

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

**IN THE MATTER OF APPLICATION)
FOR TRANSFER 71607 IN THE)
NAME OF 4 BROS. DAIRY, INC.) **FINAL ORDER**
_____)**

On April 19, 2004, 4 Bros. Dairy, Inc. ("Four Brothers") submitted an application for transfer of water right with the Idaho Department of Water Resources (the "Department" or "IDWR"). The application for transfer proposes several changes to water right no. 37-20613 and was assigned transfer no. 71607 (the "application"). The application seeks to: (a) establish two new points of diversion; (b) change the nature of use from irrigation to stockwater and commercial; (c) establish new places of use; and (d) change the period of use to year-round from seasonal irrigation use.

Notice of the application was published in the Lincoln County Journal of Shoshone, Idaho on January 13 and 20, 2005. Elizabeth Tews, Henry Blake and JaNene Buckway, Doug Albright, Jerry Westendorf, Bev Ashton, Russell and Pamela Pantone, and the Lincoln County Rural Council ("Rural Council") protested the application (collectively, the "protestants"). The protestants raised the following issues:

- a. Whether the proposed wells would decrease the amount of water in neighboring wells?
- b. Whether the proposed wells would overstress the aquifer already stressed by drought?
- c. Whether the change from an irrigation season of use to a year-round season of use improperly enlarges the water right?
- d. Whether the aquifer under the proposed wells on the fringe of the Eastern Snake Plain Aquifer is more vulnerable to increased water withdrawals than the current location of the water right?
- e. Whether the proposed use threatens water quality?

The protestants requested that the application be denied.

BACKGROUND

On March 14, 2005, Peter R. Anderson was appointed hearing officer by the Director of IDWR.

On May 13, 2005, the hearing officer conducted a prehearing conference in Twin Falls, Idaho. Protestant Doug Albright did not attend this prehearing conference.

A *Notice of Proposed Default Order* was issued to Albright on May 20, 2005, for his failure to attend the May 13, 2005, prehearing conference. Albright was given seven days to respond to the notice. He filed no response.

On May 20, 2005, the hearing officer invited the Department to file by July 8, 2005, a staff memorandum providing: (1) the Department's analysis of whether the application should be granted and, if so, any proposed conditions; (2) a listing of applicable Department memoranda; (3) an analysis of the availability of ground water at the proposed point of diversion, or analysis of any studies related to the availability of ground water at the proposed point of diversion; and (4) a GIS map showing the proposed place of use and point of diversion. The Department submitted its staff memorandum on July 8, 2005. Ex. 800.

A second prehearing conference was held on July 14, 2005, at the Lincoln County Cooperative Extension office in Shoshone, Idaho. Protestants Russell and Pamela Pantone did not attend this prehearing conference. Following this conference, the Four Brothers filed a *Motion for Order Striking Respondent's Exhibits or, Alternatively, for Vacation of Hearing Other Sanctions* [sic] on July 26, 2005. After conversations with the attorney for Four Brothers, and the attorney for the Rural Council, the hearing officer entered an *Order Vacating Hearing* on July 26, 2005.

A *Notice of Proposed Default Order* was issued on July 15, 2005, to the Pantones for their failure to attend the July 14, 2005, prehearing conference. The Pantones were given seven days to respond to the notice. The Pantones filed their response with IDWR on July 22, 2005, stating that Rich Carlson, attorney for the Rural Council, represented their views.

An *Amended Prehearing Order* was issued on August 4, 2005, amending the schedule for discovery and for the exchange of exhibit and witness lists, and establishing tentative hearing dates of September 1-2, 2005.

After being re-set a number of times, a hearing was held on November 17-18, 2005, at the Bureau of Land Management conference room in Shoshone, Idaho and on December 9, 2005, by telephonic hearing originating from IDWR's office in Boise, Idaho. At the hearing Four Brothers was represented by Robert E. Williams. Protestant Rural Council was represented by Richard Carlson. Protestants Elizabeth Tews, Henry Blake and JaNene Buckway, Bev Ashton, Jerry and Susan Westendorf, and the Pantones appeared pro se, but were represented by Richard Carlson when not present.

At the conclusion of the hearing on December 9, 2005, the parties were given until January 6, 2006, to file written closing statements. The time for submittal was extended by stipulation of the parties to January 9, 2006. Four Brothers, the Rural Council, Richard Tews, and Henry Blake and JaNene Buckway filed written statements. This matter was fully submitted to IDWR on January 9, 2006.

