

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

IN THE MATTER OF APPLICATION FOR)	<u>AMENDED</u>
TRANSFER NO. 79380 IN THE NAME OF)	PRELIMINARY ORDER
<u>THOMAS AND DOROTHY LENO</u>)	APPROVING TRANSFER

On May 20, 2014, Thomas and Dorothy Leno filed Application for Transfer No. 79380 with the Idaho Department of Water Resources ("Department"). The application was advertised to the public beginning on July 3, 2014. Protests were filed by Jimmie L. Conder, Michael and Jana Humphries, William D. Hamby, Eric Parrott, Lois M. Rice, Leslie Ellsworth (for herself and 9 other individuals), Pam Ritter, Ed Smith, Victoria Henson, Scott Houtz, Delea Miller (Andrew), Jeanie McCreary, Barbara and Lynn Stephens, Margaret Winsryg and Leroy Elliott, Elizabeth (Betty) Slifer, and Martin F. Hackard.

A pre-hearing conference was conducted on November 19, 2014. The parties were unable to resolve the issues of protest during the conference and requested that a hearing be held to decide the contested case.

On January 20, 2015, Cedar Ridge Dairy, LLC ("Cedar Ridge") filed a motion to intervene in support of the application. The motion to intervene was granted on March 5, 2015 based on the fact that Cedar Ridge was represented by the same attorney as Thomas and Dorothy Leno and agreed to rely on the evidence presented by the Lenos.

An administrative hearing was conducted on March 18 and 19, 2015 in Twin Falls, Idaho. Thomas and Dorothy Leno and Cedar Ridge were represented by attorney Travis Thompson. Margaret Winsryg and Leroy Elliot were represented by attorney David Coleman. The hearing was held in conjunction with hearings for Application for Transfer Nos. 79357, 79384 and 79466. Separate orders will be issued for Applications 79357, 79384 and 79466. After carefully considering the evidence in the administrative record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Transfer 79380 proposes to move a split portion (35.3 acres, 0.42 cfs and 105.9 acre-feet) of water right 47-17589 from property near the Idaho-Nevada border to a dairy ("Dairy #3") located north of Berger, Idaho. Exs. 1 and 16. Thomas and Dorothy Leno are the current owners of record for water right 47-17589. Ex. 2. Thomas Leno ("Leno") signed the application.

2. Dorothy Leno passed away in August 2011. *See* Attachments to Application 79380. Leno's attorney, Travis Thompson, provided an order from the Idaho Fifth Judicial District Court settling the estate of Dorothy Leno and confirming that the entire estate was distributed to Leno.

3. In July 2014, Leno sold the property at the existing place of use for water right 47-17589 to Y-3 II (an Idaho general partnership), but reserved the portion of water right 47-17589 associated with transfer applications 79357, 79380 and 79384. *See* Attachments to Application 79380.

4. At the time Application 79380 was filed, Dairy #3 was owned by Henry Calvin Hafliger Jr. ("Hafliger") and L&S Land Holdings, LLC, each owning an undivided ½ interest in the property. Attachment to Application 79380. L&S Land Holdings, through its attorney Charles Wright, provided a letter to the Department consenting to the changes proposed in Application 79380. *Id.*

5. Application 79380 included a Contract of Agreement between Hafliger and Leno stating that Hafliger would allow Leno to move 0.42 cfs and 66.0 acre-feet of water right 47-17589 to Dairy #3. Ex. 1, page 3. The agreement states that ownership of the split portion of the water right will remain in the name of Thomas and Dorothy Leno. *Id.*

6. In June 2014, Dairy #3 was sold by Hafliger and L&S Land Holdings, LLC to Four Sisters Dairy, LLC ("Four Sisters"). The proposed place of use and points of diversion at Dairy #3 are on property now owned by Four Sisters. *See* Application for Transfer 79466 for Water Right 47-2306B. Hafliger is a member of and registered agent for Four Sisters. *Id.*

7. On May 16, 2014, Leno and Cedar Ridge signed a Water Right Purchase and Sale Agreement for a portion (1.10 cfs, 279.6 afa, 93.2 acres) of water right 47-17589. *See* Attachment to Application 79380. The portion of water right 47-17589 being sold to Cedar Ridge was divided into three parts, which are the water rights involved in transfer applications 79357, 79380 and 79384. *Id.*

8. On June 1, 2010, a partial decree was issued for water right 47-7106 in the Snake River Basin Adjudication ("SRBA"). Ex. 2. Water right 47-7106 bore a priority date of December 25, 1970, authorized the diversion of 1.85 cfs and an annual diversion volume of 465 acre-feet for the irrigation of 155 acres. *Id.*

9. In three previous transfers approved by the Department (77406, 77669 and 78127), portions of water right 47-7106 were moved to other locations. Brockway Report, App. C. Water right 47-7106 was split into four parts as a result of the previous transfers. The portion of water right 47-7106 remaining at the original place of use was assigned water right number 47-17589.

