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JUN 26 2015

DEPT OF WATER RESOURCES
SOUTHERN REGION

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79384 (in the name of
Thomas & Dorothy Leno)

Protestant Response
APPLICANT'S EXCEPTIONS TO
PRELIMINARY ORDER

COME NOW, Applicant THOMAS LENO and Intervenor CEDAR RIDGE DAIRY LLC (collectively hereinafter referred to as "Applicant"), by and through counsel of record, and pursuant to Idaho Code § 67-5245 and Rule 720.02(b) of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*) hereby files this exceptions brief to the Hearing Officer's May 29, 2015 *Preliminary Order Denying Transfer* ("Irrigation Order"). The Applicant respectfully requests oral argument on this exceptions brief.

INTRODUCTION

The Applicant takes exception to the Hearing Officer's denial of the proposed transfer, including the lack of evidence supporting the decision, and the failure to identify a "reasonable groundwater pumping level" required by Idaho law (I.C. § 42-226). The best available scientific evidence shows no injury to neighboring domestic wells. As such, the Applicant respectfully requests the Director to reverse the Hearing Officer and approve the transfer application.

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1.1

Covering lightly in the hearing

Squire Response to Parratt,

A 3.5 Acre ^{Pond} ~~well~~ exists (see photos)

60 feet from the "test" well at 2200E 3300N

The pond leaks one or more inches per day - personal observation of many driving by

In the irrigation season of 4 months

that is a accumulation of 35 Acre

feet in the Aquifer.

That recharge accounts for the fact

that a formerly dry hole "test well"

can pump a good flow for 16 hours. It

also accounts for McCleary well ~~Rise~~ it

in fact it did, as McCleary is 400 plus

feet away and down grade.

Richard Parratt

BACKGROUND

The Hearing Officer described the factual background for the transfer application and the underlying decreed water right at pages 1-6 of the preliminary order. In general, the Applicant proposes to move a split portion of the water right (41.6 acres, 0.49 cfs and 124.8 acre-feet) to an existing well and new place of use near the Berger, Idaho area.¹ See Ex. 5.

The application was protested by various domestic water right holders who lived less than one mile to several miles away from the proposed point of diversion. Ex. 12. The protests were not resolved therefore an administrative hearing was held before the Hearing Officer on March 18th and 19th, 2015 at the SRBA District Court. The Hearing Officer issued the preliminary order on May 29, 2015.

EXCEPTIONS TO PRELIMINARY ORDER

1. The Hearing Officer ~~erred~~ ^{was correct} in failing to adopt the aquifer hydraulic conductivity value of 55 feet/day as published in a regional groundwater model report developed by the Idaho Water Resources Research Institute (IWWRI) and calculated by Brockway Engineering.
2. The Hearing Officer ~~erred~~ ^{was correct} in failing to adopt a more conservative aquifer hydraulic conductivity value of 15.3 feet/day as calculated by Brockway Engineering based upon a review of area well logs. *1.0 is accurate for location - Kimball*
3. The Hearing Officer ~~erred~~ ^{was correct} in adopting a hydraulic conductivity value of 1.0 feet/day for the aquifer based upon a single pump test at a single well. *Documents That was Haflinger choice*
4. The Hearing Officer erred by not using a "reasonable groundwater pumping level" standard to determine whether or not the transfer would injure existing water rights. *He decided case by case*
5. The Hearing Officer erred by using an "unreasonable drawdown" standard to evaluate whether or not the transfer would injure existing water rights. *Case by case*
6. The Hearing Officer erred in finding a groundwater level drawdown of 9 feet over 30 years to be "unreasonable" despite no impact on Protestant McCreary's domestic well. *McCreary's plot is suspect - wrong address*

¹ The underlying decreed water right (47-7106) had previously been split and transferred to various areas for both stockwater and commercial uses. See Ex. 18, see also IDWR files for Transfer Nos. 77406 (Triple J Dairy), 77669 (Brackett Cattle Co.), 78127 (Idaho Water Co. LLC). In other words, IDWR had already reviewed the water right and approved other transfers of portions of the water right pursuant to Idaho Code § 42-222.

ARGUMENT

I. IWRRI's Regional Groundwater Model Report and the Hydraulic Conductivity Values Calculated by Brockway Engineering Represents the Best Scientific Evidence for Aquifer Hydraulic Conductivity Values.

