptions* at 8-9. The Director disagrees that the surface water first condition reduces flexibility. The condition does not restrict which wells or ground water rights can be used for irrigation, it only ensures that the status quo is maintained regarding use of surface

³ The strong public policy in favor of the use of surface water first when both ground water and surface water sources are available is also reflected in Idaho's land use code. Idaho Code § 67-6537 provides, in relevant part, that "[a]ll applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." Idaho Code § 67-6537(1).

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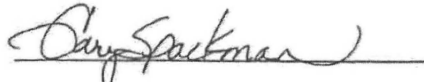
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water on lands where surface water is available and has been historically used. The surface water first condition includes an exception where the use of surface water was replaced by the use of ground water diverted in connection with each right before the approval of the Transfer.

ORDER

IT IS HEREBY ORDERED that Transfer No. 79778 is APPROVED with amended conditions as shown in the accompanying approval document.

Dated this 4th day of October, 2016.


GARY SPACKMAN
Director

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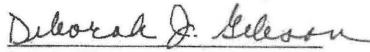
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of October 2016, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Exceptions and Amending Transfer Approval and Explanatory information to accompany a Final Order

CITY OF MERIDIAN
33E BROADWAY AVE
MERIDIAN, ID 83642

CHARLES HONSINGER
HONSINGER LAW PLLC
P O BOX 517
BOISE, ID 83701



Debbie Gibson
Administrative Assistant

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Appendix C KETCHUM ORDER

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 80621 IN THE NAME OF
CITY OF KETCHUM

ORDER ADDRESSING
EXCEPTIONS AND AMENDING
TRANSFER APPROVAL

PROCEDURAL HISTORY

On March 4, 2016, the Idaho Department of Water Resources ("Department") issued a preliminary order approving Transfer No. 80621 ("Transfer") authorizing the City of Ketchum ("Ketchum") to divert ground water for municipal purposes from seven wells under each of their seven water rights. The Transfer included the following as a condition of approval ("Condition #3"):

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, this right retains its original priority for well locations authorized under this right as identified in the decree dated 6/29/11.

On March 18, 2016, Ketchum filed a petition for reconsideration of the order ("Petition"). After communication between Ketchum and the Department to clarify Condition #3, the Department issued an order denying the Petition on April 8, 2016.

On April 22, 2016, Ketchum filed its *Exceptions to Preliminary Order for Transfer Approval* ("Exceptions").

EXCEPTIONS TO PRELIMINARY ORDER

Ketchum takes exception with Condition #3 and argues:

1. Condition #3 is vague, over-broad, and confusing.
2. The Department has been applying this condition inconsistently and should first set forth a policy that states the circumstances which warrant this Condition.

Exceptions at 3.

Ketchum requests that the Department strike Condition #3 or substitute language to clarify when limited pumping would be imposed. *Id.*

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The Transfer authorizes Ketchum to use its city wells as alternate points of diversion for each of its municipal water rights. The effect of the Transfer is that Ketchum can divert its most senior rights from any of its wells. This raises the potential for injury to other water rights existing prior to the Transfer, either due to local interference between wells or due to a geographically limited¹ delivery call. Condition #3 was applied to each right in the Transfer to identify well locations associated with the priority date under each right in the event administration of rights becomes necessary.

The language in Condition #3 is substantially similar to language used by the Department which was upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830 (2012). In that case, the Court agreed with the Department that the condition was necessary to assist in the administration of water rights and to avoid injury to other water rights. *Id.* at 835.

Ketchum argues that, in *City of Pocatello*, "the Court held that the condition was necessary during priority administration in order to protect from physical interference between water rights during time of shortage" and therefore the "condition would only apply during priority administration during a water delivery call." *Exceptions* at 3-4 (emphasis in original). Ketchum equates "priority administration" to "a water delivery call." Ketchum suggested an alternate condition that would limit application of the condition to "priority administration during delivery calls." *Id.* at 4

Ketchum seeks to impose a limitation that is not imposed by the Idaho Supreme Court in *City of Pocatello* and is not consistent with the record in that case. Ketchum's argument focuses on one section of the Court's decision and seeks to limit the condition to its application only in a delivery call. The problem with this interpretation is that the Court in *City of Pocatello* did not limit the application of the condition to just a delivery call situation. To the contrary, the Court recognized that the key consideration is injury to senior priority water rights. As the Court recognized, "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *City of Pocatello*, 152 Idaho at 835. The reason for the condition was to address well interference issues and mitigation requirement for aquifer wide regulation. *Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Application of the condition is not limited to just a delivery call. The Director disagrees with the narrow application of the condition suggested by Ketchum because it would preclude application in a well interference situation.

Idaho Code § 42-222 requires that the Department "examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby..." The Department is not limited in its use of conditions to protect from injury only during a delivery call. Application of Condition #3 should be applied broadly to any situation where the approval of alternate points of diversion under a water right for a municipality has the potential to injure other rights. The condition should be applied to municipal rights specifically, because municipal rights generally identify (or have the potential to identify) a much larger place of use than other water rights and injury

¹ The condition helps ensure that a municipality cannot circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area to protect junior priority wells within the curtailment area.

situations may not arise for years or even decades due to the growing service area of a municipality.

Ketchum also argues that the Department's application of Condition #3 to municipalities is inconsistent, and therefore arbitrary. *Exception* at 5. Ketchum submitted a list of transfers approved by the Department for municipalities that either included the condition or did not include the condition without explanation. Ketchum believes the Department should develop a policy to guide the Department and inform the public regarding use of the condition.

The Department's Administrator's Memorandum – Transfer Processing No. 24 dated December 21, 2009 includes the following policy statement (see p. 24):

An application for transfer that is approved to provide alternate points of diversion from ground water under one or more municipal water rights to develop or expand a common delivery system shall include conditions of approval to identify the point(s) of diversion authorized under each right prior to the transfer. The purpose of the condition is to provide for future administration of water rights in situations where increased municipal pumping over time is determined to cause injury through interference with other nearby wells.

The Department's policy states that the purpose of the condition is to address injury through interference with other nearby wells. The policy does not expressly address injury due to delivery calls. Nonetheless, Condition #3 should address possible injury due to delivery calls. The policy statement instructs staff to include a condition when alternate points of diversion are added to a municipal right through a transfer.

The Director agrees that Condition #3 should be applied consistently. Absence of the condition would not excuse a municipal right holder from a determination of injury due to the use of alternate points of diversion. Inconsistent use of the condition on transfer approvals is not justification for an applicant to injure a senior water right. The condition is not arbitrary.

FURTHER ANALYSIS ON REVIEW

Ketchum asserts that Condition #3 is vague, over-broad and confusing. There is no substantive difference between the language in Condition #3 and the language in the condition upheld by the Idaho Supreme Court in *City of Pocatello*. Ketchum seems to believe otherwise, however. To remove any question regarding the language, however the Director will edit the Transfer approval. First, those water rights decreed in the SRBA with an alternate point of diversion condition (for example water right no. 37-2628) will retain the decreed condition identifying where ground water was first diverted under the water right. Second, for those water rights which previously did not include an alternate point of diversion condition (for example, water right no. 37-4413), a condition similar to the SRBA decreed alternate point of diversion condition will be added if the location information is available to the Department. Third, the Department will include the following condition for each right in the Transfer as follows:

Transfer _____ authorizes additional Well No(s) _____ located in T_____, R_____, S_____, _____ as a point(s) of diversion under this right as of the date of approval.

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The additional condition is necessary to identify which points of diversion are alternate points of diversion authorized by the Transfer, which is pertinent information for a transfer with regard to potential injury claims by other water rights.

Ketchum further asserts the condition should be removed because the Department has not explained "in what circumstances Condition #3 will be imposed." *Exceptions* at 4. The record in the City of Pocatello provides information on how the condition operates. In a basin wide curtailment action by the Department encompassing all the points of diversion in the entire Ketchum system, the alternate point of diversion conditions would have no impact on Ketchum because the city would only be required to curtail its junior water rights, but would retain flexibility to use its remaining senior water rights at alternate locations. See Brief for Respondent at 9, fn. 2, *City of Pocatello v. State of Idaho*, (S.Ct. Doc. No. 37723-2010),² In a limited curtailment action by the Department that does not encompass all the points of diversion in the Ketchum system, the 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 Ketchum 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. See *id.*

When well-to-well interference is an issue, the alternate point of diversion conditions ensure that if a well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the Ketchum well, alleges injury from pumping water from the Ketchum well, and Ketchum's increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, Ketchum will be required to reduce pumping to not cause interference. See *Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Ketchum cannot pump water from alternate points of diversion to the detriment of other existing well owners.

For the reasons stated, the Department will not remove the alternate point of diversion conditions, but will amend the transfer approval as discussed above.

ORDER

IT IS HEREBY ORDERED that Transfer No. 80621 is APPROVED with amended conditions as shown in the accompanying approval document.

Dated this 27th day of October, 2016


GARY SPACKMAN
Director

² Available on Westlaw at 2011 WL 3512891.

CERTIFICATE OF SERVICE

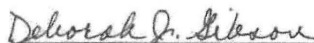
I HEREBY CERTIFY that on this 27th day of October 2016, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Exceptions and Amending Transfer Approval and Explanatory information to accompany a Final Order

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Deborah Gibson
Administrative Assistant

Order Addressing Exceptions and Amending Transfer Approval

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**EXPLANATORY INFORMATION TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Revised July 1, 2010

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

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Appendix D IDAHO BRIEF

CITY OF POCATELLO, Appellant, v. The State of Idaho, ..., 2011 WL 3512891...

's

2011 WL 3512891 (Idaho) (Appellate Brief)
Supreme Court of Idaho.

CITY OF POCATELLO, Appellant,
v.
The State of Idaho, Respondent.

No. 37723-2010.
July 25, 2011.

Appeal from the Snake River Basin Adjudication, Fifth Judicial District of the State of Idaho, in and
for the County of Twin Falls In the Matter of SRBA Case No. 39576 Subcase Nos. 29-00271 et al.,
Hon. Eric J. Wildman, District Court Judge, presiding.

Brief for Respondent

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Attorneys for Respondent: Clive J. Strong, ISB No. 2207, Shasta Kilminster-Hadley, ISB No. 7889, Idaho
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IMAP WRAP-UP NOTES (10/9/2023)

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*1 I. STATEMENT OF THE CASE

A. Nature of the Case

This is a water rights case on appeal from the Snake River Basin Adjudication ("SRBA") District Court. Pocatello appeals the SRBA District Court's *Order on Motion to Alter or Amend* (R. 5250-71) its *Memorandum Decision and Order on Challenge* (R. 5125-56). In its *Order on Motion to Alter or Amend*, the SRBA Court held that the Special Master did not err by 1) conducting a hearing on injury absent a third-party objection to Pocatello's accomplished transfer claim; 2) recommending a condition to address injury; 3) rejecting Pocatello's claims that its ground water wells should be alternate points of diversion for its surface rights; and 4) recommending water right 29-7770 with an irrigation purpose of use. The Court further held that pre-1969 water rights are subject to the no-injury rule and thus are not exempt from investigation of injury by the Director. The SRBA Court also affirmed its adoption of the Special Master's findings of fact that the City's surface water rights and groundwater wells do not divert from the same source and the recommended priority dates of water rights 29-13558 and 29-13639.

