BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 69754 IN THE NAME OF HARVEY QUESNELL RANCHES, INC.	)))))	**PRELIMINARY ORDER**

This matter came before the Idaho Department of Water Resources ("Department") in the form of a protested application for transfer. On September 19 and 27, 2002, the Department held a hearing in the matter. On October 15, 2002, Harvey Quesnell Ranches, Inc. ("applicant"), Gerald Huettig ("Huettig") and Lee Halper ("Halper") filed post-hearing summary briefs and closing arguments. On October 28, 2002, the applicant filed a MOTION TO STRIKE EXHIBIT, REPLY TO SUMMARY BRIEF OF LEE HALPER and REPLY TO SUMMARY STATEMENT OF GERALD HUETTIG, PROTESTANT. On October 28, 2002, Halper filed the RESPONSE BRIEF OF LEE HALPER and Huettig filed REBUTTAL TO APPLICANT'S CLOSING ARGUMENTS AND BRIEF.

During the hearing on September 19 and 27, 2002, and in the closing argument and brief of the applicant, the applicant sought dismissal of Halper's protest based on Halper's failure to show that he is affected by the proposed transfer. On September 27, 2002, the hearing officer took the motion under advisement and stated he would rule on the motion in this Preliminary Order.

The hearing officer believes that the extent of issues to be included in the "local public interest" has not been further refined or restricted through statute, rule or court directive from the all inclusive scope set forth in Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985) to provide a basis to reject Halper's protest in this contested matter. In addition, most of the issues raised by Halper are included in the issues raised by the other protestants. Accordingly, the hearing officer declines to reject the protest.

On November 18, 2002, the hearing officer issued and served on the parties an ORDER FOR AUGMENTATION OF RECORD to which no objections were filed.

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

FINDINGS OF FACT

1. On December 5, 2001, the Snake River Basin Adjudication ("SRBA") Court issued a partial decree in the name of Bill Kelley as follows:

Identification No:	**36-02595**
Source:	Ground water
Priority:	November 27, 1964
Rate of diversion:	2.1 cubic feet per second ("cfs")
Annual Volume:	620 acre feet ("AF")
Point of diversion:	SW1/4 NW1/4 Section 25, T10S, R20 E, B.M., Jerome County
Use:	Irrigation
Season of use:	March 15 to November 15
Place of use:	155 acres within parts of sections 25 and 26, T10S, R20E, B.M.

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

2. On December 14, 2001, the applicant filed Application for Transfer No. 69754 ("application") with the Department seeking to change the use of 0.61 cfs and 135 AF per year of water right no. 36-02595 to a stockwater and commercial use in connection with a proposed new dairy. The proposed points of diversion (2) for the dairy are located in the SWNE Section 26, T10S, R20 E, B.M. and the proposed place of use for the commercial and stockwater uses is located within parts of Section 26, T10S, R20E, B.M., Jerome County. Solid and liquid waste will be land applied in parts of sections 25, 26, 34 and 35, T10S, R20E, B.M.

3. The applicant proposes to provide the water supply for the dairy by drying up 45 irrigated acres of the 155 acres authorized for irrigation under water right no. 36-02595. The land to be dried up will be used as part of the dairy site and is located as follows:

T10S, R20 E, B.M.		
Section 25		
	NENW	6 acres
Section 26		
	NENE	33
	SENE	6
	Total	45 acres

Ground water under water right no. 36-02595 has been exclusively used for irrigation of the 155 acres. North Side Canal Company shares of surface water are not appurtenant to the 155 acres.

4. The Department published notice of the application that subsequently was protested by Scott and Diana Breeding, Lee Halper, Gerald Huettig, and Evan Kohtz.

5. On September 19 and 27, 2002, the Department conducted a hearing in the matter. The applicant was present and was represented by Rob Williams. The protestants were present and represented themselves.

