

September 16, 1994

Attached is a copy of the **Final Order** issued in connection with Application for Transfer Nos. 4318 and 4319 of Licensed Water Right No. 36-07295 in the name of Jack J. Hirai

Copies forwarded to:

IDWR - Northern Regional Manager

IDWR - Southern Regional Manager

IDWR - Eastern Regional Manager

IDWR - Western Regional Manager

Legal Division - Phil Rassier

Adjudication Bureau - Dave Shaw

Information Officer - Dick Larsen

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Department of Water Resources
Eastern District Office

Water Allocation Bureau - Glen Saxton

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Jim Johnson



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

September 16, 1994

RE: In the Matter of Application for Transfer Nos. 4318 and 4319
of Licensed Water Right No. 36-07295 in the name of Jack J.
Hirai

Dear Interested Party:

The accompanying order is a "final order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance 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.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A nonparty shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department 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 67-5246(4) Idaho Code.

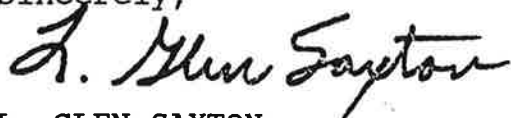
APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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 a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,



L. GLEN SAXTON
Chief, Water Allocation Bureau

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 4318
WATER RIGHT NO. 36-07295A

This is to certify that: JACK J HIRAI
3192 S 1300 E
WENDELL ID 83355

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/01 to 10/31	2.43 CFS	708.0 AF

SOURCE

GROUNDWATER

Priority: 12/11/1973

LOCATION OF POINT(S) OF DIVERSION:

NESE , Sec. 8, Township 08S, Range 14E
GOODING County

PLACE OF USE: IRRIGATION

<u>TWN RGE SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
08S 14E 8	NENE 4	NWNE 36	SWNE 40	
	SENE 37	NESE 40	SESE 20	177
		Total number of acres irrigated:		177

CONDITIONS/REMARKS:

Right No. 36-07295A is subject to the conditions of the Final Order in the matter of Application for Transfer No. 4318.

Dated this 16th day of September, 1994.


Chief, Water Alloc. Bureau

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 4319
WATER RIGHT NO(S). 36-07295B/36-07295C

This is to certify that: JACK J HIRAI
3192 S 1300 E
WENDELL ID 83355

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
Right No. 36-07295B :			
Priority: 12/11/1973			
IRRIGATION	04/01 to 10/31	2.80 CFS	763.6 AF
SUBTOTAL:		2.80 CFS	763.6 AF
Right No. 36-07295C :			
Priority: 12/11/1973			
STOCKWATER	01/01 to 12/31	0.16 CFS	34.7 AF
COMMERCIAL	01/01 to 12/31	0.16 CFS	8.0 AF
SUBTOTAL:		0.32 CFS	42.7 AF
TOTAL:		3.12 CFS	806.3 AF

SOURCE
GROUNDWATER

LOCATION OF POINT(S) OF DIVERSION:

Right No. 36-07295B :
NWSW , Sec. 9, Township 08S, Range 14E

GOODING County

Right No. 36-07295C :
SWSW , Sec. 9, Township 08S, Range 14E

GOODING County

Right No. 36-07295B :

PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
08S	14E	8	NENE 4.0			4.0
		9	SENW 37.0	NESW 37.5	NWSW 37.5	
			SWSW 37.4	SESW 37.5		186.9
Total number of acres irrigated:						190.9

TRANSFER NO. 4319
WATER RIGHT NO(S). 36-07295B/36-07295C

Right No. 36-07295C :

PLACE OF USE: STOCKWATER & COMMERCIAL

TWN RGE SEC

08S 14E 9

SWNW

CONDITIONS/REMARKS:

Right Nos. 36-07295B and 36-07295C are subject to the conditions of the Final Order in the matter of Application for Transfer No. 4319.

Dated this 16th day of September, 1994.


Chief, Water Alloc. Bureau

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NOS. 4318 AND)
4319 OF LICENSED WATER RIGHT)
NO. 36-07295 IN THE NAME OF)
JACK J. HIRAI)

FINAL ORDER

On August 24, 1994, the Department of Water Resources (department) issued a Recommended Order in connection with Application for Transfer Nos. 4318 and 4319 of Licensed Water Right No. 36-07295 in the name of Jack J. Hirai (applicant). Four (4) protestants filed with the department a Petition for Reconsideration, a Petition for Rehearing and Exceptions in connection with the Recommended Order. On September 8, 1994, the hearing officer denied the petitions and exceptions to the Recommended Order.

Based upon his understanding of the facts and the law in this matter, the Director of the department makes the following Findings of Fact, Analysis, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. On November 29, 1989, the department issued License No. 36-07295 to Jack J. Hirai (applicant) providing the following:

Source:	Ground water
Rate of div:	5.55 cfs
Volume:	1,619.6 AF/Yr
Priority:	December 11, 1973
Use:	Irrigation
Point of div:	NW1/4SW1/4 Section 9, T8S, R14E,BM.
Place of use:	404.9 acres in parts of Sections 8 and 9, T8S, R14E,BM.

