BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 5384 IN THE NAME OF BOX CANYON DAIRY	))))	**FINAL ORDER ON REMAND**

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "Department" or "IDWR") for consideration of protested Application for Transfer No. 5384 ("application"). The application seeks to change the nature of use for portions of water right nos. 36-02312 and 36-07387 from irrigation to stockwater and commercial for use in a dairy expansion by Box Canyon Dairy ("applicant"). The application specifically seeks to change portions of the water rights to supply water to Box Canyon Dairy #3 and is opposed by William K. Chisholm ("Chisholm") and Lee Halper ("Halper") (collectively "protestants").

STANDARD FOR DECISION

Applications to change or transfer existing water rights are considered pursuant to Idaho Code § 42-222. Idaho Code § 42-222 (Michie 2000) provides in 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 42-203A(5), Idaho Code, 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.

An applicant bears the burden of proof for the factors the Director must consider under Idaho Code § 42-222.

COURSE OF PROCEEDINGS

The Department conducted an initial hearing in the matter on November 17, 1999. On March 15, 2000, the Department issued a *Preliminary Order* approving the application. The *Preliminary Order* became a *Final Order* on April 5, 2000.

The protestants sought judicial review of the *Final Order* of April 5, 2000. On March 9, 2001, the Fifth Judicial District Court ("district court") issued a *Memorandum Decision on Appeal* in Gooding County Case No. CV00-00300, reversing the agency decision and remanding the matter to the Department for further consideration of the factors relating to the local public

interest criterion. On January 23, 2002, the Department conducted a second hearing to accept additional evidence and testimony on the local public interest.

On June 20, 2002, the Department Hearing Officer issued a *Preliminary Order on Remand* approving the application upon conditions. The protestants filed Petitions for Reconsideration which were denied by the Hearing Officer on July 11, 2002. Protestant Chisholm thereafter filed a timely brief and exceptions to the Preliminary Order with the Director on July 24, 2002. The applicant did not file a response to Chisholm's brief and exceptions.

Having reviewed the *Preliminary Order on Remand*, the brief and exceptions thereto, the Transcript of Agency Hearing Dated November 17, 1999, and the Transcript of Agency Hearing Dated January 23, 2002, the Director enters the following Findings of Fact, Conclusions of Law, and Final Order on Remand.

STATEMENT OF ISSUES ON REMAND

In its *Memorandum Decision on Appeal*, the district court stated that the Department must consider the following issues in determining whether approval of the application is in the local public interest:

(1) Any locally important factor impacted by the Dairy's proposed expansion;

(2) The economic benefits of the project;

(3) Any economic detriments;

(4) Effect on water quality;

(5) The impact on other properties in the area, including any impact on recreational and scenic uses of any nearby area impacted by the project and the odors it might create; and

(6) Environmental impact to the area, including obnoxious odors (air quality).

The court stated: "This is not a catalog of all factors that <u>may</u> relate to the 'local public interest' element, but is a suggestion of factors to be weighed in determining whether or not the project falls within the 'local public interest.'"

STATEMENT OF ISSUES RAISED BY EXCEPTIONS

The Protestant's Brief in Support of Exception to Preliminary Order to the Director of IDWR raised the following issues concerning the Hearing Officer's *Preliminary Order on Remand*:

(1) The Hearing Officer erred in his analysis of the lack of any nuisance complaint ever being filed against the Box Canyon Dairy;

(2) The Hearing Officer erred in his analysis of statements made by witnesses for the protestants that the applicant's dairy is a well-maintained operation;

(3) The Hearing Officer failed to address the cumulative effects of odor from the 5,000 animals at the Box Canyon Dairy included in the 30,000 permitted animals within an 18-square-mile area and in the 72,000 permitted animals within a 36-square-mile area;

(4) The Hearing Officer erred by reliance on the lack of protests by neighbors within one-half mile of the Box Canyon Dairy #3;

(5) The Hearing Officer was negligent in rejecting evidence regarding studies of impacts from odors on health regardless of where the studies originated;

(6) The Hearing Officer failed to adequately assess the possibility of water quality degradation resulting from expansion of the Box Canyon Dairy; and

(7) Approval of the application is not in the local public interest.

EVIDENCE CONSIDERED

Additional exhibits offered by the applicant at the hearing on remand of January 23, 2002, and admitted by stipulation of the protestants as part of the record are as follows:

Exhibit 16: Letter dated December 3, 2001, from Michael J. Tremblay and a Soil Test Data Sheet

Exhibit 17: Letter dated November 26, 2001, to Felton & Felton by Gary B. Genske, CPA, with 2 attachments

Exhibit 18: Revised Map of Box Canyon Dairy #3 and vicinity (large exhibit about 2 feet by 2.5 feet on hardboard).

Additional exhibits offered by the applicant and admitted at the hearing on remand of January 23, 2002, as part of the record are as follows:

Exhibit 19: List of landowners within 1/2-mile of Box Canyon Dairy #3, letter dated January 16, 2002, to Michael Felton from Marv Patten, together with a listing of nuisance complaints, active Grade A & B producers for Gooding and Jerome counties, and odor complaints in Gooding and Jerome counties in 2001 and 2002 (29 pages)

Exhibit 20: Time Line

Exhibit 21: Gooding County New CAFO Siting Permit dated March 29, 2000

Exhibit 22: Untitled map of vicinity near dairy (8 inches x 11-1/2 inches)

Exhibit 23: Map, Well Driller's Report and graphs (8).

Additional exhibits offered on behalf of protestant Halper at the hearing on remand of January 23, 2002, and admitted by stipulation of the applicant as part of the record are as follows:

Exhibit A: American Falls and Thousand Springs Ground Water Management Areas Information, IDWR News Release 2001-67, presentation material from Karl Dreher on designation of ground water management areas, ORDER dated August 3, 2001, designating the Thousand Springs Ground Water Management Area, Name Index of water rights referenced in draft Curtailment Order

Exhibit B: Maps of Box Canyon area

Exhibit C: USGS map of Box Canyon area

Exhibit D: Ground Water Quality Technical Report No. 14 titled Cumulative Impacts Assessment, Thousand Springs Area of the Eastern Snake River Plain, Idaho, prepared by Idaho Department of Environmental Quality ("IDEQ"), July 2000

Exhibit E: Nitrates in Ground Water - A Continuing Issue for Idaho Citizens, IDEQ

Exhibit F: Literature Review of the Health Effects Associated with the Inhalation of Hydrogen Sulfide, IDEQ, June 19, 2001.

