

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 81940 IN THE NAME OF EAST
VALLEY CATTLE, LLC

PRELIMINARY ORDER APPROVING
TRANSFER WITH CONDITIONS

BACKGROUND AND PROCEDURAL HISTORY

On September 22, 2017, East Valley Cattle, LLC (“EVC”) filed Application for Transfer No. 81940 (“Application”) with the Idaho Department of Water Resources (“Department”),¹ proposing to change the commercial place of use for twenty commercial/stockwater rights.

The Department published notice of the Application in the Times News for two consecutive weeks on May 1 and May 8, 2018. Timely protests were filed by Nolan Branch and Kirtland Yates (“Protestants”). *See Notice of Protest of Nolan Branch*; and *Notice of Protest of Kirtland Yates*.

On May 22, 2018, the Department held a pre-hearing conference, at which the parties were unable to resolve the protested issues. *See Notice of Pre-Hearing Conference*. On August 1, and August 29, 2018, the Department held status conferences, where the parties remained unable to resolve the protested issues. *See Notice of Status Conference*. As a result, the parties asked the Department to authorize discovery and schedule a formal hearing. *See Order Authorizing Discovery; Scheduling Order; Notice of Hearing; and Amended Scheduling Order*.

On January 18, 2019, Nathan Erickson the Watermaster (“Watermaster”) for Water District 143 (“WD 143”), of which EVC is part, submitted his recommendations to the Department related to the Application pursuant to Idaho Code § 42-222.

The parties introduced testimonial evidence, expert testimony, and documentary evidence into the administrative record at a formal hearing on January 29, 2019.² During the hearing, EVC’s Exhibits 1-12 and Protestant’s Exhibit 100 were entered into the record. Counsel for each party made closing arguments at hearing, choosing not to file post-hearing briefs. H.R. Vol. 6 at 55.

After carefully considering the evidence in the administrative record, the Department finds, concludes, and orders as follows:

¹ The Applicant amended the Application on February 9, 2018, modifying the place of use and narrative description of the proposed transfer.

² The hearing was digitally recorded and can be accessed on the Department’s website by using the Department’s Water Right and Adjudication search for water right 43-13449. IDWR Water Right and Adjudication Search link: <https://idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx> The Hearing Recording (“H.R.”) was not transcribed or otherwise reproduced or altered.

FINDINGS OF FACT

EVC's Existing Water Rights and Proposed Transfer

1. EVC operates a dairy and Concentrated Animal Feed Operation ("CAFO"), or feedlot, located in Township 11 South, Range 27 East, Section 35, Boise meridian ("B.M."), approximately 4.8 to 5.8 miles east and 7.5 and 8.5 miles north of Malta, Idaho, on land previously used for irrigation. Approximately 800 acres of water rights previously used for irrigation were successfully converted to commercial and stockwater use through Water Right Transfer Nos. 73648 and 80639. H.R. Vol. 1 at 1.
2. The Application proposes to change the commercial and stockwater place of use for the following ground water rights: 43-13449, 43-13451, 43-13453, 43-13455, 43-13457, 43-13459, 43-13461, 43-13463, 43-13491, 43-13493, 43-13495, 43-13497, 43-13499, 43-13501, 43-13503, 43-13505, 43-13507, 43-13509, 43-13511, and 43-13763 (collectively referred to hereafter as "43-13449 et al."). *Application* Exhibit A at 4.
3. More specifically, the Application proposes to amend the current places of use for 43-13449 et al., which are currently appurtenant to the existing CAFO area (T11S, R27E, Section 35, B.M.—approximately 640 acres) to EVC's 9,204 acre irrigated permissible place of use ("PPU")³ as described in Exhibit B of the Application. *Application* Exhibit B at 5 and 68.
4. The combined limits of the commercial/stockwater rights are a diversion rate of 4.61 cubic feet per second ("cfs") and a volume of 1,782.8 acre-feet ("AF"). *Application* at 3.

EVC's Current PPU and Irrigated Lands

5. EVC owns the following ground water rights for irrigation: 43-2313D, 43-2317C, 43-2317F, 43-2320A, 43-2320B, 43-2339F, 43-2340, 43-2343, 43-2345, 43-2364, 43-2365, 43-2423F, 43-2467F, 43-2510F, 43-4002F, 43-10365, 43-10366, 43-2339C, 43-2339E, 43-2423C, 43-2423E, 43-2467C, 43-2467E, 43-2510C, 43-2510E, 43-2574E, 43-2576E, 43-4002C, 43-4002E, 43-4014A, 43-4014B, 43-10019, 43-12933, 43-13405, 43-13458, 43-13460, 43-13462, 43-13490, 43-13492, 43-13494, 43-13496, 43-13498, 43-13500, 43-13502, 43-13504, 43-13506, 43-13508, 43-13510, 43-2321B, 43-2574B, 43-2576B, 43-4012B, 43-4012C, 43-4012D, 43-4013B, 43-4015B, 43-10045, 43-10046, 43-13301, 43-13303, 43-13305, 43-4060D, 43-4063D, 43-10787, 43-10795, and 43-12923 ("Ground Water Irrigation Rights").

³ The aerial extent of EVC's PPU is delineated in EVC's Exhibit 12.

