State of Idaho
DEPARTMENT OF WATER RESOURCES
Western Region • 2735 Airport Way • Boise, Idaho 83705-5082
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BRAD LITTLE
Governor

GARY SPACKMAN
Director

October 8, 2020

MICHAEL P LAWRENCE
GIVENS PURSLEY LLP
601 W BANNOCK ST
PO BOX 2720
BOISE ID 83701

Preliminary Order Denying Transfer for Transfer No. 82161

Dear Applicant:

Please see the enclosed *Preliminary Order Denying Transfer* for Transfer No. 82161 in the name of Suez Water Idaho Inc.

If you have any questions regarding this matter, please call me at 208-334-2190.

Sincerely,

Kensie Thorneycroft
Administrative Assistant

Enclosures

CC: JOHN MARSHALL
JERRY A KISER
KIMBELL D GOURLEY

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.	**PRELIMINARY ORDER DENYING TRANSFER**

PROCEDURAL HISTORY

On February 5, 2018, the Idaho Department of Water Resources ("Department") received Application for Transfer No 82161 ("Application") filed by SUEZ Water Idaho Inc. ("SUEZ"). The Application proposes to change the point of diversion and place of use for water right 63-123F. The Department published notice of the Application in May 2018 and received timely protests from Farmers Union Ditch Company, Ltd. ("Farmers Union") and Lexington Hills Homeowner's Association ("HOA"). Lexington Hills, Inc. ("Lexington") filed a timely petition for intervention in October 2018, and the Department granted intervention on October 24, 2018. Farmers Union withdrew its protest on February 1, 2019, and the HOA withdrew its protest on March 12, 2019. The Department subsequently met and corresponded with SUEZ to collect additional information about the water right changes proposed in the Application. On March 3, 2020, SUEZ asked the Department to issue a decision based on the Application as filed and as subsequently amended and clarified through the additional information submitted.

After carefully examining the evidence and available information, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Water right 63-123F authorizes a diversion of water from the Boise River at a rate of 1.385 cubic feet per second ("cfs") to irrigate 136.8 acres.

2. Water right 63-123F is owned by intervenor Lexington. 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 is under contract to purchase the water right upon approval of the Application.

3. The Application proposes to change the point of diversion for water right 63-123F from the headgate of the Farmers Union Canal (T03N R02E S05 NE¼SE¼NE) to two existing surface water intakes owned and operated by SUEZ. The two SUEZ diversions are known as the Columbia Plant (T02N R03E S04 L6) and the Marden Plant (T03N R02E S14 L7). SUEZ proposes to distribute the diverted water to the proposed place of use through SUEZ's existing municipal water system.

4. The Application proposes to change the place of use for water right 63-123F. The authorized place of use for water right 63-123F is currently described with a digital boundary as defined by Idaho Code § 42-202B(2), is within T04N R01E S3, and is generally described as within the Lexington Hills Subdivision, Lexington Hills East

Subdivision, and Lexington on the Rim. SUEZ proposes to change the place of use to its service area, as defined in Idaho Code § 42-202B(9).

5. SUEZ's service area represented in IDWR's GIS system encompasses an area of approximately 91,000 acres.

6. The Application does not propose to change the nature of use of water right 63-123F from irrigation to municipal use or any other nature of use.

7. On September 12, 2019, SUEZ filed a letter proposing a more definite place of use for the 136.8 acres of irrigation authorized by water right 63-123F. In the letter, SUEZ proposes "that its service area be approved as a permissible place of use within which it is entitled to irrigate 136.8 acres in a single irrigation season, and that the specific area containing 136.8 acres depicted on the map will be the actual irrigated place of use until further notice." The area depicted on the map is a 385-acre residential area within which SUEZ asserts 136.8 acres of residential land will be irrigated with water diverted pursuant to water right 63-123F.

8. The diversion and use of water from the Boise River and its tributaries is administered by the watermaster of Water District 63. Many water rights[1] authorizing diversion from the Boise River bear a "step down" provision that requires the watermaster to reduce all rights bearing the provision by an equal percentage as the available natural flow declines. Such rights are reduced to 60% of their decreed flow rates through much of the irrigation season each year.

9. Water right 63-123F bears a priority date of 6/1/1864. This is the most senior priority date of the water rights that divert from the main stem of the Boise River. Further, water right 63-123F lacks the "step-down" element of many other Boise River water rights. As a result, water right 63-123F is available at its full diversion rate throughout the entire irrigation season.

10. SUEZ's historical diversion rates at the Marden and Columbia Plant diversions typically exceed 5.0 cfs during the irrigation season.

