

Enlargement and Interruptibility

I. Enlargement

A. What is Enlargement of a water right?

A right can be enlarged in three primary ways: 1. The instant demand rate (Qi) can be increased; 2. The annual quantity (Qa) can be increased and/or 3. The annual consumptive quantity (ACQ) under the right can be increased. Transfers of and/or changes to water rights are not supposed to enlarge a right so when authorizing a transfer attention to these aspects of the transfer are important.

B. When Does Enlargement of a water right become an issue?

Enlargement is often subtle. Examples of when enlarging a right might occur would be in an instance when a surface water diversion that sometimes goes partially or completely dry is changed to a well that does not go dry. Another example is when the number of acres to be added to an irrigation right is increased or when additional uses are to be made of the water.

C. What can be done about it?

Analyze consumptive quantities used before and after the transfer to assure that the right is not enlarged. This analysis is done in two differing degrees of intensity: 1. Where the transfer proposes an additional use or additional acres to be irrigated an Annual Consumptive Quantity test (ACQ) is employed which measures the average use of the two highest years of the last five years of continuous use (see DOE POL 1210 attached). 2. Where there is no additional use (e.g. all being transferred from irrigation to municipal) then there is a more general “Enlargement Analysis” (aka. “ACQ lite”).

If ACQ or other analysis fails to demonstrate that enlargement will not occur then the transfer may be conditioned such that it does not impair existing rights. The conditions are tailored to fit the aspect of the enlargement. (e.g. condition withdrawals of ground water to the availability of surface water at the original point of diversion, reduce annual quantities to ensure that consumed amounts are not increased.) These conditions often take the form of interruptions (see below)

Mark Peterson; 103 Palouse Street, Suite 5; Wenatchee, WA 98801

Phone: 509.667.8097

Fax: 816.817.4435

markp@nwi.net

II. Interruptibility

A. What is Interruptibility of a water right?

Water right demand quantities authorized may be suspended for a periods of time under certain circumstances (generally low instream flows or availability at original source) as a condition imposed in the water right document at the time of issuance or transfer to address impairment of existing rights.

B. When Does Interruptibility of a water right become an issue?

Interruptability most commonly at the time of water system plan approval for potable water providers. Orchards or other developments that would be harmed by an interrupted supply can also give rise to this issue if it appears they would have to rely on a right conditioned in this manner.

C. What can be done about it?

Analyze the portfolio of available water rights to see if the interruption will create a problem. Many times potable water systems have lower instant demand rates than the certificates that authorize them allowing for Instant demand rates to be attributed to uninterrupted rights during times when some of the rights are interrupted.

Engineers may have a solution through system configuration. Particularly if the period of interruption is infrequent or expected to be short in duration, it is possible that the interruption could be treated as any other system reliability issue and additional storage capacity may suffice.

If conditions fail then you may also consider mitigation efforts. Mitigations are efforts undertaken to offset impairments. The most successful mitigation proposals are ones that provide offsetting effects that are most similar to the impairments anticipated.

Finally, when all else fails there is the possibility of obtaining a determination that the change should be granted in spite of the potential impairment based on an "Overriding Public Interest" (OPI). Existing potable water systems are particularly well suited to exercise this option because they fulfill critical health, safety and welfare roles. However, this approach is relatively untested and likely to be politically challenging.

V. Summary/ Question and Answer

Questions

1. Are there any particular pitfalls to be avoided in an enlargement analysis?

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markp@nwi.net

Answer: be sure to calculate interior and exterior uses separately if possible. Lumping them together renders both calculations liable to detrimental assumptions that can be other wise avoided. (give example)

2. What kinds of interruptions do you typically see in your practice and how have they been dealt with?

Answer: instream flows. It depends on the potential duration.