6. EVC's Ground Water Irrigation Rights are limited to the irrigation of a specific 7,101.6 acres within the 9,204-acre PPU in a single irrigation season as authorized by the water rights. See EVC's Exhibit 10. The Ground Water Irrigation Rights are subject to other combined limits to diversion rate, diversion volume, and acres of irrigation. *Id.*
7. Each irrigation season, EVC is required to submit an "Irrigation Map" delineating which specific acres will be irrigated within the PPU for the coming irrigation season. These authorized irrigated acres may not exceed 7,101.6 acres. *Id.*

EVC's Current Operations

8. EVC's current operations include farming, raising dairy cattle and steer, and operating a dairy. H.R. Vol. 1 at 5. At any given time there are a total of "some 50,000" cattle on the feed lot. H.R. Vol. 1 at 14. EVC's "dairy facilities" completely occupy the 640 acres of Section 35 of T11S, R27E, Cassia County. H.R. Vol. 1 at 9:10. Section 35 is both a feedlot and a dairy. H.R. Vol. 1 at 18.
9. EVC's commercial uses of water on the subject property include drinking water for livestock, cleaning facilities, and milk cooling. H.R. Vol. 1 at 29. Drinking water is the largest commercial use. *Id.* at 29:30. The majority of drinking water is exported from the CAFO as cow milk. *Id.* at 29:45.
10. Water commercially used by EVC that is not consumed by stock, is used "two or three times" on the CAFO to cool milk, water cattle, and clean floors. H.R. Vol. 1 at 30. After water has been used multiple times, it becomes "green water" or "manure water" and is discharged to and collected in EVC's lagoons. *Id.*
11. EVC has spent over nine million dollars to grade the land within its facilities. H.R. Vol. 1 at 32. EVC has graded 640 acres of section 35 and 160 acres of the SE quarter of Section 26 (totaling 800 acres) to control and route runoff or stormwater through its facilities to its lagoons. *Id.* EVC states that it carefully and purposefully collects water in its lagoons to keep its cattle dry and to contain the water for additional use. *Id.*
12. EVC operates four primary lagoons to capture green water and runoff from its 800 acre CAFO facility. H.R. Vol. 1 at 22. The lagoons are located in the SE and SW quarters of Section 26, the SE quarter of Section 27, and the NE quarter of Section 34 of T11S, R27E, Cassia County. See EVC's Exhibit 10. The lagoons are lined with clay to protect against seepage and leakage to groundwater or surface water sources. H.R. Vol. 1 at 26.
13. EVC supplements crops irrigated with its Ground Water Irrigation Rights by land applying wastewater from its lagoons to authorized irrigated acres within its PPU. The current acres to which EVC applies wastewater have "active irrigation water rights."⁴ H.R. Vol. 1 at 41.

⁴ The Watermaster defines "active irrigation water rights" as "full existing" water rights. *Watermaster Comments*

EVC's Proposed Operations

14. The Application represents EVC's plan to irrigate land with wastewater that is within its PPU but outside the 7,101.6 acres of delineated irrigated lands. In other words, EVC plans to irrigate lands not covered by an "active water right." H.R. Vol. 5 at 12.
15. Immediately following the transfer, if approved, EVC plans to irrigate land in Section 22 of T11S, R27E, via four pivots identified as P6, P7, P8, and P9, which is land within EVC's PPU, but not within its currently delineated irrigated lands. See EVC's Exhibit 11; and H.R. Vol. 5 at 12.
16. At hearing, EVC testified that it never diverts "more water than is needed for the cooling, the cleaning, and the stockwater at any given time." H.R. Vol. 1 at 36. EVC also testified that it did not know of any incentive for it "to divert more water to commercial and stockwater purposes than it needs at any given time." H.R. Vol. 1 at 37.
17. EVC testified that it does not make sense to dry up irrigated acreage to convert to stockwater and then over divert the stockwater use for irrigation. EVC testified that it would make more sense to keep water on the originally irrigated ground. *Id.*
18. If the transfer is approved, EVC testified that wastewater currently used to irrigate land with "active water rights" will no longer be used to irrigate said lands. At hearing EVC's expert Mr. Sullivan testified that if land irrigated with ground water changed to an alternative source of surface water for irrigation, it "could" result in less ground water being pumped. H.R. Vol. 3 at 26. Conversely, Mr. Sullivan testified that if irrigated lands dependent on ground water and surface water sources, lose the surface water source for irrigation, it could result in an increase in diversion of ground water. *Id.*

EVC's Commercial Water Use and Consumptive Use

19. Since acquiring its irrigated lands in Cassia County, EVC has modified the irrigation operation to conserve water and practice "better water stewardship." H.R. Vol. 1 at 17. Modifications to the irrigation system include installing efficient sprinklers, installing variable frequency drives on wells, and adding ponds. H.R. Vol. 1 at 17.
20. EVC uses jersey cows due to their profitability and feed efficiency. H.R. Vol. 1 at 18. Feed efficiency relates to the unit weight of feed needed to produce a unit volume of milk. H.R. Vol. 1 at 19. The greater the feed efficiency, the less feed, and therefore water, needed to produce an equivalent volume of milk. *Id.* EVC testified that Jersey cows give you the "most bang for your buck on the crops." *Id.*

Transfer #81940 at 1. At hearing the EVC's expert witness Greg Sullivan defined an "active water right" as a water right "recognized by the state that is authorized by the state to be used at [a specified] location" and that has not been "curtailed or set aside for mitigation." H.R. Vol. 2 at 13-14. The term is not otherwise defined in Idaho law or Department regulation or policy.

21. EVC uses an automated PLC/SCADA system to “highly manage” water and to ensure water is only delivered within its CAFO operations upon demand. H.R. Vol. 1 at 35.
22. EVC uses a sophisticated wastewater management system including clay-lined lagoons, gravity settling cells, mechanical solids separation, and water quality testing to treat up to 400 million gallons of wastewater before land application. H.R. Vol. 1 at 39-43. EVC’s wastewater management system treats its wastewater to sufficient quality such that no dilution of the wastewater with clean water is required before land application, as required by some dairies. H.R. Vol. 1 at 46.
23. EVC testified that the proposed transfer would help it accomplish its goal of increasing its operation from its current 15,000 head of dairy cows to 35,000. H.R. Vol. 1 at 62. EVC’s stated goal is “to greatly expand its operation, to more than double” within the next year. *Id.*
24. EVC’s Exhibit 5, “Water Requirements and Consumptive Use” worksheet, reports total commercial stockwater water use is 1,145.60 AF and total consumptive use is 1,066.1 AF.
25. EVC’s Exhibit 6, “Water Balance-East Valley Cattle Dairy” spreadsheet, estimates that the total water supply available from the CAFO operation is 1,562.7 AF. Exhibit 6 at 1. EVC’s Exhibit 6 estimates that 1,562.7 AF could irrigate 702.1 acres of triticale. *Id.*
26. EVC performed a consumptive use analysis to evaluate whether the proposed transfer would result in an increase or change to consumptive use in Basin 43.⁵ EVC’s consumptive use analysis is set forth in EVC’s Exhibit 7 – “East Valley Cattle – Consumptive Use Calculations.” Exhibit 7 at 1. In its consumptive use analysis EVC assumed an average crop consumptive use of 2.22 feet/acre. *Id.*
27. Protestant’s Exhibit 100 suggests EVC’s Exhibit 6 estimate of 1,562.7 AF of total available commercial water supply should be reduced by 932 AF to account for evaporation from the “EVC facility” and 210 AF to account for “evaporation from the surface of the EVC ponds.” Exhibit 100 at 3. After reducing the total water supply by evaporation from EVC’s commercial facilities and ponds, Exhibit 100 estimates the total commercial water supply is enough to irrigated 156 acres, assuming a “crop usage” of 2.7 feet/acre, or a total volume of 420.7 AF. *Id.*

