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

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79357 (in the name of
Thomas & Dorothy Leno)

**APPLICANT'S EXCEPTIONS TO
AMENDED PRELIMINARY ORDER**

COME NOW, Applicant THOMAS LENO and Intervenor CEDAR RIDGE DAIRY LLC (hereinafter "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 June 1, 2015 *Amended Preliminary Order Approving Transfer ("Dairy #2 Order")*. The Applicant respectfully requests oral argument on this exceptions brief.

INTRODUCTION

The Applicant takes exception to the Hearing Officer's conditioned approval of the proposed transfer, including restrictions on both the season of use and priority of the water right, and the failure to identify a "reasonable pumping level" required by Idaho law (I.C. § 42-226). The best available evidence in the record, which was unrefuted, shows no injury to neighboring domestic wells.

Therefore, the Hearing Officer wrongly restricted the season of use and erroneously advanced the priority date of the water right. The Applicant respectfully requests the Director to reverse the Hearing Officer and grant the application for transfer without the season of use and priority limitations.

PROCEDURAL BACKGROUND

The Hearing Officer described the background for the transfer application and the underlying decreed water right at pages 1-4 of the amended preliminary order. Presently, there are two existing water rights at Dairy #2, water rights 47-7431B and 47-7519B. Together, the existing rights authorize a combined diversion rate of 0.39 cfs and an annual diversion volume of 166.8 acre-feet. *Dairy #2 Order* at 3, ¶ 15. The Applicant proposes to move a split portion of water right 47-17589 (0.19 cfs and 30.5 acre-feet) to the existing wells for year-round commercial and stockwater uses at Dairy #2.¹ *See* Ex. 1. In other words, the Applicant seeks to only add 16% more water (annual volume) to its current year-round water use. Unlike crops, dairy cows and the associated milking operation need water year-round, hence the 1/1 to 12/31 season of use for commercial and stockwater rights.

The application was protested by various domestic water right holders who lived more than one mile to several miles away from the proposed points of diversion. Ex. 18. 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 amended preliminary order on June 1, 2015.

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.

EXCEPTIONS TO AMENDED PRELIMINARY ORDER

1. The Hearing Officer erred in limiting the water right's season of use to May 1 to September 30.
2. The Hearing Officer erred in advancing the water right's priority date to the date of the transfer, rather than December 22, 1970, as decreed by the Snake River Basin Adjudication District Court.

FACTUAL BACKGROUND / TRANSFER ANALYSIS

Although variable, as is the case with most aquifers, groundwater levels in the Berger or "Salmon Tract" area "are stable." *Dairy #2 Order* at 7, ¶ 47. This is confirmed by USGS and IDWR monitoring wells as depicted and described in the *Expert Report and Narrative Relative to Water Right Transfer #79357* (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.

As depicted in monitoring wells, the groundwater levels in the Salmon Tract respond seasonally, due to precipitation and irrigation. *Id.* at 14. The water level can fluctuate seasonally over 10 feet. *Id.*; *see also Dairy #2 Order* at 6, ¶ 39 ("The static water levels in the Berger area fluctuate as much as 10 feet throughout the year . . ."). In addition, the Brockway Report recognized that the "depths to water levels decrease or are shallower as the contours encounter the Twin Falls Canal Company High Line and Low Line canals." *Id.* at 18.; *see also Ex. 17*; Brockway Report, Appendix D.

The seepage from the canal system provides elevated aquifer levels that are accessed by shallower wells with shallower static water levels. It would be expected that these shallower wells would experience seasonal water level fluctuation related to water being diverted into the canal during the months of April through October and would be less affected by the increased pumping that would occur by this proposed transfer.

Brockway Report at 18.

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 18-25. The Theis equation is a well-known scientific method and has been relied upon by IDWR in evaluating water right permit and transfer applications.² *Id.* Importantly, in running the model, "monthly diversions were developed by 'shaping' the season curve assuming that the peak summertime diversion is 50% higher than the wintertime low usage." *Id.* at 22. In other words, Brockway used a year round season of use for the modeling analysis and evaluated potential impacts to existing water rights. *Id.*

Brockway Engineering performed two modeling exercises to analyze the transfer. First, Brockway 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.