Exhibits offered on behalf of protestant Halper at the hearing on remand of January 23, 2002, but not admitted by the Hearing Officer and not considered by the Hearing Officer are as follows:

Exhibit G: Not admitted

Exhibit H: Not admitted

Exhibit I: Not admitted

Exhibit J: Not admitted

On April 19, 2002, after the hearing on remand of January 23, 2002, the attorney for protestant Halper submitted Deposition of Jenifer Beddoes taken on February 25, 2002, which was included as part of the record.

The following individuals testified on behalf of the applicant during the hearing on remand of January 23, 2002:

a. Mr. Scott Haag – Manager, Box Canyon Dairy

b. Dr. Charles Brockway, P.E. – Brockway Engineering, P.L.L.C.

c. Mr. Jim Etherington – Etherington Environmental Consulting

The following individuals testified on behalf of the protestants during the hearing on remand of January 23, 2002:

a. Dr. Richard Rutkowski – Property owner

b. Ms. Katherine Simmons – Property owner

c. Ms. Patricia Hansing – Property owner

d. Mr. James Dekleinhans – Property owner

e. Mr. Lee Halper – Protestant

f. Mr. Bill Chisholm - Protestant

In addition to the witnesses for the applicant and witnesses for the protestant, Mr. Vladimir Prudek, residing in Buhl, Idaho, appeared as a public witness during the hearing on remand of January 23, 2002. Both the applicant and the protestants were afforded the opportunity to cross-examine the opposing side's witnesses as well as the public witness.

ANALYSIS OF ISSUES ON REMAND

The application to transfer water rights was initially approved by the *Final Order* of April 5, 2000, and the transfer was implemented soon thereafter in 2000. Transcript of Agency Hearing ("Tr."), January 23, 2002, page 22, Lines 8-14. Although approval of the application was reviewed and reversed by the district court, the court did not vacate the *Final Order* of April 5, 2000, and the protestants did not seek a stay of the *Final Order* of April 5, 2000. Consequently, the transfer has been effective and Box Canyon Dairy #3 has been operational from the spring of 2000 to and beyond the date of the hearing on remand, January 23, 2002, which provides some actual basis for evaluating the effects of Box Canyon Dairy #3 in 2000 and 2001 that occurred with implementation of the water rights transfer. The operation of Box Canyon Dairy #3 increased the number of milking cows at the Box Canyon Dairy from 330 at the

time of the first hearing on November 17, 1999 (Tr. p. 44, Ln. 12-15), to about 850 cows in the spring of 2000 (Tr. p. 35, Ln. 21 through p. 36, Ln. 1), an increase of 520 cows.

The factor on which most of the testimony was focused at the hearing on remand was odor. Other locally important factors identified by the protestants and witnesses on behalf of the protestants during the hearing on remand consisted of nuisance caused by large numbers of flies alleged by witnesses for the protestants to be from the dairies in the area of Box Canyon Dairy #3, negative impacts on human health, general degradation in quality of life, negative impacts on water quality, and declining property values. The applicant's witnesses identified the economic benefits from Box Canyon Dairy #3 and positive effects on the ground water resource as locally important factors.

Odor

Clearly, odors from some dairies operating in Gooding and Jerome counties as of the date of the hearing on remand were problematic and objectionable. Both of the protestants and all four of their witnesses testified concerning objectionable odors allegedly originating from dairies operating in the area of Gooding and Jerome counties. Between January 1, 2001, and on or about January 15, 2002, there were 151 odor complaints filed against agricultural operations in Gooding and Jerome counties with the Idaho Department of Agriculture. Of those 151 odor complaints, 143 were for dairies. Ex. 19.

Neither of the protestants testified that they were able to determine that a meaningful amount of the odors they found to be objectionable could be traced to the operations at Box Canyon Dairy #3 or other Box Canyon Dairy facilities. Protestant Halper, whose residence is estimated to be 10 or more miles southeast of Box Canyon Dairy #3 (Ex. 22), testified that "... [the odor] comes from all around my home from everywhere else, wherever the wind blows. I would imagine that some of it comes from Box Canyon Dairy, but as to the amount, I couldn't tell you." Tr. p. 225, Ln 17-20. Protestent Chisholm, whose residence based on his description is about 5 miles west of Box Canyon Dairy #3, testified that "500 head doesn't appear to be significant, but when you have 500 head with however many thousands are already in the area, then it is significant that you're adding to the thing." Tr. p. 238, Ln. 4-7. Protestent Chisholm also testified regarding the Box Canyon Dairy that:

> When I was coming out of the -- when I was coming out of Thousand Springs that night heading back to Buhl, I came up out of the -- came up out of the canyon and took 1500 East onto the old Bob Barton which takes me directly by the -- by the Box Canyon Dairy, and I noticed there's this cloud that's starting to form up above the dairy. You know, you have thousands of animals walking around in the, basically, fecal dust, and, again, during the day when you have the heat there, the air and that moisture and they're urinating and all that, and so there's moisture in that thing.

Tr. p. 243, Ln. 3-12.

The protestant Chisholm did not testify that he discerned objectionable odors emanating from the Box Canyon Dairy on the night he described.

Although the protestants were unable to determine that a meaningful amount of the odors they found to be objectionable could be traced to the operations at Box Canyon Dairy #3 or other Box Canyon Dairy facilities, 99 of the 143 odor complaints against dairies filed with the Idaho Department of Agriculture in 2001 and into 2002 identified specific dairy operations as the sources of objectionable odors. Ex. 19. None of the odor complaints received by the Idaho Department of Agriculture were filed against Box Canyon Dairy #3 or other Box Canyon Dairy facilities.

Similarly, the 4 property-owner witnesses testifying on behalf of the protestants were unable to determine that a meaningful amount of the odors they found to be objectionable could be traced to the operations at Box Canyon Dairy #3 or other Box Canyon Dairy facilities, although 3 of the 4 witnesses testified about dramatic increases in odors in 2001 (Box Canyon Dairy #3 began operating in 2000), and one of the witnesses alleged that the increases of odor in 2001 could be linked to the operations of a particular dairy.