Raft River Ground Water Levels, Critical Ground Water Area Designation, and Curtailment

28. On July 23, 1963, the Director of the Department (“Director”) issued an order designating the Raft River Critical Ground Water Area (“RRCGWA”) pursuant to Idaho Code § 42-233a. *See generally Designation of Raft River Critical Ground Water Area*

⁵ To coordinate water management activities, the Department administers water rights on the basis of over fifty “administrative basins.” Basin 43 is the administrative basin identification number assigned to the Raft River Basin. Basin 43 and the Raft River Basin are synonymous terms.

("RRCGWA Order") (July 23, 1963). The RRCGWA Order included ground water located within the entire Raft River drainage area of Basin 43, and the Marsh Creek drainage area (Albion Basin) within Basin 45.

29. On December 2, 2015, the Department issued a *Preliminary Order Creating Water District No. 143* for the administration of ground water rights in the Raft River Basin. WD 143 included all ground water rights in Basin 43, except ground water domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(1), and ground water rights within Water District 130, which underlay the Eastern Snake River Plain Aquifer ("ESPA").
30. The RRCGWA is located within the Snake River Basin. A general adjudication of the Snake River Basin was completed on August 26, 2014, by issuance of the *Final Unified Decree of the Snake River Basin Adjudication* ("SRBA") District Court. See *Final Unified Decree, In re SRBA, Case No. 39576* (Fifth Jud. Ct. Aug. 26, 2014).
31. The SRBA issued seventy-five ground water expansion partial decrees in the RRCGWA based on water right claims filed pursuant to Idaho Code § 42-1416B.⁶ The total number of irrigated acres represented by all RRCGWA expansion rights is 6,804.
32. Idaho Code § 42-1416B(2) states that even if expansion rights are decreed in a general water rights adjudication, water will not be deemed available to "fill the rights for expanded use . . . unless the [D]irector finds that a management program exists which will, within a time period acceptable to the [D]irector, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer."
33. As a result of the completion of the SRBA, by August 26, 2016, the Director was required by law to determine whether an adequate management program existed to bring withdrawals into balance with recharge in the RRCGWA.
34. On June 15, 2016, the Raft River Ground Water District ("RRGWD") submitted to the Director its *Critical Ground Water Area Management Plan* ("Management Plan"). The Management Plan stated that the "plan is adaptable and has the potential to allow RRGWD to mitigate for the expanded acres and to balance the aquifer." *Management Plan* at 1. The RRGWD Management Plan "request[ed the] [Department's] support to allow implementation of th[e] plan." *Id.* At 5.
35. On August 26, 2016, the Director issued the *Final Order re: Management Program and Curtailing Expansion Rights*. Subsequently, on September 21, 2016, the Director issued

⁶ Idaho Code § 42-1416B(5)(a) defines "[e]xpanded use [as] an increase in the number of acres irrigated, or other additional use, under a valid ground water right without any increase in the rate of diversion or volume of water diverted." Hence, expansion rights for irrigation in the RRCGWA have no associated volume and curtailment had to be accomplished through a reduction of acres irrigated pursuant to the water rights.

an Amended Final Order RE: Management Program Curtailing Expansion Rights ("Curtailment Order").

36. The Curtailment Order concluded the Management Plan submitted by the RRGWD—which proposed, at best, an annual benefit to the aquifer of 39,508 AF—was inadequate to bring aquifer withdrawals into balance with aquifer recharge. *Curtailment Order* at 9-10.
37. The Director's conclusion was based, in part, on a United States Geological Survey ("USGS") study that estimated that ground water withdrawals in the Raft River Basin exceeded recharge by 103,000 acre-feet in 1966. Walker, E.H., Dutcher, L.C., Decker, S.O., and Dyer, K.L., *The Raft River Basin, Idaho-Utah, As of 1966: A Reappraisal of the Water Resources and Effects of Ground-Water Development* (Aug. 1970); and *Curtailment Order* at 4.
38. In reviewing the Management Plan, the Department also undertook an analysis of eight wells with adequate spring-season data from 1966 through 2016. *Id.* at 9. This analysis demonstrated a basin-wide average decline from 1966-1991 of 0.85 feet per year, and a 1991-2016 basin-wide average decline of 2.05 feet per year. *Id.*
39. Given the continuously declining water level trends in the RRCGWA since the USGS issued its study in 1970, the Director concluded that it is reasonable to assume that ground water withdrawals in the Raft River Basin still exceed recharge by at least 103,000 acre feet per year. *Id.* Therefore, again, the Director concluded the Management Plan was not adequate to bring withdrawals into balance with recharge in the RRCGWA. *Id.* at 9-10.
40. As a result, a list of ground water right holders that "must reduce the number of acres irrigated pursuant to the water rights holder's expansion right's" according to a schedule determined by the Director was attached to the Curtailment Order. *Curtailment Order* Attachment A.
41. Specifically, the curtailment schedule required the list of ground water expansion right holders to: (1) reduce the number of expansion acres irrigated by one third beginning with the 2017 growing season; (2) reduce by an additional one third beginning with the 2018 growing season; and (3) completely curtail use in 2019 and subsequent growing seasons. *Id.* at 10.
42. EVC was listed as a ground water right holder in Attachment A to the Curtailment Order and, therefore, is subject to its curtailment provisions. *Curtailment Order* Attachment A at 1.