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

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).

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

boundary of the two zones, Brockway Engineering relied upon a value in between those two, ultimately a more conservative value of 55 feet/day. Brockway Report at 19; *Dairy #2 Order* at 8, ¶ 7 (“Higher hydraulic conductivity would result in less drawdown effects at neighboring wells”). Brockway’s analysis for the Dairy #2 transfer was not disputed by any other expert and was accepted by the Hearing Officer. *Dairy #2 Order* at 5-6.

Using the hydraulic conductivity value of 55 feet/day Brockway ran the Winflow model to evaluate potential impacts from the transfer. *See* Brockway Report at 22-23. The analysis shows a potential maximum drawdown at the various Protestants’ wells ranging from 0.028 to 0.047 feet (0.34 to 0.56 inches) after 20 years. *Id.* at 23. All potential drawdowns are less than an inch and are negligible compared to the observed seasonal fluctuations of the groundwater table and normal operation of a domestic well. *Supra.*

Next, Brockway performed a second Winflow analysis with an even more conservative hydraulic conductivity value of 15.3 feet/day. *Id.* at 23-25 (Winflow Analysis 2); *see also Dairy #2 Order* at 8, ¶ 7 (“Higher hydraulic conductivity would result in less drawdown effects at neighboring wells”). 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 irrigation well on Oct. 7th and 8th, 2014 (point of diversion for Transfer No. 79384). Brockway Report at 24 (Table 2).

Importantly, the wells identified for this analysis are not the wells belonging to any of the Protestants. *See id.* In particular, the well identified as “87 Domestic” in Table 2, otherwise known as Well #7 in the *Dairy #2 Order*, is not a well owned by any Protestant. *Id.* This well was specifically identified by the Hearing Officer as the “closest well to the proposed point of diversion” for the Dairy #2 transfer. *Dairy #2 Order* at 8, ¶ 7. This well also has a “calculated hydraulic conductivity of 108 feet/day” – much higher than either the 55 feet/day or the 15.3

feet/day values used in the Winflow modeling analyses. *Id.* “Higher hydraulic conductivity would result in less drawdown effects at neighboring wells.” *Id.*

Using the more conservative value of 15.3 feet/day, the analysis showed a potential impact of 0.05 to 0.12 feet (0.6 to 1.4 inches) after 20 years. Brockway Report at 25. Under either analysis, the impacts from the transfer were negligible compared to the normal operation of a domestic well and the annual fluctuation experienced in the Salmon Tract aquifer. *Supra.* Moreover, 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).

In reviewing the Brockway analysis, the Hearing Officer found that it “is reasonable and is likely conservative given the proximity of Dairy #2 to the TFCC High Line Canal.” *Dairy #2 Order* at 8, ¶ 7. Yet, notwithstanding this finding, the Hearing Officer claimed that “Brockway should have focused its analysis on” certain unidentified domestic wells located “approximately ½ mile to the north” of Dairy #2 which belong to water users who did not protest the transfer application.

The Hearing Officer ultimately concluded:

10. Because of increased aquifer levels occurring when water is in the TFCC High Line Canal, it is unlikely that the domestic wells located ½ mile north of the proposed points of diversion will be injured during the irrigation season. Brockway did not provide any analysis showing how these domestic wells may be impacted by pumping from the Dairy #2 wells during times when water is not in the TFCC canals and aquifer levels are at their lowest.

11. In the absence of reliable data about the impacts to nearby domestic wells during the non-irrigation season, the season of use for the proposed transfer should be limited to times when water is in the TFCC system and aquifer levels are at their highest. Visser testified that the primary demand for the additional water at Dairy #2 will occur between the months of May and September, a time when water should be flowing in the TFCC system. Therefore, it is reasonable to limit the season of use for the split portion of water right 47-17589 proposed to be transferred to May 1 - September 30.

* * *

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

Dairy #2 Order at 8, ¶¶ 10-13.