B. Course of Proceedings Below and the Facts

1. Proceedings in the Snake River Basin Adjudication ("SRBA")

The water rights at issue here were claimed in 1990 by the City of Pocatello. (R. 4502-13). Following the issuance of the Director's Reports in 2003 (R. 1-62), Pocatello filed an objection to each water right recommendation (R. 78-262). The State of Idaho, and later the Surface Water Coalition ("SWC") filed responses to the City's objections (R. 456-568 and R. 1927-2343, respectively). Following summary judgment proceedings *2 and a trial, the Special Master issued a *Master's Report and Recommendation and Order on Motion to Reconsider* (R. 4553-4739), in which she recommended: 1) that the condition imposed by the Director be maintained to prevent injury to existing water rights; 2) that the City's groundwater wells NOT be recommended as alternative points of diversion for Pocatello's surface water rights; 3) that water right 29-7770 be decreed with an irrigation purpose of use; and 4) that the priority date for water right no. 29-13558 be decreed as recommended by the Director, while the priority of water right 29-13639 be decreed with a priority date one day earlier than the Director recommended. The Special Master subsequently issued an *Amended Master's Report and Recommendation and Order on Motion to Reconsider*, amending the place of use description for Pocatello's municipal rights (R. 4743-4818).

On May 28, 2008, the Special Master issued an *Order Denying Motion to Alter or Amend* (R. 4881-89), and on June 11, 2008, Pocatello filed a *Notice of Challenge to the Master's Report and Recommendation* (R. 4890-96). On April 10, 2009, United Water of Idaho, City of Nampa and City of Blackfoot filed a *Motion for Leave to Participate or to Participate as Amici Curiae* (R. 4959-67). The SRBA District Court granted the *Motion to Participate as Amici Curiae* (R. 4987-91). After oral argument on the Challenge, the SRBA District Court issued its *Memorandum Decision and Order on Challenge*, on November 9, 2009, affirming the order of the

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Special Master (R. 5125-56).

On November 23, 2009, Pocatello filed a *Motion to Alter or Amend the Memorandum Decision and Order on Challenge* (R. 5157-61). Following a hearing, the SRBA Court denied the Motion, affirming its decision in the *Memorandum Decision and Order on Challenge* (R. 5250-71). Pocatello filed a *Notice of Appeal* with the Idaho *3 Supreme Court on May 24, 2010, and an *Amended Notice of Appeal* on July 9, 2010 (R. 5272-92).

2. Statement of the Facts

This case concerns state based water rights claimed by the City of Pocatello. The water rights are used to provide municipal water service to water users and residents of the City of Pocatello, and to service its airport facility. Water for the in-town service is supplied through an interconnected system of 22 wells through which 21 ground water rights are diverted. Pocatello claims the wells, developed at different times and in different locations, as alternative points of diversion for each of its 21 ground water rights. Pocatello seeks the right to divert water under its most senior ground water rights from any of its wells. Additionally, Pocatello holds 4 surface water rights that divert from Mink Creek and Gibson Jack Creek, which are both tributary to the Portneuf River and the Lower Portneuf River Valley Aquifer ("LPRVA"). The LPRVA is the source of the City's ground water rights. Pocatello claimed its 22 groundwater wells as alternative points of diversion for the four surface water rights as well.

IDWR recommended the ground water rights with alternative points of diversion, but included a condition it deemed necessary to prevent injury to other water users:

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 Pocatello well [description] in the amount of cfs.

IDWR did not recommend Pocatello's ground water wells as alternative points of diversion for the City's surface water rights. The City objected to the inclusion of the condition and to the denial of alternative points of diversion for its surface water rights. No third-party *Objections or Responses* to IDWR's recommendation were filed.

*4 Pocatello's water right no. 29-7770 was licensed in 2003 with a purpose of use of irrigation. *Appellant's Opening Brief* at 16. IDWR recommended the right consistent with the license, as an irrigation right (R. 42). Pocatello objected to the Director's recommendation (R. 390-395).

Pocatello claimed a priority date of June 30, 1905 for water right no. 29-13558 (R. 856) based on newspaper articles about the history of the cities of Alameda and Pocatello (R. 7656-7664). IDWR recommended a priority of July 16, 1924, one day before the City of Alameda was established (R. 48). Similarly, Pocatello claimed a priority date of December 31, 1940 for water right no. 29-13639 (R. 870). IDWR recommended a priority date of October 22, 1952, based on the application date for the water right permit (R. 61). The Special Master recommended the right with a priority of October 21, 1952 (R. 4764).

II. ISSUES PRESENTED

The issues presented, as framed by the Respondent, are as follows:

A. Whether the District Court erred in affirming the Special Master's finding that the City of Pocatello's interconnected municipal groundwater rights should include a condition indicating the original point of diversion and priority date.

B. Whether the District Court erred in affirming the Special Master's determination that the City of Pocatello's groundwater wells could not be designated alternative points of diversion for the City's surface water rights.

C. Whether the District Court properly found that transfers of water rights developed prior to 1969 are subject to the same no-injury requirement as transfers of post-1969 water rights.

D. Whether the District Court properly upheld the Special Master's finding the purpose of use of water right 29-7770 is irrigation.

E. Whether the District Court properly upheld the Special Master's findings as to the priority dates of water rights 29-13639 and 13558.

*5 F. Whether respondents should be awarded attorney fees and costs on appeal.

III. STANDARD OF REVIEW

The District Court is required to adopt the special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In turn, the special master's findings of facts, which are adopted by the SRBA district court, are considered to be the findings of the SRBA district court. I.R.C.P. 52(a); *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001). The findings of the district court will not be set aside on appeal unless clearly erroneous. I.R.C.P. 52(a). The standard for review of the trial court's findings of fact is whether they are supported by substantial, although conflicting, evidence. *Rasmussen v. Martin*, 104 Idaho 401, 404, 659 P.2d 155, 158 (Cl.App.1983).

"The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive." *State v. Hagerman Water Right Owners*, 130 Idaho at 740, 947 P.2d at 413 (1997). The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court. *McCray*, 135 Idaho at 513, 20 P.3d at 697. This Court freely reviews the SRBA district court's conclusions of law. *Id.*

IV. ARGUMENT

A. The District Court did not err in affirming the Special Master's finding that the City of Pocatello's interconnected municipal groundwater rights should include a condition indicating the original point of diversion and priority date

The District Court correctly affirmed the Special Master's recommendation of Pocatello's water rights with the contested condition. The District Court agreed that the condition is necessary to prevent injury to other water rights from the City's use of *6 alternative points of diversion (R. 5135-40). The Court also held that the Director has the authority to impose the condition, pursuant both to Idaho Code § 42-1411 and 42-1425, and that the Special Master correctly inquired into whether injury to other water rights would occur, despite no third-party objections to the claims (R. 5133-34). Finally, the Court held that the condition would not prevent Pocatello from diverting water under senior rights for which the original point of diversion no longer exists (R. 5143).

1. A condition indicating the original point of diversion and priority date is necessary to prevent Pocatello from using alternative points of diversion to undermine the priority of other water users.

The City of Pocatello claimed all of its wells as alternative points of diversion for each of its groundwater right claims (R. 4502-13). The effect of claiming municipal rights with alternative points of diversion is to allow the City to divert any of its water rights from any of its wells. The Idaho Department of Water Resources ("IDWR") recommended the ground water rights with the alternate points of diversion, but included a condition stating:

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To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface waters, groundwater was first diverted under this right from Pocatello well (legal description) in the amount of ____ cfs.

(R. 10-62). At trial, the Director of IDWR at the time, David Tuthill, testified that the condition is necessary to protect other water users from injury. He explained the concerns that led to the recommendation of the condition on rights claimed with alternative points of diversion:

*7 Our understanding of our responsibility through the adjudication is to appropriately condition a water right so that it cannot be expanded over time inappropriately...The two areas that we were concerned about were, number one, well interference that could happen in the future as a result of increased pumping at wells and, secondly, conjunctive administration concerns relative to diversion from one location as compared with diversion from another location.

Tr. Vol. II, p. 231, L. 24 through p. 232 L. 25¹ Pocatello objected to the condition, stating that there was no injury to other water users as a result of the City's interconnected well system, in place prior to 1987. As a result, the Special Master was required to investigate whether the condition was necessary to avoid injury to existing water rights. As explained by the District Court in its *Memorandum Decision and Order on Challenge*, "[i]n this case an objection was filed by Pocatello, appropriately triggering an inquiry into injury." (R. 5135).

¹ Citations to the transcript from the trial are identified as "Tr. ____."

Pocatello argues that the Special Master erred in finding that the condition is necessary to prevent injury to existing water rights. The District Court disagreed, finding that the Special Master correctly applied the legal principles of what constitutes injury to a water right. The Court found that: Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case, a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved. The Special Master correctly acknowledged this principle: "Where a change or transfer would undermine a priority date, the injury is real and material even if the damage is not immediately manifest. In a prior appropriation system, undermining a priority date is a seminal injury. Thus the condition appears to correctly protect juniors from injury to their priorities."

*8 (R. 5139). The District Court affirmed the Special Master's conclusions of law as to the nature of injury to the priority of water rights and adopted the Special Master's findings of fact that recommending Pocatello's rights with alternative points of diversion without the condition would cause such injury. (R. 5153)

The City of Pocatello has provided no evidence that the Court's findings of facts as to injury to priority are clearly erroneous. Pocatello has also failed to disprove the Court's legal conclusion that a diminishment of priority is a seminal injury that occurs at the time a transfer is approved. Rather than address the well reasoned finding of the Court as to the real and immediate injury to priority that would occur upon approval of the accomplished transfer, the City maintains that the Court is simply concerned with future, speculative injury.

Pocatello offers no rebuttal to the assertion that, were its rights recommended without the condition, the effect would be to diminish the priority of others. Instead, it maintains that its settlement with the Surface Water Coalition ("SWC") "should ameliorate IDWR's concerns about injury." *Appellant's Opening Brief* at 34. This

constitutes a tacit acknowledgement that the operation of its water rights without the stipulation would cause injury to existing water users. The agreement between Pocatello and the SWC requires that the City seek administrative approval before increasing its well capacity (R. 6574-76). Pocatello ignores that the stipulation is only binding on Pocatello and the SWC, may be dissolved at the whim of the parties and is not be enforceable by IDWR.

Pocatello's agreement with the SWC also fails to address the need for the condition in times of regional administration, when there is geographically limited *9 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 of the condition in this scenario is clear, without it, the City could use alternative points of diversion to undermine the curtailment.²

² The condition would have no impact on Pocatello's ability to divert under its water rights in the most likely administration scenario—curtailment applicable to all wells and water rights serving the City. In such a broad, area-wide curtailment scenario, IDWR, to protect the senior rights of downstream water users could order the curtailment of all water rights junior to a certain date in order to protect the senior rights of downstream water users. In that event, the condition would have no impact because the curtailment would be based strictly on the priority of Pocatello's rights. The City's junior rights could simply not be diverted, while the City's senior rights could be pumped from any well within the municipal system. Indeed, this is a key reason for recognizing alternative points of diversion—a benefit that is not undermined by the contested condition.

