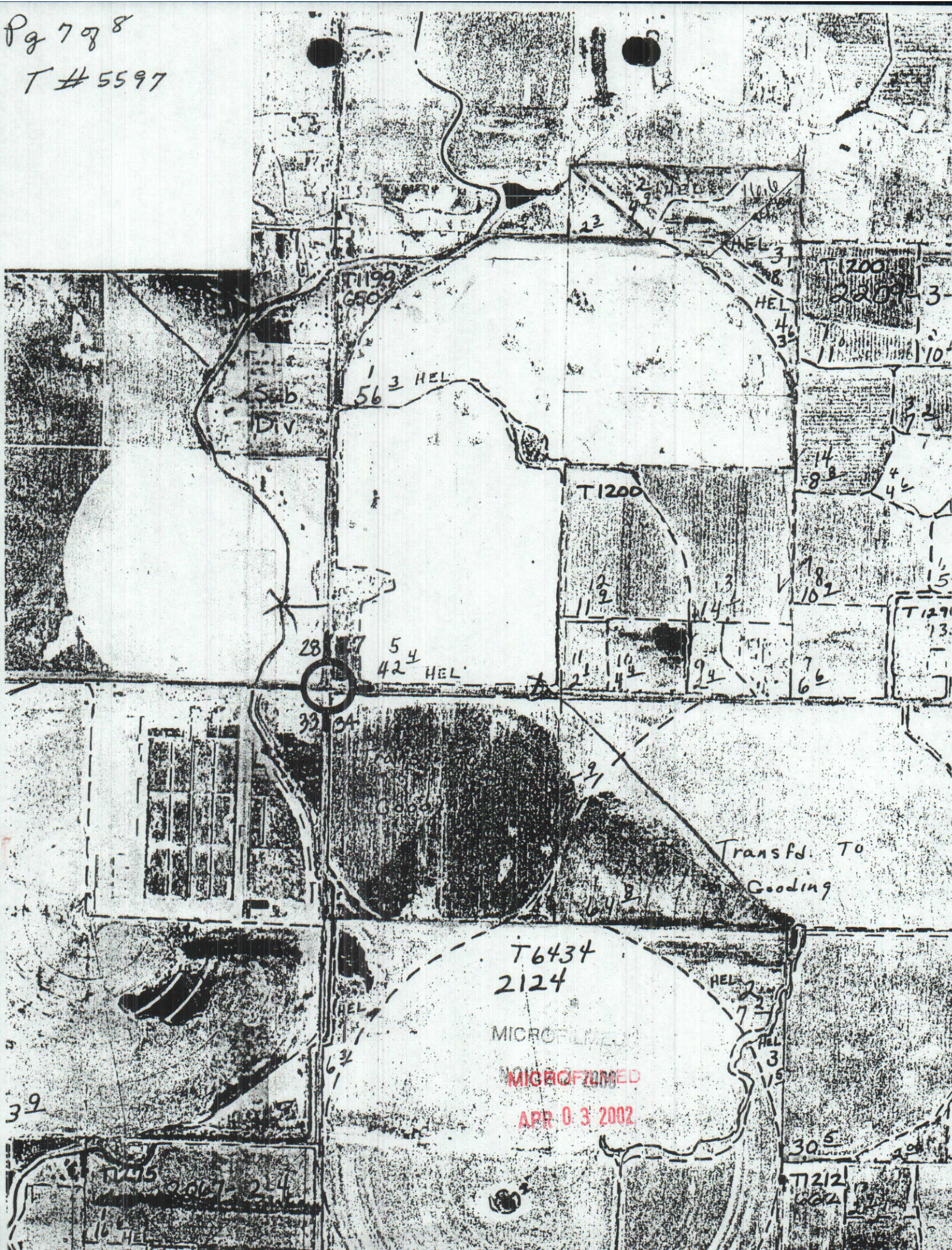
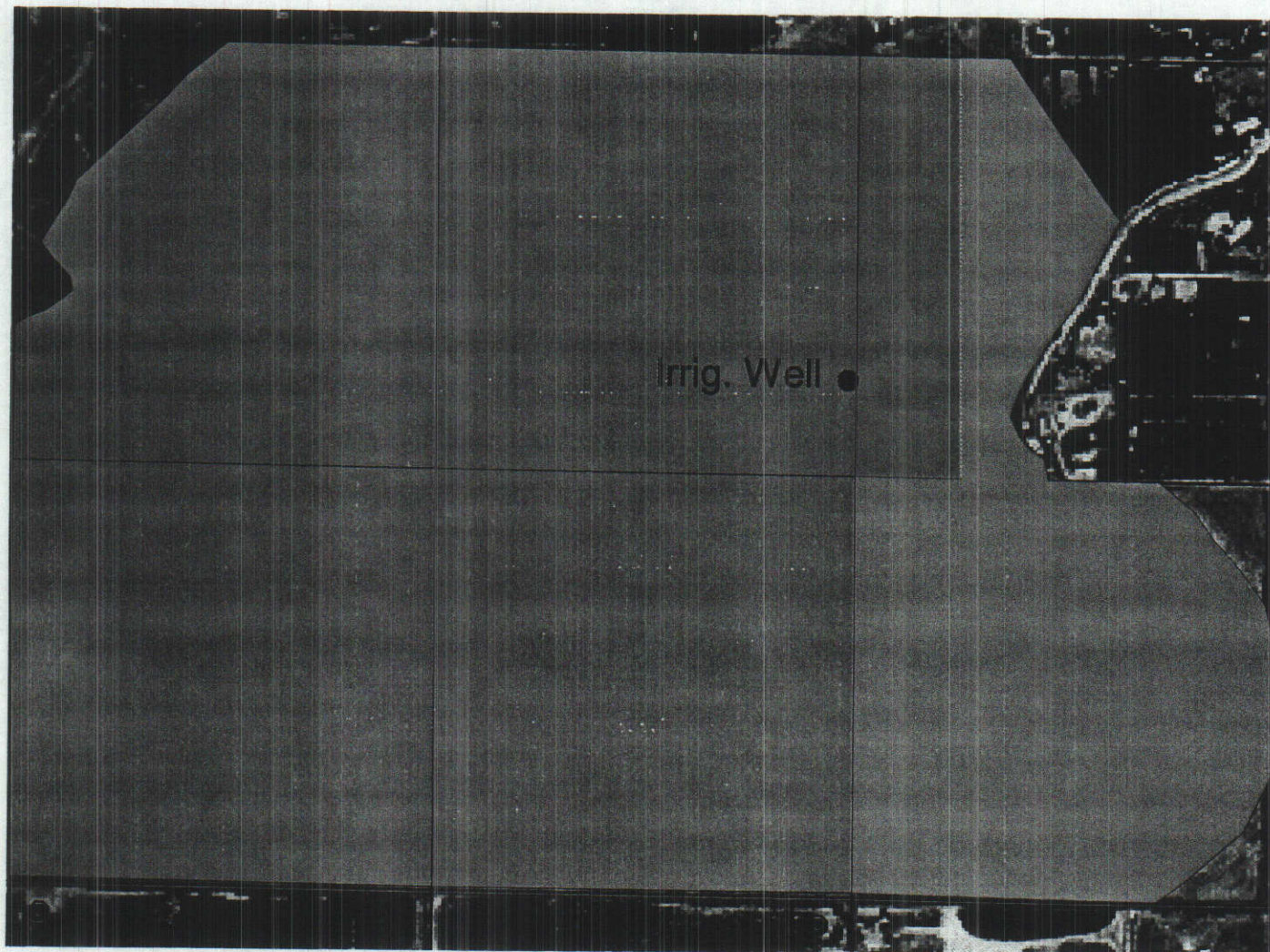


Pg 778
T# 5597



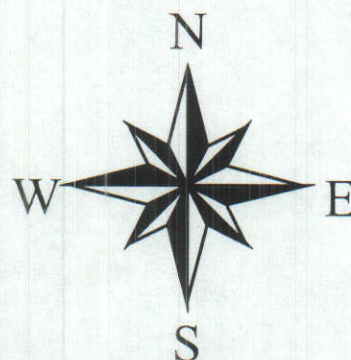


CALVIN DEKRUYF PROPERTY
E 1/2 SW 1/4, SE 1/4 SEC. 28 T. 8S R. 16E



■ Untransferred Land

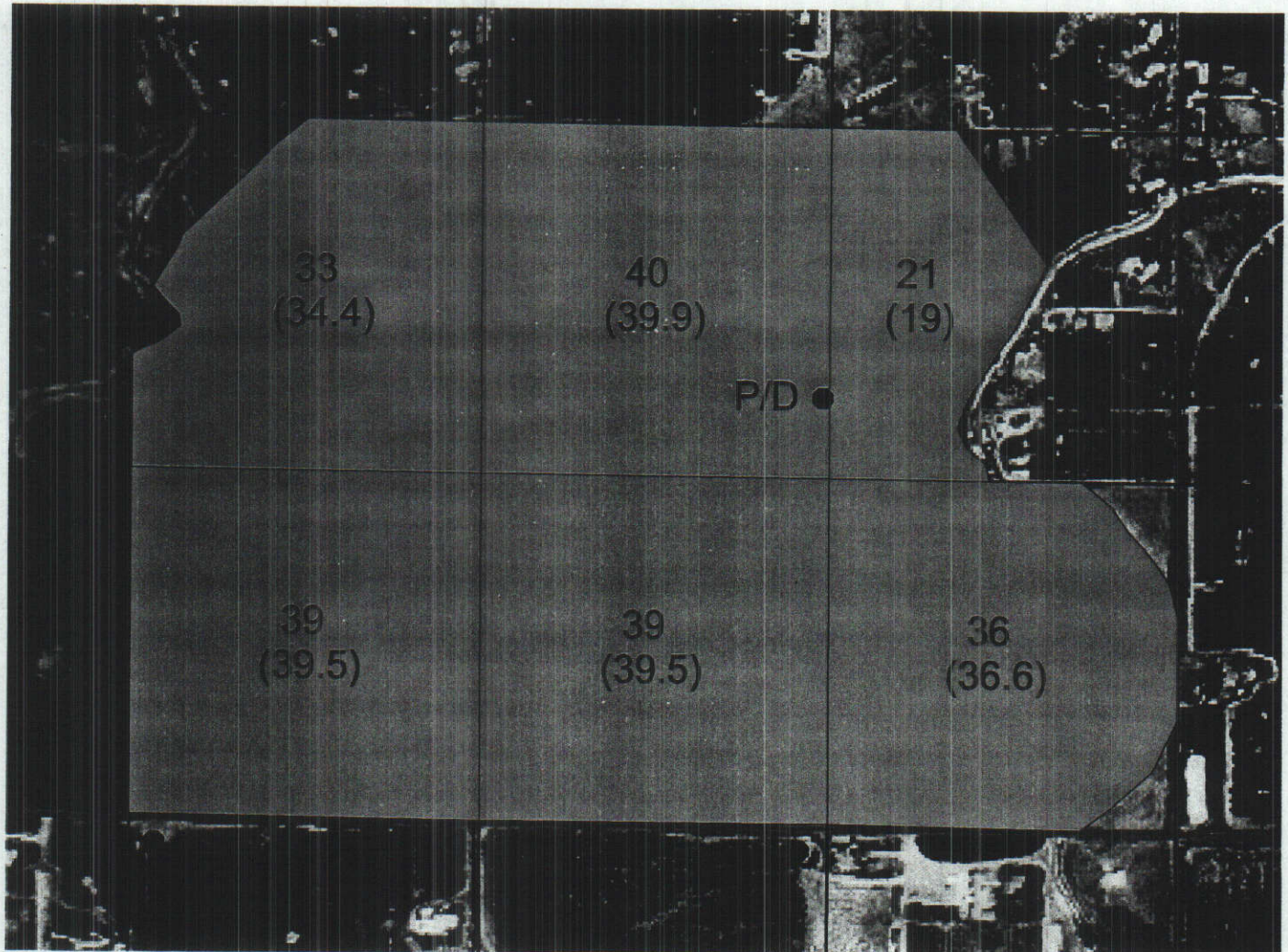
■ Land Being Dried Up



Prepared By J E Stanton
11-8-1999

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APR 03 2002

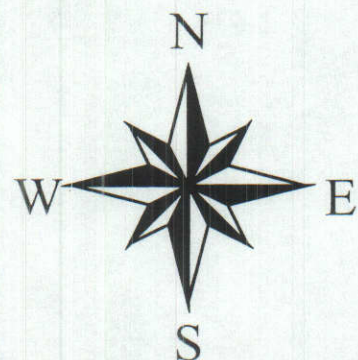
EXISTING P/U - CALVIN DEKRUYF
SEC. 28 T. 8S R. 16E



Irrigated Land

Acres: As Decreed
(Per GIS)

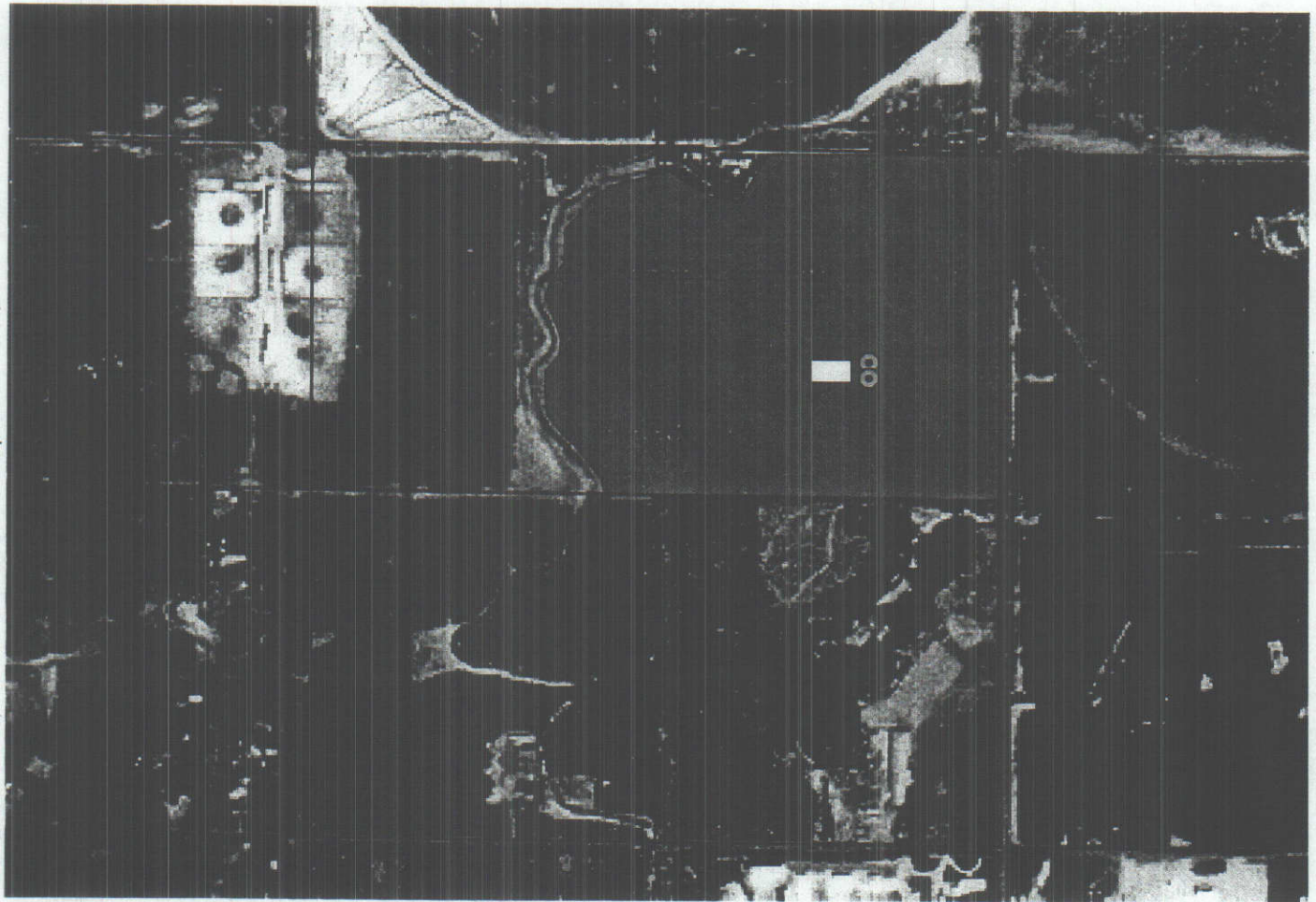
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Prepared By J E Stanton
11-8-1999

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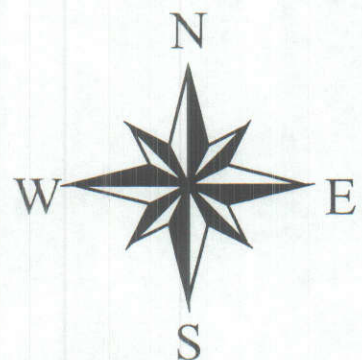
PROPOSED CALVIN DEKRUYF DAIRY
N 1/2 SE 1/4 SEC. 33 T. 8S R. 16E



■ Dairy Site

□ Barn

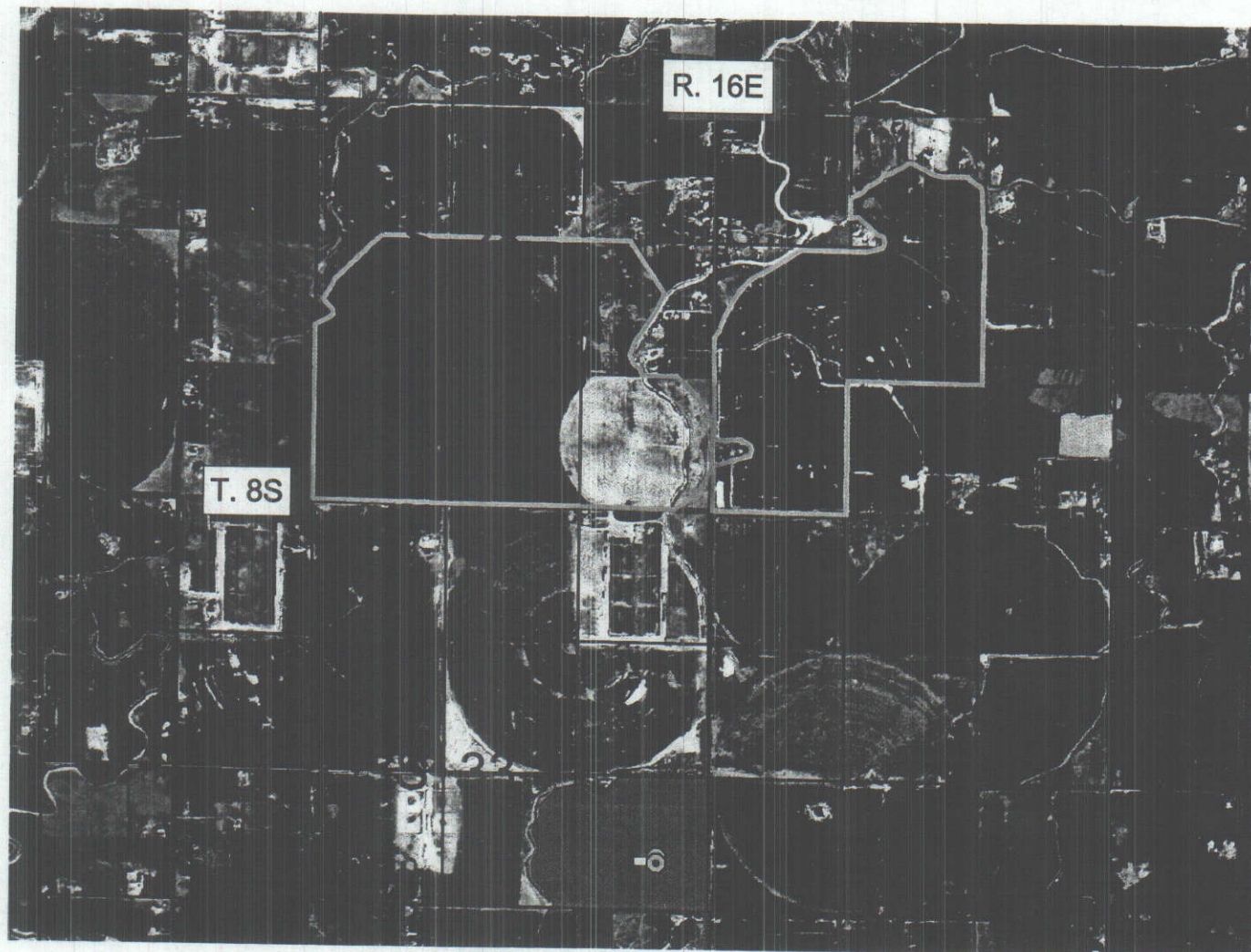
● Well



Prepared By J E Stanton
11-8-1999

MICROFILMED
NOV 22 2000
MICROFILMED
APR 03 2002

DEKRUYF DAIRY & LAND-APPLICATION AREA



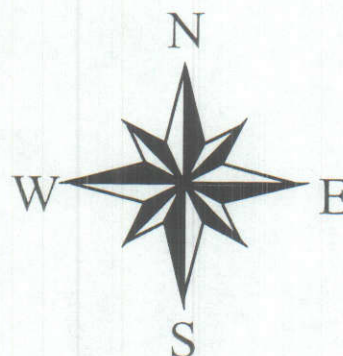
■ Dairy Site

□ Land Application Area

Prepared By J E Stanton
11-9-1999

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NOV 22 2000

MICROFILMED
APR 03 2002



T# 5597

Sub
Division

Transferred to
Hooding County

Sub
Div.

Sub
Divis



T1229

T1328

HEL 1
4-1 HOME
SITE

764

74² HEL

939

T1315
752

T1275

22 HEL

49²

T1272

2004-1-4

T1273

2004-1-4

T6066

2419

Sub Division

32

T1252

T1265

2004-1-5

T1263

2004-1-4

515

30

105

T1297

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 5597
WATER RIGHT NO(S). 36-02474B/36-10082B

This is to certify that: **CALVIN DE KRUYF**
MARK DE KRUYF
303 W 300 S
JEROME ID 83338

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
Right No. 36-02474B :			
STOCKWATER	01/01 to 12/31	0.59 CFS	122.1 AF
COMMERCIAL	01/01 to 12/31	0.59 CFS	122.1 AF
Priority: 02/10/1961			
Right No. 36-10082B :			
STOCKWATER	01/01 to 12/31	0.06 CFS	13.8 AF
COMMERCIAL	01/01 to 12/31	0.06 CFS	13.8 AF
Priority: 03/15/1976			
TOTAL:		0.59 CFS	135.9 AF

SOURCE

GROUNDWATER

LOCATION OF POINT(S) OF DIVERSION:

NESE , Sec. 33, Township 08S, Range 16E
JEROME County

PLACE OF USE: STOCKWATER

TWN RGE SEC

08S 16E 33	NESE	NWSE
------------	------	------

PLACE OF USE: COMMERCIAL

TWN RGE SEC

08S 16E 33			
08S 16E 27	SESW	NESW	NWSW
	SWSW		
28	NESW	SESW	NESE
	NWSE	SWSE	SESE
33	NESE	NWSE	

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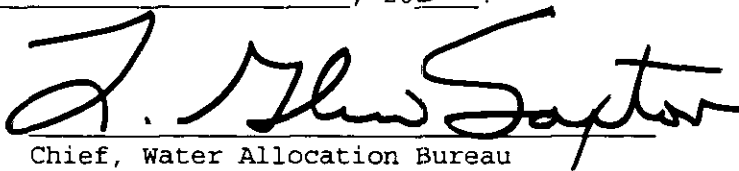
NOV 22 2000

TRANSFER NO. 5597
WATER RIGHT NO(S). 36-02474B/36-10082B

CONDITIONS OF APPROVAL AND REMARKS

Rights 36-02474B and 36-10082B are subject to the conditions of the Amended Preliminary Order dated 10-27-2000 which has become final in the matter of Application for Transfer 5597.

Dated this 17th day of November, 2000


Chief, Water Allocation Bureau

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NOV 22 2000

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE)
NAME OF CALVIN DEKRUYF AND/OR)
MARK DEKRUYF)
_____)

**AMENDED
PRELIMINARY ORDER**

This matter came before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer. On August 29, 2000, the hearing officer for the Department conducted a hearing in the matter and on October 12, 2000 issued a Preliminary Order approving the application. On October 26, 2000, Calvin Dekruef and/or Mark Dekruef ("applicant") filed a Petition for Reconsideration ("petition") of the Preliminary Order. The hearing officer having reviewed the petition enters the following Findings of Fact, Conclusions of Law and Amended Preliminary Order:

FINDINGS OF FACT

1. On December 16, 1997, the Snake River Basin Adjudication ("SRBA") Court issued a partial decree for water right no. **36-02474** to Janss Farms as follows:

Source:	Groundwater
Priority:	February 10, 1961
Rate of diversion:	2.7 cubic feet per second ("cfs")
Point of diversion:	NW1/4SE1/4 Section 28, T8S, R16E, B.M.
Use:	Irrigation
Season of use:	Irrigation season
Place of use:	187 acres within a 208 acre permissible place of use within parts of Section 28, T8S, R16E, B.M., Jerome County
Conditions of approval:	Use of this right with right no. 36-10082 is limited to a total combined diversion rate of 2.7 cfs and a total combined annual diversion volume of 832 acre feet ("AF")

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. The Department has recommended SRBA claim No. **36-10082** to the court as follows:

Source: Groundwater
Priority: March 15, 1976
Rate of diversion: 0.27 cfs
Point of diversion: NWSE Section 28, T8S, R16E, B.M., Jerome County
Use: Irrigation
Season of use: April 1 to October 31
Place of use: 21 acres within a permissible place of use of 208 acres within parts of Section 28, T8S, R16E, B.M.

