

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5580 IN THE)
NAME OF STEVE AND/OR DARLA)
WYBENGA)
_____)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On March 23, 1987, the Department issued Water Right License No. **37-08005** ("license") to Faulkner Land & Livestock as follows:

Source:	Ground water
Priority:	March 20, 1982
Rate of diversion:	4.03 cubic feet per second ("cfs")
Volume:	1056 Acre Feet per Annum ("AFA")
Point of diversion:	NE1/4SW1/4 Section 8, T6S, R14E, B.M., Gooding County
Use:	Irrigation
Season of use:	April 1 to November 1
Place of use:	264 acres within parts of Section 8, T6S, R14E, B.M.

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

2. On May 28, 1993, the Department approved Transfer No. **4062** ("T4062") which split the license into parts 37-08005A and 37-08005B. Part B is as follows:

Identification. No:	37-08005B
Source:	Ground water
Priority:	March 20, 1982
Rate of diversion:	2.02 cfs
Volume:	528 AFA
Point of diversion:	SESW Section 31, T6S, R15E, B.M.
Use:	Irrigation
Season of use:	April 1 to October 31

Place of use: 111 acres in parts of Section 31, T6S, R15E, B.M. and Section 5, T7S, R15E, B.M.

3. On July 11, 1994, the Department approved Transfer No. 4305 ("T4305") which split part 37-08005A into parts 37-08005C and 37-08005D as follows:

Identification. No: **37-08005C**
Source: Ground water
Priority: March 20, 1982
Rate of diversion: 1.6 cfs
Volume: 404 AFA
Point of diversion: NESW Section 8, T6S, R14E, B.M., Gooding County
Use: Irrigation
Season of use: April 1 to October 31
Place of use: 122 acres in Section 8, T6S, R14E, B.M.

Identification. No: **37-08005D**
Source: Ground water
Priority: March 20, 1982
Rate of diversion: 0.41 cfs
Volume: 124 AFA
Point of diversion: SESW Section 31, T6S, R15E, B.M.
Use: Irrigation
Season of use: April 1 to October 31
Place of use: 31 acres within a permissible place of use of 260 acres within Sections 5 and 6, T7S, R15E, B.M.

4. On August 31, 1988, Wayne and Sylvia Tompkins filed Snake River Basin Adjudication Claim No. **A37-11191** ("claim") based on beneficial use as follows:

Source: Ground water
Priority: January 1, 1955
Rate of diversion: 0.06 cfs
Point of diversion: SWSE Section 30, T5S, R13E, B.M.
Use: Stockwater for 150 cattle
Domestic - 1 home
Season of use: Year-round
Place of use: SWSE Section 30, T5S, R13E, B.M.

5. On October 26, 1999, Steve and/or Darla Wybenga ("applicant") filed Application for Transfer No. 5580 ("application" or "T5580") with the Department proposing to change the use of 0.17 cfs and 39 AFA of water from water right no. **37-08005D** and 0.06 cfs and 5.8 AFA of water from claim no. **37-11191** for use in connection with an existing dairy ("Wybenga dairy" or "dairy"). The part of water right

no. 37-08005D sought for transfer is in the name of Sawtooth Sheep Company ("Sawtooth") represented by Mike Faulkner ("Faulkner"). The water would be diverted from two wells located in the SWSE Section 30, T5S, R13E, B.M. for use in a dairy located in the same tract. The applicant presently has approximately 950 dairy cows; 750 of which are milking cows at the facility.

6. The Department published notice of the application that was protested by Ray and Judy Maxfield, Ronald Stroud, R. Randolph Erkins, Mike and Lynn Elliott, Elden Thompson and Lee Halper. Lee Halper subsequently withdrew his protest.

7. On April 25 and 26, 2001, the Department conducted a hearing in the matter. The applicant was present and was represented by Patrick D. Brown. Protestants Ray and Judy Maxfield, Mike and Lynn Elliott, and Elden Thompson were represented by James P. Speck. Protestants Ronald Stroud and R. Randolph Erkins were present and represented themselves.

