

**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            )  
\_\_\_\_\_ )                    **PRELIMINARY ORDER**  
  **ON REMAND**

This matter came before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer. On November 17, 1999, the hearing officer for the Department conducted a hearing in the matter and on March 15, 2000, issued a Preliminary Order, that became a Final Order on April 5, 2000.

The protestants in the matter sought judicial review of the Final Order and on March 9, 2001, the Fifth Judicial District Court ("Court") issued a Memorandum Decision on Appeal remanding the matter to the Department for further development of the record with respect to the local public interest criterion. On January 23, 2002, the Department conducted a hearing on remand in the matter. Based on the hearing officer's understanding of the facts in the matter and of the law, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order On Remand:

**FINDINGS OF FACT**

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

Identification No:	A36-02312B
Source	Ground water
Priority:	November 26, 1956
Rate of diversion:	0.75 cubic feet per second ("cfs")
Point of diversion:	SE1/4NE1/4 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.

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

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

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

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

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

3. On November 13, 1998, Box Canyon Dairy ("applicant") filed Application for Transfer No. 5384 ("application") 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 a proposed expansion to an existing dairy. 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 for 896 milking cows of which 620 milking cows are grandfathered under an existing CAFO. The increase in milking cows at the dairy will be 276 head.

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 ("protestants"). The Idaho Department of Parks and Recreation subsequently withdrew its protest.

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.
- 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 attorney 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 represented by Mike Felton, Jr. Protestant Lee Halper was present and was represented by Richard A. Carlson. Protestant William K. Chisholm represented himself. Protestant Morgan did not appear at the second hearing.

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 Spring 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. Protestant's Exhibit K - Photographs (9)
  - ai. Deposition Exhibit No. 1 - Nutrient Management Plan for Box Canyon Dairy, October 22, 1999 by Jenifer Beddoes
8. Subsequent to the November 17, 1999 hearing but prior to the January 23, 2002 hearing, 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 owned dairies that are 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 up to 896 milking cows although approximately 300 to 350 cows were milked at the site at the time of the November 17, 1999 hearing. After the Department issued a Preliminary Order on March 15, 2000 approving Transfer No. 5384, the applicant added cows to Box Canyon Dairy No. 3 bringing the total to 896 cows at the site. The applicant has received temporary approval from Gooding County for 896 cows at the dairy site. (See Applicant's Exhibit 21). The rebuilt dairy dries up about 33 irrigated acres located in the NENE Section 25, T8S, R14E, B.M.

12. The applicant notified landowners located within 1/2 mile of the boundary of Box Canyon Dairy #3 of the Gooding County CAFO hearing for the enlarged dairy. None of the landowners showed up at the county hearing to protest enlargement of the dairy and no nuisance complaints have ever 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 including reuse of water several times in the dairy and has implemented other management procedures that do not require use of water to accomplish. Examples are scraping

alleys and pads with a tractor instead of washing the alleys and pads using a flush system and cleaning cows by hand rather than using sprinklers in the holding pens.

14. An increase of 276 cows at the dairy (from 620 to 896 cows) is estimated to require additional annual operating expenditures of about \$875,000 (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 as provided in a nutrient management plan. A berm keeps water from escaping from the site and directs drainage to a concrete lined sump.

16. 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 electronically controlled system to spray an oil-based insecticide on the backs of the cows. In addition, the applicant scrapes manure and other wastes from cement areas daily, 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. The applicant has a liquid waste management system that reduces odor potential.

17. The annual consumptive volume of water needed for the dairy is estimated to be about 77.4 AF per year. To provide this volume of water, the applicant will need to dry up about 22 acres of irrigated land. The actual amount of water used at the enlarged dairy during 2000, however, was measured to be 47 AF, well within the projected maximum annual volume of water use.

18. 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 distant from the dairy wells 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 distant from the dairy wells cannot be detected. (See Applicant's Exhibit 9).

