

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5804 IN THE)
NAME OF DAVID BLOXHAM)
_____)

PRELIMINARY ORDER

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

FINDINGS OF FACT

1. On June 19, 1973, the Department issued License No. **35-02727** to Vern M. Brown as follows:

Source:	Ground water
Priority:	March 13, 1965
Rate of diversion:	3.66 cubic feet per second ("cfs")
Volume:	819 Acre Feet ("af") per year at 3.5 af per acre
Point of diversion:	SW1/4NW1/4 Section 17, T4S, R31E, B.M., Bingham County
Use:	Irrigation
Season of use:	April 1 to November 1
Place of use:	234 acres in parts of Sections 17 and 18, T4S, R31E, B.M.

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

2. On May 4, 2000, the Department issued Transfer **5688** in the name of Foster Farms as follows:

Identification No:	35-02727B
Source:	Ground water
Priority:	March 13, 1965
Rate of diversion:	1.54 cfs
Volume:	345.4 af per year
Point of diversion:	SWSE Section 5, T6S, R30E, B.M., Bingham County
Use:	Irrigation
Season of use:	April 1 to November 1

Place of use: 132 acres within Section 5, T6S, R30E, B.M.
Conditions of approval: This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 af per acre per year at the field headgate

Note: The rate of diversion is less than a proportionate share of the right and was determined by the sales agreement.

3. The remaining portion of License No. 35-02727 as recommended in the Snake River Basin Adjudication is as follows:

Identification No: **35-02727A**
Source: Ground water
Priority: March 13, 1965
Rate of diversion: 2.12 cfs
Volume: 408 af per year
Point of diversion: SWNW Section 17, T4S, R31E, B.M., Bingham County
Use: Irrigation
Season of use: April 1 to November 1
Place of use: 181 acres within Sections 17 and 18, T4S, R31E, B.M.
Conditions of approval: Use of this right with right no. 35-07603C is limited to a total combined diversion rate of 2.12 cfs.

4. On September 9, 1993, the Department issued License Nos. 35-07603A, 35-07603B and 35-07603C all in the name of Roy E. Hincks and Delores B. Hincks. License No. **35-07603C** provides the following:

Source: Ground water
Priority: February 15, 1986
Rate of diversion: 0.93 cfs
Point of diversion: SWNW Section 17, T4S, R31E, B.M., Bingham County
Use: Irrigation
Season of use: April 1 to October 1
Place of use: 79 acres within parts of Sections 17 and 18, T4S, R31E, B.M.
Conditions of approval: Use of this right with right no. 35-02727 is limited to a total combined diversion rate of 3.66 cfs, a total combined annual diversion volume of 1,240 af, a total combined annual consumptive use volume of 930 af and to the irrigation of a combined total of 310 acres in a single irrigation season.

5. On July 27, 2000, David Bloxham ("applicant") filed Application for Transfer No. **5804** ("application") with the Department proposing to change 0.62 cfs and 160.5 af per year of water right nos. 35-02727 and 35-07603C diverted in Bingham County to year-round stockwater and commercial for use at a proposed dairy ("dairy") in Section 19, T7S, R19E, B.M. in Twin Falls County. The dairy will have 1,900 milking cows and 200 non-

milking cattle. The owner of the water rights sought for transfer plans to cease irrigating approximately 53.5 acres in Bingham County to provide water for the dairy from two wells located in the NWNW Section 19, T7S, R13E, B.M. in Twin Falls County.

6. The Department published notice of the application that was subsequently protested by the Idaho Rural Council ("protestant").

7. On February 7, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. Richard A. Carlson appeared for the protestant. William Chisholm appeared as a public witness.

8. Issues identified by the protestant 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.
- e. The water rights sought for transfer are not valid.

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

- a. Applicant's Exhibit 1 – Location maps of dairy site (2)
- b. Applicant's Exhibits 2-1, 2-2 and 2-3 – Site Plan Maps - Bloxham Dairy - (large 2' x 3' exhibits)
- c. Applicant's Exhibit 3 – Well Interference Analysis Bloxham Dairy - Bell Rapids
- d. Applicant's Exhibit 4 – Livestock Confinement Operations – Water Requirements and Consumptive Use Worksheet
- e. Applicant's Exhibit 5 – Water Balance Analysis Bloxham Dairy – Bell Rapids
- f. Applicant's Exhibit 6 – Bell Rapids Area South and Bell Rapids North – Ground Water Hydrographs
- g. Applicant's Exhibit 7 – Groundwater Contours and Flow Lines