8. Issues identified by the protestants are as follows:

- a) The proposed changes will injure other water rights.
- b) The proposed changes constitute an enlargement in use of the original rights.
- 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.

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

- a. Applicant's Exhibit 1 - Wybenga Dairy Vicinity map
- b. Applicant's Exhibit 2 - Wybenga Dairy Site Map
- c. Applicant's Exhibit 3 - Contour map
- d. Applicant's Exhibit 4 - Letter dated December 1, 1999 to Steve Wybenga from Stephen N. Thompson
- e. Applicant's Exhibit 5 - Aerial photograph
- f. Applicant's Exhibit 6 - Analysis of Nutrient Management Practices - Summary of Facility Description
- g. Applicant's Exhibit 7 - Letter dated December 16, 1999 to Steve Wybenga from Marv Patten
- h. Applicant's Exhibit 8 - Letter dated November 12, 1999 to Steve Wybenga from Stephen N. Thompson - Soils Rating Criteria

- i. Applicant's Exhibit 9 - Letter dated November 10, 1999 to Steve Wybenga from Jenifer Beddoes and a Nutrient Management Plan
- j. Applicant's Exhibit 10 - Statement from Mike Faulkner
- k. Applicant's Exhibit 11 - Statement from Ray Faulkner
- l. Applicant's Exhibit 12 - Statement from Tim Leach
- m. Applicant's Exhibit 13 - Statement from Rhonda and Carol Wood Farms
- n. Applicant's Exhibit 14 - Letter dated November 2, 2000 to Steve Wybenga from Cooper Norman & Co.
- o. Applicant's Exhibit 15 - 1997 Flow Rate Test Report for Water Right No. 37-08005B by Steelhead Engineering, Report of Acreage for years 1995 through 1999 and an aerial photograph
- p. Applicant's Exhibit 16 - Senate Bill No. 1067
- q. Applicant's Exhibit 17 - E-mail dated January 31, 2001 from Lee Halper to Allen Merritt
- r. Applicant's Exhibit 18 - Letter dated December 8, 2000 to Patrick Brown, James Speck, Gooding County P&Z from Allen Merritt
- s. Applicant's Exhibit 19 - Fax dated March 11, 2000 to Pat Brown from R. Randolph Erkins
- t. Applicant's Exhibit 20 - Letter dated April 10, 2001 to Steve Wybenga from Cooper Norman & Co. and Summary Statement of Expenses
- u. Applicant's Exhibit 21 - Letter dated December 29, 2000 to Allen Merritt from Pat Brown with 4 attachments
- v. Applicant's Exhibit 22 - Letter dated June 23, 2000 to Allen Merritt from Pat Brown
- w. Applicant's Exhibit 23 - Memo dated March 20, 2001 to Pat Brown from John Rosholt
- x. Applicant's Exhibit 24 - House Bill No. 262
- y. Applicant's Exhibit 25 - Letter dated December 22, 1999 to Patrick D. Brown from Jeffrey S. Rau and a Well Interference Analysis
- z. Applicant's Exhibit 26 - Report on the Hydrologic Impact of Groundwater Withdrawal at the Wybenga Dairy prepared by Brockway Engineering - June 6, 2000, Final revisions February 14, 2001
- aa. Applicant's Exhibit 27 - Letter dated March 20, 2001 to ERO Resource Corp from Gary Bahr together with sample reports
- ab. Applicant's Exhibit 27A - Large map titled Nitrogen-15 Isotope Results (Feb. 2000)
- ac. Applicant's Exhibit 28 - Water Right License 37-08005
- ad. Applicant's Exhibit 29 - Quitclaim Deed - Faulkner Land and Livestock, Inc to Sawtooth Sheep, Inc.
- ae. Applicant's Exhibit 30 - Photocopy of aerial photo
- af. Applicant's Exhibit 31 - Transfer of Water Right no. 4305
- ag. Applicant's Exhibit 32 - IDWR Beneficial Use Field Report - 37-08702
- ah. Applicant's Exhibit 33 - Letter report dated April 19, 2001 to Patrick D. Brown from Charles G. Brockway

