

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

|                                          |   |                                |
|------------------------------------------|---|--------------------------------|
| <b>IN THE MATTER OF APPLICATION FOR</b>  | ) | <b>AMENDED FINAL ORDER</b>     |
| <b>TRANSFER NO. 79380 IN THE NAME OF</b> | ) | <b>CONDITIONALLY APPROVING</b> |
| <b>THOMAS AND DOROTHY LENO</b>           | ) | <b>TRANSFER</b>                |
| <hr/>                                    | ) |                                |

**PROCEDURAL BACKGROUND**

On May 20, 2014, Thomas Leno (“Leno”) filed Application for Transfer No. 79380 with the Idaho Department of Water Resources (“Department”). The Department published notice of the application 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, Edward 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 Leno and agreed to rely on the evidence presented by Leno.

On March 18 and 19, 2015, Department hearing officer James Cefalo conducted an administrative hearing in Twin Falls, Idaho. Attorney Travis Thompson represented Leno and Cedar Ridge. Attorney David Coleman represented Margaret Winsryg and Leroy Elliot. The hearing was held in conjunction with hearings for Application for Transfer Nos. 79357, 79384 and 79466.

On June 1, 2015, the hearing officer issued an Amended Preliminary Order Approving Transfer 79380

On June 15, 2015, Leno and Cedar Ridge filed timely exceptions to the hearing officer’s Amended Preliminary Order Approving Transfer 79380.

**SUPPORT DATA**

IN FILE # 47-17589

On June 25, 2015, the Department received *Petitioners Objection to Applicants Exceptions to Change the Ruling Made by Hearing Officer May 29, 2015*, signed by a number of the protestants.

On June 29, 2015, the Department received a document titled *Protestant's Objection to Applicant's Exceptions to Amended Preliminary Order* filed by Edward Smith.

On October 13, 2015, the Director of the Department issued a *Final Order Approving Transfer* ("Final Order"). The Director agreed with the hearing officer that Transfer No. 79380 should be approved but disagreed with hearing officer's conclusions that the season of use should be limited to May 1 – September 30 and that the priority date should be advanced to the date of the approval (June 1, 2015).

On October 21, 2015, Leno and Cedar Ridge filed *Applicant's Petition for Reconsideration and Clarification of Final Order* ("Applicant's Petition"). In the Applicant's Petition, Leno and Cedar Ridge ask the Director to re-issue the Final Order with the formal water right transfer forms showing the elements of the approved transfer. Leno and Cedar Ridge state that reissuing the Final Order with the transfer approval forms "will provide clarity and avoid confusion" regarding the elements of the approved transfer. *Applicant's Petition* at 2. Leno and Cedar Ridge also ask the Director to remove the last three sentences of Conclusion of Law #29 as they are inconsistent with the findings and conclusions in the rest of the order. *Id.*

On October 26, 2015, Protestant Edward Smith submitted *Protestant's Petition for Director's Reconsideration of Final Order* ("Smith Petition"), asking the Director to reconsider his decision regarding the season of use and the priority date.<sup>1</sup> Smith argues the Director should adopt the shorter season of use recommended by the hearing officer. *Smith Petition* at 1. In the alternative, Smith asks the Director to limit the season of use to March 15 – November 15. *Id.* Smith further argues that "expansion to a full year Season of Use places neighbors (whether protestants or not) in jeopardy by allowing water extraction at the dairies to occur when there is no '[b]ack-fill' of ground water from the Twin Falls Canal System from roughly October to April." *Id.*

Smith also argues the priority date should be advanced to the date of the transfer approval, stating "[t]he close proximity of exiting water rights to the new dairy extraction sites creates the potential for well interference in existing wells, but the existing wells will not have the protection of their priority dates to defend themselves against an adverse water condition caused by the dairies if the 1970 priority date is allowed. . . . It is only fair and equitable to protect the neighbors in the dairy area by protecting their current water right priority dates, which is the essence of Idaho water law" *Id.* at 2.