Conditions of approval:

Use of this right with right no. 36-02474 is limited to a total combined diversion rate of 2.7 cfs, a total combined annual diversion volume of 832 AF, to a total annual consumptive use volume of 624 AF and to the irrigation of a combined total of 208 acres in a single irrigation season.

3. On September 3, 1999, the applicant filed Application for Transfer No. **5597** ("application") with the Department proposing to change the point of diversion, place of use, nature of use, and season of use of part of the water rights to stockwater and commercial use in connection with a proposed dairy.

4. The application proposed to change 0.59 cfs and 135.9 AF of the rights to year-round stockwater and commercial use to be diverted from two wells located in the NESE Section 33, T8S, R16E, B.M., Jerome County for use at the proposed dairy in the NESE Section 33, T8S, R16E, B.M. The application proposes 3,000 milking cows and 1,000 non-milking cattle at the dairy site. Approximately 45.3 irrigated acres will be dried up to provide water for the dairy.

5. The Department published notice of the application that was subsequently protested by Lee Halper.

6. On August 29, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. The protestant was present and was represented by Richard A. Carlson.

7. Issues identified by the protestant are as follows:

- a. The proposed changes will injure other water rights.
- b. The proposed changes will constitute an enlargement in use of the original right.
- c. The proposed changes are not in the local public interest.
- d. The proposed changes are not consistent with the conservation of water resources within the state of Idaho.

8. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - Vicinity map
- b. Applicant's Exhibit 2 - Proposed site plan
- c. Applicant's Exhibit 3 - Nutrient management plan
- d. Applicant's Exhibit 4 - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet
- e. Applicant's Exhibit 5 - Well Interference Analysis
- f. Applicant's Exhibit 6 - Analysis of Water Right Transfer to Dairy
- g. Applicant's Exhibit 7 - Jerome County Livestock Confinement Operation ("LCO") Permit Application with attachments
- h. Applicant's Exhibit 8 - Letter dated July 24, 2000 to Robert E. Williams from Paul M. Mulder
- i. Applicant's Exhibit 9 - Letter dated June 21, 2000 from J&E Farms by Tim Thompson
- j. Applicant's Exhibit 10 - Letter dated June 21, 2000 from Bill Gulley
- k. Applicant's Exhibit 11 - Letter dated June 21, 2000 from Bob Shillington
- l. Applicant's Exhibit 12 - Jerome County LCO Ordinances
- m. Applicant's Exhibit 13 - Map
- n. Protestant's Exhibit A - 4 E-mail letters
- o. Protestant's Exhibit B - NOT ADMITTED
- p. Protestant's Exhibit C - NOT ADMITTED
- q. Protestant's Exhibit D - NOT ADMITTED
- r. Protestant's Exhibit E - NOT ADMITTED
- s. Protestant's Exhibit F - NOT ADMITTED
- t. Protestant's Exhibit G - NOT ADMITTED
- u. Protestant's Exhibit H - DEQ report titled "Cumulative Impacts Assessment, Thousand Springs Area of the Eastern Snake River Plain, Idaho"
- v. Protestant's Exhibit I - Petition In Opposition

9. The applicant presently operates a dairy at the proposed new dairy site with a total of about 1,400 milking and dry cows but wants to upgrade and enlarge the dairy. The location of the dairy is about 3 miles south and 3 miles west of Jerome.

10. The applicant proposes to construct the new dairy in the SE Section 33, T8S, R16E, B.M. and to land apply liquid waste in parts of Sections 27 and 28, T8S, R16E, B.M. The applicant proposes free stall housing and to flush the alley ways.

11. Tremblay Consulting of Jerome, Idaho has prepared a Nutrient Management Plan for the proposed dairy enlargement which plan has been approved by the Idaho Department of Agriculture (See Applicant's Exhibit 3).

12. The Jerome County Planning and Zoning administrator has approved the application for a Livestock Confinement Operation ("LCO") at the proposed dairy site. The protestant and other parties plan to appeal the proposed LCO permit to the Jerome Planning and Zoning Commission. (See Applicant's Exhibit 7).

13. Annual expenses associated with the proposed dairy are estimated to be in excess of \$5 million generating about \$33 million dollars of economic activity in the area. (See Applicant's Exhibit 8).

14. The applicant plans to construct a berm on the west end of the property to contain any overland flow of water. Other operators have agreed to take solid waste generated by the dairy. (See Applicant's Exhibits 9, 10 and 11).

15. The applicant proposes a "flush system" for cleaning solid waste from the alley ways as opposed to mechanical "scraping" of the facilities. To control odors, the applicant proposes to use an activated sludge system which has not generally been used yet in the dairy industry in Idaho. The applicant plans reuse of water in the new dairy such as reusing cooling water for cow drinking water and using flushing water more than once.

16. The rate of diversion, consumptive use and total volume of water diverted under the application will not be larger after the transfer than before the transfer. (See Applicant's Exhibit 6).

17. The applicant proposes to cease using groundwater for irrigation on 45.3 acres located as follows:

Section 28, T8S, R16E, B.M.

NESE	-	9.3 acres
SESE	-	<u>36.0 acres</u>
TOTAL		45.3 acres

18. Using an average annual pumping rate of 0.19 cfs, which is the continuous diversion rate to provide the required annual volume of water, and a pumping period of 80 days, the estimated drawdown in a well 100 feet distant from the dairy wells is about 0.06 feet. Using a maximum pumping rate of 0.59 cfs for 12 days, the estimated drawdown in a well 100 feet distant from the dairy wells is 0.17 feet. (See Applicant's Exhibit 5).

19. There are three Statewide Program monitoring wells in the vicinity of the Dekruyf dairy. One well is located about 2.5 miles northwest of the dairy wells and shows nitrate concentrations as follows:

1991 - 1.6 mg/l
1995 - 1.9

1999 - 1.89

The second well is located about 1.4 miles southwest of the dairy wells and shows nitrate concentrations as follows:

1991 - 0.78 mg/l

1995 - 1.30

1999 - 1.09 l

The third well is located about 2.5 miles to the northeast of the dairy wells and shows nitrate concentrations as follows:

1993 - 2.1 mg/l

1996 - 2.2

1997 - 2.19

1998 - 2.19

1999 - 2.22

20. The protestant is concerned about the number of cows in the general vicinity of the applicant's dairy and believes there is a potential for the dairy operation to adversely affect water quality and air quality. The protestant believes the application is not in the local public interest.

21. The protestant did not show that the proposal of the applicant will injure other water rights, will enlarge the use of water, is not in the local public interest or is not consistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

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, and 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 42-203A(5), Idaho Code;

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

5. The proposed changes will not injure other water rights.

6. The proposed changes do not constitute an enlargement in use of the original rights.

7. The nitrate concentration in the observation wells has not significantly changed from 1991 through 1999 and is substantially below the Maximum Contaminant Level for public drinking water established at 10 mg/l by the U.S. Environmental Protection Agency.

8. The proposed changes are in the local public interest.

9. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

10. The Department should approve the application with certain conditions.

ORDER

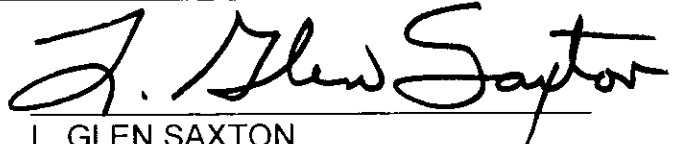
IT IS THEREFORE, hereby ORDERED that Application for transfer No. 5597 in the name of Calvin or Mark DeKruyf is **APPROVED** subject to the following conditions:

1. The right holder shall design and construct the dairy facility in compliance with the requirements of the Idaho Department of Agriculture. Prior to construction of wells and diversion of water under this approval, the right holder shall provide evidence acceptable to the Department that the right holder has met the compliance requirements of the Idaho Department of Agriculture, including the disposal of solid waste from the dairy.
2. Prior to diversion and use of water under this approval, the right holder shall install and maintain a suitable measuring device on each diversion as determined by the Department. The right holder shall measure and shall annually report the amount of water diverted under this transfer to the West Water Measurement District or to the Department.
3. The place of commercial use authorized by this transfer includes land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not

be used for irrigation or for flushing alleys and wasteways unless the water is first beneficially used for other purposes in the dairy as authorized by this transfer.

4. Forty five and three tenths (45.3) acres located in the NESE and SESE Section 28, T8S, R16E, B.M. are no longer authorized for irrigation under Water Right Nos. 36-02474 and 36-10082.
5. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. Prior to diversion and use of water under this approval, the dairy operation shall comply with applicable county zoning ordinances.
7. Commercial use is for a dairy located in the SE Section 33, T8S, R16E, B.M.
8. Two (2) points of diversion are located within the NESE Section 33, T8S, R16E, B.M.
9. SRBA Claim No. 36-10082B is an enlargement of Right No. 36-02474B pursuant to Section 42-1426, Idaho Code, and is valid only to the extent determined in the SRBA.
10. The total instantaneous diversion of water from all points of diversion under this transfer shall not exceed 0.59 cfs or a combined annual volume of 135.9 AF.
11. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
12. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Signed this 27th day of October, 2000.


L. GLEN SAXTON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2000, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

Robert Williams
Fredericksen, Williams & Meservy
P.O. Box 168
Jerome, ID 83338-0168

Richard A. Carlson
P.O. Box 21
Filer, Idaho 83328



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

REC-10
OCT 27 2000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE)
NAME OF CALVIN DEKRUYF AND/OR)
MARK DEKRUYF)
_____)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On December 16, 1997, the Snake River Basin Adjudication ("SRBA") Court issued a partial decree for water right no. **36-02474** to Janss Farms as follows:

Source: Groundwater
Priority: February 10, 1961
Rate of diversion: 2.7 cubic feet per second ("cfs")
Point of diversion: NW1/4SE1/4 Section 28, T8S, R16E, B.M.
Use: Irrigation
Season of use: Irrigation season
Place of use: 187 acres within a 208 acre permissible place of use within parts of Section 28, T8S, R16E, B.M., Jerome County
Conditions of approval:
Use of this right with right no. 36-10082 is limited to a total combined diversion rate of 2.7 cfs and a total combined annual diversion volume of 832 acre feet ("AF")

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. The Department has recommended SRBA claim No. **36-10082** to the court as follows:

Source: Groundwater
Priority: March 15, 1976
Rate of diversion: 0.27 cfs
Point of diversion: NWSE Section 28, T8S, R16E, B.M., Jerome County

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Use: Irrigation
Season of use: April 1 to October 31
Place of use: 21 acres within a permissible place of use of 208 acres within parts of Section 28, T8S, R16E, B.M.

Conditions of approval

Use of this right with right no. 36-02474 is limited to a total combined diversion rate of 2.7 cfs, a total combined annual diversion volume of 832 AF, to a total annual consumptive use volume of 624 AF and to the irrigation of a combined total of 208 acres in a single irrigation season.

3. On September 3, 1999, Calvin Dekruyf and/or Mark Dekruyf ("applicant") filed Application for Transfer No. **5597** ("application") with the Department proposing to change the point of diversion, place of use, nature of use, and season of use of part of the water rights to stockwater and commercial use in connection with a proposed dairy.

4. The application proposed to change 0.59 cfs and 135.9 AF of the rights to year-round stockwater and commercial use to be diverted from two wells located in the NESE Section 33, T8S, R16E, B.M., Jerome County for use at the proposed dairy in the NESE Section 33, T8S, R16E, B.M. The application proposes 3,000 milking cows and 1,000 non-milking cattle at the dairy site. Approximately 45.3 irrigated acres will be dried up to provide water for the dairy.

5. The Department published notice of the application that was subsequently protested by Lee Halper.

6. On August 29, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. The protestant was present and was represented by Richard A. Carlson.

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- b. The proposed changes will constitute an enlargement in use of the original right.
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- k. Applicant's Exhibit 11 - Letter dated June 21, 2000 from Bob Shillington
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- m. Applicant's Exhibit 13 - Map
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- r. Protestant's Exhibit E - NOT ADMITTED
- s. Protestant's Exhibit F - NOT ADMITTED
- t. Protestant's Exhibit G - NOT ADMITTED
- u. Protestant's Exhibit H - DEQ report titled "Cumulative Impacts Assessment, Thousand Springs Area of the Eastern Snake River Plain, Idaho"
- v. Protestant's Exhibit I - Petition In Opposition

9. The applicant presently operates a dairy at the proposed new dairy site with a total of about 1,400 milking and dry cows but wants to upgrade and enlarge the dairy. The location of the dairy is about 3 miles south and 3 miles west of Jerome.

10. The applicant proposes to construct the new dairy in the SE Section 33, T8S, R16E, B.M. and to land apply liquid waste in parts of Sections 27 and 28, T8S, R16E, B.M. The applicant proposes free stall housing and to flush the alley ways.

11. Tremblay Consulting of Jerome, Idaho has prepared a Nutrient Management Plan for the proposed dairy enlargement which plan has been approved by the Idaho Department of Agriculture (See Applicant's Exhibit 3).

12. The Jerome County Planning and Zoning administrator has approved the application for a Livestock Confinement Operation ("LCO") at the proposed dairy site. The protestant and other parties plan to appeal the proposed LCO permit to the Jerome Planning and Zoning Commission. (See Applicant's Exhibit 7).

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JUL 22 2000

13. Annual expenses associated with the proposed dairy are estimated to be in excess of \$5 million generating about \$33 million dollars of economic activity in the area. (See Applicant's Exhibit 8).

14. The applicant plans to construct a berm on the west end of the property to contain any overland flow of water. Other operators have agreed to take solid waste generated by the dairy. (See Applicant's Exhibits 9, 10 and 11).

15. The applicant proposes a "flush system" for cleaning solid waste from the alley ways as opposed to mechanical "scraping" of the facilities. To control odors, the applicant proposes to use an activated sludge system which has not generally been used yet in the dairy industry in Idaho. The applicant plans reuse of water in the new dairy such as reusing cooling water for cow drinking water and using flushing water more than once.

16. The rate of diversion, consumptive use and total volume of water diverted under the application will not be larger after the transfer than before the transfer. (See Applicant's Exhibit 6).

17. The applicant proposes to cease using groundwater for irrigation on 45.3 acres located as follows:

Section 28, T8S, R16E, B.M.

NESE	-	9.3 acres
SESE	-	<u>36.0 acres</u>
TOTAL		45.3 acres

18. Using an average annual pumping rate of 0.19 cfs, which is the continuous diversion rate to provide the required annual volume of water, and a pumping period of 80 days, the estimated drawdown in a well 100 feet distant from the dairy wells is about 0.06 feet. Using a maximum pumping rate of 0.59 cfs for 12 days, the estimated drawdown in a well 100 feet distant from the dairy wells is 0.17 feet. (See Applicant's Exhibit 5).

19. There are three Statewide Program monitoring wells in the vicinity of the Dekruef dairy. One well is located about 2.5 miles northwest of the dairy wells and shows nitrate concentrations as follows:

1991 - 1.6 mg/l
1995 - 1.9
1999 - 1.89

The second well is located about 1.4 miles southwest of the dairy wells and shows nitrate concentrations as follows:

1991 - 0.78 mg/l
1995 - 1.30
1999 - 1.09 l

The third well is located about 2.5 miles to the northeast of the dairy wells and shows nitrate concentrations as follows.

1993 - 2.1 mg/l
1996 - 2.2
1997 - 2.19
1998 - 2.19
1999 - 2.22

20. The protestant is concerned about the number of cows in the general vicinity of the applicant's dairy and believes there is a potential for the dairy operation to adversely affect water quality and air quality. The protestant believes the application is not in the local public interest.

21. The protestant did not show that the proposal of the applicant will injure other water rights, will enlarge the use of water, is not in the local public interest or is not consistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

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, and 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 42-203A(5), Idaho Code;

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

440-20

NOV 22 1999

5. The proposed changes will not injure other water rights.
6. The proposed changes do not constitute an enlargement in use of the original rights.
7. The nitrate concentration in the observation wells has not significantly changed from 1991 through 1999 and is substantially below the Maximum Contaminant Level for public drinking water established at 10 mg/l by the U.S. Environmental Protection Agency.
8. The proposed changes are in the local public interest.
9. The proposed changes are consistent with the conservation of water resources within the state of Idaho.
10. The Department should approve the application with certain conditions.

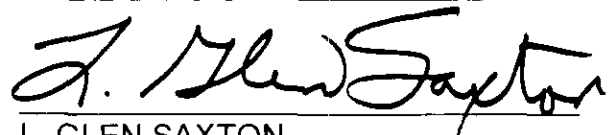
ORDER

IT IS THEREFORE, hereby ORDERED that Application for transfer No. 5597 in the name of Calvin or Mark DeKruyf is **APPROVED** subject to the following conditions:

1. The right holder shall design and construct the dairy facility in compliance with the requirements of the Idaho Department of Agriculture. Prior to construction of wells and diversion of water under this approval, the right holder shall provide evidence acceptable to the Department that the right holder has met the compliance requirements of the Idaho Department of Agriculture, including the disposal of solid waste from the dairy.
2. Prior to diversion and use of water under this approval, the right holder shall install and maintain a suitable measuring device on each diversion as determined by the Department. The right holder shall measure and shall annually report the amount of water diverted under this transfer to the West Water Measurement District or to the Department.
3. The place of commercial use authorized by this transfer includes land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not be used for irrigation or for flushing alleys and wasteways unless the water is first beneficially used for other purposes in the dairy as authorized by this transfer.
4. Forty five and three tenths (45.3) acres located in the NESE and SESE Section 28, T8S, R16E, B.M. are no longer authorized for irrigation.

5. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. Prior to diversion and use of water under this approval, the dairy operation shall comply with applicable county zoning ordinances.
7. Commercial use is for a dairy located in the SE Section 33, T8S, R16E, B.M.
8. Two (2) points of diversion are located within the NESE Section 33, T8S, R16E, B.M.
9. SRBA Claim No. 36-10082B is an enlargement of Right No. 36-02474B pursuant to Section 42-1426, Idaho Code, and is valid only to the extent determined in the SRBA.
10. The total instantaneous diversion of water from all points of diversion under this transfer shall not exceed 0.59 cfs or a combined annual volume of 135.9 AF.
11. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
12. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Signed this 12th day of October, 2000.


L. GLEN SAXTON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2000, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

Robert Williams
FREDERICKSEN, WILLIAMS & MESERVY
PO Box 168
Jerome, ID 83338-0168

Richard A. Carlson
P.O. Box 21
Filer, ID 83328

Lisa Hall
Lisa Hall

FILED
OCT 27 2000

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

RECEIVED

SEP 12 1988

Department of Water Resources
Boise, Idaho

Name of applicant Calvin Dekruyf &/or Mark Dekruyf Phone 324-7360
Post Office address 203 W 300 S, Jerome, ID 83328

PURPOSE OF TRANSFER

- ☐ Change point of diversion ☒ Add diversion point(s) ☒ Change place of use
☒ Change nature of use ☒ Change period of use ☒ Other Split rights
- Describe the reason for the proposed changes Convert a portion of rights from irrigation to stockwater & commercial uses for a new dairy to be built on another property.

DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

- | Right Number | Priority | Amount (cfs/ac-ft) | Nature of Use | Period of Use |
|-------------------------------|------------------|--------------------|-------------------|----------------------------|
| <u>74</u>
<u>36-02438B</u> | <u>2-10-1961</u> | <u>0.59/122.1</u> | <u>Stockwater</u> | <u>1-1</u> to <u>12-31</u> |
| | | <u>"</u> | <u>Commercial</u> | <u>"</u> to <u>"</u> |
| <u>36-100828</u> | <u>3-15-1976</u> | <u>0.06/13.8</u> | <u>Stockwater</u> | <u>"</u> to <u>"</u> |
| | | <u>"</u> | <u>Commercial</u> | <u>"</u> to <u>"</u> |
- Total amount of water being transferred 0.59 cubic feet per second and/or 135.9 acre-feet per annum.
- Source of water Groundwater tributary to _____
- Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		NE	SE	33	8S	16E	Jerome	Two wells

5. Lands irrigated or place of use: * Land application area

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
8S	16E	33													S, C	S			
8S	16E	27								*	*	*	*						
		28								*			*	*	*	*	*	*	

MICROFILMED

SEP 22 1988

PART 1

6. General Information:

- a. Description of diversion system Two new wells to be drilled, motors, pumps, pipelines to dairy barn & stock troughs (main well & backup well).
- b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? ✓ Yes _____ No. If yes, provide a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes.
- c. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer:
Land will be irrigated with dairy wastewater and canal shares. We have about 130 shares of NSCC water that can be moved to this property from other land that is no longer irrigated. The proposed dairy site is presently irrigated with canal water (53 acres), & this land will all be dried up.
- d. Remarks:
We want to serve 3000 dairy cows & 1000 dry adults in this facility. It will just north of our existing dairy & heifer operation, but will have a separate water system.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____

And said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, 19 _____

MICROFILMED

NOV 2 2000

PART 2

TRANS NO. 5597

A. DESCRIPTION OF RIGHT AS RECORDED:

Claim No. 36-02474

STAGE: DECREED

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
IRRIGATION	04/01 to 10/31	2.70 CFS

SOURCE

GROUNDWATER

Priority: 02/10/1961

LOCATION OF POINT(S) OF DIVERSION:SENWSE , Sec. 28, Township 08S, Range 16E
JEROME CountyPLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
08S	16E	28	NESW 33	SESW 39	NESE 21	
			NWSE 40	SWSE 39	SESE 36	208
Total number of acres irrigated:						208

CONDITIONS/REMARKS:

1. RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
2. USE OF THIS RIGHT IS COMBINED WITH WATER FROM NORTH SIDE CANAL CO. LTD.
3. USE OF THIS RIGHT WITH RIGHT NO. 36-10082 IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 2.70 CFS, A TOTAL COMBINED ANNUAL DIVERSION VOLUME OF 832 AF
3. THIS RIGHT IS LIMITED TO THE IRRIGATION OF 187 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
USE OF THIS RIGHT WITH RIGHT NO. 36-10082 IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 208 ACRES IN A SINGLE IRRIGATION SEASON.
4. RIGHT NO. 36-10082 IS AN EXPANSION OF THIS RIGHT PURSUANT TO SECTION 42-1426 IDAHO CODE.
5. RIGHT NO. 36-10082 IS ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE.

MICROFILMED

NOV 22 2000

No If yes, describe _____

(If the entire right is to be changed by the applicant, omit part B and C.)

- [illegible]

[illegible][illegible][illegible]

PART 2

TRANS NO. 5597

A. DESCRIPTION OF RIGHT AS RECORDED:

Claim No. 36-10082

STAGE: BENEFICIAL USE

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
IRRIGATION	04/01 to 10/31	0.27 CFS

SOURCE

GROUNDWATER

Priority: 03/15/1976

LOCATION OF POINT(S) OF DIVERSION:SENWSE , Sec. 28, Township 08S, Range 16E
JEROME CountyPLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
08S	16E	28	NESW 33	SESW 39	NESE 21	
			NWSE 40	SWSE 39	SESE 36	208
				Total number of acres irrigated:		208

CONDITIONS/REMARKS:

1. USE OF THIS RIGHT IS COMBINED WITH WATER FROM NORTH SIDE CANAL CO. LTD.
2. THIS WATER RIGHT IS AN EXPANSION OF RIGHT 36-02474 PURSUANT TO IDAHO CODE 42-1416(2).
3. THIS RIGHT IS LIMITED TO THE IRRIGATION OF 21 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
4. RIGHT NO. 36-02474 IS ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE.
5. USE OF THIS RIGHT WITH RIGHT NO. 36-02474 IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 2.70 CFS, A TOTAL COMBINED ANNUAL DIVERSION VOLUME OF 832 AF, A TOTAL COMBINED ANNUAL CONSUMPTIVE USE VOLUME OF 624 AF, AND TO THE IRRIGATION OF A COMBINED TOTAL OF 208 ACRES IN A SINGLE IRRIGATION SEASON.

MICROFILMED

JUN 77 1981

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?