With the above limitations, the Hearing Officer found the Dairy #2 transfer would meet the statutory criteria set forth in Idaho Code § 42-222 and approved the transfer. The Hearing Officer's limitations or conditions of approval are inconsistent with his factual findings and not supported by the evidence in the record or existing law. The modeling analysis and existing information regarding domestic wells north of Dairy #2 shows no injury to area domestic wells. Consequently, the conditions should be removed. Since the transfer will not injure any existing water rights, and the Applicant needs water for his dairy operation year round, the Applicant respectfully requests the Director to remove the "season of use" and "priority date" limitations in the transfer approval.

In sum, the Dairy #2 transfer, seeking to only add 16% more water to the current water use at the dairy, should be approved as set forth in the application.

ARGUMENT

Exception #1:

The Hearing Officer erred in limiting the water right's season of use to May 1 to September 30.

I. Brockway Engineering Analyzed the Potential Impacts of Pumping on Area Ground Water Levels Based Upon Year-Round Commercial and Stockwater Uses.

Brockway's "reasonable" and "conservative" analysis found that the impacts to the Protestants' domestic wells would be minimal, at best. *Supra*. Importantly, the modeling analysis incorporated year-round water use at the dairy, not just seasonal water use. *See* Brockway Report at 22, Figure 6; Ex. 19. Although the peak use was predicted to occur during the summer months, the dairy's manager Ryan Visser testified that water would also be needed for commercial and stockwater uses year round. *See* Ex. 19; Visser Testimony (Part B, Track 6, 0:15:00 – 0:20:00) (confirming that the wells run "year round"). Unlike crops, dairy cows and the associated operations to produce milk need water year-round, not just during the irrigation season.

It is undisputed in the record that the TFCC canals increase area groundwater levels. *See* Brockway Report at 18 ("The depths to water levels decrease or are shallower as the contours encounter the Twin Falls Canal Company High Line and Low Line Canals"). Importantly, however, Brockway's Winflow analysis did not incorporate the benefits of these canals in his determination that pumping at the Dairy #2 wells would only reduce groundwater levels by 0.34 to 0.56 inches (Winflow Analysis 1) and 0.6 to 1.4 inches (Winflow Analysis 2) in 20 years. *Supra*.

As such, although water in the TFCC canals may increase the water table during or following the irrigation season, that factor was not included in the drawdown analysis.

Accordingly, the modeling analysis was more conservative and assumed a greater drawdown without the canal seepage influence.

As set forth above, the drawdown from the transfer approval (only 16% additional water use to existing operations), based on year round diversions, is expected to only be 0.34 to 0.56 inches (Winflow Analysis 1) and 0.6 to 1.4 inches (Winflow Analysis 2) in 20 years. *Supra*. Therefore, it is undisputed that Brockway's analysis properly considered the "non-irrigation season" impacts of pumping from the Dairy #2 wells after the transfer.⁴ *See also*, Exs. 20, 21.

Importantly, the Hearing Officer found the expected drawdown would not injure any of the Protestants' domestic water rights. *See Dairy #2 Order* at 8 (no injury to other water rights due to drawdown of aquifer). The Hearing Officer focused on the closest Protestants (Rice and Henson), located 1.5 miles to the south, and accepted the expected negligible impact to their domestic well of only 0.5 inches or 1.5 inches over 20 years. *Id.* at 5, ¶ 33; at 6, ¶ 38. As to all the Protestants, the Hearing Officer did not find any injury to their water rights or groundwater pumping levels. Further, the Hearing Officer concluded that:

Brockway's analysis is reasonable and is likely conservative given the proximity of Dairy #2 to the TFCC High Line Canal. The closest well to the proposed points of diversion has a calculated hydraulic conductivity of 108 feet/day. Higher hydraulic conductivity would result in less drawdown effects at neighboring wells.

Dairy #2 Order at 8, ¶ 7 (emphasis added).