10. An analysis was provided with the three previous transfers, which calculated the number of acres irrigated with ground water at the original place of use for water right 47-7106. Brockway Report, pages 3-6; *Historical Water Use Analysis on Parent Water Right 47-7106* (Attachment to Application 79380). That analysis shows that 145.7 acres of the 155 acres described in water right 47-7106 were primarily irrigated with ground water. *Id.* The 35.3 acres proposed to be dried up

and moved in the pending application are part of the 145.7 acres considered primary ground water acres. *Id.*

11. As it currently exists, water right 47-17589 authorizes the diversion of 1.21 cfs and an annual diversion volume of 307.5 acre-feet for the irrigation of 102.5 acres. The split portion of water right 47-17589 associated with Application 79380 authorizes the diversion of 0.42 cfs and an annual diversion volume of 105.9 acre-feet for the irrigation of 35.3 acres.

12. Application 79380 proposes to change the nature of use of the split portion of water right 47-17589 from irrigation use to stockwater and commercial use. Leno proposes to limit the changed portion of the water right to an annual diversion volume of 66.0 acre-feet, the consumptive portion of the original water right.

13. The existing place of use for water right 47-17589 is located in Sections 20 and 29, T16S, R16E. The existing point of diversion is located in Section 20, T16S, R16E.

14. The existing place of use for water right 47-17589 is also irrigated with surface water rights 47-2118, 47-2048, 47-14285 and 47-7287 from Mule Creek. Ex. 13. Leno proposes to abandon or relinquish the portions of the Mule Creek rights associated with the 35.3 acres proposed to be transferred. *See* Attachments to Application 79380. Leno has demonstrated continued ownership of the portions of water rights 47-2118, 47-2048, 47-14285 and 47-7287 that are proposed to be relinquished if Application 79380 is approved. *Id.*

15. There is one existing ground water right used for commercial and stockwater purposes at Dairy #3. Water right 47-2306B bears a priority date of January 31, 1957 and authorizes a diversion rate of 0.59 cfs and an annual diversion volume of 250 acre-feet. Four Sisters is the current owner of record for water right 47-2306B.

16. Water right 47-2306B describes two authorized points of diversion: two existing ground water wells located 25 feet apart in the SENE of Section 6, T11S, R16E. Visser Testimony; Ex. 4. Application for Transfer 79466, filed shortly after Application 79380, proposes to add a third point of diversion (a new ground water well) to water right 47-2306B. The three points of diversion described in Application 79466 are the same three points of diversion described in Application 79380.

17. Application 79466 was advertised to the public and was protested. An administrative hearing for Application 79466 was held in conjunction with the hearing for this contested case.

18. The existing wells at Dairy #3 were drilled in April 1999. Ex. 6. Both wells were drilled to a depth of 355 feet and had a static water level of 262 feet below land surface at the time of completion. *Id.*

19. In February 2005, one of the existing wells at Dairy #3 (the north well) was deepened to 450 feet. Ex. 7. The static water level was measured at 262 feet below land surface at that time. *Id.* In January 2014, the static water level of one of the existing wells at Dairy #3 was measured at 288 feet below land surface. Brockway Report, App. D; Visser Testimony.

20. Comparing a small set of depth to water measurements in an aquifer with seasonal fluctuations in water levels may not provide an accurate picture of increases or declines in aquifer levels. Squires Testimony. It is difficult to know whether a single water level measurement represents the maximum or minimum water level for that particular year. *Id.* There is no information in the record about whether the measured well or the other well at Dairy #3 were pumping at the time of the 2005 or 2013 depth measurements.

21. Ryan Visser, manager for Cedar Ridge, testified that ground water diverted at Dairy #3 is used for cleaning milk pipelines and tanks, cleaning equipment, cleaning floors, cooling dairy cows, providing water to cows, and cooling milk. Water is piped from the existing wells to the milking parlor, where it is used to cool milk and clean equipment. Uncontaminated water is then piped out of the parlor to provide drinking water for the cows and cool the cows.