No

If yes, describe _____

B. DESCRIPTION OF PORTION OF RIGHT BEING TRANSFERRED

(If the entire right is to be changed by the applicant, omit part B and C.)

1. amount 0.06 cfs for Irrig. purposes from 4-1 to 10-31
 (cfs/ac-ft)
 amount 13.8 AFA for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion: As Decreed

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use: PPU of 4.6 ac/yr

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
85	16E	28													9.3			36	45.3

Total acres 45.3

C. DESCRIPTION OF UNCHANGED PORTION OF RIGHT (omit if there is no change)

1. amount 0.21 cfs for Irrig. purposes from 4-1 to 10-31
 (cfs/ac-ft)
 amount 65.6 AFA for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion: As Decreed

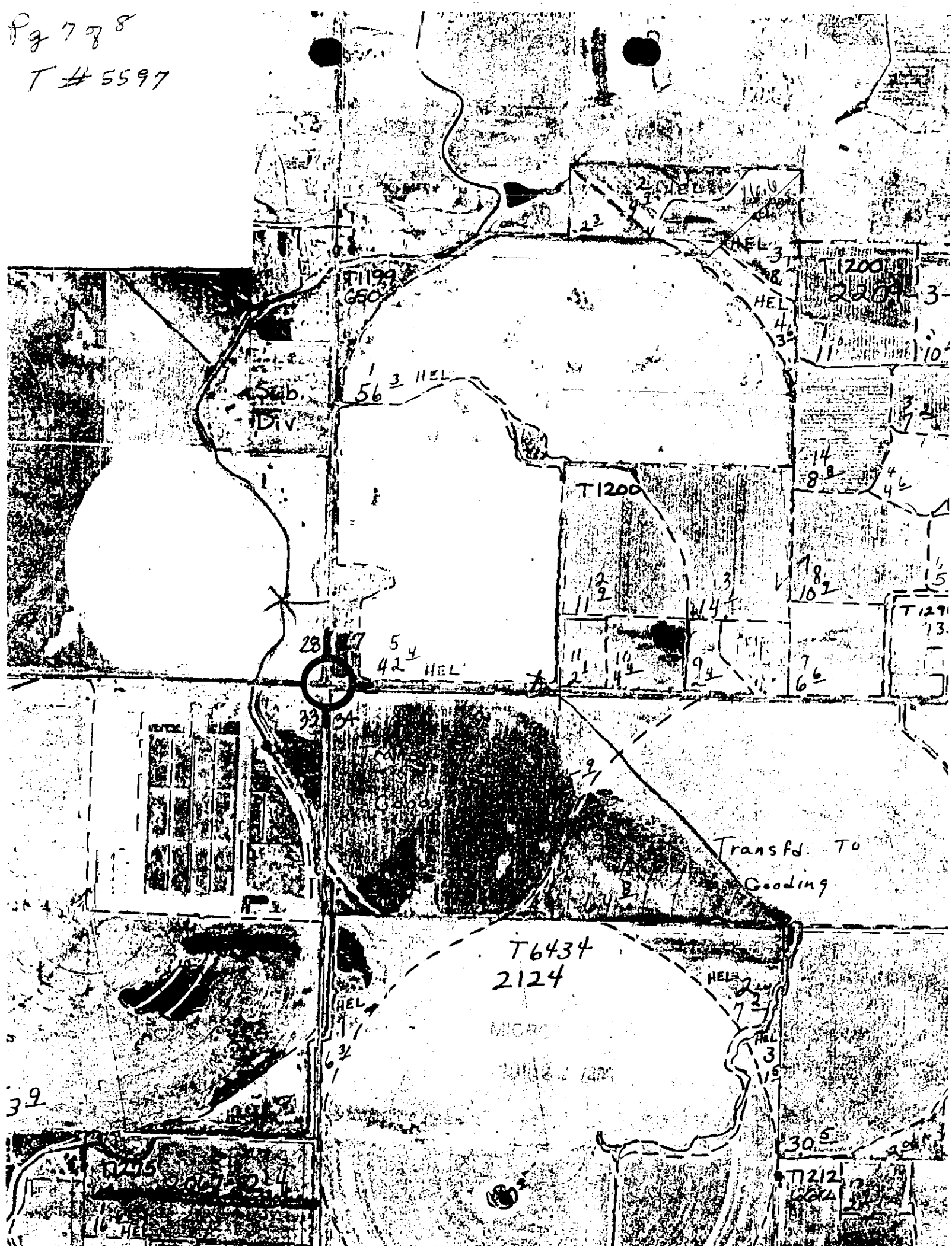
Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

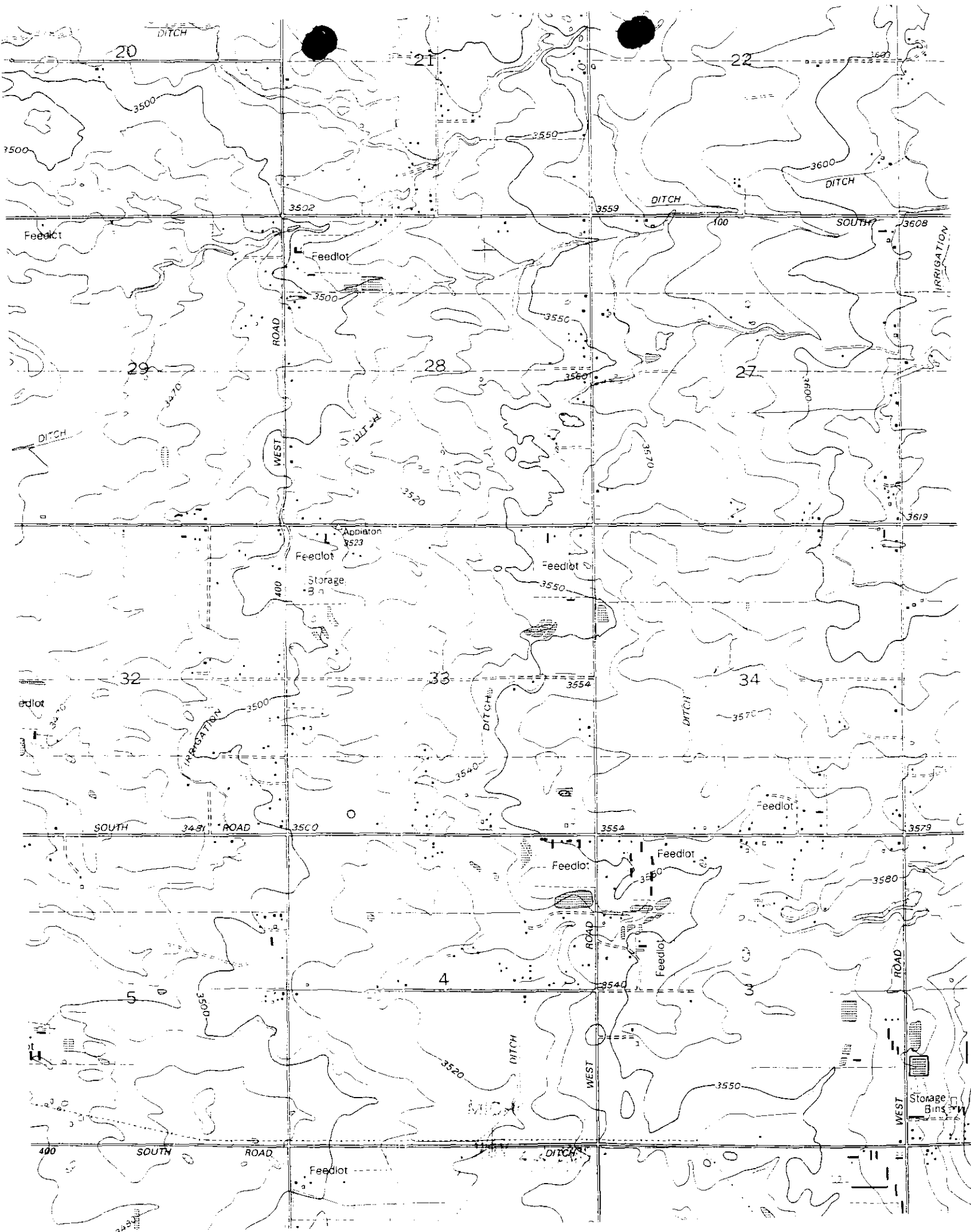
3. Lands irrigated or place of use: PPU of 16.4 ac/yr

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
85	16E	28									33			39	117	40	39		162.7

162.7

Pg 778
T# 5597





PART 3

B. CHANGES IN NATURE OF USE

1	New Nature of Use	Amount (cfs/ac-ft)	Hours/days/year	Period of Use
	<u>Stockwater/Commercial</u>	<u>0.59/135.9</u>	<u>as needed</u>	<u>1-1</u> to <u>12-31</u>
				to

2. Quantity and quality of return flows and location of discharge:

Water will be ponded & land applied as needed.

3. Describe effects on other water uses resulting from the proposed change:

Should have no effect.

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

I understand that any willful misrepresentations made in this application may result in voiding its approval.

[Signature]
(Signature of Applicant)

Subscribed and sworn to before me this 3rd day of September, 19 99.

[Signature]
(Notary Public)

My commission expires 10-25-2000

FOR DEPARTMENT USE ONLY

Transfer contains 8 pages and 2 attachments

Received by J. Stanton Date 9-3-99 Protest filed by _____

Prelim. check by [Signature] Fee \$100. 5022521

Received by [Signature] Date 9-3-99

Published in North Side News Copies of protest forwarded by _____

Pub. dates 02/03 & 02/10/00 Hearing held by _____ Date _____

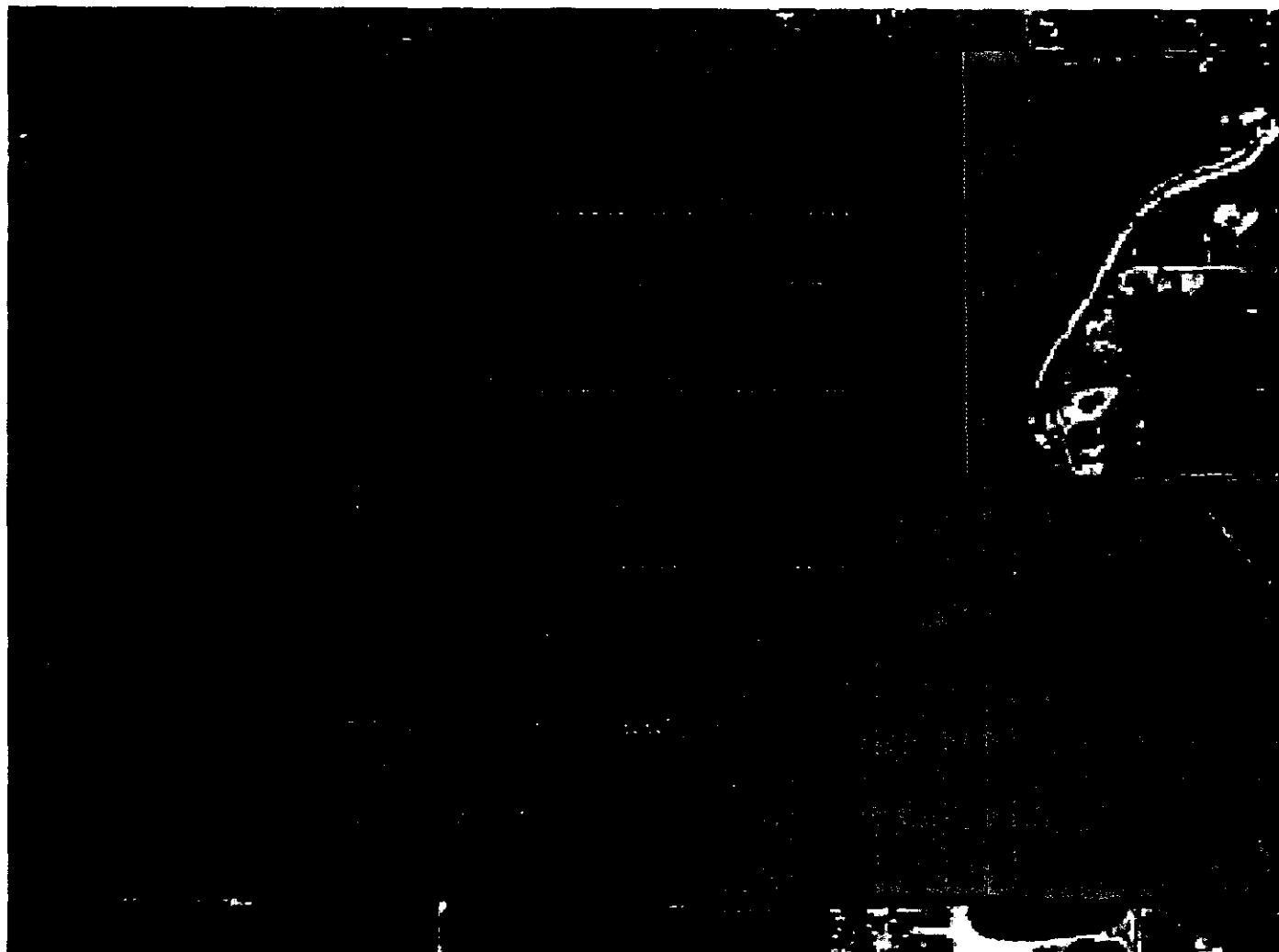
Watermaster recommendation requested on N/A Recommended for ☐ approval ☐ denial

_____ rec'd. _____ by _____

Copy of transfer sent to lien holder _____

NOV 22 2000

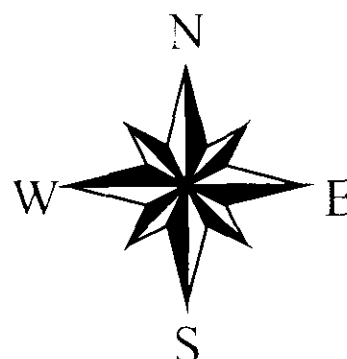
CALVIN DEKRUYF PROPERTY
E 1/2 SW 1/4, SE 1/4 SEC. 28 T. 8S R. 16E



■ Untransferred Land

■ Land Being Dried Up

Prepared By J E Stanton
11-8-1999



EXISTING P/U - CALVIN DEKRUYF
SEC. 28 T. 8S R. 16E

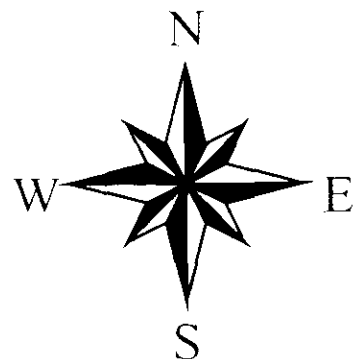


Irrigated Land

Acres: As Decreed
(Per GIS)

NOV 24 2000

Prepared By J E Stanton
11-8-1999



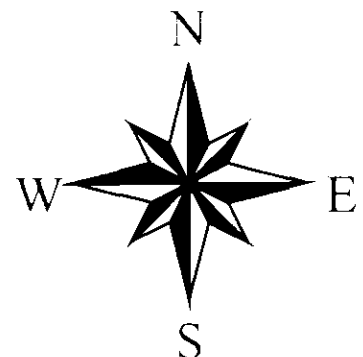
PROPOSED CALVIN DEKRUYF DAIRY
N 1/2 SE 1/4 SEC. 33 T. 8S R. 16E



■ Dairy Site

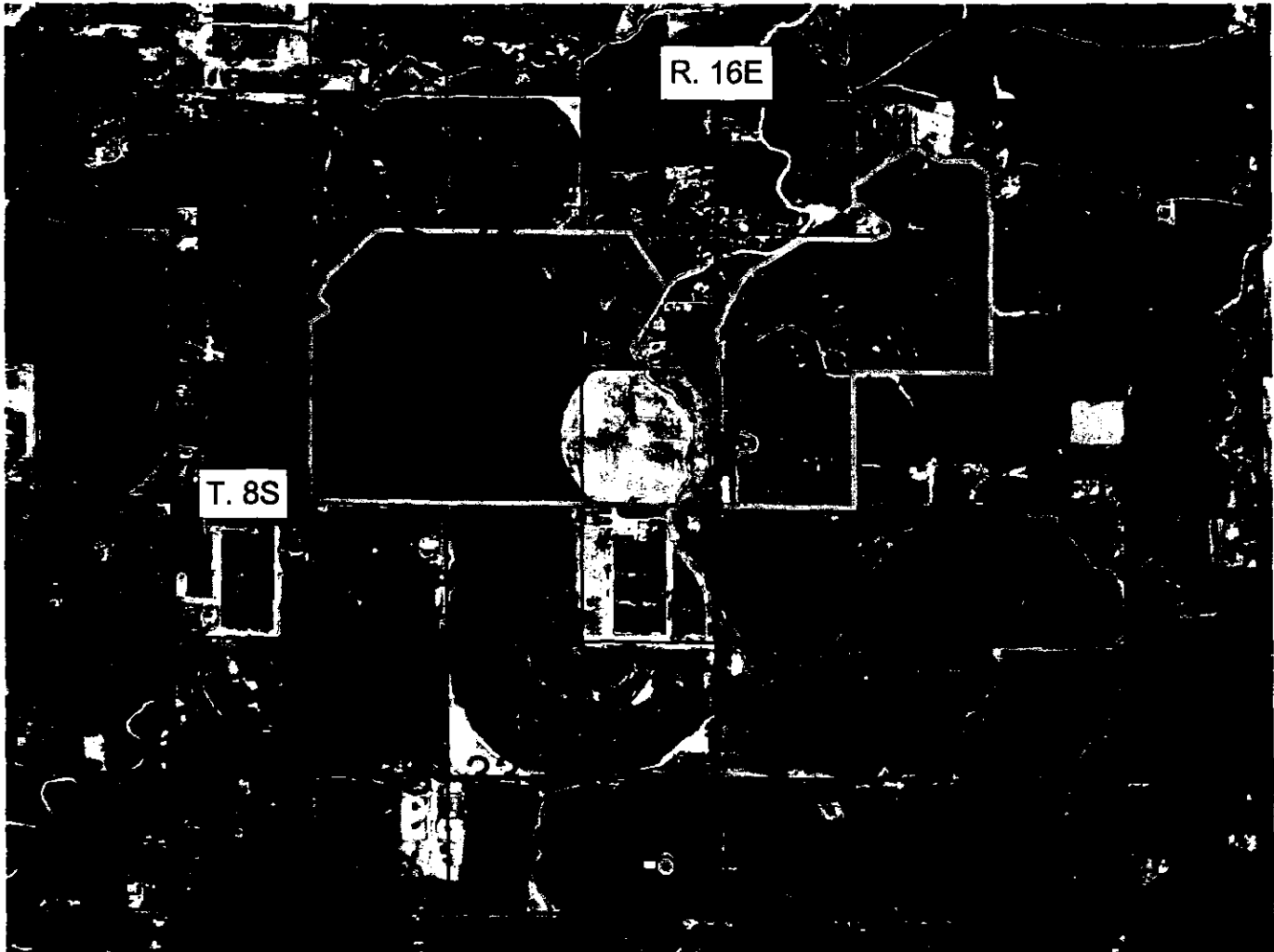
□ Barn

● Well



Prepared By J E Stanton
11-8-1999

DEKRUYF DAIRY & LAND-APPLICATION AREA

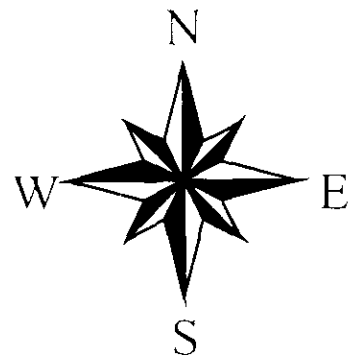


Dairy Site



Land Application Area

Prepared By J E Stanton
11-9-1999



Sub
Division

Sub.
Div.

Sub
Div.

Sub
Div.

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T1229

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HEL

Site

T1328

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Important Information About Your Water Right

August 27, 2001

CALVIN DE KRUYF
ALICE RUTH DE KRUYF
303 W 300 S
JEROME, ID 83338

Dear Water Right Claimant(s):

The reverse side of this letter contains a copy of an *Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decree An Express Statment Regarding General Provisions, Nunc Pro Tunc* (hereinafter "*Order*") for water right number 36-02474. According to Idaho Department of Water Resources (IDWR) records, you are the current owner of this water right. If you are not the current owner, please contact IDWR immediately at:

Idaho Department of Water Resources
1301 North Orchard
Boise, ID 83706
800-451-4129

The Purpose of the *Order* is to set forth beginning and ending dates for the irrigation period of use for this water right. As stated in the face of the *Order*, this action was necessary following the decision of the Idaho Supreme Court in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998). This *Order* also incorporates into the *Partial Decree* an express statement that the *Partial Decree* is subject to such general provisions necessary for the definition or for the efficient administration of the water right. This express statement is necessary to comply with the requirements of Idaho Code section 42-1412(6). This *Order* in combination with the *Partial Decree* that was issued for this water right on January 15, 1998, sets forth all of the elements of your water right. The Snake River Basin Adjudication (SRBA) Court suggests that you keep this document in a safe location together with a copy of the *Partial Decree* to show evidence of the water right. The original of this *Order* and the original of the *Partial Decree* for this water right are on file with SRBA Court. If you do not have a copy of the original *Partial Decree*, one can be obtained by contacting the SRBA Court at (208) 736-3011. Please note that the *Order* is entered *Nunc Pro Tunc*, meaning that the *Order* will be treated as if it were issued the same date that the *Partial Decree* was originally issued.

Sincerely,



Diana Delaney
Case Administrator

MICROFILMED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)

Water Right 36-02474

Case No. 39576)

ORDER AMENDING IRRIGATION PERIOD OF USE ELEMENT
IN PARTIAL DECREE AND INCORPORATING INTO PARTIAL
DECREE AN EXPRESS STATEMENT REGARDING GENERAL
PROVISIONS, *NUNC PRO TUNC*

A *Partial Decree* was entered for the above-captioned irrigation water right on January 15, 1998. The period of use element was decreed as "irrigation season." In *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), the Idaho Supreme Court remanded with the directive to include specific dates for the period of use element. Following remand, IDWR filed a *Supplemental Director's Report, Reporting Area 3, IDWR Basin 36, Regarding Revision of Period of use (For Irrigation Water Uses) and Conjunctive Management General Provisions*, which included an irrigation period of use recommendation for this water right. No objections were filed to this recommendation and the time period for filing objections has now expired.

THEREFORE, IT IS ORDERED that the period of use for the irrigation element of the above-captioned water right is hereby amended and decreed as:

PERIOD OF USE: 03-15 11-15

IT IS FURTHER ORDERED that the *Partial Decree* for the above-captioned water right is hereby amended and decreed to contain the following:

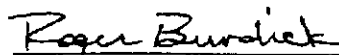
This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. I.C. section 42-1412(6).

This order is being entered *nunc pro tunc* as of the date the *Partial Decree* was issued and is not intended to modify any subsequent administrative changes for the water right, if any, which occurred following entry of the *Partial Decree*.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated August 27, 2001


ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

MICROFILMED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
Case No. 39576)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 36-02474

1978 JUL 15 AM 11:25

NAME & ADDRESS: JANSS FARMS
PO BOX 99
BLISS ID 83314

SOURCE: GROUNDWATER

QUANTITY: 2.7 CFS

USE OF THIS RIGHT WITH RIGHT NO. 36-10082 IS LIMITED TO A
TOTAL COMBINED DIVERSION RATE OF 2.70 CFS, A TOTAL COMBINED
ANNUAL DIVERSION VOLUME OF 832 AF

PRIORITY DATE: 02/10/1961

POINT OF DIVERSION: T08S R16E S28 SENWSE Within JEROME County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	IRRIGATION	Irrigation Season	2.7 CFS

PLACE OF USE:	IRRIGATION	Within JEROME County			
	T08S R16E S28	NESW 33	SESW 39	NESE 21	NWSE 40
		SWSE 39	SESE 36		
	208 ACRES TOTAL				

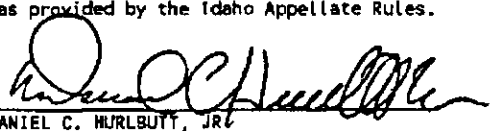
THIS RIGHT IS LIMITED TO THE IRRIGATION OF 187 ACRES WITHIN
THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
USE OF THIS RIGHT WITH RIGHT NO. 36-10082 IS LIMITED TO THE
IRRIGATION OF A COMBINED TOTAL OF 208 ACRES IN A SINGLE
IRRIGATION SEASON.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

RIGHT NO. 36-10082 IS AN EXPANSION OF THIS RIGHT PURSUANT TO
SECTION 42-1426 IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


DANIEL C. HURLBUTT, JR.
PRESIDING JUDGE
Snake River Basin Adjudication

RECEIVED

THIS MATTER IS ON APPEAL WITH
THE DISTRICT COURT IN JEROME
COUNTY

PLEASE DIRECT ANY QUESTIONS
TO LEGAL

(THE ORIGINAL HEARING EXHIBITS HAVE BEEN
SUBMITTED TO THE DISTRICT COURT. COPIES
OF THE EXHIBITS ARE LOCATED WITH THE
LEGAL FILES UNTIL THE CASE IS DECIDED)

1-12-01

—Also, See Briefs below:

8-28-2001 See Order on Judicial Review (Folder #2)

RECEIVED

APR 10 2001

Richard A. Carlson
ISB No. 5971
Post Office Box 21
Filer, ID 83328
Telephone and Facsimile (208) 326-3686

Department of Water Resources

JEROME COUNTY CLERK
RECEIVED: 4/9/01 2:25pm
(DATE)
BY: /s/ M. Han Lodged
(DEPUTY CLERK)

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF JEROME

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 5597 IN THE	)	
NAME OF CALVIN DeKRUYF,	)	CASE NO. SPOT00-120
AND/OR MARK DeKRUYF,	)	
	)	
Applicants,	)	
	)	
LEE HALPER,	)	
	)	
Petitioner,	)	PETITIONER'S BRIEF
vs.	)	
	)	
IDAHO DEPARTMENT OF WATER	)	
RESOURCES, CALVIN DeKRUYF	)	
and MARK DeKRUYF,	)	
	)	
Respondents.	)	

COMES NOW Petitioner, Lee Halper, by and through his attorney,
Richard A. Carlson, and respectfully submits this Brief in support of his Petition for
Review of Administrative Agency Action by the Idaho Department of Water Resources
(IDWR).