Pocatello fails to show that the District Court's findings of fact on the subject of injury are not supported by substantial evidence. On the contrary, the assertion by the City that its agreement with the SWC will prevent injury bolsters the finding that injury would occur in the absence of the agreement. The Court's conclusions of law are similarly supported by substantial evidence and by Idaho law. Therefore, the Court's findings and conclusions should be affirmed.

2. The Director has authority to impose this descriptive condition on Pocatello's water rights.

The City of Pocatello argues that IDWR lacked the authority to recommend the City's water rights with the above-cited condition because it had not previously recommended that other municipal water rights with alternative points of diversion include such a condition³. The fact that other rights recommended earlier in the SRBA were not similarly conditioned is irrelevant to whether this condition is necessary for the *10 City of Pocatello's rights. Here the condition has been shown to be necessary to prevent injury to other water users diverting from the common source.

³ Subsequent to the City of Pocatello's recommendations, IDWR has included the alternative points of diversion condition in water right recommendations for municipal providers with interconnected systems.

Additionally, a greater understanding of conjunctive administration has a direct impact on what the Director deems necessary for administration of a right today as opposed to the past. To force the Director to adhere to past practices despite a better understanding of the principles of conjunctive administration would prevent him from fulfilling his statutory obligations. It would also leave Idaho's water resources mired in a system of acknowledged misconceptions and archaic principles in an area of water resource management that is rapidly evolving in Idaho. The Director must be able to bring to bear his expertise in processing water right claims, and that expertise necessarily expands and evolves with new developments in water resource management and in the law. Pocatello's claim that the Director cannot condition its water rights because it did not recommend the same condition in 2003 on other municipal rights is therefore unavailing.⁴

⁴ It is also worthy of note that the Amici Curiae in this subcase are themselves municipal providers (United Water of

Idaho, City of Nampa and City of Blackfoot), who described in detail in their Amicus Brief the injury to the priority of other water users that would result in the absence of the recommended condition. (R. 4968-78)

3. The District Court did not err in affirming the Special Master's finding that, absent the condition recommended by IDWR, the proposed accomplished transfers would injure other water rights.

The City of Pocatello argues that the Court should reverse the District Court and Special Master's finding that the proposed accomplished transfers injure other water users. *Appellant's Opening Brief* at 30-38. Pocatello contends that the statute authorizing accomplished transfers limits inquiry into injury to situations where a party "11 objects to the transfer. *Appellant's Opening Brief* at 32. This is an incorrect reading of the accomplished transfer statute. Idaho Code § 42-1425 provides a means for memorializing previously unauthorized/undocumented transfers in the SRBA. It states that certain changes to a water right may be claimed in a general adjudication "provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right." These changes must have occurred prior to the commencement of the SRBA, that is to say prior to November 19, 1987. The statute goes on to outline the procedure for dealing with objections to a change under the statute, but does not limit inquiry into injury to only those cases where there has been an objection.

As the SRBA District Court pointed out, Idaho Code § 42-1425 "does not eliminate the Director's authority and statutory duty to investigate the claim and file a Director's Report." (R. 5133). Rather, it permits the Director to recommend that a water right be claimed as it was exercised as of the commencement of the SRBA, so long as no injury to other rights resulted from the change. This allows the Director the flexibility to recommend accomplished transfers without denying such changes on the procedural basis that no formal transfer occurred. It does not create a scenario whereby all changes will be accepted as claimed without investigation by IDWR or verification that the criteria of Idaho Code § 42-1425 have been met. In addition to not causing injury to existing water rights, the accomplished transfer does not authorize an enlargement of the right.

Idaho Code § 42-1425 was held constitutional in *"12 Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.,* 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Basin-Wide Issue No. 4), precisely because of its built-in protections against injury and enlargement. This no-injury premise is critical to the accomplished transfer. Without it, the accomplished transfer statute would be unconstitutional. Accordingly, the Department is duty-bound to ensure that in recognizing any accomplished transfer, injury is avoided.

Contrary to the argument advanced by the City of Pocatello, the absence of objections to a proposed accomplished transfer does not absolve the Director of his duty to investigate whether a proposed accomplished transfer complies with the statutory criteria described above.

As the SRBA District Court stated:

Nowhere does the statute require IDWR to accept Pocatello's claim as a prima facie showing of compliance with the statutory criteria nor does Idaho Code § 42-1425(2) limit these criteria to the circumstance where an objection is filed by a third party. This would potentially eliminate any review by the Director as contemplated under I.C. § 42-1425 (1)(c).

Although the amnesty provisions of I.C. § 42-1425 waive the application of the formal transfer requirements, the purpose of the statute is not to put the claimant in a better position than had the transfer requirements been followed by overlooking whether the transfer results in injury or enlargement in the absence of an objection by a third party."

(R. 5134). This Court has addressed this issue before in *Barron v. IDWR*, in which it held that IDWR was not required to accept a transfer applicant's showing of compliance with the transfer statute without an examination, simply because no objections were filed. 135 Idaho 414, 421-422, 18 P.3d 219, 226-227 (2001).

In addition to misconstruing the Director's authority under Idaho Code § 42-1425, the City of Pocatello fails to address the Director's statutory duty to investigate water right claims and file a Director's Report on the nature and extent thereof, pursuant to *13 Idaho Code §§ 42-1410 and 42-1411, respectively. The Director is authorized to include in his Report "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." Idaho Code § 42-1411.

As discussed above, the Director provided evidence that recommending Pocatello's rights with alternative points of diversion without a condition limiting diversion by priority and diversion rate would be injurious to other existing water rights. (R. 892-894; Tr. Vol. II, p. 231, L. 24 through p. 232 L. 25). The language in the condition merely serves to maintain the priority associated with each of the City's rights while allowing the flexibility and efficiency of an interconnected well system. This is a necessary protection of other existing water users and for the Director's administration of the water right, and does not affect Pocatello's rights adversely. In fact, the condition merely ensures that the City will exercise its water rights consistent with the prior appropriation doctrine. As noted in the Special Master's Amended Report, IDWR would not have recommended the alternative points of diversion without the condition (R. 4749).

Without the condition, the protection afforded to other water users by the priority date attached to their rights is diminished. As discussed above, the SRBA District Court has held that where the priority of an affected right is diminished, the injury is essentially *per se*. See *Order on Challenge, (A & B Irrigation District)* at 25-26. "Even though the priority administration may occur at some point in the future, the injury to the priority date occurs at the time the accomplished transfer is approved." (R. 5139). The Court made the additional point that:

*14 The condition in no way prevents Pocatello from using its wells as alternative points of diversion for each other. The condition only has significance in the event of priority administration at which time the senior priorities of existing users are protected. The very fact that Pocatello contests the condition is an acknowledgement that without the condition the priorities of existing water rights will be diminished in favor of the alternative point of diversion for one of Pocatello's more senior rights... The Special Master also acknowledged this point - "[i]f, as Pocatello argues, the alternative points of diversion cause no injury to juniors, then the condition should not affect Pocatello's rights." Amended Master's Report and Recommendation and Order on Motion to Reconsider at 19.

(R. 5140-5141).

The SRBA District Court was correct in finding that the injury analysis conducted by the Special Master was appropriate as a matter of law. The Special Master's findings of fact with regard to the necessity of the condition are well supported in the Amended Report, and therefore were properly adopted by the District Court.

4. The condition does not prevent Pocatello from effectively and efficiently delivering water to its municipal customers, even in cases where the original point of diversion listed no longer exists.

Pocatello argues that IDWR erred in recommending the above-cited condition on water rights that were first diverted from wells that no longer exist. The State disagrees. *Appellant's Opening Brief* at 23. In cases where the original point of diversion of a water right is no longer in use, the condition is nonetheless necessary to document both the quantity of water diverted under the right and its original point of diversion. To explain this, it is helpful to examine a hypothetical scenario. First, assume a municipality has Water Right #1, which was developed at Well A in 1955 for 2.0 cfs. Next, assume you have a domestic water user with Water Right #2, which was developed at Well B in 1970, several miles away from Well A. Now assume that the municipality has Water Right #3, which was developed in 1980 at Well C for 1.5 cfs and that Well C is near Well B. *15

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Further assume that the municipality's water delivery system is interconnected and Water Right #1 lists both Well A and Well C as points of diversion. Finally, assume Well A is eventually abandoned by the municipality and the municipality now wants to divert the full 3.5 cfs through Well C.

Under the above hypothetical, if the increase in pumping from Well C from 2.0 cfs to 3.5 cfs causes well interference for owner of Well B, the owner would be precluded from getting relief from that injury without IDWR's recommended condition on the water rights because there would be no record of the original development for these interconnected water rights. Thus, IDWR's recommended condition protects other water users by identifying how much water was developed under each water right at each original well. Without this history, IDWR could not evaluate injury to other water rights if a municipality consolidates its water rights at fewer wells. A municipality could argue that they are entitled to withdraw the full 3.5 cfs of their water rights without concern for the historical diversion rate. And while the increase in pumping in the hypothetical scenario above is small, the cumulative impact of consolidation could be much greater for municipalities who hold a large portfolio of interconnected water rights. The condition recommended by IDWR ensures that consolidation of water rights at individual wells will not injure other water rights.

The original legal description for the wells also comes into play in times of geographically limited administration. The original legal description is important so that senior water rights developed outside the area of administration are not transferred into the area of administration. If Water Right #1 was developed at Well A, which was outside the current area of administration, while Water Right #3 was developed inside the "16 area of administration at Well C, the Department would view the use of Water Right #1 at Well C as injury to water right rights within the area of administration that have a priority date between Water Right #1 and Water Right #3, such as Water Right #2.

Pocatello complains that listing non-operating wells would mean that it could not divert under its most senior rights. *Appellant's Opening Brief* at 23, 49. On the contrary, each of those rights lists 22 points of diversion, representing the City's 22 operating wells, under which it can be used. As the SRBA Court explained:

To the extent Pocatello's use of the right through an alternative point of diversion interferes with the well of an existing right then Pocatello has still the option of diverting from other wells not causing interference. This is no different than with Pocatello's other rights. In the event of regional administration, Pocatello could still divert from alternative points of diversion within the region subject to administration, provided the original well no longer in operation is also located within that same region and is senior to the priority being regulated. This is also no different than with any of Pocatello's other rights. Pocatello is correct that to the extent the well no longer in operation is located outside of the area of regulation, Pocatello would not be able to revert back to the original well to avoid regulation as the well is no longer in operation. Pocatello would still be able to divert the right from alternative wells, if any, located outside the area of regulation.

