

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

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 79466 IN THE NAME OF)	PRELIMINARY ORDER
<u>FOUR SISTERS DAIRY, LLC</u>)	APPROVING TRANSFER

On July 9, 2014, Four Sisters Dairy, LLC ("Four Sisters") filed Application for Transfer No. 79466 with the Idaho Department of Water Resources ("Department"). The application was advertised to the public beginning on August 7, 2014. Protests were filed by Richard Parrott, Jimmie L. Conder, Michael and Jana Humphries, William D. Hamby, Eric Parrott, Lois M. Rice, Leslie Ellsworth (for herself and 11 other individuals), Pam Ritter, Ed Smith, Shadow & Bonnie Seaman, Jeanie McCreary, Barbara and Lynn Stephens, Margaret Winsryg and Leroy Elliott, Elizabeth (Betty) Slifer, and Martin F. Hackard.

A prehearing 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 Four Sisters and agreed to rely on the evidence presented by Four Sisters.

An administrative hearing was conducted on March 18 and 19, 2015 in Twin Falls, Idaho. Four Sisters and Cedar Ridge were represented by attorney Travis Thompson. Margaret Winsryg and Leroy Elliot were represented by attorney David Coleman. The hearing was held in conjunction with hearings for Application for Transfer Nos. 79357, 79380 and 79384. Separate orders will be issued for Applications 79357, 79380 and 79384. After carefully considering the evidence in the administrative record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Transfer 79466 proposes to add a point of diversion to water right 47-2306B and update (reduce) the commercial place of use to reflect current water usage. Water right 47-2306B is currently in the name of Four Sisters. Application 79466 was signed by Henry C. Hafliger Jr. who is a manager and registered agent for Four Sisters. Ex. 1.

2. Water right 47-2306B bears a priority date of January 31, 1957 and authorizes the diversion of 0.59 cfs from ground water for commercial and stockwater use associated with a dairy

located in the NE ¼ of Section 6, T11S, R16E (hereinafter “Dairy #3”). The water right is limited to an annual diversion volume of 250 acre-feet.

3. Water right 47-2306B currently authorizes two points of diversion: two existing ground water wells located in the SENE of Section 6, T11S, R16E. The existing wells are located within 25 feet of each other. Visser Testimony. The proposed additional point of diversion is a well to be constructed in the NWNE of Section 6, T11S, R16E, approximately 1000 feet away from the existing wells. Ex. 3 and 4.

4. The existing wells were drilled in 1999 to a depth of 355 feet. The static water level at the time of completion was 262 feet below land surface. In 2005, one of the wells was deepened from 355 feet to 450 feet. At the time of completion, the static water level in the modified well was 262 feet below land surface. There was no apparent decline in static water levels in the modified well at Dairy #3 between 1999 and 2005.

5. Water diverted under water right 47-2306B is used at Dairy #3 for cleaning milk pipelines and tanks, cleaning equipment, cooling dairy cows, providing water to cows, and cooling milk. Visser Testimony.

6. The existing wells do not have the capacity to produce the 0.59 cfs authorized by water right 47-2306B. Visser Testimony. An additional well will allow Four Sisters to divert its authorized diversion rate. *Id.* Doing so will keep the storage tanks full at Dairy #3, which are used to prevent interruptions in the supply of water. *Id.*

7. The existing stockwater place of use for water right 47-2306B covers the NE ¼ of Section 6, T11S, R16E. The existing commercial place of use covers 14 quarter-quarters, including the NE ¼ of Section 6. The pending application proposes to reduce the commercial place of use to match the stockwater place of use – to only cover the NE ¼ of Section 6, T11S, R16E. The existing and proposed places of use are owned by Four Sisters.

8. At the time it was licensed (in 1963), water right 47-2306 authorized the diversion of 1.44 cfs from ground water and the irrigation of 152 acres. The point of diversion for water right 47-2306 was located ¼ mile south of the existing wells at Dairy #3 and the irrigation place of use for water right 47-2306 included the west half of the NE ¼ of Section 6, T11S, R16E.

9. In June 1998, the Department approved Transfer 5148, splitting water right 47-2306 into water right 47-2306A (Irrigation, 0.85 cfs, 358 acre-feet, 89.5 acres) and water right 47-2306B (Stockwater/Commercial, 0.59 cfs, 250 acre-feet).

10. On March 13, 2000, the Department issued an Amended Final Order approving Transfer 5475, which adjusted the authorized place of use for water right 47-2306B. The Amended Final Order included the following conditions:

Prior to diversion of water under this approval, a totalizing measuring device of a type approved by [the] Department shall be installed and maintained on each of the wells authorized under Rights 47-02306A and 47-02306B. The volume of water diverted from each well shall be measured and recorded monthly and

reported annually to the Department. The static water levels of the dairy wells shall be measured and recorded twice each year in April and October and reported annually to the Department. The annual reports may be subject to reporting fee requirements.

