



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

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C.L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Director

May 19, 2014

Don F. Pickett  
1659 South 600 West  
Oakley, Id 83346

Re: FED Agribusiness LLC

Dear Mr. Pickett:

I received your letter dated May 6, 2014 requesting that the Department forego the ESPAM analysis requirement for a transfer to be filed by FED Agribusiness LLC ("FED"). I understand FED has been working with Department staff to prepare an application to add a point of diversion to water rights that currently authorize diversion of low temperature geothermal water. In your letter, you assert that, because the wells associated with the proposed transfer are all outside the ESPA, there is no need for an ESPAM analysis to determine injury.

As you know, Idaho Code § 42-222 authorizes changes to water rights if certain criteria can be satisfied, including the provision that no water rights are injured by the change. One of the tools available to assess injury is ESPAM, a ground water model developed to simulate depletions to the Snake River caused by diversion of ground water from the Eastern Snake Plain Aquifer and tributary aquifers. Without ESPAM, it would be difficult for applicants to satisfy their burden to demonstrate that no other water rights would be injured by their diversion of ground water.

The ESPAM area is broken down into one square mile cells. If a transfer of a point of diversion is limited to the area within one model cell, ESPAM simulations would show no change in depletion to the Snake River because model inputs do not change within the cell. Recognizing this limitation to ESPAM, and the potential inequity of requiring an ESPAM analysis for a short-distance change across one model cell boundary, the Department has waived the requirement for submittal of an ESPAM analysis with an application if the transfer proposes a change in point of diversion to the area within a model cell or to an adjacent or surrounding cell. If an application is subsequently protested, the burden to demonstrate no injury to other water rights remains with the applicant, and an injury analysis may be required to satisfy the burden.

I understand that FED's proposed point of diversion is an existing well located on or near an ESPAM cell boundary that places it just within or just outside a cell that would not trigger the need to submit an ESPAM analysis with an application for transfer. I am willing to forego a requirement for submittal of an ESPAM analysis with FED's application with the understanding that, if the application is protested, the applicant is not relieved of the burden to demonstrate that the transfer will not cause injury to other water rights, including rights in the ESPA or from the Snake River.

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Because the proposed transfer involves low temperature geothermal water, IDWR must consider other factors. Water right nos. 45-2626 and 45-2374 were perfected prior to the enactment of Idaho Code § 42-233, which requires low-temperature geothermal resources to be used primarily for heat value. FED may divert an amount previously authorized under the rights and actually put to beneficial use prior to the enactment of Idaho Code §42-233, from the low-temperature geothermal resource without utilizing the water primarily for its heat value, either through deepening of an existing well or by drilling a new well. Note also that deepening an existing well or drilling a new well into the low-temperature geothermal resource requires bonding and compliance with low-temperature geothermal resource rules and regulations to ensure well construction standards are satisfied to protect the resource.

Any additional diversion of the low-temperature geothermal resource exceeding the historic use, and not being utilized primarily for its heat value, would require an exemption by the Director if the requirements for exemption can be satisfied pursuant to Idaho Code § 42-233. If an exemption under Idaho Code § 42-233 is requested, the following criteria must be satisfied:

- 1) there is no feasible alternative use of the resource;
- 2) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available; and
- 3) the exemption is in the public interest.

The Department views the first criterion as applicable to the local area to address the question: Is there any viable alternative use of the resource by others? Regarding the third criterion, consideration of the public interest would include consideration of the impacts to the local agricultural economy as well as the interest of the public in protection of the resource for existing or future heating uses. These criteria would be evaluated at the time of request, through a public process, if an exemption becomes necessary.

I hope this letter addresses your questions. Please feel free to contact me if you want to discuss further.

Sincerely,



Gary Spackman  
Director

cc: IDWR Southern Region  
Tim Luke, State Office, IDWR