(R. 5144). The original well is listed because, if administration of the right is necessary, information about the original point of diversion, including location and diversion rate, is needed to ensure that other water users are not injured by the City's use of alternative points of diversion. The scenarios mentioned above provide clear examples in which information about the original well would be necessary for administration of water rights in an interconnected system.

Finally, Pocatello argues that it cannot administer its water rights uniformly because all of its rights have not been recommended with the condition. *Appellant's Opening Brief* at 29. Three of the City's water rights were subject to a formal transfer *17 dated June 28, 1999, which designated 12 alternative points of diversion, and did not include the condition discussed above. (See R. 4761). Because the transfer was issued in 1999, the Special Master concluded that the City could not meet the pre-1987 change requirement necessary for an accomplished transfer under Idaho Code § 42-1425 (R. 4761-62). Therefore, the Special Master's Amended Report states that the points of diversion for those water rights should remain as recommended, and that the water rights should be decreed as in the transfer, without the condition. *Id.* The City contends that this creates

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confusion because "[t]he same wells have the condition in relation to some water rights, but not to others." *Appellant's Opening Brief*, p. 29.

Pocatello's argument is without merit, because it is *water rights* that are conditioned in the SRBA, not wells. A water user can divert water under multiple water rights using the same well. Those water rights may have different priority dates as well as different uses. The fact that three of Pocatello's water rights do not have the condition does not create any confusion, as IDWR administers water by water right, not by conditions placed on individual wells. To the extent that the City would like uniformity in how its water rights are conditioned, it can file an administrative transfer with IDWR to have the condition imposed on the three rights which were not subject to an accomplished transfer.

B. The District Court did not err in affirming the Special Master's determination that the City of Pocatello's groundwater wells could not be designated alternative points of diversion for the City's surface water rights.

The City of Pocatello claimed its groundwater wells as alternative points of diversion for its surface water rights on Mink Creek and Gibson Jack Creek (R. 3812-3823, 816-818). These surface water rights are among the City's most senior rights. *18 The City has ceased to divert surface water from the creeks and instead, seeks to divert groundwater from the Lower Portneuf River Valley Aquifer ("LPRVA"), under these senior water rights.

The City of Pocatello claims that the Special Master erred as a matter of law in finding that the City was required to show that its ground water and surface water rights were diverting from the same source in order to obtain an accomplished transfer for ground water points of diversion. *Appellant's Opening Brief* at 41. The City's rationale is that "[t]he SRBA court has already determined that all sources of water in basin 29 will be administered as connected sources of water within the Snake River Basin, and that all sources of water in basin 29 (except 'Spring tributary to Papoose Creek') will be administered as connected sources of water within basin 29." *Opening Brief*, p. 13.

Pocatello seems to be arguing that *connected* sources of water are to be considered the *same* source of water. This argument is without merit; source is an element of a water right, whereas interconnection of water sources bears on administration of water rights. Pocatello's argument that a water user is entitled to convert a surface water right to a ground water right so long as the sources are connected, carried to its logical conclusion, turns water administration on its head. If Pocatello is correct, a person with a senior priority surface water right at the upper end of the Eastern Snake Plain Aquifer ("ESPA") would be able to divert an equal quantity of water through a ground water well hundreds of miles away at the lower end of the ESPA. This runs counter to the prior appropriation doctrine and counter to administration using the ESPA ground water model. Additionally, there is a vast difference between surface water rights *19 on creeks whose water levels vary drastically throughout the year, and the relatively constant, reliable supply provided by groundwater.

The City construes the Special Master's investigation into the source element of the subject water rights as an error as a matter of law, claiming that *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2006) prohibits judicial intervention into issues of interconnection. *Appellant's Opening Brief* at 43. This is a mischaracterization of the Court's comments in that case. The issue in *American Falls* was a facial challenge to the constitutionality of the conjunctive management rules. This Court did not address what the SRBA can or should consider in issuing a partial decree; the *American Falls* decision merely stated that a "partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source." *American Falls*, 143 Idaho at 877, 154 P.3d at 448.

Furthermore, in this matter, the Special Master was not determining a degree of interconnection for purposes of administration, but whether the ground water and surface water rights were diverting from the same source. Source is an element of a water right and completely within the purview of the SRBA District Court.

The City of Pocatello asserts its ground water wells as alternative points of diversion for its senior surface water rights, claiming an accomplished transfer under Idaho Code § 42-1425. *Appellant's Opening Brief* at 38-39. Idaho Code § 42-1425(2) states in part as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this *20 state, [1] prior to November 19, 1987, ... may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided [2] no other water rights existing on the date of change were injured and [3] the change did not result in an enlargement of the original right.

The statute, however, does not allow for a change in the source element. As the SRBA District Court stated in its *Memorandum Decision and Order on Challenge*:

The accomplished transfer provisions of Idaho Code § 42-1425 authorize changes to the "place of use, point of diversion, nature or purpose of use or period of use" but does not expressly authorize a change to the source element. Presumably for the very reason that the injury to the water rights of existing water users on the "new" source is *per se*. A change in source is essentially the appropriation of a new water right. However, in the case of a new appropriation the priority date is junior to those of existing users on the new source while a transferred right retains its original priority thereby shifting the schedule of existing priorities on the new source resulting in injury to existing priorities.

(R. 5146). Thus, if Pocatello's groundwater wells are not drawing from the same source as its surface water rights, an accomplished transfer is not authorized by the statute. The City of Pocatello does not appear to dispute that a change in source is not authorized by Idaho Code § 42-1425, rather it claims that because its Basin 29 rights are connected, there would be no change in source if its ground water wells were used to divert water under its surface water rights. *Appellant's Opening Brief* at 42-45.

The groundwater rights in question, as claimed by Pocatello, divert from the LPRVA while the surface water rights divert from Mink Creek and Gibson Jack Creek (R. 801-70, 3812-20). IDWR's Senior Water Agent and Manager of the Adjudication Technical Section, Carter Fritschle, testified that, while the sources were hydraulically connected, the distance between the wells and the creeks (1/4 mile to 1 mile) was great enough that the wells could not be said to be drawing the same water as the surface rights (TR., Vol. I, p. 79, L. 1 - p.80, L.3). Pocatello's expert, Greg Sullivan, testified to the *21 contrary, that the sources are so closely connected as to be essentially the same source (TR. Vol. IV pp. 802-03). The SRBA District Court carefully reviewed the record before the Special Master and concluded that:

the evidence overwhelming [sic] supports the Special Master's finding. Mr. Sullivan testified that 'roughly at least half the supply, if not more is coming from these tributaries. So that would be half the supply of the Lower Portneuf River Valley Aquifer comes from Mink Creek - or primarily comes from Mink Creek and Gibson Jack Creek with some coming from other tributaries.' TR. Vol. IV pp. 801-802. Mr. Sullivan then concludes that because of the existence of this hydraulic connection, Mink Creek, Gibson Jack Creek and the LPRVA are essentially the same source. TR. Vol. IV pp. 802-03. The testimony does not support the conclusion.

(R. 5147). After reviewing the testimony of both witnesses, the Special Master concluded that

"[e] showing that two separate water rights have independent sources or are fed by different springs supports a finding of a separate source...the city wells, although closely connected to the surface creeks, derive water from a different source when they draw from the LPRVA. Although the LPRVA derives a large portion of its water from the two creeks, it derives a significant portion of water from other sources."

(R. 4754). The SRBA District Court, in affirming the Special Master's findings of fact, also pointed out that,

By allowing the transfer the injury to the priority dates of existing ground pumpers would be unavoidable. The two sources are sufficiently disconnected such that ground water pumping has no affect [sic] on the surface sources. While evidence was presented that the two creeks contribute to the aquifer no evidence was presented supporting that the aquifers contribute to the creeks... Pocatello fails to address the issue of the water it would receive from sources other than Mink or Gibson Jack Creek which contribute to roughly the other half of the supply of the aquifer.

(R. 5147-48).

*22 The City has presented no evidence to support rejecting the Special Master's findings of fact. Rather, the City claims that it was an error as a matter of law for the Special Master to investigate whether the City's water rights divert from the same source. *Appellant's Opening Brief* at 42. On the contrary, the SRBA is charged with determining the nature and scope of water rights, including the water source.

The Special Master properly undertook an analysis of the source elements of the City's groundwater and surface water rights to determine if an accomplished transfer of alternative points of diversion was authorized by Idaho Code § 42-1425. After hearing the expert testimony of the City's witness and the Department's witness, the Special Master concluded that such alternative points of diversion would amount to a change in source, which is not authorized by the statute. The District Court properly adopted the Special Master's findings of fact, and properly affirmed the lower court's determination that Idaho Code § 42-1425 does not, as a matter of law, authorize changes in source.

C. The District Court properly found that transfers of water rights developed prior to 1969 are subject to the same no-injury requirement as transfers of post-1969 water rights.

In its Motion, Pocatello claims that the accomplished transfer statute does not apply to changes made to water rights before 1969, when it became necessary to seek a formal transfer for changes to water rights. *Appellant's Opening Brief* at 46. Therefore, the City reasons that the Director has no authority to recommend a condition on water rights based upon such pre-1969 changes. *Id.* at 48.

Contrary to Pocatello's assertion, pre-1969 transfers are subject to an injury analysis. Pocatello argues that, prior to the enactment of Idaho Code § 42-222 in 1969, water right holders could make changes to their rights at will, and therefore, the *23 accomplished transfer statute can only apply to those changes to a water right occurring between 1969 and 1987, the date by which a change must occur to be authorized under Idaho Code § 42-1425. *Appellant's Opening Brief* at 46-48. The City asserts that before the 1969 enactment of Idaho Code § 42-222, which required administrative approval of changes to a water right, water right holders had a constitutional right to change their water rights as they wished. *Id.* Accordingly, the City claims, the Director has no authority to approve or disapprove of changes occurring before 1969 and cannot impose a condition based on an analysis of injury resulting from such changes. *Id.* at 48.

Pocatello's argument is misplaced. First, as the SRBA District Court observed, "[t]he requirement to file an application for a change in point of diversion became mandatory in 1943." (R. 5258). Second, Idaho Code § 42-108 states that a water right holder may change the point of diversion so long as the change does not injure the water rights of others. This limitation has been part of the statute since it was enacted in 1899.

Idaho common law dating from the early 1900's also holds that a person cannot change their water right if others are injured thereby. *Walker v. McGinness*, 8 Idaho 540, 69 P. 1003, 1006 (1902); see also *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741, 745 (1911). "[A] prior appropriator has no right to change the point of diversion, when it will in any manner injure a subsequent appropriator." *Bennett v. Nourse*,

22 Idaho 249, 125 P.1038, 1039-1040 (1912); see also *Crockett v. Jones*, 42 Idaho 652, 249 P.483 (1926).

Pocatello has argued that:

IDWR cannot now retroactively use the provisions of Idaho Code § 42-1425 to place a condition on a water right that would impede a water right *24 holder from diverting water in accordance with changes rightfully accomplished prior to May 26, 1969 because water right holders had a constitutional right to make changes to their water right without prior administrative approval up until May 26, 1969.

