

Memorandum

To: Craig Saxton, Water Allocation Bureau Chief
Nick Miller, Western Regional Manager
Cody Parker, Water Resources Supervisor
Jacob Caraig, Engineer Intern
Garrick Baxter, Lead Deputy Attorney General
From: Sara Ajeti, Deputy Attorney General
Date: April 18, 2025
Re: Review of Veolia's Request to Modify and Add Conditions to IMAP Approval

Questions Presented

Should the Department modify the standard alternative point of diversion ("APOD") condition added to municipal water rights on the transfer approvals?

Should the Department add the reopener condition to the transfer approvals?

Should the Department add the surface water first condition to the transfer approvals?

Does the Department need to consider a stipulated withdrawal between parties when issuing conditions on the transfer approvals?

Answer

Regarding the APOD condition, it depends. The APOD condition has worked in the past to prevent injury for priority administration through well interference or curtailment. However, the Department should make a policy decision as to whether the APOD condition should be modified to describe whether a junior water right inside a curtailment zone may be moved outside the curtailment zone during limited geographical curtailment.

Regarding the reopener condition, the Department has historically been opposed to reopener conditions. It is recommended that the Department rejects adding the reopener condition.

Regarding the surface water first condition, the Department can add the surface water first condition on specific municipal water rights that have historically used surface water for irrigation only.

Regarding the stipulated withdrawal, the Department may or may not accept the stipulated withdrawal agreement between the applicable parties depending on the conditions the Department elects to add to the transfer approvals.

Background

In the early 2000s, Veolia Water Idaho, Inc. (“Veolia”)¹ proposed the Integrated Municipal Application Package (“IMAP”) to the Idaho Department of Water Resources (“Department”). The IMAP is a transfer application seeking APODs for its decreed water rights and establishes a planning horizon for its municipal purpose of use. Many parties protested, intervened, and were interested parties in the IMAP matter.²

On December 18, 2003, the Director issued an order staying the IMAP matter pending the issuance of partial decrees by the Snake River Basin Adjudication (“SRBA”) District Court. On October 6, 2011, Veolia petitioned the Department to lift the stay after the SRBA Court issued the partial decrees. *In the Matter of Integrated Municipal Application Package (IMAP) of United Water Idaho Inc., Being a Collection of Individual Applications for Transfers of Water Rights and Applications for Amendment of Permits, United Water’s Motion to Lift Stay and Request for Status Conference*, at 1 (Oct. 6, 2011).

Over the next decade, the parties began to withdraw their protests.³ Of particular concern to Veolia, Protestants NMID and SID (collectively, “Districts”) and Veolia filed a *Stipulation for Withdrawal of Protests and Request to Change Status to Intervenor by Nampa & Meridian Irrigation District and Settlers Irrigation District* (“*Stipulated Withdrawal*”) on April 18, 2018. In the *Stipulated Withdrawal*, Veolia and the Districts requested the approved IMAP water rights be conditioned with the following:

4. [Veolia’s] request for [APODs], if approved by the Department, will be made subject to an express, enforceable condition or remark appearing on the face of each right that embodies the principles described in *Suez’s 2017 Supplement to the Update Report, Addressing APODs* (June 26, 2017), *Suez’s Further Explanation of APOD Condition Language* (Sept. 11, 2017), and *SUEZ’s Submission of Additional Authority on APODs* (Nov. 28, 2017). So long as the APODs are granted subject to condition language along those lines, the Districts have no objection to the APODs.

...

6. Accordingly, the Districts support SUEZ’s offer to accept a “re-opener condition” that will give the Department some flexibility in re-evaluating the extent of SUEZ’s reasonably anticipated future needs before the end of the 50-year planning horizon. The Districts defer to the Department as to the frequency of such

¹ Previously known as Suez Water Idaho, Inc. and United Water Idaho, Inc.

² Protestants include City of Meridian, City of Caldwell, Nampa & Meridian Irrigation District (“NMID”), Settlers Irrigation District (“SID”), Pioneer Irrigation District, City of Middleton, City of Star, Star Water & Sewer District, Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District, and Boise-Kuna Irrigation District. *In re Application for Transfer of Water Rights in the Name of United Water Idaho, Inc., Integrated Municipal Application Package (IMAP), Order Affirming Party Status and Notice of Status Conference*, at 1–2 (Aug. 8, 2012). Intervenor include City of Boise. *Id.* at 2. Interested parties include City of Eagle, City of Kuna, and City of Pocatello. *Id.*

³ See *In re Integrated Municipal Application Package (“IMAP”) of Suez Water Idaho, Inc. for Applications for Transfer of Water Rights*, Idaho Dept. of Water Resources, Legal Administrative Actions <https://idwr.idaho.gov/legal-actions/administrative-actions/suez-water-idaho-inc-IMAP/> (listing the withdrawals).

re-openings, but assume that it would not be more frequent than once every 10 years. The Districts specifically reserve the right to be a party to any reopening proceedings and to raise objections or concerns at said re-opening proceedings as the Districts may deem necessary.

