

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

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 69051 IN THE	)	<b>AMENDED</b>
NAME OF JOHN AND AGNES	)	<b>PRELIMINARY ORDER</b>
SCHILDER	)	
_____	)	

On September 27, 2001, the hearing officer for the Idaho Department of Water Resources ("Department") issued a Preliminary Order in connection with the above captioned matter. On October 11, 2001, the applicant filed a Petition for Reconsideration ("petition") seeking to correct typographical errors in the Preliminary Order. The hearing officer responds to the petition as follows:

Finding of Fact 14 in the Preliminary Order is correct and should not be changed. As explanation, water right no. 47-04163A describes 22 irrigated acres within the NWSE Section 21 and 22 irrigated acres within the SWSE Section 21. Part B of the application for transfer shows that 3 acres within the SWSE Section 21 will continue to be irrigated. Hence 19 acres within the SWSE Section 21 will no longer be irrigated as described in Finding of Fact 14.

Condition of Approval 3 in the order section of the Preliminary Order is correct and should not be changed. See the previous paragraph for an explanation.

Condition of Approval 6 in the order section of the Preliminary Order should be changed to show the location of the points of diversion as being within the SWSE Section 21, T10S, R14E, B.M. as shown in the petition.

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 May 2, 1980, James Lunte filed Claim to a Water Right No. **47-04163** ("claim") with the Department as follows:

Source:	Ground water
Priority:	1948
Rate of diversion:	2.0 cubic feet per second ("cfs")
Point of diversion:	SW1/4SE1/4 Section 21, T10S, R14E, B.M., Twin Falls County
Use:	Irrigation
Season of use:	April 1 to September 30

Place of use: 160 acres in E1/2SW1/4 and W1/2SE1/4 Section 21, T10S, R14E, B.M., Twin Falls County

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

2. On July 1, 1996, the Department approved Transfer No. **4505** authorizing a change to claim no. 47-04163 as follows:

Identification No: **47-04163B**  
Source: Ground water  
Priority: May 1, 1954\*  
Rate of diversion: 0.07 cfs / 35 Acre feet  
Points of diversion: SESW, SWSE Section 21, T10S, R14E, B.M.  
Use: Stockwater and commercial  
Season of use: Year-round  
Place of use: SWSE Section 21, T10S, R14E, B.M.  
Comment: \*The priority is based on the date the well was drilled

3. The remaining part of claim no. 47-04163 is described as follows:

Identification No: **47-04163A**  
Source: Ground water  
Priority: May 1, 1954  
Rate of diversion: 1.5 cfs / 58 Acre feet  
Point of diversion: SWSW Section 21, T10S, R14E, B.M.  
Use: Irrigation  
Season of use: April 1 to September 30  
Place of use: 123 acres in parts of Section 21, T10S, R14E, B.M.

4. On April 18, 2001, John and Agnes Schilder ("applicant") filed Application for Transfer No. **69051** ("application" or "T69051") with the Department proposing to change a portion of right 47-04163A for use in an existing dairy as follows:

Identification No: 47-16785  
Source: Ground water  
Priority: May 1, 1954  
Rate of diversion: 0.3 cfs / 34.5 Acre feet\*  
Point of diversion: SWSE Section 21, T10S, R14E, B.M.  
Use: Stockwater and commercial for 250 dairy cattle  
Season of use: Year-round  
Place of use: Section 21, T10S, R14E, B.M.  
Remarks: The applicant plans to continue to irrigate 3 acres of the 123 acres authorized for irrigation by water right no. 47-04163A.

\*The rate and volume are a proportionate share of the use

determined through investigation.

5. The Department published notice of the application that was subsequently protested by Bill Chisholm ("protestant").

6. On August 23, 2001, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. The protestant was present and represented himself.

7. Issues raised by the protestant in connection with the application are as follows:

- a. The proposed changes will injure other water rights.
- b. The proposed changes constitute an enlargement in use of the original right.
- c. The proposed changes are not in the local public interest.