PROCEDURAL HISTORY

On September 3, 1999, Calvin DeKruyf and/or Mark DeKruyf (applicants)

applied to IDWR for Transfer No. 5597 requesting a change in the point of use, place of use, nature of use and season of use of part of Water Right No. 36-02474 and Snake River Basin Adjudication Claim No. 36-10082 to commercial and stock water use in connection with a proposed dairy. The dairy site is in Jerome County, approximately 3 miles south and three miles west of the City of Jerome.

IDWR published notice of the application, which was protested by Mr. Halper.

On August 29, 2000, IDWR conducted a hearing in the matter. The hearing was presided over by Glen Saxton, a hearing officer appointed by the Director of IDWR. At the hearing, sworn testimony was received and exhibits were admitted into evidence. The Applicants were present, presented testimony and other evidence, and were represented by Robert Williams. The Protestant presented testimony and evidence and was represented by Richard Carlson. At the conclusion of the hearing, Mr. Saxton took the matter under advisement pending a decision on the merits. On October 12, 2000, Mr. Saxton issued a Preliminary Order approving the application. An Amended Preliminary Order was issued on October 27, 2000, upon the Petition of the Applicants. The Amended Order has become a Final Order and contains the Findings of Fact and Conclusions of Law, which are the focus of the present appeal.

SUMMARY OF ISSUES

1. The Order appears to have misapplied the burden of persuasion in the hearing concerning issues IDWR was required to consider.

2. IDWR's Order allowing the transfer requested by the Applicants was unlawful and contrary to Idaho Code 42-222 which requires IDWR to consider the

following in a process consistent with the Idaho Administrative Procedure Act:

- A. Whether or not the proposed changes will injure other water rights;
- B. Whether the proposed constitutes an enlargement in use of the original rights;
- C. Whether the proposed change is in the public interest;
- D. Whether the proposed changes are consistent with the conservation of water resources within the State of Idaho.

It is clear from the record of the case that Petitioner's objections to the application were based on two potential problems: air quality and water quality impacts of a large-scale dairy operation. While air quality issues fit squarely into the "public interest" category, water quality issues could fit into the "injury", "public interest", or "conservation" categories set forth above. There is no Finding in the Order that the Applicants' proposed dairy plan will eliminate potential odor problems. There is no analysis of the evidence relating it to the four criteria above which IDWR had to consider. The Finding concerning the water quality issues raised by the Protestant is inadequate.

In the absence of critical Findings of Fact or to the extent that they fail to include a concise and explicit statement of the underlying facts supporting the findings as required by Idaho Code 67-5248(1)(a), the Order is contrary to law.

3. Petitioner further contends that the evidence in the record upon which IDWR's approval of the transfer was based does not meet the "substantial evidence" test in Idaho Code 67-5279(3)(d) which requires substantial evidence supporting each of the Findings of Fact and Conclusions of Law made with respect to the criteria listed above.

4. The resulting Order and approval were in violation of statutory

provisions relating to the discharge of pollutants into the groundwater below the proposed place of use.

BURDEN OF PERSUASION

In its Conclusions of Law Nos. 2-4, the Order correctly stated the applicable rules concerning the burdens of proof and persuasion. However, Finding of Fact No. 21 appears to have shifted these burdens to the Protestant: "The Protestant did not show that the proposal of the applicant will injure other water rights, will enlarge the use of water, is not in the public interest, or is not consistent with the conservation of water resources within the State of Idaho." This Finding is at odds with the holding in Shokal v. Dunn, 109 Idaho 330 (1985) which places the burden of persuasion on all relevant issues on the applicant.

ABSENT, INADEQUATE FINDINGS OF FACT

The Idaho Administrative Procedure Act (APA) requires a written order including: "a reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings." Idaho Code 67-5248(1)(a). There is no analysis of the evidence articulating which evidence was considered and weighed with respect to the criteria in Idaho Code 42-222.

There is no finding in the Order to the effect that Applicants' proposed multi-thousand cow dairy will not cause significant odor problems. In the area immediately surrounding the proposed dairy there are already approximately ten thousand dairy cows that are causing severe odor problems. (Tr. pp.116, 122-125). Odor constitutes an "air pollutant" under Idaho's administrative code. IDAPA 58.01.01.066.04.

“Air pollution” is defined, in part, as the presence in the outdoor atmosphere of any air pollutant or combination thereof in such quantity of such nature and duration and under such conditions as would interfere unreasonably with the enjoyment of life or property. IDAPA 58.01.01.006.05 (emphasis supplied). Polluting the air is unlawful: “No person shall allow, suffer, cause or permit the emission of odorous gases, liquids or solids into the atmosphere in such quantities as to cause air pollution”. IDAPA 58.01.01.776.01. These rules are consistent with Idaho’s statutory prohibitions of air and water pollution. See Idaho Code 39-103 et seq.

In the context of the consideration of requests for new appropriations of water, IDWR must consider the application’s compliance with applicable air and water standards as part of the “public interest” criteria. IDAPA 37.03.08.045.01(e)(iii) (emphasis supplied).

The lack of a finding and a supporting reasoned analysis of the facts supporting the finding that Applicants’ proposed dairy will comply with Idaho’s air pollution regulatory scheme makes the Order defective. The Idaho Supreme Court, reviewing a medical license revocation proceeding conducted by the Idaho State Board of Medicine, emphasized the need for detailed findings: “Accordingly, we determine that it is consistent with the Board’s statutory obligation to render a reasoned decision to require the Board to identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision. Such an explanation is essential to meaningful judicial review, and it is a logical adjunct to the agency’s statutory duty to supplement its decisions with findings of facts and conclusions of law.” Woodfield v. Board of Professional Discipline, 127 Idaho 738, 747 (Ct. App. 1995).

While the Order contains a finding concerning nitrate levels in a few of the wells near the Applicants' proposed wells (Finding of Fact No. 19), and contains what purports to be a Conclusion of Law (No. 7) concerning the water quality issues raised by the Petitioner, both are inadequate for reasons stated above with respect to the air quality issues. It is not even clear from the record where the agency obtained the facts appearing in Finding of Fact No. 19. The "Facts" found are not in the evidentiary record. Without any explanation or analysis whatsoever, the Order fails to address the evidence of water quality impairment in the area where Applicants propose to site their dairy contained in Cumulative Impacts Assessment, Thousand Springs Area of the Eastern Snake River Plain, Idaho prepared by the Idaho Department of Environmental Quality in July, 2000:

1. An analysis of long term ground water nitrate+nitrite data from a well southwest of Jerome showed a statistically significant upward trend in the nitrate+nitrite concentration from 5.64 mg/l in 1990 to 9.22 mg/l in 2000 and that neither commercial nitrogen fertilizer, precipitation, nor the effluent from the septic tank associated with this well is the likely source of elevated nitrogen in the well. (Protestant's Exhibit H, pp.2, 24-26). This well is in the same general area as Applicants' dairy site and is within the 0-3 year time of travel zone to the Crystal Springs/Niagara Springs complex flowing into the Snake River. (Id. at 27, Figs. 4-15).

2. A statistical analysis of nitrate+nitrite data from five springs down gradient from the dairy site (Box Canyon, Crystal Springs #1 and #2, Clear Springs, and Niagara Springs) showed statistically significant increases of nitrate+nitrite concentrations from 1991, or 1994 to 1999. (Id. p.2).

3. The Idaho Ground Water Quality Rule (IDAPA 58.01.11)

established Maximum Contaminant Levels (MCL) of 10 mg/l for nitrate+nitrite. (Id. p.3). At least two of springs studied, Clear Springs and Crystal Springs #2, could reach a level of 5 mg/l, the so-called "action level", within four or five years. (Id. p.27).

4. Most of the studies done have concluded that the nitrate+nitrite is elevated in the groundwater of Jerome County. (Id. p.23).

5. The best estimates available show that dairy and beef facilities constitute approximately 40 percent of the nitrogen loads in the area. (Id. p.21).

It is true that IDWR has the power to weigh the evidence before it and apply its expertise in the process of sifting contradictory facts and evidence. However, the agency must provide a reasoned analysis articulating why it finds a particular fact and discredits evidence that would contraindicate the finding. Vernon v. Omark Industries, 113 Idaho 358 (1987); Department of Health and Welfare v. Sandoval, 113 Idaho 186 (1987).

Based on the lack of analysis in the Order, it is impossible to determine whether the agency even considered conflicting evidence in the record on the focal issues of air and water quality. If the agency applied its expertise and exercised its discretion to reject some evidence in favor of other evidence, it still owes the parties a reasoned analysis of how and why it did so. See, e.g. Michael Gilmore and Dale Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho Law Review 2, pp.362-366 (1993-94).

LACK OF SUBSTANTIAL EVIDENCE

Idaho Code 42-203A(5) defines "local public interest" as "the affairs of the people in the area directly affected by the proposed use". IDWR must exercise its sound

discretion to determine the particular elements of the public interest that might be affected by the proposed use. Shokal v. Dunn, 109 Idaho 330 (1985). As discussed above, the agency failed to identify which issues in the hearing were considered as bearing on the public interest and merely stated, without any particular findings, discussion or analysis, that the proposed changes were in the public interest. (Conclusion of Law No. 8). This is an abuse of discretion and sufficient reason to reverse the agency's decision.

However, for purposes of argument, Petitioner contends that Finding of Fact No. 15, if it could be interpreted as a finding that odor problems related to the dairy would be eliminated, is not supported by substantial evidence.

Evidence in the record concerning the potential for severe odors from the proposed dairy came from several sources. Mark DeKruyf, one of the Applicants, testified that he was aware of the potential for odor problems, was working with a consultant to deal with the problem, and intended to use "best management practices" to reduce or try to eliminate them. (Tr. p.21). However, on cross examination he admitted that dairies in the Magic Valley using the "flush system" to manage waste "at times have pretty severe odor problems" (Tr. p.23) and was not able to name any dairies in the area using the flush system which didn't have at least some severe odor problems. (Tr. pp.23-26).

James Etherington, Applicants' wastewater and odor management consultant, also provided testimony about his "plan" to deal with odor problems. (Tr. pp.38-45). While he stated that his activated sludge system would reduce the odors from the facility substantially, he admitted that there was not a system operating in the region "even close" to what he would be using, but that his proposed system was a carbon copy

of a system that worked in Florida. (Tr. pp 40-41). The system just became available in this area within the last few months and is untested on dairies in Idaho. (Tr. p.42). He testified that without the system he was trying to sell to the Applicants there was a likelihood of regular and severe odor problems associated with the flush system. (Tr. p.43).

Considering Mr. Halper's testimony that there are already approximately ten thousand cows in the area immediately surrounding the Applicants' site which are the source of severe odor problems (Tr. pp.166, 122-125), evidence of the Applicants' good intentions to manage this problem and an experimental, untested design isn't substantial evidence that supports any kind of finding favorable to the Applicants on this issue.

VIOLATION OF STATUTORY PROVISIONS

IDWR's approval of the transfer in this case is beyond its statutory authority to the extent that the approval will allow the introduction of pollutants into the Eastern Snake River Plain Aquifer which has a direct hydrological connection to the Snake River, a water of the United States protected by the Clean Water Act. See 33 U.S.C. 1251 et seq. Concentrated animal feeding operations such as Applicants' proposed dairy are considered point sources under the NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM (NPDES) program. See 33 U.S.C. 1362. A point source may not discharge pollutants into waters of the United States without an NPDES permit and may do so only according to the terms of the permit. There is no evidence in the record that Applicants have such a permit.

There should be no doubt that the site of Applicants' proposed place of use is located directly above the Eastern Snake River Plain Aquifer, a body of groundwater,

which has a direct hydrological connection to the Snake River. (Protestant's Exhibit 'H'). The site is within the 0-3 year time-of-travel zone to the Crystal Springs/Niagara Springs complex. (Id. at 27, Figs. 4-15)

Dr. Charles Brockway, the Applicants' expert hydrologist and author of Applicants' Exhibit No. 6, admitted that of the 651-acre feet applied to the Applicants' crop ground for irrigation purposes, 72-acre feet would return to the aquifer. (Tr. p.85; Applicants' Ex. 6). This irrigation water is water that has been mixed with lagoon water. (Applicants' Ex. 4). Approximately 52-acre feet of this lagoon water will be made available for irrigation purposes. (Applicants' Ex. 4, p.5). Dr. Brockway expected the percolation of the returning irrigation water to occur "probably certainly within ten years" and seemed to leave open the possibility that it might take only five years to leach in to the aquifer. (Tr. p.87). He acknowledged that there could be leaching of nutrients into the aquifer and went so far as to admit there will be leaching of nutrients which he attributed, without explanation, to commercial fertilizers. (Tr. pp.88-90).

While the Applicants' Nutrient Management Plan assumes there will be no percolation of irrigation water into aquifer, Mr. Tremblay, the Plan's author, admitted there would be some percolation without quantifying the amount. (Tr. p.57). The Plan itself does not monitor percolation of excess water. (*Id.*). The Plan does not even monitor the nutrient content of the soil below the two-foot level. (Tr. pp.55-56). Percolating irrigation water is likely to carry nitrogen with it. (Tr. p.63-64).

A majority of courts faced with the question have held that the Clean Water Act, which does not directly answer the question itself, does apply to discharges to surface water by way of hydrologic groundwater connections. See e.g., Williams Pipeline

Co. v. Bayer Corp., 964 F Supp 1300 (S.D. Iowa 1997); Quivera Mining Co. v. United States E.P.A., 765 F.2d 126 (10th Cir. 1985) cert. denied, 474 U.S. 1055 (1986). The Federal District Court for the District of Idaho decided otherwise in United States v. ConAgra, Inc., Case No. CV 96-0134 (D. Idaho 1997). However, the *ConAgra, Inc.* case was decided in part on the lack of a consistent EPA interpretation of its own rules extending its regulatory jurisdiction over discharges to surface waters of the United States via hydrologically connected groundwater. The court noted that in the absence of such a formal interpretation, the court would give no deference to the agency's interpretation. *Id.* at p.9. The EPA has now promulgated proposed revisions to its rules asserting jurisdiction over operations, confined animal feeding operations in particular, which have the potential to discharge pollutants to waters of the United States via direct hydrological connections. 66 Federal Register 2960, 3136. Furthermore, when it issued the general NPDES permit for confined animal feeding operations in Idaho, the EPA asserted its regulatory authority over surface waters contaminated via a groundwater connection. *Id.* at 3016, quoting previous publication at 62 F.R. 20177, 20178 (April 25, 1997). Without a ruling on this issue yet from the Ninth Circuit, there is at least reason to believe that the District Court for the District of Idaho will join the majority if presented with the question again.

CONCLUSION

Petitioner's protest of the Transfer resulted in an Order allowing the Transfer that fails to meet basic requirements of the law. The burden of persuasion has been misplaced. The Order contains Findings of Fact and Conclusions of Law but no meaningful analysis of the connection between the two. It contains no explanation of why

the agency gave weight to some evidence and rejected other evidence.

To the extent that Petitioner can guess at the meaning of some of the Findings, they appear not to be supported by substantial evidence.

To the extent that Agency has failed to consider or ignore clear evidence that the Transfer is inconsistent with federal statutes regulating water quality, the Agency has acted beyond its own statutory authority.

For these reasons Petitioner respectfully requests that this court enter an order reversing the decision and Order of the Agency and such other relief the court deems appropriate.

Dated this 9th day of April, 2001.



Richard A. Carlson, Attorney for
Protestant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of April, 2001, he caused a true and correct copy of the foregoing PETITIONER'S BRIEF to be served on the following persons by U.S. Mail, postage prepaid:

Phillip Rassier
Deputy Attorney General
Department of Water Resources
Post Office Box 83720
Boise, ID 83720-0098

Robert Williams
FREDRICKSEN, WILLIAMS & MESERVY
Post Office Box 168
Jerome, ID 83338-0168



Richard A. Carlson, Attorney for
Protestant

450 H
751 2 1000
JUDICIAL DISTRICT
JEROME, IDAHO

DISTRICT COURT
FIFTH JUDICIAL DIST.
JEROME, IDAHO

DEC 21 11 42 AM '00

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE)
NAME OF Calvin and/or Mark DeKruyf,)
Applicants.)

Case No. SP OT 00 00120

NOTICE OF HEARING

LEE HALPER,)
Petitioner,)
vs.)
IDAHO DEPARTMENT OF WATER)
RESOURCES and CALVIN and MARK)
DeKRUYF,)
Respondents.)

RECEIVED

DEC 28 2000

Department of Water Resources

NOTICE IS HEREBY GIVEN that the above-entitled matter will be brought before the Court on the 22nd day of January, 2001, at 1:30 o'clock p.m., at the Jerome County Courthouse, District Courtroom, Jerome, Idaho regarding this Court's intended transfer of this matter to the Snake River Basin Adjudication after Sagewillow. The parties/counsel are to appear and show cause, if any they have, why this matter should not be transferred.

DATED This 21st day of December, 2000.

CHERYL M. WATTS
Clerk of the District Court

By Michelle K. Emerson
Michelle K. Emerson, Deputy Clerk

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 21st day of December, 2000, a true and correct copy of the foregoing Notice of Hearing was mailed, postage paid, to the following persons:

Honorable Alan Lance
Idaho Attorney General
Statehouse, Room 210
P. O. Box 83720
Boise, ID 83720-0010

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Id 83720-0098

Robert E. Williams
Attorney at Law
P. O. Box 168
Jerome, ID 83338-0168

Calvin or Mark DeKruyf
303 West 300 South
Jerome, ID 83338

Richard A. Carlson
P. O. Box 21
Filer, ID 83328

By 
Michelle K. Emerson, Deputy Clerk

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DEC 12 2000

Department of Water Resources

DISTRICT COURT
FIFTH JUDICIAL DIST.
JEROME, IDAHO

DEC 7 1 55 PM '00

BY *[Signature]*
DEPUTY CLERK

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE NAME)
OF CALVIN AND/OR MARK DeKRUYF)

Case No. SPOT00-120

LEE HALPER)

**ORDER GOVERNING
JUDICIAL REVIEW**

Petitioner,)

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES, and CALVIN and MARK)
DeKRUYF)

Respondents.)

Appellant Lee Halper having filed with the district court on November 22, 2000, a
Petition for Judicial Review appealing a final decision of the Director of the Idaho Department of
Water Resources, pursuant to Idaho Code § 42-1701A and Chapter 52, Title 67, Idaho Code,

IT IS HEREBY ORDERED:

1. That the review of this case on appeal will be confined to the record as provided
in I.R.C.P. 84(u) and I.C. § 67-5277, supplemented by any additional evidence taken pursuant to
I.C. § 67-5276;

2. That a transcript of the proceedings before the agency will be required and shall
be prepared as provided in I.R.C.P. 84(k);

REPROFILMED

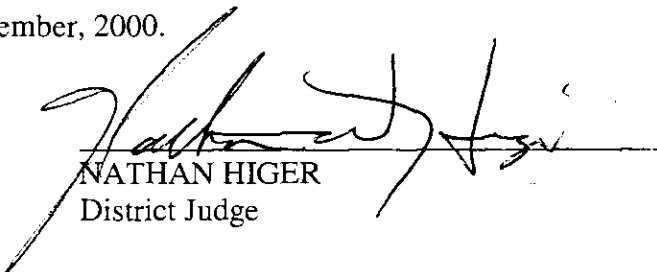
DEC 12 2000

3. That the agency shall cause the agency record to be prepared in accordance with Rule 84(n) and filed with the district court within seven (7) days of the settlement of the transcript;

4. That pursuant to I.R.C.P. 84(v) and I.A.R. 34, the brief of the appellant shall be filed within 35 days of the date of notice that the agency record has been filed with the district court; respondent's brief shall be filed within 28 days after filing of appellant's brief; any reply brief shall be filed within 21 days after filing of the respondent's brief; and

5. That after all briefs are filed, any party may notice the matter for oral argument pursuant to I.R.C.P. 84(w), or the court may set the matter for argument.

DATED this 7th day of December, 2000.


NATHAN HIGER
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 5th day of December, 2000.

Document Served: (Proposed) ORDER GOVERNING JUDICIAL REVIEW

Persons Served: Richard A. Carlson
Attorney at Law
P.O. Box 21
Filer, ID 83328

Robert Williams
Fredrickser, Williams & Meservy
P.O. Box 168
Jerome, ID 83338-0168


PHILLIP J. RASSIER

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 7th day of December, 2000, a true and correct copy of the Order Governing Judicial Review in Jerome County Case No. SP OT 00-00120 was mailed, postage paid, by U.S. Mail.

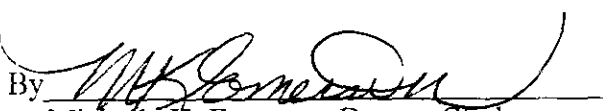
Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Robert E. Williams
Attorney at Law
P. O. Box 168
Jerome, ID 83338

Richard A. Carlson
Attorney at Law
P. O. Box 21
Filer, ID 83328

Phillip J. Rassier
Deputy Attorney General
P. O. Box 83720
Boise, ID 83720-0098

By


Michelle K. Emerson, Deputy Clerk

CERTIFICATE OF MAILING

RECEIVED

DEC 12 2000

Department of Water Resources

DISTRICT COURT
FIFTH JUDICIAL DIST.
JEROME, IDAHO

Dec 7 1 42 PM '00

BY B. J. Mc
DEP. CLERK

ALAN G. LANCE
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division

PHILLIP J. RASSIER, ISBA 1750
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 327-7920
Fax: (208) 327-7866

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE NAME)
OF CALVIN AND/OR MARK DeKRUYF)

Case No. SPOT00-120

Fee Category: Exempt

LEE HALPER)

Petitioner,)

NOTICE OF APPEARANCE

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES, and CALVIN and MARK)
DeKRUYF,)

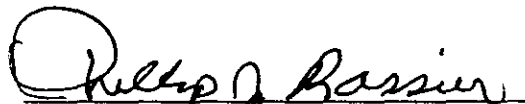
Respondents.)

TO: CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL COUNSEL OF
RECORD:

YOU ARE HEREBY NOTIFIED THAT Phillip J. Rassier, Deputy Attorney General, Idaho Department of Water Resources, hereby enters an appearance as attorney of record for and on behalf of the Idaho Department of Water Resources, respondent in the above-referenced action.

DATED this 5th day of December, 2000.

ALAN G. LANCE
Attorney General



PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water Resources

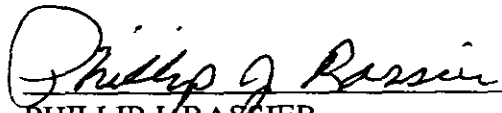
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 5th day of December, 2000.

Document Served: NOTICE OF APPEARANCE

Persons Served: Richard A. Carlson
Attorney at Law
P.O. Box 21
Filer, ID 83328

Robert Williams
Fredricksen, Williams & Meservy
P.O. Box 168
Jerome, ID 83338-0168


PHILLIP J. RASSIER

RECEIVED

DEC 04 2000

Department of Water Resources

DISTRICT COURT
FIFTH JUDICIAL DIST.
JEROME, IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

Dec 1 10:38 AM '00

BY [Signature]
DEPUTY CLERK

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE)
NAME OF Calvin and/or Mark DeKruyf,)

Case No. SP OT 00 00120

Applicants.)

NOTICE OF TRANSCRIPT
AND RECORD

LEE HALPER,)

Petitioner,)

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES and CALVIN and MARK)
DeKRUYF,)

Respondents.)