Stipulated Withdrawal, at 2–3. Veolia’s first request is to modify the Department’s standard APOD conditional language. Veolia’s second request is to add a reopener condition. Each condition will be discussed in turn.

I. The Department’s standard APOD condition should be sufficient without adopting Veolia’s proposed conditional language.

Many municipal water rights require a transfer application to add APODs so the provider may divert water from any of its water rights from any of its wells. When the Department approves such transfer requests, the Department adds standard APOD conditional language. The Department adds the APOD condition to address issues with (1) well interference and (2) limited geographical curtailment. The first section states the Department’s APOD condition and how Veolia proposes to modify that conditional language. The second section analyzes how the Department’s APOD condition is likely sufficient without the need for modification because it has been upheld by the Idaho Supreme Court and expounded upon in administrative actions.

A. The Department’s APOD condition versus Veolia’s proposed condition.

The Department’s APOD condition is exemplified in proposed Condition 13 of Veolia’s water right no. 63-11990. It states:

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 the Edgeview well located in T03N R01E S16 SENE.

This transfer authorizes the following additional wells as points of diversion under this right as of the date of approval.

Hidden Valley 1 well located in T02N R01E S3 SESE, [listing all 80 APODs] . . .
Veterans well located in T04N R02E S32 SESE.

Revised APOD Language for IMAP, at 7–8 (Feb. 3, 2025).

Due to the *Stipulated Withdrawal* and Veolia’s claim that the APOD condition is vague and confusing, Veolia proposed to amend the APOD condition to the following:

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, the analysis of material injury may take into account the dates on which points of diversion were authorized for this right. The purpose of this condition is to allow the right holder to divert water at authorized points of

diversion that were not initially associated with this right, but only when doing so does not cause material injury to other rights.

In well interference administration, material injury may be evaluated taking into account which points of diversion were authorized under this right as of the priority date of the water right alleged to be injured.

In a regional administration, material injury may be evaluated taking into account which points of diversion were authorized under this right as of the priority date to which junior rights are subject to curtailment (the cut-off date).

In a regional administration, if the original point or points of diversion associated with this right are located within the curtailment zone and the right is not subject to curtailment due to its priority, water under this right may also be diverted from any authorized point of diversion that is (1) outside the curtailment zone, (2) within the curtailment zone and authorized prior to the cut-off date, or (3) within the curtailment zone and authorized on or after the cut-off date if doing so does not materially increase the injury that the regional administration is intended to address. If the original point or points of diversion are located outside the curtailment zone, water may be diverted from an authorized point of diversion within the curtailment zone only if that point of diversion was authorized prior to the cut-off date. Points of diversion authorized for this right outside the curtailment zone are not affected by a regional curtailment even if points of diversion within the curtailment zone are curtailed. Rights within the curtailment zone means those rights that are subject to curtailment based on the cut-off date and geographic or other criteria bearing on material injury.

The information set out in the remainder of this condition is provided for convenience to facilitate future administration. In the event of a discrepancy between the information below and other official records of the Department, the other official records control.

Ground water was first diverted under this right from the Edgeview well located in T03N R01E S16 SENE.

Transfer 89499 authorized the following additional wells as points of diversion under this right as of the date of approval:

1. Hidden Valley 1 well located in T02N R01E S3 SESE.

...

80. Veterans well located in T04N R02E S32 SESE.

Id. at 9–14.

B. The APOD Condition has been affirmed by the Idaho Supreme Court and modified and applied in administrative actions.

The Department's APOD condition today is slightly different than the version upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830, 833 (2012).⁴ In the *City of Pocatello*, the Court held that the Department's APOD condition is necessary to avoid injury to "junior water right holders by diminishing their priorities." *Id.* at 836. The Court reasoned that if the City "could have each well be an [APOD] for each water right without the condition, . . . 'the City would be allowed to withdraw water under its most senior priority water right from any well location.'" *Id.* at 836 (quoting *Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights*, at 12 (April 13, 2006) [hereinafter *Director's Report*]).

The Court analyzed how the APOD condition allowed the City to use each well in the City's interconnected water distribution system as an APOD for each of the City's water rights without causing injury. *Id.* at 835. The Court found that when each well within the City's interconnected system began diverting water, "it had an associated water right with a specific priority date and a specific quantity of water that could be pumped from the well." *Id.* And when approving the City's transfer application to add the APODs, the transfer cannot "change the priority date of the water right associated with any well or the quantity of water that can be pumped from the well." *Id.* Specifically, the City's transfer must not "constitute[] either an enlargement of the water right or otherwise injure[] water rights existing on the date of the change." *Id.* The Court found that an enlargement occurs when the volume of water diverted increases and an injury occurs "to junior water rights holders anytime an enlargement receives priority." *Id.* Whenever a water user's priority is diminished, there is "an undeniable injury to that water right holder." *Id.*

The Court's injury analysis was adopted in large part on the findings and recommendations made in the *Director's Report*. Compare *Director's Report* at 12–13, with *City of Pocatello*, 152 Idaho at 835–36. The *Director's Report* divides the APOD condition into three distinct water right elements for the original water right and explained how each were important to prevent injury to other water users. *Director's Report*, at 14.