22. A large portion of the 66.0 acre-feet proposed to be transferred to Dairy #3 would be used to cool dairy cows during the summer months. Visser Testimony. Visser testified that Dairy #3 will employ a “drench system” in the feed line and holding pens where the dairy cows are soaked with water and then cooled as water evaporates off of the animals. *Id.*

23. Visser provided a calculation sheet showing that as much as 63.1 acre-feet per year may be needed for the drench system. Ex. 13. According to Visser’s calculations, the drench system water demand will occur between the months of May and September. *Id.* Visser testified that the additional 0.42 cfs and 66.0 acre-feet proposed in the pending application are primarily needed to satisfy peak demands during the summer months. Visser Testimony.

24. The proposed points of diversion are located approximately 34 miles north of the existing point of diversion for water right 47-17589. Ex. 16.

25. The existing point of diversion and proposed points of diversion are located within Administrative Basin 47 (“Basin 47”). On February 6, 2014, the SRBA Court issued General Provisions for Basin 47. Ex. 3. The document included the following statement: “Except as otherwise specified above [nothing is specified], all other water rights within Basin 47 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.” *Id.*

26. The protestants in this contested case divert ground water from the local aquifer for domestic and stockwater purposes. Protestant Eric Parrott diverts water from a domestic well located 1.7 miles south of the proposed points of diversion. Brockway Report, pages 20-21. Of all of the protestants’ wells, the Parrott well is the closest to the proposed points of diversion. *Id.*

27. There are homes and domestic wells located closer to the proposed points of diversion than the protestants’ wells (approximately $\frac{3}{4}$ mile west of the proposed points of diversion). *See* Ex. 22. The owners of these domestic wells did not protest the pending application.

28. The term “Salmon Tract” refers to an area south of Twin Falls that lies within the service area for the Salmon River Canal Company. Berger, Idaho is located in the north central part of the Salmon Tract.

29. The productive aquifer in the Berger area is primarily comprised of basalt. Bonnichsen Report, page 1; Bonnichsen Rebuttal Report, pages 3-4. Most of the domestic, irrigation and stockwater wells in the area divert water from the basalt aquifer. *Id.* The basalt aquifer in the Berger area is underlain by geologic formations that do not readily transmit water. *Id.* Hydraulic conductivity and transmissivity values can vary greatly throughout the Salmon Tract aquifer. C. Brockway Testimony.

30. “[T]he elevation of the bottom of the basalt zone in the Berger area may very locally by several hundred feet.” Bonnichsen Report, page 3. “[T]he bottom of the basalt zone represents the bottom of the aquifer from which sustained water volumes can be obtained.” *Id.* at 4. Wells logs in the record suggest that the saturated zone of the aquifer is between 100 and 250 feet thick in the Berger area. *Id.*

31. Cedar Ridge hired Brockway Engineering, PLLC (“Brockway”) to evaluate the effects of diverting ground water as proposed in Application 79380. Brockway prepared two Winflow models to estimate the drawdown impacts resulting from pumping an additional 66.0 acre-feet from the Dairy #3 wells (including the proposed new well) during the irrigation season. The Winflow models relied on the Theis equation to estimate drawdown and evaluate impacts after 20 years of pumping. Exs. 14-17; Sullivan Testimony.

32. The first Brockway model incorporated the following assumed aquifer parameters:

Ground water gradient: 50 feet/mile
Saturated thickness: 435 feet (265 feet to 700 feet below land surface)
Hydraulic conductivity: 55 feet/day
Storativity: 0.12

Brockway Report, page 19.

33. The conductivity and storativity values used by Brockway were taken from a regional evaluation of the Salmon Tract aquifer completed by Cosgrove, et al. in the late 1990s. Brockway Report, pages 19 and 29.

34. The first Brockway model predicted a drawdown of 1.2 inches at the Parrott well, located 1.7 miles south of the proposed points of diversion. Brockway Report, page 23. Brockway did not estimate the drawdown for the domestic wells (not owned by any of the protestants) located closer to the proposed points of diversion.

35. Brockway decided to prepare a second Winflow model to estimate the drawdown impacts at the protestants’ wells. C. Brockway Testimony; Brockway Report, pages 23-25. In the second model, Brockway reduced the assumed hydraulic conductivity value to 15.3 feet/day. *Id.*

36. Brockway derived the hydraulic conductivity value of 15.3 feet/day through an analysis of short term pump tests described in well driller reports for ten wells located within five miles of the proposed points of diversion. Brockway Report, pages 23-25. The average hydraulic conductivity calculated for the ten wells is 15.3 feet/day. *Id.*

37. One of the well driller reports used in the Brockway analysis is for a domestic well (“Well #5”) located right next to the Dairy #3 property in the NWNE of Section 6, T11S, R16E. Brockway Report, page 24; Ex. 22. The calculated hydraulic conductivity for Well #5 is only 0.4 feet/day. Brockway Report, page 24.