2. On February 25, 1994, Jack Hirai filed Application for Transfer No. 4318 with the department. The application proposes a split in the ownership of the irrigated land shown on License No. 36-07295 and proposes the addition of a new well to be located in NE1/4SE1/4 Section 8, T8S, R14E,BM. This part of License No. 36-07295 after the desired change would appear as follows:

Ident No.	36-07295A
Rate of div:	2.43 cfs
Volume:	708 AF/Yr
Use:	Irrigation
Point of div:	NE1/4SE1/4 Section 8, T8S, R14E,BM.

Place of use: 177 acres in Section 8, T8S, R14E, BM.

3. On February 25, 1994, the applicant also filed Application for Transfer No. 4319 with the department proposing to change the nature of use of part of the remaining portion of License No. 36-07295 to be as follows:

Ident No. 36-07295C
Rate of div: 0.32 cfs
Volume: 148 AF/Yr
Use: Commercial and stockwater
Point of div: SW1/4NW1/4 Section 9, T8S, R14E, BM. (2 wells)
Place of use: SW1/4NW1/4 Section 9, T8S, R14E, BM.

Remarks: The commercial and stockwater use is in connection with a proposed dairy.

The remaining part of License No. 36-07295 provides the following:

Ident No. 36-07295B
Rate of div: 2.80 cfs
Volume: 763.6 AF/Yr
Use: Irrigation
Point of div: NW1/4SW1/4 Section 9, T8S, R14E, BM.
Place of use: 190.9 acres in parts of Section 9, T8S, R14E, BM.

4. The department advertised the applications which were protested by the following parties:

Harry T. & Lorene F. Shaw
Fenton & Wanda Hays
Daniel Petta
Ron Caster
Marvin & Pat Titus
George & Maxine Waltz
Dan & Dawn Maier
E.I. & Carol Williams
Hagerman Valley Citizens Alert, Inc.

Daniel Petta, Ron Caster and Marvin & Pat Titus subsequently withdrew their protests.

5. On July 12, 1994, the department conducted a hearing in the matter in Gooding, Idaho. The applicant was present and was represented by Norman M. Semanko. The following protestants were present and represented themselves:

E. I. Williams
Ned Swisher for Hagerman Valley Citizens Alert, Inc.
George & Maxine Waltz
Dan & Dawn Maier
Fenton & Wanda Hays
Harry T. Shaw

Harry T. Shaw, Fenton Hays and Wanda Hays while present at the hearing, chose not to actively participate in it.

6. Issues identified by the protestants include the following:

- a) The proposed changes will injure other water rights.
- b) The proposed changes will constitute an enlargement in use of the original right.
- c) The proposed changes conflict with the local public interest.
- d) The applications are not consistent with the conservation of water resources within Idaho.

7. Exhibits offered and accepted as a part of the record include the following:

- a. Applicant's Exhibit No. 1. - Building site plan.
- b. Applicant's Exhibit No. 2. - General map of the applicant's property.
- c. Applicant's Exhibit No. 3. - Laboratory Report from Alchem Laboratories - Lab Sample Number 56779.
- d. Applicant's Exhibit No. 4. - Well Driller's Reports for twenty-six (26) wells.
- e. Applicant's Exhibit No. 5. - Copy of aerial photograph of applicant's property.
- f. Applicant's Exhibit No. 6. - Fresh Water Considerations for Dairy Farms by Dean E. Falk, Extension Dairy Specialist, University of Idaho.
- g. Applicant's Exhibit No. 7. - Copy of a letter dated June 20, 1994 from Tena Petter of Robert Jones Realty, Inc.
- h. Applicant's Exhibit No. 8. - Laboratory Report from Alchem Laboratories - Lab Sample Number 56780.

8. At the hearing, the hearing officer officially noticed the following:

- a) Water right license file no. 36-07295 including the application for transfer and related information.
- b) Past decisions and orders of the department.
- c) Water right records in department files including the rights of the protestant.

d) Reports, water measurements and flow records in department files such as U.S. Geological Survey reports.

e) Well Driller's Reports in department files.

f) Idaho Supreme Court case entitled Shokal v. Dunn, 109 Idaho 330 (1985).

9. The planned dairy operation in the SW1/4NW1/4 Section 9, T8S, R14E, BM has been described by the applicant or by the applicant's representatives in terms of size as follows:

a) The application for transfer describes a maximum of 1,200 milking cows and 300 non-milking cows.

b) At the hearing held on July 12, 1994, the applicant stated the operation would start with about 800 milking cows and 160 non-milking cows.

c) The operation was represented as 750 milking cows and 120 non-milking cows by the applicant to the University of Idaho and to the Division of Environmental Quality of the Idaho Department of Health and Welfare (DEQ) when seeking to determine requirements for the construction of a waste lagoon. The estimate of non-milking cows is based on the industry standard of approximately 16% of the milking cows.

The proposed lagoon for the impoundment of waste water from the dairy operation will be about seven (7) acres in surface area and will be lined with either a PVC or polyethelene plastic liner to prevent seepage from the lagoon. The applicant also proposes an automatic cow washing system as a part of the facility.