First, the *Director's Report* explained that listing the well location legal description for the original water right on the APOD condition was "important because many other wells could have been drilled nearby before or after the City owned well was drilled or used." *Id.* The Department's briefing in the *City of Pocatello* explained that the original well legal description listed on "the condition would restrict the City from transferring a senior water right from outside the curtailment to a well inside the curtailment area." *Id.* at 43, 46. In *re IMAP*, *Suez's Submission of Supplemental Authority on APOD*, App'x D, at 43, 46 (Nov. 28, 2017) [hereinafter *Supplemental Authority*]. The Department acknowledged that without the condition, the City could undermine curtailment by using the APODs. *Id.* at 43.

⁴ The version upheld by *City of Pocatello* included the first part of the APOD conditional language used today: "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 the [Well name] in the amount of . cfs." *City of Pocatello*, 152 Idaho at 833.

Second, the *Director's Report* explained that listing the priority date for the original water right on the APOD condition was important to address “well-interference issues and mitigation requirements for aquifer-wide regulation.” *Id.* For example,

[I]f a well developed by [the City] in 1990 causes interference with a neighbor's well that was drilled in 1960, the City's well will be treated as junior to the 1960 well even though the City, on occasion could be diverting a quantity from that well that is associated with a 1950 well owned elsewhere by the City.

Id.

Third, the *Director's Report* explained that listing the diversion rate for the original water right on the APOD condition identified the historical quantity of water appropriated under an original water right. *Id.* at 15. This was important to determine whether an injury against another water user occurs caused by an increase in diverting water from an APOD well. *Id.* For example,

[I]f a senior surface water user makes a call and the Department determines that the City's use of ground water is causing injury to that senior surface water user from a certain well, the City has the flexibility to obtain that quantity from different well locations to supply its residents with water.

Id. The Department's briefing in the *City of Pocatello* further elaborates how the APOD condition documenting the historical diversion rate and priority date allows the Department to evaluate whether another water user is injured in a delivery call. *Supplemental Authority*, at 46. For instance, the Department could consider the cumulative impact of the City's increased pumping at various APODs and determine whether that increased pumping injures a senior water user. *Id.*

The *City of Pocatello* case only analyzed the first part of the APOD condition.⁵ Following the *City of Pocatello*, the Director issued final orders on exceptions approving transfer applications to divert ground water from APODs for the City of Meridian and City of Ketchum's ("Cities") water rights. *See Supplemental Authority*, App'x B, at 24–33 (referencing *In re Application for Transfer No. 79778 in the Name of City of Meridian, Order Addressing Exceptions and Amending Transfer Approval* (Oct. 4, 2016) [hereinafter *Meridian Order*] and *In re Application for Transfer No. 80621 in the Name of City of Ketchum, Order Addressing Exceptions and Amending Transfer Approval* (Oct. 27, 2016) [hereinafter *Ketchum Order*]).

The Director modified the APOD condition based on the Cities' claims that the language is vague and confusing. *Supplemental Authority*, App'x B at 25 & App'x C, at 30. The Director modified the APOD condition to identify the location of the APODs.⁶ *Id.* App'x B at 26 & App'x C, at 32. The Director reasoned that adding the APOD condition will assist with analyzing

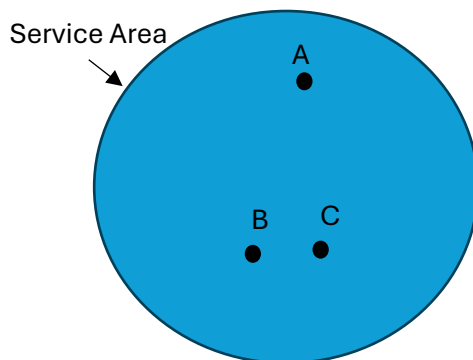
⁵ *Supra* n.4.

6 The Department added the following language to the APOD condition: “This transfer authorizes the following additional wells as points of diversion under this right as of the date of approval. [Name of well] located in T[] R[] S[] [] [].”

potential injury claims by other water users. *Id.* App’x B at 26 & App’x C at 33. Specifically, in a well interference action:

[A] well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the [City] well, alleges injury from pumping water from the [City] well, and [City’s] increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, [City] will be required to reduce pumping to not cause interference.