On October 29, 2015, Leno and Cedar Ridge submitted *Applicant's Response in Opposition to Protestants' Petition for Reconsideration of Final Orders* ("Response"). Leno and Cedar Ridge argue that the Protestants "provide no valid legal or factual reasons to change the Director's decision." *Response* at 2.

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<sup>1</sup> Nearly identical petitions were subsequently submitted to the Department by Protestants Elizabeth Slifer, Barbara and Lynn Stephens, Jeanie McCreary, Martin Hackard, Pam Ritter, and Leslie Ellsworth.

On November 5, 2015, the Department received *Protestant's Letter Concerning Non-Payment of Deposition Fees by Applicants* ("Discovery Letter") filed by Edward Smith, in which Smith asks the Director to order Leno and Cedar Ridge to comply with the discovery order issued by the hearing officer requiring Leno and Cedar Ridge to pay the costs of deposing the Protestants' expert, Ed Squires. Accompanying Smith's letter are emails between Smith and counsel for Leno and Cedar Ridge documenting Smith's attempts to get Leno and Cedar Ridge to comply with the discovery order and an invoice from Squires showing the deposition costs. Leno and Cedar Ridge did not respond to the Discovery Letter.

## **RESPONSE TO REQUESTS FOR RECONSIDERATION**

The Director declines to impose the shorter season of use requested by the Protestants. The following text, extracted from the Final Order and modified slightly, adequately explains why the Director approved application Transfer No. 79380 and authorized year-round use of the water right transferred:

### **Season of Use**

The hearing officer determined that water levels may fluctuate ten feet seasonally in the Berger area. During the irrigation season, surface water delivery and irrigation recharges the aquifer. During the nonirrigation season, the surface water does not recharge the ground water, resulting in declines up to ten feet.

Water levels will fluctuate between the irrigation season and the nonirrigation season regardless of whether the Department approves this application for transfer.

Hydraulic conductivity is a measure of the ease with which water can move through pore spaces or fractures of an aquifer. If the hydraulic conductivity value is high, easier transmittal of water toward a pumping well results in less drawdown in the pumping well, and consequently, less drawdown in nearby wells affected by the pumping well's cone of depression. Conversely, if the hydraulic conductivity value is low, the slow transmittal of water toward a pumping well results in a higher drawdown in the pumping well because the pumping well must draw from a greater vertical column in the well to derive the same amount of water. The deeper cone of depression in a well completed in material with a low hydraulic conductivity will cause greater drawdowns in nearby wells.

Brockway selected 10 wells near the proposed point of diversion. Brockway averaged hydraulic conductivities derived for each of the ten wells, and computed an average hydraulic conductivity of 15.3 feet/day.

The proposed point of diversion is located near one of the ten wells selected by Brockway for determination of hydraulic conductivity. Brockway computed the hydraulic conductivity for the nearest well in determining hydraulic conductivity. The data from this "nearest" well produces an individual hydraulic conductivity value of 0.4 feet/day, a much lower value than the average hydraulic conductivity for the ten selected wells. As a result, pumping

water from the proposed points of diversion would cause more drawdown to **nearby** wells than the simulated drawdown when the data from all ten wells is averaged. Brockway's hydraulic conductivity of 15.3 ft/day is excessive.

The nearest well owned by a protestant is 1.7 miles away. By employing an excessive value of 15.3 ft/day for hydraulic conductivity, pumping the proposed well will cause a drawdown of 2.8 inches in the protestant's well.

There are other domestic wells located approximately three-quarters of a mile away from the proposed well. Brockway did not model drawdowns in these wells caused by pumping the proposed wells. The cone of depression for drawdown is steep near a pumping well, particularly when the hydraulic conductivity is low. The cone of depression flattens at greater distances from a pumping well. While drawdowns in wells with low hydraulic conductivity are larger and cause significant drawdowns in nearby wells, at distances remote from the pumping wells, the drawdown curve flattens out and approaches the static ground water level in a shorter horizontal distance from the pumping well. The drawdowns in a well located at remote distances from the pumping well with a small hydraulic conductivity will be smaller than the drawdown in a well at the same distance from a pumping well that has a high value of hydraulic conductivity.