6. Issues the Department can consider in the matter are described 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.

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

Applicant's

Exhibit 1	Location Map
Exhibit 2	Snake River Public Access Map
Exhibit 3	Well Interference Analysis
Exhibit 4	Letter dated January 16, 2002 to John Frietag from Charles E. Brockway and Livestock Confinement Operations, Water Requirements and Consumptive Use Worksheet
Exhibit 5	Analysis of Water Right Transfer to Dairy by Brockway Engineering
Exhibit 6	Nutrient Management Plan by Bob Ohlensehlen
Exhibit 7	USGS Hydrograph data
Exhibit 8	Jerome County LCO Approval
Exhibit 9	Letter dated August 19, 2002 to Robert E. Williams from Rick Bloxham
Exhibit 10	Letter dated August 19, 2002 from Jack and Beverly Boyd
Exhibit 11	Letter dated August 19, 2002 to Idaho Department of Water Resources from Keith and Sharon Huettig, Myron and Ellen Huettig and Larry and Nancy Huettig
Exhibit 12	Manure Management Plan by Macedo Mitchell Engineering, August 19, 2002
Exhibit 13	Letter dated November 8, 1989 to Mike Quesnell from Warren T. McFall
Exhibit 14	Letter dated August 19, 2002 to Idaho Department of Water Resources from Nathan and Melanie Huettig
Exhibit 15	Letter dated August 19, 2002 to Idaho Department of Water Resources from Rocky Hagen and Randy Grant
Exhibit 16	Population Density Within a 2-Mile Radius of Proposed Dairy Facility, Hazelton, Idaho
Exhibit 17	Population Density Within a 2-Mile Radius of Current Quesnell Dairy Facility, Twin Falls, Idaho
Exhibit 18	Enclosed Manure Reception and Mixing Tank with a Biofiltration Emission Treatment System
Exhibit 19	Vitae for Mike Quesnell
Exhibit 20	Vitae for Matthew Quesnell

Exhibit 21	Photographs (3)
Exhibit 22	Letter dated February 7, 2002 to Art Brown from Idaho Department of Agriculture, Engineering Services
Exhibit 23	Vita for Valerie Quesnell
Exhibit 24	Revised Manure Management Plan by Macedo Mitchell Engineering, September 5, 2002
Exhibits 25A and 25B	Dairy Site Plan (2 large exhibits on hard board backing - 2.5 feet x 3.5 feet)
Exhibit 26	Observed Groundwater Contours, Snake Plain Aquifer - North of Twin Falls (large exhibit on hard board backing)
Exhibit 27	Quesnell Dairy - Pumping Comparison (Note: This exhibit was numbered as Applicant's Exhibit 26 at the continued hearing held on September 27, 2002 but should have been identified as Applicant's Exhibit 27).

Protestant's

Exhibit A	Watershed Protection Plan - Environmental Assessment, Accelerated Land Treatment for Water Quality, Scott's Pond Watershed, Jerome, ID, July 2001
Exhibit B	Halper Well #1 - Nitrates in MG/L (PPM)
Exhibit C	Observed Groundwater Contours
Exhibit D	Letter dated August 7, 2002 to Lee Halper from Gary Bahr together with a list of dairies showing measured levels of nitrates
Exhibit E	Estimated Water Use at Dairy Farms in Gooding, Jerome, and Twin Falls Counties, Idaho, 1990 - 93, USGS
Exhibit F	Name Index of Water Rights Referenced in the Thousand Springs Impact Area Curtailment Order Dated August 29, 2001 (from IDWR records)
Exhibit G	NOT OFFERED
Exhibit H	NOT OFFERED
Exhibit I	NOT OFFERED
Exhibit J	Location Map, Proposed Quesnell Dairy, Jerome County
Exhibit K	Location Map, Proposed Quesnell Dairy, Jerome County
Exhibit L	Harvey Quesnell Ranches, Inc, New Dairy Proposal (with transparent overlay)
Exhibit M	Letter dated February 7, 2002 to Art Brown from Engineering Services, Idaho State Department of Agriculture
Exhibit N	Letter dated July 19, 2002 to Evan Kohtz from James E. Stanton
Exhibit O	Well Driller's Report
Exhibit P	Letter dated July 15, 2002 from Delbert Kohtz
Exhibit Q	2001 Assessment Notice
Exhibit R	Idaho Power bill
Exhibit S	Idaho Power bill
Exhibit T	Map showing partial pivots
Exhibit U	Qwest bill
Exhibit V	Idaho's Nitrate Areas of Concern by R.L. Mahler and K.E. Keith
Exhibit W	Map of vicinity around the Quesnell dairy

