



APODs: Not Just a Tool for Adjudication

The solution used to be simple. Need more water? Then drill another well. Whether you were a homesteader looking to plant the back 40 or a civic leader trying to keep up with the needs of your growing community, the answer lay underground.

Fundamentally speaking, this remains true today.¹ For entities that have sufficient financial means and a groundwater source that is open to further development, expansion still can be satisfied in vintage fashion – with an additional well and a state-issued water right attached to it.

But this incremental approach presents a complication that has only recently been addressed. As became evident during the Snake River Basin Adjudication (SRBA), Idaho had to deal, both administratively and judicially, with the concept of alternative points of diversion (APODs) as it applies to municipalities. And its impact will not be limited to the SRBA.

As alluded to above, cities in the western United States historically expanded their water supply at same pace as their population grew, which typically was one well – and one water right – at a time. In states such as Idaho that allocate water by way of the prior appropriation doctrine, each water right is assigned a date of priority, which establishes a hierarchical order for administrative purposes during times of shortage. So, under the basic tenets of prior appropriation, a city that had 10 wells would likely be dealing with 10 different dates of priority, even though the wells all served the same municipal water system.

In an effort to simplify management and delivery, some cities began using their wells interchangeably; that is, the volume of water allocated under a particular right was not necessarily pumped from its designated point of diversion. The issue with that unauthorized practice, which came to light during the SRBA, is that it creates the possibility of injury to other water rights by increasing the cone of depression with higher rates of pumping than authorized. By using APODs, a city might pump water allocated under a senior right from any of the wells within its interconnected system, including those located several miles away and drilled years, if not decades, after the one to which that right was originally attached.

Appreciating the value APODs offered municipal providers, as well as the potential for injury they posed to other water users, the Idaho Department of Water Resources (IDWR or Department) developed a compromise. In instances where APODs were in use prior to the commencement of the SRBA, IDWR recognized accomplished transfers pursuant to Idaho Code 42-1425 – changes were accomplished though not administratively approved. Accordingly, IDWR advised

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that providers be allowed to pump water allocated under their rights from any interconnected well serving their respective delivery systems, provided the wells drew from the same source and that no injury or enlargement resulted.

But IDWR also recommended – and both the state adjudication court and the Idaho Supreme Court agreed² – that a right authorizing APODs subsequent to an accomplished transfer shall be decreed with a condition acknowledging the right’s original point and volume of diversion, therefore restricting APOD use under certain circumstances.³

Although this condition for accomplished transfers will no doubt surface regularly during the ongoing North Idaho Adjudication, it is not necessarily limited to that particular application. Parties who protest APOD authorization sought through new appropriation or formal administrative transfer can request that approval be conditioned on language designed to protect their existing rights.

While IDWR has declined to unilaterally impose the condition under such circumstances, it is arguable whether the Department should continue this hands-off approach. As stated in perhaps the most widely respected treatise on Idaho Water Law, “[i]f the Department had information showing that future injury was a real possibility, the Department might be justified in imposing conditional language along the lines of the APOD condition developed in the SRBA context.”⁴

About the authors

Laura A. Schroeder is the charter member of Schroeder Law Offices, P.C., a firm that represents water-rights clients in six western states and consults internationally. James Browitt practices water law in Idaho and Washington with his firm, Browitt Law Office, and works as Of Counsel for Schroeder Law Offices. You can read more about this topic and other water-rights issues at Schroeder Law Offices’ Water Law Blog, www.water-law.com/home/blog.

End notes

¹ IDWR is currently processing nearly 1,200 applications for permits to appropriate water. Of those active applications, more than 850 identify a groundwater source. See www.idwr.idaho.gov/apps/ExtSearch/WRAJSearch/SearchPage.aspx.

² In *City of Pocatello v. Idaho*, 152 Idaho 830 (2012) the state Supreme Court ruled, among other things, that the APOD condition was appropriately included in SRBA decrees involving accomplished transfers.

³ The condition included in decrees involving APODs and accomplished transfers is as follows: “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] in the amount of ___ cfs.”

⁴ JEFFREY C. FEREDAY, CHRISTOPHER H. MEYER & MICHAEL C. CREAMER, WATER LAW HANDBOOK: THE ACQUISITION, USE, TRANSFER, ADMINISTRATION, AND MANAGEMENT OF WATER RIGHTS IN IDAHO p. 138 (2014). The authors gratefully acknowledge the information on this topic contained in the foregoing publication. ♦

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Jim Browitt: j.browitt@water-law.com
Laura Schroeder: schroeder@water-law.com
Boise: (208) 994-7007 www.water-law.com