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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Applicant Big Sky Farms

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 72435

BIG SKY FARMS,

Applicant,

Dean T. Dimond, Harold S. Dimond,
Richard Bullers, Cyrus Bullers, James
Stewart, Brenda Herrmann, Dennis H.
Dimond, Blaine E. Miller, James Wyatt,
Rita Ayers & Lee Halper,

Protestants.

CLOSING STATEMENT
OF APPLICANT

SOURCE: Ground water

County: Jerome

Applicant, Big Sky Farms, through its attorney, Robert E. Williams of Fredericksen, Williams, Meservy & Lothspeich, LLP, hereby files its closing statement in the above referenced matter following the conclusion of the hearing on the application held July 26, 2007.

1. SCOPE OF FINAL STATEMENT.

Applicant is mindful of the admonishment of the Hearing Officer concerning the nature of the content of Closing Statements to be filed by the participants. Therefore, this Closing Statement will not argue the facts derived from the testimony adduced at the hearing. This statement will, however, discuss several aspects of the law as it applies to the evidence

in the record, including the testimony given at the July 26, 2007 hearing.

2. APPLICABLE STANDARDS OF IDAHO CODE § 42-222 WHICH GOVERN THE APPROVAL OF THIS APPLICATION FOR WATER TRANSFER.

The present application for transfer seeks to convert existing irrigation usage to stock water/commercial usage while consolidating existing stock water rights. It is not a case where the place of use is outside the water shed or local area where the source of water originates. It is also not a case where the transfer affects the agricultural base, since the new underlying use for the transfer is also agricultural. The criteria for approval for this water application transfer as found in I.C. § 42-222 therefore are:

- A. No other water rights must be injured thereby;
- B. The change proposed by the transfer must not constitute an enlargement in use of the original right;
- C. The change must be consistent with the conservation of water resources within the state of Idaho;
- D. The change must be in the local public interest as defined in § 42-202(b) Idaho Code;
- E. The new use must be a beneficial use.

3. APPLICATION REVISIONS AND APPLICANT'S EXHIBIT 6.

The original application, dated October 3, 2005, sought the transfer of .662 cfs and a volume of 226 acre feet per annum for use at a new Holstein heifer raising facility to be constructed by the Applicant in eastern Jerome County.

On July 14, 2006, a corrected application for transfer was signed by the Applicant. This transfer application, for the same purposes as the original application, sought transfer of .67 cfs and an annual volume of 240.7 acre feet per annum. Both applications took into account existing stock water rights on the real property involved and proposed that approximately .32 cfs of irrigation right be transferred to make up the total desired diversion rate and annual volume.

The well interference study, Plaintiff's Exhibit 6, used, on page 1 of the Exhibit, a

diversion rate of .72 cfs, which was the extrapolated rate of diversion for the historic irrigation of the acres to be withdrawn from irrigation as a result of the transfer. The next two (2) pages of Exhibit 6 address the effects of the increased diversion rate required to produce the desired volume of water in the transfer proceeding. The purpose of the exhibit was to demonstrate the lack of injury to other water rights as a result of the transfer under various pumping scenarios. To constitute "injury" in the sense of whether another water right will be "injured", the term has been said to mean "...substantially injured, not merely a fanciful injury, but real and actual injury." *Beacher v Cassia Creek Irr. Co.*, 66 Idaho 1, 8 154 P.2d 507 (1944). It is submitted that the three (3) pages of Exhibit 6, taken as a whole, establish that there will be no injury in this sense to any water right as a result of the transfer.

4. REDUCTION IN ANIMAL NUMBERS.

Applicant's Exhibit 8 contains a revised water requirements and consumptive use worksheet reflecting the amendment of the Applicant's LCO application before Jerome County between the date of the filing of the corrected water transfer application and the date of the hearing. The application for an LCO operation before Jerome County was reduced by approximately one-third ($1/3$) from the numbers of animals initially requested, and upon which the water transfer application was originally based. Instead of the annual volume sought by the corrected application, Exhibit 8 demonstrates that only 178.7 acre feet of volume will be required to service the animals now applied for with Jerome County. Dr. Charles E. Brockway testified without contradiction, that the effect of a lower volume of water under the transfer than what had been originally proposed would mean that the effects of the transfer on others, already shown to be de minimus, would be even less.

I.C. § 42-222 authorizes the Director to approve an application for transfer
"...in whole, or in part or upon conditions..."

The parameters of the water right as applied for in the corrected application, subject to the condition that the right not be used for more livestock than approved by Jerome County authorities for the underlying livestock confinement operation permit, at any one time, would be appropriate. Such a condition would not prejudice or injure any of the Protestants or their water rights.

5. JURISDICTION OVER WATER QUALITY.

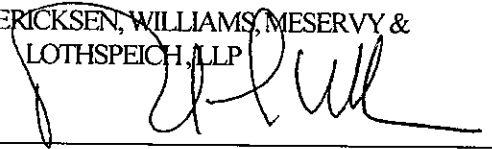
It is not the primary job of the Department of Water Resources to protect the health and welfare of Idaho citizens with respect to issues regarding water quality. *Shokal v Dunn*, 109 Idaho 330, 707 P.2d 441, 452 (1985). In *Shokal, supra*, the Court further explained that IDWR should be precluded from issuing permits regarding water when to do so would violate water quality standards of other agencies. The great preponderance of the evidence produced in the hearing of this matter was that the project would not violate the water quality standards of the state of Idaho or any of its agencies. A letter was introduced into evidence establishing that a Nutrient Management Plan, designed to protect the waters of the state of Idaho has been approved by the Idaho Department of Agriculture for Applicant's operation. Under these circumstances, IDWR need not inquire into the matter any further in this transfer proceeding. The Idaho Department of Agriculture through a Memorandum of Understanding with the United States Environmental Protection Agency, the Idaho Department of Environmental Quality and IDWR has the primary jurisdiction over making certain that Nutrient Management Plans by Confined Animal Feeding Operations are adhered to, thereby protecting the quality of the waters of this State. There was no evidence in this record that the Applicant could not, or would not, adhere to the requirements of its approved Nutrient Management Plan.

CONCLUSION

Applicant respectfully requests that the pending application for water transfer of Big Sky Farms be approved in accordance with its corrected application of July 14, 2006, subject to the condition described in Section 4.

RESPECTFULLY SUBMITTED this 10th day of September, 2007.

FREDERICKSEN, WILLIAMS, MESERVY &
LOTHSPEICH, LLP

By: 

ROBERT E. WILLIAMS
Attorney for Applicant

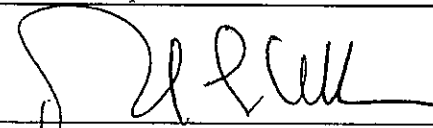
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing instrument to be served upon the following at the address and in the manner indicated below:

Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
IDWR Document Repository PO Box 83720 Boise ID 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
IDWR – Southern Region 1341 Fillmore St Ste 200 Twin Falls ID 83301	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
Deborah Gibson PO Box 83720 Boise ID 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
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DATED: September 10, 2007


ROBERT E. WILLIAMS