38. The second Brockway model predicted a drawdown of about 2.8 inches at the Parrott well after 20 years of pumping an additional 66.0 acre-feet per year from the proposed points of diversion. Brockway did not estimate the drawdown for the domestic wells (not owned by any of the protestants) located closer to the proposed points of diversion.

39. Twin Falls Canal Company (“TFCC”) operates a High Line Canal which crosses through the Berger area from east to west approximately $\frac{3}{4}$ mile north of the proposed point of diversion. See Ex. 22. The TFCC Low Line Canal is located a few miles farther north. *Id.* Seepage from these large canals provides elevated aquifer levels resulting in smaller depth-to-water levels to the north of the Dairy #3 wells. Brockway Report, page 18. The static water levels in the Berger area fluctuate as much as 10 feet throughout the year due to seepage from the surface water canals and seepage from irrigation. Squires Testimony; Ex. 20.

40. Seepage from surface canals in the area results in a seasonal increase in aquifer levels. See Ex. 20. Pumping from the proposed wells is less likely to impact nearby domestic wells during the summer months, when the aquifer levels are increased due to seepage from nearby canals.

41. Ground water at the existing point of diversion for water right 47-17589 flows south into Nevada toward Shoshone Creek, a tributary of Salmon Falls Creek. Bonnichsen Rebuttal Report, page 3; C. Brockway Testimony. “[T]here is absolutely no reason to believe that water from the [existing point of diversion] . . . would travel underground northward to become part of the groundwater system in the Berger area.” Bonnichsen Report, page 5.

42. “Shoshone Creek joins Salmon Falls Creek about 3.7 miles south of the Idaho-Nevada border.” Bonnichsen Rebuttal Report, page 2. Ground water and surface water in this area leaves the valley as surface water in Salmon Falls Creek near Jackpot, Nevada. Bonnichsen Report. “[T]here does not appear to be any sort of subterranean rock sequence through which groundwater readily could flow out of the basin [near] Jackpot [Nevada] and into the Salmon Tract area to the north.” Bonnichsen Report, page 5

43. Water flowing in Salmon Falls Creek at the Idaho-Nevada border can be captured and stored in Salmon Falls Creek Reservoir and then used for irrigation by Salmon River Canal Company. The proposed place of use for the pending application is within the service area of the Salmon River Canal Company.

44. A portion of the water diverted from Salmon Falls Creek by Salmon River Canal Company is lost to seepage in the company’s reservoir, canals and ditches. Some of this seepage occurs near the proposed wells.

45. An increase in water flow in Salmon Falls Creek at the Idaho-Nevada state line increases the water supply for Salmon River Canal Company. Additional water delivered through the Salmon River Canal Company system results in additional seepage losses from the company's canals.

46. Seepage from Salmon Falls Creek, Salmon Falls Creek Reservoir, and seepage from Salmon River Canal Company canals contributes water to the regional aquifer. Brockway Report; C. Brockway Testimony.

47. Ground water levels in the area of the proposed point of diversion are stable. Squires Testimony. Monitoring wells in the area do not show a significant decline in aquifer levels over the last 35 years. Brockway Report, pages 12-15.

ANALYSIS / CONCLUSIONS OF LAW

1. Idaho Code § 42-222 sets forth the criteria used to evaluate transfer applications:

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, 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 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

2. The applicant bears the burden of proof for all of the factors listed in Section 42-222.

Injury to Other Water Rights

3. Injury between ground water users is governed by Idaho Code § 42-226, which states: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources . . ."

4. Reasonable pumping levels have not been established in Basin 47. Therefore, the reasonableness of projected drawdown in neighboring wells resulting from a proposed transfer will be evaluated on a case-by-case basis.

5. A regional analysis of the Salmon Tract aquifer estimated the hydraulic conductivity of the aquifer to be 55 feet/day. Brockway Report, page 19. Regional estimates of conductivity do not

necessarily reflect the actual conductivity at a specific point in the aquifer. C. Brockway Testimony. There can be significant local variation depending on the homogeneity of the aquifer substrate.

6. Brockway predicts that the long-term drawdown to the protestants' wells caused by pumping an additional 66.0 acre-feet per year from the proposed wells will be less than 3 inches. Brockway makes this prediction based on the results of a Winflow model incorporating a hydraulic conductivity value of 15.3 feet/day.

