



State of Idaho

DEPARTMENT OF WATER RESOURCES

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May 23, 2011

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

John M. Marshall
John Marshall Law, PLLC
575 W. Bannock, Ste. B
Boise, ID 83702

Re: Water Right no. 63-123F

Dear John,

In a recent meeting regarding Lexington Hills, Inc ("Lexington Hills"), you asked the Department for a letter clarifying the transferability of water right 63-123F. Specifically, you asked whether a particular condition in 63-123F would cause the Department to limit the use of water under permit 63-11413 if Lexington Hills were to transfer 63-123F. As discussed at the meeting, the Department cannot prejudice a transfer before it is filed and before notice of the application is published to provide other water users the opportunity for protest and a hearing on the matter. That said, however, the Department is willing to offer some comments regarding the impact the condition may have on a transfer with the understanding that the comments do not bind the Department in any way. This letter is being provided to Lexington Hills to aid in understanding the issues implicated in a possible transfer of 63-123F, and is not the Department's final or official position on this issue.

63-123F is a surface irrigation right for 1.385 cfs recently decreed by the Snake River Basin Adjudication ("SRBA") district court to Lexington Hills Inc. I understand that the right is not currently being diverted because the right is associated with the impervious, non-irrigated areas in subdivisions developed by Lexington Hills in Eagle, Idaho. 63-123G is a surface irrigation right for 3.22 cfs that was also recently decreed in the SRBA. 63-123G is owned by the Lexington Hills Homeowners Association and is used for irrigation in the subdivisions. The following limiting language was included in the decree for both rights:

The ability to transfer this water right pursuant to Idaho Code Section 42-222 is contingent upon a finding by the Department that such transfer will not be cause for the Department to further limit the use of water right 63-11413.

This condition was inserted into 63-123F and 63-123G by the SRBA district court because of a condition in permit 63-11413 that inextricably ties 63-123F and 63-123G to permit 63-11413. Permit 63-11413 is a permit for ground water that Lexington Hills originally developed in its name but subsequently conveyed to the City of Eagle. 63-11413 provides

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municipal water supplies to the subdivisions developed by Lexington Hills. It is my understanding that when application for permit 63-11413 was filed, it was protested because of concerns about potential impacts to ground water levels in the area. As a result of the protests and hearing, conditions were added to the permit approval to ensure that the existing surface water supply would continue to be used for irrigation in the subdivisions and to ensure that surface water rights would not be sold or transferred from any portion of the property. The conditions served the dual purpose of conserving ground water and maintaining a source of recharge to the aquifer. Condition 5 of the order approving permit 63-11413 provided the following:

This water right may be used for irrigation purposes only if the entire amount of water from the Farmers Union Canal Company remains with the lands described in the application. Sale or transfer of surface water from any portion of the property will void the department's approval to use the right for irrigation purposes.

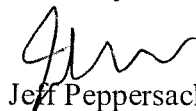
This condition was modified in a subsequent amendment to the permit and provides in pertinent part:

This water right may be used for irrigation purposes only if the entire amount of water from the Farmers Union Canal Co. remains with the lands in Lexington Hills and Trail Creek Ranch. Sale or transfer of surface water from any portion of these properties will be cause for the Department to further limit the use of this right.

While the language in the condition is broad, the Department believes that the condition was intended to apply to the entirety of the Farmers Union Canal Co. rights associated with the subdivision property. However, the Department acknowledges that because 63-123F is not used and cannot be used in its present location, a transfer of the right would not result in a reduction in aquifer recharge nor an increase in the amount of groundwater pumped. Consequently, a reduction or limitation of 63-11413 due to a transfer of 63-123F would not seem warranted.

I hope you find this information helpful. If a transfer is filed, additional information may come to light which causes the Department to reconsider the issue. Let me know if you have additional questions.

Sincerely,



Jeff Peppersack
Chief, Water Allocation Bureau

cc: Bruce Smith, City of Eagle
John Simpson, Lexington Hills HOA
Western Region

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