**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| **IN THE MATTER OF APPLICATION FOR TRANSFER 71607 IN THE NAME OF 4 BROS. DAIRY, INC.** | ) ) ) ) | **RECOMMENDED DECISION AND ORDER** |

## LEGAL STANDARDS

This matter comes before the Idaho Department of Water Resources ("IDWR") on the application by 4 Bros. Dairy Inc. ("4 Bros." or "Applicant") to change the place of use, point of diversion, purpose of use and period of use of existing ground water right no. 37-20613. Applications to change water rights in this way are processed under Idaho Code § 42-222. Idaho Code § 42-222(1) provides in part that:

> Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided...
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> * * *
>
> 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. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area...

Idaho Code §42-202(B) (1) defines "consumptive use" 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. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code."

IDWR has no rules governing transfers, but has issued an Administrator's Memorandum, dated October 30, 2002, as updated by a Memorandum dated April 15, 2005, which provides policy direction to IDWR staff. Ex. 800. A water right transfer applicant bears the burden of proof for the factors IDWR must consider under Idaho Code §§ 42-222. *See Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414 (2001).

## FINDINGS OF FACT

### I. Course of Proceedings.

1. On April 19, 2004, 4 Bros. submitted an Application for Transfer of Water Right to IDWR. The Application for Transfer of Water Right sought to make several changes to water right no. 37-20613, and was assigned Transfer No. 71607 (the "Transfer"). The Transfer sought (a) to establish two new points of diversion; (b) to change the nature of the use of the water right from irrigation to stock water and commercial; (c) to establish new places of use; and (d) to change the period of use to year round from seasonal irrigation use, in order to allow this water right to be used at the 4 Bros. dairy.

2. Notice of the Transfer was published in the Lincoln County Journal of Shoshone, Idaho on January 13 and 20, 2005.

3. Protests to the Transfer were received by IDWR from Elizabeth Tews, Henry Blake and JaNene Buckway, Doug Albright, Jerry Westendorf, Bev Ashton, Russell and Pamela Pantone, and the Lincoln County Rural Council. Issues raised by the protests were:

a. Whether the proposed wells would decrease the amount of water in neighboring wells?

b. Whether the proposed wells would overstress the aquifer already stressed by drought?

c. Whether the change from an irrigation season of use to a year-round season of use improperly enlarges the water right?

d. Whether the aquifer under the proposed wells on the fringe of the Eastern Snake River Plain Aquifer is more vulnerable to increased water withdrawals than the current location of the water right?

e. Whether the proposed use threatens water quality?

The protests requested that the Transfer be denied.

4. Peter R. Anderson was appointed Hearing Officer by the Director of IDWR on March 14, 2005.

5. A prehearing conference was held on May 13, 2005, in Twin Falls, Idaho. Protestant Doug Albright did not attend this prehearing conference. Following that conference a Prehearing Order was issued on May 20, 2005, allowing for the conduct of discovery; establishing a schedule for discovery; tentatively scheduling a second prehearing conference; providing for a date for exchange of witness and exhibit lists; establishing tentative hearing dates of July 28 - 29, 2005; and setting the date for issuance of any IDWR Staff Memorandum.

6. On May 20, 2005, the Hearing Officer invited IDWR staff to file by July 8, 2005 a staff memorandum providing: (1) an analysis by IDWR staff of whether the Transfer should be granted and, if so, any proposed conditions; (2) a listing of applicable IDWR memoranda; (3) an analysis of the availability of ground water at the proposed point of diversion, or analysis of any studies related to the availability of ground water at the proposed point of diversion; and (4) a GIS map showing the proposed place of use and point of diversion. A staff memorandum was submitted on July 8, 2005. Ex. 800.

7. A *Notice of Proposed Default Order* was issued to Protestant Doug Albright on May 20, 2005, for his failure to attend the May 13, 2005, prehearing conference. He was given seven days to respond to the *Notice.* He filed no response.