In this case, even with a significantly lower value of hydraulic conductivity, the cone of depression will likely be fairly flat at three-quarters of a mile from the pumping well and, at most, would be several inches.

If wells were located within a few hundred feet of the pumping well, the Director would be concerned about drawdowns caused by pumping water from the proposed wells. Because the nearest domestic wells are three-quarters of a mile away, and because of the small quantity of water proposed to be pumped, the drawdowns in wells three-quarters of a mile away will not injure the domestic water right holders.

The evidence presented at the hearing established that the ground water levels in the Berger area are stable or even rising.

A drawdown of several inches in domestic wells, either during the irrigation or nonirrigation season is not a sufficient decline in the aquifer to conclude that the pumping at the proposed point of diversion will injure other water right holders. Because the demand from the ground water resource for the uses proposed by transfer no. 79380 is significantly reduced in the winter, the drawdowns attributable to the small additional water diverted will be minimal.

This final order will approve the transfer of the water right for year round use.

The Director also declines the Protestants' request to advance the priority date of the water right sought to be transferred. The following text from the Final Order adequately explains why the Director retained the priority date of the underlying water right when he approved application Transfer No. 79380:

### **Advancement of Priority**

Because water levels in the basalt aquifer in the Berger area are stable and approval of this transfer will not destabilize water levels in the aquifer, the priority date of this transfer should not have been advanced. The water right transferred will retain its original priority date.

The Director agrees with Leno and Cedar Ridge that re-issuing the Final Order with the water right transfer approval forms will help provide clarity. The Final Order will be re-issued and will include the water right transfer approval forms. The Director also agrees that the last three sentences in Conclusion of Law #29 should be removed. They were mistakenly copied over from the Hearing Officer's *Amended Preliminary Order* and are inconsistent with the rest of the order.

### **RESPONSE TO DISCOVERY LETTER**

The Director has reviewed the hearing officer's discovery order regarding payment of expert fees for depositions. The Director agrees with the hearing officer's legal analysis that Idaho Rule of Civil Procedure 26(b)(4)(C) specifically addresses payment of expert fees for time spent in depositions. The rule is not ambiguous. It clearly states that the party seeking discovery through a deposition shall pay the deposed expert a reasonable fee for the time spent testifying in the deposition. Depositions in administrative proceedings like this one are governed by the Idaho Rules of Civil Procedure. IDAPA 37.01.01.523. There is no evidence of "manifest injustice" in this case if Rule 26(b)(4)(C) is followed. It does not matter that the expert's fees were already paid by Idaho Rural Council. Payment is Leno's and Cedar Ridges' obligation. Leno and Cedar Ridge must reimburse Idaho Rural Council for payment. To ensure compliance with this requirement, the Director will conditionally approve the transfer upon payment by Leno and Cedar Ridge of the expert witness fees.

After carefully considering the evidence in the administrative record, the Director 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 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 simulate 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. Bonnicksen Report, page 1; Bonnicksen 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 vary locally by several hundred feet.” Bonnicksen 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. Well 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 cone of depression for drawdown is steep near a pumping well, particularly when the hydraulic conductivity is low. The cone of depression flattens at greater distances from a pumping well. While drawdown in a well with low hydraulic conductivity is larger and causes significant drawdowns in nearby wells, at distances remote from the pumping well, the drawdown curve flattens out and approaches the static water level in a shorter horizontal distance from the pumping well. The drawdowns in a well located at remote distances from a pumping well with a small hydraulic conductivity will be smaller than the drawdown in a well at the same distance from a pumping well that has a high value of hydraulic conductivity.

39. 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. If Brockway had used a hydraulic conductivity of 0.4, the predicted drawdown in the Parrott well, given the distance from the pumping well and the lower hydraulic conductivity, would likely have been even less.