Ms. Hansing, whose residence based on her description is about 5 miles west of Box Canyon Dairy #3, testified that she built her home in about June 1999 (Tr. p. 196, Ln. 15) and that:

> When we moved in, we had -- we would get these odors periodically when the wind was coming from the south and east. And at the beginning last -- not this summer, but the summer before we had finished our house and we had a lot of barbecues and things out on the porch, and a few flies, but nothing, you know, that we couldn't live with, and then this last summer [of 2001] it was so bad we never had one dinner out on our patio because the flies would become so great, and if we'd invite people down, it was embarrassing.

Tr. p. 197, Ln. 3-11.

Mr. Dekleinhans, whose residence based on his description is about 4 miles southwest of Box Canyon Dairy #3, testified that:

> ... we've lived there nine years now, and we never had any odors the first few years, and then every once in a while, we'd get odors when the wind came from the east.
>
> ....
>
> Now, this last year [2001] has been really bad. About once a week it's been really objectionable odors.

Tr. p. 204, Ln. 12-14 and Ln. 19-20.

Finally, Dr. Rutkowski, whose residence based on his description is about 5-1/2 miles northwest of the Box Canyon Dairy #3, testified that he built his house in 1995 (Tr. p. 166, Ln. 22) and that:

> Since we moved into the home, particularly in the summer, we've noticed odors coming from the other side of the river when the wind [is] blowing out of the east and southeast. But this past summer [of 2001], it was totally unacceptable and objectionable.

Tr. p. 167, Ln. 4-8.

When asked if he had protested the Southfield Dairy, which he stated began operations in May of 2001 (Tr. p. 183, Ln. 3-4), Dr. Rutkowski testified: "No. I didn't even know about it until I smelled it this summer." Tr. p. 183, Ln. 5-6.

Mr. Haag and Mr. Etherington, testifying for the applicant, described various measures implemented or being implemented at Box Canyon Dairy #3 to control and minimize odors from the dairy operations including (1) mechanically scraping solid waste from the dairy daily instead of removal by flushing with water, (2) harrowing wet manure daily so that it dries quickly, (3) effective separation of solids from the liquid waste stream and alternating use of settling ponds, (4) minimizing amount of liquid waste in storage in waste lagoons, particularly during the summer months, (5) minimizing the length of time liquid waste is in storage in waste lagoons, (6) maintaining aerobic conditions in the settling ponds and waste lagoons, (7) mixing adequate fresh water with liquid waste for land application, (8) changing over to drop lines for sprinkler systems used to land apply mixture of fresh water and liquid waste, and (9) having sufficient land for land application of liquid and solid waste at optimal agronomic rates. Regarding odor, Mr. Haag also testified that he has "never noticed the pivot having any odor" and that "... we're mixing with other water, so, no. There's little or minimal odor." Tr. p. 39, Ln. 4-5 and Ln. 9-10. Mr. Etherington testified that "... with management practices to prevent production of gases and the practices [Mr. Haag] use[s] [at the Box Canyon Dairy #3], I would -- I would think that [the Box Canyon Dairy #3] wouldn't affect anybody more than a quarter mile or a half mile, probably a half mile radius there." Tr. p. 130, Ln. 15-18. To the extent that not controlling dust can contribute to odor problems, Mr. Haag also testified that "... our feed alleys and driving areas, we have paved so that our vehicles don't stir up dust." Tr. p. 20, Ln. 4-5.

The testimony of Mr. Haag and Mr. Etherington was not rebutted, except for some hearsay testimony for which there was no foundation in the record. Therefore, based on the preceding analysis, the evidence and testimony in the record support a determination that measures implemented at Box Canyon Dairy #3 to minimize odors prevents any noticeable addition to the objectionable odors generally alleged to be from dairies in the area of Box Canyon Dairy #3 by the protestants, and witnesses appearing on behalf of the protestants.

Flies

The protestants and all four of their witnesses testified concerning the objectionable nuisance of large numbers of flies, especially in 2001, that they alleged were associated with dairies operating in the area of Box Canyon Dairy #3. Although the protestants and their witnesses corroborated each other's testimony, none of them could say for certain that the flies came from any particular dairy or group of dairies.

Mr. Haag testified on behalf of the applicant that:

> ... we put in a new system this last year with electric eyes and a new type of fly killer that's an oil base so it sticks to the cows, and we had extremely good luck with that. We also harrow our corrals and scrape the cement every day to break it up so that it will dry quickly, and flies can't lay their eggs in the dry manure.

Tr. p. 20, Ln. 10-15.

Mr. Haag's testimony was not rebutted, and there was no evidence or testimony offered indicating that the measures implemented to control flies at Box Canyon Dairy #3 were not effective. Therefore, the evidence in the record supports a determination that the measures implemented at Box Canyon Dairy #3 to minimize the nuisance of flies prevents any noticeable addition to the numbers of objectionable flies generally alleged to be from dairies in the area of Box Canyon Dairy #3 by the protestants, and witnesses appearing on behalf of the protestants.

Impacts on Human Health

The protestants and 3 of their 4 witnesses testified expressing concerns regarding impacts to human health from dairies generally. Additionally, a public witness, Vladimir Prudek, testified about health issues. There was no foundation in the record for any of the testimony regarding impacts to human health, and no weight is given to Prudek's testimony.

Property Values

Testifying on behalf of the protestants, Dr. Rutkowski stated "I know of one real estate sale in the subdivision that I live in that fell through because of dairy problems and dairy odors...." Tr. p. 176, Ln. 3-5. Also on behalf of the protestants, Ms. Hansing testified that:

> And I have -- we have an MLS listing. When we spoke of property values -- if you'd like to see a copy from the MLS book, the value of the properties when they were purchased and when they sold, there's a whole list from Castleford, Buhl, all down the line here of the values, and they've gone -- a lot of them have gone down. I would say more than half of them have gone down in value.

Tr. p. 198, Ln. 20 through p. 199, Ln. 1.

The fact that one real estate sale "fell through" in the subdivision where Dr. Rutkowski lives does not equate to a loss in property value. Additionally, there is no foundation or exhibits in the record supporting the testimony of Ms. Hansing.