⁴ Through this analysis, Brockway considered year round water use at the dairy. Brockway Report at 22 & App. F. While the analysis and testimony of Ryan Visser confirmed the peak water use occurs during the summer, the dairy and its wells operate "year round." *See* Ex. 19; Visser Testimony (Part B, Track 6, 0:15:00 – 0:20:00) (confirming that the wells run "year round"). Moreover, even assuming the additional water was only needed for cooling cows (which is not the case), Mr. Visser's heat index exhibit showed that cows suffer stress when the temperature hits 68 degrees Fahrenheit. Ex. 7. Coincidentally, on March 20th, the day after the hearing, the temperature was forecasted to reach 75 degrees Fahrenheit. Kimball Testimony (Part B, Track 7, 0:10:25 – 0:11:00). Accordingly, the cooling system could be used and needed during such hot days in the spring, which can and do occur well before May 1st. Consequently, the Hearing Officer wrongly assumed that the season of use limitation would have minimal impact on the Dairy #2 operations because the water is needed year round. *Dairy #2 Order* at 8, ¶ 11. His proposed limitation on the transfer is not supported by the evidence in the record and should be removed.

Notwithstanding this finding, however, the Hearing Officer determined that the season of use for the Dairy #2 water right should be restricted due to the *unidentified* impacts at *unidentified* “nearby domestic wells during the non-irrigation season.”⁵ *Dairy #2 Order* at 4, ¶ 26; at 8, ¶ 11. According to the Hearing Officer, the Applicant was required to demonstrate that there would be “no injury to all water rights, regardless of whether the right holders are Protestants to the pending application.” *Id.* at 8, ¶ 8. Further, the Hearing Officer opined that “Brockway should have focused its analysis on these domestic wells in addition to the domestic wells owned by the protestants.” *Id.* at 8, ¶ 9.

Contrary to the Hearing Officer’s unsupported assumptions, the record shows that there will be no injury to any domestic wells in the location of Dairy #2 – including the unidentified domestic wells “located approximately ½ mile north” of the proposed points of diversion. *Id.* Notably, static water levels in the area north of Dairy #2 are as much as 140 feet higher than those to the south. Brockway Report at 17, Figure 4.⁶ Whereas static groundwater levels ½ mile north of the Dairy #2 Well range from 150 to 180 feet, the Protestants’ wells to the south of Dairy #2 are pumping from water levels at 270-290 feet. *Id.*; *see also, id.* at 21, Figure 5 (showing location of Protestants’ wells); *see also* Ex. 23 and Brockway Report, Appendix E (showing available records on depth to water in Protestants’ wells).

In addition, the facts demonstrate that any potential impacts to wells north of Dairy #2 will be less than any impacts to the wells located to the south. In particular, the well identified as “87 Domestic” in the Winflow Analysis 2 (or Well #7 in the order, *Dairy #2 Order* at 5-6, ¶¶ 36-

⁵ The Hearing Officer relies upon Exhibit 18 for his conclusion “There are a number of homes and domestic wells located approximately ½ north of the proposed points of diversion.” *Dairy #2 Order* at 4, ¶ 26. Exhibit 18 is an aerial photo showing Dairy #2 and the Protestants’ wells. While the photo shows other homesteads, the Hearing Officer does not identify the exact locations of these other “homes” or “domestic wells.” As such, the Hearing Officer’s finding is an erroneous assumption not supported by evidence in the record.

⁶ The Place of use identified on Figure 4 is Dairy #3. Brockway Report at 17. Dairy #2 is located approximately 1 mile to the east of Dairy #2. *See id.* at 7, Figure 1 & at 13, Figure 2.

37) has a hydraulic conductivity of 108 feet/day. Brockway Report at 24; *Dairy #2 Order* at 8, ¶ 7. The Hearing Officer concluded that this hydraulic conductivity value, which is much higher than the 15.3 feet/day conductivity used in the Winflow Analysis 2, “would result in less drawdown effects at neighboring wells.” *Dairy #2 Order* at 8, ¶ 7. Stated differently, any impacts to Well #7, located ½ mile north of Dairy #2, would be less than the impacts to wells with a lower hydraulic conductivity located to the south. *Id.* at 4, ¶ 26, at 5, ¶ 36, at 8, ¶ 7.

Again, this is important, because Well #7 is located approximately ½ mile north of Dairy #2, which is the area of the unidentified wells the Hearing Officer claimed might be injured during the non-irrigation season. *Id.* (legal description of 87 Domestic Well located ½ mile north of Dairy #2 well).

