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DEPARTMENT OF
WATER RESOURCES

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MEMORANDUM

TO: Cody Parker, Water Rights Supervisor, Western Regional Office, IDWR
Sara M. Ajeti, Deputy Attorney General

FROM: Christopher H. Meyer 

RE: Request to remove or revise the “surface-water-first condition” in IMAP
Transfer No. 89499

DATE: July 20, 2025

This is my third follow-up memo addressing issues raised at our meeting on 6/12/2025. The first was my 7/18/2025 memo addressing the “anti-speculation condition.” The second was my 7/18/2025 memo addressing the “redefinition condition.”

This memo addresses the “surface-water-first condition.” This condition appears, for example, as condition #2 in right No. 63-11990. It is similar to Standard Condition 102.

IDWR's version

As currently proposed by IDWR (6/9/2025), the condition reads:

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. 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's concern

Veolia cannot comply with this condition for the simple reason that Veolia cannot control what water its customers apply to their lawns and landscaping. Many of its customers (including the author of this memo) have dual sources of irrigation water. By turning valves, they can switch from Veolia water to HOA-provided surface water. Most customers are responsible (and cost sensitive). They use free HOA water during the irrigation season and switch to Veolia water during the shoulder season (or don't irrigate at all).

Veolia has no way of knowing if a customer fails to promptly turn on his or her surface water supply when it becomes available in the spring. Even if Veolia did know, it has no ability to force a customer to stop irrigating with Veolia water during the summer. Veolia has no police power. To the contrary, it operates under a mandatory duty imposed by statute and enforced by the IPUC to serve all customers.

Likewise, Veolia has no control over an HOA, a developer, or a land owner who decides to sell off appurtenant surface water.

Make no mistake, Veolia strongly supports Idaho's "surface-water-first" policy. It will do everything in its power to encourage compliance with that requirement. Our prior suggested condition language would make that binding. (See below.) But it is unfair and unreasonable to impose a condition on Veolia requiring it to control what it has no ability to control.

No legal basis to apply this condition to municipal permits or transfers

Prior practice

For years, IDWR routinely imposed surface-water-first conditions on most ground water rights. The Department believed it had authority to do so under the local public interest test coupled with a provision in LLUPA (Idaho Code § 67-6537(1)) requiring land developers "to use surface water, where reasonably available, as the primary water source for irrigation."

2022: Eden's Gate

In 2021, IDWR denied ground water appropriation applications filed by a developer who had sold lots that had been stripped of their surface water shares. This action was overturned in *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022). In that case, Judge Wildman ruled that the LLUPA provision was inapplicable to IDWR, and the local public interest provision was too narrow in scope to support the permit denial. He concluded: "The Court is unaware

of any stated ‘blanket’ state-wide legislative policy setting forth a preference for the use of surface water over unappropriated ground water in the context of an application to appropriate water.” *Eden’s Gate* at pp. 6-7.

2023: Section 42-204A

The Legislature responded in 2023 and again in 2025, but its response was appropriately limited, and not applicable to municipal water rights or to any transfers.

In 2023 it enacted Idaho Code § 42-204A. This statute requires that new permits for irrigation purposes “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.” Idaho Code § 42-204A(1). However, the statute applies only to new appropriations of water “for irrigation purposes.” Idaho Code § 42-204A(2). It does not apply to municipal water rights. Nor does it apply to the transfer of any existing rights.

2023: IDWR’s guidance

The narrow scope of section 42-204A is recognized by the Department in its revised guidance (*Application Processing No. 79 (“Surface-water-first” Requirements for New Ground Water Irrigation Appropriations)* (July 3, 2023)). This guidance, which reimposed the Department’s policy of adding a surface-water-first condition, applies only to “an application to appropriate ground water for irrigation purposes.” *Application Processing No. 79*, p. 2.

The guidance observes that the statute is limited “to applications for ‘irrigation purposes.’” *Application Processing No. 79*, p. 3. It concludes “irrigation purposes” includes the irrigation component that is often associated with a domestic water right. The guidance states that this irrigation use shall be listed separately on the face of the right as a separate purposes of use, and shall be made subject to the surface-water-first condition. *Application Processing No. 79*, pp. 3-4.

Appropriately, however, the 2023 guidance does not address municipal water rights (nor transfers of any rights), both of which fall outside the authority granted to the Department by Idaho Code § 42-204A(2).

In sum, Judge Wildman concluded that the Department lacks authority to deny of an application (or to impose a surface-water-first condition) on the basis of a perceived statewide “surface-water-first” policy. That decision was overturned by the Legislature in 2023, but only with respect to new appropriations for irrigation purposes. Hence, the Department still has no authority to impose such a condition on the IMAP transfers.

2025: Section 31-3805(3)

The Legislature's most recent enactment reinforces the conclusion that a surface-water-first condition should not be placed on a municipal right. In 2025, the Legislature repealed and replaced Idaho Code § 31-3805. Subsection (3) of the new statute requires developers to utilize available surface water in designing the irrigation of lots within new subdivisions. Similar to Idaho Code § 67-6537(1), it applies to local governments in the land use context. It has no applicability to IDWR's administration of water rights.

This sensible statute focuses where it should—on the entities with on-the-ground control over irrigation systems. This reflects the Legislature's recognition these entities—not municipal water providers—have the ability to implement the surface-water-first policy.

Veolia's proposed condition

For these reasons, Veolia believes that the surface-water-first condition should be removed altogether from the IMAP transfers. However, as an alternative, Veolia previously suggested the following language:

Taking into account operational complexities, the right holder shall divert water available under its natural flow surface water rights to meet demand whenever reasonably practicable. The right holder shall take no action to compel its customers or developers of land to be served by the right holder not to use surface water owned or controlled by them or a local irrigation entity that is available to them as a primary source of irrigation water and appurtenant to land served by the right holder.

Veolia continues to believe this language, or something like it, is more in keeping with the Department's authority and practical realities.

Conclusion

In all candor, Veolia is not going to the mattresses over this. We have litigated the IMAP for too many decades. It is time to bring this to a conclusion.

Accordingly, Veolia makes its case as vigorously as it can, in the sincere hope that the Department will reconsider its proposed surface-water-first condition. It is now in the Department's hands to do the right thing.