43. As of 2019, EVC has 773.7 acres of total curtailed expansion water rights on irrigated lands associated with this transfer. *Watermaster Comments Transfer #81940* at 1.⁷

Continued Decline of the Raft River Aquifer and its Effects on Local Public Interests

44. In 2016, the RRGWD's technical consultant estimated an annual decline to the Raft River Basin aquifer of 50,000 AF. *Curtailment Order* at 9.
45. At hearing, EVC testified that it "was aware that ground water levels have been declining in the RRCGWA for some time." H.R. Vol. 6 at 46. EVC further testified that it thinks it is a "good goal to stabilize the aquifer." H.R. Vol. 6 at 4.
46. EVC's expert Mr. Sullivan further testified that the curtailment orders in the Raft River Basin are in effect to "stabilize the aquifer because it has been declining dramatically over the last 20 years." H.R. Vol. 3 at 35. He testified that his "personal feel" is that the "aquifer is declining" and he does not dispute the reported declines. H.R. Vol. 3 at 27.
47. The Protestants' Expert, Brian Higgs, testified that he is monitoring aquifer levels on behalf of the RRGWD and that aquifer levels in the Raft River Basin are "still dropping" despite the Department's curtailments. H.R. Vol. 5 at 46. Mr. Higgs further testified that if aquifer levels continue to drop, the Department will be required by law to curtail additional acres until it "balances out." H.R. Vol. 5 at 48.
48. Mr. Yates, a protestant in this matter and an RRGWD advisory board member, testified at hearing that the RRGWD is trying to develop a new ground water management plan that will be acceptable to the Department and will consider additional curtailment. H.R. Vol. 6 at 16.
49. Mr. Yates testified that he personally has had 75 acres out of 240 acres curtailed by the *Curtailment Order*. H.R. Vol. 6 at 6. He testified that the curtailment has resulted in economic impact to him through reduced income. *Id.*
50. Mr. Yates testified at hearing that if "we are community minded here, we will join hands and stabilize the aquifer" and all water users have to "sacrifice." H.R. vol. 6 at 13.
51. Mr. Yates further testified that land with water rights in his area is valued at approximately \$7,000 per acre, and dry land ground without water rights is valued at \$200 per acre. H.R. Vol. 6 at 9-10. Mr. Yates testified that stabilizing the aquifer is imperative to maintain the value and "investment" of their land and he questions "how anyone in their right mind can jeopardize their investment to go from \$7,000/acre to \$200/acre." *Id.*

⁷ The RRCGWA has over 5,600 acres of expansion water rights that have been fully curtailed as of the start of the 2019 irrigation season. *Watermaster Comments Transfer #81940* at 1.

52. At hearing Mr. Yates testified that to stabilize the aquifer “we’re all going to have to bite the bullet to some degree or another or we’ll all just dry up.” H.R. Vol. 6 at 9. Mr. Yates testified that he has “curtailed his expanded acres” and he “expected everyone else to do the same” and that because of this Application “EVC wasn’t going to do that.” H.R. Vol. 6 at 11 and 12.
53. Mr. Branch, a protestant in this matter and an advisory board member for WD 143 and the RRGWD, testified that “[g]round water levels are depleting, they are going down.” H.R. Vol. 6 at 24. He testified that because aquifer levels continue to go down, the RRGWD is considering submitting a new ground water management plan to the Department that will propose to further “reduce consumptive use” in the Raft River Basin.
54. Mr. Branch further testified that he personally has 180 acres of curtailed expansion acres. H.R. Vol. 6 at 18. He also testified that the curtailment has resulted in an “economic hardship” to him because he is no longer able to farm the land and it has devalued his property. *Id.* at 20.
55. Mr. Branch testified that he protested the Application because it would allow EVC to land apply water that historically has been used on land with active irrigation water rights on “additional acres” and in his mind that is an “expansion of use of water” and because “[the land] is in a critical ground water area, because [water users] are under a curtailment [it is] wrong to allow [EVC] to irrigate more acres than [it] had previously been irrigating.” *Id.* at 23:00.

The Watermaster’s Recommendation

56. Consistent with Idaho Code § 42-222, on January 18, 2019, the Watermaster submitted recommendations to the Department regarding the Application. *Watermaster Comments Transfer #81940* at 1.
57. The Watermaster concluded the proposed transfer “would potentially allow EVC to irrigate acres that would otherwise not be allowed.” *Id.* He expressed concern the “community” would perceive the approval of the Application as a “loop hole in the Department’s policy that undermines any efforts to conserve water in a [critical ground water area].” *Id.*
58. The Watermaster raised the concern that because the Department does not regulate commercial efficiency, or the number of acres irrigated with commercial water, it is possible that EVC “could over use water in an effort to dilute and render water more suitable for irrigation” and “potentially irrigate more acres than were originally irrigated.” *Id.* at 2.
59. Due to the fact that EVC’s commercial and irrigated lands are within the RRCGWA and concerns the Application is contrary to the public interest, the Watermaster recommended

that the Application, if approved, be conditioned so “the commercial waste water would only be used on land with active irrigation water rights.” *Watermaster Comments Transfer #81940* at 2.