Id. In other words, the Department may require the city to reduce pumping from the water right with an original priority date that is near the senior water user’s well that claimed injury. For example, consider the hypothetical below.



	Water Right #1	Water Right #2	Water Right #3
Well Name/Location	Well A	Well B	Well C
Priority Date	1955	1970	1980
Diversion Rate	2.0 cfs	0.04 cfs	1.5 cfs
Purpose of Use	Municipal	Domestic	Municipal

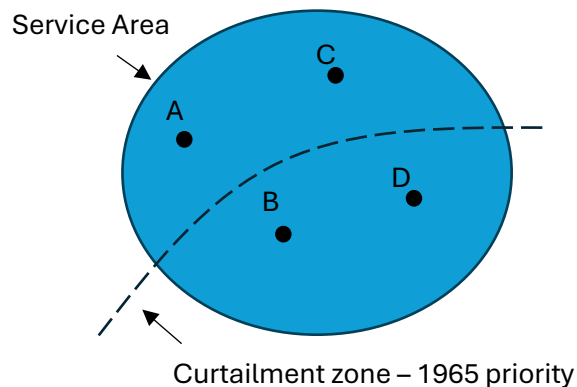
Figure 1. Well Interference

In this hypothetical, the municipality may divert its Water Rights #1 or #3 from either Wells A or C. However, assume the municipality abandons Well A and wants to divert the full 3.5 cfs of Water Rights #1 and #3 from Well C. Although the increase in diversion rate is small, the increase in pumping from Well C would cause well interference for the domestic owner of Well B due to how close it is in proximity to Well C. The cumulative impact of consolidating the diversion rate of multiple water rights to one Well is much greater for municipalities that hold a large portfolio of interconnected distribution systems. The APOD condition protects other water users by identifying how much water was developed under each original water right by ensuring the consolidation of water rights at individual wells will not injure other water rights. The current APOD condition is sufficient in instances where well interference may occur because the Department could look at the municipal provider’s historical diversion rates, priority dates, and well locations to determine whether another senior water user is being injured by the municipal provider’s pumping from an APOD.

In the *Meridian Order* and the *Ketchum Order*, the Director also explained that in a limited curtailment action:

[Identifying] the original locations for points of diversion associated with the priority date under each right [will] ensure that [City] 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.

Supplemental Authority, App'x B at 26 & App'x C at 33. In other words, the city cannot move its senior water rights into the curtailment zone, but it is not clear whether the city can move its junior water rights outside the curtailment zone. This limited curtailment scenario can best be understood by considering the hypothetical below:



	Water Right #1	Water Right #2	Water Right #3	Water Right #4
Well Name/Location	Well A	Well B	Well C	Well D
Priority Date	1950	1960	1970	1980
Rate	1 cfs	2 cfs	3 cfs	4 cfs

Figure 2. Limited Geographical Curtailment

In this hypothetical, each water right is a municipal water right in an interconnected distribution system listing its original legal description, priority date, and diversion rate. Each water right lists all the Wells as APODs, allowing each water right to be diverted from any of the four wells.⁷ In the limited curtailment hypothetical, the municipal service area is divided in half with a 1965 priority cutoff date within the curtailment zone. Based on the hypothetical, there are certain scenarios which the Department and Veolia agree and one scenario which it is unclear whether they agree. The Department and Veolia agree the following diversions are clearly authorized in a limited curtailment situation:

1. Well A may pump up to 6 cfs which includes:
 - a. Up to 1 cfs from Water Right #1

⁷ Although not at issue here, a region wide curtailment that covers the entire municipal service area with a 1965 priority date would curtail Water Rights #3 and #4 but the municipality could still pump the 1 cfs and 2 cfs from Water Rights #1 and #2 from any well because they have earlier priority dates than the cutoff date.

- b. Up to 2 cfs from Water Right #2
 - c. Up to 3 cfs from Water Right #3
- 2. Well B may pump:
 - a. Up to 2 cfs from Water Right #2
- 3. Well C may pump up to 6 cfs which includes:
 - a. Up to 1 cfs from Water Right #1
 - b. Up to 2 cfs from Water Right #2
 - c. Up to 3 cfs from Water Right #3
- 4. Well D may pump:
 - a. Up to 2 cfs from Water Right #2

The original legal description, the priority date, and the diversion rate in the APOD condition assist the Department with determining which water rights may be diverted from which APOD. For instance, up to 2 cfs from Water Right #2 may be pumped from any Well, inside or outside the curtailment zone, because it has a 1960 priority date which is senior to the curtailment cutoff date. In addition, up to 4 cfs from Water Rights #1 or #3 may be pumped from either Wells A or C because those water rights are outside the curtailment zone. Both the Department and Veolia agree that Water Rights #1 and #3 cannot be pumped from Wells B or D inside the curtailment zone because that would undermine the purpose of the curtailment. *Supplemental Authority*, at 5.