EVIDENCE CONSIDERED

Exhibits offered by Four Brothers and admitted by stipulation of all protestants as part of the record are as follows:

EXHIBIT NO.

1. Eastern Snake River Plane Aquifer map.
2. Site Location Map.
3. Aerial Photo of proposed place of use and points of diversion.
- 3(a). Aerial oblique photograph of proposed place of use and point of diversion.
- 3(b). Enlargement of Exhibit 3(a).
4. Driller logs for wells near proposed place of use.
5. Driller logs in vicinity of the "Black Butte" property.
6. Test/production well design schematic.
7. Dairy Water Requirements Worksheets.
8. Consumptive use for certain irrigation crops from Brockway/Allen study.
9. Local well water quality data.
10. Well interference analysis prepared by Brockway Engineering.
11. Copy of transfer application with mitigation plan narrative and transfer spreadsheet output.
12. Well hydrographs from local USGS observation wells.
13. Enlargement analysis.
- 13A. Enlargement analysis with 25% mitigation.
14. Local climate and precipitation data.
15. Local soils data.
16. Aerial photograph of currently authorized place of use.
17. Mitigation plan analysis under new regional Eastern Snake Plain Aquifer ("ESPA") model.
18. Copy of applicant's Confined Animal Feeding Operation permit submitted to the County of Lincoln.
19. Applicant's Nutrient Management Plan for its expanded facility.
20. Chart of allocation of ESPA water.
21. Direct power coefficient data from farm well.

At the request of Four Brothers, IDWR took official notice of its decision in Transfer No. 5193, which was a previous transfer of a portion of the water right involved in the present transfer.¹

¹ At the time of this transfer, the water right was assigned number 37-07413B.

Exhibits offered by the Rural Council and admitted into the record² were:

100. Department map depicting ground water districts.
101. Department map depicting ground water elevations and ESPA.
102. Department map depicting ground water flow directions.
103. Department map depicting ground water elevations and ESPA.
104. Water right records of surrounding properties.
105. Well logs in the general area of the Four Brothers' dairy.
- 106(a)-(f). Transfer Impacts.
107. Response to public records request.
108. Four Brothers' application to rent water from water bank.
109. Miscellaneous IDWR data and correspondence re: Black Butte Transfer.
110. Site team report considering expanded operation of Four Brothers.
111. Four Brothers' withdrawal of the County of Lincoln Application.
112. Four Brothers' Nutrient Management Plan.
113. Response to public records request made to the Department of Agriculture.
114. Water quality tests from Buckway well.
115. Idaho Department of Environmental Quality, "Cumulative Impacts Assessments" (2000).
116. Crop statistics from 1990.
117. IDWR orders re: water right transfers.
118. Satellite photograph.
119. Satellite photograph.
120. Lincoln County Planning and Zoning documents.
121. Ground water level change map.
122. Idaho Department of Agriculture's response to public records request through July 29, 2005.

The following exhibit was offered by JaNene Buckway and admitted into the record:

300. Written testimony.

IDWR, on its own initiative and without objection from the parties, admitted the following exhibit:

800. Staff Memorandum.³

The following persons testified on behalf of Four Brothers:⁴

Andrew Fitzgerald.
Dr. Charles E. Brockway.

² The hearing officer took official notice of Exhibit No. 117. Exhibit No. 115 was admitted into evidence over the objection of Four Brothers. The Rural Council's remaining exhibits were admitted by stipulation of all parties.

³ Shane Bendixsen of IDWR was made available for cross-examination by the parties pursuant to IDAPA 37.01.01.602, but no party requested such examination.

⁴ The witnesses offered testimony both in the Four Brothers' case-in-chief and in rebuttal to protestants' testimony.

The following persons testified on behalf of the Rural Council:

Paul Drury.
Marv Patten.

The following persons testified in their own behalf:

Rusty Tews.
Janene Buckway.
Beverly Ashton.
Jerry Westendorf.
Susan Westendorf.

No other party offered exhibits or testimony for the Department's consideration.

On March 20, 2006, the hearing officer issued a *Recommended Order* approving the application with conditions. One of the conditions stated:

4 Bros. shall conduct a pump test and analysis of the well, pre-approved by IDWR, that describes the characteristics of the well, the aquifer from which it draws, and the expected impacts of its use, and submit the results of such pump test to IDWR.

