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Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 69309 Water Right No. 47-4287 AVELARS DAIRY, Applicant.	SOURCE: Groundwater COUNTY: Twin Falls APPLICANT'S BRIEF IN SUPPORT OF PETITION FOR RECONSIDERATION
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COMES NOW the Applicant, Avelars Dairy, by and through its attorney, Robert E. Williams of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and submits this Brief in support of its Petition for Reconsideration, dated October 12, 2005, which was granted by the Department on the 18th day of October, 2005.

I. FACTS

As supported by the attached Affidavit of Charles G. Brockway, salient facts appurtenant to the Applicant's Petition for Reconsideration are these:

1. The original Application for Transfer filed on April 2, 2001, hereinafter referred to as the "Transfer", proposed to convert a portion of a supplemental ground water irrigation right No. 47-4287 to stock water and commercial usage for the purposes of expanding the Applicant's dairy operation in Twin Falls County.

2. Utilizing historical well diversion volumes by referencing power records from 1993 through 2000, a power consumption coefficient was developed, and through the use of actual power records, usage volumes were determined. Volumes produced from the supplemental irrigation right which was the subject of the transfer, for purposes of irrigation, for the years 1993 through 2000 were as follows:

<u>Year</u>	<u>Volume in afa</u>
1993	108.2
1994	108.6
1995	128.2
1996	86.2
1997	122.7
1998	79.8
1999	.3
2000	1.2

3. The maximum withdrawal for the prior five (5) years was 122.7 afa in 1997. Based upon the Idaho Department of Water Resource's (hereinafter IDWR) policies and procedures then in existence, Dr. Brockway determined that the annual diversion volume of 75.4 afa necessary for the purposes for which the application was sought, divided by 122.7 afa was 61.5% of the total right. That percentage multiplied by the 128 acres which was the place of use, yields 78.7 acres. Since the Department's allowed consumptive use volume for

irrigation was then three (3) afa to the acre, Dr. Brockway determined that 25.1 acres ($75.4 \div 3.0$) would yield the number of acres required to be dried up under any source so that no enlargement of the water right in violation of Idaho Code § 42-222 would occur.

4. Subsequent to the filing of the Application for Transfer, a recommendation was made for Water Right No. 47-4287 in the SRBA. The recommendation for the right was 1.15 cfs and 121.6 acres. The Applicant revised its application to be consistent with the SRBA recommendation for the right. Based upon 61.5% of the new acreage of 121.6, the acreage to support the transfer was reduced to 74.7. The diversion rate proposed to be transferred was also reduced to comply with the SRBA's recommendation.

5. Sometime during the middle of 2005, IDWR changed its historic policy regarding the volume available for transfers from irrigation use to stock water/commercial. Formerly, the Department had permitted transfers to be made on the entire historic annual volume of the irrigation right but changed its policy to allow a proportional transfer of only the consumptive portion of the right. Southern Region staff calculated the equivalent primary usage of the supplemental right at 30.7 acres and then multiplied that number by 3 afa of consumptive use to yield 92.1 afa of consumptive use available for transfer. 75.4 afa of volume originally calculated as necessary to accomplish the purposes of transfer was divided by the 92.1 figure to yield 81.8% of the supplementary right as now being subject to transfer. 81.8% of the 121.6 acres recommended in the SRBA then required 99.6 acres of the original 121.6 to yield the necessary 75.4 afa requested by the transfer. This recalculation was done without the knowledge or consent of the Applicant.

6. On September 14, 2005, a memo from the state office of the IDWR further modified the parameters of the approved water transfer. These reductions were made on the basis of the Department's Administrator's Memorandum dated October 30, 2002, hereinafter referred to as the "Administrator's Memorandum." Paragraph 5, page 23 of the Administrator's Memorandum adopted a policy where annual historic consumptive use under a supplemental water right would be determined by the average annual historic consumptive use over a time period that may be greater than five (5) years. Prior to the date of the Administrator's Memorandum, the apparent policy of the Department had been that the maximum withdrawal for the previous five (5) years from the date of the transfer would measure the amount of the allowable volume to be transferred. Utilizing the new policy of the Administrator's Memorandum, equivalent primary usage acres were reduced to 19.9. That number of acres multiplied by the 3 afa of allowable consumptive use yielded 59.7 afa available for the transfer from the entire supplemental irrigation right. Thus, on the basis of the IDWR policy changes while the transfer was pending, the Applicant's transfer parameters went from a tentatively approved volume for transfer of 75.4 afa with 46.9 acres of the original supplemental irrigation right remaining to a volume of 59.7 afa available with no portion of the original supplemental irrigation right remaining.

II. ANALYSIS

Idaho Code § 67-5201(19) defines a rule as:

"The whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter that implements,

interprets or prescribes: (a) law or policy; or (b) the procedure or practice requirements of an agency."

The same statute exempts the following actions from the definition of a rule:

- "1. Statements concerning only internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
2. Declaratory rulings issued pursuant to Section 67-5232, Idaho Code; or
3. Intra-agency Memoranda; or
4. Any written statements given by an Agency which pertain to an interpretation of a rule or to the documentation and compliance with a rule."

