BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 5464 IN THE NAME OF SALMON FALLS LAND & LIVESTOCK CO.	)	**FINAL ORDER**

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "Department") as a result of a protested application for transfer of water right no. 47-02386A. Application for Transfer No. 5464 ("application") was filed in the name of Salmon Falls Land & Livestock Company ("applicant"). The application was protested by William K. Chisholm ("protestant") and on October 13, 1999, the Department conducted an administrative hearing. On November 24, 1999, the Department issued a Preliminary Order denying the application on the grounds that approval was not in the local public interest as defined under the governing statute at the time. On January 19, 2000, the Preliminary Order became a Final Order, since the applicant did not file exceptions with the Director.

On February 16, 2000, the applicant filed a Petition for Judicial Review of the Final Order with the Fifth Judicial District Court. On April 17, 2000, in response to a *Motion for Leave to Present Additional Evidence* filed by the applicant pursuant to Idaho Code § 67-5276, the court remanded the matter to the Department for the purpose of receiving additional evidence and conducting additional fact finding relative to the local public interest and the other requirements set forth in Idaho Code § 42-222. On July 17, 2000, the court denied the applicant's motion for reconsideration of the remand order, and the matter was returned to the Department for further proceedings.

On September 19, 2000, the Department conducted a second administrative hearing. On March 7, 2001, the Hearing Officer for the Department issued an Amended Preliminary Order denying the application on the grounds that it was not in the local public interest. On March 21, 2001, the applicant filed a Petition for Director's Review of Preliminary Order ("petition") and Brief in Support of Petition for Review.

On April 16, 2001, the Hearing Officer issued an Order Granting Petition that allowed 14 days for the protestant to respond to the applicant's petition. The 14-day period ended on April 30, 2001, but upon request of the protestant the Hearing Officer and the applicant agreed to extend the time for response by the protestant to May 4, 2001. On May 4, 2001, the protestant filed Protestant's Brief.

The Director having reviewed the applicant's petition and supporting brief, the protestant's brief, the Department's record pertaining to the application, including the transcripts of both administrative hearings, enters the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. On November 5, 1996, the Department issued Amended License No. 47-02386 as follows:

Identification No.	47-02386
Source:	ground water
Priority Date:	September 12, 1963
Rate of Diversion:	3.51 cubic feet per second ("cfs")
Annual Volume Limit:	824 acre-feet
Point of Diversion:	SW1/4SE1/4 Section 23 and SW1/4SW1/4 Section 24, T8S, R12E, B.M.[1]
Nature of Use:	Irrigation
Season of Use:	March 1 to November 1
Place of Use:	206 acres in parts of Sections 23 and 24, T8S, R12E, B.M.

A claim on this right was filed in the Snake River Basin Adjudication on June 9, 1988. The claim was split into parts 47-02386A and 47-02386B on May 14, 1997.

2. On November 19, 1996, the Department issued transfer No. 4818 in the name of Salmon Falls Land & Livestock Co. as follows:

Identification No.	47-02386B
Source:	ground water
Priority Date:	September 12, 1963
Rate of Diversion:	2.22 cfs

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

Annual Volume Limit:	520 acre-feet
Point of Diversion:	NENW Section 36, T8S, R12E, B.M.
Nature of Use:	Irrigation
Season of Use:	April 1 to October 31
Place of Use:	130 acres in parts of Section 36, T8S, R12E, B.M.

3. On March 12, 1999, Salmon Falls Land & Livestock Company filed Application for Transfer No. 5464 with the Department seeking to change the point of diversion, place of use, nature of use, and season of use for the remaining part of Water Right License No. 47-02386 as follows:

Identification No.	47-02386A
Source:	ground water
Priority Date:	September 12, 1963
Rate of Diversion:	1.29 cfs
Annual Volume Limit:	228 acre-feet (consumptive use at 3 acre-feet/acre shown on application) 304 acre-feet (diversion volume to be transferred at 4 acre-feet/acre)
Points of Diversion:	NWSW (2 points) and SWNW Section 13, T8S, R13E, B.M.
Nature of Use:	stockwater and commercial
Season of Use:	year-round
Place of Use:	parts of Sections 11, 12, 13 and 14, T8S, R13E, B.M. and parts of Sections 17 and 18, T8S, R14E, B.M.
Remarks:	stockwater and commercial uses are in connection with a new proposed dairy

4. The Department published notice of the application, which was subsequently protested by William K. Chisholm ("protestant").

