

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. T69606 IN THE)
NAME OF C. E. BRACKETT CATTLE)
CO.)
_____)

**AMENDED
PRELIMINARY ORDER**

On July 25, 2002, the hearing officer for the Idaho Department of Water Resources ("Department") issued a Preliminary Order in connection with the above captioned matter. On August 7, 2002, applicant C. E. Brackett Cattle Co. filed a Petition for Reconsideration with the hearing officer seeking changes to conditions of approval nos. 4 and 5. On August 8, 2002, protestants John K. and Pat Courtnay filed a Petition for Reconsideration seeking changes to Findings of Fact 22 and 23 and condition of approval no. 5.

The hearing officer responds to the petitions for reconsideration as follows:

Condition of approval no. 4 has been changed as shown in this Amended Preliminary Order.

Condition of approval no. 5 has been changed but not to show that the protestants have the burden to show injury to their rights. In this case, the applicant seeks to transfer a water right that was developed in the Twin Falls tract where the amount of ground water available for use is augmented with seepage from canals and laterals that convey surface water through the tract. The amount of ground water in the Salmon Falls tract is more limited and is not recharged with surface water as in the Twin Falls tract. Moving the point of diversion of a water right from an area where ground water is readily available to an area with substantially less ground water potentially injures other ground water users in the area in which there is a smaller amount of ground water.

Findings of Fact 22 and 23 have been changed as shown in this Amended Preliminary Order.

Based upon his understanding of the law and the facts in this matter, the hearing officer makes the following Findings of Fact, Conclusions of Law and Amended Preliminary Order:

FINDINGS OF FACT

1. On January 30, 1973, the Department issued license no. **47-07010** in the name of Lynn Hempleman as follows:

Source: Ground water
Priority: September 26, 1967
Rate of diversion: 1.27 cubic feet per second ("cfs")
Annual Volume: 304 acre feet ("AF")
Point of diversion: SE1/4SE1/4 Section 35, T10S, R17E, B.M.
Use: Irrigation
Season of use: April 1 to October 15
Place of use: 76 acres in E1/2SE1/4 Section 35, T10S, R17E, B.M.

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

2. On November 16, 1988, Olmstead Farms submitted Snake River Basin Adjudication claim no. A47-07010A ("SRBA claim A47-0701A") claiming a portion of water right license no. 47-7010 as follows:

Identification No: **A47-07010A**
Source: Ground water
Priority: September 26, 1967
Rate of diversion: 0.66 cfs
Annual Volume: 158 AF
Point of diversion: NWNE Section 2, T11S, R17E, B.M., SESE Section 35, T10S, R17E, B.M.
Use: Irrigation
Season of use: April 1 to October 15
Place of use: 39.5 acres in NESE Section 35, T10S, R17E, B.M.

3. On November 5, 2001, the applicant filed application for Transfer No. 69606 ("application") with the Department based on a part of SRBA Claim A47-7010A. The portion of the claim sought for transfer is identified as follows:

Identification No: **47-16831**
Source: Ground water
Priority: September 26, 1967
Rate of diversion: 0.40 cfs
Annual Volume: 72 AF
Point of diversion: SESW Section 4, T12S, R17E, B.M. (1 well)
Use: Stockwater
Season of use: Year-round
Place of use: E1/2SW, W1/2SE Section 4, T12S, R17E, B.M.

4. The portion of SRBA claim A47-7010A that will not be changed is identified as follows:

Identification No: **47-16830**
Owner: B&T Farming
Source: Ground water
Priority: September 26, 1967

Rate of diversion: 0.26 cfs
Annual Volume: 62 AF
Points of diversion: SESE Section 35, T10S, R17E, B.M. and NWNE Section 2, T11S, R17E, B.M.
Use: Irrigation
Season of use: April 1 to October 15
Place of use: 15.5 acres in NESE Section 35, T10S, R17E, B.M.

5. The Department published notice of the application that was subsequently protested by John K. and Pat Courtney ("protestants").

6. On June 18, 2002, the Department conducted a hearing in the matter. The applicant was represented by Rob Williams. The protestants were present and represented themselves.

7. Issues the Department can consider in the matter are as follows:

- a. Whether the proposed changes will injure other water rights.
- b. Whether the proposed changes will constitute an enlargement in use of the original right.
- c. Whether the proposed changes are in the local public interest.
- d. Whether the proposed changes are consistent with the conservation of water resources within the state of Idaho.