In *Asarco, Incorporated vs State of Idaho, Idaho Department of Environmental Quality, et al*, 138 Idaho 719, 69 P.3d 139 (2003), the Idaho Supreme Court stated that:

"An agency action is a rule if it:

- (1) is a statement of general applicability and
- (2) implements, interprets or prescribes existing law."

To further refine whether an agency action requires rule making, the Court determined that the following characteristics of an agency action would be indicative of a rule:

"(1) wide coverage; (2) applied generally and uniformly; (3) operates only in future cases; (4) prescribes a legal standard or directive not otherwise provided by the enabling statute; (5) expresses agency policy not previously expressed; and, (6) is an interpretation of law or general policy." *Asarco, Inc., supra*, p. 723.

Here, the Administrator's Memorandum purportedly provides guidance of the IDWR in processing transfer applications. As shown by this case, a portion of the Administrator's Memorandum utilized by IDWR have been made into substantive standards to determine whether the "no enlargement" standard of I.C. § 42-222(1) has been met.

Pam Skaggs' Memorandum of September 14, 2005, hereinafter referred to as the "Skaggs' Memorandum", a copy of which is attached hereto as EXHIBIT "A", treats the Administrator's Memorandum as a substantive standard. The Skaggs' Memorandum led directly to the existing Preliminary Order. Because of new policies adopted by the IDWR at the regional and state level, the amount of acres available to the Applicant from Water Right No. 47-4287 after the Transfer went from 46.9 to zero, the volume available for transfer was reduced from 75.4 afa to 59.7 afa and the remaining acres available for supplemental irrigation used has gone from 46.9 to 0. The Applicant contends that the Department's use of the guidance of the Administrator's Memorandum made it clear that the Administrator's Memorandum, at least as it is being applied to the enlargement criteria on transfer applications, is a rule. Applying the six (6) part test of *Asarco, supra*, to the present facts:

Is the IDWR's policy of determining the amount of water available from a supplemental irrigation right for transfer to commercial/stockwater by averaging use over a number of years characterized by:

1. Wide Coverage? (Yes.)
2. General and Uniform Application? (Yes.)
3. Operation only in future cases? (There is no indication that the policy was meant to apply to anything other than pending and future cases.)
4. Prescription of a legal standard or directive not otherwise provided by the enabling statute? (Yes, nothing in I.C. § 42-222 expresses the standards contained in the Memorandum.)

5. Expression of agency policy not previously expressed? (Yes.)

6. An interpretation of law or general policy? (Yes. In fact, as previously demonstrated, it is a departure from previous policy.)

All of the foregoing questions being answered in the affirmative, the "policy" is not just a "statement of internal management." It is a rule.

Asarco, supra, at p. 725, makes it clear that if the IDWR's adoption of the "averaging" method of determining the amount of water available for transfer under a supplemental irrigation right is a rule, and it was adopted without utilizing the procedure for rule making as prescribed by I.C. § 67-5201, *et seq.*, it is invalid. See also I.C. § 67-5231. The administrative rule making process was not resorted to by the IDWR in adopting the Administrator's Memorandum.

The same six (6) part analysis may be applied to the Department's "in-house" change of its policy without the benefit of anything in writing, formerly allowing a proportional transfer of the actual diversion volume of an irrigation right being converted to commercial/stockwater, to allowing a proportional transfer of only the consumptive use portion of the right. All six (6) *Asarco, supra*, questions can be answered in the same fashion to this policy as set forth previously. This change was set forth in the calculations of A. Merritt and J. Freitag dated July 20, 2005 and the J. Freitag memo of August 4, 2005, copies of which are attached hereto collectively as EXHIBIT "B." This "rule" also was adopted informally. Because the rule making processes of I.C. § 67-5201, *et seq.*, were not resorted to, it is invalid.

III. CONCLUSION

The policy statement adopted by the IDWR in the ESPA Administrator's Memorandum of October 30, 2002, regarding "averaging" the volume of water available for transfer from a supplemental irrigation right and the in-house determination to limit the volume available for transfer from irrigation rights from the total volume to consumptive use are rules as defined by the Idaho Administrative Procedures Act and Court decision. They have not been adopted in accordance with statutory rule making procedures and are invalid. The Department should therefore enter an Amended Preliminary Order approving the transfer in the amount of 75.4 afa and requiring only 74.7 acres of the supplemental right (No. 47-4287) to be deleted, consistent with the Department's former policies and the parameters of the SRBA recommendation for Water Right No. 47-4287.

RESPECTFULLY SUBMITTED this 8th day of November, 2005.