Ground Water Measurement Order and Measurement Device Requirements for the Applicant

60. On September 14, 2016, the Department issued a *Preliminary Order in the Matter of Requiring Measuring Devices for Ground Water Diversion in Water District No. 143 (Raft River Basin)* (“Measurement Order”). The *Measurement Order* required the installation of an approved measurement device on all administrated irrigation ground water diversions by the start of the 2018 irrigation season, and by January 1, 2018, for non-irrigation diversions. *Measurement Order* at 4.
61. On September 17, 2018, the Director issued a curtailment order curtailing 22 administered ground water diversions in WD 143 for failure to install an approved measurement device in accordance with the *Measurement Order*.
62. As measurement relates to this Application, the Watermaster concluded that if commercial wastewater is applied to land with active irrigation water rights, it “would technically not require measurement of the waste water since water would be used in combination with ground water [rights] on active irrigation acres.” *Watermaster Comments Transfer #81940* at 2. Under the *Measurement Order*, only the diversion(s) would need be measured.
63. On the other hand, the Watermaster concluded that if commercial wastewater is applied to land not covered by active irrigation water rights, it “would require the waste water to be kept independent of other irrigation water.” *Id.* Under that scenario, “commercial wastewater would need to be measured and regulated in a way to confirm no other irrigation water is contributed to the system.” *Id.*
64. In addition, the Watermaster concluded he would need “measurement on the lines going to the acres to be irrigated by the commercial waste water to confirm the amount of water used for irrigation is consistent with the amount of water used on the dairy/feedlot.” *Id.*
65. In his testimony, EVC’s expert Mr. Sullivan stated that it is his experience that the measurement and reporting of water used has become more prevalent in Idaho in the last 5-6 years. H.R. Vol. 4 at 2.
66. Mr. Sullivan agreed that it would be a reasonable requirement, and he would expect the Department to require measurement devices at the dairy lagoons if the wastewater were to be applied to lands without active irrigation water rights. H.R. Vol. 4 at 6.

GOVERNING LAW AND EVALUATION CRITERIA

Local Public Interest

Idaho Code § 42-202B(3) states:

“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.

Change in Point of Diversion, Place of Use, Period of Use, or Nature of Use of Water Under Established Rights

Idaho Code § 42-222(1), in pertinent part, 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.

Burden(s) of Proof

The transfer applicant bears the burden of proof for all of the pertinent criteria listed in Idaho Code § 42-222. That statute requires the transfer applicant “to present sufficient evidence to the Department so that the director can make an informed determination as to [the applicant’s] transfer application.” *Barron v. Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2000).

Substantial and Competent Evidence

Decisions herein must be made on substantial and competent evidence. *Id.* “Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001). Substantial evidence does not need to be uncontradicted, or lead to a certain conclusion, “it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion” as the Department. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732 736, 518 P.2d 1194, 1198 (1974).

The Department's Administrative Memorandum #24

The Department's *Administrative Memorandum No. 24 re: Transfer Processing Policies and Procedures* ("Admin. Memo. #24") establishes "policy guidance for processing applications for transfer of water rights pursuant to [Idaho Code § 42-222] and other applicable law." *Admin Memo. #24* at 1.

Admin. Memo. 24 addresses the "Land Application of Wastewater," stating the following:

An application for transfer is required for a proposed change in the place of use under a water right for uses such as industrial, dairy, or confined animal feeding operations that would allow land application of wastewater from that use or change the location of lands used for application of wastewater, when there is not a full existing water right for irrigation of the place of use receiving wastewater.

Admin. Memo. #24 at 3.

Admin. Memo. #24 also illustrates the Department's statutory responsibility to request and consider the pertinent watermaster's recommendation for all transfer applications, stating:

Section 42-222, Idaho Code, requires that the department shall advise the watermaster of any water district in which the water is used of any proposed change. The department shall not take final action on an application for transfer until the watermaster's recommendation has been received and considered.

Admin. Memo. #24 at 19.

Admin. Memo. #24 specifically sets forth the factors to be considered when the Department processes applications for transfer that would allow for the disposal of wastewater by land application on cultivated fields resulting from uses such as on dairies or other CAFOs.

An application for transfer filed to provide for the disposal of wastewater, by land application on cultivated fields or other beneficial use disposing of the wastewater, resulting from use of water under non-irrigation uses such as a dairy or other confined animal feeding operation, or "municipal" or "industrial" water rights where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial, municipal, or industrial water right. While not an enlargement of the water right, such use of wastewater must not injure other water rights (see Application Processing Memorandum No. 61 as revised under Section 1 of this memorandum) and must comply with best management practices required by the Idaho Department of Environmental

Quality, the U. S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction.

Admin Memo #24 at 31.

Admin. Memo. #24, Section 5.e, further establishes guidance for reviewing transfers with respect to the statutory local public interest review criteria as set forth in Idaho Code Section § 42-202B(3). Considerations outlined in Section 5.e include: 5.e.1 - recreation, fish, and wildlife impacts; 5.e.2 - water, and hazardous substances standards; 5.e.3 - local and state government; 5.e.4 - neighboring jurisdictions; and 5.e.5 – state water plan.

Finally, Admin. Memo. #24 Section 5.e.3 states:

Whether the proposed transfer would comply with local government and state government, if any, planning and zoning ordinances, regulations, records of decisions, or policies affecting the public water resource (e.g. requirement of a local government to use surface water for irrigation for developments involving land use changes pursuant to Section 67-6537, *Idaho Code* is considered an expression of local public interest).

Admin Memo #24 at 34.

ANALYSIS

A. Validity of Water Right Nos. 43-13449 et al.

Idaho Code § 42-222(2) states, in pertinent part: “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.” For every water right included in a transfer application, the Department must verify that the portion of the water right being changed has not been forfeited through nonuse. *See Jenkins v. State, Dep’t of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Forfeiture must be established by clear and convincing evidence. *Id.* at 389; 647 P.2d at 1261.

Idaho Courts have held: “Once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of Idaho Code § 42-222(2) are . . . tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to a partial decree.” *In Re SRBA*, Case No. 39576, *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, Subcase Nos. 36-02708, et al. (Fifth Jud. Dist. Ct. 1999).

The water rights at issue in this matter have been decreed and the Department has no evidence of forfeiture. Therefore, water rights 43-13449 et al. are valid water rights and Application 81940 should be evaluated under the criteria set forth above under Idaho Code § 42-222.

B. Injury to Other Water Rights

There is no evidence in the record identifying specific water rights that would be injured by the changes proposed by the Application.

As discussed below, evidence in the record supports the conclusion that the Application can be conditioned to ensure the changes proposed by the Application will not increase consumptive use in the basin and will not generally injure other ground water rights in the RRCGWMA.

