

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5464 IN THE)
NAME OF SALMON FALLS LAND &)
LIVESTOCK CO.)
_____)

**AMENDED
PRELIMINARY ORDER**

This matter came before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer. On October 13, 1999, the Department conducted an administrative hearing on protested Application for Transfer No. 5464 ("application") in the name of Salmon Falls Land & Livestock Co. ("applicant"). On November 24, 1999, the Department issued a Preliminary Order denying the application on the grounds that it did not satisfy the local public interest criterion under the governing statute. On January 19, 2000, the Preliminary Order became a Final Order, since the applicant did not file exceptions with the Director.

On February 16, 2000, the applicant filed a Petition for Judicial Review of the Final Order with the Fifth Judicial District Court. On April 17, 2000, in response to a motion by the applicant the court remanded the matter to the Department for the purpose of receiving additional evidence and conducting additional fact finding relative to the local public interest and the other decision criteria under section 42-222, Idaho Code. On July 17, 2000, the court denied applicant's motion for reconsideration of the remand order and the matter was returned to the Department for further proceedings.

Having conducted an additional hearing on September 19, 2000 and having received additional evidence in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Amended Preliminary Order:

FINDINGS OF FACT

1. On November 5, 1996, the Department issued Amended License No. 47-02386 as follows:

Identification No.	47-02386
Source:	Ground water
Priority:	September 12, 1963
Rate of diversion:	3.51 cubic feet per second ("cfs")
Annual Volume:	824 Acre Feet ("AF")

Point of diversion: SW1/4SE1/4 Section 23 and SW1/4SW1/4 Section 24, T8S, R12E, B.M.¹
Use: Irrigation
Season of use: March 1 to November 1
Place of use: 206 acres in parts of Sections 23 and 24, T8S, R12E, B.M.

A claim on this right was filed in the Snake River Basin Adjudication on June 9, 1988. The claim was split into parts 47-02386A and 47-02386B on May 14, 1997.

2. On November 19, 1996, the Department issued transfer No. 4818 in the name of Salmon Falls Land & Livestock Co. as follows:

Identification No. **47-02386B**
Source: Ground water
Priority: September 12, 1963
Rate of diversion: 2.22 cfs
Annual Volume: 520 AF
Point of diversion: NENW Section 36, T8S, R12E, B.M.
Use: Irrigation
Season of use: April 1 to October 31
Place of use: 130 acres in parts of Section 36, T8S, R12E, B.M.

3. On March 12, 1999, Salmon Falls Land & Livestock Company filed Application for Transfer No. 5464 ("application") with the Department seeking to change the point of diversion, place of use, nature of use and season of use of the remaining part of Water Right License No. 47-02386 as follows:

Identification No. **47-02386A**
Source: Ground water
Priority: September 12, 1963
Rate of diversion: 1.29 cfs
Annual Volume: 228 AF (Consumptive use at 3 AF per acre shown on application)
304 AF (Diversion volume to be transferred at 4 AF per acre)
Points of diversion: NWSW (2 points) and SWNW Section 13, T8S, R13E, B.M.
Use: Stockwater and Commercial
Season of use: Year-round
Place of use: Parts of Sections 11, 12, 13 and 14, T8S, R13E, B.M. and parts of Sections 17 and 18, T8S, R14E, B.M.
Remarks: The stockwater and commercial uses are in connection with a new proposed dairy

4. The Department published notice of the application that was subsequently protested by William K. Chisholm ("protestant").

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

5. Issues identified by the protestant in the written protest 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.

At the hearings, the protestant provided testimony and exhibits concerning forfeiture of the water right sought to be transferred and information intended to show that the proposal is not in the local public interest.

6. On October 13, 1999 and on September 19, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by Roger Ling and Timothy J. Schneider. The protestant was present and represented himself. Thirteen (13) public witnesses appeared at the September 19, 2000 hearing voicing opposition to the proposed transfer. Approximately twenty-five (25) people submitted written comments after the hearing. Most written comments opposed the dairy. On October 16, 2000, the applicant filed "Objections to Written Testimony of Public Witnesses." The hearing officer did not consider or give weight to letters from commentators who did not otherwise qualify as public witnesses.