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPICH, LLP



ROBERT E. WILLIAMS
Attorney for Applicant, Avelars Dairy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 8th day of November, 2005, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

L. Glen Saxton Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
Allen D. Merritt, P.E. Idaho Department of Water Resources 1341 Fillmore St Suite 200 Twin Falls, Idaho 83301	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
Brockway Engineering 2016 N Washington St Ste 4 Twin Falls ID 83301	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
Jeff Peppersack, Manager Water Rights Permits Section Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express



ROBERT E. WILLIAMS

MEMORANDUM

Date: September 14, 2005
To: Transfer 69309
From: Pamela Skaggs
Re: Final Recommendations

Final review of this transfer found that the analysis of historical use does not follow current standards. Right 47-4287 is a supplemental groundwater right. The Transfer Memo directs using an average of historical annual volume for supplemental rights when changing the nature of use to avoid enlargement. The evaluation of the amount available for transfer identified by the consultant was 122.7 afa. This is nearly the highest recorded annual volume submitted with the application as the historical pumping volume. Information submitted shows a range from 0.3 af to 128.2 af per year from 1993 to 2000. The average of this period equals 79.4 afa.

After discussion with state office manager and region staff, the following modifications to recommendations have been made. 79.4 af of water used supplementally on 121.6 acres or the equivalent of 19.9 acres primary use at the standard 4.0 af/acre. The transfer requests 75.4 af for dairy uses. The historical consumptive use volume for the irrigation use was determined to be 2.99 or 3.0 af/acre. At this rate, 19.9 acres equals 59.7 af available for transfer to new uses. This amount accounts for the entire right leaving no further irrigation use. 20 shares of Twin Falls Canal Company associated with the transferred groundwater use will be required held without being used at the dairy to avoid enlargement of use by unstacking surface and groundwater rights.

EXHIBIT

a

MEMORANDUM

Date: August 4, 2005
To: Transfer 69309
From: jfreitag
Re: Comment/Analysis

Transfer Sufficiency- 69309

Authority to File:
Numerous agreements

Water Right Validity:
Recommendation exists

Allen Merritt and myself have calculated the following for this supplemental right

Recommendation is for 1.15 cfs and 121.6 acres irrigation.

Can also be considered 122.7 afa div. vol. Or 92.1 afa c.u. vol.

Thus 0.94 cfs and 75.4 afa c.u. goes to dairy

Remaining is 0.21 cfs and 22.3 afa div. vol. Or 16.7 afa c.u. vol. And 22 acres of irrigation if supplemental or 5.6 acres if primary.

Also requiring 25 Twin Falls Canal Company shares to be retained and unused at the dairy site - T10S, R14E, S15, NESE.

The transfer approval varies from the original application, which was proposing the following

Brockway was originally proposing to dry up 78.7 acres of water right 47-4287 to be converted to commercial and stockwater use. The remaining 49.3 acres will be left for irrigation use. Water right 47-4287 is supplemental to TFCC shares, thus the reason for drying up 78.7 acres for 75.4 AFA see

Brockways analysis with the transfer.

Physically the transfer proposes to no longer irrigate 25.1 acres with either TFCC shares or groundwater See part 1, 6c on original application

Also the flow rate needed at the dairy is not proportionate to what is being dried up so the proposal is to transfer 1.01 cfs to the dairy and retain 0.99 cfs or 0.02 cfs per acre for irrigation see Brockways analysis included with transfer

Injury to Other Water Rights:

Analysis on historical use is included and historical crop use supports 3.0 afa.

There appears to be several water rights out of the same well listed as the POD for this transfer. these are... 47-8434-application for permit to be withdrawn pending approval of this transfer-per conversation with Chuck Brockway Jr. 8-3-01, 47-8241, 47-14333, 47-14334, 47-14335.

Enlargement of Use:

No apparent increase in use proposed.

Local Public Interest:

No apparent issues

Beneficial Use/Conservation of Water Resources:

Does not appear to be contrary to conservation practices.

Review of the application finds there is no clear inconsistency with criteria set forth in Section 42-222 Idaho Code preventing processing of this application.

EXHIBIT

B

MEMORANDUM

Date: August 29, 2005
To: Transfer 69309
From: Allen Merritt
Re: Recommendation

This transfer was processed in parallel with State Office staff. The application was advertised without protest. The transfer moves supplemental water used for irrigation to use at an existing dairy. The review of the supplemental use set a historical limit on use that could be transferred as long as no expansion of irrigated lands occurred. To assure this the applicant was required to maintain control of canal shares at the dairy site instead of where the irrigation right originates since the applicant does not own that land.

Review of the partial decrees for D&S rights at the dairy was confusing so I conducted a field review at the dairy site to determine how these rights relate. I met with Joe Avejar and he explained the system and the development of the various wells. Based on this investigation I updated the SDE layers for these rights (47-14333, 47-14334 and 47-14335). Currently two wells (1970 and 1990 wells) are hooked together for use in the dairy. I understand that once this transfer is approved to place this water into the 1990 well that another transfer will be filed to tie the wells together into a common system. The 1993 well may also be tied in. License 47-8241 describes all stockwater and commercial use at the dairy at the time of licensing in 1996 so the D&S rights provide no additional water for these uses. They only provide additional water for the domestic uses. The attached map was created based on my findings of the field visit.

I recommend approval of this transfer as drafted this day 8/29/2005.