Failure of the right holder to comply with any condition of approval of this transfer is cause for the Director to rescind approval of the transfer.

11. Similar measurement and reporting conditions were included on Transfer Approval 5148. There is no evidence in the file for water right 47-2306B that Four Sisters or any previous owner of the water right complied with any of the measurement and reporting requirements between 2000 and 2012.

12. On January 5, 2015, Cedar Ridge filed a water usage report for water right 47-2306B. The report set forth the monthly diversion volumes occurring at Dairy #3 under water right 47-2306B for the 2013 and 2014 calendar years. The report did not include any ground water level measurements.

13. On June 2, 2009, a partial decree was issued for water right 47-2306B in the Snake River Basin Adjudication ("SRBA"). The partial decree listed the same water right elements described above: an authorized diversion rate of 0.59 cfs for commercial and stockwater use and an annual diversion volume of 250 acre-feet.

14. Application for Transfer 79380, which was filed on May 20, 2014, seeks to move an additional ground water right to Dairy #3 for commercial and stockwater use. Application 79380 proposes to pump the additional water right from the same three ground water wells identified in Application 79466.

15. Application 79380 was advertised to the public and was protested. An administrative hearing for Application 79380 was held in conjunction with the hearing for this contested case.

16. The protestants in this contested case divert ground water from the local aquifer for domestic and stockwater purposes. The closest of the protestants wells are located approximately 1.7 miles south of the proposed additional well.

17. The protestants provided very little evidence related to Application 79466. Ed Squires, an expert for the protestants, argued that any change in points of diversion could result in impact to other ground water users in the area, but did not provide any specific analysis related to the magnitude of changes which could result from approval of Application 79466.

EVALUATION CRITERIA / ANALYSIS

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. Therefore, the reasonableness of projected drawdown in neighboring wells resulting from a proposed transfer will be evaluated on a case-by-case basis.

5. The changes proposed in the pending application will have very little impact on the pumping levels in the aquifer surrounding Dairy #3. This water right (or previous versions of the water right) has been pumped from the local aquifer from wells located within 2,000 feet of the proposed additional well since the late 1950s.

6. Four Sisters has the right to divert water at a rate of 0.59 cfs from its existing wells at Dairy #3. Pumping a portion of this 0.59 cfs from a third well located about 1,000 feet from the existing wells will have very little impact on the overall water levels in the aquifer. Any drawdown changes that may result from the proposed transfer would not result in an unreasonable drawdown to neighboring wells. The protestants wells are located so far from the proposed additional well, that the possibility of unreasonable drawdown at the protestants wells is very remote.

Measurement and Reporting

7. Between 2000 and 2012, Four Sisters and/or the previous owners of water right 47-2306B did not comply with the measurement and reporting conditions added to the water right

through Transfers 5148 and 5475. According to a condition on the water right, failure to comply with the measurement and reporting requirements is sufficient cause for the Department to rescind Transfers 5148 and 5475.

8. The question of whether Transfers 5148 and 5475 should be rescinded for failure to comply with the measurement and reporting conditions is beyond the scope of this proceeding. By providing data for 2013 and 2014, Four Sisters has demonstrated a willingness to now comply with those conditions.

9. The measurement and reporting conditions should continue to be listed on the water right. Failure to comply with the measurement and reporting conditions moving forward will put the water right holder at risk that this transfer approval could also be rescinded, which would eliminate the authorization to pump water right 47-2306B from the new ground water well.

Enlargement of Water Rights

10. Four Sisters sufficiently demonstrated that approval of this transfer will not result in the enlargement of the water right 47-2306B. The commercial place of use for the water right is being reduced to reflect the actual extent of use at Dairy #3. Water right 47-2306B will continue to be limited to a diversion rate of 0.59 cfs and an annual diversion volume of 250 acre-feet.

Conservation of Water Resources

11. The transfer application is consistent with the conservation of water resources within the state of Idaho. There is no evidence in the record that Four Sisters will employ wasteful practices at Dairy #3.

Local Public Interest

12. 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))

13. There is no evidence in the record that the changes proposed in Application 79466 are not in the local public interest.

Summary

14. Four Sisters has satisfied its burden of proof for the review criteria set forth in Idaho Code § 42-222. The transfer should be approved with the same measurement and reporting conditions that have existed on water right 47-2306B since March 2000.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79466 in the name of Four Sisters Dairy, LLC is APPROVED. Water right 47-2306B has been changed as described in Transfer Approval 79466, issued in conjunction with this Order.

Dated this 29th day of May, 2015.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May 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, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (79466)

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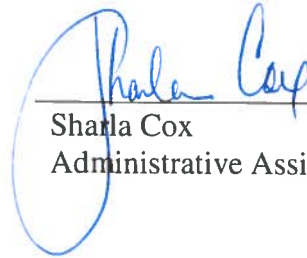
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EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.