(R. 5288). This analysis is incorrect because, as discussed above, prior to 1969, water right holders had a constitutional right to make changes to their water rights only if such changes did not cause injury to other water users. Idaho Code § 42-1425(2) states that changes to water rights occurring prior to 1987 may be claimed in the SRBA "even though the person has not complied with sections 42-108 and 42-222" provided no other water rights were injured. Pocatello hangs its hat on the requirement of administrative approval mandated by Idaho Code § 42-222 but neglects the reference to Idaho Code § 42-108, which has long required that any of the changes permitted therein cause no injury to other water users.

As discussed above, the Special Master properly determined that Pocatello's designation of alternative points of diversion for its water rights causes injury to the priority of other water rights (R. 4758-61). To the extent that such changes occurred before 1969, they are not in compliance with the requirements of Idaho Code § 42-108 or Idaho common law. To the extent that they occurred after 1969, they are not in compliance with Idaho Code § 42-222. In either circumstance, the water right changes, if claimed, come under the purview of Idaho Code § 42-1425. The Director therefore is unquestionably vested with authority to analyze such changes and to recommend the condition thereon.

Finally, Pocatello neglects the language of Idaho Code § 42-1411, which empowers the Director, when recommending a water right, to add such conditions and remarks "as are necessary for definition of the right, for clarification of any element of a *25 right, or for administration of the right..." This authority is distinct from that provided by Idaho Code § 42-1425. As shown in the course of this proceeding, the condition on Pocatello's water rights is necessary for the administration of the rights in times of shortage, under scenarios of both local well interference and regional administration (R. 4758-61, 5139-42). Thus, even without the analysis conducted pursuant to Idaho Code § 42-1425, the Director is empowered to impose the condition as a necessity for administration under the prior appropriation doctrine.

D. The District Court properly upheld the Special Master's finding that the purpose of use of water right 29-7770 is irrigation.

The City of Pocatello argues that the Special Master erred as a matter of law in finding that changing the designated use of water right 29-7770 from irrigation to municipal requires a valid administrative transfer. The Special Master based her determination on the fact that the accomplished transfer statute only applies to changes made to water rights before 1987, and this water right was licensed as an irrigation right in 2003. The City argues that the Special Master can and should change the use designation to correct the Department's "error of law" in designating the use as irrigation. *Appellant's Opening Brief* at 53. Furthermore, the City states that it is not arguing for a change in use for the water right, rather that the use has "always been within the broad definition of 'municipal', and that legally this right must be changed to a more appropriate descriptor." *Id.* at 15. "It is an error of law for the purpose of use to be listed as municipal because the purpose of use for water right 29-7770 is exactly the same as that of water rights 29-7118 and 29-7119, which the Special Master and IDWR have agreed are municipal." *Id.*

*26 As set forth in the Special Masters Amended Report, however, the City itself sought and obtained the licensed water right in 2003, claiming irrigation as the purpose of use (R. 4762). The City of Pocatello claims

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that the Department erred in designating this water right's use as irrigation, yet stated in its *Opening Brief on Challenge* that "Pocatello requested the irrigation designation in order to expedite the long-overdue licensing of 29-7770." (R. 5008). The City cannot now claim that the Department erred in issuing the water right in accordance with the City's claimed use. Circumvention of a department backlog through listing irrigation as the purpose of use does not justify now changing the use to municipal. There is no agency error with regard to the purpose of use of water right 29-7770, Pocatello simply seeks to change it now without going through the formal statutory transfer process.

There has been no valid transfer to change the licensed elements of water right 29-7770, and there is no pre-1987 change that can be documented through the accomplished transfer statute because the water right was not licensed until 2003. Therefore, there is no evidence to support a change in the elements of the water right to be decreed. The SRBA District Court properly affirmed the Special Master's decision in maintaining the purpose of use as irrigation.

E. The District Court properly upheld the Special Master's findings as to the priority dates of water rights 29-13639 and 29-13558.

The Director's Report is considered to be prima facie evidence of the elements of a water right. Idaho Code § 42-1411. The Director's Report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997). Idaho Rule of Evidence 301 states that a presumption in a civil *27 action or proceeding is rebutted "by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist." "The trier of fact has the primary responsibility for weighing the evidence and determines whether the required burden of proof on an issue has been met." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002). The Court shall adopt the Special Master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2).

City of Pocatello claims that the Special Master did not correctly apply the standard of proof in her analysis of whether the facts presented by the City were sufficient to overcome the prima facie evidence of priority in the Director's Report. *Appellant's Opening Brief* at 54. This argument attempts to disguise a matter of fact as a matter of law. The Special Master did not apply the wrong standard of proof, but rather determined that the evidence offered by Pocatello failed to rise to the level of substantial evidence required to rebut the Director's Report.

The City claims that water right 29-13558 is for the first well used by the City of Alameda. For evidence of a 1905 priority date, the City offered a historic newspaper article describing the history of a Mr. Satterfield, who, according to the article, moved to the area in 1905 (R. 7664). The article quotes Mr. Satterfield as saying that Alameda's first well was deepened during the time of Alameda's first mayor, and indicates that the City of Alameda was founded in 7/17/1924. *Id.* The Department recommended a priority date of 7/16/1924 because of the logical inference from the article that the well was in existence prior to the establishment of Alameda, and in the absence of any further detail on when the well was drilled (R. 901). The City of Pocatello seeks a priority date of 1905 based solely upon the claim that Mr. Satterfield came to the area in 1905.

*28 There is nothing in the City's evidence to suggest that the well existed when Mr. Satterfield arrived in the area, or that his arrival in 1905 precipitated the construction of a well. As the City presented evidence that Alameda was not formed until 1924, there is no basis to conclude that deepening the well during the term of the first mayor supports a priority of 1905. As stated in the Amended Report, "[a]lthough that evidence has some probative value, by itself it does not rebut the Director's Report conclusion that priority is July 16, 1924." (R. 4764). The SRBA District Court properly upheld the Special Master's finding that there was insufficient evidence to meet the standard required by I.R.E. 301, to rebut the finding of priority made by the Director.

The evidence offered by the City to rebut the Director's Report regarding priority of water right 29-13639 is also tenuous. The Director based his determination of priority on an earlier license for the specific well which

Ground Water Appropriators, Inc., 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Basin-Wide Issue No. 4). The contention that the Director cannot impose a condition today that he did not impose on "31 similar water rights 10 years ago is in direct conflict with Idaho Code § 42-1411 which unambiguously grants the Director the authority to impose conditions or remarks he *deems necessary* for the administration of the right. Finally, the question of whether pre-1969 water right transfers are subject to the no-injury rule is a matter of settled Idaho law.

As a result of the City of Pocatello's appeal the State has been forced to spend considerable time and resources responding to this appeal. Since the appeal is unreasonable and lacks foundation in fact or law, the State should be awarded its reasonable attorney's fees and costs pursuant to Idaho Code § 12-121.

IV. CONCLUSION

Pocatello has failed to show that the findings of fact of the SRBA District Court are clearly erroneous as to whether the proposed accomplished transfer listing all of Pocatello's wells as alternate points of diversion for its groundwater rights injures other water rights, as to whether the City's groundwater wells are diverting from the same source as the City's surface water rights, or as to the priority dates of water right nos. 29-13639 and 29-13558. Therefore, these findings should be affirmed.

Idaho law clearly supports the District Court's conclusions that, as a matter of law, the Director has the authority to investigate Pocatello's claimed accomplished transfer, and to recommend a condition he deems necessary for the administration of the water rights. Further, the plain language of Idaho Code § 42-1425 supports the District Court's conclusion that the statute does not provide for accomplished transfers resulting in a change of source, or allow for accomplished transfers in the case of changes made after 1987. The State respectfully requests, therefore that the Court affirm the findings of the SRBA District Court and grant it attorney fees and costs.

End of Document

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Exhibit B ***KEEN MEMO: MEMORANDUM FROM SHELLEY KEEN SETTING OUT PROPOSED CONDITIONS (6/29/2018)***

M E M O R A N D U M

DATE: June 29, 2018

TO: IMAP Participants & Hearing Officer Cefalo

FROM: Shelley W. Keen *SWK*

RE: Proposed Conditions of Approval

Background

To advance discussions regarding possible settlement of protests against the Integrated Municipal Application Package ("IMAP") of Suez Water Idaho Inc., IDWR's Water Rights Section has compiled a draft list of approval conditions that could be placed on each water right or permit addressed in the IMAP, if an approval is ultimately issued. The hearing officer for the IMAP contested case proceeding requested this draft list of conditions at the status conference on May 31, 2018. On a right-by-right basis, additional conditions of approval may also be necessary to further describe, define, or administer specific water rights. Further, IDWR's final decision on the IMAP will ultimately depend on IDWR's determinations pursuant to the statutory requirements and limitations of Idaho Code § 42-222 (for licensed or decreed water rights) and Idaho Code § 42-211 (for permits).

The list of potential conditions includes standard conditions for transfer approvals, reasonably anticipated future needs ("RAFN") water rights, municipal water rights in general, and alternative points of diversion ("APODs") for municipal water rights.¹ In addition, the list includes a non-standard condition addressing the desire of the participants in the IMAP matter to document that use of the water rights involved in the IMAP may also be subject to private agreements.

The list does not include a condition reflecting the IMAP participants' desire to allow re-opening the transfer approval at some time during the proposed planning horizon. Idaho Code does not direct IDWR to re-open RAFN transfer approvals, and the Water Rights Section is concerned about the operational impact of committing resources to re-review the IMAP and about the precedent it might set for similar resource commitments to resolve other contested cases. In addition, the questions of whether IDWR could include re-opener conditions in approving the IMAP and what the conditions should look like raise legal and procedural questions that should be addressed by the hearing officer in the IMAP proceeding.

¹ For further explanation regarding the proposed APOD conditions (nos. 5 and 6), see pages 2-3 of the *Order Addressing Exception and Amending Transfer Approval* ("Order") in the Matter of Application for Transfer No. 79778 in the Name of City of Meridian. The Order is available via IDWR's website among the documents for Water Right No. 63-2893.

The list also does not include a condition reflecting some of the IMAP participants' desire to allow the planning horizon for the IMAP to be advanced or rolled forward at the end of the initial planning horizon. As with the re-opener issue, the questions of whether IDWR could include roll-forward conditions in approving the IMAP and what the conditions should look like raise legal and procedural questions that should be addressed by the hearing officer.

Proposed Conditions

1. Place of use is within the service area of SUEZ Water Idaho as provided for under Idaho law. The place of use is generally described as within the city limits of Boise and the surrounding service area.
2. A map generally depicting the service area for this water right at the time of this approval is attached to this document for illustrative purposes.
3. This right authorizes <0.00> cfs for reasonably anticipated future needs for a planning horizon that ends on December 31, 2065, within the service area pursuant to Chapter 2, Title 42, Idaho Code.
4. The full system capacity necessary to provide water for the reasonably anticipated future needs authorized under this right must be used by the end of the designated planning horizon.
5. 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 name> located in T____, R____, S____, _____.
6. This transfer authorizes additional wells located in T____, R____, S____, _____ as points of diversion under this right as of the date of approval.
7. 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 this transfer. 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.
8. That portion of this right authorized for reasonably anticipated future needs shall not be changed to a place of use outside the service area as defined in Idaho Code § 42-202B or to a new purpose of use.
9. After specific notification by the Department, the right holder shall record the quantity of water diverted or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.