On April 3, 2006, the Rural Council filed a *Petition for Reconsideration*. On April 7, 2006, the hearing officer denied the Rural Council's *Petition for Reconsideration*.

On April 21, 2006, the Rural Council filed exceptions to the hearing officer's *Recommended Order*.

On June 12-15, 2006, Brockway Engineering conducted a pump test. IDWR received a copy of the pump test data and analysis on July 24, 2006.

Department staff analyzed the pump test and issued a staff memorandum on January 19, 2007. The IDWR staff memorandum was served on the parties on February 22, 2007, and the parties were granted the opportunity to review and submit comments.

EXCEPTIONS

Statement of Exceptions

The Rural Council's exceptions are summarized as follows:

1. The legal description for the place of use of the Four Brothers' proposed expanded dairy operation cannot be approved by IDWR because Lincoln County has not approved all the lands for a dairy through its "Siting Registration."

2. There was insufficient documentation that pasture was the historical crop grown on the place of use from which the water rights are being transferred.
3. Water not pumped at the location of the point of diversion from which a water right is proposed to be transferred will not physically reach the new point of diversion.
4. Four Brothers will not apply waste in accordance with standards imposed by its own nutrient management plan.
5. The proposed transfer will increase water use and reduce recharge to part of the aquifer in the local area northwest of Shoshone, Idaho.
6. Diversion of ground water proposed by the application for transfer will have a cumulative impact on existing wells.

Analysis of Exceptions

Consideration of Lincoln County Siting Requirements

The 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).

The fact that the place of use proposed by Four Brothers does not exactly match the site description for Lincoln County approval is not grounds for IDWR to refuse to grant the transfer. The local public interest criterion does not allow IDWR to consider county approvals or denials of a proposed activity unless the county determination is related to “the interests . . . people in the area . . . have in the effects of such use on the public water resource.” Lincoln County must exercise its authority to enforce its decisions without linkage to the transfer process.

Documentation of Historical Crops Grown

Four Brothers computed the volume of water proposed to be transferred based on an historic consumptive use of pasture. A Farm Service Agency (“FSA”) document contained in Exhibit no. 11 identifies “alfalfa” as the crop grown in 2001 on the land from which water is proposed to be transferred. The consumptive use of alfalfa is almost identical to the consumptive use of pasture. IDWR will not require a reanalysis of the volume of water transferred because of the difference between the FSA document showing an historic alfalfa crop and the computations of water availability assuming an historic pasture use.

An applicant seeking to change the nature of use can show that lands from which a water right will be transferred were planted in a very water-consumptive crop and can transfer the high consumptive use associated with the crop. In this case, IDWR will not require an analysis of a cropping pattern or rotation.

Water from the “From Well” not Physically Flowing to the “To Well” Location

The Rural Council cites two IDWR orders on applications for transfer, Bloxham and Jerome Cheese, to support an argument that the water particles in the aquifer intercepted by the well from which the water right is proposed to be transferred must actually migrate down gradient to the location of the well to which the water right is proposed to be transferred and from which water will be diverted if this application for transfer is approved. Copies of the two decisions were received into evidence as Exhibit no. 117.

IDWR must evaluate a proposed transfer to determine if the proposal will injure other water rights. *See* Idaho Code § 42-222. A transfer of a ground water right could injure other ground water rights in the vicinity of the well to which the water rights are proposed to be transferred. A transfer of a ground water right could also injure surface water rights that are hydraulically connected to the ground water.

In Bloxham, the transfer application proposed moving the point of diversion approximately 110 miles away from the original point of diversion. In that instance, diversion of water from the new point of diversion would have depleted surface water flows to a different reach of the Snake River than diversion of water from the existing point of diversion. In addition, the existing point of diversion of water diverted from the Eastern Snake Plain Aquifer, and the proposed point of diversion would divert water from an aquifer named the Bell Rapids Aquifer. These two ground water aquifers are not hydraulically connected. Accordingly, the Bloxham transfer application was denied for the above two reasons. The denial was not based on an analysis of whether water particles in the aquifer at the location of the existing well would physically migrate to the location of the proposed well.