7. Brockway asserts that using a hydraulic conductivity value of 15.3 feet/day is "very conservative" when compared to the published conductivity values for the Salmon Falls Tract. Brockway Report, page 24. However, the evidence in the administrative record shows that assuming a hydraulic conductivity value of 15.3 feet/day may not be conservative.

8. The calculated hydraulic conductivity for a domestic well (Well #5) located right next to Dairy #3 is only 0.4 feet/day. Brockway Report, page 24; Ex. 22. The calculated hydraulic conductivity for a domestic well (Well #2) located one mile to the west of the proposed wells is 3.6 feet/day. *Id.*

9. Brockway focused its analysis on domestic wells owned by the protestants. Idaho Code § 42-222 is not limited to protecting only the water rights of protestants. Leno bears the burden of demonstrating no injury to all water rights, regardless of whether the right holders are protestants to the pending application.

10. Aerial photography shows that there are a number of homes located approximately $\frac{3}{4}$ miles west of Dairy #3. Ex. 22. Brockway should have focused its analysis on these domestic wells in addition to the domestic wells owned by the protestants.

11. In the absence of direct analysis from Brockway addressing the question of injury to the domestic wells (not owned by the protestants) which are closest to Dairy #3, the hearing officer must determine whether there is any data or evidence in the record which can be used to estimate drawdown impact to these domestic wells.

12. Prior to the hearing, an expert witness for the protestants, DuWayne Kimball, prepared a simplified model to estimate drawdown effects in the Berger area. For his model, Kimball assumed a hydraulic conductivity of 0.9 feet/day, a storativity value of 0.12, an aquifer thickness of 250 feet, and an annual diversion volume of 124.8 acre-feet (twice as much as the annual diversion volume proposed in Application 79380). Kimball Testimony. Given the calculated hydraulic conductivity for Well #2 and Well #5, Kimball's assuming a hydraulic conductivity of 0.9 feet/day for his model is reasonable. *See* Brockway Report, page 24.

13. Kimball found that, after one season of pumping, the drawdown at a location 750 feet from the modeled point of diversion would be approximately 6.8 feet. Kimball Testimony. Kimball testified that 6.8 feet of drawdown represents the worst-case scenario for a well located 750 feet from a proposed point of diversion, given the assumed aquifer parameters. *Id.*

14. The actual drawdown at the domestic wells west of Dairy #3 would be much less than 6.8 feet. The domestic wells west of Dairy #3 are located nearly 4,000 feet from the proposed points of diversion (5 times farther than the 750 feet assumed in the Kimball model). Further, the volume of water pumped at the proposed point of diversion will be 66 acre-feet (1/2 the amount assumed in the Kimball model). Both of these factors result in less drawdown at the domestic wells west of Dairy #3.

15. The information contained in the Kimball model is sufficient to conclude that the changes proposed by Leno will not injury existing water rights. The magnitude of seasonal aquifer fluctuation is far greater than the anticipated drawdown impacts to the closest domestic wells to Dairy #3.

16. Evidence in the record suggests that water levels near Dairy #3 are influenced by seepage from the TFCC High Line Canal. Seepage from the canals would increase water levels in nearby domestic wells during the irrigation season. Brockway did not provide any analysis showing how the domestic wells west of Dairy #3 wells will be impacted during times when water is not in the TFCC canals and aquifer levels are at their lowest.

17. In the absence of reliable data about the impacts to nearby domestic wells during the non-irrigation season, the season of use for the proposed transfer should be limited to times when water is in the TFCC system and aquifer levels are at their highest. Visser testified that the primary demand for the additional water at Dairy #3 will occur between the months of May and September, a time when water should be flowing in the TFCC system. Therefore, it is reasonable to limit the season of use for the split portion of water right 47-17589 proposed to be transferred to May 1 – September 30.

18. The proposed points of diversion are located approximately 34 miles north of the existing point of diversion for water right 47-17589. Water at the existing point of diversion must travel through Nevada to reach the proposed points of diversion.

19. There was no evidence provided about a pending or foreseeable delivery call against or curtailment requirement for ground water rights near Berger, Idaho. However, if administration of water rights or curtailment is ever initiated in the Berger area in the future, in order to protect existing water rights in the Berger area (junior to December 25, 1970), the portion of water right 47-17589 being transferred must be assigned a priority date of the date of this approval.

20. If the water right season of use and priority date are adjusted as described above, Leno has sufficiently demonstrated that the proposed change will not result in unreasonable drawdown (injury) to domestic water rights located near the proposed points of diversion.

Connectivity of Ground Water in Basin 47

21. A significant amount of testimony was presented at the hearing addressing the question of whether ground water at the existing point of diversion is hydraulically connected to the ground water at the proposed points of diversion.