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

- a. Applicant's Exhibit 1 - Map
- b. Applicant's Exhibit 2 - Map
- c. Applicant's Exhibit 3 - NOT OFFERED
- d. Applicant's Exhibit 4 - Site Plan
- e. Applicant's Exhibit 5 - Plat of pivot locations
- f. Applicant's Exhibit 6 - Letter dated May 18, 1999 to Bill Crafton from Marv Patten and a letter dated May 14, 1999 to Mike Hensley from Jenifer Beddoes with an Animal Waste Management Planning Worksheet
- g. Applicant's Exhibit 7 - Inventory and Evaluation of Animal Waste Lagoon Sites by NRCS
- h. Applicant's Exhibit 8 - Estimating Runoff and Peak Discharge
- i. Applicant's Exhibit 9 - Well Driller Report
- j. Applicant's Exhibit 10 - Water Balance Worksheet by Brockway Engineering
- k. Applicant's Exhibit 11 - Well Interference Analysis - Salmon Falls Land and Livestock Dairy
- l. Applicant's Exhibit 12 - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet
- m. Applicant's Exhibit 13 - Dairy Water Use Worksheet
- n. Applicant's Exhibit 14 - Letter dated March 19, 1999, to Bill Crafton from

Dave Burgess

- o. Applicant's Exhibit 15 - Letter to Twin Falls County Planning and Zoning from Granville Eckert
- p. Applicant's Exhibit 16 - Letter dated January 14, 2000 to Mike Henslee from Lee Taylor and letter dated June 5, 2000 to Mike Henslee from Lee Taylor
- q. Applicant's Exhibit 17 - Twin Falls County Code - Title 8, Zoning Ordinance, Chapter 6, Districts or Zones, Article A -Agricultural Range Preservation Zone, Article B - Agricultural Zone and Article C - Livestock Confinement Operations
- r. Applicant's Exhibit 18 - Letter dated January 14, 2000 to Mike Henslee from Lee Taylor (Note: This letter is also part of Exhibit 17)
- s. Applicant's Exhibit 19 - Letter dated June 5, 2000 to Mike Henslee from Lee Taylor approving applicant's LCO application (Note: This letter is part of Exhibit 17)
- t. Applicant's Exhibit 20 - Wastewater Tech. Sheet/Enz-A-Bac
- u. Applicant's Exhibit 21 - Letter dated December 22, 1999 to Mike Hensley from Jenifer Beddoes and Animal Waste Management Planning Worksheet
- v. Applicant's Exhibit 22 - Dairies: Water Use Worksheet
- w. Applicant's Exhibit 23 - Amended Notice of Claim to a Water Right
- x. Applicant's Exhibit 24 - Enlarged USGS quadrangle sheet showing the dairy site and irrigation pivot locations
- y. Protestant's Exhibit A - Bell Rapids Industrial Dairy Application Denial and CAFO Moratorium Petition (13 pages)
- z. Protestant's Exhibit B - Letter dated September 13, 1999, to the Twin Falls Planning and Zoning Board from the Citizens of Owyhee County Organized Association
- aa. Protestant's Exhibit C-1 - Letter dated September 13, 2000 from Candy Hansing
- ab. Protestant's Exhibit D - Color photograph – size 8 1/2" x 11"
- ac. Protestant's Exhibit E - Photograph
- ad. Protestant's Exhibit F - Photograph
- ae. Protestant's Exhibit G - Photograph
- af. Protestant's Exhibit H - Photograph of Section 23, T8S, R12E, B.M. - 1994
- ag. Protestant's Exhibit I - Photograph of Section 23, T8S, R12E, B.M. - 1995
- ah. Protestant's Exhibit J - Photograph of Section 23, T8S, R12E, B.M. - 1996 (Reversed)
- ai. Protestant's Exhibit K - Photograph of Section 23, T8S, R12E, B.M. - 1997
- aj. Protestant's Exhibit L - Photograph of Section 23, T8S, R12E, B.M. - 1998
- ak. Protestant's Exhibit M - Photograph of Section 23, T8S, R12E, B.M. – 1999
- al. Protestant's Exhibit N - Copy of orthophoto sheet showing SE1/4 Section 23, T8S, R12E, B.M.
- am. Protestant's Exhibit O - Aerial photograph of Sections 23 and 24, T8S, R12E, B.M.

8. The location of the dairy site ("site") is zoned "Agricultural Range Preservation." The Twin Falls County zoning ordinance provides that an application for a

Livestock Confinement Operation ("LCO") in this zone in excess of 3,000 animal units shall be reviewed by the Twin Falls County Planning and Zoning Commission ("PZC").