40. In addition to the Parrott well, there are other domestic wells located approximately three-quarters of a mile away from the proposed well. Brockway did not model drawdowns in these other wells caused by pumping the proposed wells.

Even assuming a significantly lower value of hydraulic conductivity, the cone of depression will be fairly flat at a distance of three-quarters of a mile from the pumping well. The drawdown in a well located three-quarters of a mile from the pumping well would only be several inches when the pumping well is pumping.

41. If the unanalyzed domestic wells were located within a few hundred feet of the pumping well (like they were in Transfer No. 79384), the Director would be concerned about drawdowns caused by pumping water from the proposed wells. Because the nearest domestic wells are three-quarters of a mile away, and because of the small quantity of water proposed to be pumped, the drawdowns in wells three-quarters of a mile away will not injure the domestic water right holders.

42. 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.

43. Seepage from surface canals in the area results in a seasonal increase in aquifer levels. *See* Ex. 20.

44. 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. Bonnicksen Rebuttal Report, page 3; C. Brockway Testimony.

45. “Shoshone Creek joins Salmon Falls Creek about 3.7 miles south of the Idaho-Nevada border.” Bonnicksen Rebuttal Report, page 2.

46. “[G]roundwater in the Mule Creek drainage will travel to the south into Nevada and will eventually loop its way back into Idaho following the ground elevation decline. The groundwater at that point of re-entry into Idaho will then flow in a general north direction as Brockway’s expert report has indicated.” Kimball Rebuttal Report, page 4.

47. Ground water at the Leno well is hydraulically connected to ground water at the proposed point of diversion.

48. 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.

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. Aerial photography shows that there are a number of homes located approximately  $\frac{3}{4}$  miles west of Dairy #3. Ex. 22.

10. 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.

11. 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.

12. 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.*

13. 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.

14. The information contained in the Kimball model is sufficient to conclude that the changes proposed by Leno will not injure 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.

15. 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.

16. 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.

17. 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.

18. 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**

19. 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.

20. Although the evidence is conflicting, the weight of the evidence establishes that ground water at the Leno well is hydraulically connected to the ground water underlying the location of the proposed point of diversion. Brockway and Bonnicksen agree that ground water at the existing point of diversion flows south into Nevada. Brockway and Kimball agree that the direction of ground water underflow generally follows the stream topography.

21. Bonnicksen and Kimball both concluded there is a hydraulic connection between the existing point of diversion and the proposed points of diversion. In addition, 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**

22. 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).

23. 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.

24. 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**

25. 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.

26. 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**

27. 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).

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

### **Summary**

29. Leno has satisfied his burden of proof for all of the review criteria set forth in Idaho Code § 42-222.

**ORDER**

IT IS HEREBY ORDERED that Application for Transfer No. 79380 in the name of Thomas and Dorothy Leno is APPROVED, conditioned upon payment of the expert deposition fees incurred by Leno and Cedar Ridge for their deposition of Ed Squires in the amount of \$665.00.

Dated this 12<sup>th</sup> day of November, 2015.



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Gary Spackman  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of November 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, to the following:

Document Served: Amended Final Order Conditionally Approving Transfer (79380) with Transfer approval documents, and Explanatory Information to Accompany a Final Order

Jimmie L. Conder  
3623 N 2000 E  
Filer ID 83328

Jeanie McCreary  
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  
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Eric Parrott  
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Twin Falls ID 83301

Elizabeth Slifer  
3779 N 2250 E  
Filer ID 83328

Lois M. Rice  
PO Box 200  
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Martin F. Hackard  
3289 N 2300 E  
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Victoria B. Henson  
3295 N 2300 E  
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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



Deborah Gibson  
Administrative Assistant

**Courtesy copies 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 FINAL ORDER

(Required by Rule of Procedure 740.02)

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 service date 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 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.
- (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 non-party 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 as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** 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) the service date 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.