10. This right does not grant any right-of-way or easement across the land of another.
11. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
12. The diversion and use of water described in this transfer approval may be subject to additional conditions and limitations agreed to by the participants in the IMAP contested case proceeding pursuant to separate agreements to which the Department is not a party. Because the Department is not a party to those agreements, the Department is not responsible for enforcement of any aspect of the agreements not specifically addressed in conditions herein. Enforcement of those portions of the agreements not specifically addressed in conditions herein shall be the responsibility of the parties to the agreements. Such agreements may include, but are not limited to, *IMAP Settlement Agreement Between Boise Project et. al. and SUEZ*.

Exhibit C **PHIL RASSIER EMAIL CHAIN ADDRESSING THE REOPENER
CONDITION (7/9/2018)**

Christopher H Meyer

From: Christopher H Meyer <ChrisMeyer@givenspursley.com>
Sent: Monday, July 9, 2018 6:50 PM
To: Christopher H Meyer; 'Phil Rassier'; 'Abigail R. Germaine Esq. (agermaine@cityofboise.org)'; 'Albert Barker'; 'Andrew Waldera'; 'Bob Bachman (bbachman@kunaaid.gov)'; 'Brent Orton'; 'Bryce Farris'; 'Charles Honsinger'; 'Cherese McLain'; 'Chris M. Bromley Esq. (cbromley@mchughbromley.com)'; 'Christopher E. Yorgason'; 'Dale Bolthouse (dbolthouse@meridiacity.org)'; 'Garrick Nelson P.E. (gnelson@meridiacity.org)'; 'John Roldan - City of Boise (jroldan@cityofboise.org)'; 'Kyle Radek'; 'Richard T. Roats (kunaattorney@icloud.com)'; 'Richard T. Roats Esq. (rroats@kunalD.gov)'; 'Shelley Davis'; 'Stephan Burgos'; 'Warren Stewart'; 'Gail McGarry'; 'Kathleen Carr'; 'Matt J. Howard Esq. (mhoward@usbr.gov)'; 'Paul L. Arrington (paul@iwua.org)'; 'Sarah A. Klahn, Esq. (sklahn@somachlaw.com)'; 'Emmi Blades (emmi.blades@idwr.idaho.gov)'; 'Garrick L. Baxter (garrick.baxter@idwr.idaho.gov)'; 'James Cefalo (james.cefalo@idwr.idaho.gov)'; 'Jeff Peppersack'; 'Kimi White'; 'Nick Miller'; 'Sharla Cox (sharla.cox@idwr.idaho.gov)'; 'Shelley Keen'; Phillip J. Rassier (Pjem76@msn.com)
Cc: Michael P. Lawrence; 'Gregory P. Wyatt (greg.wyatt@suez-na.com)'; 'Marshall Thompson (marshall.thompson@suez-na.com)'; 'Roger D. Dittus (roger.dittus@suez-na.com)'
Subject: RE: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWOV-GPDM5.FID508386]
Attachments: CHM Memo re APOD condition language.PDF

To: Hearing Officer, Parties & IDWR Staff
From: Chris Meyer

I expect that the main focus of tomorrow's status conference will be on the reopener condition and related procedural issues.
However, I also offer the attached memorandum addressing the proposed APOD condition.
There is nothing conceptually new here.
This is simply my effort to distill what has been said before into language that could be added to the IMAP approval order.

If we do not get to this tomorrow, that is fine. But I thought I would put it out there, perhaps allowing a brief preliminary discussion.

-Chris

CHRISTOPHER H. MEYER

chrismeyer@givenspursley.com / www.givenspursley.com

From: Christopher H Meyer <ChrisMeyer@givenspursley.com>
Sent: Monday, July 9, 2018 10:12 AM
To: 'Phil Rassier' <PJEM76@msn.com>; Abigail R. Germaine Esq. (agermaine@cityofboise.org) <agermaine@cityofboise.org>; Albert Barker <apb@idahowaters.com>; Andrew Waldera <andy@sawtoothlaw.com>; Bob Bachman (bbachman@kunaaid.gov) <bbachman@kunaaid.gov>; Brent Orton <borton@cityofcaldwell.com>; Bryce Farris <bryce@sawtoothlaw.com>; Charles Honsinger <honsingerlaw@gmail.com>; Cherese McLain <cdm@msbtlaw.com>; Chris M. Bromley Esq. (cbromley@mchughbromley.com) <cbromley@mchughbromley.com>;

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Cc: Michael P. Lawrence <mpl@givenspursley.com>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Marshall Thompson (marshall.thompson@suez-na.com) <marshall.thompson@suez-na.com>; Roger D. Dittus (roger.dittus@suez-na.com) <roger.dittus@suez-na.com>
Subject: RE: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWVOV-GPDMS.FID508386]

To: Hearing Officer, Parties & IDWR Staff
From: Chris Meyer

For your information and consideration prior to tomorrow's status conference, I am forwarding the email below from Phil Rassier, in which he shares some useful thoughts about the reopener. His view, and I agree, is that no implementing legislation is needed. But if IDWR perceives that legislation is needed or desirable, there is plenty of time to develop such legislation prior to the reopener taking effect.

-Chris

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLP
chrismeyer@givenspursley.com / www.givenspursley.com

From: Phil Rassier <PJEM76@msn.com>
Sent: Monday, July 9, 2018 10:00 AM
To: Christopher H Meyer <ChrisMeyer@givenspursley.com>
Cc: Michael P. Lawrence <mpl@givenspursley.com>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Marshall Thompson (marshall.thompson@suez-na.com) <marshall.thompson@suez-na.com>
Subject: Re: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWVOV-GPDMS.FID508386]

Chris,

I have no objection to your sharing my below email with the IMAP parties and Hearing Officer.

Phil

From: Christopher H Meyer <ChrisMeyer@givenspursley.com>
Sent: Monday, July 9, 2018 5:38 PM
To: 'Phil Rassier'
Cc: Michael P. Lawrence; Gregory P. Wyatt (greg.wyatt@suez-na.com); Marshall Thompson (marshall.thompson@suez-na.com)

na.com)

Subject: RE: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWOV-GPDMS.FID508386]

Phil,

Thanks much, once again, for these insights.

Would you allow me to share your email below with the parties & Hearing Officer?

-Chris

CHRISTOPHER H. MEYER

GIVENS PURSLEY LLP

chrismeyer@givenspursley.com / www.givenspursley.com

From: Phil Rassier <PJEM76@msn.com>

Sent: Monday, July 9, 2018 9:09 AM

To: Christopher H Meyer <ChrisMeyer@givenspursley.com>

Cc: Michael P. Lawrence <mpl@givenspursley.com>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Marshall Thompson (marshall.thompson@suez-na.com) <marshall.thompson@suez-na.com>

Subject: Re: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWOV-GPDMS.FID508386]

Chris,

Thank you for providing me with a copy of your email to the Hearing Officer and the parties in the IMAP proceeding before IDWR. You did a nice job of presenting our discussion on the proposed reopener condition. I do not see a need for any modifications.

There is, however, one additional area of discussion which could come up during the status conference to which you should be prepared to respond. During the previous status conference the Hearing Officer raised the option of the parties pursuing legislation to address IDWR's concern over its lack of authority to include a reopener condition on Suez's RAFN water rights. While I feel confident of the Director's authority to employ the proposed reopener condition under existing law, it remains a matter of discretion as to whether the Hearing Officer and the Director elect to do so without such legislation being enacted.

I assume the position of the parties is that in order to benefit from their current agreements to resolve the IMAP matter without the need for a hearing, they favor present action by IDWR rather than awaiting the future passage of legislation. The point I wish to make is that IDWR need not decline present use of the proposed reopener condition on the IMAP rights even if it is of the view that legislation is necessary. As drafted, the proposed reopener condition would not be available for activation until 2040.

If IDWR is of the view that additional legislative authority is necessary to activate the reopener condition there is ample time for IDWR and/or the parties to seek such authority. The legislation could confirm that the agency has the authority to implement any such existing or future reopener conditions placed on municipal provider RAFN water rights to allow for the reduction or extension of the applicable planning horizons to meet reasonably anticipated future needs. Of course, the legislation could also address other related matters as determined necessary or desirable. The important point is that any contemplated legislation need not be enacted prior to placement of the reopener condition on the IMAP rights. If such legislation is necessary, its enactment at any time prior to implementation of the reopener condition would be sufficient. If such legislation is never enacted, IDWR could decline to activate the reopener condition in response to a request to

do so based upon its perceived lack of authority to do so. That decision would then be subject to judicial review.

Finally, you asked whether I desire to participate by phone in the 9:00 a.m. Tuesday status conference on IMAP. Well I certainly might find it enjoyable, I'm concerned that it might serve more as a distraction than a benefit to the process. You and Michael do a great job of representing your client in this matter and I'm happy to provide whatever assistance I can to you. However, I don't want to be potentially viewed as acting in an advocate position given my inactive status in the Idaho Bar. In addition, I do have a conflicting telephone meeting scheduled from 7:00 to 10:00 a.m. on Tuesday morning.

My best regards to all,

Phil

From: Christopher H Meyer <ChrisMeyer@givenspursley.com>
Sent: Monday, July 9, 2018 2:14 AM
To: Phillip J. Rassier (Pjem76@msn.com)
Cc: Michael P. Lawrence; Gregory P. Wyatt (greg.wyatt@suez-na.com); Marshall Thompson (marshall.thompson@suez-na.com)
Subject: FW: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWOV-GPDMS.FID508386]

Phil,
I meant to copy you on this, but didn't.
Please let me know of any errors or omissions you see in what I said.

Is there any chance you might want to participate by phone in the status conference on Tuesday at 9:00 Boise time?