8. A second prehearing conference was held on July 14, 2005, at the Lincoln County Cooperative Extension office in Shoshone, Idaho. Protestants Russell and Pamela Pantone did not attend this prehearing conference. Following this conference, the Applicant filed a *Motion for Order Striking Respondent's Exhibits or, Alternatively, for Vacation of Hearing Other Sanctions* (sic) on July 26, 2005. After conversations with the attorney for 4 Bros. Dairy, Inc., and the attorney for the Lincoln County Rural Council, the Hearing Officer entered an *Order Vacating Hearing* on July 26, 2005.

9. A *Notice of Proposed Default Order* was issued on July 15, 2005, to Protestants Russell and Pamela Pantone for their failure to attend the July 14, 2005, prehearing conference. They were given seven days to respond to the *Notice.* The Pantones filed their response with IDWR on July 22, 2005, indicating that Rich Carlson, attorney for the Idaho Rural Council, represented their views.

10. An Amended Prehearing Order was issued on August 4, 2005, amending the schedule for the conduct of discovery and for the exchange of exhibit and witness lists, and establishing tentative hearing dates of September 1-2, 2005.

11. After being re-set a number of times a hearing on the Transfer was held on November 17 and November 18, 2005, at the Bureau of Land Management conference room in Shoshone, Idaho and on December 9, 2005, by telephonic hearing originating from IDWR's office in Boise, Idaho. At the hearing the Applicant was represented by Robert E. Williams. Protestant Lincoln County Rural Council was represented by Richard Carlson. Protestants Elizabeth Tews, Henry Blake and JaNene Buckway, Bev Ashton, Jerry and Susan Westendorf and Russell and Pamela Pantone appeared for themselves, but were represented by Richard Carlson when not present.

12. At the conclusion of the hearing on December 9, 2005, the parties were given until January 6, 2006, to file written closing statements. The time for submission was extended by stipulation of the parties to January 9, 2006. 4 Bros., Lincoln County Rural Council, Richard

Tews, and Henry Blake Buckway and JaNene Buckway filed written statements. This matter was fully submitted to IDWR on January 9, 2006.

## II. Evidence Considered.

13. Exhibits offered by 4 Bros. and admitted by stipulation of all Protestants as part of the record are as follows:

EXHIBIT NO.

1. Eastern Snake River Plane Aquifer map.
2. Site Location Map.
3. Aerial Photo of proposed place of use and points of diversion.

3(a) Aerial oblique photograph of proposed place of use and point of diversion.

3(b) Enlargement of Exhibit 3(a).

4. Driller logs for wells near proposed place of use.
5. Driller logs in vicinity of the "Black Butte" property.
6. Test/production well design schematic.
7. Dairy Water Requirements Worksheets.
8. Consumptive use for certain irrigation crops from Brockway/Allen study.
9. Local well water quality data.
10. Well interference analysis prepared by Brockway Engineering.
11. Copy of Transfer application with mitigation plan narrative and transfer spread sheet output.
12. Well hydrographs from local USGS observation wells.
13. Enlargement analysis.

13A. Enlargement analysis with 25% mitigation.

14. Local climate and precipitation data.
15. Local soils data.
16. Aerial photograph of currently authorized place of use.

17. Mitigation plan analysis under new regional ESPA model.

18. Copy of Applicant's Lincoln County CAFO permit.

19. Applicant's Nutrient Management Plan for their expanded facility.

20. Chart of allocation of ESPA water.

21. Direct power coefficient data from farm well.

At the request of 4 Bros. IDWR took official notice of its decision in Transfer No. 5193, which was a previous transfer of a portion of the water right involved in the present transfer.[1]

14. Exhibits offered by the Lincoln County Rural Council and admitted into the record[2] were:

100. IDWR map depicting ground water districts.

101. IDWR map depicting ground water elevations and ESPA.

102. IDWR map depicting ground water flow directions.

103. IDWR map depicting ground water elevations and ESPA.

104. Water right records of surrounding properties.

105. Well logs in the general area of the 4 Bros. dairy.

106(a) - (f). Transfer Impacts.