Contrary to the Hearing Officer’s conclusion, there is no “absence of reliable data about the impacts to nearby domestic wells during the non-irrigation season.” *Dairy #2 Order* at 8, ¶ 11. The data presented – which the Hearing Officer found to be “reasonable” and “conservative,” *id.* at ¶ 7 – showed minimal impacts to the Protestants’ groundwater wells to the south, where the hydraulic conductivity is lower and, as such, potential drawdown would be higher. *Supra.* This analysis was performed, assuming year round diversions from the Dairy #2 wells – with peaks during the summer months and reduced diversions during the winter months. *See* Brockway Report at 22; Ex. 19. Wells to the north of Dairy #2 are pumping from higher groundwater levels (as much as 150 feet) and have higher hydraulic conductivity values (as much as 108 feet/day). *Supra.* Accordingly, despite higher groundwater levels and the likelihood of lower drawdowns for domestic wells located near the High Line Canal, the Hearing Officer believed they could be injured during the non-irrigation season.⁷ This decision directly

⁷ The Hearing Officer further erred as a matter of law by not determining whether or not the unidentified domestic ground water users located closer to the High Line Canal were pumping from “reasonable groundwater pumping

conflicts with his findings and the evidence in the record.⁸ There is simply no basis in the record to limit the season of use for the Dairy #2 wells.

It appears that the Hearing Officer's decision is based on the failure of the Brockway Report to specifically identify and analyze the impacts to the surrounding domestic wells owned by non-protestants. *Dairy #2 Order* at 8. Idaho Code § 42-222 requires a certain showing in a transfer proceedings. In this case, the Applicant demonstrated that there would be negligible and insignificant impacts to groundwater levels resulting from diversions at the Dairy #2 wells after the transfer (again only 16% more water than what is allowed under the existing rights). This analysis was not refuted and was accepted by the Hearing Officer. *Id.* at 8, ¶ 7. As stated, this is the case for all wells in the vicinity of Dairy #2 – even those unidentified domestic wells “located ½ north of the proposed points of diversion.” *Id.* at ¶ 10. Although Brockway's analysis demonstrated that the impacts would be minimal *throughout the area* of the aquifer surrounding Dairy #2, the figures and charts prepared from the analysis only specifically identified the Protestants' wells. *Supra*. Despite this focus of the analysis, this does not mean that there was an “absence of reliable data about the impacts to nearby domestic wells during the non-irrigation season.” *Id.* at ¶ 11. To the contrary, the record shows that there will be minimal impacts resulting from year-round pumping at the Dairy #2 wells after the transfer. Moreover,

levels” and whether the transfer would injure them in reference to that legal standard. *See* I.C. § 42-222. At a minimum the Hearing Officer would have to use this standard for any injury analysis. His failure to do so is clear legal error. However, the Applicants submit such an analysis is moot in this case given the modeling analysis that was accepted and the fact any drawdown would be negligible and not injure existing water rights. *See Dairy #2 Order* at 8, ¶ 7; *see e.g. Preliminary Order Approving Transfer Applications* at 7 (App. for Transfers Nos. 75738 and 75739, Machado, Sept. 16, 2011).

⁸ Ironically, in the *Preliminary Order Denying Transfer* (T-79384), the Hearing Officer found Well #7 was not representative of other domestic wells located two miles to the south and should have been excluded from the modeling analysis for the irrigation transfer. *Order* at 8, ¶¶ 11-12. Here, however, where Well #7 is “the closest well to the proposed points of diversion” for the Dairy #2 transfer, the Hearing Officer refused to consider the well's aquifer characteristics to find no injury to domestic wells in its vicinity. Instead, he claimed that wells in the area of Well #7 could be injured in the non-irrigation season. Such inconsistent reasoning is not supported by the facts and should be reversed by the Director.

the Hearing Officer acknowledged that domestic wells north of Dairy #2 had shallower depths and greater hydraulic conductivity values. *Id.* at 5, ¶¶ 36-37; at 8, ¶ 7.

As such, there is no basis for the Hearing Officer's season of use limitation. Therefore, the Applicant respectfully requests the Director to remove the season of use limitation and approve the year round season of use identified in the transfer application.