C. Enlargement of Water Rights

The Protestants express concern about enlargement of water rights under the Application. The Protestants argue that current wastewater generated from EVC's commercial uses associated with 43-13449 et al. is land applied to cultivated lands also irrigated with EVC's Ground Water Irrigation Rights. That is, EVC's commercial wastewater supplements the supply of ground water diverted by EVC under its Ground Water Irrigation Rights to irrigate its crops. Because, the cultivated lands irrigated by EVC's Ground Water Irrigation Rights will still require largely the same amount of water, once the land applied wastewater no longer supplies lands irrigated with EVC's Ground Water Irrigation Rights, EVC will be forced to divert more ground water in the future to maintain current irrigation levels.

EVC argues its Application will not constitute enlargement because commercial water rights are considered fully consumptive. Furthermore, EVC argues the Application complies with department policy related to changing the location of lands used for application of wastewater when there is not a full existing water right for irrigation of the place of use receiving wastewater. *Admin. Memo. #24* at 3. It also argues the Application does not constitute enlargement because the Application was filed in compliance with the Department's June 1 Letter, which states, "[i]f wastewater from a dairy or [CAFO] is applied to lands not having a full existing water right for irrigation, then the use of the wastewater on these lands must be described as a commercial use on the water right(s) covering the dairy or [CAFO]." *Application* at Exhibit 2.⁸

Idaho Code § 42-222(1) states that the change associated with a transfer can be approved if it does not constitute an enlargement in use of the "original water right." With respect to the Application,

⁸ EVC also testified that it relied on the June 1 Letter as tacit approval of the place of use transfer now at issue in this docket. In other words, it apparently decided to move forward and construct a new large-scale irrigation system—costing millions of dollars—so that it could land apply wastewater to land that both: (1) did not currently have a full existing water right for irrigation; and/or (2) was not currently described as a commercial place of use on EVC's commercial water rights. The June 1 Letter did not authorize any change to EVC's water rights or recommend that EVC invest in or construct new irrigation works. It simply informed EVC that it may file an application to amend the commercial place of use on its water rights. Any further misplaced reliance should have been immediately alleviated as the letter explicitly forewarned EVC that because of the nature of the potential transfer, and issues related to enlargement, any application would need to be presented to the public in order to allow protest. EVC in no way should have relied on the June 1 Letter as any form of approval of a plan or transfer unless it was willing to accept the financial risk of ultimately not having the transfer approved.

the “original water right” is 43-13449 et al., which describes stockwater and commercial natures of use. *Application* at 4. EVC’s Ground Water Irrigation Rights are not being modified by the Application and therefore are not considered “original water rights.” Therefore, the consideration of enlargement is limited to whether the Application will result in the enlargement of use associated with 43-13449 et al.

The Application proposes changing the place of use of 43-13449 et al. to include all lands within EVC’s PPU so that wastewater generated from the commercial use of the water rights can be land applied to cultivated lands within EVC’s PPU that do not have active irrigation water rights. Department policy explicitly addresses the consideration of enlargement under this set of facts. An application for transfer filed for the disposal of wastewater by land application on cultivated fields resulting from the use of water under dairy or CAFO water rights, where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial water right. *Admin. Memo. #24* at 31.

D. Conservation of Water Resources

EVC argues that its operations, and this Application, are consistent with the conservation of water resources. EVC has demonstrated on the record significant levels of commitment to the conservation of water resources.

On the other hand, Protestants argue the Application is inconsistent with the basic premise of conservation of water, because the Application will result in the increased diversion and consumption of ground water in an atmosphere of declining aquifer levels and the RRCGWA designation.

The conditions imposed on the grant of the Application will ensure principles of water conservation are reasonably fulfilled. Conservation of water resources in the Raft River Basin is directly tied to the RRCGWA Order, the Curtailment Order and the now curtailed ground water rights in the basin. Any increased pumping of ground water would be antithetical to the conservation based purposes of balancing the Raft River Basin aquifer. Both EVC and the Protestants acknowledge the precariousness and ongoing depletive effects of groundwater use from the aquifer and EVC should continue to carryout and improve its conservation efforts toward that end.

E. Effect on the Local Economy

Idaho Code § 42-222(1) requires evidence the transfer “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.” The Applicant is not proposing to move its proposed place of use outside of the local watershed. Therefore, this review criterion is not pertinent to the Application.

F. Local Public Interest

The “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).

Admin. Memo. #24 guides the Department in considering the local public interest when reviewing and permitting transfer applications. Including considerations such as: recreation, fish and wildlife impacts; water and hazardous substances standards; local and state government; neighboring jurisdictions; and the state water plan. *Admin Memo #24* at 34. With respect to the local and state government criteria, the Department considers whether the transfer complies with “local and state government . . . planning and zoning ordinances, regulations, records of decisions, or policies affecting the public water resources.” *Id.*

The Raft River Basin has long suffered from declining ground water supplies, as detailed in the findings of fact above. The Department has estimated that the average basin-wide ground water declines from 1966 – 1991 were 0.85 feet/year and from 1991 – 2016 were 2.05 feet/year. Not only have ground water declines not abated in the basin, they have increased in severity over the last 25 years.

In response to declining ground water supplies in the Raft River, the Department designated a critical ground water area (CGWA) in 1963. CGWAs are designated when the Director determines a ground water basin does not have sufficient ground water to provide a “reasonably safe supply” for irrigation or other uses. Within a CGWA, the Director can deny new applications for appropriation, require measurement and reporting of diversions, approve ground water management plans to manage the effects of ground water withdrawals on the aquifer, and curtail or reduce the withdrawals of water holders on a “time priority basis.” Idaho Code § 42-233A.

The RRGWD submitted a proposed Management Plan to the Director in 2016 to “mitigate for the expanded acres and to balance the aquifer.” *Management Plan* at 1. The Director did not approve the Management Plan because it was “inadequate to bring aquifer withdrawals into balance with aquifer recharge.” *Amended Final Order re: Management Program and Curtailing Expansion Rights* at 9. Lacking an acceptable management plan the Department issued the 2016 Curtailment Order, curtailing expansion water rights over three years, with full curtailment occurring at the

start of the 2019 irrigation season. *Id.* at 10. To reiterate, more than 5,600 expansion acres have been curtailed, including 773.7 acres of EVC's irrigated ground.