Biased and not local

Although variable, as is the case with most aquifers, groundwater levels in the Berger or "Salmon Tract" area "are stable." *Irrigation Order* at 6, ¶ 37; Ex. 10. This is confirmed by various USGS and IDWR monitoring wells as depicted and described in the *Expert Report and Narrative Relative to Water Right Transfer #79384* (Feb. 13, 2015) ("Brockway Report"):

Because the fluctuation over the last 34 years is constant and there is no indication from these wells the aquifer water table is decreasing or increasing, it can be concluded that the ground water aquifer is stable.

Brockway Report at 15.

Other Brockway reports worry about + predict 25 foot drop - move sprinklers

The Protestants' expert witness confirmed this fact as well. See *Irrigation Order* at 6, ¶ 37 (citing Squires Testimony). As depicted in the monitoring wells, the groundwater levels in the Salmon Tract respond to precipitation and irrigation seasonally. See *id.* at 14. The groundwater levels can fluctuate over 10 feet seasonally. See *id.* Further, certain Protestants have experienced increases in ground water levels over time. See *id.* at 6, ¶ 37 (Ritter example, groundwater level at 240 feet in 1982, increased to 217 feet in 2009); see *infra* Part II (McCreary example, groundwater level at 310 feet in 1995, increased to 270 feet in 2014).

Cherry picked AND wrong

Invalid as per Ritter
Invalid per McCreary interview 26 June 2015
In order to evaluate potential impacts on existing water rights, most notably the Protestants' domestic wells, Brockway utilized a Winflow model based upon the Theis equation.

See Brockway Report at 18-28. The Theis equation is a well-known scientific method to evaluate aquifer response and has been relied upon by IDWR in evaluating water right permit

Brockways input is incorrect per Humboldt Squires at hearing

and transfer applications.² *See id.* One of the model parameters for the equation is a hydraulic conductivity value for an aquifer area.

Exception #1

The Hearing Officer erred in failing to adopt the aquifer hydraulic conductivity value of 55 feet/day as published in a regional groundwater model report developed by the Idaho Water Resources Research Institute (IWRRI) and calculated by Brockway Engineering.

The Hearing Officer accepted all of the aquifer parameters for Brockway's Winflow model analysis except for the hydraulic conductivity value (55 or 15.3 feet/day) and the aquifer thickness value (435 feet). *Irrigation Order* at 4, ¶ 22. Notably, the Hearing Officer accepted the aquifer parameters of ground water gradient (50 feet/mile) and storativity (0.12), which was also accepted by the Protestants' expert DuWayne Kimball. *See Kimball Rebuttal Report, Appendix; Kimball Testimony* (Part A, Track 9, 0:50:00 – 0:52:00, accepting storativity value of 0.12 as a "reasonable" value).

As to the hydraulic conductivity and aquifer thickness parameters, Brockway Engineering reviewed published data for the Salmon Tract aquifer and incorporated the aquifer parameters set forth in the report entitled *Development of a Transient Ground-Water Model for the Twin Falls, Idaho Area* (Cosgrove et al., Idaho Water Resources Research Institute, University of Idaho Moscow, Idaho, 1998) ("*IWRRI Report*"). At hearing, Dr. Charles Brockway described the model development and work performed by IWRRI, including its calibration. Brockway Testimony (Part A, Track 4, 1:05:00 – 1:25:00). Multiple model runs were performed to tune hydraulic conductivities for the transient state model in the model cells

throughout the aquifer. *See IWRRI Report* at 31-36.

Don't include anywhere Near 2200 East 3300 ✓ - The only well pumped for test

² *See Preliminary Order Approving Transfer Applications* at 7 (App. for Transfers Nos. 75738 and 75739, Machado, Sept. 16, 2011); *Final Order Approving Transfer* at 7 (App. for Transfer No. 78532, South View Dairy, May 30, 2013); *Final Order* at 11 (App. for Transfer No. 71692, Funk, Feb. 23, 2007).

APPLICANT'S EXCEPTIONS BRIEF (T-79384)

Doesn't apply
Never heard of
This - miles away
across Rock creek

145-foot
Draw Down!!
16 hr at 73
Planned Rate
8 months

In the area of the proposed transfer, IWRRI identified two zones of hydraulic conductivity values, zone 9 with a value of 75 feet/day, and zone 10 with a value of 40 feet/day.³

See IWRRI Report at 29-30. Since the proposed well for the transfer was very close to the boundary of the two zones, Brockway Engineering relied upon a value in between those two, ultimately a more conservative value of 55 feet/day. See Brockway Report at 19; Brockway Testimony (Part A, Track 4, 1:20:00 – 1:23:00); Sullivan Testimony (Part A, Track 0:12:00 to 0:15:00).