10. The protestants' primary concerns were that their property values will decline if a dairy is built, that they may have difficulty selling their property and that there is the potential of contamination of both ground water and the Snake River. The nearest protestants live approximately a mile away from the proposed dairy operation.

11. There is an existing dairy operation located in the SE1/4NW1/4 Section 5, T8S, R14E, BM which is approximately a mile from the applicant's proposed operation.

12. Domestic wells in the general area are from 100 to 200 feet in depth. Irrigation wells are generally deeper.

13. Gooding County administers a "Confined Animal Feeding" ordinance with which dairy operations must comply.

14. License No. 36-07295 authorizes the annual diversion of (37 acres) (4 AF/acre) = 148 AF of water for irrigation of 37 acres in the SW1/4NW1/4 Section 9, T8S, R14E, BM of which 111 AF can be consumed annually. The proposed dairy operation will divert a

total of about 42.7 AF of which 12.7 AF will be consumed annually.

15. The protestants did not assert that their existing water rights would be injured by the proposed transfers.

16. The applicant plans to install state of the art dairy equipment which will limit the amount of water needed for the operation of the dairy and the amount of water to be impounded in its proposed waste water lagoon.

17. The proposed dairy will provide employment in the county and will generate more revenue than would be generated from the irrigation of the 40 acre tract on which the dairy is proposed.

ANALYSIS

The protestants allege that the proposed dairy is speculative in nature, since there is a proposed buyer for the dairy and that the proposed buyer was not present at the hearing. This argument should be rejected, since there is no requirement for a proposed buyer of a water right to appear at the hearing if the owner of the water right or a representative of the owner appears in connection with a proposed change to a water right.

The protestants also allege that the application for transfer should not be approved since final plans have not been prepared relative to the dairy. While a final design has not been prepared or submitted as a part of the hearing record, the application is not speculative, since the applicant has provided sufficient information to allow review of the proposal including the number of dairy cattle, the rate and volume of water needed for the proposed facility, the size and type of lagoons, and the locations of the dairy facility. Blue print quality plans are not required.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

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

3. The proposed changes will not constitute an enlargement in use of the original right.

4. The proposed changes do not conflict with the local

public interest.

5. The applications are consistent with the conservation of water resources within Idaho.

6. The department should approve the applications for transfer with certain conditions and limitations but should not authorize a dairy operation larger than the size for which the applicant sought and received design information from the Division of Environmental Quality for the wastewater lagoon.

ORDER

IT IS THEREFORE, hereby ORDERED that Applications for Transfer Nos. 4318 and 4319 of License No. 36-07295 are APPROVED subject to the following conditions and limitations:

1. The change authorized by this approval shall be accomplished within two (2) years of the date of the Final Order.

2. The proposed dairy operation under transfer no. 4319 shall comply with applicable zoning and use ordinances of Gooding County.

3. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the department from all authorized points of diversion which will allow determination of the total rate of diversion.

4. In connection with the dairy operation, the right holder shall install and maintain an impervious membrane liner in its lagoon to prevent seepage of impounded water into the ground water aquifer. Use of water under transfer no. 4319 shall also otherwise comply with the Water Quality Standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

5. The maximum size of the dairy operation authorized by this approval shall not exceed 750 milking cows and 120 non-milking cows.

6. The right holder(s) shall either (a) install and maintain suitable headgates, lockable controlling works and measuring devices capable of determining the maximum rate of diversion and the total volume of water diverted from each well during a reporting period or shall (b) enter into an agreement with the Director of the department as authorized in Section 42-701, Idaho Code, to submit such information and technical data concerning the diversion and pumping facilities as the Director determines necessary to determine the amount of water which has been diverted during a reporting period.

7. During 1995 and in subsequent years, the right holder(s) shall furnish to the department the depth to water in any well

prior to pumping, the depth to water during the pumping period, the pressure in the pipe distribution system during the pumping period if the well is not free flowing and shall furnish the pumping information requested on a reporting form to be provided by the department.

8. Failure to comply with the conditions of approval is cause for the Director of the department to rescind approval of the transfers.

Signed this 15TH day of SEPTEMBER, 1994.



R. KEITH HIGGINSON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 1994, I mailed a true and correct copy, postage prepaid, of the foregoing **FINAL ORDER** to the following:

Jack Hirai
3192 S 1300 E
Wendell, ID 83355

Marvin & Pat Titus
3052 S 1200 E
Hagerman, ID 83332

Harry T & Lorene F Shaw
3184C S 1200 E
Hagerman, ID 83332

George & Maxine Waltz
3107 S 1200 E
Hagerman, ID 83332

Fenton & Wanda Hays
3184B S 1200 E
Hagerman, ID 83332

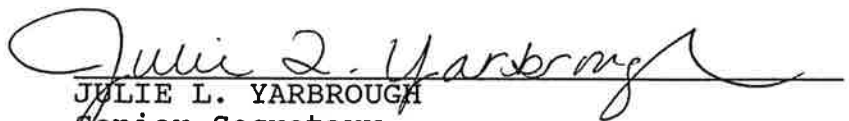
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JULIE L. YARBROUGH
Senior Secretary