5. Issues identified by the protestant in the written protest 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 October 13, 1999, the Department conducted an administrative hearing on the protested application. On November 24, 1999, the Department issued a Preliminary Order denying the application on the grounds that it was not in the local public interest. On February 16, 2000, the applicant filed a Petition for Judicial Review of the Final Order with the Fifth Judicial District Court. In response to *Motion for Leave to Present Additional Evidence* filed by the applicant pursuant to Idaho Code § 67-5276, the court remanded the matter to the Department on April 17, 2000, for the purpose of receiving additional evidence and conducting additional fact finding relative to the local public interest and the other requirements under Idaho Code § 42-222.

7. On September 19, 2000, the Department conducted a second hearing in the matter. The applicant was present and was represented by Timothy J. Schneider. The protestant was present and represented himself. Sworn testimony was received and exhibits were admitted into evidence. At the close of the hearing, the record was left open for 10 days for additional written comments. Parties were given 14 days to respond to any additional information submitted.

8. Approximately twenty-five (25) individuals submitted written comments after the hearing on September 19, 2000. On October 16, 2000, the applicant filed "Objections to Written Testimony of Public Witnesses." The Director did not consider or give any weight to any of the written comments from individuals that were submitted after the September 19 hearing since the applicant could not cross-examine the individuals with respect to their written comments or any work cited therein.

9. Exhibits pre-marked, offered, or accepted as a part of the record are as follows:

a. Applicant's Exhibit 1 - Map

b. Applicant's Exhibit 2 - Map

c. Applicant's Exhibit 3 - NOT OFFERED

d. Applicant's Exhibit 4 - Site Plan

e. Applicant's Exhibit 5 - Plat of pivot locations

f. Applicant's Exhibit 6 - Letter dated May 18, 1999 to Bill Crafton from Marv Patten and a letter dated May 14, 1999 to Mike Henslee from Jenifer Beddoes with an Animal Waste Management Planning Worksheet

g. Applicant's Exhibit 7 - Inventory and Evaluation of Animal Waste Lagoon Sites by NRCS

h. Applicant's Exhibit 8 - Estimating Runoff and Peak Discharge

i. Applicant's Exhibit 9 - Well Driller Report

j. Applicant's Exhibit 10 - Water Balance Worksheet by Brockway Engineering

k. Applicant's Exhibit 11 - Well Interference Analysis - Salmon Falls Land and Livestock Dairy

l. Applicant's Exhibit 12 - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet

m. Applicant's Exhibit 13 - Dairy Water Use Worksheet

n. Applicant's Exhibit 14 - Letter dated March 19, 1999 to Bill Crafton from Dave Burgess

o. Applicant's Exhibit 15 - Letter to Twin Falls County Planning and Zoning from Granville Eckert

p. Applicant's Exhibit 16 - Letter dated January 14, 2000 to Mike Henslee from Lee Taylor and letter dated June 5, 2000 to Mike Henslee from Lee Taylor

q. Applicant's Exhibit 17 - Twin Falls County Code - Title 8, Zoning Ordinance, Chapter 6, Districts or Zones, Article A -Agricultural Range Preservation Zone, Article B - Agricultural Zone and Article C - Livestock Confinement Operations

r. Applicant's Exhibit 18 - Letter dated January 14, 2000 to Mike Henslee from Lee Taylor (Note: This letter is also part of Exhibit 17)

s. Applicant's Exhibit 19 - Letter dated June 5, 2000 to Mike Henslee from Lee Taylor approving applicant's LCO application (Note: This letter is part of Exhibit 17)

t. Applicant's Exhibit 20 - Wastewater Tech. Sheet/Enz-A-Bac

u. Applicant's Exhibit 21 - Letter dated December 22, 1999 to Mike Henslee from Jenifer Beddoes and Animal Waste Management Planning Worksheet

v. Applicant's Exhibit 22 - Dairies: Water Use Worksheet

w. Applicant's Exhibit 23 - Amended Notice of Claim to a Water Right

x. Applicant's Exhibit 24 - Enlarged USGS quadrangle sheet showing the dairy site and irrigation pivot locations

y. Protestant's Exhibit A - Bell Rapids Industrial Dairy Application Denial and CAFO Moratorium Petition (13 pages)

z. Protestant's Exhibit B - Letter dated September 13, 1999 to the Twin Falls Planning and Zoning Board from the Citizens of Owyhee County Organized Association

aa. Protestant's Exhibit C-1 - Letter dated September 13, 2000 from Candy Hansing

ab. Protestant's Exhibit D - Color photograph – size 8 1/2" x 11"

ac. Protestant's Exhibit E - Photograph

ad. Protestant's Exhibit F - Photograph

ae. Protestant's Exhibit G - Photograph

af. Protestant's Exhibit H - Photograph of Section 23, T8S, R12E, B.M. - 1994

ag. Protestant's Exhibit I - Photograph of Section 23, T8S, R12E, B.M. - 1995

ah. Protestant's Exhibit J - Photograph of Section 23, T8S, R12E, B.M. - 1996 (Reversed)

ai. Protestant's Exhibit K - Photograph of Section 23, T8S, R12E, B.M. - 1997

aj. Protestant's Exhibit L - Photograph of Section 23, T8S, R12E, B.M. - 1998

ak. Protestant's Exhibit M - Photograph of Section 23, T8S, R12E, B.M. – 1999

al. Protestant's Exhibit N - Copy of orthophoto sheet showing SE1/4 Section 23, T8S, R12E, B.M.

am. Protestant's Exhibit O - Aerial photograph of Sections 23 and 24, T8S, R12E, B.M.

10. The applicant purchased the 80 acres from which the applicant proposes to transfer water right no. 47-02386A in October of 1996. The protestant submitted photographic evidence intended to demonstrate that the tract was not irrigated and water right no. 47-02386A

was not used from 1994 to July of 2000. (See Protestant's Exhibits H through M.) In July of 2000, the applicant started using three wheel lines on the property to replace forage burned by wildfires on other land grazed by the applicant's cattle. The 80-acre tract had not been enrolled in the Conservation Reserve Program ("CRP"). (See Protestant's Exhibit C-1.)

11. The site for the proposed dairy facilities, irrigation pivot locations, and hand-line irrigated areas shown on Applicant's Exhibit No. 24 are located south and west of the Snake River on a bluff or plateau adjacent to the Snake River in Twin Falls County. There are at least 6 waterways or "gullies" heading down from the plateau shown on Applicant's Exhibit No. 24 that traverse other lands adjacent to the pivot locations and the valley floor below the plateau. At least 5 of the gullies cross the route for U. S. Highway 30 and head to the Snake River. The Thousand Springs complex is located in Gooding County directly across the Snake River from the proposed irrigation pivot locations and hand-line irrigated areas.

12. Drainage from the proposed irrigation pivot locations and hand-line irrigated areas into the gullies, as shown on Applicant's Exhibit No. 24, was described by Michael Henslee, Vice President and Ranch Manager for the applicant, during his testimony at the hearing on September 19, 2000. Henslee's description of drainage off the plateau was supported by the testimony of witnesses Wes Nash, David May, and Dr. Paul Moynahan. All three testified that irrigation on the plateau results in surface runoff down gullies and swales onto the valley floor.

13. The general area for the proposed dairy facilities is not irrigated land and is seeded to crested wheat grass to provide wintertime dry land grazing for beef cattle. The proposed dairy site is zoned "Agricultural Range Preservation." The Twin Falls County zoning ordinance provides that an application for a Livestock Confinement Operation ("LCO") in this zone in excess of 3,000 animal units shall be reviewed by the Twin Falls County Planning and Zoning Commission ("PZC").

14. The applicant originally proposed to develop a 3,300 milking cow dairy in a free stall facility, but the proposal was denied by the PZC after conducting public hearings.

15. The applicant subsequently submitted an amended LCO application reducing the size of the proposed dairy operation to 2,142 dairy cows for a total of just less than 3,000 animal units. Twin Falls County defines a dairy cow as equivalent to 1.4 animal units. The downsized application did not require public hearings or review by the PZC and was perfunctorily approved by the PZC director without public input.

16. The applicant proposed a "flush system" of cleaning solid waste from alleys and to land apply liquid waste on about 1,560 acres using irrigation pivots in combination with hand-line irrigation near the dairy site. The applicant planned to apply liquid waste through 13 pivots and 10 hand lines, more or less, marked in red on Applicant's Exhibit No. 24. Michael Henslee testified that liquid dairy waste would not be land applied through the 3 pivots marked in green on Applicant's Exhibit No. 24 (pivots 1, 2, and 13).

17. The applicant was required by the Idaho Department of Agriculture to design and construct liquid storage facilities, or lagoons, to store liquid waste from the dairy and runoff from a 24-hour rain storm having a return period or average recurrence interval of 25 years ("25-year storm event"). The applicant did not present evidence or provide information indicating that the minimum storage volume for liquid waste and storm runoff required by the Idaho Department of Agriculture was intended to adequately protect land uses and resources proximate to and below the plateau-site for the proposed dairy facilities and pivot locations from contamination by liquid dairy waste.

18. The minimum storage volume required by the Idaho Department of Agriculture for liquid waste and runoff from the 25-year storm event for the downsized dairy currently proposed by the applicant is 2,065,291 cubic feet, or about 47 acre-feet. (See Applicant's Exhibit No. 21.) Michael Henslee testified that the applicant proposed to construct lagoons for liquid waste and runoff from the 25-year storm event sized for the original dairy. The lagoons as proposed would have a storage volume of 3,619,202 cubic feet, (see Applicant's Exhibit No. 6), or about 83 acre-feet. Although this is considerably more liquid storage capacity than required by the Idaho Department of Agriculture for the downsized dairy, the applicant did not present evidence or provide quantitative information indicating the recurrence interval for the storm event or the associated volume of storm-event runoff that would be accommodated by the larger-than-required lagoons.

19. Michael Henslee also testified that the applicant proposed construction of an emergency containment berm around the lagoons to assure that any spills from the lagoons do not leave the dairy site. Henslee described constructing the berm "... in case anything, you know, [a] hundred year flood happen[s] or something." (See Transcript of Agency Proceeding of September 19, 2000, p. 38, Lns. 6-8.) The applicant did not present evidence or provide quantitative information demonstrating that the proposed containment berm had been properly sized to contain spills from the lagoons during a 100-year storm event or any other reasonably probable event.

20. Michael Henslee also testified that the applicant proposed construction of a diversion canal just south and west of the proposed dairy facilities, between pivots 10 and 14 shown on Applicant's Exhibit No. 24 (note that what appears to be pivot 14 is shown as a duplicate pivot 11 on Applicant's Exhibit No. 24), to capture surface runoff from adjacent property to the south of the proposed dairy facilities and convey the captured runoff to a natural drainage channel that traverses pivot 14. The applicant did not present evidence demonstrating that the proposed diversion canal had been properly sized to capture and convey runoff around the proposed dairy facilities during any reasonably probable storm event. Henslee did state that:

> Our neighbors Eichert said the most they've ever seen come off there is about 20 cf[s], so we was going to build it, I think, for at least, what was it, 60 [cfs] or so. We was just going to take a scraper down along here. It's going to be a pretty good diversion canal. It'll come down and around all the lagoons and back into the natural drainage.

(See Transcript of Agency Proceeding of September 19, 2000, p. 56, Lns. 24-25 and p. 57, Lns. 1-4.)

21. To avoid runoff resulting from irrigation using water diverted from the Snake River and applied through pivots 1, 2, and 13 on the plateau from being conveyed through gullies onto adjacent lower-elevation property and into the Snake River, as shown on Applicant's Exhibit No. 24, Michael Henslee testified that ponds had been constructed to capture the runoff. Henslee also testified: "And we've put ponds here, and we can put in a lot bigger ponds in this area." (See Transcript of Agency Proceeding of September 19, 2000, p. 33, Lns. 16-17.)

22. To avoid runoff resulting from irrigation using treated liquid dairy waste and applied through the remaining pivots and hand lines on the plateau from being conveyed through gullies onto adjacent lower-elevation property and into the Snake River, as shown on Applicant's Exhibit No. 24, Michael Henslee testified that a pond had been constructed that was probably 2-½ to 3 acres in size to capture the runoff. (See Transcript of Agency Proceeding of September 19, 2000, p. 34, L. 19.) When asked what other measures were planned, Henslee testified that at least one additional pond would be constructed. (See Transcript of Agency Proceeding of September 19, 2000, p. 48, Lns. 1-2.) Regarding other planned measures, Henslee also testified: "We could put in a containment, berm, in this gully here. Probably it'd be before we hit the BLM ground right on the border there." (See Transcript of Agency Proceeding of September 19, 2000, p. 36, Lns. 17-19.) The gully referred to by the applicant is shown on Applicant's Exhibit No. 24 as crossing between pivots 3 and 4.

23. Under cross-examination, Michael Henslee testified that one or more additional containment berms could be constructed. (See Transcript of Agency Proceeding of September 19, 2000, p. 50, Lns. 9-11.)

24. The proposed containment berms described in Findings 22 and 23, were intended to control runoff from the pivots used to land apply liquid dairy waste during the irrigation season. (See Transcript of Agency Proceeding of September 19, 2000, p. 49, Lns. 16-19.) None of the proposed containment berms described in Findings 22 and 23 were intended to control runoff from storm events of any significance. In fact, Michael Henslee testified that each of the proposed berms would have an overflow or spillway to pass storm-event runoff. (See Transcript of Agency Proceeding of September 19, 2000, p. 49, Lns. 13-15, and p. 50, Lns. 4-5.) Henslee testified that: "... you don't have flash floods like created then during the summer – during the irrigation season." (See Transcript of Agency Proceeding of September 19, 2000, p. 49, Lns. 16-17.) Henslee further testified that:

> ... we're just designing it to run – to control the irrigation runoff, not the spring floods. And we cannot design it for that 'cause, you're right, it would create a catastrophic series of events.

(See Transcript of Agency Proceeding of September 19, 2000, p. 51, Lns. 2-5.)

25. While the intentions and willingness of the applicant to attempt to prevent surface runoff of liquid dairy waste off the plateau, down into the valley floor below, and into the Snake River are laudible, the applicant has not presented sufficient detailed information to support the improbability of such an event. Particularly deficient are: (1) the lack of information demonstrating that the proposed diversion canal around the proposed dairy facilities has been

properly sized to capture and convey runoff from adjacent lands south of the proposed dairy facilities during a reasonably probable storm event; (2) the applicant's assumption that a severe rainfall event of reasonable probability will not occur during the irrigation season when liquid dairy waste would be land applied through irrigation pivots and hand lines resulting in runoff consisting of a mixture of storm-event runoff and dairy waste; and (3) the lack of detail describing the sites and sizing of the ponds and containment berms proposed to be constructed to control runoff down the gullies.

26. The protestant and public witnesses testifying at the hearing on September 19, 2000, expressed concerns about the proposed dairy as well as the irrigation pivots and hand lines proposed for land disposal of liquid dairy waste, since some of the pivots and hand lines are located within a mile or less from the Snake River and the Thousand Springs area. Concerns expressed include noxious odors from the dairy site, negative impacts on aesthetics, and negative impacts on outdoor recreation activities in the area. Other concerns expressed included decreased real estate value of private property in the area, potential surface and ground water contamination, increased truck traffic, potential health hazards, reduced tourism, and decreased ground water levels.

27. The plateau site for the proposed dairy facilities and the irrigation facilities proposed to be used for land application of liquid dairy waste are within about 1 to 4 miles of the Thousand Springs area, which is generally recognized as a recreation area due to the aesthetic beauty of the area and recreational opportunities that include camping, boating, sight seeing, and fishing. The Highway 30 State Scenic Byway traverses the general area. In addition, there are homes and businesses within about 1 mile of locations proposed for land application of liquid dairy waste. Businesses in proximity to the locations proposed for land application of liquid dairy waste include Sligar's Hot Springs, which has an RV campground and tourist facilities. The area is well known statewide as a tourist attraction due to the many springs discharging water from the basalt canyon walls on the east side of the Snake River. Aesthetics and recreational opportunities available in the Thousand Springs area are unique and are limited in extent in the area.

28. The prevailing wind in the Thousand Springs area is from the west, although at times the wind can be from any direction. Diurnally, air moves down slope from the plateau, which is the site for the proposed dairy facilities and irrigation facilities proposed to be used for land application of liquid dairy waste, to the valley floor as the air cools in the evening, where a number of homes and businesses are located.

29. Although the amount and extent of odor and the effects of such odor from the proposed dairy operation and associated handling of dairy waste can not be fully determined until and unless the dairy is actually constructed and in operation, there would be odors from the applicant's dairy. In his testimony, Michael Henslee stated that the applicant will take steps to minimize objectionable odors. Henslee testified that the applicant plans to employ fan separators, aerators, and other processes to address odor problems. This testimony, however, does not establish that these actions will be successful in controlling odors from a dairy this size.

30. Michael Henslee readily admitted that he is not a waste management expert and that the applicant is new to the dairy business. When asked at the second hearing, Henslee was unable to point to examples of local dairy operations that successfully use a similar management plan to address odor issues. Henslee testified that there are no other dairies in Idaho currently using a similar waste management system stating: "Not what we're proposing. There is none in place working of what we are proposing." (See Transcript of Agency Proceeding of September 19, 2000, p. 52, Lns. 15-16.) Henslee testified that he was told that a similar system is being used for animal waste somewhere "back east" but was not able to identify where exactly or whether that project is successful in controlling odors.[2]

31. The applicant has complied with the requirements of Twin Falls County in obtaining an LCO permit for a 2,100-cow, 3,000-animal unit dairy operation. The proposed dairy facilities would be about 1-½ miles from the boundary between Twin Falls County and Gooding County. Some of the irrigation pivots and hand-line areas proposed for land application of liquid dairy waste are about 1 mile from the boundary between Twin Falls County and Gooding County.

32. Water rights with priority dates later than the right sought for transfer have been established to the north, south, and east of the proposed dairy for domestic, commercial, irrigation, and stockwater purposes. The places of use for these later in priority rights are located within about 1 mile of the proposed dairy site. Several witnesses expressed concern that a new well at the proposed dairy site, withdrawing ground water at a rate of up to 580 gallons per minute, would diminish the availability of ground water for their domestic water rights.

33. The testimony described in Finding 32 did not include sufficient evidence to support a finding that the transfer will cause injury to other water rights. Furthermore, the protestant did not provide evidence to counter Applicant's Exhibit 10 (Water Balance Worksheet), Applicant's Exhibit 11 (Well Interference Analysis), or the testimony of Dr. Charles Brockway, the applicant's expert hydrologist, who testified that withdrawing ground water under the transferred water right from a new well constructed at the proposed dairy site would not cause injury to any other water rights and would not enlarge the use of water under the water right.

34. The applicant provided estimates of the annual budget, employment and payroll, property taxes, and other benefits associated with the proposed dairy. The protestant countered by presenting testimony and evidence describing social and economic costs associated with the proposed dairy including noxious odors, negative impacts on aesthetics and outdoor activities in the area, decreased real estate value of private property, increase traffic potential, health hazards, and reduced tourism.

35. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

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[2] When asked at the first hearing to identify other similar dairies in Idaho, Henslee identified two dairies and described them as successful in dealing with odor problems. It was unexplained by Henslee why his answer had changed at the second hearing. More weight is given Henslee's statements at the second hearing since those statements are the most recent on the issue.

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. Idaho Code § 42-222(2) provides in pertinent part as follows:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

3. The Director has jurisdiction to determine the question of abandonment and forfeiture and such may be determined as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. See *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256 (1982); *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 845, 70 P.3d 669 (2003).

4. Forfeiture of a water right is tolled during the pendency of the Snake River Basin Adjudication. See *In Re* SRBA, No. 39576, Wood v. Troutt, Subcase No. 65-05663B (SRBA Dist. Ct., Idaho, May 9, 2002). Water right no. 47-02386 was claimed in the SRBA on June 9, 1988, but has not yet been decreed, and no evidence was submitted indicating that there were 5 years of continuous nonuse of water right no. 47-02386 prior to June 9, 1988. Therefore, water right no. 47-02386A has not been forfeited.

5. 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 that it will be consistent with principles of conservation of the water of the state of Idaho.

6. The applicant demonstrated that the proposed change will not injure other water right holders, and that it will not constitute an enlargement of the use.

7. The applicable statutory definition for local public interest in effect at the time of the initial hearing on October 13, 1999, the date on which the initial preliminary order became a final order (January 19, 2000), and at the time of the second hearing on September 19, 2000, was

"the affairs of the people in the area directly affected by the proposed use." Idaho Code § 42-203A(5) (Michie 1996). Although the statutory definition of local public interest was changed effective July 1, 2003, the changed statutory definition does not apply to this application for transfer.

8. In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the Supreme Court held that: "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion."

9. 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.

10. The applicant has the ultimate burden of persuasion for the 4 requirements for approval of a transfer under Idaho Code § 42-222.

11. The Director has considered the evidence and testimony of both the applicant and the protestant. It is the determination of the Director that the applicant has failed to satisfy its burden of establishing that approval of the transfer is in the local public interest, as defined by current law in Idaho Code § 42-202B(3) or as defined by applicable law at the time of the hearing on remand, on three counts. First, while compliance with the requirements of Twin Falls County represents partial satisfaction of being in the local public interest, the requirements of Twin Falls County do not include all aspects of the local public interest that must be considered by the Department, nor do those requirements represent the local public interest in the contiguous Gooding County. Similarly, compliance with the requirements of the Department of Agriculture does not include the remaining aspects of the local public interest that must be considered by the Department. Secondly, to assess the impact of the proposed dairy facilities and associated waste on the local public interest, the designs of the various features must be definite enough to evaluate impacts. In this instance, the applicant's designs are not sufficiently detailed to demonstrate that potential negative impacts from surface runoff of dairy waste off the plateau, down into the valley floor below, and into the Snake River, are sufficiently improbable so that the proposed dairy facilities and associated waste disposal facilities would be in the local public interest. Third, the record lacks sufficient evidence regarding the effectiveness of the proposed management plan in controlling odors. The applicant failed to demonstrate that the waste management system proposed will be effective in controlling odors from a 2,100-cow dairy.

12. On balance, it is the determination of the Director that the negative impacts on water quality in the Snake River resulting from uncontrolled runoff of dairy waste during storm events together with the negative impacts on businesses, recreational ventures, and homeowners dealing with odors and contaminated runoff outweighs the economic benefit of the proposed dairy operation.

13. Because the applicant has failed to satisfy its burden of establishing that approval of the transfer is in the local public interest, the Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5464 in the name of Salmon Falls Land & Livestock Company is **DENIED**.

Signed this 3rd day of September, 2004.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2004, 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:

ROGER LING
LING & ROBINSON
PO BOX 396
RUPERT ID 83350

WILLIAM K. CHISHOLM
10973 E HWY 30
BUHL ID 83316

ALLEN MERRITT
IDWR SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380

Patsy McGourty
Administrative Assistant
Idaho Department of Water Resources