At the first hearing for this matter conducted on November 17, 1999, Mr. Robert Jones, the principal broker for Robert Jones Realty in Twin Falls, Idaho, testified that land next to a dairy will have "significantly more value" than farm land that is not close to a dairy. Transcript of Agency Hearing, November 17, 1999, page 53, Line 13. When asked about the value of residential property next to dairies, Mr. Jones testified that "... it'd be more favorable to increase." Transcript of Agency Hearing, November 17, 1999, page 56, Line 13.

The testimony of Mr. Jones is not rebutted by the testimony of Dr. Rutkowski. Similarly, the testimony of Ms. Hansing is without foundation and is not credible as a result. Therefore, the evidence in the record supports a determination that Box Canyon Dairy #3 will not have a negative effect on surrounding property values and may increase surrounding property values.

General Effects on Quality of Life in the Area

The protestants and all 4 of the witnesses testifying on behalf of the protestants, expressed general concerns about diminishment in their overall quality of life, including recreational opportunities. As for the factors of odors and flies, there was no evidence or testimony offered indicating that the degradation in quality of life resulted from the operation of Box Canyon Dairy #3. Therefore, the evidence in the record supports a determination that measures implemented at Box Canyon Dairy #3 prevent any noticeable additional degradation to quality of life in the area, including recreational opportunities.

Effects on Surface Water Quality

On behalf of the applicant, Mr. Haag testified that:

> ... the barn sits on a slight rise and everything slopes to this end, and we have a concrete sump that collects the water and then it's pumped into there. And along this red line on the bottom, the property line, there's a six-foot berm across the property in case something went wrong the entire thing would be held by that berm.
>
> ....
>
> We pipe the entire canal. ... We piped it from here all the way across to the other side of our property, so there was never any danger of our waste getting into the canal system.

Tr. p. 17, Ln. 5-10 and Tr. p. 17, Ln. 19-22.

Mr. Haag's testimony was not rebutted, and there was no evidence or testimony offered indicating that the measures implemented to protect surface water quality from the effects of operations at Box Canyon Dairy #3 were not effective. Therefore, the evidence in the record supports a determination that the measures implemented at Box Canyon Dairy #3 protect surface water from contamination.

Effects on Ground Water Quality

Testifying about ground water quality trends in the vicinity of Box Canyon Dairy #3, Dr. Charles Brockway noted that "from 1997 to 2001, there's a downward trend" in concentrations of nitrate plus nitrite in the discharge from the Box Caynon Springs complex that is about 2 miles west of Box Canyon Dairy #3, which began operations in 2000. Tr. p. 61, Ln. 18-19. Dr. Brockway also noted a decreasing trend in nitrate plus nitrite concentrations after 1999 in the discharge from the Niagara Springs complex, which is about 5 miles southeast of Box Canyon Dairy #3. Tr. p. 62, Ln. 4-5.

Protestant Halper testified concerning water quality testing of ground water from his domestic well and the results of those tests. However, Halper's domestic well is located 10 miles or more east of Box Canyon Dairy #3, and Halper's testimony failed to establish any relevancy to potential water quality effects from the operation of Box Canyon Dairy #3. Therefore, the evidence in the record supports a determination that the measures implemented at Box Canyon Dairy #3 protect ground water from contamination.

Effects on Ground Water Resource

Dr. Brockway also testified that Box Canyon Dairy had voluntarily agreed to curtail irrigation on more land than was needed to provide water for the expansion of Box Canyon Dairy #3. As a result, less water would be depleted from the aquifer to the benefit of the ground water resource and springs in the Snake River Canyon. Tr. p. 52, Ln. 2-25 and p. 55, Ln. 3-6.

Economic Benefits

Exhibit 17, submitted on behalf of the applicant, sets forth an analysis of the economic benefits of the Box Canyon Dairy prepared by Genske, Mulder & Co., LLP. Genske, Mulder & Co. described themselves as a "firm of professional accountants whose broad knowledge and experience provide a wide range of assurance, tax and business advisory services to the dairy industry." Ex. 17, p. 1. The second page of Exhibit 17 provides projected annual expenditures in 2001 dollars of $875,000 by Box Canyon Dairy resulting from expansion of Box Canyon Dairy #3 by 276 head, or about $3,170 per head. The expenditure of $3,170 per head is essentially the same unit expenditure for the expenditures shown in Exhibit 17 for a total of 896 head at Box Canyon Dairy #3 and for a total of 5,450 at all of the Box Canyon Dairy facilities. Since the expansion that occurred in the spring of 2000 following the approval of the water rights transfer was 520 head, this equates to an annual expenditure of $1,648,400 for the expansion of Box Canyon Dairy No. 3.

Page 2 of Exhibit 17 also includes the statement: "According to the United States Chamber of Commerce, any given dollar spent within the local community is turned over five to seven times within that community." Based on that statement, an annual expenditure of $1,648,400 for the expansion of Box Canyon Dairy No. 3 by 520 cows could potentially generate $8,000,000 to $11,500,000 of economic stimulus in 2001 dollars annually, which is significant.

ANALYSIS OF EXCEPTIONS

Nuisance Complants

Protestant Chisholm alleges that the Hearing Officer erred in his analysis of the lack of any nuisance complaint ever being filed against the Box Canyon Dairy, stating that "No nuisance complaints have been filed against the Box Canyon Dairy Complex, not because there isn't a nuisance odor issue, but because the number of cows in the area is so great that it would be hard

to say that the nuisance is specific to Box Canyon Dairy." Chisholm's allegation does not square with the evidence in the record.

First, as described in the preceding Analysis of Issues on Remand for odor, between January 1, 2001, and approximately January 15, 2002, there were 151 odor complaints filed against agricultural operations in Gooding and Jerome counties with the Idaho Department of Agriculture. Of those 151 odor complaints, 143 were for dairies, of which 99 identified specific dairy operations as the sources of objectionable odors. Ex. 19. Therefore, in more than 2 out of 3 instances where odor complaints were made against dairy operations, the complainants were able to specifically identify the dairy that was the source of the objectionable odors.