11. Water administration on the Boise River includes use of a computerized water rights accounting system that calculates available natural flow each day and allocates it to water rights at each diversion based on the priority dates of the rights at the diversion and the amount of water actually diverted. This after-the-fact accounting is run weekly or more frequently during the irrigation season to assist the watermaster and other users to identify what water rights are in priority and to inform water right administration decisions for the ensuing day(s).

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications:

> 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

[1] Generally those rights that were decreed in the Stewart and Bryant Decrees with priority dates senior to about 1916.

> 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. ... In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

Idaho Code § 42-202B defines a digital boundary:

> (2) "Digital boundary" means the boundary encompassing and defining an area consisting of or incorporating the place of use or permissible place of use for a water right prepared and maintained by the department of water resources using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard.

Idaho Code § 42-219 defines when the use of a digital boundary and generally described place of use for irrigation are authorized:

> (2) If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land irrigated by such water, except that the general description of a place of use described in accordance with subsection (5) or (6) of this section may be described using a digital boundary, as defined in section 42-202B, Idaho Code. If the use is for municipal purposes, the license shall describe the service area as provided in section 42-202B(9), Idaho Code.
>
> (5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho, the license issued shall be issued to the persons, association, company, corporation or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project. It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. The water diverted and the water right acquired thereby shall relate to the entire project, and the diversion of the water for the beneficial use under the project shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not.

(6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.

ANALYSIS

Pursuant to Idaho Code § 42-222(1), for any application for transfer the Department must determine whether the proposed change would enlarge the use of water under the water right or injure other water rights. Enlargement occurs when the total diversion rate, annual diversion volume, or extent of beneficial use, exceeds the amounts or beneficial use authorized under the water right prior to the proposed transfer.[2] Enlargement can cause injury by reducing the amount of water available to satisfy the water rights of other water users. SUEZ proposes to divert and deliver a surface water right for irrigation purposes within the same water delivery system it operates for its municipal water rights. SUEZ does not propose to exceed the authorized diversion rate for water right 63-123F, and water right 63-123F was not decreed with an annual diversion volume limit. SUEZ proposes to irrigate 136.8 acres, as is authorized by the decree for 63-123F. Although SUEZ does not propose to enlarge the decreed elements of water right 63-123F, the Department must evaluate if SUEZ can accomplish the proposed changes without enlarging the right or injuring other water users.

SUEZ has the facilities to divert the authorized 1.385 cfs of water from the Boise River at either of the two proposed points of diversion. These points of diversion routinely divert more than five cfs during the irrigation season. Given the senior priority date of water right 63-123F, any diversion from the two intakes during the irrigation season up to 1.385 cfs would be attributed by the Water District 63 accounting system to water right 63-123F. In other words, if the Application were to be approved, neither administration by priority nor physical diversion constraints would limit SUEZ's diversion of the full 1.385 cfs of water under water right 63-123F throughout the season of use.

Neither SUEZ nor Lexington[3] are an irrigation district, and the proposed place of use is not an irrigation project, so neither SUEZ nor Lexington are entitled to a generally described place of use for irrigation as authorized by Idaho Code §§ 42-219(5) or (6). SUEZ does not propose to change the nature of use of water right 63-123F from irrigation to municipal, so the permissible place of use for 63-123F should not be described using SUEZ's service area as provided in Idaho Code § 42-202B(9). SUEZ must specifically identify the proposed place of use for irrigation under water right 63-123F. SUEZ has identified an area

[2] Enlargement may also occur when the quantities or beneficial use exceed the quantities or beneficial use accomplished pursuant to the water right prior to the proposed transfer, even if the quantities or beneficial use after the transfer will not exceed the amounts authorized under the right prior to the transfer.

[3] Although the Application does not propose to change the ownership of water right 63-123F, Intervenor Lexington has stated that SUEZ is under contract to purchase the water right upon approval of the Application. It is appropriate to consider whether ownership may have some impact on the analysis.

within which it asserts 136.8 acres of irrigated residential land exists, but SUEZ has not demonstrated that it will have any knowledge of or control over whether or when those acres are irrigated or how much water is used to irrigate that land.

