

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5639 IN THE)
NAME OF K & W DAIRY)
_____)

**SECOND AMENDED
PRELIMINARY ORDER**

On October 11, 2000, the hearing officer for the Idaho Department of Water Resources (the "Department" or "IDWR") issued a Preliminary Order in connection with the above captioned matter. On October 24, 2000, protestant William Chisholm filed a Petition for Reconsideration with the hearing officer.

The objection raised by the protestant at hearing and in the petition is that the application is not in the local public interest. Specific concerns of the protestant described in the petition include the cumulative impacts of adding more dairy cattle to the area, potential degradation of ground water quality, air quality concerns, and adverse impacts on the quality of life and recreational opportunities. Having reviewed the petition the hearing officer responds to the petition as follows:

The approved Nutrient Management Plan for the proposed dairy provides procedures for the applicant to avoid degrading water quality in the area. With suitable management of dairy waste, the applicant will not degrade water quality. The nitrate concentration in observation wells in the vicinity is well below the Maximum Contaminant Level for public drinking water as shown in finding of fact 20.

With respect to the undesirable odors emanating from a dairy with more than 6,500 dairy cattle, the applicant did not provide reasonable assurance that "flushing" of the alleys would not further contribute to the undesirable odors. Without objection, a hearing witness described an existing dairy of comparable size to the applicant's proposed dairy that uses a flush system. The witness described the undesirable odors from the flushed waste product. The applicant has proposed the "flush system" of cleaning the alleys as an alternative being considered for the new dairy but stated that means other than flushing might be used. The Department has addressed the requirement for cleaning the alleys, as well as holding pens, in condition of approval 12.

On November 24, 2000, applicant K & W Dairy filed a Brief in Support of Preliminary Order. On December 1, 2000, the hearing officer for the Department issued an Amended Preliminary Order approving Transfer No. 5639.

On December 14, 2000, both the applicant and the protestants filed a Petition for Reconsideration ("petition") with the hearing officer in connection with the Amended Preliminary Order.

With respect to the petition of the applicant, the hearing officer has changed part of the

fourth full paragraph on page 1 as shown in this second amended preliminary order and has changed condition of approval 12 to clarify that holding pens for the milking barn may be washed down using fresh water after each milking.

With respect to the petition of the protestants, the protestants raised several of the same issues that were previously raised in the hearing and in the petition for reconsideration filed on October 24, 2000 by protestant Bill Chisholm. The hearing officer's response to the October 24, 2000 petition of protestant Bill Chisholm is applicable to the protestants' December 14, 2000 petition, and is further supplemented below.

In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the court provided guidance relative to public interest considerations. The decision provides in part that the "... burden of production lies with the party that has knowledge peculiar to itself. For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal matter that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm."

The protestants allege that the preliminary order does not contain a finding that mechanical scraping of solid waste from alleys will result in any less desirable odor than flushing of the alleys would produce. The evidence presented at the hearing supports revised finding of fact 15 and conclusion of law 8 finding and concluding that mechanical scraping of solid waste from alleys will reduce the amount of undesirable odor as compared with flushing of the alleys.

The protestants allege that the preliminary order contains no findings on cumulative impact, quality of life and recreational issues. The applicant provided sufficient information at the hearing to show that the proposed project is in the public interest. The protestants have not countered the showing of the applicant and have not gone forward to establish harm. The protestants' allegation does not rise to the level of showing that the applicant has failed to meet its burden relative to the local public interest.

In *Shokal*, the court determined that IDWR, in its sound discretion, is authorized to determine what elements of the public interest are impacted by a proposal and what the public interest requires. The hearing officer has evaluated and balanced the evidence and testimony and has determined that the project is in the local public interest. The hearing officer has not given weight to mere statements of the protestants claiming harm but not supported by evidence.

IDWR does not, as asserted by protestants, have a policy that all liquid dairy waste be maintained on the dairy site. IDWR does, however, determine the amount of water required for a dairy operation as if the amount of water diverted for dairy use is totally consumed. In this manner, the amount of water required for a dairy operation is not underestimated resulting in future allegations of enlargement, if water use or water treatment requirements are changed.