Veolia acknowledges that Water Right #4 cannot be pumped from Wells B or D inside the curtailment zone. *Id.* However, Veolia argues that up to 4 cfs from Water Right #4 should be able to be pumped from either Wells A or C outside the curtailment zone. *Id.* The current APOD language does not address this question, so Veolia would like the issue clarified through a new condition. Veolia claims the language in the *Meridian Order* and *Ketchum Order* regarding moving junior priority rights outside the curtailment zone causes confusion when applying the APOD condition. *Id.* at 6–7. Veolia interprets the language in the *Meridian Order* and *Ketchum Order* as possibly prohibiting the diversion of Water Right #4 from Wells A or C. *Id.* at 7. The language in the *Meridian Order* and *Ketchum Order* can be interpreted as the Director intending to prohibit pumping Water Right #4 from Wells A or C. However, it is also fair to say that it is not clear that this is what the Director intended.

The current APOD condition does not clarify whether, under the above scenario, Water Right #4 could be diverted from Wells A or C. The Director’s *Meridian Order* and *Ketchum Order* purport to determine how water should be administered in limited curtailment. However, as Veolia noted, the language in the orders causes some confusion. Revising the APOD condition would clarify any confusion for administering water during limited curtailment. However, legally, the Department is not required to address every possible future curtailment scenario through a water right condition. It is a policy question for the Department to decide whether it is important to address the potential scenario now in a condition. The benefit of addressing it now is that it would clarify the issue for the future. The downside is that it would be locking the Department into a position that a future Director may or may not agree with.⁸ If the Department decides to address the issue, the Department would first need to decide whether it agrees with

⁸ Whether authorizing the diversion of Water Right #4 from Wells A and C would constitute injury was not analyzed as part of this memorandum.

Veolia about whether a junior water right can be moved out of the limited curtailment area. If the Department agrees, Veolia's proposed language is too specific and any references to material injury should be removed as that is covered in the Department's Conjunctive Management Rules and does not need to be detailed on a water right condition. It is recommended that if the Department agrees with Veolia and decides to address this issue, the Department should propose another version of APOD conditional language to identify how a municipal provider may distribute its water rights between its APODs that are located inside and outside curtailment zones.

II. The Department has not historically used a reopener condition.

Veolia asks the Department to add a reopener condition in its transfer approvals to give other parties notice and an opportunity to be heard at the reporting period or when the planning horizon expires. *Notes on IDWR's Proposed Conditions for IMAP Approval*, at 14. The Department adopted the following language in a recent round of proposed conditions by Veolia, and Veolia proposed to add the underlined portion:

On or before December 31, 2045 and again each 21 years thereafter (or such other date as the Department may specify in the future) or upon the expiration of the planning horizon then in effect, whichever occurs first, the right holder shall prepare an updated forecast of peak demand at the end of the planning horizon, together with a gap analysis comparing projected peak demand with the right holder's portfolio of water rights and other entitlements available to meet that demand. The demand forecast and gap analysis shall be consistent with procedural requirements, law, and guidance on the subject then in effect. The evaluation shall be submitted to IDWR with notice provided by the right holder to the parties and interested parties to transfer 89499 and such other persons or entities as IDWR may direct. Following the submission of each such demand forecast and gap analysis or the right holder's failure to timely provide such, IDWR may (1) request the submission of additional information from the right holder and engage informally with the right holder and others regarding such information, (2) initiate a contested case, or (3) take no action. If IDWR does not initiate a contested case within three months following the latest submission, any interested person including the right holder may petition IDWR to initiate a contested case within three months from the expiration of such period. If a contested case is initiated, IDWR shall determine whether the right holder has met its obligation to demonstrate that there is no substantial shortfall of projected peak demand compared to available water rights and entitlements at the close of the planning horizon. This determination shall take into account all relevant circumstances including the need for redundant supplies and a reasonable cushion. Based on that determination, IDWR may elect to lengthen or shorten the duration of the planning horizon consistent with Idaho law then in effect.

Notes on IDWR's Proposed Conditions for IMAP Approval, at 13–14 (Jan. 17, 2025).

This condition requires Veolia to submit a twenty-year report that projects the demand forecast and gap analysis involved with its planning horizon. A contested case need not be initiated based on the data in the report. However, the condition allows the Department to lengthen or shorten the planning horizon once a contested case is initiated by the Department, a party, or an interested person.

A. The outcome of the Department’s May 2018 Status Conference resulted in a policy standpoint against a reopener condition.

During the May 31, 2018 Status Conference,⁹ Veolia claimed that the Department has the authority to condition transfer approvals with any conditions it would like to impose, including a reopener condition. Veolia further claimed that once the Department received the twenty-year report, the Department does not necessarily need to take any additional action after reviewing the report. Veolia raises these arguments because it is concerned with future forfeiture proceedings due to the potential slow development of the water rights, which is why Veolia wants the ability to extend the planning horizon if needed based on the contents of the twenty-year report.