SUEZ uses its municipal system to divert and deliver both surface water and ground water from multiple points of diversion to supply the municipal demand within its service area. Municipal demand is not constant. SUEZ diverts more water into its system when demand is higher and less water when demand is lower. If the Application is approved, SUEZ would continuously divert 1.385 cfs of natural flow under water right 63-123F throughout the irrigation season, and would continue to divert additional surface and ground water as necessary to meet the municipal demand. When the water diverted under water right 63-123F is not needed or used on the 136.8 acre place of use, it will still be diverted and will be physically in the municipal system. Because SUEZ will not know whether or how much water is being used to irrigate the place of use for water right 63-123F, it cannot know whether the amount of water SUEZ must divert to satisfy the municipal demand is being augmented by water diverted under water right 63-123F. The most likely outcome is that SUEZ will divert less water under its other entitlements than it would have absent the presence of water diverted under water right 63-123F, and the water diverted under water right 63-123F will be used for some purpose other than irrigation of a specific 136.8 acres within SUEZ's municipal water system. Even if that municipal purpose is irrigation of lawns, gardens, parks, and open space within SUEZ's municipal service area, water right 63-123F would be enlarged because the use would exceed the beneficial use that was authorized and historically accomplished -- 136.8 acres of irrigation -- under the right prior to the transfer.

SUEZ's opportunity to divert water pursuant to water right 63-123F throughout the irrigation season would be the same as Lexington's. SUEZ's proposed use of water diverted under 63-123F differs from Lexington's, despite the fact that in both situations, the right is diverted continuously throughout the irrigation season and that there are times when the right is not fully used to irrigate the place of use. When Lexington is not irrigating, unused water "spills" back to the Boise River. Thus, while Lexington diverts water pursuant to water right 63-123F throughout the irrigation season, Lexington applies to the field only the amount required by the turf or crops grown on 136.8 acres, plus an amount to overcome inefficiencies in its on-field irrigation system. When it is raining, or when crops are being harvested, irrigation does not occur, and the water not applied to the field pursuant to water right 63-123F is available to satisfy other water rights. In contrast, SUEZ has not offered a means to ensure that when the entire 136.8 acres are not being irrigated, water diverted pursuant to water right 63-123F will be available to satisfy other water rights and will not be used for some other municipal purpose within the SUEZ delivery system.

To address the enlargement concern, SUEZ has suggested limiting the annual diversion volume for water right 63-123F to 4.5 acre-feet per acre. However, limiting water right 63-123F to 4.5 acre feet per acre would not prevent enlargement because it would not prevent a portion of that volume from being distributed to other components of SUEZ's municipal water use when the entire amount is not needed for irrigation of the 136.8-acre place of use.

As SUEZ notes in its March 3, 2020, email to the Department, the Department has considered the issue of water right changes to deliver irrigation rights through municipal systems. The Department has acknowledged that enlargement and associated injury concerns

can sometimes be addressed through monitoring and reporting sufficient to differentiate irrigation use occurring on lands authorized to be irrigated under the irrigation right from other components of the municipal use in the municipal service area.[4] The Department has approved some proposals to transfer irrigation water rights into a municipal system and has in some cases, required monitoring and reporting to address enlargement concerns.

SUEZ asserts the Department should adopt periodic monitoring and reporting in an approval of its Application to address enlargement and injury concerns. In SUEZ's municipal system, if the Boise River water diverted under 63-123F is not used for irrigation of the place of use, it will be used for some other purpose and may or may not return to the stream. SUEZ has not proposed a mechanism for identifying when the water diverted under water right 63-123F is not being used for irrigation of the place of use, nor has it offered a proposal for what corrective action could be taken to prevent water diverted pursuant to the irrigation water right from being routed to other purposes. SUEZ has not demonstrated that periodic monitoring and reporting would be effective in identifying or preventing enlargement and preventing injury to other users.

CONCLUSIONS OF LAW

1. The permissible place of use place of use for water right 63-123F proposed by Application for Transfer 81261 cannot be described using a generally described place of use, nor can it or be described as SUEZ's service area as provided in section 42-202B(9), Idaho Code. SUEZ must utilize 63-123F to irrigate a specific 136.8 acres of land.
2. The proposal to divert and deliver water right 63-123F using SUEZ's municipal delivery system cannot be accomplished such that the change will not constitute an enlargement in use of the original right or such that no other water rights are injured.
3. The Department should deny the Application.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 82161 is **DENIED**.

Dated this 8th day of October 2020

Nick Miller
Manager, IDWR Western Region

[4] The April 7, 1998 letter from Karl Dreher to Michael Creamer, and the November 15, 2005 letter from Daniel Nelson to Charles E. Brockway that SUEZ attached to its March 3, 2020 email to the Department are examples of the Department considering the utility of monitoring and reporting to address enlargement concerns.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October 2020, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

Michael P Lawrence
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For SUEZ Water Idaho, Inc., Applicant

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- ☐ Overnight Mail
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Kensie Thorneycroft
Administrative Assistant 1

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

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

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.