Similarly, IDWR’s denial of Jerome Cheese’s transfer application was not based on an analysis of whether water particles in the aquifer at the location of the existing well would physically migrate to the location of the proposed well. Jerome Cheese sought to move the point of diversion approximately 90 miles away from the original point of diversion. There the diversion of water from the new point of diversion would have depleted surface water flows to a different reach of the Snake River than diversion of water from the existing point of diversion. Diversion of ground water from the new point of diversion would have increased the depletions to springs flowing to the Snake River generally in the Thousand Springs complex. These depletions would injure water rights authorizing use of water from the Thousand Springs complex. Because the denial of Jerome Cheese’s transfer application was based on anticipated injury to other water rights and not on an analysis of whether water particles in the aquifer at the location of the existing well would physically migrate to the location of the proposed well, reliance on the Jerome Cheese order is misplaced. By contrast, under the present Four Brothers transfer application, water for the proposed use will be diverted from the ESPA by two wells located approximately 12 miles from the existing point of diversion of the water right to be transferred and no injury to other water rights is expected.

Application of Waste in Violation of the Nutrient Management Plan

The Rural Council argues that IDWR should deny the application because (a) Four Brothers has applied waste to uncovered rock outcroppings in violation of the Idaho Department of Agriculture (“Agriculture”) regulations and the nutrient management plan; and (b) Four Brothers’ nutrient management plan does not identify the owners of lands to which waste will be exported or at what rates the exported waste will be applied.

Exhibit no. 19 is the nutrient management plan for the Four Brothers’ dairy. Dustin Olson prepared the plan, and it was completed on July 15, 2005. The last page of Exhibit no. 19 is a copy of a letter written by Steve Thomas, an employee of Agriculture. In his letter, Thomas states, “The Nutrient Management Plan for Four Brother Dairy, written by Dustin Olson, has been approved by Steve Thomas, ISDA Resource Technician on 2/20/2005.”

Primary responsibility for overseeing the water quality laws and regulations of the State of Idaho is vested in the Idaho Department of Environmental Quality. Idaho Code § 39-3624. The Idaho Department of Environmental Quality has delegated its authority for oversight of confined animal feeding operations (“CAFOs”) to Agriculture. *See generally* Idaho Code §§ 67-6529A–67-6529G; IDAPA 02.04.18.000, *et seq.*, 58.01.01.760–58.01.01.764. IDWR should not approve a water right transfer that will result in violations of water quality laws or regulations. In most cases, however, IDWR is not responsible for determining initially whether a violation has or will occur. This is particularly true when the agency that is responsible for primary oversight has approved a waste management plan. A determination of whether the operator is complying with the plan is vested in Agriculture, not IDWR.

When Agriculture approves a nutrient management plan, IDWR will not review the details of the plan to second-guess the agency having primary jurisdiction over waste management. If a nutrient management plan is submitted to IDWR as evidence without Agriculture’s approval, IDWR must look to the components of the plan to determine whether the plan will satisfy state standards and whether it is consistent with testimony presented at the hearing.

In this case, Agriculture approved the nutrient management plan, effectively determining that the plan will satisfy Idaho water quality standards. Agriculture is also responsible to insure that Four Brothers complies with the standards. IDWR will condition this approval to provide that, upon a determination by Agriculture, the Department of Environmental Quality, or any other agency having primary jurisdiction over enforcement of water quality standards that the water right holder has violated water quality standards or the provisions of the nutrient management plan, IDWR has cause to revoke approval of this application for transfer.

Increased Water Use/Reduction in Recharge

The Rural Council suggested “the proposed transfer will increase the water diversion . . . from a part of the aquifer.” A ground water diversion will not reduce recharge, however, unless it is directly drawing on a source of recharge. Testimony at the hearing and the analysis of the

pump test conducted following the hearing establishes that the proposed diversion will not cause withdrawals from the aquifer that exceed the average annual rate of recharge.

Impact on Existing Wells

Testimony at the hearing and the analysis of the pump test conducted following the hearing establishes that there will be some reduction in local water levels, but that the reductions in water levels will not be significant enough to injure other water users.

Based on the above analysis, the Director issues the following Findings of Fact, Conclusions of Law, and Final Order:

FINDINGS OF FACT

1. Four Brothers is an Idaho corporation. The shareholders in the corporation are Jerome, Andrew, Lawrence, and Clem Fitzgerald. Four Brothers operates an existing dairy and row crop farm in Lincoln County. Four Brothers owns and operates a large dairy operation with 10,000 head of livestock and 88 employees. It irrigates just less than 4,000 acres of row crops. It has been located in Lincoln County since late 1980.