TO: The above-named parties or their attorneys:

It appearing that on the 22nd day of November, 2000, a Petition for Judicial Review OF
administrative Agency Action was filed in the above-entitled matter,

YOU ARE HEREBY NOTIFIED that the agency record/transcript is to be filed within
forty-two (42) days from the date of this notice.

DATED This 1st day of December, 2000.

CHERYL M. WATTS
Clerk of the District Court

By [Signature] **RECORDED**
Michelle K. Emerson, Deputy Clerk

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 1st day of December, 2000, a true and correct copy of the foregoing Notice of Transcript and Record was mailed, postage paid, to the following persons:

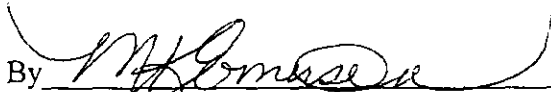
Honorable Alan Lance
Idaho Attorney General
Statehouse, Room 210
P. O. Box 83720
Boise, ID 83720-0010

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Id 83720-0098

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Calvin or Mark DeKruyf
303 West 300 South
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Richard A. Carlson
P. O. Box 21
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By 
Michelle K. Emerson, Deputy Clerk

RECEIVED

NOV 24 2000

Richard A. Carlson

ISBA No. 5971

P.O. Box 21

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Telephone and fax: (208)326-3686

Department of Water Resources

Nov 22 11 54 AM '00
Charles
B. M. K.

Attorney for Lee Halper

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE)
NAME OF Calvin &/or Mark DeKruyf,)

Applicants.)

LEE HALPER,)

Petitioner,)

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES and CALVIN and MARK)
DeKRUYF,)

Respondents.)

Case No. ~~5597~~ SPOT00-120

Filing Fee Category:

Filing Fee:

PETITION FOR JUDICIAL REVIEW
OF ADMINISTRATIVE AGENCY
ACTION

COMES NOW Petitioner, Lee Halper, by and through his attorney, Richard A. Carlson, and
complains and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1.

Petitioner Lee Halper is a private citizen and resident of Jerome County, Idaho. Applicants are
residents of Jerome County, Idaho.

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PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION

2.

Respondent Idaho Department of Water Resources (IDWR) is an administrative agency within the executive department of the government of the State of Idaho created pursuant to the provisions of Title 42, Chapter 17, Idaho Code. Among other things, pursuant to Idaho Code 42-108 and 42-222, IDWR is charged with the statutory responsibility of receiving applications to transfer permits and licenses issued by IDWR providing for the appropriation and use of public waters of the State of Idaho, protests to such applications, and for acting in a quasi-judicial capacity to resolve such applications and protests.

3.

Calvin &/or Mark DeKruyf (Applicants) applied to IDWR for the transfer of use of water right no. 36-02474 and Snake River Basin Adjudication Claim no. 36-10082 and is a party-respondent with regard to this Petition for Judicial Review.

4.

This is a proceeding for judicial review of agency action pursuant to the Idaho Administrative Procedures Act, Idaho Code 67-5201, et seq. (IDAPA) and specifically Idaho Code 67-5270 through 67-5279. This Court has jurisdiction over the parties and the subject matter of the case.

5.

Venue is proper in this Court under Idaho Code 67-5272 in that Applicants' proposed dairy is in Jerome County, the water rights are located there, and the Petitioner, Mr. Halper, lives there.

FACTUAL ALLEGATIONS

6.

PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION

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On September 3, 1999 the Applicants filed Application for Transfer 5597 (application) with IDWR proposing to change the point of diversion, place of use, nature of use, and season of use of part of the water rights to stock water and commercial uses in connection with a proposed dairy with 3,000 milking cows and 2,000 non-milking cows on site. The application proposed to change 0.59cfs and 135.9 acre feet of the rights to year-round stock water and commercial uses to be diverted from two wells located in the NESE Section 33, T8S, R16E, B.M., Jerome County for use at the dairy at the same site.

7.

IDWR published notice of the application which was subsequently protested by Petitioner Halper.

8.

On August 29, 2000, IDWR conducted a hearing in the matter. The Applicants were present and were represented by Robert E. Williams. The Protestant was present and was represented by Richard A. Carlson. The hearing was presided over by L. Glen Saxton, acting as a Hearing Officer designated and appointed by the Director of IDWR. At the hearing, sworn testimony was received and exhibits were admitted in evidence and the application and protest were taken under advisement by the Hearing Officer pending a decision on the merits. The hearing was recorded, not reported, and the official tapes of the hearing and other evidentiary materials are in the custody of IDWR at 1301 North Orchard St., Boise, Idaho, 83720.

9.

On October 27, 2000 the Hearing Officer issued an Amended Preliminary Order approving the proposed transfer. The Order contained Findings of Fact and Conclusions of Law and, in particular Findings that the proposed transfer would not injure other water rights or enlarge

PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION

Applicants' use of water and that the proposed transfer was consistent with the conservation of water resources within the State of Idaho and was in the local public interest. The Order became a Final Order on November 10, 2000.

DESCRIPTION OF GROUNDS FOR RELIEF

10.

The decision by IDWR allowing the transfer requested by the Applicants was unlawful and contrary to Idaho Code 42-222 which requires IDWR to consider the following:

- A. Whether or not the proposed changes will injure other water rights;
- B. Whether the proposed constitutes an enlargement in use of the original rights;
- C. Whether the proposed change is in the public interest;
- D. Whether the proposed changes are consistent with the conservation of water resources within the State of Idaho.

The agency's approval of the transfer was not based on substantial evidence supporting the conclusions made with respect to the criteria listed above and the resulting Order and approval were in violation of statutory provisions. The decision was also a result of procedural irregularities and an abuse of discretion to the extent that the Protestant was denied his right to a fair hearing by the exclusion of relevant and probative evidence and was denied his right to properly cross-examine witnesses called by the Applicants and properly examine his own witnesses who gave testimony which was considered by the Hearing Officer.

REQUEST FOR RELIEF

WHEREFORE, the Petitioner requests judgment and relief as follows:

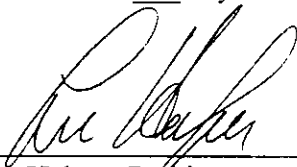
1. That the Court review IDWR's action approving the transfer which is in violation of statutory provisions and which is based on a record which lacks substantial evidence

PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION

on critical issues, was developed through procedural irregularities and as a result of abuses of discretion;

2. That the Court enter an Order setting aside IDWR's Order allowing the transfer;
3. That the Court enter an award of reasonable attorney fees incurred by Petitioner pursuant to Idaho Code 12-117, 12-121 and as otherwise provided by law;
4. That the Court allow such other and further relief to which Petitioner may be justly entitled.

DATED this 22nd day of November, 2000.



Lee Halper, Petitioner



Richard A. Carlson, Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2000 he caused true and correct copies of the foregoing PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION to be served on the following persons by U.S. Mail, postage prepaid:

Honorable Alan Lance, ESQ.
Attorney General
Idaho Statehouse
P.O. Box 44449
Boise, ID 83711-4499 (2 copies)

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard St.
Boise, ID 83720-0098

Robert Williams
Fredricksen, Williams & Meservy
P.O. Box 168
Jerome, ID 83338-0168

Calvin &/or Mark DeKruyf
303 W 300 S
Jerome, ID 83338

Dated this 22nd day of November, 2000.



Richard A. Carlson

PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

November 20, 2000

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

CALVIN DE KRUYF
MARK DE KRUYF
303 W 300 S
JEROME ID 83338

RE: Transfer of Water Rights 36-02474B/36-10082B (Transfer 5597)

Dear Water Right Holder(s):

Enclosed please find approved Transfer of Water Right for the water rights referenced above.

If you have any questions regarding this matter, please call me at 208-327-7940.

Sincerely,

Samela S. Skaggs
for Jeff Peppersack, Manager
Water Right Permits Section

JP:klt

Enclosure

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF TRANSFER NO. 67017)
)
OF WATER RIGHT 36-2474B & 36-10082B) ORDER GRANTING
) EXTENSION OF TIME TO
IN THE NAME OF CALVIN &/OR MARK DE KRUYF) COMPLETE TRANSFER
)
_____)

On October 12, 2000 the Department approved Application for Transfer 5597 (renumbered to 67017) with a condition that:

The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.

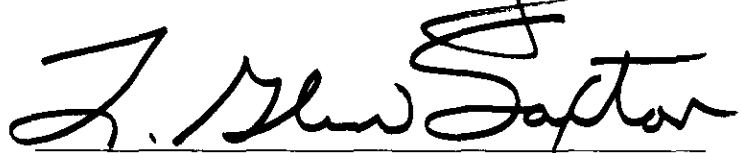
The right holder has notified the Department that the transfer has not yet been accomplished.

The right holder has requested an extension of time for completion of the transfer and has shown reasonable cause for the delay.

IT IS, THEREFORE, HEREBY ORDERED that the right holder of Transfer No. 67017 is granted an extension to November 30, 2003 in which to accomplish the transfer.

IT IS FURTHER HEREBY ORDERED that this extension does not stay the accumulation of the 5 year period associated with forfeiture of a water right for non-use.

Dated this 19th day of February, 2002.



L. GLEN SAXTON
Chief, Water Allocation Bureau

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Department of Water Resources

DISTRICT COURT
FIFTH JUDICIAL DIST.
JEROME COUNTY, IDAHO

AUG 28

1:20 PM '01

BY

DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5597 IN THE NAME))
OF CALVIN AND/OR MARK DeKRUYF,))
_____))

Case No. SP OT 00 00120

LEE HALPER,))

Petitioner,))

vs.))

IDAHO DEPARTMENT OF WATER))
RESOURCES, and CALVIN and MARK))
DeKRUYF,))

Respondents.))
_____))

ORDER ON JUDICIAL REVIEW

APPEARANCES:

Richard A. Carlson, Attorney at Law, Filer, Idaho for the Petitioner, Lee Halper.

Robert E. Williams III, Attorney at Law, Jerome, Idaho, and Christopher H. Meyer, Attorney at Law, Boise, Idaho, Attorney for Respondents, Calvin DeKruyf and Mark DeKruyf.

Phillip J. Rassier, Deputy Attorney General, Boise, Idaho, Attorney for Respondent, Idaho Department of Water Resources.

Barry Wood, District Judge, presiding.

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I.

Statement of the Case

This case is an appeal from an administrative decision of the Idaho Department of Water Resources ("IDWR") approving an application to transfer two irrigation water rights. The applicants, Calvin and Mark DeKruyf ("DeKruyfs"), filed Application to Transfer Water Right No. 5597 ("transfer application") with IDWR proposing to change the point of diversion, place of use, nature of use, and season of use of part of water right numbers 36-02474 and 36-10082 to stockwater and commercial use in connection with a proposed dairy. Local resident, Lee Halper ("Halper"), protested the transfer. IDWR held an administrative hearing to receive evidence and testimony regarding the proposed transfer. Subsequently, IDWR approved the transfer application.

In this appeal, Halper challenges IDWR's decision approving the transfer application.

II.

Matter Deemed Fully Submitted for Decision.

Oral argument before the District Court in this matter was held on July 24, 2001, in Lincoln County, Shoshone, Idaho for the convenience of counsel and the Court. At the conclusion of the hearing, no party requested additional briefing, and the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or July 25, 2001.

III.

Issues Presented on Appeal

The following are the issues presented by Halper in this appeal:

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1. Whether IDWR misapplied the burden of persuasion? There is the further assertion that the hearing officer's findings of fact do not meet the requirement of Idaho Code §67-5248 and are therefore inadequate.
2. Whether IDWR's conclusions that the transfer does not injure other water rights, will not constitute an enlargement, is in the local public interest, and is consistent with conservation of water resources within the State of Idaho are supported by sufficient findings of fact and substantial evidence.
3. Whether IDWR's Order was in violation of statutory provisions relating to the discharge of pollutants into the ground water below the proposed place of use.

IV.

Applicable Standard of Review

Judicial Review Under IDAPA Generally:

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code §42-1701A(4). Under the IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code §67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code §67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;

- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code §67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

The appellant must show that the agency erred in a manner specified in Idaho Code §67-5279(3), and that a substantial right of the party (petitioner or appellant) has been prejudiced. Idaho Code §67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if there is conflicting evidence in the record, the court shall not overturn an agency's decision that is based on substantial,¹ competent evidence in the record. *Id.*

It also bears emphasis that the Petitioner (the one challenging the agency decision) bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 552, 976 P.2d 477 (1999). A dissatisfaction by the Petitioner with the agency's final decision is insufficient to meet the requisite standard.

The Idaho Supreme Court recently summarized each of these points:

The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record. . . . The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2P.3d 738 (2000)(citations omitted); ~~see~~ *also* *Cooper v. Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

¹ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding - - whether it be by a jury, trial judge, special master, or hearing officer - - was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the hearing officer reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

Finally, if the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code §67-5279(3); *University of Utah Hosp. v. Board of Comm'rs. Of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

Judicial Review of an Agency Decision Regarding Transfer Of Water Rights specifically:

The applicable Idaho Code establishes four criteria for evaluating the transfer of water rights: They are:

- (1) injury of a water right,
- (2) enlargement of a water right,
- (3) the consistency of the transfer with the local public interest, and,
- (4) conservation of Idaho water.

Idaho Code §42-222.

To prevail, the Petitioner must affirmatively establish an error with respect to one or more of these four criteria, and he must show it to be an error which prejudiced a substantial right of his.

V.

Issue No. 1:

Whether IDWR misapplied the burden of persuasion?

On October 12, 2000, IDWR hearing officer L. Glen Saxton issued his Preliminary Order in regard to Transfer No. 5597. This Preliminary Order followed an evidentiary hearing held August 29, 2000. A transcript of this hearing has been prepared and read by the Court.

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Following DeKrufys' Petition for Reconsideration and a subsequent Amended Petition for Reconsideration, the same hearing officer issued an Amended Preliminary Order dated October 27, 2000.

Halper first contends that IDWR misapplied the burden of persuasion because of the statement contained in Finding of Fact No. 21 on page 5 of the Order: "The protestant did not show that the proposal of the applicant will injure other water rights, will enlarge the use of water, is not in the local public interest or is not consistent with the conservation of water resources within the State of Idaho." R. p. 92 (emphasis added).

This Court finds that Halper's argument is misplaced. "Finding" No. 21, which is really a conclusion of law and not a finding of fact, must be read in context with the entire Amended Preliminary Order. When so read, the decision as a whole clearly stands for the proposition that DeKruyfs proved each of the requisite elements (or negated them as the case may be), of Idaho Code §42-222. To the contrary, the hearing officer found Halper proved nothing.

This is even more evident when one reads Finding No. 20 in context with Finding No. 21.

They provided as follows:

20. The protestant is concerned about the number of cows in the general vicinity of the applicant's dairy and believes there is a potential for the dairy operation to adversely affect water quality and air quality. The protestant believes the application is not in the local public interest.
21. The protestant did not show that the proposal of the applicant will injure other water rights, will enlarge the use of water, is not in the local public interest or is not consistent with the conservation of water resources within the state of Idaho. R. p. 92. (Emphasis added).

In other words, and to paraphrase the hearing officer, Finding No. 20 states, "Halper was protesting the transfer on such and such bases." In No. 21, the hearing officer responds to No. 20 and says, " Halper provided no credible evidence to prove any of the bases asserted in No. 20."

Simply stated, once the DeKruyfs' make a prima facia case, it is then up to Halper to at least meet it, if not surpass it.

Finally, in his Conclusions of Law, No. 2, 3, and 4, the hearing officer clearly states the correct burdens. For all of these reasons, this challenge by Halper is overruled. The hearing officer did not misapply the appropriate burdens.

Whether Idaho Code §67-5248 was complied with as to the findings of fact of the hearing officer.

Idaho Code §67-5248 provides:

67-5248. Contents of orders.— (1) An order must be in writing and shall include:

(a) a reasonable statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.

(b) a statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.

(2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.

(3) All parties to the contested case shall be provided with a copy of the order.

Halper takes exception to the hearing officer's finding of fact and "analysis of the evidence concerning potential air quality (odor) and water quality impacts of a large dairy." See Petitioner's Brief, p.3, 4, 5, 6 and 7.

In 75B Am Jur 2nd §1968, (1992) findings of fact are defined as follows:

Findings are a formal, deliberate statement of a court's determination of facts. The findings of fact in a nonjury trial are comparable to a jury's answers to special issues. Findings of fact may be defined as the written statement of the ultimate facts as found by the court, signed by the court, and filed therein, and essential to support the decision and judgment rendered thereon. (emphasis added).

The purpose of findings is found in Section 1969 of the same Am Jur text cited immediately above as follows:

The purpose of requiring the trial court to make findings of fact and conclusions

of law, when requested to do so, is to enable the appellate court to examine the basis on which the trial court reached its ultimate judgment and to obtain a correct understanding of the factual issues determined by the trial court as a basis for its conclusions of law and judgment. The specific findings of fact and conclusions of law enable the appellate courts to determine whether the trial court has correctly applied the law to the facts.

The requirement of findings and conclusions is also intended to insure that the trial judge has dealt fully and properly with all the issues in the case before it is decided. *Id.*

This statement is consistent with Idaho case law. See *Woodfield v. Board of Professional Discipline*, 127 Idaho 738, 747 (Ct.App. 1995).

Halper's apparent position is that not only must the hearing officer find the facts upon which he reaches his decision, but he must also engage in a lengthy discussion as to why he finds certain evidence and witnesses to be credible and why he finds other evidence and witnesses to not be credible. This Court does not believe this to be the case. As noted above, findings of fact are the written statements of the ultimate facts as found and not a written dialogue and explanation of every scintilla of evidence and testimony produced. The Court finds that the findings at issue here are adequate.

Lastly, if the record is so clear that it yields obvious answers to the factual questions presented to the appellate court, inadequate findings may be excused. See eg. *Spencer v. Idaho First Nat'l Bank*, 106 Idaho 316 (Ct.App. 1984); *Donnelinger v. Donnelinger*, 107 Idaho 431 (Ct.App. 1984). This Court has read the entire transcript and believes the record is clear and issues obvious answers to the material factual issues presented by Idaho Code §42-222.

Even Halper's own witness, Mike Ihler, testified that the primary issue is one of proper management, and if even large dairies are managed properly, they are not a problem. See *Tr. p. 113-115*.

In conclusion, the record as a whole clearly supports the findings of fact.

VI.

Issue No. 2:

Whether IDWR's conclusions that the transfer does not injure other water rights, will not constitute an enlargement, is in the local public interest, and is consistent with conservation of water resources within the State of Idaho are supported by sufficient findings of fact and substantial evidence?

Based upon the factual record presented in this case, the Court overrules Halper's second objection that the record does not contain substantial evidence to support IDWR's decision to approve the desired transfer.

A: Injury to other water rights and enlargement and conservation.

Idaho Code §42-222(1) states that the Direct of IDWR cannot approve a transfer if other water rights would be injured by the proposed change. To be considered legal injury, the affect on the other water right(s) must be substantial and "not merely a fanciful injury but a real and actual injury." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7-8, 154 P.2d 507, 509-10 (1944).

The administrative record contains substantial evidence to show that the proposed transfer does not injure other water rights. In addition, IDWR's Order contains adequate facts to support its conclusions. DeKruyfs' expert witness in hydrology, Dr. Brockway, conducted a study that investigated the effects the proposed transfer would have on water levels in nearby wells and concluded that no injury would occur to water rights from those wells. *Tr. p. 70, L. 12-20, p. 73, L. 1-16; R. p. 89-90 (Finding of Fact No. 8)*. Dr. Brockway testified that there would be no injury or enlargement due to the proposed transfer: "There's a decrease in the consumptive use of that groundwater, [sic] and there's a decrease in the aquifer net loss as a result of putting in the dairy." *Tr. p. 74, L. 10-12*. In fact, his testimony shows that there would actually be more water in the aquifer after the transfer than before the transfer because of a

decrease in the consumptive use of the water due to 45.3 acres being de-watered or dried up. *Tr. p. 74, L. 2-12.* Likewise, Dr. Brockway testified, "It [the aquifer] will be better off. There will be a decrease in the net depletion of the system of the aquifer after the installation of the dairy." *Tr. p. 75, L. 7-9; Exhibit No. 6.*

Before a transfer can be approved, Idaho Code §42-222 also requires that no enlargement of the water right occur and that the transfer is consistent with the conservation of water resources of the state. Dr. Brockway testified that no enlargement of the water rights would occur due to the transfer. Exhibit Number 6, a water balance analysis prepared by Dr. Brockway, shows various aspects of water and land use before the transfer and after the transfer. *Tr. p. 73, L. 19-22.* Exhibit Number 6 and Dr. Brockway's testimony supports the conclusion that no enlargement of the water right will occur due to the transfer: no increase in total volume pumped, no increase in consumptive use, and no increased impact on the aquifer. *Tr. p. 73, L. 21-25, p. 74, L. 1, 12-15; R. p. 91 (Finding of Fact No. 16).* In fact, the evidence showed that there would be 25.4 acre feet more water in the aquifer after the transfer due to the drying up of 45.3 acres of irrigated land. *Tr. p. 74, L. 2-12.*

Thus, IDWR's conclusion that no injury to other water rights or enlargement to the transferred water rights would result is supported by adequate findings of fact and substantial competent evidence. Likewise, IDWR's conclusion that the transfer is consistent with the conservation of water resources in the state is also supported by findings in the Order and substantial evidence in the record.

B. The public interest standard:

Idaho Code §42-222 requires that a proposed transfer be in the local public interest before being approved. The statute defines local public interest as the "affairs of the people in the area directly affected by the proposed use." Idaho Code §42-203A(5). The legislature vested in the

Director of IDWR the authority to determine what elements of the public interest are affected by a proposed transfer and what constitutes the public interest. *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988).

The agency's record contains substantial economic evidence to conclude that the transfer is in the local public interest as there was a significant amount of evidence as to the economic benefits of the dairy to the local community.

Not only were the economic effects on the local public interest explored at the hearing but odor control was also raised as an issue. One of Halper's biggest concerns about the expansion of the dairy, and apparently part of his argument that the transfer is not in the local public interest, centers around the odors that may be produced. Halper's argument is that large dairies can produce very offensive odors. But the question presented to this Court in this case is not what a large dairy is capable of doing, rather what is this proposed dairy going to actually do to control odor. A Mr. Etherington testified that the dairy was going to use a successful odor management system. *Tr. p. 40, L. 8-21*.

Speculative future environmental concerns, whether they be air quality or water quality, or both, cannot alone rise to the level of competent evidence to sustain the protest. Any future environmental degradation potential must, like future damages in a regular civil case, be proven to a reasonable degree of certainty in this case, and not just as a general proposition. This was not done here.

The proposed water transfer itself does not foul the air or pollute the ground water. It is subsequent mismanagement of a dairy operation which can lend to such offensive results. And, there are other agencies who then get involved such as DEQ and the Department of Agriculture.

VICRC

1998-11-10

VII.

Issue No. 3:

Whether IDWR's Order was in violation of statutory provisions relating to the discharge of pollutants into the ground water below the proposed place of use?

The third issue raised by Halper is most easily dispensed with. First, the issue was never raised before the hearing officer but is raised for the first time on judicial review. As such, this Court should not entertain it. *Balser v. Kootenai County Bd. Of Comm'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986).

Secondly, DeKruyfs' argue in their Respondents' Brief that the Clean Water Act does not apply to any ground water, even it if is hydrologically connected to surface water, citing *United States v. ConAgra, Inc.*, 1997 Lexis 21401 (D. Idaho, December 31, 1997) Magistrate Judge Boyle presiding in Boise, Idaho, Respondents, DeKruyfs' brief at page 34, This Court does not believe that the *ConAgra* case is the most recent Idaho case on the subject. To the contrary, see *Idaho Rural Council v. Jacob Bosma, etal*, D. Idaho June 4, 2001, Case No. CV99-0582-S-BLW), wherein Judge Winmill held:

For these reasons, the Court finds that the CWA extends federal jurisdiction over ground water that is hydrologically connected to surface waters that are themselves waters of the United States. This does not mean, however, that the plaintiff's burden is light. As Judge Van Sickle explained in *Washington Wilderness Coalition* (at 870 F.Supp. at 990):

Plaintiffs must still demonstrate that pollutants from a point source affect surface waters of the United States. **It is not sufficient to allege ground water pollution, and then to assert a general hydrological connection between all water.** Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.

Id. Whether IRC can make this showing remains to be seen. However the Court finds, for purposes of the Bosma's summary judgment motion, that the CWA regulates discharges from the Grand View Dairy into the groundwater where there exists a hydrological connection with Walker and/or Butler Springs, and

such discharges can be traced from their source to those springs. Thus, the Court will deny the Bosma's Motion for Summary Judgment insofar as it is based on the argument that (a) the CWA does not cover groundwater discharges even where a hydrological connection exists to Walker and/or Butler Springs, or (b) that there is no genuine issue of fact as to whether such a connection exists.