- h. Applicant's Exhibit 8 – USGS Well data
- i. Applicant's Exhibit 9 – Nutrient Management Plan for David Bloxham Dairy, Hagerman, Idaho, April 28, 2000
- j. Applicant's Exhibit 10 – Letter dated January 20, 2001 to Rob Williams from LeRoy Hayes
- k. Applicant's Exhibit 11 – Letter dated June 10, 2000 from Jane George
- l. Applicant's Exhibit 12 – Letter dated June 8, 2000 from Randy Bean
- m. Applicant's Exhibit 13 – Letter dated June 14, 2000 to Bill Crafton from Dave Burgess
- n. Applicant's Exhibit 14 – Letter dated August 17, 2000 to David Bloxham from Lee Taylor
- o. Applicant's Exhibit 15 – Memorandum dated August 1, 2000 to Norm Young from Helen Harrington
- p. Applicant's Exhibit 16 – Groundwater Contours and Flow Lines for the Bloxham Dairy Water Right Transfer, Brockway Engineering, 1-23-01
- q. Applicant's Exhibit 17 – Bloxham Dairy Ownership - (large 3' x 4' exhibit)
- r. Protestant's Exhibit A – Memorandum dated August 1, 2000 to Transfer File No. 5804 from Corey Skinner and Memorandum dated July 28, 2000 to Allen Merritt from Corey Skinner
- s. Protestant's Exhibit B – A Hydrostratigraphic Model for the Perched Aquifer Systems Located Near Hagerman Fossil Beds National Monument, Idaho by Charles Neal Farmer, 1988
- t. Protestant's Exhibit C – Evaluation of Hydrological Processes Affecting Soil Movement in the Hagerman Fauna Area, Hagerman, Idaho, U.S. Geological Survey, Water-Resources Investigations Report 84-4137
- u. Protestant's Exhibit D – ISDA Dairy Nitrate Study
- v. Protestant's Exhibit E – Letter dated March 6, 2000 from Gus Eliopolos and Idaho State Department of Agriculture Technical Results Summary #2 titled "Ground Water Quality of Twin Falls County Volcanic and Sedimentary Aquifer"

- w. Protestant's Exhibit F – E-Mail messages between Richard Carlson and Jeni Beddoes
- x. Protestant's Exhibit G – NOT ADMITTED
- y. Protestant's Exhibit H – E-Mail messages between Richard Carlson and Nicholas Cizmich of DEQ – (Note: Only part of the proposed exhibit was admitted).
- z. Protestant's Exhibit I – NOT ADMITTED
- aa. Protestant's Exhibit J – NOT OFFERED
- ab. Protestant's Exhibit K – NOT ADMITTED
- ac. Protestant's Exhibit L – Middle Snake River Recreational Opportunities At Risk by Middle Snake River Recreation Work Group, Twin Falls, ID, October 1997
- ad. Protestant's Exhibit M – Hagerman Fossil Beds National Monument – General Management Plan, September 1996
- ae. Protestant's Exhibit N – Hagerman Fossil Beds National Monument – Idaho, Draft General Management Plan/Environmental Impact Statement, November 1995

The hearing officer officially noticed certain information at the hearing including the Amended Preliminary Order issued by the Department on October 12, 1999 for Transfer No. 5436 that was filed in the name of Jerome Cheese Company.

10. The licensed point of diversion ("Hincks well") is within the Eastern Snake Plain Aquifer ("ESPA") and the proposed new points of diversion are within the Bell Rapids Aquifer located approximately 110 miles to the west of the Hincks well. The ESPA and the Bell Rapids Aquifer are different aquifers and are not hydraulically connected.

11. Approximately 90 per cent of the ground water not pumped at the Hincks well will reach American Falls Reservoir on the Snake River and the remainder of the ground water flows through the ESPA emerging as springs and reaching the Snake River in the Milner to King Hill reach near Twin Falls, Idaho.

12. There are numerous diversions of water from the Snake River downstream from the locations where the ground water not pumped at the Hincks well reaches American Falls Reservoir and the Snake River. Ground water that is not pumped which reaches the Snake River during the non-irrigation season is subject to impoundment under any water rights authorized to store water during the non-irrigation season.