2. Four Brothers owns the irrigated farmland to which water right no. 37-20613 is currently appurtenant, water right no. 37-20613 itself, and the land upon which Four Brothers proposes to expand its dairy operation. The application proposes to move water right no. 37-20613 to the dairy operation. Four Brothers has begun construction of the new barn that is an integral part of the proposed use. Ex. 3(b). Four Brothers has a CAFO registration from Lincoln County allowing 10,889 animal units at the dairy, which would cover the animal units proposed under the expansion. Ex. 18.

Current Water Use

3. Water right no. 37-20613 was partially decreed in the Snake River Basin Adjudication to Four Brothers for the following water use:

Priority Date:	12/12/1974.
Source of Water:	Ground water.
Point of Diversion:	SENESE Sec. 20, T6S, R18E, B.M., Lincoln County, Idaho.
Purpose of Use:	Irrigation of 77.4 acres.
Total Quantity:	1.12 cfs/ 309.6 acre feet annually (AFA).
Period of Use:	March 15 – November 15.
Place of Use:	SENESE Sec. 20, T6S, R18E, B.M., Lincoln County, Idaho.

Ex. 11.

4. The source of water for water right no. 37-20613 is generally described ESPA. The ESPA is a water-table aquifer in the deep Snake River Plain basalts with water generally

flowing in a southwest direction. Ex. 1. The ESPA discharges into the Snake River at numerous locations. The specific character of the aquifer formations and characteristics is discussed later in this final order.

5. Water right no. 37-20613 authorizes diversion from ground water by a single well, located approximately five miles southeast of Shoshone, Idaho.

6. Historically, water was diverted under water right no. 37-20613 for the irrigation of crops on 77.4 acres known as the "McCowan place." The McCowan place has been farmed consecutively for many years prior to the year the application for transfer was filed. Dr. Charles Brockway testified that the most water consumptive crop historically irrigated on the McCowan place in the last 10 years was "pasture." Documents submitted with the application suggest that alfalfa was raised on the McCowan place, and Exhibit 21 indicates that corn has also been cultivated there.

7. Dr. Charles Brockway opined that the highest historic consumptive use under water right no. 37-20613 was 3.01 AFA per acre. The consumptive irrigation requirement for pasture was determined from a water use study prepared by Brockway and Allen in 1983. Ex. 8. Multiplying that consumptive use per acre by 77.4 acres results in a maximum historic consumptive use of 233.1 AFA.

Proposed Dairy Water Use

8. The application for transfer proposes the following:

Priority Date:	12/12/1974.
Source of Water:	Ground water.
Point of Diversion:	SESE Sec. 5, T5S, R17E, B.M., Lincoln County, Idaho.
Purpose of Use:	Stockwater and commercial.
Total Quantity:	1.12 cfs/ 174.8 ⁵ AFA.
Period of Use:	January 1 – December 31 (year-round).
Place of Use:	SWSE and SESE of Sec. 5 and NENE and NWNE of Sec. 8, T5S, R17E, B.M., Lincoln County, Idaho.

The proposed water use will allow up to an additional 3,500 head of cows and 500 head of heifers to be placed at Four Brothers' existing dairy operations.⁶

9. Four Brothers will construct a new dairy barn in which 80 cows can be milked at a time. Water will be used to water livestock, for milk cooling in the dairy barn and cleaning. Four Brothers will construct two lagoons to store liquid waste until the waste is land-applied through gated pipe, and will construct berms to shield the waste water from entering area canals,

⁵ The annual volume is different than that requested in the Application. It is reduced by 25% based upon the representation of Andrew Fitzgerald, as discussed in Finding of Fact no. 23.

⁶ Some livestock will be moved into the new facility from other areas of the dairy.

all in accordance with the requirements of Agriculture. Exhibit 7 provides justification for the quantity of water requested for operation of the dairy.

10. Four Brothers minimizes water use by employing a dry scrape method of cleaning the corrals and by employing efficient water delivery systems.

11. Water for the proposed use will be diverted from the ESPA by two wells and used approximately 12 miles northwest of the existing point of diversion and place of use of water right no. 37-20613.