9. The applicant purchased the 80 acres from which the applicant proposes to transfer water in October 1996. The protestant submitted photographic evidence intended to demonstrate that the tract was not irrigated and water right no. 47-02386A was not used from 1994 to July 2000. (See Protestant's Exhibits H through M). In July 2000, the applicant started using three wheel lines on the property to replace forage burned by wildfires on other land grazed by the applicant's cattle. The 80-acre tract has not been enrolled in the Conservation Reserve Program ("CRP"). (See Protestant's Exhibit C-1).

10. The applicant originally proposed to develop a 3,300 milking cow dairy in a free stall facility, but the proposal was denied by the PZC after conducting public hearings. The applicant subsequently submitted an amended LCO application reducing the size of the proposed dairy operation to 2,142 dairy cows for a total of about 3,000 animal units. Twin Falls County defines a dairy cow as equivalent to 1.4 animal units. The downsized application did not require public hearings or review by the PZC and was ministerially approved by the administrator of the PZC staff without public input on location.

11. The proposed dairy site is located south and west of the Snake River on a bluff or plateau adjacent to the Snake River. The Thousand Springs area is across the Snake River from the site. The general area of the dairy site is not irrigated land and is seeded to crested wheat grass to provide winter time dry land grazing for beef cattle. The applicant proposes a "flush system" of cleaning solid waste from alleys and to land apply liquid waste on about 1,560 acres using a combination of 13 irrigation pivots and hand line irrigated areas near the dairy site. The required liquid waste storage volume for the downsized dairy is about 47 AF. To minimize runoff onto land in the valley adjacent to the Snake River, the applicant proposes to construct small dams and dikes in some of the drainages tributary to the Snake River. The applicant plans to construct an emergency containment berm around the dairy site to assure that spills from the dairy do not leave the dairy site.

12. The applicant is required by the Idaho Department of Agriculture to design and construct ponds to store liquid waste from the dairy to withstand the 25 year storm or flood event. The applicant proposes to construct storage facilities sized for the original dairy, which will have a larger storage capacity than required for the downsized dairy.

13. The protestant believes that land application of dairy waste on the plateau will result in surface runoff of applied waste down gulleys and swales onto the valley floor and into the Snake River. The gulleys and swales leading down gradient from the proposed dairy site are physically located such that either solid or liquid dairy waste can reach recreation sites in the Thousand Springs area and the Snake River either during significant runoff events or as a result of impoundment failures.

14. A witness for the protestant testified that during a past thunderstorm, water discharged from the applicant's property down natural draws onto the witness's property

located adjacent to the Snake River causing damage to the property. The discharged water also reached the Snake River.

15. The prevailing wind in the Thousand Springs area blows from the west, although the wind from time to time can blow from any direction. The diurnal pattern of air movement is to flow down slope as the air cools in the evening and night time.

16. The Thousand Springs area is generally recognized as a recreation area due to the aesthetic beauty of the area and recreational opportunities that include camping, boating, sight seeing and fishing. The Highway 30 State Scenic Byway traverses the general area. In addition, there are homes and businesses close to the proposed dairy site. Businesses include Sligar's Hot Springs, Miracle Hot Springs and Banbury Hot Springs to the south, all of which have RV campgrounds and tourist facilities. The area is well known statewide as a tourist attraction due to the many springs discharging water from the basalt canyon walls on the east side of the Snake River. The springs are the location of the discharge point of ground water from the Snake Plain Aquifer. Aesthetics and recreational opportunities available in the Thousand Springs area are unique and are limited in extent in the area.

17. The protestant and public witnesses expressed concerns about the proposed dairy and irrigation pivots proposed for land disposal of liquid waste, since some of the pivots are located within a mile or less from the Snake River and the Thousand Springs recreational area. Concerns expressed include noxious odors from the dairy site, negative impact on the aesthetics and outdoor recreation activities of the area. Other concerns expressed included decreased real estate value of private property in the area, potential surface and ground water contamination, increased truck traffic, potential health hazards, reduced tourism, and decreased ground water levels.

18. Jack Thornborrow, the senior member of the Twin Falls County Planning and Zoning Commission, testified that the primary reason for denial of the applicant's first LCO application by the PZC was the overwhelming public opposition against the proposed dairy.

19. Water rights with priority dates later than the right sought for transfer have been established northerly, southerly and easterly of the proposed dairy site for domestic, commercial, irrigation and stockwater purposes and are located within approximately one mile of the proposed dairy site. Several witnesses expressed concern that a new well at the proposed dairy site pumping up to 580 gallons per minute would diminish the amount of water available for their domestic water rights.