Exhibit X Letter dated June 27, 2002 to Gerald Huettig from Steven Hannula
Exhibit Y Invoice to 4-H Farms from G.J. Verti-Line Pumps, Inc.
Exhibit Z EXHIBIT NUMBER NOT USED
Exhibit AA Invoice to Gerald Huettig from Allen Pump, Inc.
Exhibit AB Petition for Preservation Zone and Rezoning of Private Lands in Jerome County
Exhibit AC Layne Pump Estimate and Order and Installer's Work Order
Exhibits AD-1 through AD-7 - Pictures
Exhibit AE Email message dated April 13, 2001 to Ginny Gunn from Travis Kator
Exhibit AF Letter dated December 14, 2001 to Richard W. Sims from Pearlie S. Reed together with a Facsimile Transmittal Sheet

8. The applicant operates two existing dairies south of Twin Falls and has been in the dairy business since 1970. Encroaching urban development has prevented enlargement of the existing dairies.

9. The applicant proposes to construct a new dairy to be built in three phases over a 6 to 10 year development period. Planned phase 1 will have about 650 producing cows, phase 2 will increase the number of milk/dry cows by 2 to 2.5 times. At phase 3 there will be approximately 2,250 milking/dry cows at the dairy facility. (See Applicant's Exhibit 12). The general location of the proposed dairy is about 6 miles southeast of Hazelton, Idaho and about 3 miles west of Milner Dam near the Snake River Canyon.

10. The applicant has developed a manure management plan that he intends to submit to the Idaho Department of Agriculture even though the plan is not required for the operation of the proposed facility. (See Applicant's Exhibit 24). The plan includes cleaning manure from the free stall barns, alleys and alleyways in the corrals using a vacuum truck/trailer system and then discharging the vacuumed waste into a covered manure mixing tank where screw press separators would be used to separate solid waste from liquid waste. The manure mixing tank would use a biofiltration emission treatment system to remove ammonia and other gases from the operation. (See Applicant's Exhibit 18). The liquid waste would be land applied together with irrigation water at a ratio of 1 part liquid waste to 9 parts irrigation water. The solid waste would be composted and then land applied to cropland of third parties located near the dairy facility or used for bedding.

11. The applicant intends to control dust by frequent cleaning of corrals and alleys. The applicant intends to control fly populations by harrowing the open lot corrals at least twice per week, enclosing the manure processing center with a structure constructed of a steel frame and impermeable material similar to a hoop barn building, by controlling weeds around the dairy facilities and by the use of pesticides.

12. The Jerome Planning and Zoning Commission has approved the applicant's Livestock Confinement Operation. (See Applicant's Exhibit 8).

13. The Idaho State CAFO Siting Team has visited the proposed dairy site and has determined that the suitability determination for the site is "Low Risk." (See Applicant's Exhibit 22). The applicant plans to implement the recommendations of the siting team including recommendations for set back from the Snake River Canyon and the installation of berming next to the canyon rim and canal that crosses the applicant's dairy site.

14. Annual expenses associated with the proposed dairy are estimated to be in excess of 5 million dollars. The expenses include feed purchases from local farmers, freight to trucking operations, property and sales taxes to local governments and jobs for area residents. (See Applicant's Exhibit 9).

15. The applicant reuses water several times before it is consumed. For example, water used to cool the milk is reused to wash down the parlor, for stock drinking water or for use in the screw press separators.

16. The Nutrient Management Plan for the dairy has been approved by the Idaho Department of Agriculture. (See Applicant's Exhibit 6).

17. Using an average annual pumping rate of 0.19 cfs, which is the continuous diversion rate to provide the required annual volume of water for the transfer, and a pumping period of 80 days, the estimated drawdown at the pumping well (dairy well) has been calculated to be 0.14 feet and the drawdown in a well 2,000 feet distant from the dairy well to be 0.03 feet. Using a maximum pumping rate of 0.61 cfs for 80 days, the estimated drawdown at the dairy well has been calculated to be 0.45 feet and the drawdown in a well 2,000 feet away to be 0.09 feet. (See Applicant's Exhibit 3). The protestants disagreed with the analysis of the applicant based on a different estimate of the depth of the saturated aquifer and calculated the drawdown at 2000 feet to be as much as 0.85 feet.

18. The rate of diversion, consumptive use and total volume of water diverted under the transfer will not be larger after the transfer than before the transfer. (See Applicant's Exhibits 4 and 5).