-Chris

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLP
chrismeyer@givenspursley.com / www.givenspursley.com

From: Christopher H Meyer
Sent: Sunday, July 8, 2018 6:09 PM
To: James Cefalo (james.cefalo@idwr.idaho.gov) <james.cefalo@idwr.idaho.gov>
Cc: Abigail R. Germaine Esq. (agermaine@cityofboise.org) <agermaine@cityofboise.org>; Albert Barker <apb@idahowaters.com>; Andrew Waldera <andy@sawtoothlaw.com>; Bob Bachman (bbachman@kunaaid.gov) <bbachman@kunaaid.gov>; Brent Orton <borton@cityofcaldwell.com>; Bryce Farris <bryce@sawtoothlaw.com>; Charles Honsinger <honsingerlaw@gmail.com>; Cherese McLain <cdm@msbtlaw.com>; Chris M. Bromley Esq. (cbromley@mchughbromley.com) <cbromley@mchughbromley.com>; Christopher E. Yorgason <chris@yorgasonlaw.com>; Dale Bolthouse (dbolthouse@meridiancity.org) <dbolthouse@meridiancity.org>; Garrick Nelson P.E. (gnelson@meridiancity.org) <gnelson@meridiancity.org>; John Roldan - City of Boise (jroldan@cityofboise.org) <jroldan@cityofboise.org>; Kyle Radek <kradek@meridiancity.org>; Richard T. Roats (kunaattorney@icloud.com) <kunaattorney@icloud.com>; Richard T. Roats Esq. (rroats@kunaID.gov) <rroats@kunaID.gov>; Shelley Davis <smd@idahowaters.com>; Stephan Burgos <sburgos@cityofboise.org>; Warren Stewart <westewart@meridiancity.org>; Gail McGarry <emcgarry@usbr.gov>; Kathleen Carr <kathleenmarion.carr@sol.doi.gov>; Matt J. Howard Esq. (mhoward@usbr.gov) <mhoward@usbr.gov>; Paul L. Arrington (paul@iwua.org) <paul@iwua.org>; Sarah A. Klahn, Esq. (sklahn@somachlaw.com) <sklahn@somachlaw.com>; Emmi Blades (emmi.blades@idwr.idaho.gov) <emmi.blades@idwr.idaho.gov>; Garrick L.

Baxter (garrick.baxter@idwr.idaho.gov) <garrick.baxter@idwr.idaho.gov>; Kimi White <kimi.white@idwr.idaho.gov>; Nick Miller <nick.miller@idwr.idaho.gov>; Sharla Cox (sharla.cox@idwr.idaho.gov) <sharla.cox@idwr.idaho.gov>; Shelley Keen <shelley.keen@idwr.idaho.gov>; Pat Hughes (pchendley@comcast.net) <pchendley@comcast.net>; Lori Gibson (lorigibson@givenspursley.com) <lorigibson@givenspursley.com>; Michael P. Lawrence (mpl@givenspursley.com) <mpl@givenspursley.com>; Gregory P. Wyatt (greg.wyatt@seuz-na.com) <greg.wyatt@seuz-na.com>; Roger D. Dittus (roger.dittus@seuz-na.com) <roger.dittus@seuz-na.com>; Marshall Thompson (marshall.thompson@seuz-na.com) <marshall.thompson@seuz-na.com>; Cathy Cooper (cathy.cooper@seuz-na.com) <cathy.cooper@seuz-na.com>
Subject: IMAP - Discussion of Issues Bearing on Possible Reopener Condition [IWOV-GPDMS.FID508386]

To: Hearing Officer, Service List, and IDWR staff
From: Chris Meyer

As you can see from the email chain below, I have been exploring with Phil Rassier various procedural issues with respect to how a planning horizon reopener provision on the IMAP might be implemented. I need a bit more time to prepare a more formal submission on behalf of SUEZ. Given that we have a status conference on Tuesday morning, I thought it would be appropriate to share this discussion with the Hearing Officer, Parties, and IDWR staff. It may be of interest only to the most intrepid IMAP enthusiasts. But they should find Phil's insights most helpful, I think.

(Note: The only change I have made to the emails below is to correct two dyslexic references by me to Rule 104 that incorrectly called it Rule 401.)

The bottom line is that it appears to me that Phil has identified a way forward to implement such a condition. You will find below Phil's suggested language for a Condition No. 13, which is a good starting point for further discussion. I have highlighted it in yellow.

In short, the Department has the authority to request updated water demand information from SUEZ, to engage with SUEZ and others informally, and to determine preliminarily whether alteration of the planning horizon is appropriate. It may do all this informally without initiation of a contested case. If it determines that shortening or extension of the planning horizon is called for, it would initiate a contested case and publish notice allowing any affected person to participate. Anyone disagreeing with the proposed action could obtain a hearing under I.C. 42-1701A(3). Alternatively, if the Department did not initiate a contested case, a private party could initiate a contested case under IDAPA 37.01.01.230.01.c.

I look forward to continuing this discussion on Tuesday. I think we are making good progress, and thank everyone involved.

-Chris

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLP
chrismeyer@givenspursley.com / www.givenspursley.com

From: Phil Rassier <PJEM76@msn.com>
Sent: Saturday, July 7, 2018 3:11 PM
To: Christopher H Meyer <ChrisMeyer@givenspursley.com>
Cc: Michael P. Lawrence <mpl@givenspursley.com>; Gregory P. Wyatt (greg.wyatt@seuz-na.com) <greg.wyatt@seuz-na.com>; Marshall Thompson (marshall.thompson@seuz-na.com) <marshall.thompson@seuz-na.com>; Roger D. Dittus (roger.dittus@seuz-na.com) <roger.dittus@seuz-na.com>
Subject: Re: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Chris,

I'm about to call it a day, but thought I would check my email first. Since our email discussion below hits on a majority of the questions others are likely to ask I think it could serve a useful purpose. I have no concern or objection if you decide to share it with others including the parties.

Phil

From: Christopher H Meyer
Sent: Saturday, July 7, 2018 10:00 PM
To: 'Phil Rassier'
Cc: Michael P. Lawrence; Gregory P. Wyatt (greg.wyatt@suez-na.com); Marshall Thompson (marshall.thompson@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com)
Subject: RE: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Phil,

Sorry for the slow response. I was tied up on family matters yesterday. (Happy ones.)

Your email response below is instructive and insightful, as usual.

I will follow up with you shortly, as I synthesize this and think about how to present this information to IDWR and the parties, preferably at or before Tuesday's status conference.

As I think that through, please let me know whether you consider the email discussion below appropriate or helpful to share with others (IDWR and/or parties).

-Chris

CHRISTOPHER H. MEYER

Givens Pursley llp

chrismeyer@givenspursley.com / www.givenspursley.com

From: Phil Rassier
Sent: Friday, July 6, 2018 9:35 AM
To: Christopher H Meyer
Cc: Michael P. Lawrence
Subject: Re: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Chris,

I agree that it will be very helpful for you and Michael to be prepared to walk through the administrative process under the proposed reopener condition as you see it playing out. Below, I have inserted my comments in response to the points you have made. Where no response is inserted it means I agree with the statement and have nothing further to add. It will also be important to have IDWR counsel available at the status conference to serve as a check on our understanding of the process. Please let me know if I may be of further assistance.

Chris:

I have been reviewing how I think this works. Would you let me know if you agree with the following (some of which is APA 101 stuff).

I ask all these questions because we are going to need to explain both to the hearing officer and to the various IMAP parties how this would work and what rights they will have.

Agency actions involving applications for permit, applications for transfer, and licensing are all contested cases. (This is because they will result in issuance of an order. Permits, licenses, and transfer approvals are all "orders" within the definition of IDAPA 37.01.01.005.15, notwithstanding the fact that they do not have the word "order" on the operative document.)

Applications for permit and transfer are initiated by a private party under IDAPA 37.01.01.220. The contested case begins immediately upon filing and acceptance of the application.

At any point during the contested case, IDWR may employ informal procedures aimed at narrowing or resolving the contested case, but those procedures must be followed by and concluded by formal procedures. IDAPA 37.01.01.100. et seq.

In other situations (which are not initiated by a private party), IDWR may explore matters (e.g., allegations of violation of a license condition or the need for a reopener of a planning horizon) informally without initiating a contested case. I.C. 67-5241(1)(a) (however, I do not find an IDAPA counterpart to this). Thus, under condition 13, in the year 2041, IDWR could ask SUEZ to provide updated information about present and future water demand. If SUEZ declined to provide that information or if IDWR found the information provided justified a change in the planning horizon, it then would initiate a contested case under IDAPA 37.01.01.104, declaring that it has reached an informal determination that will become final in the absence of further action by SUEZ (or anyone else that IDWR identifies in "correspondence").

Phil:

Actually, my intention in drafting proposed Condition 13 was that IDWR's use of "an informal determination that will become final in the absence of further action by SUEZ or others" is one option, and perhaps a favored option, for IDWR to follow. The relevant sentence from Condition 13 reads: "Any agency action taken shall be in a contested case proceeding which may be initiated by a document from the Department informing the parties that the agency has reached an informal determination that will become final in the absence of further action by a party to the proceeding." The emphasized text using the word "may" rather than "shall" was intended to show that use of the "informal determination" is optional. This second part of the sentence may be contrasted with the first part of the sentence which states: "Any agency action taken shall be in a contested case proceeding" My reason for drafting the sentence in this manner was based on my perhaps faulty thinking that it was understood that the agency could as well initiate a contested case in the matter without first making an "informal determination." My thinking stems from the first sentence of IDAPA 37.01.01.104 which reads: "Formal proceedings, which are governed by rules of procedure other than Rules 100 through 103, must be initiated by a document (generally a notice, order or complaint if initiated by the agency)" Given the possibility of confusion on this point, it may be wise to specifically set out in the condition the two options for agency initiation of a contested case.

Chris:

Condition 13 calls for notice of this Rule 104 proceeding to be published. I don't see a rule authorizing that notice; I assume you feel that the agency inherently has the authority to provide such notice and to make such notice mandatory in the condition.

Phil: Correct

Chris: After issuance of the Rule 104 notice of formal proceedings, SUEZ or anyone else could demand a formal hearing on the reopener under I.C. 42-1701A(3).

Phil: Correct

Chris: Prior to issuance of the Rule 104 notice of formal proceedings, IDWR may interact with whomever it likes, or no one at all. Thus, it might informally interact with SUEZ, but none of the other parties to the IMAP proceedings.

Phil: I think this is generally correct. However, the area of informal interaction between the agency and prospective litigants before the agency is one that calls for considerable discretion so as not to prejudice other prospective litigants in the matter or give the impression of so doing. Openness is always desirable.

Chris: One thing that seems odd to me is that there does not seem to be a mechanism under the Department's rules to initiate a contested case other than the Rule 104 announcement described above. In other words, the Department cannot just say, "IDWR has no pre-conceived idea of whether the planning horizon should be shortened, left the same, or extended. Please come forward and present evidence at a hearing on this question." Instead, the Department must make an initial informal determination and put that out there for people to react to.

Phil: As described in my lengthy comment above, I do read the first sentence of Rule 104 to allow IDWR to initiate a contested case through the issuance of an order to that effect without having first made an informal determination in the matter. From an agency resources standpoint, however, it seems unlikely that IDWR would want to initiate a contested case proceeding in a matter in which it had no reason to think that there was a significant water resource issue that required attention or resolution.

Chris: Alternatively, couldn't a re-opener be initiated by a person (SUEZ or, more likely, someone else) filing a petition to initiate a contested case under IDAPA 37.01.01.230.01.c? Of course, IDWR would have no obligation to grant the petition. But, if IDWR denied the petition to initiate a contested case, couldn't any person seek a hearing on that decision under I.C. 42-1701A(3)?

Phil: Yes, any person could initiate a contested case by filing a petition with IDWR asking the Director to activate the IMAP reopener condition. And yes, if the requested relief was denied the petitioner could seek a hearing under I.C. 42-1701A(3).

Chris: Your proposed condition 13 does not address this alternative. Is that because you intended to exclude it as an option? Would this alternative be available only if provided in the condition, or is it "just there" in any event?