107. Response to public records request.

108. 4 Bros. application to rent water from water bank.

109. Miscellaneous IDWR data and correspondence RE: Black Butte Transfer.

110. Site team report considering expanded operation of 4 Bros.

111. 4 Bros. withdrawal of Lincoln County Application.

112. Nutrient Management Plan of Applicant.

113. Response to public records request made to the Department of Agriculture.

114. Water quality tests from Buckway well.

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[1] At the time of this transfer the water right was assigned number 37-07413B.

[2] The Hearing Officer took official notice of Exhibit No. 117. Exhibit No. 115 was admitted into evidence over the objection of the Applicant. The Lincoln County Rural Council's remaining exhibits were admitted by stipulation of all parties.

115. Idaho Department of Environmental Quality, "Cumulative Impacts Assessments" (2000).

116. Crop statistics from 1990.

117. IDWR orders re water right transfers.

118. Satellite photograph.

119. Satellite photograph.

120. Lincoln County Planning and Zoning documents.

121. Ground water level change map.

122. ISDA response to public records request through July 29, 2005.

15. The following exhibit was offered by JaNene Buckway and admitted into the record:

300. Written testimony.

16. IDWR, on its own initiative and without objection from the parties, admitted the following exhibit:

800. Staff Memorandum.[3]

17. The following persons testified on behalf of the Applicant:[4]

Andrew Fitzgerald.

Dr. Charles E. Brockway.

18 The following persons testified on behalf of the Lincoln County Rural Council:

Paul Drury.

Marv Patten.

19. The following persons testified in their own behalf:

Rusty Tews.

Janene Buckway.

Beverly Ashton.

Jerry Westendorf.

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[3] Shane Bendixsen of IDWR was made available for cross-examination by the parties pursuant to IDAPA 37.01.01.602, but no party requested such examination.

[4] Applicant's witnesses offered testimony both in their case-in-chief and in rebuttal to Protestants' testimony.

Susan Westendorf.

20. No other party offered exhibits or testimony for IDWR's consideration.

21. All parties present at the hearing were afforded the opportunity to cross-examine the opposing side's witnesses.

## III. Applicant.

22. 4 Bros. is an Idaho corporation, owned by the four Fitzgerald brothers, with an existing dairy and row crop operation in Lincoln County. 4 Bros. submitted no direct evidence showing that it had sufficient financial resources to complete this transfer and put the water to the proposed beneficial use. It does, however, own and operate a large dairy operation with 10,000 head of livestock and 88 employees. It irrigates just under 4000 acres of row crops. It has been located in Lincoln County since late 1980.

23. 4 Bros. owns the irrigated farmland to which water right no. 37-20613 (the "Irrigation Right") is currently appurtenant, the Irrigation Right itself, and the land upon which 4 Bros. proposes to expand its dairy operation. The Transfer was submitted in order to move the Irrigation Right to the dairy operation. 4 Bros. has begun construction of the new barn which is an integral part of the proposed use. Ex. 3B. 4 Bros. has a CAFO registration from Lincoln County allowing 10,889 animal units at the dairy, which would cover the animal units proposed under the expansion.[5] Ex. 18.

## IV. Current Water Use Under the Irrigation Right.

24. The Irrigation Right was partially decreed in the Snake River Basin Adjudication to 4 Bros. for the following water use:

| | |
|---|---|
| Priority Date: | 12/12/1974 |
| Source of Water: | Ground water. |
| Point of Diversion: | SENESE Sec. 20, T6S, R18E, B.M., Lincoln County, Idaho. |
| Purpose of Use: | Irrigation of 77.4 acres. |
| Total Quantity: | 1.12 cfs/ 309.6 acre feet annually (AFA). |
| Period of Use: | March 15 – November 15. |
| Place of Use: | SENESE Sec. 20, T6S, R18E, B.M., Lincoln County, Idaho. |

Ex. 11 (last page).