Memorandum Decision and Order filed June 4, 2001 at p. 16, 17 in the United States District Court for the District of Idaho, Case No. CV-99-0581-S-BLW. (emphasis added).

So assuming Judge Winmill's ruling is the current law in Idaho, Halper presented no competent evidence of a requisite hydrological connection of ground water from this actual dairy site to any surface water. As such, this challenge is overruled.

This Court wishes to make one other statement which is that by discussing the CWA in this decision, the Court does not impliedly agree that it or IDWR even has jurisdiction regarding the CWA, at least in the context of these proceedings.

VIII.

Conclusion

For all the reasons stated above, the Court overrules Mr. Halper's objections and affirms the actions of the hearing officer.

IT IS SO ORDERED:

DATED: August 28, 2001
SIGNED: B. Wood
BARRY WOOD
District Judge

MICRO

2001 AUG 28 11:00 AM

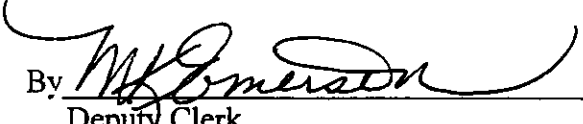
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 28th day of August, 2001, at true and correct copy of the foregoing Order on Judicial Review was mailed, postage paid, by United States Mail, to the following persons:

Richard A. Carlson
Attorney at Law
P. O. Box 21
Filer, ID 83328

Phillip J. Rassier
Deputy Attorney General
Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Robert E. Williams
Attorney at Law
P. O. Box 168
Jerome, ID 83338-0168

By 
Deputy Clerk

MICROFILMED

2001

CERTIFICATE OF MAILING



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

October 22, 2002

Mark DeKruyf
c/o DeKruyfs Dairy's
303 W 300 S
Jerome, Idaho 83338

RE: WATER RIGHT NOS. 36-02474B and 36-10082B IN THE NAME OF CALVIN DEKRUYF AND MARK DEKRUYF

Dear Mr. DeKruyf:

I have reviewed your letter dated October 13, 2002 in which you request a change in the condition of transfer approval that required accomplishment of the transfer on or before November 30, 2003. I assume your request is for the purpose of countering future allegations of forfeiture by third parties that the rights have been forfeited through 5 consecutive years of non-use. If this is the case, I suggest you offer to place the water rights in the Water Supply Bank ("bank") operated by the Water Resource Board until such time as you are ready to use the water authorized under the transfer. One of the benefits of placing a water right in the bank is that while a water right is in the bank, forfeiture provisions are stayed. Enclosed is an application to place a water right into the bank.

If you do not choose to put the rights in the bank, the department is willing to issue an extension, but such an extension will not stay the accumulation of the 5-year period of non-use that could initiate allegations of forfeiture due to non-use.

If you have questions, please feel free to contact me or our Southern Regional Office in Twin Falls (phone no. 736-3033).

Sincerely,

L. GLEN SAXTON, P.E.
Chief, Water Allocation Bureau

✓Encl: 1

c: IDWR - S. Region

RECEIVED

OCT 21 2002

Department of Water Resources

October 13, 2002

DeKruyfs Dairy's
303 W 300 S
Jerome, Idaho 83338

Idaho Department of Water Resources
1301 Nth Orchard
Boise, Idaho 83705

Gentlemen,

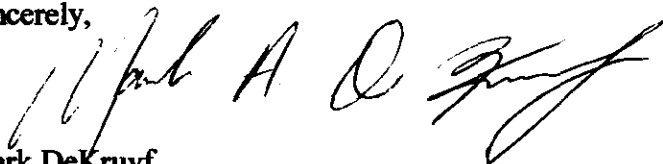
This letter is a request for an extension for Transfer # 36-10082B ,the following reasons include:

- This last year we lost Calvin DeKruyf, our father who was instrumental in the development of the new Jerome Dairy facilities. This great loss established a hold on our eventful future.
- Recent economy has off-set and put a damper on the dairy industry.

There has been great progression in the development of our new dairy. We have completed the lagoon and have had land scraped and leveled. In time we will have an innovative dairy that will be a sound process. This venture will help the economy, and the environmental concerns.

Sincerely,

Mark DeKruyf

A handwritten signature in black ink, appearing to read 'Mark A. DeKruyf', is written over the printed name.



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

February 26, 2002

CALVIN &/OR MARK DE KRUYF
303 W 300 S
JEROME ID 83338

RE: Order In the Matter of Transfer No. 67017

Dear Water Right Holder(s):

Enclosed please find Order Granting Extension of Time to Complete Transfer issued by the department in reference to the above listed information.

If you have any questions regarding this matter, please call me at 327-7940.

Sincerely,

for Jeff Peppersack, Manager
Water Right Permits Section

JP:klt

Enclosure

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MAR 03 2002

RECEIVED

FEB 07 2002

Department of Water Resources
Southern Region

February 7, 2002

Idaho Dept of Water Resources
Statehouse Mail
Boise, ID
83720

FEB - 8 2002

RE: Approved Transfer 5597, Calvin &/or Mark DeKruyf

Dear Sirs;

As you may recall, this transfer was originally approved in October 2000. One of the approval conditions required that our new dairy be constructed and in operation within one year. However, the approval was appealed to the district court by Lee Halper. We were obviously prevented from completing this project due to this appeal. The court ruled on the appeal in August of 2001, siding with your approval of the transfer. We are in the process of obtaining financing for this project, and hope to be fully operational by October or November of this year. As there is some question of which date starts the allowed development time, and our financing is not yet assured, we are hereby requesting a final development date of November 30, 2003. Thank you for your consideration.

Regards,



Mark DeKruyf
303 W 300 S
Jerome, ID
83338

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FEB 08 2002

5597/67017
36-2474B/36-10682B



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

September 14, 2001

MIKE FELTON
PO BOX 589
BUHL ID 83316

Re: Application for Transfer No. 5597 in the name of Calvin Dekruyf
and/or Mark Dekruyf

Dear Mr. Felton:

Glen Saxton asked that I send you the enclosed Amended Preliminary Order for the above-referenced matter pursuant to your telephone request today. If you have any questions, please contact Mr. Saxton at (208)327-7955.

Sincerely,

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Encl.

MICROFILMED

Aug 9 3 2002

Yler *1/11*
norm *1/11* *Lisa*

Robert E. Williams, III

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS & MESERVY

Attorneys at Law

117 South Adams Street

P.O. Box 168

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Christopher H. Meyer

Gary G. Allen

IDAHO STATE BAR NOS. 4461 AND 4366

GIVENS PURSLEY LLP

277 North Sixth Street, Suite 200

P.O. Box 2720

Boise, Idaho 83701-2720

Telephone: 208-388-1200

Facsimile: 208-388-1300

Attorneys for Respondents DeKruyf

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF JEROME**

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 5597 IN THE NAME OF CALVIN
DeKRUYF, AND/OR MARK DeKRUYF

LEE HALPER,

Petitioner,

IDAHO DEPARTMENT OF WATER RESOURCES,
CALVIN DeKRUYF and MARK DeKRUYF,
Respondents.

Case No. SPOT 00-00120

**BRIEF OF RESPONDENTS
DeKRUYF**

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3 <i>Legislative History of the Clean Water Act of 1977</i> at 532 (Senate Debate, Dec. 15, 1977)	48
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COME NOW, CALVIN DeKRUYF and MARK DeKRUYF, (hereinafter "Respondents," "Applicants" or "DeKruyf"), through their attorneys, Robert E. Williams of the firm Fredericksen, Williams and Meservy, and Christopher H. Meyer and Gary G. Allen of the firm Givens Pursley LLP, and hereby submit their *Brief in Opposition to the Petition for Judicial Review* filed by the Petitioner.

PROCEDURAL BACKGROUND

This matter arises from the entry of an *Amended Preliminary Order* by the Department of Water Resources in Water Right Transfer Case No. 5597, issued on October 27, 2000 (Agency Record, p. 88, hereinafter abbreviated as "A.R."). This *Amended Preliminary Order* approved the Applicant's *Application for Transfer of Water Right*. The order authorizes the transfer of part of two existing irrigation water rights to stock water and commercial use in connection with a new, larger dairy operation they plan to undertake adjacent to a smaller dairy they now operate. (Both the existing dairy and the new dairy are referred to herein as "DeKruyf Dairy.") The order authorizes a maximum combined diversion rate of 0.59 cfs and a combined annual volume of 135.9 acre-feet. A corresponding dry-up of 45.3 acres of land (formerly irrigated at 3 acre-feet per acre) was ordered to ensure no injury or enlargement.

The *Application for Transfer of Water Right* was protested by Lee Halper (hereinafter "Protestant," "Petitioner" or "Halper"). Halper did not seek administrative review of the *Amended Preliminary Order* pursuant to I.C. § 67-5245. Consequently, the *Amended Preliminary Order* became a *Final Order* automatically under I. C. § 67-5246(3).

Halper then filed a *Petition for Judicial Review* on November 22, 2000. The *Petition* was brought under the Idaho Water Code, I. C. §§ 42-222 and 42-1701A(4), and the Idaho Administrative Procedure Act, I. C. §§ 67-5201 to 67-5292.

Petitioner filed his *Opening Brief* on April 9, 2001. By order of the Court dated April 24, 2001, the time for filing Respondents' Briefs was extended to May 21, 2001.

ISSUES PRESENTED ON APPEAL

Applicant DeKruyf adopts the statement of "issues presented on appeal" set out in the State's responsive brief.

STANDARD OF REVIEW

This is an appellate proceeding in which the Court's review is limited. The standard of review is "substantial evidence on the record as a whole" as set out in I. C. § 67-5279(3)(d) of the Idaho Administrative Procedure Act.¹ In their seminal work,

¹The Idaho Administrative Procedure Act sets the following rules governing the scope of review:

"(1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on question of fact.

"(2) [deals with review not on the record]

"(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

"a. in violation of constitutional or statutory provisions;

"b. in excess of the statutory authority of the agency;

"c. made upon unlawful procedure;

"d. not supported by substantial evidence on the record as a whole; or

"e. arbitrary, capricious, or an abuse of discretion.

"(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced."

I. C. § 67-5279 (emphasis added).

Professor Goble and Deputy Attorney General Gilmore summarized the standard this way:

[S]ubstantial evidence means more than a mere scintilla, more than simply some evidence supporting the agency's decision. It does not mean, however, that the court is to engage in a *de novo* review or to substitute its judgment on the weight of the evidence for that of the agency. The standard is likened to that applicable to motions for a directed verdict: if the evidence in the record would support a refusal to direct a verdict in a jury trial, the evidence is "substantial." Thus — to say the same thing yet again — the standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's factfinding is reasonable.

Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 362-63 (1993). In short, if the Court finds that a jury (or the agency, in this case) could have reasonably approved the transfer of these water rights, then the Court must affirm the result.

It also bears emphasis that the Petitioner (the one challenging the agency decision) bears the burden of documenting and proving that there was not substantial evidence on the record to support the agency's decision. *Payette River Property Owners Assn. v Board of Comm'rs*, 132 Idaho 551, 976 P.2d 477 (1999). Complaining about the outcome is insufficient to met this standard.

Finally, identifying a flaw in the agency's analysis is not sufficient, in itself, to justify overturning the agency's decision. Rather, the Idaho Administrative Procedure Act expressly provides that "substantial rights of the appellant" must be shown to have been "prejudiced." I. C. § 67-5279(4). This has been referred to as the "harmless error" rule. Gilmore & Goble, at 366.

Our Supreme Court recently summarized each of these points:

The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record. ... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I. C. § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also*, *Cooper v Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

With these general administrative principles in mind, we turn next to the specific controlling provisions of the Idaho Water Code. The Water Code establishes four² criteria for evaluating the transfer of water rights: They are: (1) injury of a water right, (2) enlargement of a water right, (3) the consistency of the transfer with the local public interest and (4) conservation of Idaho water. I. C. § 42-222. To prevail, the Petitioner must affirmatively establish an error with respect to one or more of these four criteria, and he must show it to be an error which prejudiced a substantial right of his.

²A fifth criterion, dealing with "beneficial use" was added by the Legislature in 1996 in the context of the municipal water rights. Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297, codified at Idaho Code §§ 42-202, 42-202B, 42-217, 42-219, 42-222. Although the beneficial use criterion is applicable to all water rights, it is merely a codification of the long-standing common law requirement. It has not yet become standard practice for the Department to list this as one of the criteria in a transfer proceeding. In any event, the water sought by the DeKruyf Dairy is for a beneficial use, and Halper has not challenged this.

SUMMARY OF ARGUMENT

Halper is opposed to large new dairies in the Magic Valley. His strategy is two-pronged: (1) to attract media attention and (2) to raise the transaction costs for new dairies. He has accomplished both by turning water right proceedings into protest meetings to discuss his views on what is wrong with the Magic Valley.

Since he has no real quarrel with the water rights transaction which is at the center of this proceeding, he has focused instead on broader "educational" issues peripheral both to the evaluation of the water right and to protection of the State's water resources. He has sought to accomplish this primarily under the rubric of the "local public interest test" which has been long part of the Idaho Water Code., I. C. § 42-222.

The local public interest test was adopted in 1978 as a sort of safety net to ensure that the Idaho Department of Water Resources ("IDWR" or the "Department") had (1) sufficient discretion to consider the impacts of appropriations and transfers of water rights on local communities and (2) sufficient authority to condition their approval on compliance with environmental laws.

Halper now seeks to convert this safety net into a mandate that the IDWR undertake its own environmental enforcement program in which it second-guesses the regulatory policy judgments of other administrative agencies. That is uncalled for. The IDWR has heard the environmental evidence and has determined that so long as the Applicant agrees to comply with applicable environmental regulations, there is no threat to the local public interest. That should end the matter.

Next Applicant complains that the Department has failed to explain its decision. The simple answer to this is that the Department has explained its decision. Halper simply does not like the explanation.

The Hearing Officer is not required to argue its decision in its order, pointing out the persuasive effect of each piece of evidence. Rather the Hearing Officer is required to simply to demonstrate that he or she stepped through the correct analysis in reaching a decision for the Department. The question then becomes one of whether the decision is supported by substantial evidence in the record. Here, it plainly is.

Finally, Halper complains that the IDWR lacks "authority" to approve this water transfer because the Applicant has failed to obtain a Section 402 permit under the Clean Water Act. The Applicant demonstrates below that it is not obligated to obtain a section 402 permit, because, any discharge³ will be to ground water, not surface water.

ANALYSIS

I. THE AMENDED PRELIMINARY ORDER CORRECTLY APPLIED THE LAW AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

The Protestant complains that the Department's decision is not supported by substantial evidence on the record. This claim does not hold up. As shown below, a review of the record as a whole clearly establishes that, with respect to each of the four water right transfer criteria under I. C. § 42-222, the Department correctly interpreted the law, applied it to the evidence, and reached conclusions supported by substantial evidence.

A summary of the key evidence in the record with respect to each of the four I. C. § 42-222 elements follows:

³Protestant has also failed to show a "point source" discharge.

A. *The Transfer Will Not Injure Other Water Rights.*

Applicant's Exhibit "5" conclusively demonstrates that there will be no significant impact on surrounding wells drawing ground water in the vicinity of the proposed place of diversion under the transfer. As explained by the Applicant's expert witness, Dr. Charles Brockway, the study described in Exhibit "5" shows the new wells associated with the transfer will have an impact on the water table of less than a foot in an area ranging between 100 feet and one-half mile from the new wells. (*Transcript*, pp. 71, 72 and 73, hereinafter referred to as "T.").

Mark DeKruyf testified that the new facility would be designed with berming to avoid any contamination of surface waters of the United States or the State of Idaho. (T., pp.17-18). Mr. DeKruyf also testified that the proposed facility had received approval of a Nutrient Management Plan from the Idaho Department of Agriculture. (T., p. 18).

Mike Tremblay, another expert witness of the Applicant, testified that the purpose of nutrient management planning was to avoid contamination of the ground waters and surface waters of the State (T., p. 48); that a Nutrient Management Plan is designed to insure that nutrients that pose a potential problem of contamination are uptaken by crops (T., p. 50); that Nutrient Management Plans entail an ongoing monitoring process to insure compliance (T., p. 52); and that organic sources of nutrients present a slower release of nutrients than commercial fertilizers (T., pp. 62, 64 and 65). Dr. Brockway also testified that the underlying aquifer would be better off, quantitatively and qualitatively, after the transfer of the water rights, than it was before. (T., pp. 74-76).

B. *The Transfer Will Cause No Enlargement in Use of the Original Water Right.*

Applicant entered their Exhibit "6" and explained it through the testimony of Dr. Charles Brockway. Applicant's Exhibit "6" establishes that in terms of maximum

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diversion rate, volume supplied by ground water, consumptive use of ground water and net loss of water to the aquifer, the transfer would utilize less water from the ground water resource than before the transfer. (T., pp. 73-74).

C. The Change is Consistent with the Conservation of Water Resources Within the State of Idaho.

The Applicants presented ample evidence that the transfer was consistent with practices of water conservation for the State of Idaho. Not only would there be less water used overall as a result of the transfer and the new dairy operation as compared to the existing row crop farming operation (see Part I.B immediately above), but Mark DeKruyf also testified that the dairy would be designed to devote the same water to multiple uses. (T., pp. 14 and 15). Mr. DeKruyf also testified that the dairy was designed to save the usage of water by using air cooled devices for cooling milk instead of water. (T., p. 14).

D. The Transfer Is in the Local Public Interest as Defined in I. C. § 42-203A(5).

In support of the contention that the transfer application would be consistent with the local public interest as defined by law, the Applicant introduced their Exhibit "8" which demonstrated the positive economic impact on the local economy of the new dairy facility.⁴ Additionally, Mark DeKruyf testified that the new employees required by the dairy would, for the most part, come from Jerome, Twin Falls and Gooding Counties. (T., p. 17). Mr. DeKruyf also testified that an application for the dairy livestock confinement operation as represented by Exhibit "7" had been approved by Jerome County authorities. (T., p. 9). Three local farmers provided letters indicating that their

⁴The testimony regarding nutrient management planning (discussed above in Part I.A at page 16) also supports the Applicant's public interest case.

receipt of nutrients in the form of manure from the dairy would be beneficial to their own agricultural operations. (Exhibits "9", "10" and "11"). Mark DeKruyf testified that as an experienced dairyman, he had managed his existing dairy to comply with the federal Clean Water Act for 20 years and that the new dairy would also be designed to comply with the requirements of the Clean Water Act, 33 U.S.C. §§ 1251-1387. (T., p. 17 and 18).

The Applicant also presented evidence that the facility would be designed and operated to contain or manage odors that would be generated from the facility. (T., p. 21). Mr. DeKruyf testified that if the flush system did not work for alleyways, that he was prepared to implement scraping manure as an alternative. (T., p. 36). His decision to change from the flush system to a scraping system may be warranted if neighbors complain about odors. (T., p. 37). The Protestant provided no evidence that the odor management controls proposed by the Applicant would not work.

James Etherington testified as a consultant for the Applicant in the field of waste water management, including odor control. He testified concerning an activated sludge system which had been proposed for the new DeKruyf Dairy and that it should control odor better than any existing system for dairies in the Magic Valley. (T., pp. 39-41). Mr. Etherington testified further that it was not a fair assumption that there would be odor problems at the DeKruyf Dairy (T., p. 43) and that Mr. DeKruyf would address issues of odor and nutrient management on his facility. (T., p. 44).

Mike Ihler, Protestant's witness, testified that if a dairy is properly managed and disposes of its waste then he had no problem with dairying. (T., p. 115). Mr. Halper, the Protestant, recognized that with intensive management, money and technology, the odor management system proposed by the Applicant could work. (T., pp. 122-23). Again, the

record is absent of any evidence that the odor management controls proposed by the Applicant would not work.

II. FINDING NO. 21 IN THE *AMENDED PRELIMINARY ORDER* DOES NOT SHIFT THE BURDEN OF PERSUASION TO THE PROTESTANT BUT INSTEAD RECOGNIZES THE LACK OF MATERIAL, RELEVANT EVIDENCE PRODUCED BY THE PROTESTANT AT THE HEARING.

Halper complains that Finding No. 21 of the *Amended Preliminary Order* demonstrates that the Hearing Officer placed the burden of proof on the Protestant. Although Finding No. 21, read alone, is somewhat unclear, the *Amended Preliminary Order*, read as a whole, makes it quite clear that the Department properly placed the burden of persuasion on the Applicant.

Finding No. 21 provides in full:

The Protestant did not show that the proposal of the Applicant will injure other water rights, will enlarge the use of water, is not in the local public interest, or is not consistent with the conservation of water resources within the State of Idaho.

At the outset, it should be noted that this is a Finding of Fact, not a Conclusion of Law (where one would expect the burden of proof to be allocated). Any ambiguity in this Finding is resolved by the Hearing Officer's detailed Conclusions of Law allocating the dual burdens of production and persuasion. Conclusions of Law Nos. 2-4.

Finding No. 21 merely shows two things: First, it reflects the fact that the Protestant does have a burden of production at some point. Second, it reflects the reality of the skimpy evidence produced at the hearing by the Protestant. Let us briefly review that evidence.

Protestant's Exhibit "A" consists of four e-mail communications. The Protestant produced no witness to sponsor the exhibit or explain their relevance. An examination of

Exhibit "A" discloses that it contains nothing which impacts on any issue relevant in the proceeding concerning the Applicant's proposed water right transfer.

The Protestant also introduced Exhibit "H" but made no effort to explain its relevance to the water transfer proceeding. There is nothing in Exhibit "H" which specifically discusses the dairy operation proposed by the Applicant or its impact. The conclusions and recommendations of the report contain a telling statement regarding the usefulness of the report in a water right transfer proceeding:

Land use activities, including agricultural activity and animal industry operations, have the potential to generate significant nitrogen loads, which if not managed properly, can impair ground water quality.

Exhibit "H," at 28 (emphasis added).

There is nothing in the exhibit to indicate that the Applicant's dairy operation would not be managed properly.

The report's limitations are further recognized by the following statement:

In order to assist in evaluating land use and water quality issues, the following activities are suggested

- A better estimate of cattle numbers is needed for the western part of the ESRP so that updated estimates of nitrogen input from manure sources can be prepared.
- Commercial fertilizer use in the same area should be tabulated to improve estimates of nitrogen input from this source.

Exhibit "H," at 31 (emphasis supplied).

In short, Exhibit "H" does not take into account the effects of nutrient management planning with respect to any dairy which is subject to those requirements. Nothing in Exhibit "H," or in the record as a whole, establishes that the specific dairy to be established by the Applicant would harm water resources or injure water rights. In fact,

since the record establishes that the goal of Nutrient Management Planning is to protect the surface and ground water resource from contamination by the very nutrients described in Exhibit "H" (See T., pp 48 and 49), the "proper management" deemed necessary by Exhibit "H" has been provided by the Applicant.

The Protestants also introduced into evidence its Exhibit "T", a petition filed by residents of Jerome, Twin Falls and Gooding County opposing establishment of the DeKruyf dairy.

The Petition addressed the LCO application pending before Jerome County. It did not address the water right transfer proceeding nor the criteria set out in I. C. § 42-222. The uncontradicted evidence in the record is that the LCO application was approved by officials of Jerome County (T., p. 9).

The transcript also contains verbal testimony from Mike Ihler and Lee Halper. None of this testimony provided any evidence, except in the most general, non-specific sense, that the dairy proposed by the Applicant would not be in the local public interest. The testimony discusses "cumulative impacts" from dairies in general and theories about what might happen if the facility was not managed properly. Neither witness produced any evidence that this facility would not be properly managed. (T., pp. 113, 114, 115, 118, 122, 123, 125).

The sum of the evidence produced by the Protestant led the Hearing Officer to find that the Protestant had failed to show that the I. C. § 42-222 criteria were not met.

III. THE DETERMINATION OF "LOCAL PUBLIC INTEREST" DOES NOT REQUIRE THAT THE IDWR SECOND GUESS REGULATORY POLICIES IMPLEMENTED BY OTHER AGENCIES.

A major premise of Halper's case is that the Department should have found the transfer of the two existing water rights (from irrigation to dairy use) inconsistent with the "local public interest."

In 1978, the Idaho Legislature added a "local public interest" test to the hurdles an applicant for a new water right must face. 1978 Idaho Sess. Laws ch. 306, § 1, pp. 767-69 (adding what is now I. C. § 42-203A(5)(e)). The Legislature offered little direct guidance as to what the term means, simply defining it as "the affairs of the people in the area directly affected by the proposed use." I. C. § 42-203A(5). Three years later, in 1981, the same "local public interest" review was made applicable to transfers of existing water rights. 1981 Idaho Sess. Laws, ch. 147 (amending I. C. § 42-222(1) to refer back to I. C. § 42-203A(5)(e)).

Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985), remains the key decision of the Idaho Supreme Court discussing the definition of the "local public interest" found at I. C. § 42-203(a)(5). The Idaho Department of Water Resources has enacted regulations expanding upon the definition of the term "local public interest" at least for appropriation cases. IDAPA 37.03.08.45.01(e). *Shokal* was an appropriation case. IDWR has not promulgated regulations which indicate that the term "local public interest" is different in transfer proceedings.