At the status conference, James indicated that the Department imposes water right conditions requiring periodic reporting, so that is not an issue. However, James also raised several questions regarding his reservations against the reopener provision because there is currently no process for reopeners in contested cases. James questioned: (1) what elements should the Department evaluate if a reopener was executed; (2) what standards of review would apply in a reopener; and (3) what public process of notice and an opportunity to be heard would exist if Veolia asked to extend the planning horizon after submitting its report?

During the conference, Shelley raised several of the Department’s concerns with adding a reopener condition. First, Idaho law does not provide any direction for a reopener condition. Second, given the unique nature of the proposed process in the reopener condition, it could set a precedent in other contested cases that are not permitted in Idaho law. Third, the Department does not want to commit any resources to evaluate extending the planning horizon based on the contents of the twenty-year report. On the contrary, Shelley also expressed reservations about Veolia initiating a transfer application instead of allowing a reopener at the twenty-year report period because extending the planning horizon is not an element of a water right. Regardless, Shelley indicated that the Department could add a condition for the Department to retain jurisdiction over whether Veolia could extend the planning horizon once Veolia filed the twenty-year report.

At the end of the May 2018 status conference, James asked the Department to develop a draft approval with conditions, which led to the *Proposed Conditions of Approval Memorandum*, Shelley Keen (June 29, 2018) [hereinafter *Keen Memo*]. In the *Keen Memo*, Shelley omitted a reopener condition and concluded that:

⁹ The recording can be found at: <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/suez-water-idaho-imap/IMAP-20180531-Status-Conference.mp3>.

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.

Keen Memo, at 1.

B. The July 2018 Status Conference resulted in the Department continuing to take a policy standpoint against the reopener condition.

During the July 10, 2018 Status Conference,¹⁰ Veolia continued to claim that the reopener condition does not commit the Department to any further action once it receives the twenty-year report. Veolia also indicated that it would be open to refiling a transfer application based on the data in the twenty-year report to extend the planning horizon; however, it is unclear how a transfer proceeding would work because the planning horizon is not an element of a water right.

At the status conference, James indicated that he was comfortable with requiring Veolia to submit a report at the twenty-year mark but clarified that the reopener provision was a separate issue. James suggested that if Veolia needed to change the planning horizon based on the results of the report, a public process would be required. However, the details of that process—whether it would be a transfer application or another procedure—were still uncertain.

Shelley agreed that a transfer application seemed reasonable but expressed concern about committing Department resources without a clear statutory process. Shelley was also worried about the reopener condition effectively creating an open-ended contested case. Shelley reiterated that the Department did not want a condition that committed it to undefined actions after receiving the report. However, Shelley also indicated that the Department could respond to a transfer application or other filings made at that time.

C. The purpose of having a reopener condition is to extend the planning horizon which is not permitted under Idaho law.

Based on the discussions in the 2018 Status Conference, the reopener condition is purported to resolve the issue of whether a planning horizon may be extended. Idaho Code § 42-204(4) states: “The permit development period shall correspond to the planning horizon authorized by the permit, *which may not be extended*.” This statutory provision raises the question of whether it is the permit development period itself or the planning horizon that cannot be extended, or both.

The legislative history suggests that while the development period for RAFN water rights may be extended to match the planning horizon, the planning horizon itself cannot be extended.

¹⁰ The recording can be found at: <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/suez-water-idaho-imap/IMAP-20180710-Status-Conference.mp3>.

For instance, several statements made during the Senate Resources and Environment Committee indicated the statute would give the Department “the ability to use the full planning horizon on the permit to prove up the water right and license the water right for the water that was actually used at the end of that period.” S.B. 1316, Senate Resources & Environment Committee Meeting Minutes, Statements by Travis Thompson (Feb. 17, 2020). In addition, the statute “allows [the Department] to extend the proof deadline to the end of the planning horizon to conform with the revised process.” *Id.* Statements by Shelley Keen. Based on these statements, it seems that the permit development period may be extended to the end of the planning horizon, and the planning horizon itself cannot be extended. This statute effectively prohibits Veolia from asking the Department to extend the planning horizon after it files the twenty-year report, thus nullifying the purpose of the reopener provision.

If Veolia reaches the end of the planning horizon without fully developing its RAFN water rights, then it could pursue available options based on applicable Idaho law at that time, whether it be filing a transfer application to add more APODs, filing a new application for permit, or some other future option yet to be determined. Therefore, it is recommended that the Department does not add the reopener condition to the transfer approvals.

III. The Department may add the surface water first condition on Veolia’s water rights that have historically used surface water to irrigate.

The Department’s standard surface water first condition states:

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 89499. 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.