- ai. Applicant's Exhibit 33-A - Large Graph titled Nitrate in Groundwater near the Wybenga Dairy 1999 - 2000
- aj. Applicant's Exhibit 34 - NOT OFFERED
- ak. Applicant's Exhibit 35 - Complaint Reports - 3 pages
- al. Applicant's Exhibit 36 - Complaint by Eldon Thompson and investigator's report
- am. Applicant's Exhibit 37 - Letter dated January 12, 2000 to Steve Wybenga from Gus Eliopulos and Well Analysis Report
- an. Applicant's Exhibit 38 - NOT OFFERED
- ao. Applicant's Exhibit 39 - NOT OFFERED
- ap. Applicant's Exhibit 40 - NOT OFFERED
- aq. Applicant's Exhibit 41 - NOT OFFERED
- ar. Applicant's Exhibit 42 - NOT OFFERED
- as. Applicant's Exhibit 43 - Application for Transfer - 37-11191 and 35-08606B
- at. Applicant's Exhibit 44 - Construction Inspection Report
- au. Applicant's Exhibit 45 - Tree Planting Plan - Wybenga Dairy
- av. Applicant's Exhibit 46 - NRCS Windbreak/Shelterbelt Establishment
- aw. Applicant's Exhibit 47 - Letter dated June 5, 2000 to Steve Wybenga from Gus Eliopulos and a Well Analyses Report
- ax. Applicant's Exhibit 48 - Letter dated August 2, 2000 to Patrick D. Brown from Charles G. Brockway
- ay. Protestant's Exhibit P101 - Letter dated November 10, 1999 to Steve Wybenga from Jennifer Beddoes
- az. Protestant's Exhibit P102 - Facility Information Sheet
- ba. Protestant's Exhibit P103 - NOT OFFERED
- bb. Protestant's Exhibit P104 - Letter dated January 12, 2000 to Ray Maxfield from Gus Eliopulos and a Well Analyses Report
- bc. Protestant's Exhibit P105 - Water Analysis Results by Stukenholtz Laboratory, Inc.
- bd. Protestant's Exhibit P106 - NOT OFFERED
- be. Protestant's Exhibit P107 - Memorandum Decision and Order issued on May 26, 1993 - In the matter of Application for Transfer No. 4062 in the Name of Faulkner Land and Livestock Co.
- bf. Protestant's Exhibit P108 - NOT OFFERED
- bg. Protestant's Exhibit P109 - NOT OFFERED
- bh. Protestant's Exhibit P110 - E-mail dated October 25, 2000 from Kay Walker to Jim Stanton
- bi. Protestant's Exhibit P111 - E-mail dated October 26, 2000 from Jim Stanton to Kay Walker
- bj. Protestant's Exhibit P112 - Beneficial Use Field Report - Permit No. 37-08702
- bk. Protestant's Exhibit P112A - IDWR Licensing Examination Data