22. The evidence presented on this issue was inconclusive. Brockway and Bonnichsen agree that ground water at the existing point of diversion flows south into Nevada. Brockway and Bonnichsen also acknowledge that there is not much data about ground water between Jackpot, Nevada and Berger, Idaho because there are so few ground water wells in that area. The hydraulic connection between ground water at these locations may include residence time as surface water in Shoshone Creek or Salmon Falls Creek and seepage from Salmon Falls Creek, Salmon Falls Creek Reservoir, or from the Salmon River Canal Company delivery system.

23. 0.42 cfs is not a large amount of water, particularly in the context of ground water flow. In the absence of more-reliable evidence that there is not a hydraulic connection between the existing point of diversion and the proposed points of diversion, the Department should rely on the general provision from the SRBA Court and treat ground water in Basin 47 as a hydraulically connected source.

Enlargement of Water Rights

24. Pursuant to Idaho Code § 42-222(1), the director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. “Consumptive Use” is defined as “that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” Idaho Code §42-202B(1).

25. To prevent enlargement, when a transfer application proposes to change the nature of use of a water right, the Department may limit the proposed water right to the historic consumptive use of the original right. In this case, Leno proposes to limit the split portion of water right 47-17589 to the historic consumptive use of 1.87 acre-feet per acre or a total volume of 66.0 acre-feet (1.87 af/acre x 35.3 acres). Attachment to Application 79380. The protestants did not provide evidence challenging Brockway’s calculation of historic consumptive use.

26. Leno sufficiently demonstrated that approval of this transfer will not result in the enlargement of the split portion of water right 47-17589. Once the transfer is approved, the proposed water right will be limited to a diversion rate of 0.42 cfs and an annual diversion volume of 66.0 acre-feet.

Conservation of Water Resources

27. During the hearing, the protestants challenged Cedar Ridge’s use of a drench system for cooling cows. Although other methods of cooling cows were discussed, no evidence was presented showing that drench systems are not used in other dairies or that drench systems are not consistent with the conservation of water resources in the state of Idaho.

28. Visser’s calculation of the maximum annual water demand of the drench system is reasonable. Visser testified that any water not needed for the drench system would be used to satisfy existing peak stockwater demands at Dairy #3. Leno satisfied his burden of proof regarding

conservation of water resources. There is no evidence in the record that the proposed water use would be inconsistent with the conservation of water resources in the state of Idaho.

Local Public Interest

29. The local public interest analysis under Section 42-222 is meant to be separate and distinct from the injury analysis. Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3).

30. There is no evidence in the record that the changes proposed in Application 79380 are not in the local public interest.


Summary

31. Leno has satisfied his burden of proof for all of the review criteria set forth in Idaho Code § 42-222. Leno did not provide enough information to determine the magnitude of impact to nearby domestic wells if the water right proposed to be transferred were diverted during the non-irrigation season. Therefore, the transfer approval should limit the season of use for the transferred water right to May 1 – September 30. Further, because of the large distance between the existing point of diversion for water right 47-17589 and the proposed points of diversion at Dairy #3, in the event of water right administration in the Berger area, the split portion of water right 47-17589 should bear a priority date equal to the date of this approval.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79380 in the name of Thomas and Dorothy Leno is APPROVED.

Dated this 1st day of June, 2015.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of ~~June~~ 2015, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (79380)

Jimmie L. Conder
3623 N 2000 E
Filer ID 83328

Jeanie Mc Creary
2217 E 3300 N
Twin Falls ID 83301

Michael & Jana Humphries
2382 E 3300 North
Twin Falls ID 83301

Barbara & Lynn Stephens
PO Box 2118
Twin Falls ID 83303-2118

William D. Hamby
2399 E 3300 N
Twin Falls ID 83301

Margaret Winsryg & Leroy Elliott
David Coleman
PO Box 525
Twin Falls ID 83303-0525

Eric Parrott
2152 E 3300 N
Twin Falls ID 83301

Elizabeth Slifer
3779 N 2250 E
Filer ID 83328

Lois M. Rice
PO Box 200
Filer ID 83328-0200

Martin F. Hackard
3289 N 2300 E
Twin Falls ID 83301

Leslie Ellsworth
PO Box 5023
Twin Falls ID 83303-5023

Delea C. Miller
2239 E 3300 N
Twin Falls ID 83301

Pam Ritter
3283 N 2300 E
Twin Falls ID 83301

Victoria B. Henson
3295 N 2300 E
Twin Falls ID 83301-0455

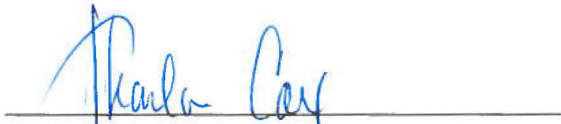
Ed Smith
PO Box 6015
Twin Falls ID 83303-6015

