

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 82161 IN THE NAME OF
SUEZ WATER IDAHO INC.

**FINAL ORDER APPROVING
TRANSFER**

BACKGROUND

On February 5, 2018, SUEZ Water Idaho Inc. (“SUEZ”) filed Application for Transfer No. 82161 (“Application”) with the Idaho Department of Water Resources (“Department”). The Application proposed to change the point of diversion and place of use for water right 63-123F. In May 2018, Farmers Union Ditch Company, Ltd., and Lexington Hills Homeowner’s Association filed notices of protest. On October 9, 2018, Lexington Hills, Inc. (“Lexington Hills”), filed *Lexington Hills, Inc.’s Petition to Intervene*. The Department issued an *Order Granting Petition to Intervene* on October 24, 2018¹. Farmers Union Ditch Company, Ltd. and Lexington Hills Homeowner’s Association withdrew their protests in February and March 2019, respectively.

On October 8, 2020, the Department’s hearing officer issued a *Preliminary Order Denying Transfer* (“Preliminary Order”). On October 22, 2020, SUEZ timely filed its *Petition for Reconsideration and Request for Hearing* with the Department. On November 12, 2020, the Director of the Department (“Director”) issued his *Order Granting Request for Hearing*.

On March 19, 2021, the Director issued a *Notice of Hearing; Scheduling Order*. On June 30, 2021, in response to SUEZ’s request, the Director issued a *Notice of Amended Scheduling Order*. SUEZ, Lexington Hills, and the Department participated in informal settlement discussions, reaching a settlement in principle. On September 14, 2021, to allow for additional time to effectuate an agreed upon settlement, the Director issued an *Order Vacating Hearing Dates and Associated Deadlines; Notice of Status Conference*.

On October 20, 2021, SUEZ filed a *Notice of Change in Water Right Ownership* (“Ownership Change”) for water right 63-123F. The Ownership Change includes a copy of a *Special Warranty Deed for Water Right* (“Warranty Deed”) executed by the president of Lexington Hills on September 24, 2021, which conveys ownership of water right 63-123F to SUEZ.

FINDINGS OF FACT

1. The Application proposes to change the point of diversion for water right 63-123F from the headgate of the Farmers Union Canal (T03N R02E S5 NE¼SE¼NE¼) to two existing surface

¹ Lexington Hills, Inc was the owner of water right 63-123F at the time SUEZ filed the Application. The Application does not propose to change the ownership of the water right, but Lexington authorized SUEZ to file the Application and later clarified that SUEZ was under contract to purchase the water right upon approval of the Application.

water intakes owned and operated by SUEZ. SUEZ’s two existing surface water intakes are known as the Columbia Plant (T02N R03E S04 L6) and the Marden Plant (T03N R02E S14 L7). SUEZ proposes to change the place of use for water right 63-123F to SUEZ’s municipal service area.

2. While SUEZ did not check the “change nature of use” box on the Application, it is clear from the Application that SUEZ intends to use the water diverted pursuant to water right 63-123F as part of its municipal water use. The application states in item A.2 of Part 1, “The proposed transfer will allow water right no. 63-123F to be diverted with SUEZ’s existing surface water intakes for irrigation of land *within SUEZ’s municipal service area.*” *Application* at 2 (emphasis added).

3. Since the issuance of the Preliminary Order, SUEZ purchased water right 63-123F from Lexington Hills. *See Warranty Deed.*

4. SUEZ has previously submitted to the Department satisfactory evidence to establish that it is a municipal provider as defined by Idaho Code § 42-202B(5)(b).

5. Table 1 below summarizes the monthly average historic consumptive use for water right 63-123F, as determined by the Department. Table 1 also lists the rates of diversion necessary to accumulate each monthly consumptive use volume if water were diverted continuously through the month, or portion of the month as shown.

Month	Diversion Rate (cfs)	Consumptive Use Volume in Acre-feet (af)
04/15 to 04/30	0.820	24.4
05/01 to 05/31	1.240	76.3
06/01 to 06/30	1.360	80.9
07/01 to 07/31	1.385	85.2
08/01 to 08/31	1.310	80.6
09/01 to 09/30	0.890	53.0
10/01 to 10/15	1.100	32.7
		Annual Total: 433.0 af

Table 1: Summary of Historic Use of Water Right 63-123F.

GOVERNING STATUTES AND RULES

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications, and states in relevant part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the

source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

Consumptive use is defined by Idaho Code § 42-202B(1) as: “that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.”

Idaho Code § 42-202B(9) defines service area as: “[T]hat area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. . . .”