Phil: Although proposed Condition 13 does not address this alternative it is an option that is always potentially available to any person under existing law.

Chris: Similarly, by referencing the year 2040, does that preclude persons from petitioning prior to that year?

Phil: Persons would not be precluded from filing earlier than 2040, but under the condition as drafted the Director would only have authority to activate the reopener beginning in 2040.

Chris: Your proposed condition does not address the frequency of further reopeners. I'm sure that was intentional. Is it your feeling that it is just too complicated to set rules for that in the condition, and that it is better to just trust that the Department will not start doing reopeners every 5 years after 2040?

Phil: Yes, my assumption is that the Department will only exercise its reopener authority under the condition if information available to the agency shows there are sound resource management reasons to do so.

Regards,
Phil

From: Christopher H Meyer

Sent: Friday, July 6, 2018 1:17 AM

To: 'Phil Rassier'

Cc: Michael P. Lawrence

Subject: RE: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Phil,

I have been reviewing how I think this works. Would you let me know if you agree with the following (some of which is APA 101 stuff).

I ask all these questions because we are going to need to explain both to the hearing officer and to the various IMAP parties how this would work and what rights they will have.

Agency actions involving applications for permit, applications for transfer, and licensing are all contested cases. (This is because they will result in issuance of an order. Permits, licenses, and transfer approvals are all "orders" within the definition of IDAPA 37.01.01.005.15, notwithstanding the fact that they do not have the word "order" on the operative document.)

Applications for permit and transfer are initiated by a private party under IDAPA 37.01.01.220. The contested case begins immediately upon filing and acceptance of the application.

At any point during the contested case, IDWR may employ informal procedures aimed at narrowing or resolving the contested case, but those procedures must be followed by and concluded by formal procedures. IDAPA 37.01.01.100. et seq.

In other situations (which are not initiated by a private party), IDWR may explore matters (e.g., allegations of violation of a license condition or the need for a reopener of a planning horizon) informally without initiating a contested case. I.C. 67-5241(1)(a) (however, I do not find an IDAPA counterpart to this). Thus, under condition 13, in the year 2041, IDWR could ask SUEZ to provide updated information about present and future water demand. If SUEZ declined to provide that information or if IDWR found the information provided justified a change in the planning horizon, it then would initiate a contested case under IDAPA 37.01.01.104, declaring that it has reached an informal determination that will become final in the absence of further action by SUEZ (or anyone else that IDWR identifies in "correspondence").

Condition 13 calls for notice of this Rule 104 proceeding to be published. I don't see a rule authorizing that notice; I assume you feel that the agency inherently has the authority to provide such notice and to make such notice mandatory in the condition.

After issuance of the Rule 104 notice of formal proceedings, SUEZ or anyone else could demand a formal hearing on the reopener under I.C. 42-1701A(3).

Prior to issuance of the Rule 104 notice of formal proceedings, IDWR may interact with whomever it likes, or no one at all. Thus, it might informally interact with SUEZ, but none of the other parties to the IMAP proceedings.

One thing that seems odd to me is that there does not seem to be a mechanism under the Department's rules to initiate a contested case other than the Rule 104 announcement described above. In other words, the Department cannot just say, "IDWR has no pre-conceived idea of whether the planning horizon should be shortened, left the same, or extended. Please come forward and present evidence at a hearing on this question." Instead, the Department must make an initial informal determination and put that out there for people to react to.

Alternatively, couldn't a re-opener be initiated by a person (SUEZ or, more likely, someone else) filing a petition to initiate a contested case under IDAPA 37.01.01 .230.01.c? Of course, IDWR would have no obligation to grant the petition. But, if IDWR denied the petition to initiate a contested case, couldn't any person seek a hearing on that decision under I.C. 42-1701A(3)?

Your proposed condition 13 does not address this alternative. Is that because you intended to exclude it as an option? Would this alternative be available only if provided in the condition, or is it "just there" in any event? Similarly, by referencing the year 2040, does that preclude persons from petitioning prior to that year? Your proposed condition does not address the frequency of further reopeners. I'm sure that was intentional. Is it your feeling that it is just too complicated to set rules for that in the condition, and that it is better to just trust that the Department will not start doing reopeners every 5 years after 2040?

Thanks again so much, Phil.

-Chris

CHRISTOPHER H. MEYER

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chrismeyer@givenspursley.com / www.givenspursley.com

From: Christopher H Meyer

Sent: Thursday, July 5, 2018 12:24 PM

To: 'Phil Rassier'

Cc: Michael P. Lawrence

Subject: RE: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Phil,

This is very helpful. I will follow up with you shortly.

I will ask you to prepare something in the form of a memorandum, as you describe.

But I'd like to take a moment to think this through a bit.

-Chris

CHRISTOPHER H. MEYER

Givens Pursley llp

chrismeyer@givenspursley.com / www.givenspursley.com

From: Phil Rassier <PJEM76@msn.com>

Sent: Thursday, July 5, 2018 10:18 AM

To: Christopher H Meyer <ChrisMeyer@givenspursley.com>

Cc: Gregory P. Wyatt (greg.wyatt@seuz-na.com) <greg.wyatt@seuz-na.com>; Roger D. Dittus (roger.dittus@seuz-na.com) <roger.dittus@seuz-na.com>; Marshall Thompson (marshall.thompson@seuz-na.com) <marshall.thompson@seuz-na.com>; Michael P. Lawrence <mpl@givenspursley.com>

Subject: Re: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Chris,

Thank you for providing me a copy of the proposed approval conditions prepared by Shelley Keen. Although it may not have been obvious to you based on the times of our respective emails on July 3, my email was not a response to yours. I did not notice your email with the proposed conditions until after I sent my email to you with the attached *Magic West* final order.

My previous email contains my reaction to Shelley's comments regarding legal advice I may have provided while at IDWR that he views as inconsistent with that provided in my Reopener Memo. If you are satisfied with that, there is really nothing more I can say. It seems to me that Shelley is likely extrapolating advice given in response to one set of facts to a different set of facts. I would be greatly surprised if we ever discussed issues related to the use of reopener conditions on RAFN approvals. The analysis in my Reopener Memo demonstrates great respect for the finality of licensed water rights as a general matter. The fact that under certain unique circumstances limited exceptions may occur does not change that.

I have reviewed Shelley's proposed approval conditions for the IMAP decision. That Shelley has declined to draft a reopener condition is not troubling to me. He perhaps rightly leaves that task to the Hearing Officer and counsel for the parties who possess greater legal experience. The other standard conditions which Shelley has drafted look fine. At least no red flags jumped out for me. You and Michael are probably in a better position to determine if there are any problems with them.

The only objection to the reopener condition that Shelley raises is that "the Water Rights Section is concerned about the operational impact of committing resources to re-review the IMAP and about the precedent it might set for similar resource commitments to resolve other contested cases." Although understandable, I do not view either of these concerns as providing a valid basis for opposing the use of a reopener condition in this instance. As indicated in my Reopener Memo, my sense is that use of a reopener condition in this and other similar cases will likely be less demanding on agency resources and represent better management of the water resources than the alternative approach.

Here is my effort at drafting a reopener condition for IMAP. It could either be added to Condition No. 3 or stand alone as a separate condition which is the way it is drafted. I've drafted it as Condition No. 13, but if that is considered unlucky it could be placed elsewhere.

13. Based upon pertinent information available to the Department, the Director may at any time after January 1, 2040 find it appropriate to review the designated planning horizon established under Condition No. 3 in order to potentially reduce or extend the time for which it is determined reasonable to hold the right for the purpose of meeting reasonably anticipated future needs. Any agency action taken shall be in a contested case proceeding which may be initiated by a document from the Department informing the parties that the agency has reached an informal determination that will become final in the absence of further action by a party to the proceeding. Notice of the proceeding shall be published in accordance with the publication requirements for water right transfers under section 42-222, Idaho Code; and a hearing, if requested, shall be conducted in accordance with the provisions of section 42-1701A Idaho Code, and chapter 52, title 67, Idaho Code, and the rules of procedure promulgated by the agency.

If you need the draft condition or any other material set forth in a signed memorandum addressed to you, please let me know. I think my Reopener Memo to you sets out all of the legal authority and analysis that should be necessary to support inclusion of the reopener condition on the IMAP rights.

Best regards,
Phil

From: Christopher H Meyer

Sent: Tuesday, July 3, 2018 8:22 PM

To: Phillip J. Rassier (Pjem76@msn.com)

Cc: Gregory P. Wyatt (greg.wyatt@seuz-na.com); Roger D. Dittus (roger.dittus@seuz-na.com); Marshall Thompson (marshall.thompson@seuz-na.com); Michael P. Lawrence

Subject: FW: Suez Water Idaho IMAP [IWOV-GPDMS.FID508386]

Phil,

I have just returned from my son's wedding and post-wedding festivities to find this memo in my in-box. We have a status conference on the IMAP coming up in a week. I would very much like your input on what Shelley Keen says about the reopener (and anything else in the memo).

At our last status conference (just before I left), there was a discussion of your memo on the reopener. Shelley Keen commented (and I paraphrase) "That's not what I remember Phil saying when he was at IDWR." Let's discuss this. If you are willing and so inclined, I think it would be helpful to have you make clear that you have not changed your position on this.

My best to you! Do you still celebrate the 4th of July? Or do you wait for the 14th?

-Chris

CHRISTOPHER H. MEYER

Givens Pursley LLP

chrismeyer@givenspursley.com / www.givenspursley.com

From: White, Kimi

Sent: Friday, June 29, 2018 3:02 PM

To: Christopher H Meyer ; Michael P. Lawrence ; Steven L. Burgos ; Abigail Germaine ; 'cbromley@mchughbromley.com' ; Warren Stewart ; Kyle Radek ; Charles L. Honsinger ; Brent Orton ; Christopher E Yorgason ; Chereese D. McLain ; S. Bryce Farris ; Andrew J. Waldera ; Barker, Albert (IWRB Member) ; Shelley M. Davis ; Richard T. Roats ; Lisa Hughes ; Debby Long ; har@idahowaters.com ; jroldan@cityofboise.org ; Jessica Witt (jlw@idahowaters.com) ; Lori Gibson ; bkm@msbtlaw.com

Cc: Cefalo, James ; Baxter, Garrick ; Blades, Emmi ; Keen, Shelley

Subject: Suez Water Idaho IMAP

Dear Parties,

Attached for service please find the memorandum from Shelley Keen regarding proposed conditions of approval in the above-referenced matter. Please contact me if you have any questions.

Thank you,

Kimi White

Kimi White, Paralegal

Office of the Attorney General

Natural Resources Division – IDWR

322 E. Front Street, P.O. Box 83720

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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

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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.

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Exhibit D ***APOD MEMO: MEMORANDUM FROM CHRIS MEYER PROPOSING
APOD LANGUAGE (7/9/2018)***

GIVENS PURSLEY LLP
Attorneys and Counselors at Law

Attorney-Client Communication
Attorney Work Product
Privileged and Confidential

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