**A. Source of Water.**

25. The source of water for the Irrigation Right is the Eastern Snake River Plain Aquifer (the "ESPA"). The ESPA, at the location of the Irrigation Right, is a water-table aquifer in the deep Snake River Plain basalts, with water generally flowing in a southwest direction. Ex. 1. The ESPA discharges into the Snake River at numerous locations.

**B. Point of Diversion and Place of Use.**

26. Water used under the Irrigation Right is diverted from the ESPA by a single well, located approximately 5 miles southeast of Shoshone, Idaho.

**C. Use and Quantity.**

27. The historical use of the Irrigation Right was for the irrigation of crops on 77.4 acres known as the "McCowan place." The McCowan place has been farmed consecutively for many years prior to the year the application for transfer was filed. Charles Brockway testified that the most water consumptive crop historically irrigated on the McCowan place in the last 10 years was "pasture," although no written documentation was offered to further substantiate this testimony. Documents submitted with the Application suggest that alfalfa was raised on the McCowan place, and Exhibit 21 indicates that corn has also been cultivated there.

28. Dr. Charles Brockway opined that the highest historic consumptive use under the Irrigation Right was 3.01 AFA per acre. He reached this conclusion by determining the consumptive irrigation requirement for pasture under the water use study done by Brockway and Allen in 1983. Ex. 8. Multiplying that "per acre" amount by 77.4 acres results in a maximum historic consumptive use of 233.1 AFA.

29. Paul Drury opined that the highest historic consumptive use under the Irrigation Right was 150 AFA. He reached this conclusion by applying the 2004 measurement field form, Ex. 21, with a power consumption co-efficient (PCC) of 679, to the historical power consumption at the McCowan place, Ex. 107,[6] to determine a maximum diversion volume under the Irrigation Right of 188 AFA. Mr. Drury then applies an assumed water application efficiency of 80% to conclude that 150 AFA was the historic consumptive use of the Irrigation Right.

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[5] A question was raised whether the legal description under the CAFO registration was sufficient to cover the expansion. The undisputed testimony was that it was.

[6] The PCC originally used in Ex. 107 was 1114.4. Charles Brockway worked with Cindy Yenter, the Watermaster for District 130, to revise the PCC for the well used by the Irrigation Right to the more accurate 679. This change is reflected in Ex. 21.

30. Dr. Brockway's calculation of historic consumptive use under the Irrigation Right is more reliable. IDWR regularly determines the consumptive use of crops in Southern Idaho using the 1983 Brockway/Allen study, which is generally based upon the water requirements of irrigated plants. The PCC method of estimating consumptive use from power records and power consumption coefficients, among other things, depends upon assumptions regarding pump efficiency, piping, irrigated acreage, most water consumptive crop, and application efficiency.

31. The weakness in Dr. Brockway's conclusion regarding historic consumptive use under the Irrigation Right was the failure to produce evidence that pasture was an irrigated crop on the McCowan place. However, Dr. Brockway testified under oath that his review indicated that pasture was irrigated there in the last ten years, and this testimony was undisputed. Dr. Brockway is a well-respected and credible expert in hydraulics and water resources engineering, and there is no reason to question his testimony.

**D. Period of Use.**

32. The Irrigation Right is used during the irrigation season: March 15 – November 15.

## V. Proposed Dairy Water Use.

33. The proposed water use, if the Transfer is granted, would be as follows:

| | |
|---|---|
| Priority Date: | 12/12/1974 |
| Source of Water: | Ground water. |
| Point of Diversion: | SESE Sec. 5, T5S, R17E, B.M., Lincoln County, Idaho. |
| Purpose of Use: | Stock water and commercial. |
| Total Quantity: | 1.12 cfs/ 174.8[7] AFA. |
| Period of Use: | January 1 – December 31 (year round). |
| Place of Use: | SWSE and SESE of Sec. 5 and NENE and NWNE of Sec. 8, T5S, R17E, B.M., Lincoln County, Idaho. |

The proposed water use will allow up to an additional 3500 head of cows and 500 head of heifers to be placed at the Applicant's existing dairy operations.[8]