Relying upon IWRRI's published data and report, Brockway used the hydraulic conductivity value of 55 feet/day for his Winflow analysis of potential impact from the transfer. See Brockway Report at 24, Brockway Testimony (Part A, Track 4, 1:20:00 – 1:23:00); Sullivan Testimony (Part A, Track 0:12:00 to 0:15:00). The analysis shows a potential maximum drawdown at the various Protestants' wells ranging from 0.087 to 0.688 feet (1.0 to 8.3 inches) after 20 years. See *id.* All potential drawdowns are less than 1 foot and are negligible compared to the observed seasonal fluctuations of the groundwater table and normal operation of a domestic well. See *id.*; see also, Brockway Report, Appendix F. Consequently, given this predicted impact, there is no injury to any existing water rights resulting from the transfer's approval.⁴

on paper - not what is actual
BAD input, false answers
If your well sucks air - its not injury!!
→ There are no successful irrigation
protestants have 5 wells have ←
This evidence shows no injury to existing water rights, including area domestic wells. wells in a 3 mile
The Hearing Officer wrongly refused to accept this evidence for purposes of his injury analysis.
been deepend - one During the hearing!!
As such, the Director should reverse the Hearing Officer's decision. Radios and
more than 3 unsuccessful ones in 40 yrs
None heat hand this was to find water for None found

³ IWRRI developed its groundwater level contour change map, and its hydraulic conductivity zones, based upon the evaluation and measurement of 118 wells between 1995 and 1996. IWRRI Report at 11.

⁴ See e.g. Preliminary Order Approving Transfer Applications at 10 (App. for Transfers Nos. 75738 and 75739, Machado, Sept. 16, 2011); Final Order Approving Transfer at 8 (App. for Transfer No. 78532, South View Dairy, May 30, 2013); Final Order at 11 (App. for Transfer No. 41692, Funk, Feb. 23, 2007).

Exception #2

The Hearing Officer erred in failing to adopt a more conservative aquifer hydraulic conductivity value of 15.3 feet/day as calculated by Brockway Engineering based upon a review of area well logs.

In addition to using IWRRI's published data for his analysis, Brockway performed a second analysis with a more conservative hydraulic conductivity value of 15.3 feet/day. See

Brockway Report at 26 (Winflow Analysis 2); Brockway Testimony (Part A, Track 4, 1:32:00 –

1:35:00). The analysis was performed to evaluate the local conditions around the proposed

irrigation well. Sullivan Testimony (Part A, Track 4, 0:15:00 – 0:17:00). This value was based

upon the mean of the values derived from 10 local well logs, including the limited pump test

performed on the proposed transfer well on Oct. 7th and 8th, 2014. See *id.* Compared to

IWRRI's report (with values of 75 and 40 feet/day in this area), Brockway concluded that the

value of 15.3 feet/day was "very conservative." See *id.*

Using the more conservative value, the analysis showed a potential impact of 0.13 to 1.94 feet after 20 years. See Brockway Report at 27. Again, the impacts were negligible and small

compared to the normal operation of a domestic well and the annual fluctuation witnessed in the

Salmon Tract aquifer (10 feet). Such predicted impacts would not injure existing water rights. — unless

it was an irrigation well proposed which draws what 500 homes want

Indeed, IDWR has previously found that impacts of less than 2 feet would not constitute

injury to nearby wells under a similar analysis. See Preliminary Order Approving Transfer

Applications at 10 (App. for Transfers Nos. 75738 and 75739, Machado, Sept. 16, 2011)

("Machado Order"); Final Order Approving Transfer at 8 (App. for Transfer No. 78532, South

View Dairy, May 30, 2013); Final Order at 11 (App. for Transfer No. 71692, Funk, Feb. 23,

2007). As such, the Director should reverse the Hearing Officer and approve the transfer

application.

These transfers are already in a position
to dry up protestant wells. The fake flaw from
leno property is being shared already

Exception #3

The Hearing Officer erred in adopting a hydraulic conductivity value of 1.0 feet/day for the aquifer based upon a single pump test at a single well.