The Department created WD 143 to administer ground water rights in the Raft River basin. Since its creation, administered ground water users have installed ground water measurement devices to measure and report annual ground water withdrawals. The Watermaster of WD 143 has also been responsible for carrying out the curtailment of expansion acres, working through the difficult process with many water users in the basin, including EVC.

In order to monitor ground water levels in the Raft River Basin, the RRGWD employs Mr. Higgs with Water Well Consultants, Inc. Mr. Higgs testified at hearing that aquifer levels are still declining despite the curtailment, and if levels continue to decline, the Department will have to curtail additional acres until the aquifer balances. Further, Mr. Yates and Mr. Branch, who both sit on the RRGWD Advisory Board, testified the ground water district is working on a revised RRCGWA management plan. Mr. Yates testified that the new plan will consider additional curtailment. Mr. Branch testified the plan will propose to further reduce consumptive use in the Raft River Basin.

From his review of the Application, the Watermaster concluded that the proposed transfer might allow EVC to irrigate land that would otherwise not be allowed by the Department. Because the Department and the Water District do not regulate commercial water use efficiency or the number of acres irrigated with commercial water, the Watermaster raised concerns that it would be possible for EVC to "over use water in an effort to dilute and render water more suitable for irrigation" and "potentially irrigate more acres than were originally irrigated." *Watermaster Comments Transfer #81940* at 2.

The Watermaster also raised the concern that the water user community in the Raft River would perceive the approval of the Application as a "loop hole in the Department's policy that undermines any efforts to conserve water in a [critical ground water area]." *Id.* at 1. Because EVC's Application affects lands within the RRCGWA, and due to his concerns that increased ground water diversions are contrary to the public interest, the Watermaster recommended that the Application be conditioned such that "the commercial wastewater would only be used on land with active irrigation water rights." *Id.*

At hearing the Protestants also expressed concern about the potential effects of the Application on the local public interest. Mr. Yates testified that all water users need to sacrifice to stabilize the shared aquifer and that he has curtailed his expansion acres and he expects everyone else to do the same. He testified that it is imperative to stabilize the aquifer to maintain their property values and he questioned "how anyone in their right mind can jeopardize their investment to go from \$7,000/acre [with water rights] to \$200/acre [dry land without water rights]." H.R. Vol. 6 at 9-10. Mr. Branch testified that this Application would allow EVC to land apply water to new lands without active irrigation water rights and that would constitute an enlargement of water use. He testified that because this Application affects lands in the RRCGWA and because water users,

including himself and Mr. Yates are being curtailed, it is “wrong to allow [EVC] to irrigate more acres than [it] had previously irrigated.” H.R. Vol. 6 at 23.

In his closing statement, Protestant’s counsel Kent Fletcher, argued that when addressing a transfer application that affects water use in a CGWA, particularly a CGWA with active curtailments, the Department should evaluate whether the Application will “help achieve an acceptable management plan” or whether it “will hinder the adoption of an acceptable management plan.” H.R. Vol. 6 at 65. Mr. Fletcher argued that granting this Application would only “increase the burdens under the curtailment order.” H.R. Vol. 6 at 66.

At hearing EVC and its expert Mr. Sullivan, repeatedly testified that transferring the land application of wastewater from lands irrigated with an active irrigation water right to lands without a water right would not necessarily result in increased ground water pumping. And yet, Mr. Sullivan testified, in the abstract, that if land historically irrigated with ground water acquired access to an additional surface water supply it could result in a decrease in ground water pumped. Conversely, the removal of a historical supply of surface water from lands also irrigated with ground water could result in an increase in ground water pumped. Ultimately, the testimony of EVC and Mr. Sullivan that removal of the supplemental wastewater from supplying lands covered by active water rights would not result in the diversion of more ground water was not convincing.

EVC acknowledged at hearing that “ground water levels have been declining for some time in the Raft River area.” H.R. Vol. 6 at 46. EVC testified that the declines cause issues with its operation because it cannot pump the same volume that it used to, it incurs extra maintenance cost, and it incurs extra expenses to drop wells. EVC also testified that it is a good goal to stabilize the aquifer and that EVC and other users should sacrifice toward that end.

At hearing EVC argued the Application is in the public interest because it is consistent with Admin. Memo. #24, the State Water Plan, and certain previously approved transfers. Mr. Sullivan testified that other transfers have been approved by the Department authorizing the use of commercial and stockwater wastewater on acres that do not have “active irrigation water rights,” including the Peter and Sylvia Grush Transfer (“Transfer 79225”)⁹(EVC’s Exhibit 3) and the Ida Gold Farms Limited Partnership Transfer (“Transfer 68532”)¹⁰(EVC’s Exhibit 4). H.R. Vol. 2 at 22.

⁹ Transfer 79225 was approved by the Department on May 30, 2014, and modified the points of diversion and places of use for four water rights with commercial and stockwater beneficial uses. See Exhibit 3. The transfer allowed for land application of wastewater and modified the commercial place of use to include irrigated land where the commercial wastewater could be land applied. EVC’s Exhibit 3 does not specify whether the commercial water was land applied prior to the filing of Transfer 79225. However, Mr. Sullivan testified at hearing that commercial water modified by Transfer 79225 is not currently land applied to acres without active irrigation water rights. H.R. Vol. 2 at 22:46.

¹⁰ Transfer 68532 was approved by the Department on August 9, 2001. See Exhibit 4. The transfer split three existing water rights for irrigation into A and B components. The transfer modified the new B components of the water rights by changing the nature of use from irrigation to commercial and stockwater for two of the rights, and to domestic, irrigation, stockwater, and commercial for the remaining water right. The transfer allowed for the land application of the commercial wastewater.