12. The maximum instantaneous quantity requested in the transfer is 1.12 cfs. This equals the maximum instantaneous quantity under water right no. 37-20613.

13. Four Brothers proposes use of water at the dairy year-round. The annual volume limitation of 174.8 AFA, however, would only allow for an average continuous flow of 0.24 cfs.

Impacts of Change on Other Water Rights

14. No evidence was presented regarding any water rights near the McCowan place that would be injured by moving water right no. 37-20613 off of the McCowan place. The primary impact would be drying up of 77.4 acres of irrigated farmland. Because only an amount that was consumptively used is being transferred, there will be no loss of water returning to the ESPA.

15. Water rights in the vicinity of the proposed dairy water use are as follows:

<u>Number</u>	<u>Name</u>	<u>Priority</u>	<u>Use(s)</u>	<u>Quantity</u>
37-10405	Westendorf	1/1/1912	Domestic	0.04 cfs
37-0404	Westendorf	1/1/1950	Domestic/Stockwater	0.04 cfs
37-10425	Albright	12/31/1910	Domestic/Stockwater	0.17 cfs
37-10382	Tews	1/1/1952	Domestic/Stockwater	0.04 cfs
37-10237	Buckway	7/31/1945	Domestic/Stockwater	0.13 cfs

Ex. 104.

16. The wells utilized by these and other water rights range in distance from the proposed new points of diversion as follows:

Buckway: .7 miles;

Albright: 1-1.5 miles (estimated);

Ashton: 1.5 miles;

Tews: 1.7 miles;
Pantone: 3.12 miles (the water right for this well was not identified);
Westendorf: 4.53 miles.
Ex. 2.

17. The proposed points of diversion for the proposed dairy water use would be located on the northern fringe of the ESPA. The lithology described in the drillers' reports of wells constructed near the location of the proposed wells suggests that the aquifer in this area may be the water-table aquifer in the deep basalts of the ESPA (Ex. 4), or may be confined by fingers of granite and/or clay intruding into the aquifer from the Idaho Batholith. This aquifer confinement is seen in the Black Butte area, two or three miles to the north of the proposed well site. The lithology in the Black Butte area shows the increased granite and clay layers from the Idaho Batholith. Ex. 5.

18. Dr. Charles Brockway estimated the localized aquifer impact of pumping for the proposed dairy use using the Theis Formula. The study assumed that the aquifer at the new points of diversion is a water table aquifer in fractured basalt, and that the average pumping rate to produce the annual volume requirement from the new wells would be .32 cfs.⁷ Utilizing these parameters the anticipated drawdown of the existing wells would be less than 3 inches after 60 days of continuous pumping. Ex. 10.

19. Brockway Engineering conducted a three-day pump test on June 12-15, 2006, and prepared a report that analyzed the data. Brockway Engineering concluded that the production aquifer is semi-confined because of rising water levels during drilling of the well.

20. The well owned by Buckway is the nearest of the protestants' wells to the production well. The Brockway test predicted a maximum drawdown of two feet in the Buckway well after pumping continuously at a rate of 1.12 cfs for a full year. Department staff analyzed the Brockway data and results in a memorandum dated January 19, 2007. Using the test data, and applying an independent method of analysis to the data, Department staff estimated a drawdown of less than one foot in the Buckway well after one year of pumping at a flow rate of 1.12 cfs.

21. Because the production zone is not fully confined, significant leakage from the overlying unconfined aquifer is sufficient to stabilize the aquifer levels following full production.

22. Shane Bendixsen, IDWR Technical Hydrogeologist, performed an analysis assessing the impact of the proposed transfer on flows in the Snake River. Using the Eastern Snake River Plain Ground Water Rights Transfer Spreadsheet, based on the Enhanced Snake Plain Aquifer Model, Version 2.0, he concluded that a reduction at the Four Brothers' dairy of 25% of the amount historically consumptively used under water right no. 37-20613 at the

⁷ This is a conservative quantity. An average continuous flow of only 0.24 cfs could be pumped at the dairy under the application.

McCowan place would be necessary to achieve $\leq 5\%$ reduction of surface water flows in any Snake River reach. Ex. 800. A 25% reduction is sufficient to mitigate any impacts the transfer will have on Snake River flows.