19. Some neighbors in the vicinity of the proposed dairy plan to sell cattle feed to the applicant for use in the dairy and are willing to take solid waste generated by the facility, although the applicant has a sufficient amount of land to dispose of the solid waste generated by the dairy facility.

20. All of the protestants live close to the proposed dairy site except for Lee Halper who lives about 30 miles westerly of the site. Protestant Huettig lives within three quarters of a mile from the proposed dairy site.

21. Ground water levels within several miles of the dairy site have generally declined since 1950. The water level in a well located in Section 27, T10S, R20E, B.M. (about a mile from the dairy site) has declined from approximately 320 feet below land surface in 1950 to about 345 feet below land surface in 2000. Ground water levels in

some wells near the dairy site are now in excess of 350 feet below land surface. The rate of decline in recent years has decreased to some extent. (See Applicant's Exhibit 7).

22. A canal diverted from the North Side Canal Company's main canal crosses the proposed dairy site. Leakage from the canal is a significant local source of recharge to ground water in the area.

23. Protestant Evan Kohtz owns about 10 acres of property near the dairy site and plans to rennovate an existing home on the property. Kohtz is concerned about potential contamination of the domestic well on the property and is generally concerned about water draining from the dairy site believing that water from the dairy site might reach the Snake River Canyon.

24. Protestant Scott Breeding built a home about 1.2 miles east of the dairy site in 2000. His major concern is the potential effect of dairy water use on his domestic well, although he is also concerned about odor, flies, dust and runoff from the dairy site. The pump in his domestic well is set at 340 feet below land surface.

25. Protestant Huettig irrigates land near the dairy site from deep wells and has not been able to divert the licensed amount of water (rate) from the wells. He believes use of water by the dairy will injure his water rights, since he believes more water will be diverted for the dairy use than previously diverted for irrigation. He also believes the applicant's site is not suitable for a dairy and is concerned about odor, flies, dust and runoff from the dairy site.

26. The hearing record shows that the proposal of the applicant will enhance the economy of the area by generating economic activity. The proposal also complies with county and state jurisdictions for operation of a dairy.

27. The hearing record contains substantial evidence to show that the proposal of the applicant will not injure other water rights, will not enlarge the use of water, is in the local public interest and is consistent with the conservation of water resources within the state of Idaho.

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 rights, that it will not constitute an enlargement in use of the right and will be consistent with principles of conservation of water resources 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. Although the ground water levels in the vicinity of the dairy are relatively deep, changing the use of the applicant's water right from irrigation use to uses associated with a dairy will not make the depth to water situation any worse than it now is. Ground water levels in the area have declined but that cannot be attributed to the proposed dairy or changed water use associated with the dairy.

6. The potential effect of pumping the applicant's proposed wells on adjacent wells, although disputed by the parties, is not estimated to be large enough to injure other water rights.

7. The proposed changes do not constitute an enlargement in use of the original right and, in fact, will result in less water being diverted and consumptively used than under the original water right. (See Applicant's Exhibit 5).

8. The proposed changes will generate positive economic activity in the local area including cattle feed purchases from local farmers, providing property and sales taxes to local governments and jobs for area residents and complies with state and local regulatory requirements. The proposed dairy is in the local public interest.

9. The proposed changes are consistent with the 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. 69754 filed in the name of Harvey Quesnell Ranches, Inc. 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. The total instantaneous diversion rate of water from all points of diversion under water right 36-15995 shall not exceed 0.61 cfs, nor a total combined

annual volume of 135.0 AF.

3. Prior to diversion and use of water under this transfer approval, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion, in accordance with department specifications.

4. Commercial use is for a dairy facility located within portions of the NE and SE quarters of Section 26, T10S, R20E, B.M.

5. The place of commercial use authorized by this approval includes land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements.

6. Water diverted under this approval shall not be used for irrigation unless the water is first used in the dairy as authorized by this water right.

7. Prior to diversion of water authorized under this approval, the right holder shall comply with applicable county zoning and use ordinances.

8. Prior to diversion of water authorized under this approval, the right holder shall comply with applicable water quality standards of the Department of Environmental Quality.

9. The right holder shall accomplish the change authorized by this approval within five (5) years.

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. 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.

Signed this 3rd day of December, 2002.

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