ANALYSIS

After extensive discussions, the Department, SUEZ, and Lexington Hills have agreed on an approach that will allow the Application to be approved. SUEZ now owns water right 63-123F, and SUEZ is a recognized municipal provider. *See supra* ¶¶ 3, 4. The Director can approve the transfer application if the nature of use for water right 63-123F is changed to municipal use, and the monthly diversion rates and annual diversion volume are limited to the amounts shown in Table 1 to prevent enlargement. The nature of use can be changed without amending and readvertising the Application because it is clear from the Application that SUEZ always intended to use water right 63-123F within its municipal service area for a component of its municipal water use. *See supra* ¶ 4. Table 1 above summarizes the historic consumptive use of water right 63-123F. *See supra* Table 1 ¶ 5. Limiting approval of the Application to the historic consumptive use for water right 63-123F will prevent enlargement of use and injury to other water rights, and will protect the local public interest.

CONCLUSIONS OF LAW

The Director concludes that, if the nature of use of water right 63-123F is changed to municipal use and diversion rate and volume limits are imposed to ensure the historic consumptive use as set forth in Table 1 is not exceeded, the transfer satisfies the evaluation criteria of Idaho Code § 42-222(1). The Application should be approved with conditions.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 82161, in the name of SUEZ Water Idaho Inc., is APPROVED and the elements of water right 63-123F, including conditions, are CHANGED as shown in the accompanying approval document.

DATED this 30th day of November 2021.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November 2021, I served a true and correct copy of the foregoing, *Final Order Approving Transfer*, by the method indicated below, upon the following:

Michael P Lawrence
GIVENS PURSLEY LLP
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720
mpl@givenspursley.com

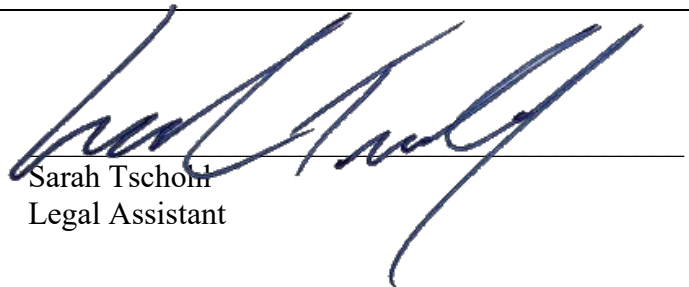
- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

For Applicant SUEZ Water Idaho Inc.

John M Marshall
JOHN MARSHALL LAW PLLC
575 W. Bannock St., Ste. B
Boise, ID 83702
john@jmarshalllaw.com

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

For Intervenor Lexington Hills, Inc.



Sarah Tschorn
Legal Assistant

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 82161**

This is to certify that: SUEZ WATER IDAHO
8248 W VICTORY RD
BOISE, ID 83709-4165

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
63-123F	WR/DECREED	6/1/1864	1.385 cfs	N/A	136.8	136.8	BOISE RIVER

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
63-123F	NO	YES	YES	NO	NO	YES

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
63-123F	63-123F	1.385 cfs	433.0 af	N/A	N/A	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		1.385 cfs	433.0 af	N/A	N/A		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 30th day of November, 2021.


Director, Idaho Department of Water Resources

WATER RIGHT NO. 63-123F

As Modified by Transfer No. 82161

In accordance with the approval of Transfer No. 82161, Water Right No. 63-123F is now described as follows:

Right Holder: SUEZ WATER IDAHO
8248 W VICTORY RD
BOISE, ID 83709-4165

Priority Date: 6/1/1864

Source: BOISE RIVER

Tributary: SNAKE RIVER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>
MUNICIPAL	04/15	to 04/30	0.820 cfs	24.4 af
MUNICIPAL	05/01	to 05/31	1.240 cfs	76.3 af
MUNICIPAL	06/01	to 06/30	1.360 cfs	80.9 af
MUNICIPAL	07/01	to 07/31	1.385 cfs	85.2 af
MUNICIPAL	08/01	to 08/31	1.310 cfs	80.6 af
MUNICIPAL	09/01	to 09/30	0.890 cfs	53.0 af
MUNICIPAL	10/01	to 10/15	1.100 cfs	32.7 af
Max Diversion Rate 1.385 cfs			Total Annual Diversion Volume 433.0 af	

LOCATION OF POINT(S) OF DIVERSION

BOISE RIVER	L6 (NWNE)	Sec 4 Twp 02N Rge 03E ADA County
BOISE RIVER	L7 (SENE)	Sec 14 Twp 03N Rge 02E ADA County

CONDITIONS OF APPROVAL

1. Place of use is within the service area of United Water Idaho as provided for under Idaho law. The place of use is generally described as within the city limits of Boise and the surrounding service area.
2. The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.
3. A map generally depicting the service area for this water right at the time of this approval is attached to this document for illustrative purposes.
4. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 63.
5. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
6. This right originated as all or part of right no. 2 in the Stewart Decree and the historic Boise River Water Masters records.

Transfer No. 82161

WATER RIGHT NO. 63-123F
As Modified by Transfer No. 82161

CONDITIONS OF APPROVAL

7. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
8. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
9. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.