34. 4 Bros. submitted no designs or engineering plans for the proposed dairy water use. A well schematic was submitted for the proposed wells. Ex. 6. An exterior picture of a

[7] The annual volume is different than that requested in the Application. It is reduced by 25% based upon the representation of Andrew Fitzgerald, as discussed in Finding of Fact 38.

new "double 40" dairy barn; in which 80 cows can be milked at a time, was submitted into the record. Ex. 3B. The water will be used to water livestock, for milk cooling in the dairy barn, and cleaning. The Applicant will construct two lagoons to store liquid waste until that waste is land applied through gated pipe, and will construct berms to shield water from its facility from entering area canals, all in accordance with the requirements of the Idaho Department of Agriculture. The water quantity requested is justified in Exhibit 7.

**A. Source of Water.**

35. The point of diversion for the proposed dairy water use is on the northern fringe of the ESPA. The lithology revealed in the well logs near the location of the proposed wells suggests that the aquifer in this area is likely to continue to be the water-table aquifer in the deep basalts of the ESPA. Ex. 4. There is a chance that the aquifer in the area of the proposed use may be confined by fingers of granite and/or clay intruding into the aquifer from the Idaho Batholith, but it is not likely. This aquifer confinement is seen in the Black Butte area, 2 or 3 miles to the north of the proposed well site. The lithology in that area shows the increased granite and clay layers from the Idaho batholith. Ex. 5. The preponderance of the evidence is that the aquifer at the 4 Bros. site is not a confined, or semi-confined, aquifer.

**B. Point of Diversion and Place of Use.**

36. Water for the proposed use will be diverted from the ESPA by two wells and used approximately 12 miles northwest of the point of diversion and place of use of the Irrigation Right.

**C. Use and Quantity.**

37. The maximum instantaneous quantity requested in the transfer is 1.12 cfs. This equals the maximum instantaneous quantity under the Irrigation Right.

38. In his testimony Andrew Fitzgerald agreed to use 174.8 AFA at the dairy under the Application. *See also* Ex. 13A. This represents a reduction of 25% of the historic consumptive use under the Irrigation Right as stated in Finding of Fact 28.

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[8] Some livestock will be moved into the new facility from other areas of the dairy.

**D. Period of Use.**

39. The proposed dairy water use would occur year-round. The annual volume limitation of 174.8 AFA, however, would only allow for an average continuous flow of 0.24 cfs.

## VI. Impacts of Change on Other Water Rights.

40. No evidence was presented regarding any water rights near the McCowan place that would be injured by moving the Irrigation Right off of the McCowan place. The primary impact would be drying up of 77.4 acres of irrigated farmland. Because only an amount that was consumptively used is being transferred, there will be no loss of water returning to the ESPA.

41. Water rights in the vicinity of the proposed dairy water use are as follows:

| Number | Name | Priority | Use(s) | Quantity |
|---|---|---|---|---|
| 37-10405 | Westendorf | 1/1/1912 | Domestic | 0.04 cfs |
| 37-0404 | Westendorf | 1/1/1950 | Domestic/Stockwater | 0.04 cfs |
| 37-10425 | Albright | 12/31/1910 | Domestic/Stockwater | 0.17cfs |
| 37-10382 | Tews | 1/1/1952 | Domestic/Stockwater | 0.04 cfs |
| 37-10237 | Buckway | 7/31/1945 | Domestic/Stockwater | 0.13 cfs |

Ex. 104. The wells utilized by these and other water rights range in distance from the proposed new points of diversion as follows:

Buckway: .7 miles;

Albright 1-1.5 miles (estimated);

Ashton: 1.5 miles;

Tews: 1.7 miles;

Pantone: 3.12 miles (the water right for this well was not identified);

Westendorf: 4.53 miles.

Ex. 2.

42. Dr. Charles Brockway estimated the localized aquifer impact of pumping for the proposed dairy use using the Theis Formula. The study assumed that the aquifer at the new points of diversion is a water table aquifer in fractured basalt, and that the average pumping rate to produce the annual volume requirement from the new wells would be .32 cfs.[9] Utilizing these

[9] This is a conservative quantity. As discussed in Finding of Fact 39, an average continuous flow of only 0.24 cfs could be pumped at the dairy under the Application.

parameters the anticipated draw down of the existing wells would be less than 3 inches after 60 days of continuous pumping. Ex. 10.