- bl. Protestant's Exhibit P113 - Loan No. 11886-MS - Assignment and Pledge of Water Licenses and Permits
- bm. Protestant's Exhibit P 114 - NOT OFFERED
- bn. Protestant's Exhibit P115 - NOT OFFERED
- bo. Protestant's Exhibit P116 - Letter dated February 21, 2001 to Dave Shaw from Steven Hannula
- bp. Protestant's Exhibit P117 - Agreement and Consent Order dated December 3, 1999
- bq. Protestant's Exhibit P118 - Letter dated December 29, 2000 to Allen Merritt from Patrick D. Brown
- br. Protestant's Exhibit P119 - Letter dated December 11, 2000 to Allen Merritt from Judy Daubner
- bs. Protestant's Exhibit P120 - IDAPA Rules 20.03.14 - Grazing Leases and Cropland Leases
- bt. Protestant's Exhibit P121 - NOT OFFERED
- bu. Protestant's Exhibit P122 - NOT ADMITTED
- bv. Protestant's Exhibit P123 through Exhibit P133 - NOT OFFERED
- bw. Protestant's Exhibit P134 - Water Right Report - 37-08005B
- bx. Protestant's Exhibit P135 - Water Right Report - 37-08005C
- by. Protestant's Exhibit P136 - Water Right Report - 37-08005D
- bz. Protestant's Exhibit P137 - Letter dated January 18, 2000 to Patrick D. Brown from Norman C. Young
- ca. Protestant's Exhibit P138 - Letter dated January 5, 2000 to Norm Young from Patrick D. Brown
- cb. Protestant's Exhibit P139 - NOT OFFERED
- cc. Protestant's Exhibit P140 - Land Patent to the State of Idaho
- cd. Protestant's Exhibit P141 - Gooding County land ownership maps - Sections 5 and 6, T7S, R15E, B.M.
- ce. Protestant's Exhibit P142 - NOT OFFERED
- cf. Protestant's Exhibit P143 through P164 - Photographs
- cg. Protestant's Exhibit P165 - Wybenga Dairy Photograph Key - March 24, 2000
- ch. Protestant's Exhibit P166 - Letter dated June 25, 1998 to Steve Wybenga from Dean E. Falk
- ci. Protestant's Exhibit P167 - Letter dated October 23, 1998 to Steve Wybenga from Michael Mitchell

At the hearing, the hearing officer officially noticed the following information in Department files:

- The application file
- Water right records
- Holdings in past decisions and orders of the Department
- Well driller reports

- Observation well data
- Ground water quality data
- Water measurements and stream flow records in Department files
- A letter dated April 4, 2001 to Patrick D. Brown from Norman C. Young. The reference on the letter is "Report on the Hydraulic Impact of Groundwater Withdrawal at the Wybenga Dairy".

10. On August 19, 1999, the Department issued a Notice of Violation/Order to Show Cause to the applicant as provided in Section 42-351, Idaho Code, since the applicant was diverting more water for use in the applicant's dairy than the applicant was authorized to divert.

11. On December 3, 1999, the applicant and the Department entered into an Agreement and Consent Order that, among other matters, provided for the payment of a civil penalty by the applicant and precluded civil enforcement action by the Department for alleged violations, except as otherwise provided in the Agreement and Consent Order. (See Exhibit P117).

12. The status of county zoning compliance for the Wybenga Confined Animal Feeding Operation is presently pending in district court and will not be evaluated in this Preliminary Order with respect to the local public interest.

13. The purpose of the application is to provide a water supply for stockwater and commercial uses at an existing dairy in excess of the amount of water the applicant is presently authorized to use for those purposes.

14. The Wybenga dairy is located on the western edge of the Eastern Snake Plain Aquifer ("ESPA") on a 40-acre tract approximately 2 miles north and 1 mile west of Bliss, Idaho. When the applicant acquired the dairy site in May 1996, about 150 cows were being milked at the existing dairy. The applicant immediately added about 100 additional cows to the dairy site. In March 1997, the applicant had about 275 cows, in June 1997, about 400 cows, in March 1998, about 500 cows, in June 1998, about 680 cows, in September 1998, about 770 cows and in December 1998, about 930 cows.

15. The applicant ceased to use the original well that was constructed into the perched ground water aquifer under the dairy site, since the well reportedly went dry in 1997. Water is presently diverted from a well drilled in April 1997 constructed into the regional ground water aquifer to a depth of 270 feet. On site are a dairy lagoon and a separate waste containment pond. The applicant pumps liquid waste onto 6 acres and has provided for the export of solid waste to other farms two or three times a year. The applicant irrigates a total of about 14 acres in the 40-acre tract.