There is an obvious distinction between the facts in *Shokal*, where the Applicant sought to apply water from Billingsley Creek for the purposes of commercial trout raising, returning the water to the creek after being run through the fish raising operations, and the present case. Here the water in question was already subject to an appropriation for irrigation purposes. The pre-transfer use of water did not facilitate the

use of water for recreational, wildlife, fish or aesthetic purposes, and the inquiry as to whether the impact of the transfer on these elements as suggested by *Shokal* must necessarily be muted. In any event, there is no evidence in this record that the transfer would have any deleterious effect on fish, wildlife, recreational opportunities or aesthetics, and that part of the "local public interest" has no relevance in this case.

A new dairy operation in the State of Idaho must comply with many statutes and regulations. Where there is a point source discharge to surface waters (not the case here), dairy operations are required to comply with federal Concentrated Animal Feeding Operation ("CAFO") regulations enacted pursuant to the Clean Water Act. 40 C.F.R. § 122.23. (See discussion in Part VI.B.2 beginning on page 33 for why this requirement does not apply to the DeKruyf Dairy.)

The State of Idaho has its own statute dealing with water quality. (See I. C. § 39-101, *et seq.*) The Idaho Department of Agriculture ("IDA"), in close consultation with the Idaho Department of Environmental Quality ("IDEQ") and the United States Environmental Protection Agency ("EPA") has enacted regulations governing the design and construction of new dairies to insure compliance with the Clean Water Act and the protection of the quality of the waters of this State. IDAPA 02.04.14. The Idaho Department of Agriculture (acting through a four-party *Memorandum of Understanding* between and among EPA, IDEQ, IDA and the Idaho Dairymen's Association) has undertaken the primary inspection and enforcement responsibility of the foregoing provisions of law with respect to the design, construction and operation of dairies. (A copy of the *Memorandum of Understanding* is attached to this Brief as Schedule "A"). The Department of Agriculture also requires the production of and enforces Nutrient Management Plans for dairies. I. C. § 37-401; IDAPA 02.04.14. Nutrient Management has been implemented to further protect the waters of this State. (T., p. 48).

In *Shokal*, the Court recognized the inevitable interplay of governmental agencies when it comes to impacts upon the public from the use of waters of this state, as follows:

We ... add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet mandatory water quality standards.

Shokal, 109 Idaho 340-41, 707 P.2d at 451-52.

Thus, IDWR may require an applicant for a water right to be in compliance with environmental standards set by other agencies. (And the Department has done just that here. See conditions 1-12 at end of *Amended Preliminary Order*). However, the quoted language makes clear that the Department should not make up new regulatory standards, nor hear evidence on the need for new regulatory programs which the Legislature and other agencies with appropriate regulatory authority have not seen fit to create.

The *Shokal* Court summarized the division of responsibility among agencies this way:

In sum, we agree with the district court, Judge Smith, that Water Resources cannot issue a permit which would allow construction of a project violative of the laws regulating water quality. However, later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare.

Shokal, 109 Idaho at 341, 707 P.2d at 452.

There is no evidence in this record that the Applicant's dairy facility will be designed, constructed or operated in violation of existing requirements of the laws which regulate water quality in this state. The opposite is in fact true because the *Amended Preliminary Order* requires compliance with the law before the dairy operates. Paragraph 1 of the order portion of the *Amended Preliminary Order* provides:

The right holder shall design and construct the dairy facility in compliance with the requirements of the Idaho Department of Agriculture. Prior to construction of wells and diversion of water under this approval, the right holder shall provide evidence acceptable to the Department that the right holder has met the compliance requirements of the Idaho Department of Agriculture, including the disposal of solid waste from the dairy.

This portion of the order expressly recognizes the portion of the *Shokal* holding requiring compliance with existing water quality laws.

Further, the Department of Agriculture requires that a new dairy facility be inspected for construction standards, which are designed to protect the waters of this State, before operation of the dairy commences. IDAPA 02.04.14.010, *et seq.* The evidence in the record does not establish that the approval of the transfer would violate any law violating water quality. In such a case, the enforcement of laws regulating water quality should be left to the agencies who oversee them, as anticipated by *Shokal*. This Court should reject the Protestant's invitation for the IDWR to become the ombudsman

enforcer of all theoretical water quality issues involved with a new or changed water right.

This Court should also reject the Protestant's invitation to allow the IDWR to regulate air quality issues in a water transfer proceeding. As previously pointed out, there is no evidence in this record that the odor control measures proposed by the Applicant, to the extent those are deemed to be part of the 'local public interest', would be ineffective. The Idaho Department of Environmental Quality regulates air quality standards in this state already (see I. C. § 39-105 and the regulations at IDAPA 58.01.01) and odors specifically. IDAPA 58.01.01.775 to 58.01.01.776. *Shokal*, indicates that where there is no evidence that the issuance of a permit by IDWR would inevitably violate an existing law, it is not within the realm of the IDWR to "second guess" other agencies as to their enforcement of the law or, in effect, to have IDWR rewrite the law in a fashion more to the liking of Protestant.

IV. THE DEPARTMENT OF WATER RESOURCES CAN LAWFULLY TAKE NOTICE OF THE KIND OF INFORMATION IDENTIFIED IN FINDING NO. 19 OF THE AMENDED PRELIMINARY ORDER.

Rule 602 of the Rules of Procedure before the Idaho Department of Water Resources provides as follows:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed.

Parties must be given an opportunity to contest and rebut the facts or material officially noticed. ...

IDAPA 37.01.01.602.

Rule 600 of the Rules of Procedure before the Idaho Department of Water Resources also provides in pertinent part:

The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600.

At the conclusion of the hearing in this proceeding, the Hearing Officer announced as follows:

I need to take official notice of a few items. I will notice the Department's file for application for Transfer No. 5597. I will notice past holding to the Department as those holdings could have some bearing on this particular matter. I will notice all Department Water Right records. I will notice observation wells data including ground water quality data, water measurements and stream flow records, that type of information that is readily available in reports of the USGS reports, etc. I will notice well driller reports, commonly called well logs.

(T., p. 129)

The information contained in Finding of Fact 19 is within the scope of the material officially noticed by the hearing officer. The data demonstrates that nitrate levels in the ground water in the vicinity of the Protestant's well have not been on the increase in recent years, despite Protestant's assertions to the contrary.

V. THE AMENDED PRELIMINARY ORDER MEETS THE REQUIREMENTS OF I. C. § 67-5248.

Halper next complains that the Hearing Officer's order was not sufficiently detailed. The Idaho Administrative Procedure Act sets the standard for what must be included in an order:

- (1) An order must be in writing and shall include:
 - a. A reasoned statement in support of the decision. Findings of fact, as set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.
 - b. A statement of the available procedures and the applicable time limits for seeking reconsideration or other administrative relief.
- (2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.
- (3) All parties to the contested case shall be provided with a copy of the order.

I. C. § 67-5248.

In short, the Department is required to explain its conclusion in sufficient detail to demonstrate that it applied the correct analysis under applicable statutory and case law. The typically lay hearing officer is not required to address each of the parties evidentiary points nor to argue and defend the agency's case. To do that would require findings and conclusions many times more elaborate than is the current practice.

Here, the agency touched all its bases. It did so without fanfare or oratory, but neither is required.

Finding of Fact No. 21 of the *Amended Preliminary Order* states:

21. The Protestant did not show that the proposal of the Applicant will injure other water rights, or enlarge the use of water, is not in the local public interest or is not consistent with the conservation of water resources within the state of Idaho.

That finding is preceded by other detailed findings of what evidence the Applicant did show to substantiate those four items under I. C. § 42-222 criteria. These findings all support the conclusion of the Hearing Officer that the I. C. § 42-222 criteria were met. In Finding of Fact No. 21, the Hearing Officer refers to the evidence produced by the Protestant at the hearing. A summary of that evidence has been earlier discussed in Section II of this Brief. Finding of Fact No. 21 is a recognition by the Hearing Officer that he considered that evidence but did not find it sufficient to overcome the evidence provided by the Applicant that the I. C. § 42-222 criteria had in fact been met. Nothing in I. C. § 67-5248 requires the Hearing Officer to set forth each and every item of evidence produced by the Protestant and discuss exactly why it was rejected. The decision of the Hearing Officer logically flows from the findings. I. C. § 67-5248 required nothing more. Of course, the Court still must review the record to see if there is substantial evidence to support the findings that were entered. As pointed out earlier, there is the required level of supporting evidence in the record.

VI. THE CLEAN WATER ACT HAS NO APPLICABILITY TO THIS WATER RIGHTS PROCEEDING.

A. *The Protestant's Legal Theory Is Difficult to Decipher.*

The last portion of the Petitioner's brief is given over to a novel claim under the heading "Violation of Statutory Provisions." Although the Protestant never says what

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statutory provisions he is referring to, apparently, this is a reference to Applicant's alleged violation of the Clean Water Act, 33 U.S.C. §§ 1251-1387.⁵

The Petitioner promptly switches gears, however, with the allegation that the Applicant's alleged failure to comply with federal law somehow pushes IDWR beyond its statutory authority:

IDWR's approval of the transfer in this case is beyond its statutory authority to the extent that the approval will allow the introduction of pollutants into the Snake River, a water of the United States protected by the Clean Water Act..

Petitioner's Opening Brief at 9.

The Petitioner never explains what statutory authority has been exceeded. Nonetheless, Halper goes on to insist (again, without explanation) that the Applicant should have applied for an NPDES permit. *Petitioner's Opening Brief* at 9.

Although the Petitioner never quite explains his theory, apparently it is intended as a distinct legal theory from the "local public interest" issues addressed above. The idea seems to be that the very existence of a permitting requirement under the Clean Water Act defeats IDWR's "statutory authority" to act.

In the discussion below, the Applicant takes issue with the Petitioner's conclusion for the following reasons:

⁵The Clean Water Act has three primary regulatory mechanisms. The first is Section 402, which governs "point sources" that discharge pollutants into waters of the United States (*i.e.*, surface waters and associated wetlands). Clean Water Act, 33 U.S.C. § 1342. This is also known as the National Pollution Discharge Elimination System ("NPDES"). This is the program which Halper alleges is implicated.

Section 404 (Clean Water Act, 33 U.S.C. § 1344) establishes a permitting program for "dredge and fill" activities. Since these activities often occur in wetlands, a section 404 permit is sometimes referred to a wetlands permit. This section has nothing to do with this litigation, however.

Finally, Section 401 (Clean Water Act, 33 U.S.C. § 1341) deals with state certification (that is, approval) of federal permits. Since no Section 402 permit is required here, Section 401 is not triggered. In any event, Halper has not alleged a violation of Section 401.

- (1) The basic premise is false; that is, the Applicant is not required to obtain an NPDES permit.
- (2) The issue is an afterthought, improperly raised on appeal.
- (3) Even if an NPDES permit were required, the allegation should be directed to a proper (presumably federal) court after exhaustion of federal administrative remedies.
- (4) The Wallop Amendment to the Clean Water Act expressly directs that the Clean Water Act not be used as a tool to upset state water allocations.
- (5) The IDWR has no statutory authority or expertise to act in the area.

We discuss each of these points in turn.

B. The Clean Water Act Only Applies to Discharges to Surface Water.

1. There Is No Evidence in the Record of a Hydrological Connection to the Snake River.

Many people mistakenly assume that the federal Clean Water Act applies to all natural water bodies. It does not. The United States Congress carefully delineated its scope, limiting its applicability to most surface waters and some wetlands.⁶

⁶Technically speaking, the NPDES program applies to "any addition of any pollutant to navigable waters from any point source". Clean Water Act § 502(12), 33 U.S.C. § 1362(12). "Navigable waters," in turn, is defined to include "waters of the United States." Clean Water Act § 502(7), 33 U.S.C. § 1362(7). At one time, it was contended by some courts and commentators that this was odd phraseology was simply a shorthand reference intended to encompass all waters within the reach of the Commerce Clause. (This would follow the pattern of the civil rights laws.) That broad view was squarely rejected by the United States Supreme Court in its most recent decision on the subject. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159, 121 S. Ct. 675 (2001) (see discussion in Part VI.B.5 at page 39.) It is now clear that the jurisdictional reach of the Clean Water Act is strictly limited to certain surface waters and some closely associated wetlands. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The DeKruyf Dairy does not discharge pollutants into any surface water or wetland.⁷ The only argument Halper can make that the Clean Water Act applies would be that the DeKruyf Dairy discharges pollutants into ground water that is "hydrologically connected" to a surface water, such as the Snake River. However, this contention is false.

The record contains no evidence of any connection between discharges of nutrients at the DeKruyf Dairy and discharges of nutrients into the Snake River. There is some minimal evidence of a distant, general hydrological connection,⁸ but there is no evidence whatsoever that nutrients (*i.e.*, the pollutants) applied at the Dairy would ever reach the Snake River. The closest the Petitioner got to that was an admission by DeKruyf's expert that a tiny fraction of nutrients applied at the site might migrate a few feet to the root zone. No evidence, however, takes the nutrients on the three and a half mile odyssey from the root zone to the Snake River.⁹ The absence of such evidence is

⁷In order to establish Clean Water Act jurisdiction, it would also necessary to show that the DeKruyf Dairy is a "point source." (See footnote 8 at page 33.) There is no evidence in the record to support this finding, either.

⁸That evidence, however, is insufficient to establish any hydrological connection at the location of the DeKruyf Dairy. General evidence that water in the Eastern Snake Plain Aquifer tends to flow in a particular direction does not support the conclusion that water put into a particular sub-aquifer will ever reach the Snake. The Court is entitled to take judicial notice of the fact that many aquifers are composed of many layers and are often separated by impermeable material. Moreover, the distance between the dairy and the Snake River (over three miles) means that the water connection, if any, would have to be measured in geological time.

⁹Nor is there any basis to simply "assume" that the nutrients will follow the hydrological flow and make their way unaltered and undiluted to the Snake River. There is no evidence that the small quantity of nutrients applied pursuant to mandated "best management practices" will not break down as they are filtered and diluted as they pass through what may be decades of passage through the Eastern Snake Plain Aquifer.

fatal to Protestant's claim that the Clean Water Act applies, no matter what legal standard is applied.¹⁰

2. EPA's Current CAFO Rule Applies Only Where There Is a Discharge to Surface Water.

In the previous section we noted that the Clean Water Act applies only to surface water and wetlands, not ground water. EPA's implementing regulation for CAFOs is consistent with that statutory limitation.¹¹ 40 C.F.R. § 122.23.

Indeed, the rule is quite straightforward. For the rule to apply, EPA must determine that the facility is a "significant contributor of pollution to the waters of the United States." 40 C.F.R. § 122.23(c)(1). As pointed out above (footnote 6 at page 32), this term of art refers to surface water and associated wetlands.

Any doubt about that is dispelled by the CAFO general permit¹² issued for Idaho in 1997 (the "General Permit").¹³ 62 Fed. Reg. 20,177 (Apr. 25, 1997). The General Permit states as follows, in pertinent part:

C. How to Determine if Your Animal Feeding Operation Is a CAFO?

...

¹⁰See *Washington Wilderness Coalition v. Hecla Mining*, 870 F. Supp 983, 990 (E.D. Wash. 1994) (holding that the Clean Water Act covers hydrologically connected ground waters, but requiring a demonstration that "pollutants from a point source affect surface waters" and that "pollutants must be traced from their source to surface waters.").

¹¹This section addresses only the current EPA CAFO rule. The Clinton proposed rule discussed infra (Part VI.B.4 at page 37) is not consistent with the current CAFO rule.

¹²If, contrary to this analysis, the DeKruyf Dairy were required to obtain an NPDES permit, such a permit may be had for the asking. All that is required is to file a "notice of intent" with the federal EPA, and the Dairy would be covered by this "general permit."

¹³A general permit is a set of general conditions under which any covered CAFO may file a "notice of intent" to operate. The idea is to simplify the permitting process.

7. Does your facility discharge directly into rivers, streams, creeks or other waters of the United States?
If yes, your facility is a CAFO. If no, proceed to next question.
8. Does your facility discharge through a man-made device such as a pipe, ditch, or field overflow from land application, into a river, stream, creek or other waters of the United States?
If yes, your facility is a CAFO. If no, your facility is not a CAFO.

Id. at 20,182.

We are left wondering what part of “no” is unclear to the Protestant. If Halper imagines that there is still wiggle room in this, the following discussion should put that to rest.

3. ***The ConAgra Case Is the Law in Idaho, and Squarely Rejects the Application of the Clean Water Act to Ground Water.***

The question of whether a mere “hydrological connection” to surface water is sufficient to trigger the Clean Water Act has split the circuits.¹⁴ However, the law in the Idaho District of the Ninth Circuit is well settled. As Halper himself concedes (*Petitioner’s Opening Brief* at 11), the applicable federal law governing Idaho firmly establishes that the Clean Water Act does not apply to any ground water, even when it is hydrologically connected to surface water. *United States v. ConAgra, Inc.*, 1997 LEXIS 21401 (D. Idaho, Dec. 31, 1997) (Magistrate Judge Boyle presiding in Boise, Idaho) (copy attached as Schedule “B” hereto).

¹⁴Again, the Applicant does not concede that there is any hydrological connection here. See footnote 8 at page 33.

The *ConAgra* court could not have stated the matter more clearly:

This Court agrees with the well reasoned and scholarly opinion of the Oregon district court, and for the same reasons stated therein concludes that discharges of pollutants into groundwater are not subject to the CWA's NPDES permit requirements even if that groundwater is hydrologically connected to surface water. Accordingly, this Court does not have jurisdiction over the violations alleged by Plaintiff of discharges to the surface water of Indian Creek via groundwater.

ConAgra at *18 (referring to *Umatilla Water Quality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Ore. 1997)) (emphasis added).

The *ConAgra* court reviewed the Oregon District Court's *Umatilla* decision in detail. Judge Boyle found strong evidence in the plain language of the Clean Water Act, its legislative history, and EPA's own interpretation of the Clean Water Act. The court first noted that Congress knew how to include ground water in the Clean Water Act's provisions when it wanted to.¹⁵ In telling contrast, the permitting provisions of the Clean Water Act never mention ground water. Based on the legislative history and EPA interpretations below, this was not a mistake. Ground water was deliberately left out.

¹⁵For example, the court looked at the planning provisions of 33 U.S.C. § 1252(a), where Congress commanded that:

the Administrator shall prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.

See *ConAgra* at *12 (quoting this provision) (emphasis added).

Congress also wished to establish a surveillance system for surface and underground waters: [The Administrator shall] establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans . . .

33 U.S.C. § 1254(a)(5). See *ConAgra* at *12-13 (quoting this provision) (emphasis added).

ConAgra similarly relies on unambiguous, subsequent legislative history. Both a Senate Committee and the entire House rejected amendments to the Clean Water Act that would have brought ground water within the act's permitting and enforcement provisions.¹⁶ Congress was aware of the issue and decided, wisely, to leave the regulation of ground water to the states.

Finally, *ConAgra* relies on the fact that EPA itself has never formally interpreted the Clean Water Act to apply to ground water. For example, EPA's Office of General Counsel advised EPA in 1973:

Section 402 [33 U.S.C. § 1342] authorizes the Administrator to issue a permit "for the discharge of a pollutant." Under § 502(12) the term "discharge of a pollutant" is defined so as to include only discharges into navigable waters (or the contiguous zone of the ocean). Discharges into ground waters are not included. Accordingly, permits may not be issued,, and no application is required, unless a discharge into navigable waters is proposed or is occurring.

ConAgra at *16-17 (quoting *Opinion*, Office of General Counsel (December 13, 1973), as reprinted in *Exxon Corp. v. Train*, 554 F.2d 1310, 1320 n. 21 (5th Cir. 1977)) (emphasis added).¹⁷

In sum, the federal district court for Idaho thoroughly reviewed the issue and ruled unequivocally that the Clean Water Act does not cover hydrologically connected ground water.

¹⁶S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); U.S.Code Cong. & Admin. News 1972, p. 3668, 3749; 118 Cong. Rec. 10,667, 10,669 (1972). See *ConAgra* at 13-15.

¹⁷EPA has twice promulgated regulations restricting its authority over ground water in accordance with this opinion. 38 Fed. Reg. 13,528 (May 22, 1973), codified as 40 C.F.R. § 125.26(a)(1) (1977); 44 Fed. Reg. 32,854, 32,870 (June 7, 1979).

4. The Clinton Administration's Eleventh Hour Proposed CAFO Rule Provides No Reason to Believe ConAgra Will Be Overturned.

Halper pitches his hopes for getting past the *ConAgra* decision on a desperate long bomb launched by EPA in the waning days of the Clinton Administration. Literally eight days before President Bush took office, the Clinton Administration issued a proposed rule which would have dramatically extended the agency's authority under the Clean Water Act to regulate CAFOs. 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001). This rule was one of an unprecedented flood of new and proposed environmental regulations which swelled the *Federal Register* during those first days of 2001.

In the proposed CAFO rule, EPA reversed longstanding agency policy and ignored thirty years of clear congressional directives. It sought to regulate, for the first time, discharges from CAFOs to ground waters that are hydrologically connected to "nearby surface waters." 66 Fed. Reg. at 3015. Thus, the proposed rule constitutes a direct repudiation of *ConAgra* and supporting cases.¹⁸

However, the proposed rule is wrong. It appeared in the Federal Register only three days after the United States Supreme Court decided *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001).

Not surprisingly, the proposed rule does not discuss the impact of *SWANCC*. This is a major problem for the rule, because *SWANCC* explicitly overruled the major premise underlying the only cases supporting the rule. In the next section (Part VI.B.5 at page 39) we discuss the devastating impact *SWANCC* has on Petitioner's argument.

¹⁸Each and every one of the authorities relied on by EPA was expressly rejected by the court in *ConAgra*. Compare 66 Fed. Reg. at 3,015-18 with *ConAgra* at *9-18. In other words, EPA offered nothing new to inform the interpretation of the Clean Water Act; it simply offered a blanket rejection of settled federal law in Idaho.

This regulation is not going anywhere fast. The Bush Administration has held up consideration of the proposed rule. 66 Fed. Reg. 19,747 (Apr. 17, 2001) (extending the public comment period until July 30, 2001).

Even if this proposed rule somehow were adopted and successfully defended, it would not apply to this dairy. The proposal would only allow EPA to determine, on a case-by-case basis, whether a “direct” hydrological connection (including passage of “pollutants” through the aquifer) exists between a particular CAFO and a particular navigable water body. 66 Fed. Reg. at 3,017. As noted above, there is no evidence in the record here of any such connection.¹⁹

In sum, the proposed rule is wrong. It has been put on regulatory hold. It is not a rule yet (and, until then, has no legal effect). Finally, it would not apply to DeKruyf even if it were a final rule.

For Halper to premise his argument on the hope that Bush Administration will resurrect, expand and defend a startling, last-minute effort by the Clinton Administration to overturn thirty years of clear congressional directives — the legal support for which has now been repudiated by the U.S. Supreme Court — is, to say the least, a stretch.

5. *SWANCC Undermines the Cases (In Other Jurisdictions) That Have Held That the Clean Water Act Applies to Ground Water Discharges.*

¹⁹Moreover, the CAFO Rule (like the Clean Water Act) expressly requires that there be a “discrete conveyance” of pollutants for the CAFO in order to be a “point source” subject to regulation. The record in this case contains no evidence of a discrete conveyance. To the contrary, the evidence is that nutrients would be dispersed throughout the site, and be contained pursuant to “best management practices.” This describes a classic “non-point source” not subject to NPDES regulations. *See generally* 33 U.S.C. § 1329.

Petitioner contends that the majority of cases support his position that the Clean Water Act covers hydrologically connected groundwater.²⁰ While that proposition was dubious to begin with,²¹ *SWANCC* vigorously undermines the very cases on which Petitioner and Clinton's proposed CAFO rule rely.

²⁰Even the so-called "pro-hydrological-connection" cases, however, require a very direct hydrological connection — more than physically exists in this case. For instance, many upheld jurisdiction only in the context of groundwater "nearby" or "adjacent to" surface waters. *E.g.*, *Sierra Club v. Colorado Refining Company*, 838 F. Supp. 1428, 1430 (D. Colo. 1993) (discharge to nearby creek alleged); *Williams Pipe Line v. Bayer Corp.*, 964 F. Supp. 1300, 1320 (S.D. Iowa) (oil in ground water affected nearby wetland swamp); *Washington Wilderness Coalition*, 870 F. Supp. at 989 (allegation of discharge to nearby surface waters through ground water). In our case, the ground water surrounding the DeKruyf Dairy is three and a half miles away from the nearest surface stream (the Snake River). Thus, even the cases Halper relies on do not really help him.