The protestants suggest that "the explosion of cow numbers" in the area will increase the level of nitrates in ground water. The protestants, however, have shown nothing to refute the

levels of nitrate measured in observation wells in the area. The protestants' allegation is not supported by evidence and does not rise to the level of showing that the applicant has failed to meet its burden. Finding of fact 20 is accurate and is unrefuted by the protestants.

Finally, protestants state that the preliminary order does not contain a finding relative to the economics of disposing of solid waste by trucking it up to 22 miles for disposal. Trucking of the waste was presented by the applicant as a part of its dairy operation procedure. The applicant has met its burden and the protestants have provided nothing to overcome the showing of the applicant that the proposal is economically feasible. No showing was made to suggest that the applicant is not entitled to use public roads and highways for this purpose.

Based upon the evidence presented in this matter and the hearing officer's understanding of the law, the hearing officer enters the following Findings of Fact, Conclusions of Law and Second Amended Preliminary Order:

FINDINGS OF FACT

1. The Snake River Basin Adjudication ("SRBA") District Court has issued partial decrees for the following ground water rights to be used for irrigation from April 1 to October 31 each year:

<u>Ident. No.</u>	<u>Priority</u>	<u>Rate</u>
36-02087A	01-23-50	4.31 cfs
36-02113A	03-12-51	2.23
36-02161A	01-11-52	1.31
36-02289D	12-02-55	0.36
36-02311A	11-23-56	2.68
36-02500A	07-18-61	1.78
36-02614A	06-07-65	3.66
36-07307A	02-26-73	2.78
36-07362A	08-02-73	4.45
36-07477A	05-28-75	1.43
36-07606A	02-04-76	1.34
36-07779A	02-22-78	4.19
36-07832A	12-11-78	0.36
36-10225A	05-01-85	1.27
36-15169A	12-11-69	12.46

Limited to: 42.52 cfs

2. On August 31, 2000, K&W Dairy ("applicant") filed Application for Transfer No. 5639 ("application") with the department proposing to change the point of diversion, nature of use, period of use and place of use of portions of the above listed water rights. The parts of the rights sought to be transferred are as follows:

<u>Ident. No.</u>	<u>Priority</u>	<u>Rate</u>
36-02087	01-23-50	0.19 cfs
36-02113	03-12-51	0.10
36-02161	01-11-52	0.06
36-02289	12-02-55	0.02
36-02311	11-23-56	0.12
36-02500	07-18-61	0.08
36-02614	06-07-65	0.16
36-07307	02-26-73	0.13
36-07362	08-02-73	0.20
36-07477	05-28-75	0.06
36-07606	02-04-76	0.06
36-07779	02-22-78	0.19
36-07832	12-11-78	0.02
36-10225	05-01-85	0.06
36-15169	12-11-69	0.56

Limited to: 1.92 cfs

The water rights involved in the application are a proportionate share of the rights appurtenant to land that the applicant has purchased.

3. The application proposes to change 1.92 cfs and 295.2 AF of the rights shown in Finding of Fact No. 1 to year-round stockwater and commercial use to be diverted from four (4) wells located in the SE1/4NE1/4 Section 32, T8S, R15E, B.M., Gooding County, for use at a proposed dairy in the NE1/4 Section 32, T8S, R15E, B.M. The applicant proposes to dry up approximately 98.4 acres in the NE 1/4 to construct the dairy site for 5,750 milking cows and 840 non-milking cattle.

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

4. The Department published notice of the application that was subsequently protested by Lee Halper and Bill Chisholm.

5. On July 13, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. Protestant Lee Halper was present and was represented by Richard A. Carlson. Protestant William Chisholm was present and represented himself. The hearing officer allowed ten (10) days following the hearing for the protestants to file briefs and allowed five (5) days for the applicant to respond to any brief that was filed. On July 26, 2000, protestant Lee Halper filed a Closing Argument and protestant Bill Chisholm filed Protestant Bill Chisholm's Summation.