Despite the published data on the Salmon Tract aquifer and Brockway's expert opinions described above, the Hearing Officer refused to accept the proposed hydraulic conductivity values of either 55 or 15.3 feet/day. The Hearing Officer disregarded this analysis primarily on the fact that Well #7 was included in the calculation. See *Irrigation Order* at 7-8. The Hearing Officer believed that Well #7 was too close to the Twin Falls Canal Company High Line Canal and was "very different" from the other wells used in the analysis. *Id.* at 7. Accordingly, the Hearing Officer indicated that the well should be excluded from aquifer characteristic analysis, resulting in an average hydraulic conductivity of the remaining wells of 5 feet/day. See *id.* at 8, ¶12.

But not applicable
aquifer indicates a water table - that only exists in 20% of the Salmon Tract and not at 2200 E 3300N Ave 2 and 3 miles each way except north 2 miles (hi line canal)

However, the Hearing Officer refused to even accept that calculation and concluded it would have been more appropriate to use "the local hydraulic conductivity value (1.0 feet/day) to determine drawdown impacts to a domestic well located just 500 feet from the proposed well."⁵ *Id.* at 8, ¶ 16. The Hearing Officer adopted the hydraulic conductivity value for the proposed well based upon a single pump test performed in October 2014. *Id.* at 8, ¶ 12. Yet, the pump test was not performed to determine aquifer characteristics, but rather determine approximate yield.⁶ *So what* Sullivan Testimony (Part A, Track 3, 0:27:00 – 0:28:00). The Hearing Officer's decision is not supported by the best available science and as such should be reversed. *huh??*

⁵ At a minimum the Hearing Officer should have adopted the hydraulic conductivity value of 5 feet/day as that value includes more than one well in its analysis. Using 5 feet/day would show an impact less than 9 feet drawdown over 30 years at the McCreary well. For example, the 15.3 feet/day value = 1.94 feet drawdown and the 1.0 feet/day value = 9 feet. The impact using a hydraulic conductivity value of 5 feet/day would fall between these two numbers.

more made up conclusions
⁶ See *Rebuttal Report on Expert Witness Reports Submitted by Hydro Logic Inc (Ed Squires), and Bill Bonnichsen, and DuWayne Kimball relative to Water Right Transfers 79357, 79380, 79384, and 79466* at 6 (Mar. 6, 2015).

First, the area of the aquifer analyzed by Brockway to determine potential impacts stretched over five (5) square miles. See Brockway Report at 22, Figure 5. The aquifer characteristics at a single well do not represent the entire aquifer area or even an area extending from the proposed well. *But they do really* See *Irrigation Order* at 8, ¶ 16. Indeed, the Hearing Officer recognized “[t]here can be significant local variation depending on the homogeneity of the aquifer substrate.” *Irrigation Order* at 7, ¶ 5. At hearing, Greg Sullivan, expert witness for the Applicant, explained that it is not scientifically supportable to evaluate an aquifer’s characteristics based upon a single well. Sullivan Testimony (Part A, Track 4, 0:26:00 – 0:28:00, 0:30:00 – 0:32:00). A hydraulic conductivity value from a single pump test or well does not provide sufficient statistical data. *Id.* (Part A, Track 4, 0:30:00 – 0:32:00). A single hydraulic conductivity value cannot adequately represent the flow of ground water through a fractured basalt aquifer. This is due to the nature of a fractured basalt aquifer. Ground water does not flow evenly through a fractured basalt aquifer and the hydraulic conductivity value will vary throughout the aquifer. It is better to utilize a hydraulic conductivity value that represents multiple wells in the area to provide a tighter hydraulic fit to the actual characteristics of the local aquifer. Brockway Testimony (Part A, Track 4, 1:35:00 – 1:37:00)

As such, the Hearing Officer erred by not accepting the values identified by IWRRI and Brockway for purposes of an estimated hydraulic conductivity value for this area of the Salmon Tract aquifer. Accepting these values, even a more conservative value of 15.3 feet/day, would show an estimated impact on area wells of less than 2 feet over 20 years. Such an impact on

*old news
Different
Area
Different
purpose
Twin Falls
City.
when they
used their
data - dry
holes
in terms of
commercial
volume*

groundwater levels is negligible and does not injure existing water rights, particularly when the aquifer already fluctuates at levels of 10 feet or more annually.⁷

The Hearing Officer's failure to accept the hydraulic conductivity values of IWRR and Brockway is not supported by the best available science and should be reversed accordingly.