Secondly, the unrebutted testimony of Mr. Haag was that he has "never noticed the pivot having any odor" and that "... we're mixing with other water, so, no. There's little or minimal odor." Tr. p. 39, Ln. 4-5 and Ln. 9-10. Similarly, the unrebutted testimony of Mr. Etherington was that "... with management practices to prevent production of gases and the practices [Mr. Haag] use[s] [at the Box Canyon Dairy #3], I would -- I would think that [the Box Canyon Dairy #3] wouldn't affect anybody more than a quarter mile or a half mile, probably a half mile radius there." Tr. p. 130, Ln. 15-18. Therefore, the evidence suggests that the reason Chisholm is unable to determine any specific nuisance attributable to Box Canyon Dairy #3 is not because the number of cows in the area is so great, but rather that measures implemented at Box Canyon Dairy #3 to minimize odors prevents any noticeable addition to the objectionable odors generally alleged to be from dairies in the area of Box Canyon Dairy #3.

The Hearing Officer did not err in his analysis of the lack of any nuisance complaint ever being filed against the Box Canyon Dairy.

Statements Made By Witnesses Regarding Dairy Operation

Protestant Chisholm also alleges that the Hearing Officer erred in his analysis of statements made by witnesses for the protestants that the applicant's dairy is a well-maintained operation, stating that while the protestants' witnesses testified that "... yes they had a well maintained operation, but that the number of animals in conjunction with the other dairy operations in the area presents an ongoing odor and fly problem."

Statements made by the protestants' witnesses that Box Canyon Dairy was a good, well-maintained operation reflect a lay-person's assessment of the outward appearance of the dairy. These kinds of statements by the protestants' witnesses, while relevant, are not accorded significant weight in this final order.

Cumulative Effects of Odor

Protestant Chisholm also alleges that the Hearing Officer failed to address the cumulative effects of odor from the 5,000 animals at the Box Canyon Dairy included in the 30,000 permitted animals within an 18-square-mile area and in the 72,000 permitted animals within a 36-square-mile area. As previously described, the unrebutted testimony of Mr. Haag was that he has "never noticed the pivot having any odor" and that "... we're mixing with other water, so, no. There's

little or minimal odor." Tr. p. 39, Ln. 4-5 and Ln. 9-10. Similarly, the unrebutted testimony of Mr. Etherington was that "... with management practices to prevent production of gases and the practices [Mr. Haag] use[s] [at the Box Canyon Dairy #3], I would -- I would think that [the Box Canyon Dairy #3] wouldn't affect anybody more than a quarter mile or a half mile, probably a half mile radius there." Tr. p. 130, Ln. 15-18.

Based on the evidence in the record, the measures implemented at Box Canyon Dairy #3 to minimize odors prevents any noticeable addition to the objectionable odors generally alleged to be from dairies in the area of Box Canyon Dairy #3. Therefore, it was not necessary for the Hearing Officer to further analyze the cumulative effects of odor from the addition of 520 animals at Box Canyon Dairy #3.

Reliance on the Lack of Protests Within One-Half Mile

Protestant Chisholm also alleges that the Hearing Officer erred by reliance on the lack of protests by neighbors within one-half mile of the Box Canyon Dairy #3 at the hearing for the dairy conducted by Gooding County, stating that "... neither of the Protestants, nor the Protestant's [sic] witnesses live with[in] [a] half mile of the Box Canyon Dairy Complex" and "The neighbors of the dairy complex are mostly dairies. Chisolm also cites to statements allegedly made by Lewis Eilers, the former executive director of the Idaho Dairy Association, that the odor from a dairy can travel five to six miles. This exception is without merit.

First, the Hearing Officer cited to undisputed testimony that none of the landowners appeared at the Gooding County hearing to protest Box Canyon #3. Second, Chisholm's assertion that the neighbors of Box Canyon Dairy #3 are mostly dairies is incorrect. Of the 14 landowners listed on Exhibit 19 as being within one-half mile of Box Canyon Dairy #3, the undisputed testimony of Mr. Haag is that only 4 of the landowners listed operate dairies on those lands. Third, the statements allegedly made by Lewis Eilers have no foundation in the record and are unsubstantiated hearsay.

Rejection of Studies on Health Impacts from Odors

Protestant Chisholm also alleges that the Hearing Officer was negligent in rejecting evidence regarding studies of impacts from odors on health regardless of where the studies originated. Rule 600 of the Department's Rules of Procedure states in part:

> The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. [emphasis added]

IDAPA 37.01.01.600.

The studies of impacts from odors on health sought to be introduced on behalf of the protestants were without foundation in the record. Additionally, the individuals conducting the studies were not available at the hearing for examination. Without foundation and the

opportunity to examine the individuals who conducted the studies at issue, the specific applicability or relevance of the studies to the operations of Box Canyon Dairy #3 could not be established. Therefore, the Hearing Officer properly and appropriately exercised his discretion in not admitting protestants' exhibits G, H, I, or J.

Water Quality

Protestant Chisholm also alleges that the Hearing Officer failed to adequately assess the possibility of water quality degradation resulting from expansion of the Box Canyon Dairy. This exception is without merit.

The unrebutted evidence in the record is that the measures implemented at Box Canyon Dairy #3 protect surface water from contamination. Similarly, the unrebutted evidence in the record is that the measures implemented at Box Canyon Dairy #3 also protect ground water quality. Protestant Halper testified about water quality of ground water from his domestic well and how the water quality may have been affected by operations at a neighboring dairy, the Aardema Dairy. However, there is no evidence in the record establishing any relationship between quality of ground water from the Halper well and the effects on ground water quality from operations at Box Canyon Dairy #3.

Local Public Interest

Lastly, protestant Chisholm alleges that approval of the application is not in the local public interest, stating that:

> The Applicant certainly did not prove that it wouldn't harm the local public interest, in fact did just the opposite and the Protestant's [sic] did prove through their witnesses that this operation and the cumulative impacts of other dairies in the area have degraded the quality of the environment in terms of odor and flies.

Simply because Box Canyon Dairy #3 is a dairy and other dairies have clearly caused odor problems and allegedly caused nuisance problems with flies, does not mean that Box Canyon Dairy #3 causes odor problems and nuisance problems with flies. The evidence in the record shows that measures implemented at Box Canyon Dairy #3 to minimize odors and control flies prevents any noticeable addition to the objectionable odors or the nuisance of flies that may be caused by operations at other dairies. The evidence also shows that operations at Box Canyon Dairy #3 do not degrade surface or ground water quality and that the dairy has a positive effect on property values and provides significant contributions to the local economy of the area. Therefore, approval of the application filed by Box Canyon Dairy #3 is in the local public interest.