23. In his testimony, Andrew Fitzgerald agreed to use 174.8 AFA at the dairy under the application. *See also* Ex. 13A. This represents a reduction of 25% of the historic consumptive use under water right no. 37-20613.

Impacts on Local Public Interest

24. Ground water levels in the area of both the McCowan place and the Four Brothers' dairy have declined from 1980–2005. Ex. 21. Although the area near the Four Brothers' dairy appears to have a somewhat greater reduction in ground water levels than the McCowan place, the withdrawal of an additional 174.8 acre feet of ground water will not result in greater total ground water demands than the average annual rate of recharge. The 25% reduction in overall consumptive use as a result of the transfer will reduce withdrawals from the ESPA.

25. The agency primarily responsible for reviewing and controlling water quality impacts at the Four Brothers' dairy is Agriculture. Agriculture forbids dairy operators, such as Four Brothers, from allowing water containing manure or other pollutants to escape the boundaries of the dairy facility. Four Brothers prepared a nutrient management plan for the waste from the dairy, including the new facility for which the application was filed, that has been approved by Agriculture. Four Brothers' dairy is subject to inspections by Agriculture for compliance with regulations regarding waste management. Four Brothers has implemented, or has agreed to implement, the mitigation measures for the expanded dairy site proposed by the CAFO Siting Team Report to lessen the "moderate risk" posed by the new dairy facilities. Ex. 110.

CONCLUSIONS OF LAW

1. Based upon the Findings of Fact, the Director makes the following Conclusions of Law:

2. Applications to change water rights in this way are processed under section 42-222 of the Idaho Code. Section 42-222(1) provides in pertinent part that:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and

the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided... .

* * *

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. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area... .

3. Section 42-202B(1) of the Idaho Code defines “consumptive use” as:

...that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. “Authorized consumptive use” means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.

4. A water right transfer applicant bears the burden of proof for the factors IDWR must consider under section 42-222 of the Idaho Code. *See Barron v. Idaho Dep’t of Water Resources*, 135 Idaho 414, 418, 18 P.3d 219 (2001); *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985).

5. Four Brothers has satisfied its burden of showing that it is entitled to the use of water under water right no. 37-20613 and to change water right no. 37-20613 as provided in the application.

6. Four Brothers has satisfied its burden of showing that the proposed dairy use is a beneficial use, and that water right no. 37-20613 will continue to be used for an agricultural use in the same local area.

7. Any impact on senior surface water rights that authorize the diversion of spring or other discharge water from the ESPA into the Snake River would be mitigated by the 25% reduction in consumptive use agreed to by Four Brothers.

8. Four Brothers submitted sufficient information regarding the dairy water use to allow its water resource impact to be evaluated. Approval of the application for transfer would not cause a greater impact upon the overall water supply in the ESPA.

9. Four Brothers has satisfied its burden of showing that there will be no injury to other water rights by approving the transfer.

10. Additionally, the Director must consider whether the requested application will lead to an unauthorized enlargement. Pursuant to section 42-222(1) of the Idaho Code, the Director “may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.”

11. The application suggests an enlargement via the change in period of use from the irrigation season to year-round use. Restricting the transferred amount to only the historic consumptive amount, however, ensures that the maximum amount of water consumed from the ESPA remains the same.⁸ Four Brothers has satisfied its burden of showing that there will be no unacceptable enlargement in water use by approving the application.

12. The Director must also consider whether the application is consistent with the local public interest. *See* Idaho Code § 42-222. Section 42-202(B)(3) of the Idaho Code defines the local public interest 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.”

13. The Department is not authorized to grant the application if doing so would violate the water quality standards of another agency. *See Shokal*, 109 Idaho at 341, 707 P.2d at 452. IDWR is also not authorized to evaluate the efficacy of the programs of those agencies with primary responsibility for protecting water quality. *See id.* at 340-41, 707 P.2d at 451-52. IDWR simply evaluates whether a proposed water use will comply with those programs, and whether any other, unregulated aspect of the water use, will have an effect on the public water resource.

14. Agriculture has the primary duty of regulating dairy waste water. *See* IDAPA 02.04.18.000, *et seq.* According to Agriculture, Four Brothers is complying with its water

⁸ Although not imposed to prevent enlargement, the 25% reduction in historic consumptive use to mitigate any increased impacts on reaches of the Snake River also ensures no enlargement in impact.

quality requirements, and so long as Four Brothers continues to comply with its nutrient management plan, Exhibit 19, the dairy will be in compliance with applicable water quality protections.