13. The applicant owns approximately 3,400 acres of land in the Bell Rapids area including the proposed dairy site and owns 100 shares of water provided by Bell Rapids Irrigation District ("District"). The District pumps Snake River water for delivery to the applicant for irrigation purposes. The applicant plans to cease using District water if the transfer is approved. The applicant stated that the District will not divert Snake River for his use if he did not plan to use the water even though he would be required to continue payment for operation and maintenance charges to the District for the water shares.

14. On May 15, 1992, the Director issued a moratorium order affecting the Eastern Snake River Plain area ("Moratorium Order") curtailing new uses of surface and ground water within the Snake River Basin upstream from the USGS gage on the Snake River near Weiser, Idaho. The moratorium was issued to prevent further development of water resources in the Snake Plain Aquifer to ensure compliance with provisions of chapter 2, title 42, Idaho Code. The Director subsequently amended the moratorium order on January 6, 1993 and on April 30, 1993.

ANALYSIS

The applicant proposes to transfer the use of ground water located in one aquifer to a different aquifer located approximately 110 miles distant. The aquifers are not connected and are separate ground water sources.

The applicant advocates that by looking at the "big picture" of water balance, the proposal will not injure other water rights or result in enlargement in use of the original rights, since ground water not diverted at the Hincks well will reach the Snake River and since the 100 shares of Bell Rapids water owned by the applicant which the applicant will cease diverting from the Snake River will also remain in the river to offset the ground water use at the dairy site. This position appears to have the elements of an "exchange" as codified in Section 42-240, Idaho Code, but deals with the interaction of a surface water source and ground water sources rather than with only surface water sources described in the statute.

Water not diverted at the Hincks well that reaches the Snake River will be intercepted and used at other points of diversion from the Snake River for other water rights which divert from the Snake River. Water diverted at the proposed dairy site when considered together with intercepted water then will result in an overall enlargement in water use.

The applicant's proposal also appears to suggest that ground water near the Hincks well that reaches the Snake River together with District water that will not be diverted, offsets or "mitigates" the applicant's proposed use of ground water at the dairy site. The Moratorium Order for the Eastern Snake River Plain Area does provide that the Director can review for approval on a case-by-case basis an application (for permit) which otherwise would not be approved under terms of the moratorium, if suitable mitigation to offset injury to other water rights is provided by an applicant for a permit. The applicant, however, has filed an application for transfer.

Although both the applicant and protestant presented evidence, testimony and argument in connection with all of the issues described in Finding of Fact No. 8 above, this preliminary order only addresses enlargement, injury and local public interest, since the findings of fact, conclusions of law and order relative to these issues makes a ruling on the other issues unnecessary.

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. Section 42-1805(7), Idaho Code, and IDAPA 37.03.08055 (Water Appropriation Rule 55) provide for the establishment of a moratorium preventing further development of a water resource in a designated area to ensure compliance with provisions of chapter 2, title 42, Idaho Code.

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 all of the criteria of Section 42-222, Idaho Code.

6. The Moratorium Order issued by the Department on May 15, 1992 was intended to prevent further development of water resources on the Eastern Snake River Plain area in order to protect prior water rights and to ensure compliance with provisions of chapter 2, title 42, Idaho Code.

7. Ground water not pumped at the Hincks well will reach the Snake River and will be captured by other water rights such as being stored in American Falls Reservoir on the Snake River or as direct diversion from the Snake River and will not be available to

offset use of ground water by the applicant for the proposed dairy located 110 miles westerly from the Hincks well.

8. The locations of the proposed points of diversion are within the area included in the Moratorium Order. Since none of the ground water in the ESPA physically is available for diversion at the proposed new points of diversion in the Bell Rapids Aquifer, diversion of water at the proposed new wells would have the same physical effect as a new appropriation of ground water and would cause injury because it would have a senior priority over validly established rights held by junior appropriators.

9. Ground water not diverted at the Hincks well that reaches the Snake River will be intercepted and used at other points of diversion from the Snake River for other water rights which divert from the Snake River before the water reaches the general area of the proposed dairy site. Ground water that reaches the Snake River during the non-irrigation season is subject to diversion to storage under water rights authorized to store water. Water then diverted at the dairy site when considered together with intercepted water will result in an overall enlargement in water use.

10. It is not in the local public interest to approve a transfer that would essentially be a new appropriation of water and that otherwise would be prevented by the Moratorium Order.

11. The Department should deny the application without prejudice.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5804 in the name of David Bloxham is **DENIED** without prejudice.

Signed this ____6____ day of _____ March _____, 2001.

_____-signed-_____
L. GLEN SAXTON, P.E.
Hearing Officer