Scott Houtz
2231 E 3300 N
Twin Falls ID 83301

Shadow & Bonnie Seaman
1940 E 3700 N
Filer ID 83328

Richard Parrott
1389 E 4400 N
Buhl ID 83316

Barker Rosholt & Simpson
Travis L Thompson
195 River Vista Place, Ste 204
Twin Falls ID 83301-3027



Sharla Cox
Administrative Assistant

Courtesy copies sent via Regular Mail to:

Thomas Leno
4236 N 1900 E
Buhl ID 83316

Four Sister Dairy LLC
PO Box 105
Twin Falls ID 83303-0105

Greg Sullivan
Brockway Engineering PLLC
2016 N. Washington St., Ste 4
Twin Falls ID 83301

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N Skyline Dr., Ste A, Idaho Falls, Idaho 83402-1718

Phone: (208) 525-7161 FAX: (208) 525-7177 www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

June 1, 2015

RE: Transfers 79357 and 79380

Dear Parties:

On Friday, May 29, 2015, I signed preliminary orders for four contested transfer applications (79357, 79380, 79384 and 79466). Transfer applications 79357 and 79380 were approved on the condition that the seasons of use for the water rights involved in the transfers are changed to be May 1 – September 30. As I read through the transfer approvals this morning, I discovered that the season of use changes described in the orders were not reflected in the transfer approval documents. This is an oversight on my part and I apologize for the mistake.

To correct the errors, I am now issuing amended approvals for Transfers 79357 and 79380. Amended transfer approval documents are enclosed. The amended transfer approvals are preliminary orders of the Department issued pursuant to Section 67-5243, *Idaho Code*, and Rule 730 of the IDWR's Rules of Procedure. **A preliminary order issued by IDWR can and will become a final order without further action unless a party petitions for reconsideration or files an exception and/or brief as described in the enclosed information sheet.**

All of the orders are available on the Department's website under the "Legal Actions" and "IDWR-Issued Orders" tabs (<http://idwr.idaho.gov/WaterManagement/Orders>). There is also a link to access the audio files from the hearings. Please feel free to call if you have any questions about the appeals process, deadlines, or are having trouble finding any of the evidence.

Sincerely,

James Cefalo
Water Resources Program Manager

Enclosures

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

AMENDED

TRANSFER OF WATER RIGHT
TRANSFER NO. 79380

AMENDED

This is to certify that: THOMAS LENO
4236 N 1900 E
BUHL, ID 83316

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
47-17589	WR/DECREED	12/25/1970	1.210 cfs	307.5 af	N/A	102.5	GROUND WATER

Associated Water Rights Also Included in the Transfer Approval (Conditions Updated)

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
47-7287	WR/DECREED	11/4/1974	N/A	24.8 af		50.9	MULE CREEK
47-14285	WR/DECREED	12/31/1969	2.450 cfs	N/A		122.6	MULE CREEK

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
47-17589	YES	YES	YES	NO	YES	YES

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
47-17589	47-17622	0.420 cfs	66.0 af	N/A	N/A	47-17589	0.600 cfs	152.7 af	N/A	50.9
COMBINED TOTALS		0.420 cfs	66.0 af	N/A	N/A		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 1st day of June, 2015.


 for _____
 Chief, Water Allocation Bureau

Transfer No. 79380

WATER RIGHT NO. 47-17589
As Modified by Transfer No. 79380

In accordance with the approval of Transfer No. 79380, Water Right No. 47-17589 is now described as follows:

Right Holder: THOMAS LENO
 4236 N 1900 E
 BUHL, ID 83316

Priority Date: 12/25/1970

Source: GROUND WATER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>
IRRIGATION	04/01	to 11/01	0.600 cfs	152.7 af
			0.600 cfs	152.7 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER NWSWSW Sec 20 Twp 16S Rge 16E TWIN FALLS County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
16S	16E	20											29.6	12.0					41.6
16S	16E	29					9.3												9.3

POU Total Acres: 50.9

CONDITIONS OF APPROVAL

1. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.0 afa per acre at the field headgate for irrigation of the lands below.
2. 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.