Veolia Notes on IDWR’s Proposed Conditions for IMAP Approval, at 8 (Jan. 17, 2025).

Veolia proposes to omit the surface water first condition from its water rights. *Id.* In the alternative, Veolia proposes that if it must have the condition, it should state:

Taking into account operational complexities, regulatory requirements, and other constraints, the right holder shall use natural flow surface water supply available to it as its primary source to meet municipal demand whenever reasonably practicable. The right holder shall take no action to prevent or discourage either its customers or developers of land to be served by the right holder from using natural flow surface water available to them as their primary source of irrigation water.

Id. Veolia asserts that the surface water first condition is inappropriate under these circumstances for two primary reasons. First, municipal providers do not have “control over the use of

appurtenant surface rights held by their customers and land developers.” *Veolia Proposed Conditions for IMAP Approval*, at 12 (Oct. 9, 2023 with “bucket notes” added April 23, 2024). Second, recent caselaw and subsequent statutory enactments only permit the Department to add the surface water first condition on new ground water permits for irrigation use only. *Id.* (citing *Eden’s Gate LLC v. Idaho Dept. of Water Res.*, Case No. CV14-21-10116 (3d Jud. Dist. Ct. June 9, 2022) and I.C. § 42-204A).

A. How the law has developed regarding the surface water first condition.

In 2016, the Director approved a transfer application from the City of Meridian, adding a surface water first condition to six of the City’s water rights. *In the Matter of Application for Transfer No. 79778 in the Name of City of Meridian, Order Addressing Exceptions and Amending Transfer Approval*, at 4 (Oct. 4, 2016) [hereinafter *City of Meridian*]. This condition was included for three main reasons: (1) to conserve limited ground water resources; (2) to ensure the City would not circumvent the surface water use requirement on lands historically irrigated with surface water; and (3) to prevent the enlargement of water rights by using ground water in areas where it had historically used surface water. *Id.* The Director referenced the Local Land Use Planning Act (“LLUPA”) in a footnote as support for prioritizing surface water first to conserve ground water resources. *Id.* n.3 (citing I.C. § 67-6537). However, transfer applications involve evaluating multiple factors, including whether the change constitutes an enlargement or whether the change is consistent with the conservation of water resources and the local public interest. I.C. § 42-222(1).

In 2022, the SRBA Court held that the Department cannot rely on LLUPA to deny an application for permit to appropriate ground water for irrigation use. *Eden’s Gate*, at 6. In *Eden’s Gate*, the Department approved applications to appropriate ground water for domestic use but denied the irrigation use portion. *Id.* at 3. The Director cited LLUPA’s public policy preference for conserving ground water by prioritizing surface water for irrigation as a reason for denying the irrigation portion of the new appropriations. *Id.* at 5. On judicial review, the SRBA Court held that the Director could not rely on LLUPA to deny the irrigation portion, as LLUPA only applies to land use changes with local entities such as a county. *Id.* at 6. The Court further reasoned that if the Director wanted “[t]o apply a local public interest preference for the continued use of surface water irrigation over new ground water irrigation, the Director must first find that the surface water is available and that finding must be supported by the record.” *Id.* at 10. However, the Court determined that the evidence in the record supported a finding that Eden’s Gate’s use was consistent with ground water conservation and the number of acres irrigated by surface water within the service area would remain the same. *Id.* at 10–11.

In response to the *Eden’s Gate* decision, the Idaho Legislature enacted Idaho Code § 42-204A, which aims to conserve ground water and maximize surface water use for irrigation. It states, in pertinent part:

- (1) The intent of this section is to *conserve ground water resources* and secure the maximum use and benefit from surface water resources in Idaho by requiring that *permits to appropriate ground water to irrigate land with surface water rights for irrigation* be conditioned to require use of available surface water as

- the primary irrigation supply and use of ground water as a supplemental water supply when surface water is not available. . . .
- (2) When the [Department] receives *an application to appropriate ground water* . . . for irrigation purposes

I.C. § 42-204A(1)–(2). The statute expressly requires that new permits to appropriate ground water for irrigation use must use available surface water as the primary source and ground water as a supplemental source only when surface water is unavailable. *Id.* This statute was introduced in response to the *Eden’s Gate* decision to “provide clear authority to the Director to condition new irrigation groundwater rights consistent with” the surface water first policy set forth in LLUPA to evaluate the local public interest factor in new ground water appropriations. S.B. 1033, Statement of Purpose (2023).

B. The Department does not need to rely on LLUPA to add the surface water first condition because this is a transfer application and it is in the interest of conserving water resources.