FINDINGS OF FACT

1. The Department has recommended Snake River Basin Adjudication ("SRBA") claim No. A36-02312B to the court as follows:

Identification No:	A36-02312B
Source	Ground water
Priority:	November 26, 1956
Rate of diversion:	0.75 cubic feet per second ("cfs")
Volume:	264 acre-feet
Point of diversion:	SE1/4NE1/4[1] Section 25, T8S, R14E, B.M., Gooding County
Use:	Irrigation
Season of use:	March 15 to November 15
Place of use:	66 acres in N1/2NE1/4 Section 25, T8S, R14E, B.M., Gooding County
Conditions:	Use of this right with right no. 36-07387B is limited to the irrigation of a combined total of 66 acres in a single irrigation season, a total combined diversion rate of 1.19 cfs, and a total annual diversion volume of 264 acre-feet.

The SRBA court has not issued a partial decree on this right.

2. The Department has recommended SRBA Claim No. A36-07387B to the court as follows;

Identification No:	A36-07387B
Source	Ground water
Priority:	October 27, 1973
Rate of diversion:	0.44 cfs
Volume:	264 acre-feet

[1] The "1/4" designations are presumed and will be omitted from subsequent legal descriptions in this order.

Point of diversion:	SENE Section 25, T8S, R14E, B.M., Gooding County
Use:	Irrigation
Season of use:	March 15 to November 15
Place of use:	66 acres in N1/2NE1/4 Section 25, T8S, R14E, B.M., Gooding County
Conditions:	Use of this right with right no. 36-02312B is limited to the irrigation of a combined total of 66 acres in a single irrigation season, a total combined diversion rate of 1.19 cfs, and a total annual diversion volume of 264 acre-feet.

The SRBA court has not issued a partial decree on this right.

3. On November 13, 1998, Box Canyon Dairy filed Application for Transfer No. 5384 with the Department proposing to change the nature of use of 0.32 cfs and 53.1 acre feet of water right nos. 36-02312 and 36-07387 from irrigation use to stockwater and commercial use in connection with Box Canyon Dairy #3. The proposed point of diversion is located in the NENE Section 25, T8S, R14E, B.M., and the proposed place of use is within the NE Section 25, T8S, R14E, B.M., Gooding County. The application seeks water to increase the number of milking cows at the dairy from the 620-cow authorization by Gooding County existing at the time the transfer application was filed to 896 milking cows, an increase of 276 dairy cattle.

4. The Department published notice of the application, which was protested by William K. Chisholm, Randall S. Morgan, Lee Halper, and the Idaho Department of Parks and Recreation. The Idaho Department of Parks and Recreation subsequently withdrew its protest in return for the applicant agreeing to restrict the application of dairy waste on lands near the state's recently-acquired park site at Box Canyon Springs.

5. Issues identified by the protestants are as follows:

a. The proposed changes will injure other water rights;

b. The proposed changes will constitute an enlargement in use of the original right;

c. The proposed changes are not in the local public interest; and

d. The proposed changes are not consistent with the conservation of water resources within the state of Idaho.

6. On November 17, 1999, and on January 23, 2002, the Department conducted hearings in the matter. At the first hearing, the applicant was present and was represented by Mike Felton, Jr. and protestants William K. Chisholm and Lee Halper represented themselves. Protestant Randall S. Morgan did not appear. At the second hearing, the applicant was present

and was again represented by Mike Felton, Jr. Protestant Lee Halper was present and was represented by Richard A. Carlson. Protestant William K. Chisholm represented himself.

7. Exhibits premarked, offered or accepted as a part of the record are as follows:

a. Applicant's Exhibit 1 - Map of vicinity of Box Canyon Dairy

b. Applicant's Exhibit 2 - Map of location of Box Canyon Dairy #3

c. Applicant's Exhibit 3 - Box Canyon #3 Site Vicinity Plan

d. Applicant's Exhibit 4 - Box Canyon #3 Site Plan

e. Applicant's Exhibit 5 - Nutrient Management Plan for Box Canyon Dairy, October 22, 1999

f. Applicant's Exhibit 6 - Letter dated December 2, 1998 to Box Canyon Dairy c/o Scott Haag from Stephen N. Thompson, letter dated December 2, 1998 to Box Canyon Dairy from Jenifer Beddoes, letter dated November 13, 1998 to Box Canyon Dairy from Jenifer Beddoes together with lagoon evaluation worksheets and letter dated April 27, 1998 to Box Canyon Dairy from Jenifer Beddoes

g. Applicant's Exhibit 7 - Soil Test Data Sheets (6)

h. Applicant's Exhibit 8 - Livestock Confinement Operations – Water Requirements and Consumptive Use Worksheets

i. Applicant's Exhibit 9 - Well Interference Analysis – Box Canyon Dairy #3

j. Applicant's Exhibit 10 - Observation Well data

k. Applicant's Exhibit 11 - Analysis of Water Right Transfer to Dairy – dated October 18, 1999

l. Applicant's Exhibit 12 - Letter dated April 27, 1998 to Box Canyon Dairy from Jenifer Beddoes, dairy inspection reports (3) and Gooding County Grandfather CAFO Siting Permit

m. Applicant's Exhibit 13 - Letter dated December 14, 1998 to Gooding County Planning and Zoning Commission from Dewey Durfee

n. Applicant's Exhibit 14 - Cost worksheet

o. Applicant's Exhibit 15 - Analysis of Water Right Transfer to Dairy – dated November 18, 1999

p. Applicant's Exhibit 16 - Letter dated December 3, 2001 from Michael J. Tremblay and a Soil Test Data Sheet

q. Applicant's Exhibit 17 - Letter dated November 26, 2001 to Felton & Felton by Gary B. Genske, CPA with 2 attachments

r. Applicant's Exhibit 18 - Revised Map of Box Canyon Dairy #3 and vicinity (Large exhibit about 2 feet by 2.5 feet on hardboard)

s. Applicant's Exhibit 19 - List of landowners within 1/2 mile of Box Canyon Dairy, letter dated January 16, 2002 to Michael Felton from Marv Patten together with a listing of nuisance complaints (29 pages)