Transfer No. 79380

WATER RIGHT NO. 47-17622**As Modified by Transfer No. 79380**

In accordance with the approval of Transfer No. 79380, Water Right No. 47-17622 is now described as follows:

Right Holder: THOMAS LENO
4236 N 1900 E
BUHL, ID 83316

Priority Date: 12/25/1970

Source: GROUND WATER

BENEFICIAL USE

COMMERCIAL
STOCKWATER

From

05/01
05/01

To

to 09/30
to 09/30

Diversion Rate

0.420 cfs
0.420 cfs
0.420 cfs

Diversion Volume

66.0 af
66.0 af
66.0 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER	SENE	Sec 6	Twp 11S Rge 16E	TWIN FALLS County
GROUND WATER	SENE	Sec 6	Twp 11S Rge 16E	TWIN FALLS County
GROUND WATER	L2 (NWNE)	Sec 6	Twp 11S Rge 16E	TWIN FALLS County

PLACE OF USE: COMMERCIAL

				NE				NW				SW				SE				Totals
Twp	Rng	Sec		NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
11S	16E	6		X	X	X	X													0.0
				L 1	L 2															

PLACE OF USE: STOCKWATER

				NE				NW				SW				SE				Totals
Twp	Rng	Sec		NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
11S	16E	6		X	X	X	X													0.0
				L 1	L 2															

CONDITIONS OF APPROVAL

1. Rights 47-2306B and 47-17622 when combined shall not exceed a total annual maximum diversion volume of 316 acre-feet. No more than 145 acre-feet of the 316 acre-feet may be diverted between October 1st and April 30th.

WATER RIGHT NO. 47-17622
As Modified by Transfer No. 79380

CONDITIONS OF APPROVAL

2. Prior to diversion of water under Transfer 79380, a totalizing measuring device of a type approved by the Department shall be installed and maintained on each of the wells authorized under water right 47-17622. The volume of water diverted from each well shall be measured and recorded monthly and reported annually to the Department. The static water levels of the wells shall be measured and recorded twice each year in April and October and reported annually to the Department.
3. For purposes of water right administration, the priority date of this right is advanced to the date of approval of Transfer 79380 and shall be junior to all existing water rights in use at the time of said approval.
4. Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare, and all applicable dairy operation standards of the Idaho Department of Agriculture. The dairy operation authorized under this approval shall comply with applicable city and county zoning and land use ordinances.
5. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
6. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
7. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
8. 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.

WATER RIGHT NO. 47-7287**As Modified by Transfer No. 79380**

In accordance with the approval of Transfer No. 79380, Water Right No. 47-7287 is now described as follows:

Right Holder: THOMAS LENO
4236 N 1900 E
BUHL, ID 83316

Priority Date: 11/4/1974

Source: MULE CREEK

Tributary: SHOSHONE CREEK

BENEFICIAL USE	From	To	Diversion Rate	Diversion Volume
IRRIGATION FROM STORAGE	03/15	to 11/15		24.8 af
IRRIGATION STORAGE	01/01	to 12/31		24.8 af
				24.8 af

LOCATION OF POINT(S) OF DIVERSION

MULE CREEK SESWSW Sec 17 Twp 16S Rge 16E TWIN FALLS County

PLACE OF USE: IRRIGATION FROM STORAGE

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
16S	16E	20											29.6	12.0					41.6
16S	16E	29					9.3												9.3

POU Total Acres: 50.9

CONDITIONS OF APPROVAL

1. 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.
2. The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.

Transfer No. 79380

WATER RIGHT NO. 47-14285

As Modified by Transfer No. 79380

In accordance with the approval of Transfer No. 79380, Water Right No. 47-14285 is now described as follows:

Right Holder: THOMAS LENO
4236 N 1900 E
BUHL, ID 83316

Priority Date: 12/31/1969

Source: MULE CREEK

Tributary: SHOSHONE CREEK

BENEFICIAL USE
IRRIGATION

From 04/01 **To** 10/31

Diversion Rate
2.450 cfs
2.450 cfs

LOCATION OF POINT(S) OF DIVERSION

MULE CREEK	SESWSW	Sec 17 Twp 16S Rge 16E	TWIN FALLS County
MULE CREEK	SESWSW	Sec 17 Twp 16S Rge 16E	TWIN FALLS County (I)
MULE CREEK	NESWNW	Sec 20 Twp 16S Rge 16E	TWIN FALLS County (R)

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
16S	16E	20											29.6	6.0					35.6
16S	16E	29					7.0		20.0	14.0	12.0	34.0							87.0

POU Total Acres: 122.6

CONDITIONS OF APPROVAL

1. The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.
2. Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.
3. This right when combined with all other rights shall provide no more than 0.02 cfs per acre for irrigation of the place of use.
4. 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.

Transfer No. 79380