



State of Idaho

DEPARTMENT OF WATER RESOURCES

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November 29, 2005

Robert E. Williams
Fredericksen, Williams, Meservy & Lothspeich, LLP
PO Box 168
Jerome, ID 83338

Transfer No. 69309, Avelars Dairy – Petition for Reconsideration

Dear Mr. Williams:

The Department of Water Resources acknowledges receipt of the Brief in Support of Petition for Reconsideration for the water right transfer referenced above. As I understand it, the brief argues that the policies adopted by the Department in the ESPA Administrator's Memorandum of October 30, 2002 ("transfer guidelines") are rules that have not been adopted in accordance with statutory rule making procedures, and argues that the guidelines are therefore invalid. In addition, the brief argues that the Department should amend the transfer approval consistent with the Department's former policies.

The Department agrees that the transfer guidelines have not been adopted as rules. The Department does not agree that the transfer guidelines are invalid as a method used to consider enlargement; however, the Department is willing to consider other proposals that can be used to demonstrate whether or not enlargement would occur in a transfer. The Department also does not agree that a prior policy called for use of the highest annual volume for a five-year historical period to consider enlargement for supplemental irrigation rights.

The Department is required to review all transfer applications to ensure they comply with Idaho law. Section 42-222, *Idaho Code* requires that "... the change does not constitute an enlargement in use of the original right..." and allows that, "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 Department understands that a dairy operation must meet certain water quality requirements that may result in full consumption of the water transferred. Given that understanding, the total volume historically diverted under the supplemental irrigation right may not be fully available for the dairy use proposed in the transfer.

As a starting point for discussion, the following table shows the historical use of ground water as estimated in the application, compared to the proposed dairy use (and remaining irrigation) for the same time period assuming a typical efficiency (75%) for an irrigation system (all units in acre-feet).

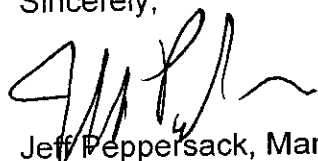
Year	<u>Prior to Transfer</u>		<u>After Transfer -</u>		<u>Dairy and 46.9 supplemental acres</u>		
	<u>Irrigation Use</u>	<u>Irrigation CIR</u>	<u>Dairy Use and CU</u>	<u>Irrigation Use</u>	<u>Irrigation CIR</u>	<u>Total Use</u>	<u>Total CU</u>
1993	108.2	81.2	75.4	41.7	31.3	117.1	106.7
1994	108.6	81.5	75.4	41.9	31.4	117.3	106.8
1995	128.2	96.2	75.4	47.3	35.5	122.7	110.9
1996	86.2	64.7	75.4	33.2	24.9	108.6	100.3
1997	122.7	92.0	75.4	47.3	35.5	122.7	110.9
1998	79.8	59.9	75.4	30.8	23.1	106.2	98.5
1999	0.3	0.2	75.4	0.1	0.1	75.5	75.5
2000	1.2	0.9	75.4	0.5	0.4	75.9	75.8

The data demonstrates that the total ground water volume would be enlarged in 6 of the 8 years and the consumptive use would be enlarged in all years. Based on this analysis, the transfer raises serious enlargement concerns and may not be approvable as proposed. As stated above, the Department is willing to consider other proposals to review enlargement. To be acceptable, any proposal must include a method to determine and compare the water use quantities both before and after a proposed change to a water right. For supplemental ground water rights, data regarding surface water use and irrigation efficiency may also be necessary to fully review the enlargement issue.

The Department's letter of Disposition of Petition for Reconsideration, dated October 18, 2005, required that, "...the applicant shall demonstrate how the change(s) will comply with the requirement in Section 42-222, Idaho Code, that the change will not constitute an enlargement in the use of the original right." Due to the technical nature of the requirement, the Department will allow an additional 21 days for the applicant to provide the necessary information. The Department will evaluate the information submitted when determining whether to grant or deny the petition for reconsideration. If there is no response, in writing within 21 days, the Department will deny the petition for reconsideration.

If you have any questions, please call me at 208-287-4948.

Sincerely,



Jeff Peppersack, Manager
Water Right Permits Section

JP:klf