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

- a. Applicant's Exhibit 1 - Proposed Site Improvements for Schilder Dairy
- b. Applicant's Exhibit 2 - Well Interference Analysis dated April 16, 2001
- c. Applicant's Exhibit 3 - Analysis of Water Right Transfer to Dairy by Brockway Engineering
- d. Applicant's Exhibit 4 - Dairy Waste System Calculations dated January 13, 1999 by Robert Ohlensehlen
- e. Applicant's Exhibit 5 - Letter dated February 10, 1999 to John Schilder Dairy from Barton E. Sonner and letter dated January 21, 1999 to John Schilder from Stan Hays III
- f. Applicant's Exhibit 6 - John Schilder Dairy - Economic Impact
- g. Applicant's Exhibit 7 - Letters to Twin Falls Planning and Zoning Administration
- h. Applicant's Exhibit 8 - Letters to Twin Falls Planning and Zoning Administration
- i. Applicant's Exhibit 9 - Letter dated June 23, 2000 to John Schilder from Lee Taylor of Twin Falls Planning and Zoning Administration
- j. Applicant's Exhibit 10 - Nutrient Management Plan for Schilder Dairy by Marsha Neibling. November 19, 1999
- k. Applicant's Exhibit 11 - Construction Inspection Report dated February 22, 1999
- l. Applicant's Exhibit 12 - A transparent overlay showing the location of a tile drain and the Herman Tunnel
- m. Protestant's Exhibit A - Dairy List Address
- n. Protestant's Exhibit B - Letter dated August 10, 2000 to Lee Halper from Gary Bahr
- o. Protestant's Exhibit C - Aerial Photograph
- p. Protestant's Exhibit D - Photographs
- q. Protestant's Exhibit E - Schematic map of seep tunnels

9. The applicant has an existing dairy operation for about 625 head of milking cattle and 150 head of dry cattle and farms 110 to 115 acres of the 150 acres the applicant owns.

10. The applicant plans to increase the dairy herd to 1,900 cows, 1,500 of which will be milking cows and 400 of which will be dry. In connection with the planned dairy enlargement, the applicant plans to construct 4 more corrals, 2 more lagoons and a waste separator. Liquid waste impounded in the lagoons will not be land applied, since the lagoons are designed to evaporate all the water in the ponds. The applicant plans to save water by not washing the cows with sprinklers in the holding pens and by not flushing alleys. The applicant plans to harrow the corrals every day to minimize flies and odors.

11. A consultant prepared a Nutrient Management Plan for the proposed dairy enlargement, which plan, has been approved by the Idaho Department of Agriculture (See Applicant's Exhibit 10).

12. On June 23, 2000, the Twin Falls County Planning and Zoning administrator approved a Livestock Confinement Operation ("LCO") permit for the applicant authorizing up to 2,660 animal units. (See Applicant's Exhibit 9).

13. The rate of diversion, consumptive use and total volume of water diverted under the application will not be larger after the transfer than before the transfer. (See Applicant's Exhibit 3).

14. The applicant proposes to cease using ground water for irrigating 120 acres located as follows:

Section 21, T10S, R14E, B.M.

NESW	39 acres
SESW	37
NESE	1
NWSE	22
SWSE	19
SESE	<u>2</u>
TOTAL	120 acres

15. Using an average annual pumping rate of 0.06 cfs, which is the continuous diversion rate to provide the required annual volume of water, and a pumping period of 80 days, the estimated drawdown in a well 100 feet distant from the dairy wells is about 0.02 feet. Using a maximum pumping rate of 0.30 cfs for 12 days, the estimated drawdown in a well 100 feet distant from the dairy wells is about 0.10 feet. (See Applicant's exhibit 2).