19. There are two monitoring wells in the Statewide Program and five monitoring wells in the INEEL Oversight Program located downgradient of the dairy well(s) and upgradient 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.

20. The protestants are concerned that expanding the dairy 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 that includes the Box Canyon dairies.

21. 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 approximately 12 miles east of the dairy site and protestant Chisholm's property is about 4 miles west of the dairy site.

22. Witnesses for the protestants were most concerned about odors, flies, potential health concerns and a decrease in residential property values in the Snake River canyon and near the mouth of Salmon Falls Creek located about 4 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.

23. The protestants produced no specific evidence to overcome the applicant's 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 public interest, the applicant made a sufficient showing that the application is in the public interest and should be approved.

### **DISTRICT COURT DECISION**

The Memorandum Decision on Appeal ("Memorandum Decision") issued by Judge Higer in connection with the Department's Preliminary Order issued on March 15, 2000, stated that there were no findings of fact to support the conclusion that the transfer was in the local public interest. The Memorandum Decision also stated that the Department must consider the following factors and issues in making a finding on "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;
6. Environmental impact to the area, including obnoxious odors (air quality).

The Memorandum Decision cautioned that its listing of factors and issues was not a "catalogue of all factors" that may 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."

The Memorandum Decision states that the Hearing Officer failed to show how, if at all, he balanced all of the different factors affecting a determination of the transfer being in the "local public interest."

## **ANALYSIS**

The applicant operates a well-managed dairy that has never been the subject of a nuisance complaint and has not been objected to by the dairy's nearest neighbors. The applicant has taken reasonable, effective steps to control dust, flies, odor, and the potential for contamination of water. The observation wells in the vicinity of the dairy do not show a nitrate contamination problem of the ground water in the area and the applicant has voluntarily piped surface water across its property to prevent mixing of wastewater with canal water. The applicant is in compliance with the nutrient management plan and monitors soil conditions for phosphorous and nitrogen three times more often than required by the Idaho Department of Agriculture.

On the other hand, the protestants complain about fly and odor problems in the Magic Valley. They argue that this dairy will only add to these problems. The protestants voiced concern about excessive flies and undesirable odors that decrease their general quality of life and decrease the usability, enjoyment and value of their properties. The ability to be able to enjoy the outdoors without experiencing objectionable smells and excessive numbers of flies is important.

However, the applicant's dairy addition, that has been operating since mid-2000, was described at the second hearing by witnesses for the protestants who have visited the applicant's dairy, as a "good operation," and as "clean and neat." And while the protestants did complain about fly and odor problems in the Magic Valley, they could not show that the applicant's dairy operation was responsible for the alleged problems about which they complained or that odors and flies originated at the applicant's dairy.

On balance, it would be unfair to conclude that the applicant's dairy operation that has not been the subject of complaints and has been described as a "good operation" and as "clean and neat" by the protestants' witnesses should be curtailed or denied and found not to be in the local public interest because of problems that have resulted from some dairy operations in the Magic Valley area.

The Department should approve the application.

## **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 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 Section 42-222, Idaho Code.

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 upgradient from the Box Canyon vicinity show low impact to ground water quality from nitrate in the area of the proposed 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 uses 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 #3 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 AF) 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 under the proposed dairy enlargement. The transfer also authorizes a diversion rate of 0.32 cfs and a volume of 77.4 acre feet.
5. Rights 36-02312D and 36-07387D when combined shall not exceed a total annual maximum diversion volume of 77.4 AF.
6. The amount of water approved by this transfer, when considered together with any other water rights for the same purposes at the dairy, shall not exceed a combined total of 0.32 cfs nor 53.1 AF per year.
7. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
8. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
9. 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 \_\_\_\_\_ day of June, 2002.

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L. GLEN SAXTON, P.E.  
Hearing Officer

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ day of June, 2002, the above **PRELIMINARY ORDER ON REMAND** was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid and properly addressed as follows:

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Deborah J. Gibson  
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