t. Applicant's Exhibit 20 - Time Line

u. Applicant's Exhibit 21 - Gooding County New CAFO Siting Permit dated March 29, 2000

v. Applicant's Exhibit 22 - Untitled map of vicinity near dairy - size 8 inches x 11-1/2 inches

w. Applicant's Exhibit 23 - Map, Well Driller's Report and graphs (8)

x. Protestant's Exhibit A - American Falls and Thousand Springs Ground Water Management Areas Information, IDWR News Release 2001-67, presentation material from Karl Dreher on designation of ground water management areas, ORDER dated August 3, 2001, designating the Thousand Springs Ground Water Management Area, Name Index of water rights referenced in draft Curtailment Order

y. Protestant's Exhibit B - Maps of Box Canyon area

z. Protestant's Exhibit C - USGS map of Box Canyon area

aa. Protestant's Exhibit D - Ground Water Quality Technical Report No. 14 titled Cumulative Impacts Assessment, Thousand Springs Area of the Eastern Snake River Plain, Idaho, prepared by Idaho Department of Environmental Quality ("IDEQ"), July 2000

ab. Protestant's Exhibit E - Nitrates in Ground Water - A Continuing Issue for Idaho Citizens, IDEQ

ac. Protestant's Exhibit F - Literature Review of the Health Effects Associated with the Inhalation of Hydrogen Sulfide, IDEQ, June 19, 2001

ad. Protestant's Exhibit G - Not admitted

ae. Protestant's Exhibit H - Not admitted

af. Protestant's Exhibit I - Not admitted

ag. Protestant's Exhibit J - Not admitted

ah. Deposition Exhibit No. 1 - Nutrient Management Plan for Box Canyon Dairy, October 22, 1999 by Jenifer Beddoes

8. Subsequent to the hearing on November 17, 1999, but prior to the hearing on January 23, 2002, the record was augmented with the following information:

a. Letter dated December 27, 1999, from the Hearing Officer to the Idaho Division of Environmental Quality ("DEQ") and DEQ's response to the letter dated January 13, 2000.

b. Motion in Opposition to Proposed Augmentation of Record or, in the Alternative, Motion for Additional Augmentation of Record, and the Affidavit of Charles E. Brockway, filed by the applicant on February 11, 2000.

c. Motion in Opposition to Applicant's Motion in Opposition to Proposed Augmentation of Record or, in the Alternative, Motion for Additional Augmentation of Record and Motion to Augment Record filed by the protestant on February 16, 2000.

9. Box Canyon Dairy consists of three dairies, one of which is Box Canyon Dairy #3. Gooding County has authorized a maximum combined total of 5,400 dairy cattle at the three Box Canyon dairies, which are all located in the same general vicinity.

10. The Idaho Department of Agriculture has prepared a Nutrient Management Plan for the applicant's dairy. (See Applicant's Exhibit 5). The applicant is in compliance with the plan. (See Applicant's Exhibit 16). The applicant takes soil samples every spring to determine compliance with the nutrient management plan, even though the Department of Agriculture requires sampling only once every 3 years.

11. Box Canyon Dairy #3 is the site of an existing dairy for which Gooding County has issued a Grandfather CAFO Siting Permit for 620 animal units. The dairy was rebuilt to accommodate a larger dairy herd of up to 896 milking cows, although 330 cows were milked at the site at the time of the hearing on November 17, 1999. After the Department issued a Preliminary Order on March 15, 2000, approving Transfer No. 5384, which became final on April 5, 2000, the applicant added 520 cows to Box Canyon Dairy #3, bringing the total cows at the site to 850, since the Department's Final Order was not vacated or stayed. The applicant has received temporary approval from Gooding County for 896 cows at the dairy site. (See Applicant's Exhibit 21). The rebuilt dairy eliminated irrigation on about 33 acres of land located in the NENE Section 25, T8S, R14E, B.M.

12. The applicant notified the fourteen landowners located within one-half mile of the boundary of Box Canyon Dairy #3 of the Gooding County CAFO hearing for the enlarged dairy. None of the landowners, four of which operated dairies on their land, showed up at the county hearing to protest enlargement of the dairy and nuisance complaints have never been filed against the operation of any of the three Box Canyon dairies. (See Applicant's Exhibit 19).

13. The applicant has implemented water conservation measures at Box Canyon Dairy #3, including reuse of water, and has implemented procedures that do not require the use of water to accomplish. Examples of the latter include scraping alleys and pads mechanically with a tractor instead of flushing and washing the alleys and pads with water, and cleaning cows by hand rather than using sprinklers in the holding pens.

14. An increase of 276 cows at the dairy (896 cows less 620 cows) is estimated to generate about $875,000 in expenditures by Box Canyon Dairy #3, The actual increase of 520 cows (850 cows less 330 cows) is estimated to generate about $1,648,400 in expenditures (See Applicant's Exhibit 17), and the enlarged dairy will provide employment for an estimated 6 to 8 new employees.

15. With respect to waste management, the applicant removes solid waste from the corrals in the spring and in the fall. Liquid waste is impounded in lagoons until it is mixed with irrigation water and applied to irrigated land in accordance with the approved nutrient management plan. A berm keeps water from escaping from the site and directs drainage to a concrete lined sump.

16. To minimize odor from the operation of Box Canyon Dairy #3, the applicant has implemented, or is implementing, various measures including (1) mechanically scraping solid waste from the dairy daily instead of removal by flushing with water, (2) harrowing wet manure daily so that it dries quickly, (3) effective separation of solids from the liquid waste stream and alternating use of settling ponds, (4) minimizing amount of liquid waste in storage in waste lagoons, particularly during the summer months, (5) minimizing the length of time liquid waste is in storage in waste lagoons, (6) maintaining aerobic conditions in the settling ponds and waste lagoons, (7) mixing adequate fresh water with liquid waste for land application, (8) changing over to drop lines for sprinkler systems used to land apply mixture of fresh water and liquid waste, and (9) having sufficient land for land application of liquid and solid waste at optimal agronomic rates. During the hearing on January 23, 2002, Mr. Haag, on behalf of the applicant, testified that he has "never noticed the pivot having any odor" and that "... we're mixing with other water, so, no. There's little or minimal odor." Tr. p. 39, Ln. 4-5 and Ln. 9-10.
Mr. Etherington, also on behalf of the applicant, testified that "... with management practices to prevent production of gases and the practices [Mr. Haag] use[s] [at the Box Canyon Dairy #3], I would -- I would think that [the Box Canyon Dairy #3] wouldn't affect anybody more than a quarter mile or a half mile, probably a half mile radius there." Tr. p. 130, Ln. 15-18.