20. The proposed dairy has generated substantial public opposition to the siting of the dairy because of its location near the Thousand Springs area. The second hearing conducted on September 19, 2000, was attended by over ninety (90) people. Thirteen (13) people gave public interest testimony at the hearing opposing the dairy. The majority of attending parties were not allowed to testify as public witnesses, since they had not provided notice to present testimony as required by IDAPA 37.01.01355 (Rule of

Procedure 355).

21. While the number of people showing up at a hearing, the number of letters or the number of public comments associated with a proposal, in themselves, do not dictate whether a proposal should be approved or denied, the numbers clearly show that residents in the Thousand Springs area are interested and concerned that the proposed dairy will adversely affect the quality of life in their community.

22. The protestant introduced Exhibits H through M in an attempt to show through aerial photography that water was not used for more than five (5) consecutive years on the 80-acre tract from which the applicant proposes to transfer the water right. The protestant additionally sought to show that the holder of the water right did not take actions to protect the right from forfeiture during the alleged period of non-use, such as enrolling the land in a federal cropland set-aside program or filing an application for extension of time to avoid forfeiture.

23. The protestant, however, did not establish by testimony or other evidence that the photographic exhibits do, in fact, demonstrate that water was not used beneficially on the subject lands during five consecutive years. For example, the protestant did not provide evidence establishing the date, or even the season of the year, that each of the photographs depicts. Exhibits H through M, therefore, do not provide clear and convincing evidence on the forfeiture issue. The failure to have enrolled the lands in a federal cropland set-aside program or to have filed an extension of time to avoid forfeiture is significant only if it is determined that the present record contains clear and convincing evidence that the water right was not beneficially used for five consecutive years.

24. The location of the applicant's dairy site is a problem. While the applicant has complied with the requirements of Twin Falls County in obtaining an LCO permit for a reduced dairy operation, the same concerns relative to local public interest exist for the downsized dairy as for the larger dairy which was first proposed. The administrator of the PZC followed county procedures that constrained him from considering the effects of the proposed dairy on the local public interest. These concerns remain to be addressed.

25. Most dairies and land to which either solid or liquid dairy waste is applied at times generate odors. In several dairy operations in the Magic Valley area, waste holding ponds have discharged liquid dairy waste to canals and natural water bodies resulting in contamination.

26. Although the amount of odor and the effect of a dairy operation can not be fully determined until the dairy is actually constructed and in operation, there will be objectionable odors and, at times, discharge of contaminated water from the applicant's dairy site. The applicant has not provided assurance that there will not be objectionable odors or discharges from the site even though the applicant has met the minimum design standards and has stated that he will take steps to prevent odors and discharges of polluted water.

27. While specifics of financial benefits as compared to financial detriment could not be provided at the hearings by either the applicant or protestant, on balance, it is the determination of the hearing officer that the negative impact on the businesses, recreational ventures and home owners of having to deal with odors and dairy related activities in the area outweighs the private benefit of the proposed dairy operation. The applicant has not met its burden to show that the proposed dairy at the location proposed is desirable or is in the local public interest.

28. The Department should not approve the transfer of a water right that will have a severely negative impact upon "the affairs of the people in the area directly affected by the proposed use" and 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. Section 42-222(2), Idaho Code, provides in pertinent part as follows:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

3. 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."

4. The director of the Department has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. See Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 389, 647 P.2d 1256 (1982).

5. Idaho law provides that a water right shall be forfeited by a failure for the term of five years to apply it to the beneficial use for which it was appropriated and thereafter the

right to use the water shall revert to the state and be again subject to appropriation. I.C. Section 42-222(2); Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981).

6. Clear and convincing proof is required to support forfeiture of a water right. See Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).

7. 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.

8. 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.

9. The applicant has the ultimate burden of persuasion for the five decision criteria for approval of a transfer under section 42-222, Idaho Code. The applicant, in this case, has failed to satisfy its burden of establishing that approval of the transfer of a water right for use in a dairy at a proposed location in close proximity to the Thousand Springs area is in the local public interest as defined in section 42-203A(5), Idaho Code.

10. The protestant bears the burden of proof on the forfeiture issue and has not shown by clear and convincing evidence that the water right sought for transfer has been forfeited through 5 or more consecutive years of non-use.

11. Approval of the application for transfer which proposes stockwater and commercial uses of water in the proposed dairy is not in the local public interest.

12. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5464 in the name of Salmon Falls Land & Livestock Company is **DENIED**.

Signed this _____ day of March, 2001.

L. GLEN SAXTON
Hearing Officer