II. The Hearing Officer Failed to Identify a "Reasonable Groundwater Pumping Level" and Erred in his Injury Determination.

Exceptions #4, #5, and #6

The Hearing Officer erred by not using a "reasonable groundwater pumping level" standard to determine whether or not the transfer would injure existing water rights.

The Hearing Officer erred by using an "unreasonable drawdown" standard to evaluate whether or not the transfer would injure existing water rights.

The Hearing Officer erred in finding a groundwater level drawdown of 9 feet over 30 years to be "unreasonable" despite no impact on Protestant McCreary's domestic well.

The signature error in the Hearing Officer's preliminary order is the injury analysis of

nearby domestic wells. The Hearing Officer misapplied Idaho law and ignored the facts as to the particular well he evaluated (Protestant McCreary) and ultimately relied upon to deny the

transfer. Consequently, the Director should correct the errors and reverse the Hearing Officer's decision.

Idaho law protects groundwater users, including domestic water rights established after March 29, 1978, to a "reasonable groundwater pumping level." See I.C. § 42-226; *Parker v.*

Wallentine, 103 Idaho 506 (1982). The Supreme Court recently reaffirmed this standard in *A&B*

Irr. Dist. v. IDWR, 153 Idaho 500, 510 (2012) ("the act applies to the administration of all ground water rights in the state").

⁷ See *Preliminary Order Approving Transfer Applications* at 10 (App. for Transfers Nos. 75738 and 75739, Machado, Sept. 16, 2011); *Final Order Approving Transfer* at 8 (App. for Transfer No. 78532, South View Dairy, May 30, 2013); *Final Order* at 11 (App. for Transfer No. 71692, Funk, Feb. 23, 2007).

IDWR has also confirmed that the "reasonable groundwater pumping level" standard applies to evaluate injury in the context of water right transfer applications. See *Machado Order* at 10 ("diversions of ground water for domestic purposes established in 1978 or later are subject to the reasonable pumping level provisions of Idaho Code § 42-226"). The law is clear in that a lowering of a groundwater level is not injury per se. Instead, groundwater users are only protected to a "reasonable pumping level." In the A&B Irrigation District delivery call case, where ground water levels had declined between 8.5 and 46.4 feet over time (much greater than any expected declines this case), Justice Schroeder described the requirement as follows:

The condition of water in the aquifer is not such that A&B can say its need to pursue the water further is over. If deepening wells is necessary to produce the amount of water A&B is entitled to under the water right, that burden remains with A&B until it is established that it is unreasonable to drill deeper.

Opinion at 36 (In the Matter of the Petition for Delivery Call of A&B, Mar. 27, 2009).

Even though a groundwater level may decrease and the user must then pump from a deeper depth, that is what the law requires. See *A&B Irr. Dist.*, 153 Idaho at 512 ("If deepening wells is necessary to produce the amount of water A&B is entitled to under the water right, that burden remains with A&B until it is established that it is unreasonable to drill deeper."); see also, *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 802 (2011) ("The 1953 amendment recognized that in order for there to be full economic development of underground water resources, a senior appropriator with a shallow well should not be able to block subsequent appropriators of groundwater."). In this case the Hearing Officer disregarded the law and failed to determine whether the projected impact on area domestic wells would force those users to pump from an unreasonable groundwater pumping level. The Director should reverse the Hearing Officer's misapplication of Idaho law.

Applicant Never Raise this at hearing - Protestants
Not prepared to Argue now. No venue provided.

Contrary to established law, the Hearing Officer created a new injury standard in his order termed "unreasonable drawdown (injury)." *Irrigation Order* at 9, ¶ 21. Nothing in the statutes, IDWR's rules, or case law defines injury in terms of "unreasonable drawdown." Indeed, the Hearing Officer's standard is essentially the common law standard set forth in *Noh v. Stoner* that was superseded by the Ground Water Act and overruled in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 581-82 (1973). See *Clear Springs Foods, Inc.*, 150 Idaho at 802. Although groundwater users were previously protected to maintenance of their historic pumping levels, the 1953 amendment to the Ground Water Act changed the law.⁸

Critically, the Hearing Officer did not evaluate whether impacted domestic wells would have to pump from an unreasonable groundwater level following approval of the transfer. Instead, he inferred a drawdown of 9 feet over 30 years (for a nearby 1995 domestic well owned by Protestant McCreary) and concluded that the expected drawdown would constitute injury to her domestic water right.⁹ *Id.* The Hearing Officer violated the law and failed to analyze whether or not the impact caused by the transfer would result in the Protestants having to pump the 15000 new well is the injury from an unreasonable ground water level. Again, the Director should reverse this plain legal error. IT was a reasonable decision and in fact should have mentioned the 5 ~~depening~~ deepenings in 5 years