16. The applicant owns 31.5 shares of water in the North Side Canal Company ("NSCC") that he acquired with the dairy. The applicant plans to convey 15 shares of the water to Sawtooth Sheep Company and to continue to irrigate the approximate 14 acres at the dairy site with the remaining shares of water. Faulkner, in fact, would not "dry up" the 13 acres from which ground water is proposed to be transferred to the applicant, since Faulkner would irrigate the 13 acres with the 15 shares of NSCC water.

17. The applicant's expert witness estimates the annual water requirements for the applicant's dairy to be 43.6 AFA. (See Applicant's Exhibit 26 - Appendix A).

18. Underlying the Wybenga dairy is a perched aquifer that is separated by a clay layer from the deeper regional aquifer. The clay layer begins less than 100 feet below land surface. Near the dairy site are several domestic wells including the Maxfield domestic well which is completed in the perched aquifer.

19. Using an average annual pumping rate of 0.06 cfs (28.5 gpm), which is the continuous diversion rate to provide the required annual volume of water for T5580, and a pumping period of 365 days, the estimated drawdown in a well 1/8 mile distant from the dairy well is 2.94 feet. At 1/4 mile distant where the wells of protestants Thompson and Elliot are located, the drawdown would be about 0.77 feet. Drawdown in wells located 1/2 mile from the Wybenga well is estimated to be 0.03 feet. Using a maximum pumping rate of 0.23 cfs (103.2 gpm) for 31 days, the estimated drawdown in a well 1 mile distant from the dairy well is 0.00 feet. (See Applicant's Exhibit 25).

20. The applicant reuses water diverted for the dairy and does not use water to flush the holding pens.

21. The ESPA contributes ground water to the Snake River in a reach from the Kimberly area downstream approximately to the Bliss Dam on the Snake River. The applicant proposes to change the point of diversion to a location approximately 14 miles northwest of the original point of diversion. Ground water pumping at the original point of diversion will deplete aquifer discharge to the Snake River in the Thousand Springs area east of Hagerman. Ground water pumping at the Wybenga well will change the location of depletion to the Snake River from the Thousand Springs area to an area south of Bliss.

22. The applicant estimated the effect of pumping ground water at the Wybenga dairy on springs tributary to the Snake River south of Bliss. Total discharge from three groups of springs south of Bliss ("springs" or "Bliss Springs") was measured by the applicant at 4.38 cfs. One of the groups of springs is known as the Stevenson Springs that are used year-round for fish propagation purposes. The discharge from the springs is less than the amount of water rights associated with the springs. The applicant estimates that the withdrawal of 46 AFA of water at the Wybenga dairy will

further decrease flow from the Bliss Springs by 0.013 cfs and 9.3 acre feet per year. While a relatively small decrease, the discharge of the springs would be further reduced by a finite amount and would injure existing water rights.

23. The applicant proposes to mitigate the effect of ground water pumping on the decreased discharge at the Bliss Springs attributable to the application by recharging the aquifer near the dairy site using approximately 10 shares of surface water provided by the NSCC. The applicant's consultant testified, however, that continual maintenance is required to prevent sealing of the bottom of a recharge pond that would make its use ineffective.

24. Tests of wells in the vicinity of the Wybenga dairy show that nitrate levels are higher in wells withdrawing water from the perched aquifer than wells withdrawing water from the regional aquifer. The perched aquifer beneath the Wybenga dairy is experiencing elevated nitrate levels which are higher than the acceptable maximum concentration level of 10 mg/l for public drinking water established by the U.S. Environmental Protection Agency. The applicant analyzed soil borings from the bottom of the lagoon to determine the likelihood of the lagoon being the cause of water quality degradation in the perched aquifer. Seepage from the lagoon was calculated to be about 1.4 AFA.

25. The Idaho Department of Agriculture has examined water samples in the general area of the dairy using Nitrogen-15 Isotope testing to try to determine the source of nitrate found in the perched aquifer near the Wybenga dairy. The testing suggests that the source of nitrate found in the perched aquifer near the Wybenga dairy is likely attributable to commercial fertilizer rather than to animal waste.