15. There is insufficient evidence to conclude that the additional solid dairy waste that will be generated as a result of granting the transfer will be used or disposed of in such a way that it will lead to water quality concerns in Idaho or elsewhere.

16. Thus, Four Brothers has satisfied its burden of showing that approving the transfer does not conflict with the local public interest.

17. By converting existing dairy waste operations to a dry scrape and by employing water conservation measures, Four Brothers has satisfied its burden to show that the proposed water use is consistent with the conservation of water resources within the state of Idaho.

Appeal of Doug Albright.

18. Doug Albright failed to fulfill his responsibilities as a protestant in this matter. Having shown no cause for failing to fulfill his responsibilities, his protest should be dismissed.

ORDER

Based upon these Findings of Fact and Conclusions of Law, application for transfer no. **71607** is **Approved** with the following conditions:

1. The annual volume that may diverted shall be 174.8 acre feet.
2. Upon a determination by Agriculture, the Department of Environmental Quality, or other agency having primary jurisdiction over enforcement of water quality standards that the water right holder has violated water quality standards or the provisions of the nutrient management plan, IDWR has cause to revoke approval of this application for transfer.
3. Beginning on the date of approval of transfer no. 71607, water right no. 37-20613 is limited to 174.8 AFA. The diversion of water shall be evenly distributed throughout the authorized season of use, except that minor variations are allowed for seasonal fluctuations in water requirements.
4. The model used to calculate depletion effects and mitigation for the Milner to King Hill reach may also show gains in other reaches of the Snake River. Such gains have not been quantified at this time. The right holder retains the right to seek quantification of such gains resulting from approval of transfer no. 71607. Protestants retain the right to object to the quantification of such gains. If such reach gains are quantified and acknowledged by the Department, credits for such gains shall be available for use only after the Department has implemented a system for administering such credits.
5. Use of water under this right will be regulated by a watermaster with

responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 130.

6. Prior to the diversion and use of water under transfer no. 71607, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion, in accordance with Department specifications.

7. Commercial use is for a dairy.

8. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable county zoning and use ordinances.

9. Right holder shall comply with the drilling permit requirements of section 42-235 of the Idaho Code and applicable Well Construction Rules of the Department.

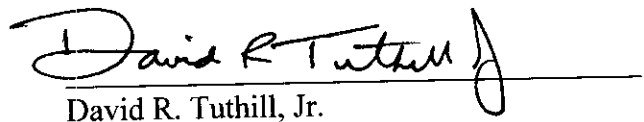
10. Right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

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

12. Pursuant to section 42-1412(6) of the Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

IT IS FURTHER ORDERED that, based on Protestant Doug Albright's failure to appear at the time and place set for prehearing conference, his protest is DISMISSED.

Dated this 30th day of April, 2007.


David R. Tuthill, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2007, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

4 BROS. DAIRY INC
ANDREW FITZGERALD
427 N 250 W
SHOSHONE ID 83352

HENRY BLAKE
JANENE BUCKWAY
585 N 250 W
SHOSHONE ID 83352

ROBERT WILLIAMS
FREDERICKSEN WILLIAMS
PO BOX 168
JEROME ID 83338-0168

BEV ASHTON
685 N 250 W
SHOSHONE ID 83352

CHARLES BROCKWAY PE PHD
BROCKWAY ENGINEERING
2016 N WASHINGTON ST STE 4
TWIN FALLS ID 83301

JERRY & SUSAN WESTENDORF
707 W 470 N
SHOSHONE ID 83352

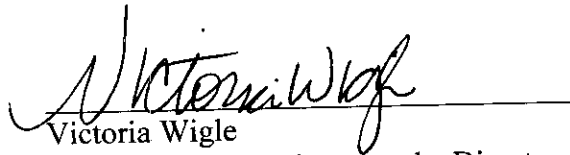
IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301

RUSSELL & PAMELA PANTONE
745 N 550 W
SHOSHONE ID 83352

ELIZABETH TEWS
680 N 350 W
SHOSHONE ID 83352

LINCOLN CO RURAL COUNCIL
C/O RICH CARLSON
PO BOX 21
FILER ID 83328

DOUG ALBRIGHT
675 N 150 W
SHOSHONE ID 83352


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.