43. Paul Drury utilized the well interference data from the "Black Butte Transfer" to estimate the local aquifer impact of pumping for the proposed dairy use. Ex. 106D. Dr. Brockway conducted a pump test to estimate the drawdowns that would result from water right transfer application No. 5098 in the name of Black Butte Properties, LLC., and submitted those results in 1998. Ex. 109. Utilizing the Black Butte data, Mr. Drury determined that the impacts on the surrounding wells from the new wells at the dairy would produce a draw down of 17 ft. within 1/2 mile of the new points of diversion, 12.2 ft. within 1 mile of the proposed points of diversion, and 5.9 ft within 2 miles of the new points of diversion.

44. Dr. Brockway's estimate of the impact of the proposed dairy water use is likely the correct one. It is based upon the assumption that the aquifer from which the water will be withdrawn continues to be the deep basalt, water table aquifer of the ESPA. As Finding of Fact 35 indicates, this is the better characterization of the aquifer at the proposed point of diversion. Mr. Drury's estimate of the impact of the dairy wells is based upon the unlikely possibility that the character of the aquifer at the dairy site is similar to that at the Black Butte site. The aquifer in the Black Butte transfer was characterized as a confined or semi-confined system. Mr. Drury concedes that Dr. Brockway's analysis is reasonable if the aquifer at the 4 Bros. sites is the highly permeable aquifer of the ESPA.

45. Shane Bendixsen, IDWR Technical Hydrogeologist, performed an analysis assessing the impact of the proposed transfer on flows in the Snake River. Using the Eastern Snake River Plan Ground Water Rights Transfer Spreadsheet, based on the Enhanced Snake Plain Aquifer Model, Version 2.0, he concluded that a reduction at the 4 Bros. dairy of 25% of the amount historically consumptively used under the Irrigation Right at the McCowan place would be necessary to achieve $\leq$ 5% reduction of surface water flows in any Snake River reach. Ex. 800. It is uncontested that this 25% reduction is sufficient to mitigate any impacts the transfer will have on Snake River flows.

## VII. Impacts on Local Public Interest.

46. Ground water levels in the area of both the McCowan place and the 4 Bros. dairy have declined from 1980 – 2005. Ex. 21. Although the area near the 4 Bros. dairy appears to

have a somewhat greater reduction in ground water levels than the McCowan place, the 12 mile change in location is insignificant in the context of the 10,000 square mile ESPA. Granting the Application would not cause a greater impact upon the overall water supply in the aquifer. For that matter, the 25% reduction in overall consumptive use as a result of the transfer will reduce withdrawals from the ESPA.

47. The agency primarily responsible for reviewing and controlling water quality impacts at the 4 Bros. dairy is the Idaho Department of Agriculture. The Idaho Department of Agriculture forbids dairy operators, such as the Applicant, from allowing water containing manure or other pollutants to escape the boundaries of the dairy facility. The Applicant has a Nutrient Management Plan for the waste from the dairy, including the new facility for which the Application was filed, that has been approved by the Idaho Department of Agriculture. Applicant's dairy is subject to inspections by the Idaho Department of Agriculture for compliance with regulations regarding waste management. The Applicant has implemented, or has agreed to implement, the mitigation measures for the expanded dairy site proposed by the CAFO Siting Team Report to lessen the "moderate risk" posed by the new dairy facilities. Ex. 110.

48. Solid waste from the dairy is provided to third-parties for application as fertilizer. Those third-parties are responsible to be sure that the solid waste does not then harm water quality. No evidence was presented regarding whether those third parties are located near the 4 Bros. dairy, are located elsewhere, or are even out of the State.