26. The applicant has provided a summary statement of expenses associated with the dairy operation. (See Applicant's Exhibit 20).

27. The protestants are concerned about odors emanating from the dairy site, flies, traffic associated with the dairy, contamination of domestic wells with nitrates and a general deterioration of the quality of life in the neighborhood.

28. The protestants argue that the application essentially proposes a new appropriation of ground water, since ground water diverted at the original point of diversion is not hydraulically connected to ground water at the new point of diversion.

29. The protestants believe that approval of the application will result in an enlargement in use and a net depletion of an additional 46 AF per annum from the ESPA and/or the Snake River, since neither the applicant nor Faulkner will dry up any irrigated acreage in connection with the application for transfer.

30. Protestant Lynn Elliott lives across Clover Creek Road several hundred yards east of the corrals and waste containment pond of the applicant. In her uncontroverted testimony, she described the odor that occurs at night as similar to the smell of rotten eggs. She testified that flies are so bad at times that she can not determine the color of her house, since the roof and walls are covered with flies. She stated that a year or so ago, the applicant sprayed her property for flies but has ceased such spraying. She stated that it is difficult to do simple and necessary outdoor activity such as mowing the lawn due to the odors from the dairy. The number of starlings in the area has significantly increased as a result of the enlarged dairy and droppings from the starlings have contaminated the Elliott's hay.

31. Protestant Eldon Thompson who built a home near the dairy site in 1977 testified that he never had a problem with odors and flies from the existing dairy before the applicant bought the dairy in 1996 and increased the number of cows at the site. Thompson said there have always been some flies associated with his property but the number of flies has substantially increased due to the concentration of dairy cows at the applicant's dairy. He also described that he and his family can no longer use their patio due to the number of flies and the odor attributable to the applicant's dairy.

32. Protestant Ray Maxwell who has lived across the road south of the dairy for about 7 years is concerned with the odors from the dairy that have prevented the Maxwells from being able to entertain guests outdoors during the summer months.

33. The applicant's approved nutrient management plan describes seven (7) measures to help control odor from the dairy, including the use of bacteria in the lagoon, use of PAM (polyacrylamide) in the settling basins, aeration devices, windbreaks, covering the lagoon with straw, pumping ozone into the lagoon and use of a solid separator. (See Applicant's Exhibit 9, pages 3 and 4). The applicant testified, however, that he has chosen not to implement any of the measures. The applicant also has chosen not to follow provisions in the nutrient management plan for applying liquid waste to the field across from the Maxfield property. The applicant applies liquid waste through a hose directly to his land rather than first mixing the waste with irrigation water to obtain a dilution effect to make the odors less objectionable.

34. Neither the applicant nor the protestants have provided specific financial information which would allow the hearing officer to directly compare financial benefits to financial detriments attributable to the dairy. The applicant, who carries the ultimate burden of persuasion has not shown that economic benefit of the dairy to the applicant or to the Magic Valley area outweighs the right of the protestants to enjoy their property without unreasonable infringement by the dairy operation.

35. The local public interest involves more than economic matters, including social costs, the effect the project will have on recreation, fish and wildlife resources,

compliance with planning and zoning ordinances of local jurisdictions, the management of obnoxious odors, and the impact upon the people and properties in the area.

ANALYSIS

The protestants argue that the application must be denied, since the proposal is similar to Application for Transfer Nos. 5174 and 5175 filed in the names of Dennis M. Baker and Huf-N-Puf Trust, respectively, which applications were denied in November 1998. This argument must be rejected, since the recent transfer proposal is different from the previous transfer applications. Mitigation to offset injury to other water rights has been offered by the applicant but was not offered in connection with the Baker/Huf-N-Puf applications.