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

- a. Applicant's Exhibit 1 - Site Location Map
- b. Applicant's Exhibit 2 - C. E. Brackett Cattle Company Proposed Site Layout
- c. Applicant's Exhibit 3 - Water Use Before Transfer - Olmstead Farms WR 47-7010A
- d. Applicant's Exhibit 4 - Ground water Contour & Approximate Flow Line Map
- e. Applicant's Exhibit 5 - C. E. Brackett Cattle Company - Theiss Analysis Results
- f. Applicant's Exhibit 6 - Twin Falls County LCO Application
- g. Protestant's Exhibit A - Preliminary Report on Ground Water in the Salmon Falls Area, Twin Falls County, Idaho, U.S. Bureau of Reclamation
- h. Protestant's Exhibit B - Letter dated February 9, 1981 to John R. Coleman from E.G. Crosthwaite
- i. Protestant's Exhibit C - U.S. Geological Survey Professional Paper 1408-B titled Geohydrologic Framework of the Snake River Plain Regional Aquifer System, Idaho and Eastern Oregon by R. L Whitehead
- j. Protestant's Exhibit D - Critical Groundwater & Water Management Areas in Idaho - June 1987, Idaho Department of Water Resources
- k. Protestant's Exhibit E - Five colored maps - U.S. Geological Survey

- I. Protestant's Exhibit F - Letter dated February 18, 2002 to the Idaho Department of Water Resources from John K. Courtney, Pat Courtney, John D. Courtney and David L. Boss

9. The applicant proposes a cattle feeding operation to be located 5 miles south and 1/2 mile east of the Twin Falls airport and proposes to provide water for the operation by drying up 24 irrigated acres located in NESE Section 35, T10S, R12E, B.M.

10. The applicant's stated purpose for the feeding operation is to winter a number of his own cattle and other cattle that he plans to purchase. The applicant currently operates a ranch in the Three Creek area located in Owyhee County, nearly 65 miles from the Twin Falls area. The applicant desires to have his children attend high school in Twin Falls and the proposed feedlot would allow the applicant and his family to move closer to Twin Falls. The applicant would move along with his family and the proposed feeding operation would provide employment for him.

11. The applicant has filed for a confined animal feeding operation permit for 999 animal units that is currently pending before Twin Falls County. The proposed feeding operation would mostly house calves. Since a calf does not constitute a full animal unit, approximately 2,000 head of calves would be the equivalent of 999 animal units. The state siting team has visited the proposed site and has yet to submit its report to the county.

12. The proposed feeding operation would not produce process water to be disposed of because the operation is a beef feeding operation. Solid waste would be disposed of according to a preliminary nutrient management plan issued by the Idaho Department of Agriculture.

13. The ownership pattern of the area surrounding the proposed feeding operation site is:

- BLM land to the north, west, and east,
- Dry grazing land to the south,
- Farm fields to the northeast.

14. The nearest house is located approximately 1/2 mile southeast of the proposed site.

15. The applicant plans to annually purchase several hundred thousand dollars of cattle feed produced locally in addition to the other materials and supplies needed for the cattle feeding operation. Employees would be hired locally and the materials and labor for constructing the facility would come from the local area.

16. The applicant plans to store overflow water from the cattle watering troughs in tanks and to recirculate the stored water to minimize waste of the stockwater.

17. The number of animal units on the proposed feeding operation would peak during the winter and would be the smallest during the summer. The applicant eventually intends to seek approval for enlargement of the operation to feed up to 5,000 animal units.

18. Water right no. A47-7010A, authorizes the diversion and use of 158 acre-feet of water of which 118.5 acre-feet are consumptively used. Proposed transfer no. 69606 will consumptively use 72 acre-feet of the 158 acre-feet.

19. Using a drawdown analysis model, the applicant based amounts of water on a worst-case scenario in which the applicant would continuously pump water at 0.4 cfs (the specified rate of diversion) for 91 days. At that point the applicant would have diverted 72 acre-feet. The model demonstrated that the aquifer drawdown at 1320 feet (1/4 mile) would be 0.82 feet. At 2640 feet (1/2 mile) the drawdown would be 0.38 feet and at 5280 feet (1 mile) the drawdown would be 0.08 feet. At the well site, the drawdown is estimated to be 7 to 8 feet. In actual practice the pumps would not be run on a continuous basis and as a result, the actual drawdown in the aquifer would be less than the calculated values.