6. 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.
7. Exhibits premarked, offered or accepted as a part of the record are as follows:
- a. Applicant's Exhibit 1 - Vicinity Map of K & W Dairy
 - b. Applicant's Exhibit 2 - Vicinity Map of K & W Dairy (Enlargement of Applicant's Exhibit 1)
 - c. Applicant's Exhibit 3 - Well Interference Analysis
 - d. Applicant's Exhibit 4 - Water Use Worksheet
 - e. Applicant's Exhibit 5 - Analysis of Water Right Transfer to Dairy
 - f. Applicant's Exhibit 6 - Analysis of Nutrient Management Practices
 - g. Applicant's Exhibit 7 - NRCS Soils Data and Soils Maps
 - h. Applicant's Exhibit 8 - Copy of letter dated June 13, 2000 to Robert E. Williams from Ronald L. Belliston
 - i. Applicant's Exhibit 9 - Gooding County New CAFO Siting Permit
 - j. Applicant's Exhibit 10 - Letter dated June 14, 2000 from Larson Magic Farms
 - k. Applicant's Exhibit 11- Letter dated June 14, 2000 from Chris Pratt
 - l. Protestant's Exhibit A - Draft Report titled Cumulative Impacts Assessment, Box Canyon Area of the Eastern Snake River Plain, Idaho prepared by Idaho Division of Environmental Quality - June 2000
8. The applicant owns about 1,100 acres located approximately 11 miles west and 1 mile south of Jerome where the new dairy is proposed. The southwestern corner of the property is located about 1/8 of a mile from the rim of the Snake River Canyon and the site for the dairy is located about 1 mile from the canyon rim.
9. The applicant operates two other dairies in Magic Valley, one with 1,150 cows and the other with 950 cows.
10. Tremblay Consulting of Jerome, Idaho prepared a Nutrient Management Plan for the proposed dairy which plan has been approved by the Idaho Department of Agriculture (See Applicant's Exhibit 6).
11. On October 1, 1999, the Gooding County Planning and Zoning Commission approved a New CAFO Siting Permit for 6,600 animal units at the proposed dairy site. (See Applicant's Exhibit 9).
12. About 90 percent of the feed needed for the dairy cattle will be purchased locally. Annual expenses associated with the dairy are estimated to be in excess of \$15 million generating about \$92 million dollars of economic activity in the area.
13. The site will be graded and berms will be constructed to prevent wastewater from entering a canal owned by Northside Canal Company, which crosses the southern part of the

applicant's property. The liquid waste will be land applied on site.

14. The applicant needs 1,900 acres to dispose of the solid waste generated by the dairy. The applicant plans to compost the solid waste and has made arrangements with two farm operators to dispose of the solid waste on up to 6,000 acres. The operators plan to truck the solid waste up to 22 miles to the land application sites.

15. The applicant proposes a "flush system" for cleaning solid waste from the holding pens and alleys as an alternative to a mechanical scraping method. The hearing record, as a whole, does not support a finding that the proposed flush system alternative would do as good a job of controlling odor as a mechanical scraping method. The record supports a finding that mechanical scraping of solid waste from alleys will reduce the amount of undesirable odor emanating from a dairy operation as compared with flushing of the alleys.

16. The applicant proposes to conserve water by using the same water for cooling, stockwater, and for washdown water in the milking parlor of the new dairy.

17. The rate of diversion, consumptive use and total volume of water diverted under Transfer No. 5639 will not be larger after the transfer than before the transfer. (See Applicant's Exhibit 5).

18. The applicant proposes to cease using ground water for irrigation on 98.4 acres located as follows:

T8S, R15E, B.M., Section 32			
NENE	-	9.2	acres
NWNE	-	9.2	acres
SWNE	-	40.0	acres
SENE	-	<u>40.0</u>	<u>acres</u>
TOTAL	-	98.4	acres

19. Using an average annual pumping rate of 0.41 cfs, which is the continuous diversion rate to provide the required annual volume of water for Transfer No. 5639, and a pumping period of 80 days, the estimated drawdown in a well 1/4 mile distant from the dairy wells is 0.07 feet. Using a maximum pumping rate of 1.92 cfs for 80 days, the estimated drawdown in a well 1/4 mile distant from the dairy wells is 0.34 feet. (See Applicant's Exhibit 3).