A. The Hearing Officer Failed to Use the "Reasonable Groundwater Pumping Level" Standard.

Importantly, the owners of the unidentified domestic wells to the north received notice of the Dairy #2 transfer application and chose not to protest that transfer. Any person could have participated and identified concerns about groundwater pumping levels or other alleged impacts to their domestic wells. However, they chose not to participate in any manner. That notwithstanding, as stated above, the analysis shows that the transfer will not result in any injury to area domestic water rights. *Supra*. Further, the law does not require that the Applicants perform additional analysis to anticipate and respond to unidentified allegations of injury that water users – particularly those who failed to protest the application – have not raised.

Instead, Idaho law protects groundwater users, including domestic water rights established after March 29, 1978, to a "reasonable groundwater pumping level." I.C. § 42-226; *Parker v. Wallentine*, 103 Idaho 506 (1982). This standard was recently confirmed by the Supreme Court. *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").

IDWR has confirmed that the "reasonable groundwater pumping level" standard applies to evaluate injury in the context of transfer applications. *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"). A mere reduction in groundwater levels is

not injury *per se*. Moreover, if a groundwater user has to pump from a greater depth or deepen a well, 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.”).

Since no reasonable pumping level has been established in the area of Dairy #2, there is no basis for the Hearing Office to determine that there will be injury to any well – let alone one for which there have been no claims of injury – as a result of the minimal drawdown found and accepted for the Dairy #2 transfer. *See Dairy #2 Order* at 8, ¶¶ 6-7.

Moreover, as discussed above, the analysis shows that the domestic wells “located approximately ½ mile to then north” of Dairy #2 are pumping from water levels as much as 150 higher than those of the Protestants to the south. Brockway Report at 17. Given the Hearing Officer’s conclusion that the 0.34 to 1.4 inch reduction in the water table over 20 years will not injure the Protestants’ water rights, there is no basis to extrapolate any injury to water users who did not even participate in these proceedings. Since the Hearing Officer failed to apply the “reasonable groundwater pumping level” standard there is no basis for any conditions to protect against injury to these unidentified domestic wells. As such, the season of use limitation is not supported by law or fact and should be removed.

B. The Hearing Officer's Condition is Inaccurate Given the Decreed Season of Use on TFCC's Water Rights.

Should the Director find the Hearing Officer's season of use condition is acceptable, which the Applicant does not concede as set forth above, then at a minimum the dates should be amended to accurately match up with the Twin Falls Canal Company water rights. The Hearing Officer concluded that "the season of use for the proposed transfer should be limited to times when water is in the TFCC system and aquifer levels are at their highest." *Dairy #2 Order* at 8, ¶ 11. However, rather than follow his own standard, the Hearing Officer shortened the season to May 1 to September 30. *See id.*

Although the peak demand for the dairy operations occurs during the summer months, dairy manager Ryan Visser testified that water is needed year-round both for stockwater and commercial water use. Visser Testimony (Part B, Track 6, 0:15:00 – 0:20:00) (confirming that the wells run "year round"). This was confirmed in the Brockway water use analysis as well. Brockway Report at 22 & App. F. Accordingly, it is undisputed that water is not just needed between May and September.

Still, even if the Hearing Officer's reasoning is correct, then the season of use should be amended to match that of TFCC's water rights, which is March 15 to November 15, when "water is in the TFCC system." *See Attachment A*⁹ (partial decree for water right 01-209); *see also*, Water Appropriation Rules IDAPA 37.03.08 (Appendix B – Suggested Irrigation Seasons in Idaho). There is no basis to shorten that season of use by three (3) months as suggested by the Hearing Officer. Although the Applicant seeks a year-round use and requests the Director to remove the limitation entirely, at a minimum the Director should amend the season of use to March 15 to November 15, in the event the Hearing Officer's reasoning is accepted.

⁹ The partial decree is provided for the Director's convenience. Further, the Hearing Officer acknowledged he would take official notice of all records in IDWR's files. Hearing Officer (Part B, Track 6, 0:02:00 – 0:04:00).

Exception #2:

The Hearing Officer erred in advancing the water right's priority date to the date of the transfer, rather than December 22, 1970, as decreed by the Snake River Basin Adjudication District Court.

In addition to the season of use limitation, the Hearing Officer held that, "in order to protect existing water rights in the Berger area (junior to December 25, 1970), the portion of water right 47-17589 being transferred must be assigned a priority date of the date of this approval." *Dairy #2 Order* at 8, ¶ 13. There is no basis in the law for this condition, and the facts show no injury to protect against.