While *Eden’s Gate* and the subsequent statutory enactment apply to new ground water appropriations, they do not prevent the Department from applying a surface water first condition in transfer cases where surface water is available for use by the permit holder. In enacting Idaho Code § 42-204A, the Legislature codified the State’s interest in using available appurtenant surface water for irrigation to conserve ground water resources. While that statute applies to new ground water appropriations, transfer applications modify the elements of existing water rights. Just because a water right element is modified, the Department still must consider whether the change is consistent with the conservation of water resources when evaluating transfer applications. I.C. § 42-222(1). Adding a surface water first condition on a transfer approval is consistent with the conservation of water resources because it ensures the municipal provider will maintain the status quo and irrigate lands that have historically used surface water. *Memorandum Re: Staff Review of Suez Water Idaho, Inc.’s Integrated Municipal Application Package*, M. Rauhut, A. Grimm, P. Skaggs, E. Boe, and S. Keen, at 21 (Jan. 14, 2019).

Veolia’s transfer request has surface water rights and ground water rights. *Veolia Status Conference, Statements from James Cefalo* (July 10, 2018). During the July 2018 Status Conference, Shelley indicated that the surface water first condition is good public policy for multiple reasons: (1) it ensures the continued use of surface water on lands historically irrigated by it; (2) it conserves ground water for other uses like drinking water; (3) and it acknowledges the interconnectedness between surface water and ground water. Shelley also indicated that applying the surface water first condition will ensure fairness between Veolia and other municipalities, like the City of Meridian. The Department may add the surface water first condition on transfer approvals where appurtenant surface water has historically been used for irrigation and is reasonably available because this practice is consistent with conserving water resources and prioritizes surface water on “permits to appropriate ground water.” *See* I.C. § 42-204A.

Veolia also raises a valid concern that they cannot control whether individual homeowners or land developers use surface water or ground water on a dual irrigation system.

However, Veolia should encourage land developers to create shutoff valve systems that prioritize surface water first, as seen in the Harris Ranch subdivision. In addition, Veolia should encourage individual customers to wait until the surface water irrigation system begins operation for the season before watering their lawns. Although enforcing individual use may be challenging, the Department can enforce the surface water first condition where Veolia controls the irrigation system (e.g., public parks) or where Veolia has historically used surface water. Therefore, it is reasonable to add the surface water first condition only on Veolia's water rights that have historically used surface water to irrigate.

IV. The Department is not required to abide by the *Stipulated Withdrawal* when issuing the transfer approvals and associated conditions.

Veolia's request to modify the APOD condition and add the reopener provision is based partially on the *Stipulated Withdrawal*. The Department has a guidance document regarding conditional withdrawals. It states:

If a conditional protest withdrawal proposes settlement conditions to be applied to an approval, the Department must determine if the conditions are appropriate prior to determining that a protest is withdrawn.

If the settlement conditions are determined to be unacceptable, the Department should prepare a letter to inform the parties that the conditional protest withdrawal is not acceptable and should list the reasons why the conditions cannot be accepted. The letter should also inform the parties that the protests will not be considered by the Department as withdrawn, that the pending application remains an active contested case before the Department, and that the parties have further opportunity to resolve the contested matter through continued negotiations.

If the settlement conditions are determined to be acceptable, and the application is otherwise approvable, the Department should acknowledge receipt of the conditional withdrawal of protest. The acknowledgement letter should inform the parties that the Department may modify the conditions as written to fit the approval format or may substitute a standard condition of the Department with essentially the same language and intent.

Administrator's Transfer Processing Memo No. 25, *Conditional Protest Withdrawal for Resolution of a Contested Application*, at 2 (July 29, 2003).

Two outcomes may result from the Department's evaluation of the proposed settlement conditions. First, if the settlement conditions are unacceptable, the Department should inform the parties that the protests are not withdrawn because the settlement conditions are unacceptable and an active contested case is still before the Department. *Id.* Second, if the settlement conditions are acceptable, the Department must inform the parties that it received the conditional withdrawal and the Department "may modify the conditions as written to fit the approval format or may substitute a standard condition of [the Department] with essentially the same language and intent."

Although this guidance document does not have the force and effect of law, it is a standard procedure followed by the Department. It is not necessary to consider the stipulated withdrawal requests and it is not required to adopt Veolia's revised APOD condition because the Department "may substitute a standard condition" implemented by the Department.

Conclusion

A portion of the APOD condition has been affirmed by the Idaho Supreme Court and has been modified in recent years in administrative matters before the Department. Veolia raises valid concerns that there is still confusion surrounding how the APOD condition would be implemented during a limited curtailment situation. The Department should reevaluate whether the APOD condition should be modified to describe whether junior water rights inside a curtailment zone may be pumped from APODs outside a curtailment zone.

The Department should not add the reopener condition to the transfer approvals because Veolia's planning horizon cannot be extended pursuant to Idaho Code § 42-204(4).

The Department may add the surface water first condition only on Veolia's water rights that have historically used surface water for irrigation.

Depending on the conditions the Department adds to the transfer approvals, the Department may or may not accept the *Stipulated Withdrawal* between Veolia and the Districts.