20. There are two monitoring wells in the vicinity of the K & W dairy. One well monitored as part of the INEEL Oversight Program is located about 2 mile southwest of the dairy site and shows the following nitrate concentrations: 1.7 mg/l (1989), 1.6 mg/l (1990), and 1.9 mg/l (1996). The other well monitored as part of the Statewide Program is located about 2 mile easterly of the dairy site and shows the following nitrate concentrations: 1.8 mg/l (1991), 2.1 mg/l (1995), and 2.5 mg/l (1999).

21. The protestants are concerned about the cumulative impact of dairies in the general vicinity of the applicant's dairy and believe there is a great potential for the dairy operations to adversely affect water quality, air quality and the overall environment. The

protestants believe the application is not in the local public interest.

22. The hearing record shows that the proposal of the applicant will enhance the economy of the area by creating jobs and generating economic activity through the purchase of cattle feed and other needs of the dairy. The proposal also complies with county and state jurisdictions for operation of the proposed dairy.

23. The hearing record contains substantial evidence to show that the proposal of the applicant, as approved by this order, 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 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 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 increase in nitrate concentration in the observation wells has not been specifically associated with any particular source. The observed concentrations are below the Maximum Contaminant Level for public drinking water established at 10 mg/l by the Environmental Protection Agency.

6. The proposed changes will not injure other water rights.

7. The proposed changes do not constitute an enlargement in use of the original right.

8. Mechanical scraping of solid waste from alleys will reduce the amount of

undesirable odor emanating from a dairy operation as compared with flushing of the alleys. Both Gooding County and the Idaho Department of Agriculture have granted approval for the jurisdictional elements for operation of the dairy within their respective jurisdictions.

9. The hearing officer having evaluated and weighed the evidence and testimony has determined that the proposed changes are in the local public interest if the approval is appropriately conditioned, as provided in this order.

10. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

11. The Department should approve the application with certain conditions as provided in this order.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5639 in the name of K & W Dairy is **APPROVED** subject to the following conditions:

1. The right holder shall design and construct the dairy facility in compliance with the requirements of the Idaho Department of Agriculture. Prior to the construction of wells and the diversion of water under this approval, the right holder shall provide evidence acceptable to the Department that the right holder has met the compliance requirements of the Idaho Department of Agriculture, including the disposal of solid waste from the dairy.
3. Prior to the diversion and use of water under this approval, the right holder shall install and maintain a suitable measuring device on each diversion as determined by the Department. The right holder shall measure and shall annually report the amount of water diverted under this transfer to the water measurement district or to the Department.
3. The place of commercial use authorized by this transfer includes land upon which wastewater may be applied to satisfy water quality requirements. Water diverted under this approval shall not be land applied unless the water is first beneficially used for other purposes in the dairy as authorized by this transfer.
4. Ninety-eight and four tenths (98.4) acres located in the NE Section 32, T8S, R15E, B.M. are no longer authorized for irrigation with ground water under the rights being transferred.
5. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. Prior to use of water under this approval, the dairy operation shall comply with applicable county zoning ordinances.
7. Commercial use is for a dairy located in the NE Section 32, T8S, R15E, B.M.

8. Right 36-10225D is an expansion right pursuant to section 42-1426, Idaho Code.
9. Rights 36-02087D, 36-02113D, 36-02161D, 36-02289F, 36-02311D, 36-02500D, 36-02614D, 36-07307D, 36-07362D, 36-07477D, 36-07606D, 36-07779D, 36-07832D, 36-10225D and 36-15169D when combined shall not exceed a total instantaneous diversion of 1.92 cfs of water from all points of diversion under transfer 5639, nor a total combined annual volume of 295.2 AF for commercial and stockwater uses at the dairy.
10. Four (4) points of diversion are located within the SENE Section 32, T8S, R15E, B.M.
11. The right holder is not authorized to assign ownership of these rights to another party without prior approval of the Department.
12. The right holder is not authorized to use water under this approval to flush alleys of the dairy and shall use an alternate means of removing and disposing of waste such as a mechanical scraping procedure unless and until the Director specifically approves the use of a flush system. This prohibition against flushing does not prevent the right holder from washing down holding pen areas in the milking barn after each milking using fresh water. The applicant may initiate authorization for a flush system by submitting a petition and plan for review and approval by the Department subsequent to this order becoming final.
13. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
14. 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 _____, 2001.

L. GLEN SAXTON, P.E.
Hearing Officer