16. There are five (5) IDWR and ISDA monitoring wells in the vicinity of the Schilder dairy. The locations of the wells and the measured concentration of nitrate are described below.

a) A well located about 1 mile south of the dairy shows nitrate concentrations as follows:

1992 - 4.10 mg/l  
1996 - 5.40  
2000 - 5.61

b) A well located about 1.3 miles southeast of the dairy shows nitrate concentrations as follows:

1998 - 4.00 mg/l  
1999 - 5.33  
2000 - 4.25

c) A well located about 1.0 mile east of the dairy shows nitrate concentrations as follows:

1998 - 6.30 mg/l  
1999 - 7.53  
2000 - 6.46

d) A well located about 1.3 miles northeast of the dairy shows nitrate concentrations as follows:

1998 - 5.60 mg/l  
1999 - 6.56  
2000 - 5.75

e) A well located about 2.3 miles northeast of the dairy shows nitrate concentrations as follows:

1998 - 4.50 mg/l  
1999 - 5.92  
2000 - 5.18

17. The protestant, who lives approximately 15 miles from the dairy site, is concerned about the number of cows in the general vicinity of the applicant's dairy and believes there is a potential for the dairy operation to adversely affect water quality and air quality. The protestant's position is that the application is not in the local public interest, since adding dairy cattle to the applicant's dairy contributes to a cumulative adverse effect of dairies on air and water quality in the Magic Valley area.

18. The protestant sought to show that existing water table lowering structures, commonly referred to as "seepage tunnels" and "tile drains", might render the applicant's dairy site undesirable for an enlarged operation. There are, however, no seepage tunnels or tile drains located on the applicant's property. The protestant did not overcome the applicant's showing that water on the applicant's property or water potentially leaving the applicant's property would not enter seepage tunnels, tile drains or a surface water source.

19. The protestant had no specific evidence to show that the application will injure other water rights, will enlarge the use of water or will be inconsistent with the conservation of water resources within the state of Idaho.

## **ANALYSIS**

The applicant proposes to change the nature of use of a supplemental ground water right that has been used by the applicant's predecessor on the applicant's land. The rate and volume of water available for change under this approval is less than the usual duty of water per acre, since the right is supplemental to surface irrigation and has not historically provided a full supply of ground water for irrigation.

The ground water in the vicinity of the applicant's dairy has been impacted in the past by nitrates. All of the sampling results from five (5) nearby monitoring wells had nitrate concentrations of 4 milligrams per liter ("mg/l") or higher. The highest concentration was 7.53 mg/l which is below the primary Maximum Contaminant Level of 10 mg/l as established by the EPA for nitrate for public water supplies. The source of the existing nitrates has not been shown to be attributable to dairy operations.

The zoning authority for Twin Falls County has granted approval for the planned dairy enlargement and the Idaho Department of Agriculture has approved a nutrient management plan for the planned dairy enlargement. The department's approval of the application will not violate water quality standards of the Department of Environmental Quality.

## **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 to show that the proposed change will not injure other water rights, that it will not constitute an

enlargement in use and will be consistent with the conservation of the water within 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 protestant did not overcome the applicant's prima facie showing that the application complies with the evaluation criteria described in Section 42-222, Idaho Code.
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. The proposed changes are in the local public interest.
9. The proposed changes are consistent with 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. 69051 in the name of John and Agnes Schilder is **APPROVED** subject to the following conditions:

1. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.
2. Water diverted under this approval shall not be used for flushing alleys or wasteways.
3. One hundred twenty (120) acres described below are no longer authorized for irrigation under Water Right No. 47-04163A.

Section 21, T10S, R14E, B.M.

NESW          39 acres

SESW	37
NESE	1
NWSE	22
SWSE	19
SESE	<u>2</u>
	120 acres

4. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
5. Commercial use is for a dairy located in the E1/2SW and SE Section 21, T10S, R14E, B.M.
6. Two (2) points of diversion are located within the SWSE Section 21, T10S, R14E, B.M.
7. The dairy operation authorized under this approval shall comply with applicable county zoning and use ordinances and with applicable water quality standards of the Department of Environmental Quality.
8. The total instantaneous diversion of water from all points of diversion under Right 47-16785 shall not exceed 0.30 cfs, nor total combined annual volume of 34.5 AF.
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 the water right(s) in the ongoing Snake River Basin Adjudication.

Signed this \_18th day of October, 2001.

\_\_\_\_\_-Signed-\_\_\_\_\_  
L. GLEN SAXTON, P.E.  
Hearing Officer