⁸ Only domestic water rights established prior to March 29, 1978 are protected to their historic groundwater pumping level. Even then, injury to that level does not mean a transfer or new application for permit would have to be denied. Indeed an applicant causing a drawdown can mitigate that injury provided the senior domestic water right holder complies with certain requirements. See *Final Order* at 33-36 (In the Matter of Applications to Appropriate Water Nos. 63-32089 et al., City of Eagle, Feb. 26, 2008).

⁹ For his analysis the Hearing Officer adopted DuWayne Kimball's analysis of 0.9 feet/day hydraulic conductivity. *Irrigation Order* at 8-9. The Hearing Officer noted there was no evidence to evaluate an expected drawdown using a hydraulic conductivity of 1.0 feet/day. See *id.* at 9. However, since the 1.0 feet/day value is higher than 0.9 feet/day, then the expected drawdown would be lower than 9 feet in 30 years (though likely not by much). ← wheee! Regardless, the injury standard is not whether Ms. McCreary's groundwater level will be lowered compared to the 1995 level (that is the *Noh v. Stoner* standard). Instead, the law requires an evaluation of whether or not her "groundwater pumping level" is reasonable and whether pumping from a greater depth would be unreasonable or not. The Hearing Officer utterly failed to address the issue. - you weren't listening Thompson case by case

Assuming for argument's sake that the projected 9 feet drawdown (over 30 years) is *would be more* correct, that impact does not constitute injury to Protestant McCreary's domestic well. The facts for Ms. McCreary's well are as follows:¹⁰

<u>Protestant Name</u>	<u>Well Drill Date</u>	<u>Well Depth</u>	<u>Static WL</u> Drilled / Reported in 2014		<u>Pump Setting</u>
Jeanie McCreary	6/28/1995	390	310	270	300

Ms. McCreary's well log (IDWR drilling permit no. 47-95-S-0066-000) shows her domestic well was drilled to a depth of 390 feet, the static water level was measured at 310 feet, and the pump was set at 300 feet (yielding 25 gpm). Attachment A.¹¹ Ms. McCreary confirmed this information in her testimony at hearing.¹² McCreary Testimony (Part B, Track 7, 58:00 – 1:07:00). *under duress + confusion to report not her own*

Since the well was drilled in 1995 it is subject to a "reasonable groundwater pumping level." I.C. § 42-226. Based upon the well log, the pump is set and Ms. McCreary pumps domestic water at 300 feet. This is similar, and somewhat shallower than the pumping levels

¹⁰ See Exhibit 23 in T-79357. The same exhibit in T-79384 (Ex. 19) is shown as not offered or admitted. The Applicant is in the process of reviewing the hearing record to confirm whether this was a mistake. The exhibit summarizes data from well driller logs in IDWR's database as well as information provided by the protestants through discovery. The Director should take notice of this evidence as it is part of IDWR's official files and records and was admitted in the two other transfer proceedings (Ex. 23 in T-79357, Ex. 27 in T-79380) heard consecutively with this transfer. The expert testimony at the hearings was combined and incorporated for each proceeding. Further, the information contained in the well log was confirmed by Ms. McCreary at hearing even though it appears the address was in error. McCreary Testimony (Part B, Track 7, 58:00 – 1:07:00). She testified that the legal description was correct and that the well was drilled in that location in June 1995. See *id.*

¹¹ The well log was used in cross-examination with Ms. McCreary at hearing and is provided as an attachment to this brief for ease of reference for the Director.

¹² Ms. McCreary also testified that her well has had some problems in the last 10 years, though it is unknown as to the cause. Ms. McCreary provided no testimony showing that she has investigated the cause of the problem, which could be mechanical. An inefficient well is no reason not to enforce the "reasonable groundwater pumping level" standard under Idaho law. *— Or maybe it is affected*

identified by other Protestants in the area. *See* Ex. 23 (T-79357) (Winsryg 300 feet, Hamby 365 feet, Parrotts 420 and 580 feet, Hackard 471 feet).