## CONCLUSIONS OF LAW

Based upon the Findings of Fact, IDWR makes the following Conclusions of Law:

**I. Entitlement to the Use of Water.**

1. 4 Bros. has satisfied its burden of showing that it is entitled to the use of water under the Irrigation Right and to change the Irrigation Right as provided in the Transfer.

**II. Beneficial Use.**

2. 4 Bros. has satisfied its burden of showing that the proposed dairy use is a beneficial use, and that water right no. 37-20613 will continue to be used for an agricultural use in the same local area.

## III. Injury to Other Water Rights.

3. The primary focus of the "no injury" rule is on injury to junior water rights who lose return flows, or who are subjected to a new, senior water right as a result of a transfer. *See* Trelease, *Changes and Transfer of Water Rights*, 13 Rocky Mtn. Min. L. Inst. 507, 511 (1967). In the present case there is no evidence of any water rights junior to the Irrigation Right in the localized area of either the McCowan place or of the 4 Bros. dairy.[10] Any impact on junior water rights utilizing discharge from the ESPA into the Snake River would be mitigated by the 25% reduction in consumptive use agreed to by 4 Bros. Findings of Fact 38 and 45. The Applicant has satisfied its burden of showing that there will be no injury to junior water rights by approving the Transfer.

4. Theoretically, under the prior appropriation doctrine the Transfer cannot "injure" water rights senior to the Irrigation Right. This is because if a water right with a senior priority date is not receiving its water supply, because of the junior Irrigation Right, the Irrigation Right must be regulated to remedy that shortfall.[11] A party applying for a water right change is not required to show that the proposed use will never interfere with an existing senior water use. Occasional impacts on senior water rights are resolved by the application of the priority system.[12]

5. When a change would cause continuous interference with a senior right, however, a transfer should be denied. Such a denial technically would not be because of "injury" to the senior water right, but because the junior water right could not be beneficially used following such change. In the present case, recognizing that the risk is solely to its junior water right, the Applicant has met its burden to show that it will be able to beneficially use Water Right No. 37-20613 at the dairy despite the presence of senior water rights in the area. A condition requiring completion of a pump test of the dairy wells will provide for greater certainty in this regard and effective administration of the proposed dairy use.

6. Any impact on senior water rights utilizing discharge from the ESPA into the Snake River would be mitigated by the 25% reduction in consumptive use agreed to by 4 Bros.

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[10] The Pantone well is within 3.12 miles of the proposed dairy wells, Finding of Fact 41, but no evidence was presented regarding the priority date of the Pantone water right, if any.

[11] The exception to this general rule would be if the dairy use after the Transfer caused an irreversible reduction in a senior water right's supply. No evidence was offered regarding irreversible impacts of the Transfer.

Findings of Fact 38 and 45. With the imposition of the condition stated in Conclusion of Law 5, the Applicant has satisfied its burden of showing that there will be no injury to other water rights by approving the Transfer.

**IV. Enlargement.**

7. Idaho Code § 42-222(1) provides, in part, that:

> 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.

The Transfer risks being an enlargement by the change in period of use from the irrigation season to year-round use. Restricting the transferred amount to only the historic consumptive amount, however, ensures that the maximum amount of water consumed from the ISPA remains the same.[13] Applicant has satisfied its burden of showing that there will be no unacceptable enlargement in water use by approving the Transfer.

**V. Conservation of Water Resources within the State of Idaho.**

8. The proposed dairy use will occur in Idaho, near the City of Shoshone. The Applicant has satisfied its burden to show that the proposed water use is consistent with the conservation of water resources within the state of Idaho.

**VI. Local Public Interest.**

9. Idaho Code §42-202(B)(3) describes the local public interest as:

> ...the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

This standard does not give IDWR the role of evaluating the efficacy of the programs of those agencies with primary responsibility for protecting water quality. *Shokal vs Dunn*, 109 Idaho 330, 340-341 (1985). IDWR simply evaluates whether a proposed water use will comply with those programs, and whether any other, unregulated aspect of the water use, will have an effect on the public water resource.