17. To prevent potential contamination of canal water with dairy waste, the applicant has enclosed the canal in a pipe for its full distance across the Box Canyon Dairy #1 and #2 sites. To control dust, the applicant has paved the feed alleys and driving areas. To control flies, the

applicant installed a new system that uses an electronic sensor and automatic system to spray an oil-based insecticide on the backs of the cows. In addition, the applicant harrows corrals to break up the manure causing it to dry more quickly and reduce the opportunity for flies to lay eggs and to reduce odor potential. These management practices have been implemented at Box Canyon Dairy #3 and are effective.

18. The annual consumptive volume of water originally estimated to be needed for the dairy was 77.4 acre-feet per year. To provide this volume of water, the applicant curtailed irrigating about 22 acres of land. The actual amount of water used at the enlarged dairy during 2000, however, was measured to be 47 acre-feet. The unused ground water remained in the Eastern Snake Plain Aquifer to the benefit of the ground water resource and the hydraulically-connected springs discharging from the aquifer.

19. Using an average annual pumping rate of 0.07 cfs, which is the continuous diversion rate to provide the required annual volume of water and a pumping period of 80 days, the estimated drawdown in a well 1/4-mile away from the point of diversion for transfer no. 5384 is 0.09 feet. Using a maximum pumping rate of 0.32 cfs for 12 days, the estimated drawdown in a well 1/4-mile away from the point of diversion cannot be detected. (See Applicant's Exhibit 9).

20. There are two monitoring wells in the Statewide Program and five monitoring wells in the INEEL Oversite Program located down gradient of the dairy well(s) and up gradient from the Box Canyon area that are used to measure nitrate in the ground water. Past monitoring shows that the nitrate levels in the monitoring wells vary from approximately 1 ppm and 3.5 ppm, although the well measured at 3.5 ppm in 1994 was remeasured at 1.4 ppm in 1998. Ten ppm of nitrate is the maximum contaminant level established by the EPA for a public water supply.

21. The protestants are concerned that expanding the Box Canyon Dairy #3 in an area with the concentration of existing dairies will degrade water quality by increasing nitrates in the ground water and will generate undesirable odors and flies. The protestants estimate that there are approximately 30,000 dairy cattle within an 18-square-mile area and 72,000 dairy cattle within a 36-square-mile area that includes the Box Canyon dairies and that the cumulative impact of enlarging Box Canyon Dairy #3 must be considered.

22. The protestants do not have water rights in the vicinity of Box Canyon Dairy #3 and did not allege injury to their water rights. Protestant Halper's well is located more than 10 miles east of the dairy site and protestant Chisholm's property is about 5 miles west of the dairy site.

23. Witnesses for the protestants were most concerned about odors, flies, potential health impacts, and a decrease in residential property values in the Snake River Canyon and near the mouth of Salmon Falls Creek located about 5 miles west of the dairy site. The witnesses described that during the summer of 2001 there were more flies than in the past, stating that flies were responsible for limited success of an art festival held in September 2001 as a fund raiser for the Nature Conservancy held on property near the mouth of Salmon Falls Creek.

24. The protestants had no specific evidence to overcome the applicant's prima facie evidence showing that the application will not injure other water rights, will not enlarge use of water, and is consistent with the conservation of water resources within the state of Idaho. With respect to the local public interest, the applicant made a sufficient prima facie showing that the application is in the local public interest and should be approved.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222(1) (Michie 2000) provides in pertinent part as follows:

> 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, and 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 42-203A(5), Idaho Code ....

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of local public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Idaho Code § 42-222.

5. Gooding County has granted temporary approval for 896 cows at the dairy site.

6. The data from monitoring wells down gradient of the dairy well(s) but up gradient from the Box Canyon vicinity show low impact to ground water quality from nitrate in the area of the Box Canyon Dairy and Box Canyon.

7. The proposed changes will not injure other water rights.

8. The proposed changes do not constitute an enlargement in use of the original right.

9. The proposed uses of water are as efficient as other similar use of water for dairies within the area and are consistent with the local public interest and conservation of water resources within the state of Idaho.

10. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE hereby ORDERED that Application for Transfer No. 5384 in the name of Box Canyon Dairy is **APPROVED** subject to the following conditions:

1. The number of milking cattle at Box Canyon Dairy No. 3 shall not exceed 896 animals.

2. The right holder shall install measuring devices at the irrigation well located in the SENE Section 25, T8S, R14E, B.M. from which water is being transferred and at the dairy well(s) in the NENE Section 25, T8S, R14E, B.M. The right holder shall measure and annually report to the Department the amount (cfs and acre-feet) of water diverted under this transfer. The Director may require more frequent measuring and reporting.

3. The place of commercial use authorized by this transfer includes land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not be used for irrigation unless the water is first beneficially used in the dairy as authorized by this transfer.

4. Use of water under this transfer requires that the applicant dry up 22 acres of land located in the NENE Section 25, T8S, R14E, B.M. although 33 acres will actually be dried up. The transfer also authorizes a diversion rate of 0.32 cfs and a volume of 77.4 acre feet.

5. Newly designated rights 36-02312D and 36-07387D when combined shall not exceed a total annual maximum diversion volume of 77.4 acre-feet.

6. The right holder shall comply with the drilling permit requirements of Idaho Code § 42-235.

7. The right holder shall file proof that the change authorized by this transfer has been accomplished within one (1) 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.

Signed this 7th day of October, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October, 2005, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Lee Halper 331 S 230 W Jerome, Idaho 83338	(x) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
Bill Chisholm 19073 East US Hwy 30 Buhl, ID 83316	(x) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
Mike Felton, Jr. Felton & Felton 1020 Main P.O. Box 589 Buhl, Idaho 83316-0589	(x) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail

Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Idaho Department of Water Resources

EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance 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.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.