At hearing, Ms. McCreary confirmed her discovery answers and testified that her groundwater pumping level as of 2014 was 270 feet. McCreary Testimony (Part B, Track 7, 58:00 – 1:07:00). Accordingly, between 1995 and 2013, the static water level in Ms. McCreary's domestic well apparently increased by approximately 40 feet (310 to 270 feet). Again, Ms. McCreary confirmed all of this information at the hearing, including the fact that her groundwater level increased over the past 20 years. McCreary Testimony (Part B, Track 7, 58:00 – 1:07:00).

As the well log indicates the pump is set at 300 feet, Ms. McCreary has at least 30 feet of available water over her pump. There is no indication that a projected drawdown of 9 feet over the next 30 years would have any impact on her domestic well or ability to use available water. Indeed, even assuming the groundwater level decreased by 9 feet (to 279 feet) in the next 30 years, she would still have available water and would not have to lower her pump or deepen her well.¹³ This fact alone shows that her pumping would not exceed a "reasonable groundwater pumping level" at 300 feet.

Regardless, even if the projected drawdown would force Ms. McCreary to pump from a deeper groundwater level that is required by law and not unreasonable given the facts. *See* I.C. § 42-226. Indeed, the well log shows that she has an additional 90 feet available in the well. Further, other Protestants in the area pump their domestic water from depths well below 300 feet (i.e. Hamby 365 feet, Parrotts 420 and 580 feet, Hackard 471 feet). Since Ms. McCreary's 1995

¹³ Again, the evidence shows the ground water levels in the area are stable. *Irrigation Order* at 6, ¶ 37; Ex. 10. Ms. McCreary's testimony confirms that fact as groundwater levels in her well have actually risen 40 feet in the past twenty years. McCreary Testimony (Part B, Track 7, 58:00 – 1:07:00).

domestic water right is subject to a "reasonable groundwater pumping level" the evidence shows that the proposed transfer would not result in any injury to her water right.

The Hearing Officer wrongly ignored these facts and concluded the projected "drawdown" would be unreasonable. In essence, the Hearing Officer concluded that lowering Ms. McCreary's groundwater level from 270 to 279 feet over 30 years was unacceptable. Even if that happened, Ms. McCreary would experience no impact to her domestic well. Given the lack of any impact on Ms. McCreary's domestic well, the Hearing Officer's decision is not supported by the facts or the law. In light of this plain error, the Director should reverse the Hearing Officer's finding.¹⁴ In sum, based upon the applicable law and facts in the record the Director should find that approval of application for transfer 79384 will not injure existing rights. Coupled with the Hearing Officer's findings on the other criteria in Idaho Code § 42-222 (no enlargement of water right, consistent with the conservation of water resources in the state, consistent with the local public interest), the transfer should be approved. *Irrigation Order* at 10.

CONCLUSION

Hearing officer was correct - deny a nightmare and
The Hearing Officer wrongly denied application for transfer no. 79384. As detailed *DO THE*
above, the Hearing Officer failed to rely upon the best scientific information available and *Applicant*
created an erroneous injury standard to justify his decision. Since the predicted impacts from the *favor*
transfer would not cause any area domestic well owners to pump from an unreasonable ground *protestants*
water level, the Hearing Officer erred in his decision. The Applicant respectfully requests the *TOO*
Director reverse the Hearing Officer and approve the application for transfer. The Applicant
requests oral argument on this exceptions brief. *Protestants request oral argument*

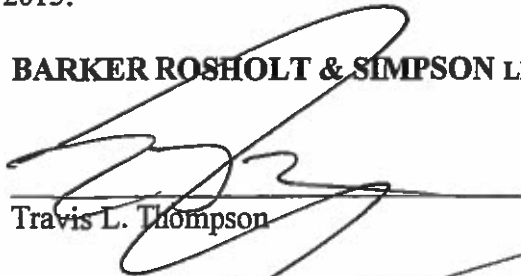
¹⁴ Alternatively, the Director could remand the issue for further hearing if additional factual development is deemed necessary before issuing a final order. IDAPA 37.01.730.d. The Applicant submits there is sufficient evidence in the record to reverse the Hearing Officer's erroneous finding. However, if additional factual development of identifying a "reasonable pumping level" is necessary before a final order, the Director has the authority to remand the matter for a further evidentiary hearing.

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DATED this 26th day of June, 2015.

Richard Parrott
Richard Parrott

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

*Attorneys for Thomas Leno, Cedar Ridge Dairy,
LLC, and Four Sisters Dairy, LLC*