20. The protestants' current point of diversion is located 3.7 miles southwest of the applicant's proposed point of diversion.

21. The protestants' main concern about the proposed transfer relates to the priority date. More specifically, the protestants maintain that a senior priority water right that is transferred into the area will injure existing junior water rights if a curtailment order is issued. The protestants also claim that the transfer of a senior water right into the area will decrease the economic value of junior water rights.

22. Based upon their reading of Protestant's Exhibit C, the protestants believe that water pumped from the current point of diversion diverts water from a different source than the source from which the applicant proposes to divert water. More specifically, the protestants are of the opinion that ground water pumped from the proposed well site originates in the Salmon Falls tract and that water pumped at the site from which water is sought to be transferred originates from the Twin Falls tract. The protestants contend that the Twin Falls tract is an area of abundant ground water, evidenced by drainage wells, drainage tunnels, and tile drains, as opposed to the Salmon Falls tract, which does not have abundant ground water. The protestants also contend that the transfer of a senior water right into the area will harm junior water users because the Salmon Falls tract has a lesser amount of ground water and any curtailment order will affect the junior water users first.

23. The protestants are concerned with the transfer because they believe the Salmon Falls tract may be designated as a critical ground water area. Currently, the Salmon Falls tract has not been designated as a critical ground water area although areas to the east and northwest of the tract have been so designated. The protestants believe that additional wells in the Salmon Falls tract are likely to lead to its designation as a critical ground water area.

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 the conservation of the water resources within the state of Idaho.

3. Both the applicant and the protestants 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 applicant proposes to change the location of ground water use upgradient from the Twin Falls tract to the Salmon Falls tract, being a distance of about 7 miles in a southerly direction. Ground water availability in the Salmon Falls tract is more limited than in the Twin Falls tract, which is recharged with surface water conveyed into the Twin Falls tract from the Snake River through canals.

6. The applicant has provided evidence that the proposed changes do not constitute an enlargement in use of the original right thereby satisfying his burden of persuasion. Because there is no increase in consumptive use, there would be no enlargement to the existing water right.

7. The applicant has satisfied his burden of persuasion by providing evidence that the proposed changes are in the local public interest. The proposed transfer would allow the applicant to construct a cattle-feeding operation and in addition to providing employment, the applicant would purchase feed and other supplies locally. The protestants did not provide satisfactory evidence to overcome the applicant's showing that the application is in the local public interest.

8. The applicant has satisfied his burden of persuasion by demonstrating that the proposed use is consistent with the conservation of water within the state of Idaho. The applicant intends to recycle any water from the overflows of the watering troughs by storing the overflow in tanks and recirculating that water to watering troughs. A practice of this nature is consistent with the conservation of water resources within the state of

Idaho required under Section 42-222, Idaho Code. The protestants offered no evidence to show that the applicant's proposed use of water is not consistent with conservation of water resources.

9. The Department should approve the application, but with certain conditions to protect existing water rights.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. T69606 in the name of C.E. Brackett Cattle Co. is **APPROVED** subject to the following conditions:

1. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
2. Upon notice by the Department, the right holder shall install and maintain a totalizing measuring device together with a data logger of a type approved by the Department as a part of the diverting works.
3. The right holder shall annually report the amount of water diverted to the Department.
4. The use of water authorized under this approval is contingent upon the right holder obtaining any necessary county land use approval and remaining in compliance with applicable county zoning and land use ordinances.
5. The priority of the use of water under this approval is subordinated to existing water rights of the protestants and to other existing water rights from ground water upgradient from the Twin Falls South Side Canal Company Highline Canal to the extent it can be shown in accordance with the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) that the existing water rights are injured by transferred water right no. 47-16831.
6. Use of water under this approval shall comply with applicable water quality standards of the Department of Environmental Quality.
7. The acres no longer authorized for irrigation under this transfer are 24 acres located in NESE Section 35, T10S, R12E, B.M.
8. This approval does not authorize the use of low temperature geothermal water. If water with a temperature greater than 85 degrees Fahrenheit is encountered by the driller, drilling must immediately cease, and the Department must be notified. Drilling shall not resume until the Department has reviewed the drilling conditions, and established

standards for construction with the driller.

9. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
10. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
11. Approval of this transfer does not preclude the opportunity for review of the validity of this water right in the ongoing Snake River Basin Adjudication.

Signed this ____27th____ day of _____August _____, 2002.

//signed//
L. GLEN SAXTON, P.E.
Hearing Officer