The protestants are not opposed to cattle and, in fact, raise cattle on their own properties. They admit that there have always been some flies and odors associated with their rural way of life and acknowledge that there has been a dairy operation at the applicant's site for many years before the applicant was involved in the dairy. The protestants, however, have never experienced the intensity of flies and odors they now endure as a result of the applicant's concentration of 900 plus dairy cows on the dairy site.

The local public interest is defined as "the affairs of the people in the area directly affected by the proposed use." In the determination of local public interest, the hearing officer must review, evaluate and attempt to balance a number of conflicting interests to reach a decision on whether a proposal is or is not in the local public interest.

In the instant matter, the applicant has shown the operating costs of the dairy and the estimated monetary benefit of the dairy to the local economy. The applicant purports that this economic activity represents the local public interest. The applicant has not estimated or provided any monetary detriments associated with the dairy and has not shown that monetary benefit to the applicant or to the Magic Valley area is more in the public interest than the right of the protestants to enjoy their property without unreasonable infringement by the dairy operation.

The applicant has not shown that the dairy is in the local public interest. In fact, by the applicant's own admission, he has not taken steps that are available and were recommended to the applicant to lessen the effect of the dairy upon immediate neighbors. Past disregard by the applicant of the impact of the dairy upon other properties and upon the people in the area affected by the dairy is not consistent with the local public interest. Flies so thick that a neighbor can not determine the color of her house clearly is not in the local public interest. After balancing the information provided by the parties relative to past and future operation of the dairy, the applicant

has not shown that the application is in the local public interest. The Department should deny the application.

CONCLUSIONS OF LAW

1. Section 42-222(1), 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. 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."

3. 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.

4. 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.

5. The applicant has the ultimate burden of persuasion for the five decision criteria for approval of a transfer under Section 42-222, Idaho Code.

6. The applicant has not adequately addressed a number of issues associated with the local public interest. The fly and odor problem attributable to the operation of the Wybenga dairy severely impacts the lives and activities of the protestants. The applicant offered nothing at the hearing to ameliorate the adverse impacts of the odors and flies attributable to its dairy operation upon the protestants whose interests clearly include "the affairs of the people in the area directly affected by the proposed use." The applicant has failed to satisfy its burden of establishing that approval of the transfer is in the local public interest as defined in section 42-203A(5), Idaho Code. The application is not in the local public interest.

7. Nitrogen-15 Isotope testing of water samples by the Idaho Department of Agriculture, while not establishing a trend due to the short sampling period of one year, suggests that the source of nitrate found in the perched aquifer near the Wybenga dairy is likely attributable to commercial fertilizer rather than to animal waste.

8. The application is not necessarily the same as a new appropriation of ground water even though ground water pumped at the original point of diversion is not on the same flow line as ground water that would be pumped at the new well. Mitigation can be considered on a case-by-case basis to offset injury to other water rights. While not an exchange of water, the applicant's mitigation proposal is similar to an exchange rather than a new appropriation of water.

9. The proposed changes do not constitute an enlargement in use of the original right, since the shares are part of an existing water right available for use within the NSCC boundaries. Resumed use of NSCC shares of water on the land from which the applicant proposes to remove ground water will be accomplished with water available under the existing water right of the NSCC and does not constitute an enlargement in use. The applicant asserts that the shares could be conveyed to another user whether the application was filed or not.

10. Without mitigation by the applicant, ground water pumping at the Wybenga dairy will injure water rights at the Stevenson Springs located south of Bliss, since the amount of water available to fill rights at the springs presently is not enough to fill the rights and would be further reduced by pumping at the dairy site.

11. The local public interest as related to compliance with applicable zoning ordinances of Gooding County is pending in district court and will be determined in those and any related proceedings. Any authorization to divert and use water under this contested matter is not authorized unless in compliance with applicable planning and zoning ordinances of local jurisdictions.

12. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5580 in the name of Steve and Darla Wybenga is **DENIED**.

Signed this 28th day of June, 2001.

Signed _____
L. GLEN SAXTON
Hearing Officer