First, water right 47-17589 was partially decreed with a priority date of December 25, 1970. Ex. 3. The Department is bound by the terms of that decree. I.C. § 42-1420(1) ("The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system"). In this case the Hearing Officer had no basis or authority to change the terms of the water right, a protected private property right interest under Idaho law. *See* I.C. § 55-101(1); *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983).

Furthermore, there is no injury to redress through the Hearing Officer's limitation. Any domestic and de-minimus stockwater uses in the Berger area will not be impacted by administration as they are exempt under the Conjunctive Management Rules under current law. IDAPA 37.03.11.020.11 ("A delivery call shall not be effective against any groundwater right used for domestic purposes regardless of priority date ... nor against any groundwater right used for stock watering where such stock water use is within the limits of the definition set for thin Section 42-1401A(12)").

In addition, this transfer was specifically limited to only the portion of the water right that had historically been consumptively used. *Dairy #2 Order* at 3, ¶ 11 (“Leno proposes to limit the changed portion of the water right to an annual diversion volume of 30.5 acre-feet, the consumptive portion of the original water right”) (underline in original). According to the analysis, recognized by the Hearing Officer to be “reasonable” and “conservative,” *Id.* at 8, this additional water use (only 16% more than the existing rights) would have negligible impacts to surrounding groundwater levels. *Supra.* As such, there is no basis to alter the water right’s priority date.

As a practical matter, the limitation is also unnecessary. At the hearing, “there was no evidence provided about a pending or foreseeable delivery call against or curtailment required for groundwater rights near Berger, Idaho.” *Dairy #2 Order* at 8, ¶ 13. The Hearing Officer found that ground water levels in the area are stable. *Id.* at 7, ¶ 47. Further, evidence in the record shows that for many of the Protestants, their water levels have risen since their domestic wells were drilled. For example, whereas the Protestant McCreary’s domestic well had a static water level of 310 feet when drilled in 1995, Ms. McCreary confirmed at hearing that as of 2014, the water level had risen to 270 feet – an increase of 40 feet. Ex. 23; McCreary Testimony (Part B, Track 7, 58:00 – 1:07:00). Accordingly, the Hearing Officer’s speculation about a future delivery call is speculative and not warranted given the facts.

In sum, the proposed condition is unwarranted and prejudices the Applicant contrary to Idaho law. *See Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388 (1982) (“Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder”). Since the Hearing Officer did not have a sufficient legal or factual basis for the change in priority date, it should be reversed as well.

CONCLUSION

Although the Hearing Officer properly approved the Dairy #2 transfer he erroneously limited the season of use and altered the priority date. The evidence in the record plainly shows that no domestic water right holder, including those located north of Dairy #2, will be injured by the transfer. Since groundwater levels are stable, and have risen in some areas, there is no basis to advance the priority date to protect against a speculative delivery call.

Finally, since it is undisputed that the cows and dairy operation require water year-round, the Director should remove the season of use limitation and approve the transfer as requested. The Applicant respectfully requests oral argument on this exceptions brief.

DATED this 15th day of June, 2015.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

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

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2015, I served the original *Applicant's Exceptions to Amended Preliminary Order* by hand delivery to IDWR Southern Regional Office, 650 Addison Ave. W., Suite 500, and true and correct copies by email and by depositing same in the United States mail, postage prepaid, addressed to the following:

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Attachment A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 01-00209

NAME AND ADDRESS: TWIN FALLS CANAL CO
PO BOX 326
TWIN FALLS, ID 83301

SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY: 3000.00 CFS

PRIORITY DATE: 10/11/1900

POINT OF DIVERSION: T10S R21E S29 LOT 8 (SWNESE) Within Twin Falls County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	3000.00 CFS

PLACE OF USE:

196162 ACRES TOTAL
Place of use is within the area served by Twin Falls Canal Company.
The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

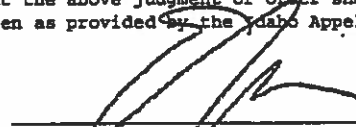
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District #2.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