However, on cross examination, EVC's expert Mr. Sullivan acknowledged Transfers 79225 and 68532 were approved prior to the Department's issuance of the Curtailment Order in 2016. H.R. Vol. 3 at 4. Mr. Sullivan also testified that Transfer 68532 did not address the land application of wastewater. *Id.*

Transfers 79225 and 68532 are distinguishable from EVC's Application. Admin. Memo. #24 and the State Water Plan do not specifically address the public interest as it relates to areas within a CGWA where curtailments to balance an aquifer are in effect. Similarly, transfers 79225 and 68532 were approved by the Department in the Raft River Basin prior to the current 5,600 AF curtailment.

Next, EVC repeatedly stated approval of the Application would result in the irrigation of lands with wastewater that are not covered by active irrigation water rights. Evidence in the record varies on the quantity of commercial water available, but it is estimated to be between 420 AF and 1,500 AF. The Applicant has already installed infrastructure that will allow it to irrigate land in Section 22, T11S, R27E, Cassia County that is not covered by an active irrigation water right and has not been recently irrigated by EVC. Because EVC's commercial wastewater has historically been used to irrigate lands with active irrigation water rights, to make up for the loss of wastewater supply, EVC could divert and consume additional ground water in the future to meet the crop water requirements historically satisfied by the 420 AF to 1,500 AF of commercial wastewater.

Therefore, unconditional approval of the Application would likely result in a net increase of ground water pumping and consumption across EVC's Ground Water Irrigation Rights and the 43-13449 et al. water rights. That outcome does not align with the local public interest of the Raft River Basin and cannot be allowed due to the current status of the Raft River aquifer. The aquifer continues to decline at a measured 2.05 feet/year. Expansion ground water rights have been fully curtailed for the first time in history. A RRCRGWA management plan has not been developed or approved that balances aquifer withdrawals with recharge. Further, both local water users and technical experts acknowledge that additional curtailment of water rights in the Raft River Basin will likely be needed in order to balance the ground water resource.

For these reasons, it is not in the local public interest to approve the Application without a condition that prevents increased ground water diversion and consumption by EVC. To prevent increased ground water diversion and consumption the transfer will be conditioned, according to the authority in Idaho Code § 42-222(1), to limit the application of wastewater to lands covered by an active irrigation water right. For the purposes of this order, lands covered by an active irrigation water right are the lands within EVC's PPU that are irrigated by EVC's Ground Water Irrigation Rights, not including EVC's curtailed acres.

G. Measurement and Administration

In his recommendations to the Department, the Watermaster considered two different EVC hypothetical commercial operational scenarios and found a need for measurement devices under each.

In the first scenario, the Application is approved with a condition limiting the land application of wastewater to lands covered by active irrigation water rights. Under this scenario, measurement devices are required on all points of diversion, but no measurement of the wastewater would be required. In the second scenario, the Application is unconditionally approved and the wastewater can be applied to lands without active irrigation water rights. Under this scenario, the Watermaster stated it would be important that “all commercial water used in the facility be measured and accounted for” and that there would also need to be “measurement [devices on] lines going to acres to be irrigated by the commercial waste water to confirm the amount of water uses for irrigation is consistent with the amount of water used on the dairy/feedlot.” *Watermaster Comments Transfer #81940* at 2.

In his testimony Mr. Sullivan testified for EVC that it is his experience that “the measurement and reporting” of water use has become prevalent in Idaho. He further testified that it would be “a reasonable requirement” and that he would “expect the Department” to require measurement devices at the dairy lagoons. H.R. Vol. 4 at 6.

As described above, in 2016 the Department issued its Measurement Order in WD 143 requiring the installation of measurement devices on regulated points of diversion by the start of the 2018 irrigation season for irrigation diversions and by January 1, 2018, for non-irrigation diversions.

On September 17, 2018, the Director issued an order curtailing 22 water users within WD 143 for failure to install measurement devices. EVC was not one of the water users curtailed by the Director for lack of installing a measurement device, which suggests that it had installed acceptable measurement devices on all regulated points of diversion.

However, based on testimony at hearing, it is apparent measurement devices have not been installed within EVC’s commercial facility to measure the amount of wastewater generated, collected into the lagoons, and historically land applied to irrigated lands. At the very least, no information or data related to measurement has been reported to the Watermaster. This information would have been useful to the hearing officer, the Watermaster, the Department, and to the Protestants in considering and understanding the Application, including the evaluation of the effects of the Application on the local public interest.

For these reasons, in addition to maintaining measurement devices on regulated points of diversion, the Application should be approved with a condition requiring the measurement and reporting of wastewater amounts that flow out of EVC’s lagoons for land application.

CONCLUSIONS OF LAW

EVC has satisfied its burden of proof for the review criteria set forth in Idaho Code § 42-222 and Transfer No. 81940 should be approved with conditions.

To ensure the transfer of the place of use under the Application does not cause injury and is not contrary to the local public interest and the conservation of water resources in Idaho, and more specifically in the RRCGWMA, conditions must be added to the 43-13449 et al. water rights to limit the application of wastewater associated with the water rights to lands with active irrigation water rights.

In addition, a condition must be added requiring the measurement and reporting of wastewater amounts that flow out of EVC's lagoons for land application.

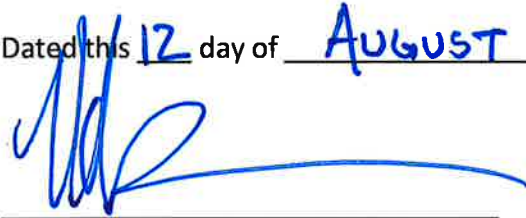
ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 81940 in the name of East Valley Cattle, LLC is APPROVED WITH CONDITIONS.

IT IS FURTHER ORDERED that Application for Transfer No. 81940 be conditioned to limit the application of commercial wastewater to land covered by active irrigation water rights as defined and described within this order.

IT IS FURTHER ORDERED that Application for Transfer No. 81940 be conditioned to require the measurement and reporting of wastewater amounts that flow out of EVC's lagoons for land application.

Dated this 12 day of AUGUST 2019.



Mat Weaver
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August 2019, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

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*For Nolan K Branch and Kirtland Yates,
Protestants*



Kimberle English

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.