10. 4 Bros. submitted sufficient information regarding the dairy water use, to allow its water resource impact to be evaluated. The amount of water involved in the Transfer is

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[12] In ground water interference cases, between hydraulically connected ground water rights, the placement of the burden of proof on the junior water right to disprove interference, ensures that senior water users are not harmed by a junior water user. *See* Martiny v. Wells, 91 Idaho 215 (1966).

[13] Although not imposed to prevent enlargement, the 25% reduction in historic consumptive use to mitigate any increased impacts on reaches of the Snake River also ensures no enlargement in impact.

moderate and dairy use is a commonly accepted use in the area. Granting the Transfer would not cause a greater impact upon the overall water supply in the ISPA.

11. The Idaho Department of Agriculture has the primary duty of regulating dairy waste water. 4 Bros. is complying with the requirements of the Idaho Department of Agriculture. So long as 4 Bros. complies with its Nutrient Management Plan, Exhibit 19, the dairy will comply with applicable water quality protections.

12. There is insufficient evidence to conclude that the additional solid dairy waste that will be generated as a result of granting the Transfer will be used or disposed of in such a way that it will lead to water quality concerns in Idaho or elsewhere.

13. With the conditions stated in Conclusion 11, 4 Bros. has satisfied its burden of showing that approving the Transfer does not conflict with the local public interest.

**VII. Appeal of Doug Albright.**

14. Doug Albright failed to fulfill his responsibilities as a Protestant in this matter. Having shown no cause for failing to fulfill his responsibilities, his protest should be denied.

## RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Transfer is GRANTED with the following conditions:

1. The annual volume that may diverted shall be 174.8 acre feet.
2. 4 Bros. shall conduct a pump test and analysis of the well, pre-approved by IDWR, that describes the characteristics of the well, the aquifer from which it draws, and the expected impacts of its use, and submit the results of such pump test to IDWR.
3. Compliance with the requirements of the Idaho Department of Agriculture or its successors, including compliance with the Nutrient Management Plan, with any approved or required amendments.
4. IDWR's standard conditions, including those regarding well construction standards, measurement of diversions, and time periods for the completion of the transfer.

Further, Based upon Protestant Doug Albright's failure to appear at the time and place set for prehearing conference it is ORDERED that his protest is DENIED.

## PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any 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.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

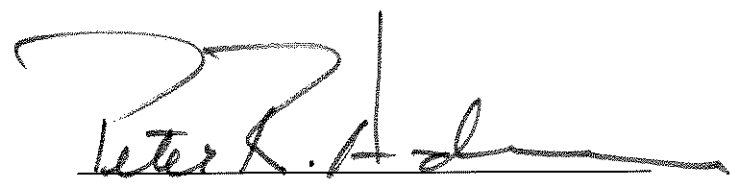
ii. The service date of a denial of a petition for reconsideration by the hearing officer; or

iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before

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

Dated this 20th day of March, 2006.



Peter R. Anderson
Hearing Officer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 2006, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

4 BROS. DAIRY INC
ANDREW FITZGERALD
427 N 250 W
SHOSHONE ID 83352

ROBERT WILLIAMS
FREDERICKSEN WILLIAMS
PO BOX 168
JEROME ID 83338-0168

CHARLES BROCKWAY PE PHD
BROCKWAY ENGINEERING
2016 N WASHINGTON ST STE 4
TWIN FALLS ID 83301

IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301

ELIZABETH TEWS
680 N 350 W
SHOSHONE ID 83352

DOUG ALBRIGHT
675 N 150 W
SHOSHONE ID 83352

HENRY BLAKE
JA NENE BUCKWAY
585 N 250 W
SHOSHONE ID 83352

BEV ASHTON
685 N 250 W
SHOSHONE ID 83352

JERRY & SUSAN WESTENDORF
707 W 470 N
SHOSHONE ID 83352

RUSSELL & PAMELA PANTONE
745 N 550 W
SHOSHONE ID 83352

LINCOLN CO RURAL COUNCIL
C/O RICH CARLSON
PO BOX 21
FILER ID 83328

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources