BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHT	)	**PRELIMINARY ORDER**
NO. 61-2206 (TRANSFER NO. 69688)	)	
IN THE NAME OF VICTOR &/OR	)	
ALBERT HOFER	)	
_____	)	

This matter is before the Department of Water Resources ("Department") as a contested case involving protests against approval of the above referenced application for transfer. A hearing has been held and a record has been created upon which a decision can be entered. Based upon his understanding of the law and the facts in this matter, the hearing officer now makes the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On January 26, 2002, Victor &/or Albert Hofer ("applicants") filed with the Department application for transfer no. 69688 ("application") seeking to change the place of use and point of diversion of a part of water right no. 61-2206. Notice of the application was published in the Mountain Home News on February 20 and 27, 2002. Protests against approval of the application were received from Charles Olson, Forrest Freer, and Ron Leydet. Mr. Leydet's protest was dismissed by order dated October 3, 2002. A hearing was held in Mountain Home, Idaho, on December 5, 2002. All parties were present and represented themselves.

2. The Snake River Basin Adjudication Court ("SRBA court") issued a partial decree on October 26, 2000, for water right no. 61-2206 as follows:

a.	Name of Owner.	Holstein Heifer Ranch, Inc.
b.	Source.	Ground water
c.	Quantity.	4.00 cubic feet per second ("cfs") 1100 acre feet per year ("afy")
d.	Priority Date.	January 5, 1965
e.	Point of Diversion.	Two wells ("Post wells") in the SE1/4 of Section 36, Township 04S, Range 05E, Boise Meridian, Elmore County.
f.	Place of Use.	275 acres within the south half of Section 36, Township 04S, Range 05E.
g.	Purpose of Use.	Irrigation
h.	Period of Use.	April 1 to October 31

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order.)

3. The application included the following documents concerning ownership of water right no. 61-2206:

a. A corporate warranty deed dated August 13, 1997, conveying the S1/2 Section 36, Township 04S, Range 05E from Holstein Heifer Ranch, Inc. to James M. Davies, a married man, along with all appurtenances.
b. A warranty deed dated June 12, 2001, conveying the S1/2 Section 36, Township 04 South, Range 05 East from Davies Family Limited Partnership to Jack Post and Karla Post, husband and wife, along with all water and ditch rights appurtenant to the property. The deed was signed by James M. Davies, Trustee.
c. An agreement dated January 28, 2002, by Jack and Karla Post to sell 50 inches (1 cfs) of water right no. 61-2206 to Albert and Victor Hofer contingent upon the Department's approval of a transfer.

4. Application for transfer no. 69688 seeks to move 1 cfs and 276 afy now authorized to be diverted from the Post wells to an existing well ("Hofer well") owned by the applicants. The Hofer well is located in the SWNE, Section 12, Township 04 South, Range 06 East, Elmore County, approximately 7 miles northeast of the Post wells. The water would be used for irrigation of a permissible place of use of 315 acres located within the north half and 20 acres within the NESW, of said Section 12. The application indicates that 69 acres within the decreed place of use of water right no. 61-2206 will be dried up and the remainder of the right will be placed in the "water bank."

5. Albert Hofer testified that the purpose of the transfer is to provide supplemental water for irrigation of the lands listed in the application. He testified that surface water delivered from Mountain Home Irrigation District ("MHID") is presently applied to all the Hofer lands first until the surface water supply is depleted. He also testified that ground water supplements MHID water. Finally, he testified that, if the transfer is approved, the additional ground water would be applied to all of the Hofer lands.

6. The following water rights and sources of water are used to irrigate the land:

a. MHID holds rights to supply water to lands within the boundaries of the district. The parties did not dispute that the NE quarter of said Section 12 is within the boundaries of the district, but did dispute whether MHID water could be used on Hofers' other land. The Hofers hold 156.65 "shares" of MHID. The amount of water represented by an MHID share is variable depending upon water availability and has ranged from 0 acre feet per acre per annum ("afa") to more than 3 afa during the period 1969 to 2002 (Protestant Olson's Exhibit 12).

MHID considers an allotment of 3 afa to be a full supply, but delivers an additional increment as “flood water,” when available.

b. Water rights nos. 61-10196 and 61-10197 authorize diversion and use of ground water from Hofers’ existing (deep) well located in the SWNE of said Section 12 for irrigation of 150.9 acres in the NE and 155.8 acres in the NW, of Section 12. The priority date for right no. 61-10196 is April 1, 1940, and for right no. 61-10197 the priority date is April 1, 1966. Diversion of water from the “trench wells” originally associated with these rights is not authorized after completion of Hofers’ deep well. The partial decrees for these water rights were issued by the SRBA court on October 26, 2000, and include the following remarks relevant to this matter:

i. The right holder and any successor-in-interest shall maintain ownership and control of all shares of water provided by the MHID for irrigation of the NE, Section 12, Township 04 South, Range 06 East.

ii. Prior to the diversion and use of water from the newly constructed well, the right holder shall install and maintain a measuring device on the well to measure both the instantaneous rate of diversion and total annual volume of water diverted from the well. The right holder shall obtain prior approval from the department relative to the type of device and shall annually report to the department the maximum rate of diversion, the depth to water prior to commencement of pumping each season, the depth to water during the pumping period and the annual volume diverted.

iii. Use of rights Nos. 61-10196 and 61-10197 is limited to the irrigation of a combined total of 306.7 acres in a single irrigation season. Use of right nos. 61-10196, 61-10197 and 61-10198 is limited to the irrigation of a combined total of 335 acres in a single irrigation season. Use of right no. 61-10196 is limited to the irrigation of 150.9 acres, and use of right no. 61-10197 is limited to the irrigation of 155.8 acres, within the authorized place of use in a single irrigation season*. (Edited to incorporate similar remarks from each of the rights).*

iv. The combined rate of diversion to the NE and the NW, Section 12 shall not exceed 3.05 cfs.

v. The combined maximum annual volume of water which may be diverted to the NE and the NW, Section 12, shall not exceed a total of 256 AF.

vi. The maximum rate of diversion for irrigation purposes in the NE, Section 12, when combined with all other water rights for irrigation of the same land shall not exceed a total of 150.9 acres as (sic) 0.02 cfs/acre

= 3.02 cfs. The maximum authorized rate of diversion for stockwater shall not exceed 0.03 cfs, for a combined irrigation and stockwater rate of 3.05 cfs.

vii. The combined maximum annual volume of water which may be diverted for irrigation in the NE and the NW, Section 12, and stockwater purposes shall not exceed 256 AF. Of this volume, 1.4 AF is for stockwater.

c. Right No. 61-10198 authorizes diversion from a waste water source for irrigation of 315 acres in the N1/2 and 20 acres in the NESW of said Section 12. The partial decree for this right was issued by the SRBA court on February 25, 2000 confirming a priority date of April 1, 1930. Use of the right is combined with water from MHID and the combined total acreage allowed to be irrigated in a single irrigation season is limited to 335 acres when combined with rights nos. 61-10196 and 61-10197.

7. The protestants described the following reasons for objecting to approval of the application:

a. Approval of the application would enlarge the use of water under the right. The protestants point out that the proposed place of use as listed in the transfer does not indicate that the use of water under the transfer will be limited to the number of acres proposed to be dried up at the decreed place of use.

b. Injury to other water rights. The protestants have wells in the area that have experienced continuing water level declines.

c. Not in the local public interest. Moving additional pumping into the area will endanger the water supply for domestic uses within nearby subdivisions.

8. Exhibits offered as part of the hearing record are as follows:

a. Applicant's Exhibit 1 – Memorandum to File No. 61-2066 by Daniel L. Nelson, dated January 30, 2002.

b. Applicant's Exhibit 2 – Memorandum to Sherl L. Chapman from Steven Hannula dated April 26, 2002, entitled "Drawdown Analysis for the Application for Transfer of Water Right 61-2206."

c. Applicant's Exhibit 3A- Ground Water Level Change Map for the Mountain Home GWMA.

d. Applicant's Exhibit 3B – Generalized Profile Across Mountain Home Plateau

e. Applicant's Exhibit 3C – Ground Water Contours for Mountain Home GWMA.

f. Applicant's Exhibit 3D – Ground Water Hydrographs – South Area.

g. Applicant's Exhibit 4 – Memorandum from Daniel A. Nelson dated May 31, 2002, entitled "Re: Victor and Albert Hofer Transfer, Transfer #69688."

h. Applicant's Exhibit 5 – "Preliminary Order in the Matter of Application for Transfer No. 69262 in the Name of Idaho Power Company," dated November 21, 2002.

i. Applicant's Exhibit 6A – Transfer No. 69725 (Terry L. and Linda K. Ketterling), dated September 5, 2002.

j. Applicant's Exhibit 6B – Application for Transfer No. 69725 (Terry L. and Linda K. Ketterling), dated February 6, 2002.

k. Applicant's Exhibit 6C – Staff Analysis of Application for Transfer No. 69725 (Terry L. and Linda K. Ketterling) dated March 4, 2002.

l. Applicant's Exhibit 6D – Two letters to the Department from Charles J. Olson, dated December 3, 1993 and January 10, 1994, relative to protests against approval of an application for transfer.

m. Applicant's Exhibit 6E – Letter from David R. Tuthill to Squaw Creek Farms concerning a protest filed against approval of applications to transfer water rights.

n. Applicant's Exhibit 6F- Application for Transfer No. 4241 (Squaw Creek Farms), dated November 2, 1993.

o. Applicant's Exhibit 7 – Order Authorizing Temporary Change of Water Right No. 61-2066 (Jack &/or Karla Post), dated July 21, 2001.

p. Applicant's Exhibit 8 – Well Test by G. J. Verti-Line Pumps, Inc. for Al Hofer, Mountain Home, dated May 21, 2001.

q. Protestant Freer's Exhibit 1 – Water Right License No. 61-2201 in the name of Mrs. Ruby W. Freer.

r. Protestant Freer's Exhibit 2 – "Augmentation of Discovery Responses by Forrest Freer as Requested by the Hearing Officer."

s. Protestant Freer's Exhibit 3 – Well Drillers Report for Albert Hofer, dated May 29, 2001.

t. Protestant Freer's Exhibit 4 – Letter signed by Gail Staley, G. J. Verti-Line Pumps, Inc. to Scott Campbell, dated August 22, 2002, regarding Al Hoffer (sic) pump.

u. Protestant Freer's Exhibit 5 – Static Water Level for the Freer Deep Well.

v. Protestant Olson's Exhibit 1 – Application for Transfer no. 69688.

w. Protestant Olson's Exhibit 2 – Partial Decrees of Water Right Nos. 61-10196, 61-10197 and 61-10198 in the name of Victoria Hofer.

x. Protestant Olson's Exhibit 3 – Department Report by Shane Bendixsen entitled "Summary of Hydrologic Conditions in the Mountain Home and Cinder Cone Butte Areas," dated April 1994.

y. Protestant Olson's Exhibit 4 – Hydrographs for wells 04S06E14ACA1 and 04S06E36DCB1.

z. Protestant Olson's Exhibit 5 – Quote from Munn v Twin Falls Canal Co., 43 Idaho 198, 207, 252, P. 865 (1926).

aa. Protestant Olson's Exhibit 6 – Department Order Establishing Mountain Home Ground Water Management Area, dated November 9, 1982.

bb. Protestant Olson's Exhibit 7 – Report of Acreage, Farm Service Agency USDA for Farm No. 808, Tim Corder, operator, for the years 1998 through 2002.

cc. Protestant Olson's Exhibit 8 – Idaho Power Company report of electricity use for T & Lc Farms for the period May 2000 to August 2002.

dd. Protestant Olson's Exhibit 9 – Hofer Water Delivery 2002 Irrigation Year.

ee. Protestant Olson's Exhibit 10 – Hiddleston Pump Company report for Charles Olson well and pump.

ff. Protestant Olson's Exhibit 11 – Olson's request to Mountain Home Irrigation District for information on Hofer Account, dated November 1, 2002.

gg. Protestant Olson's Exhibit 12 – Mountain Home Irrigation District water delivery amounts per acre 1969 to 2001.

hh. Protestant Olson's Exhibit 13 – Partial Decrees for Water Right Nos. 61-00363, 61-00264, 61-10421, 61-10419, 61-10417, 61-0266, and 61-00263 and Claim to a Water Right No. A63-02188, all in the name of Mountain Home Irrigation District.

ii. Protestant Olson's Exhibit 14 – Final Order in the matter of Application for Transfer No. 4552 (Victoria Hofer).

jj. Protestant Olson's Exhibit 15 – Drilling Permit No. 768684 (Albert Hofer).

kk. Protestant Olson's Exhibit 16 – Not admitted.

ll. Protestant Olson's Exhibit 17 – Letter signed by Daniel A. Nelson regarding "Hofer Clarification Letter Received 8/18/2002," dated August 29, 2002.

mm. Protestant Olson's Exhibit 18 - Letter signed by Gail Staley, G. J. Verti-Line Pumps, Inc. to Scott Campbell, dated August 22, 2002, regarding Al Hoffer (sic) pump.

9. The land in S1/2 of Section 36, Township 04 South, Range 05 East to which right no. 61-2206 is appurtenant has not been irrigated since approximately 1986. The land was in the federal CRP set aside program from 1987 to 1997 and irrigation has not been resumed (Reference: Applicant's Exhibit 1 at Page 1). Testimony and evidence indicate that the property was actively irrigated and cropped until the mid-1980's.

10. Steve Hannula, a consultant retained by the applicants, estimated the effect of the transfer on ground water levels in the vicinity of the Hofer well. Mr. Hannula testified that withdrawing water in accordance with the application would reduce ground water levels at a radius of 1 mile by 0.1 to 0.8 feet. At a radius of 3 miles the draw down would be less than 0.04 feet, and at ½ mile the draw down would be between 0.64 feet and 1.96 feet. These estimates were based upon a "worst case" scenario that Mr. Hannula described as unlikely to occur but which involves pumping the entire volume (276 afa) sought to be transferred at a rate of 0.76 cfs over a 183-day irrigation season. On cross-examination, Mr. Hannula clarified that although the recognized irrigation season in the Mountain Home area exceeds 183 days, because the diversion rate would be proportionately reduced to yield the same annual volume,

the estimates of draw down would not significantly change. Mr. Hannula also testified that the proposed change would move the location of ground water withdrawal from an area of greater water level decline to an area in which ground water levels are declining less rapidly.

11. The Post wells and the Hofer well are located within the Mountain Home Ground Water Management Area ("MHGWMA"). Ground water levels in the immediate area of the Hofer well declined 10 to 20 feet during the period 1976 to 1997. Ground water levels in the Post wells area declined 25 to 30 feet during the same period (Applicant's Exhibit 3A). Ground water levels in both areas have continued to decline after 1997 (Applicant's Exhibit 3D).

12. Protestant Freer holds five rights from ground water authorizing a combined diversion rate of 8.83 cfs for irrigation of 502.4 acres from wells located in Sections 1, Township 04 South, Range 06 East and Section 6, Township 04 South, Range 07 East. The priority dates of these rights range from June 20, 1947 to March 15, 1984. Mr. Freer also holds two rights from ground water for domestic and/or stock watering purposes with a priority date of December 31, 1883. All of these rights have received partial decrees from the SRBA court. Some of the wells from which these rights are diverted are less than one mile from the Hofer well.

13. Protestant Olson holds three rights to divert and use ground water from two irrigation wells located in Sections 20 and 29, Township 04 South, Range 07 East. These water rights have priority dates ranging from June 22, 1961 to March 15, 1985. Mr. Olson also holds four rights from ground water for domestic and/or stock watering purposes from wells in Sections 20, 28 and 29, Township 04 South, Range 07 East, with priorities ranging from May 20, 1900 to March 27, 1975. Mr. Olson's wells are more than 2 miles from the Hofer well.

14. The hearing record was left open for a ten-day period following the hearing for the purpose of receiving information concerning historic diversion use of right no. 61-2206 from the Post wells. The applicant and Protestant Olson submitted information related to this purpose and the applicant included information concerning annexation of land in Section 12 into MHID.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, 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 public interest of which they are each most cognizant.

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

5. The SRBA court has ruled that forfeiture is tolled for water rights while an adjudication claim is pending and that the five-year period for forfeiture is renewed upon issuance of a partial decree for the right. (*Memorandum Decision and Order on Challenge and Order of Partial Decree (Wood v. Troutt*), Subcase No 65-05663B, In Re SRBA, Case No. 39576, May 2, 2002). Accordingly, water right no. 61-2206 has not been forfeited.

6. Although the ground water levels in the regional (deep) aquifer for much of the MHGWMA are relatively deep and continue to decline in many locations within the area, changing the use of water as proposed by the applicant will not make the depth to water situation worse within the MHGWMA as a whole. However, the immediate area in which additional pumping is proposed under transfer no. 69688 will experience a slightly increased rate of decline. Transferring additional ground water diversion into the immediate area could injure the rights held by the protestants and others in the area unless the approval is conditioned to subordinate diversion and use of the changed water right to all of the rights existing in the immediate area at the time the application for transfer was filed (January 26, 2002). The “immediate area” is the part of the regional aquifer near the Hofer well for which it can be shown in accordance with the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) that existing water rights would be injured by withdrawal of ground water as proposed in application for transfer no. 69688 unless use of water under right no. 61-2206 is subordinated to use of water under the existing rights.

7. The proposed transfer is based upon the quantity of water (4 acre feet per acre) that the Department recommends for water rights providing a full supply of water for irrigation of alfalfa or other high water demand crops. The information in the hearing record, although somewhat conflicting, indicates water has been historically provided from the Post wells for irrigation of small grains, alfalfa, and pasture.

8. Enlargement in use of a water right occurs if the rate of diversion, annual volume diverted or the annual volume consumptively used is increased. Using water on additional acres can increase the volume of water consumptively used even if the rate of diversion and annual volume diverted are not increased. Limiting the acreage

allowed to be irrigated under an approval of application for transfer no. 69688 is not a practical way of preventing enlargement in use because water from the Hofer well is authorized under other existing water rights to be used on most of the place of use described under the application. To prevent enlargement in the use of right no.61-2206, the volume of water allowed to be diverted and used from the Hofer well under an approval of application for transfer no. 69688 must be limited to the amount consumptively used on 69 acres at the decreed place of use. Based on the hearing officer's past technical experience and knowledge of water requirements for irrigation in the state of Idaho, the average annual consumptive use of alfalfa is 2 ½ afa in the Mountain Home area. The volume of water allowed to be withdrawn from the Hofer well under transfer no. 69688 should be limited to 172.5 afy (i.e., 2 ½ afa times 69 acres).

9. The applicants contend that reducing withdrawal from the Post wells area will improve long-term water availability for the Mountain Home Air Force Base. The protestants argue that the increased withdrawals at the Hofers' well will endanger the long-term supplies for irrigation, municipal and subdivision uses in that area. Approval of the transfer is in the local public interest only if the approval is conditioned to subordinate diversion and use of water from the Hofer well under water right no. 61-2206 to all water rights existing in the immediate area of the Hofer well.

10. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

11. The Department should approve application for transfer no. 69688 with conditions to prevent injury to other rights, enlargement of the historic use of the right, and the local public interest.

12. Information submitted by the applicant after the hearing concerning annexation of land in Section 12 into the MHID is not accepted as part of the hearing record and will not be considered.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 69688 in the name of Victor and/or Albert Hofer is **APPROVED** subject to the following conditions:

1. Water right no. 61-2206 is divided into water right no. 61-11963 (the part remaining at the decreed place of use) and water right no. 61-11964, the part transferred under this approval and described as follows:

a.	Right Number.	61-11964
b.	Name of Owner.	Victor and/or Albert Hofer
c.	Source.	Ground water

d.	Quantity.	1.0 cfs 276 afy limited to the use of 172.5 afy in accordance with this approval
e.	Priority Date.	January 5, 1965 (see condition of approval no. 9)
f.	Point of Diversion.	SWNE Section 12, Township 04 South, Range 06 East, Elmore County
g.	Place of Use.	315 acres in the N1/2 and 20 acres in the NESW of Section 12, Township 04 South, Range 06 East.
h.	Purpose of Use.	Irrigation
i.	Period of Use.	April 1 to October 31

2. Drilling additional wells or modifying the existing well is not authorized by this order.

3. Prior to diversion and use of water under this approval: (a) The right holder shall install and maintain a measuring device on the well to measure both the instantaneous rate of diversion and total annual volume of water diverted from the well; (b) The right holder shall obtain approval from the department relative to the type of device; and (c) The measuring device shall be calibrated initially and recalibrated as determined necessary by the department by a licensed engineer or other person approved by the department.

4. The right holder shall annually report to the department the maximum rate of diversion, the depth to water prior to commencement of pumping each season, the depth to water during the pumping period and the annual volume diverted.

5. Use of Right No. 61-11964 shall be supplemental to the use of water supplied by the Mountain Home Irrigation District, for use within the place of use approved under Transfer No. 69688.

6. The right holder shall use the full allotment of appurtenant surface water rights in conjunction with ground water diverted under this right and shall only divert ground water under this right when water from the appurtenant surface water rights cannot be delivered to the right holder.

7. If the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use, this right to divert groundwater shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.

8. Use of water under Right No. 61-11964 shall not exceed 1 cfs nor 172.5 acre feet per year and, when combined with all other rights, shall not exceed 0.02 cfs per acre nor more than 4.0 acre feet per acre per year. The combined maximum

diversion rate under rights 61-11964, 61-10196, and 61-10197 shall not exceed 4.02 cfs nor a combined annual diversion volume of 427.1 acre feet per year, for irrigation purposes.

9. Right no. 61-11964 retains its priority date of January 5, 1965, relative to actions to distribute water that relate to management of the MHGWMA as a whole, but diversion and use of water is subordinate to all rights to use ground water existing within the immediate area (as described in Conclusion of Law no. 6) on January 26, 2002, relative to water management actions related to increased draw downs of the water table or depletion of ground water resulting from this approval.

10. The right holder shall accomplish the change authorized by this approval within 1 year.

11. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

12. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

13. The period of use for the irrigation described in this approval may be extended to a beginning date of 3/15 and an ending date of 11/15 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 4/1 and after 10/31 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than 10-26-2000.

Signed this 5th day of February, 2003.

/signed/
Norman C. Young
Hearing Officer