²¹The best that can be said from Protestant's standpoint is that the case law is split. Two of the three circuits to address the issue have held that the Clean Water Act does not cover hydrologically connected groundwater. *Cf. Rice v. Harken Exploration Co.*, 2001 WL 422051 (5th Cir., Apr. 25, 2001) (decided under an identical definition of "navigable waters" in the Oil Pollution Act, 33 U.S.C. §§ 2701, *et seq.*) and *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-66 (7th Cir. 1994), *cert. den.* 513 U.S. 930 (1994) *with Quivera Mining Co. v. U.S. EPA*, 765 F.2d 126, 129 (10th Cir. 1985), *cert. den.* 474 U.S. 1055 (1986). *See also Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1453-54 (1st Cir. 1992) (upholding Army Corps of Engineers decision not to analyze ground water impact on wetlands). Of the district court cases supporting Protestant's position, several were within the Tenth Circuit and rely on *Quivera Mining* or other Tenth Circuit case law. *See Friends of Santa Fe County v. Lac Minerals, Inc.*, 892 F. Supp. 1333, 1357 (D. N.M. 1995); *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428, 1433-34 (D. Colo. 1993). Within the Ninth Circuit, district courts are nearly evenly split. As discussed, the District of Idaho has found no application of hydrologically connected ground waters, *see ConAgra* at *6-*19, and is joined by the District of Oregon. *Umatilla*, 362 F. Supp. at 1318-22; *but see Friends of the Coast Fork v. County of Lane*, 1997 U.S. Dist. LEXIS 22705 (D. Or. Jan. 3, 1997) (magistrate decision finding that NPDES permit was required, implicitly overruled by *Umatilla*). The Western District of Washington and the Eastern District of California, on the other hand, have held that the Clean Water Act does cover hydrologically connected ground waters. *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 990 (E.D. Wash. 1994); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1195-96 (E.D. Cal 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995), *cert. den.* 516 U.S. 807 (1995). Other district courts are split. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F.Supp. 1300, 1319-20 (S.D. Iowa 1997); *Kelley v. United States*, 618 F. Supp 1103, 1106-07 (D.C. Mich. 1985).

SWANCC was a case about wetlands regulation. In short, the Supreme Court held that the Army Corps of Engineers (the "Corps") did not have authority to regulate isolated wetlands pursuant to Section 404 of the Clean Water Act. Section 404 regulates the discharge of dredged or fill material into the "navigable waters," exactly as Section 402 (the permitting section) regulates the discharge of pollutants into the navigable waters.

The Corps had claimed jurisdiction over the isolated wetlands pursuant to what is known as the "Migratory Bird Rule." This rule had asserted jurisdiction on the basis that migratory birds need to use the isolated wetlands, and those birds in turn affect interstate commerce in the form of bird-watching, hunting and so on. The Supreme Court rejected the Migratory Bird Rule as a basis for jurisdiction.

The Supreme Court clarified and reinforced the limitation in its earlier decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the Court had found Corps jurisdiction over wetlands that were immediately adjacent to a navigable waterway. In contrast, the Court found in *SWANCC* that the wetlands in question there had no "significant nexus" to a navigable waterway, and therefore fell outside the reach of the Clean Water Act.

This holding, by itself, places Petitioner's reading of the Clean Water Act in serious jeopardy. *SWANCC* at least infers that, if hydrologically connected waters are part of the navigable waters, the connection had better be very close and very direct (like the adjacent wetlands in *Riverside Bayview*). It is impossible to read *SWANCC* and suppose that a hypothetical ground water connection three and a half miles away — with ground water movement probably measured in decades or more — is sufficient to confer jurisdiction.

Even more importantly, however, *SWANCC* explicitly holds that Clean Water Act jurisdiction does not extend as far as the Commerce Clause permits. The Court states:

Permitting respondents to claim federal jurisdiction over ponds and mudflats falling with the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this matter, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . ."

SWANCC at 121 S. Ct. at 684 (citations omitted).

Rather than imposing a radical readjustment, the Court found that the Clean Water Act continues Congress' traditional jurisdiction over navigable waters, leaving ground water to regulation by the states.

This holding is devastating to Petitioner's claim. Virtually every case (all of which are outside the Ninth Circuit) finding EPA jurisdiction over hydrologically connected wetlands is premised on the assumption that Congress intended jurisdiction under the Clean Water Act to extend as far as the Commerce Clause permits.²² This premise is now demonstrably false. There is simply no way EPA could now justify regulating a source that is over three miles away from surface water.

Within the last few weeks, there have been a number of cases, interpreting *SWANCC*. For example, the Fifth Circuit confirmed that *SWANCC* represents a sea change in the scope of Clean Water Act regulation.²³ *Rice v. Harken Exploration Co.*,

²²*Quivera Mining*, 765 F.2d at 129; *Friends of Santa Fe County*, 892 F. Supp. at 1355; *Washington Wilderness Coalition*, 870 F.Supp. at 989; *Colorado Refining*, 838 F. Supp. at 1433.

²³Then again, one might say that *SWANCC* reflects no change at all, but merely brings to an end the speculation and theories aimed at expanding the jurisdiction of the Clean Water Act beyond its original intent. A quiet after the storm is also a sea change.

2001 WL 422051 (5th Cir. April 25, 2001), interpreted the term “navigable waters” under the Oil Pollution Act, which defines the term identically to the Clean Water Act. The court held navigable waters do not include hydrologically connected ground waters. The court relied heavily on *SWANCC*, noting that the Supreme Court has recently “limited the scope of the CWA.” *Id.* at *3-4. Based in part on the Supreme Court’s direction in *SWANCC*, the Fifth Circuit left no doubt that navigable waters are just that:

Accordingly, we hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA.

Rice at *7.

C. Because the Clean Water Act Issue Was Not Raised Below, It May Not Be Raised on Appeal.

We have addressed the merits of the Clean Water Act claim in the preceding section, because the merits are clear. We do not wish to give the appearance of hiding behind a procedural technicality. However, it is not necessary for the Court to reach the merits. The discussion of Petitioner’s Clean Water Act claim may begin and end with the observation that he has raised it too late. Neither Halper, his witnesses, nor his counsel ever mentioned the Clean Water Act in their pleadings, their presentation of evidence, nor their argument to the IDWR.

This is readily confirmed by reference to Finding of Fact No. 7 which identifies each of the four issues raised by the Petitioner at the hearing. *Record* at 89. None of these remotely suggests this issue raised on appeal with respect to the Clean Water Act. Halper has not sought reconsideration or otherwise challenged this finding.

The law in Idaho is crystal clear that a legal argument or claim must first be raised first before the administrative agency. For instance, in *Balser v. Kootenai County Bd. of Comm'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986), a disappointed zoning applicant raised for the first time on appeal to the district court the argument that zoning ordinance in question was not properly adopted. The Supreme Court chastized the district court for entertaining the argument: "It is by now a well established rule in Idaho that review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issue presented for the first time on appeal. *Balser*, 110 Idaho at 40, 714 P.2d at 9 (citing a line of Idaho cases).

The Supreme Court has continued to hammer away on this point. "It is axiomatic that an issue not raised below will not be considered for the first time by this Court." *Butters v. Hauser*, 125 Idaho 79, 82, 867 P.2d 953, 956(1993). "The rule applies equally to contested cases in administrative settings as well as proceedings before the courts." *Knight v. Dept. of Insurance*, 124 Idaho 645, 649, 862 P.2d 337, 341 (Idaho App. 1993).

The rule stated above is black and white. The only gray area is found where a party raises an issue below, but without the proper formalities. *Manookian v. Blaine County*, 112 Idaho 697, 700, 735 P.2d 1008, 1011 (1987). Halper cannot fit into this exception. The Clean Water Act was mentioned in testimony offered by the Applicant, in the context of identifying all the procedural hoops which had been satisfied. However, the fact that Applicant mentions something as a non-issue does not equate to a claim — even an "informal claim" — made by the Petitioner.

In sum, this issue was not raised by the Petitioner below. That should end the matter.

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D. The Petitioner Is Asking for Relief Unavailable at this Court.

The Petitioner would have the IDWR enforce the Clean Water Act as an adjunct to its water rights analysis. The Court does not have jurisdiction to do so. The Clean Water Act provides a clear remedy for citizens aggrieved by any failure of the federal government or any state to enforce the Clean Water Act. The Act permits the filing of a "citizen suit" to redress any "violation of ... an effluent standard or limitation under this chapter" or any "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a).

Nothing in Idaho law indicates that the Idaho Legislature intended to duplicate Clean Water Act review by requiring some sort of parallel public review of federal water quality standards within the transfers. In fact, the Legislature was quite explicit that it would not permit any regulation beyond that required under the Clean Water Act and that IDEQ would make that determination for the State. I. C. § 39-3601.²⁴

²⁴Idaho's Surface Water Quality Act, I. C. §§ 39-3601 to 39-3639, governs the protection of surface waters in Idaho (i.e. the "waters of the United States" described in Petitioner's brief). Idaho Code Section 39-3601 declares the Legislature's intent in passing the Surface Water Act:

The legislature, recognizing that surface water is one of the state's most valuable natural resources, has approved the adoption of water quality standards and authorized the administrator of the division of environmental quality of the department of health and welfare in accordance with the provisions of this chapter, to implement these standards. In order to maintain and achieve existing and designated beneficial uses and to conform to the expressed intent of congress to control pollution of streams, lakes and other surface waters, the legislature declares that it is the purpose of this act to enhance and preserve the quality and value of the surface water resources of the state of Idaho, and to define the responsibilities of public agencies in the control, and monitoring of water pollution, and, through implementation of this act, enhance the state's economic well-being. In consequence of the benefits resulting to the public health, welfare and economy, it is hereby declared to be the policy of the state of Idaho to protect this natural resource by monitoring and controlling water pollution; to support and aid technical and planning research leading to the control of water pollution, and to provide financial and technical assistance to municipalities, soil conservation districts and other agencies in the control of water pollution. The director, in cooperation with such other agencies as may be appropriate, shall administer this act. It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this act not impose requirements beyond those

We believe the Legislature's statement in Section 39-3601 is jurisdictional.²⁵ The Legislature could not have intended to allow courts to apply a different, vague standard to water rights applications that is not required under the Clean Water Act. In each case where the Department or a Court addressed this standard, there would be the opportunity for regulation more stringent than the Clean Water Act. Further, any review under the public interest standard becomes pointless. The "public interest" question becomes simply whether the applicant has obtained necessary approvals from EPA and IDEQ. Any determination contrary to these agencies would be more stringent than the Clean Water Act requires.

of the federal clean water act.

I. C. § 39-3601 (emphasis added).

²⁵Section 39-3601 plainly establishes two points: 1) that IDEQ is the primary agency in charge of water quality protection, and 2) that Idaho law permits no more stringent water quality protection limits than federal law requires. Section 39-3601 places the responsibility for water quality protection on IDEQ, which may act "in cooperation with other agencies as may be appropriate"

IDEQ's cooperation with the Idaho Department of Agriculture ("IDA") in implementing the dairy waste program is the prime example of how the cooperation process works. In delegating certain responsibilities under the dairy waste program, IDEQ, IDA and others entered into a specific memorandum of understanding defining who was to do what. In stark contrast, no such memorandum exists with IDWR, and there simply is no formal cooperative relationship between IDEQ and IDWR on the water quality matters at issue in this case.

Similarly, Section 39-3601 is clear that Idaho law cannot impose more stringent limitations on discharges than federal law requires. This requirement is impossible to reconcile with Protestant's contention that IDWR should undertake an undefined public interest or statutory analysis as to the water quality impacts of a water rights application. If IDWR's analysis causes it to impose more stringent requirements than EPA or IDEQ would require, it violates Section 39-3601. If it imposes the same or lesser requirements, IDWR's action becomes unnecessary and duplicative. We note that the legislature enacted Section 39-3601 long after the Idaho Supreme Court decided *Shokal*, so the court's analysis in *Shokal* is not informed by and does not address the stringency issue in Section 39-3601.

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E. The Wallop Amendment Preserves the Separate Integrity of State Water Law and Allows the Department to Proceed with this Transfer Unfettered by the Clean Water Act.

At the time of the adoption of the Clean Water Act, there was considerable controversy over whether the Act might be used to undermine or interfere with the allocation of water rights under state law (just as the Petitioner is seeking to do here). As a consequence, Congress adopted the Wallop Amendment (named after its sponsor, Senator Wallop of Wyoming) in 1977 to ensure that this not occur. The Amendment provides:

It is the policy of Congress that the authority of each State to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

Pub. L. No. 95-217 § 5(a), 91 Stat. 1567 (1977) (codified at Clean Water Act § 101(g), 33 U.S.C. § 1251(g)).

There have been a number of cases over the years addressing the Wallop Amendment. Throughout these decisions, the message has been consistent — as clear and simple as the language of the amendment itself:

The Clean Water Act addresses environmental concerns within its precisely defined and highly structured regulatory process. It is a complicated process, involving multiple federal and state agencies, with many regulatory tentacles. But when it comes to the allocation of state water rights, the Clean Water Act's tentacles are cut off by the Wallop Amendment. There is no authority under the Act to alter the outcome of a state water rights allocation.

On the other hand, the Wallop Amendment only goes so far. In several instances, plaintiffs have tried unsuccessfully to hide behind their state water rights, employing the Wallop Amendment as a shield against federal environmental regulation. Each time this has failed. Federal courts have made it clear that the Wallop Amendment does not excuse a person from compliance with the Clean Water Act, even where the result may be an indirect impairment of the person's ability to exercise his or her state water rights.²⁶

Despite this limitation, the Wallop Amendment means something. It means something very important. It is a clear, two-word message regarding state water allocation: "hands off."

This is consistent with what Senator Wallop himself said about his own measure:²⁷

²⁶For example, in *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985), the Tenth Circuit rejected an argument by an irrigation district planning to construct an irrigation dam that it did not need to obtain a "section 404 permit" under the Clean Water Act, even though such a permit might be denied or conditioned on the basis of flow conditions (thereby arguably, "impairing" the district's water rights). The Tenth Circuit noted that the Wallop Amendment was "only a general policy statement, 'which cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose.'" *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) (second appeal) (quoting *Connecticut Light and Power Co. v. FPC*, 324 U.S. 515 (1945)).

A federal court in Alabama recently addressed the Wallop Amendment in *Water Works & Sewer Board of the City of Birmingham v. U.S. Department of the Army, Corps of Engineers*, 983 F. Supp. 1052 (N.D. Ala. S.D. 1997): "As is clear from the above, the Wallop amendment was meant to prevent an entity, such as the Water Works, that has found itself unable to prevent reallocation of water resources under state law to use the Corps' permitting process to block the allocation on the ground that the allegedly aggrieved entity was somehow a better water source." Likewise, Halper should not be allowed to use the Clean Water Act as an excuse to re-structure the state water allocation process.

See also, *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp.486, 493 (D. Colo. 1996), in which the federal court reminded the parties that the Wallop Amendment requires an "accommodation" between federal environmental concerns and state water allocation, with each operating in their respective spheres.

²⁷"As the legislation's primary sponsor, his remarks are entitled to substantial weight." *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).

The requirements of [Clean Water Act] permits may incidentally affect individual water rights It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any are prompted by legitimate and necessary water quality considerations. This amendment is an attempt to recognize the historic allocation rights contained in State constitutions. It is designed to protect historic rights from mischievous abrogation by those who would use the act, designed solely to protect water quality and wetlands, for other purposes.

3 *Legislative History of the Clean Water Act of 1977* at 532 (Senate Debate, Dec. 15, 1977) (cited in *United States v. Akers*, 785 F.2d at 821, and *Water Works*, 983 F. Supp. at 1078-79) (emphasis supplied).

In other words, although the Wallop Amendment is not a trump card which exempts one from complying with federal law, neither is the federal Clean Water Act a trump card which can be used to independently alter the outcome of state water proceedings.

Yet, Halper is using the Clean Water Act in exactly the way which Senator Wallop sought to halt. Halper is saying something which amounts to this:

Even though I can't quite put my finger on it, I think there might be some sort of federal environmental permitting requirement applicable here. Consequently, even though the Department of Water Resources has no authority or expertise to evaluate this, let's go ahead and flat out deny the Applicant's state water right, irrespective of how that permitting process ultimately plays out.

This is exactly the sort of "mischievous" reasoning Senator Wallop warned of. It is exactly what the Wallop Amendment prohibits.

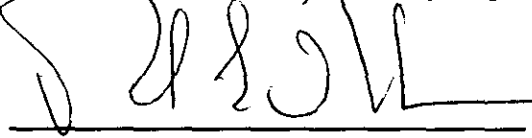
Consequently, this Court should not entertain Halper's invitation to alter the allocation of state water rights on the basis of a vague reference to federal Clean Water Act requirements.

F. The IDWR Has No Statutory Authority or Expertise to Take Regulatory Actions on the Basis of Clean Water Act Requirements.

There is good reason that the Wallop Amendment protects state water right proceedings from interference by the Clean Water Act. Many state water departments across the West, including Idaho's, have no expertise or authority on the subject. Because this argument is best made by the agency itself, we defer to (and adopt by reference) that part of the State of Idaho's brief on the subject.

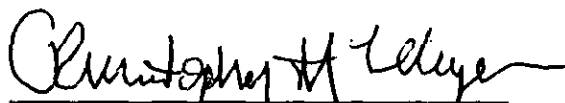
Respectfully Submitted this 21st day of May, 2001.

FREDERICKSENS, WILLIAMS & MESERVY



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CHRISTOPHER H. MEYER

Attorneys for Respondents DeKruyf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21st day of May, 2001, 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:

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- ☒ By depositing copies of the same in the United States mail, postage prepaid, at the post office at Jerome, Idaho.
- ☐ By hand delivering copies of the same to said person at _____.
- ☐ By facsimile transmission to _____, and by then mailing copies of same in the United States mail, first class postage prepaid, at the post office at Jerome, Idaho.



ROBERT E. WILLIAMS

LIST OF EXHIBITS

SCHEDULE A: Memorandum of Understanding

SCHEDULE B: *ConAgra* case

SCHEDULE A

10/10/10

10/10/10

THE IDAHO DAIRY POLLUTION PREVENTION INITIATIVE MEMORANDUM OF UNDERSTANDING

OBJECTIVE

The objectives of this Memorandum of Understanding (MOU) are to define roles of the agencies in regulating the dairy industry in Idaho and to recognize the Idaho State Department of Agriculture's (ISDA's) lead role in ensuring dairy waste systems and practices in accordance with the provisions outlined in the Idaho Waste Management Guidelines for Confined Feeding Operations (CFO Guidelines), a 1993 publication by the Idaho Department of Health and Welfare's Division of Environmental Quality (IDEQ). This MOU sets forth a working arrangement between the agencies and the Idaho dairymen to reduce duplicative inspection efforts, increase the frequency of inspections of dairy waste management systems and to provide a sound inspection program, in order to prevent pollution and protect Idaho's surface and groundwater from dairy waste contamination.

BACKGROUND

This MOU has been developed because of the recognition by the Idaho Dairymen's Association (IDA), ISDA, the U.S. Environmental Protection Agency (EPA), IDEQ, and other interested parties for the need to formalize an ongoing effort to conserve resources, to more effectively and efficiently use personnel, to reduce duplicative inspection services, and to ensure Idaho dairymen comply with the Clean Water Act (CWA) and the Idaho Water Quality Standards and Wastewater Treatment Standards (IWQS). This approach will capitalize on the already frequent presence of ISDA dairy inspectors on dairy farms and is intended to enable IDEQ and the EPA to redirect and focus resources.

AGREEMENT

Whereas the ISDA routinely inspects dairies for milk sanitation issues, and;

Whereas the ISDA, the IDEQ, and the EPA conduct routine environmental inspections on these same dairy farms, and;

Whereas it is in the best interests of the people residing in the State of Idaho to support more efficient governmental programs, and;

Whereas the protection of water quality will be enhanced through a more cooperative and efficient approach, the undersigned agencies hereby acknowledge the ISDA as the lead agency for dairy waste management inspections to ensure compliance with the CWA and the IWQS, and agree to the following:

GENERAL POLICIES

- 1) Inspections of dairies should generally include a visual inspection of the waste containment and runoff control facilities.
- 2) Inspections of dairies will be conducted so that reliable information concerning operating conditions applicable to water quality requirements will be documented.
- 3) Inspections may include the collection of discharge samples and photographs. Any sampling of discharges and subsequent analyses will be conducted according to procedures subsequently approved by ISDA, IDEQ, and EPA with consultation with IDA.
- 4) Meetings between the ISDA, the IDEQ, the EPA, and the IDA will be the primary method for discussion of program progress. The ISDA, IDEQ, and EPA may also identify those instances where enforcement action may be appropriate. An annual mid-year review meeting will be held each April between the ISDA, the IDEQ, the EPA, and the IDA to address issues regarding waste management and the environment relative to the dairy industry.
- 5) ISDA, IDEQ and EPA files will be mutually available under applicable law to the ISDA, IDEQ and EPA for inspection and copying. They shall respect the confidentiality of files or materials designated CONFIDENTIAL in accordance with federal and state regulations.

RESPONSIBILITIES

The ISDA will:

- 1) Promulgate and enforce rules for the purpose of carrying out the objective of this MOU. Non-compliance with these rules or discharge violations may result in revocation of authority to sell milk for human consumption.
- 2) Initiate appropriate dairy waste inspection protocols to prevent dairy waste releases.
- 3) Conduct periodic inspections of all dairies to include evaluation of waste collection, treatment, handling, disposal, and management procedures for compliance with the CWA and the IWQS. Respond to all complaints and information regarding dairy waste management.
- 4) Notify IDEQ immediately of all releases that cannot be stopped within 24 hours. All releases that present a substantial present or potential hazard to human health and the environment shall be immediately reported to the IDEQ.

- 5) Provide a written summary report of all observed releases from dairies that reach waters of the United States on a quarterly basis to the EPA and the IDEQ. The report will include, at a minimum, the number of releases by watershed, the number of inspections conducted, and a summary of the resolution actions taken.
- 6) Prepare and submit an annual report to the IDEQ and the EPA prior to the annual mid-year review. The report will include activities for the past year as well as planned and ongoing activities for the current year.
- 7) Not revoke a dairy facility's authorization to sell milk if there is a discharge from that facility if that facility has a National Pollution Discharge Elimination System (NPDES) permit and the discharge is not in violation of the NPDES permit.
- 8) Approve the design, construction, and location of dairy waste management systems for dairy farms, per the CFO Guidelines.

The IDEQ will:

- 1) Provide training, information, education, and technical assistance for waste handling and disposal to the ISDA, and/or to dairies upon request, to the extent of available resources.
- 2) Discontinue routine compliance inspections on dairies, consistent with the terms of this MOU.
- 3) Conduct inspections of dairies only when requested by the ISDA. However, the IDEQ retains the right to inspect in any situation it considers to present a substantial present or potential hazard to human health and the environment after due notification to ISDA.
- 4) Initiate enforcement actions under the authority of the Idaho Environmental Protection and Health Act, only upon request or referral by the ISDA or as a direct result of the investigation actions outlined in paragraph 3 above.
- 5) Evaluate ISDA inspection records annually, or at a frequency determined to be necessary by the parties to this agreement during the annual mid-year review. The IDEQ will prepare and submit a report of this review to the ISDA.

The EPA:

- 1) Will provide NPDES permit coverage for those dairy operations wishing protection afforded through the authority of the CWA.
- 2) Will discontinue routine compliance inspections on dairies during the term of this agreement.

- 3) Intends to conduct inspections of dairies only when requested by the ISDA. However, the EPA retains the right to inspect in any situation it considers to present a substantial present or potential hazard to human health and the environment after due notification of ISDA.
- 4) May initiate enforcement action under the CWA upon request or referral by the ISDA or the IDEQ, or as a direct result of investigations conducted as outlined in the preceding paragraph.
- 5) Will provide annual training, information, education, and technical assistance for waste handling and disposal to the ISDA and/or dairies upon request, to the extent of available resources.
- 6) Will review the ISDA inspection program twelve months after its initiation. A small number of dairies (not to exceed ten) across the state will be visited as part of the oversight review to determine program success. During the oversight review, these dairies will be visited by an ISDA inspector or field person and an EPA staff person for the following purposes: (1) to ensure that inspections are occurring as provided by this MOU and ISDA rules; and (2) to ensure inspections are conducted in a consistent manner across the state. Information collected by EPA during oversight visits will be for the purpose of providing feedback to ISDA. As ISDA will be the lead agency in Idaho for dairy inspections, EPA does not intend to use information resulting from the oversight visits to initiate independent enforcement actions except as provided in paragraph #3 above. EPA will submit a report of the review to the parties. This on-site inspection process will be reviewed annually to determine if it is needed for the following year and be renewed, modified or cancelled.

The IDA will:

- 1) Continue the concept of the "Dairy of Merit" program which acknowledges dairies that operate in an environmentally responsible manner.
- 2) Support continuing education of dairies concerning necessary waste management practices to protect surface and ground water from contamination.
- 3) Participate in the annual review with the signatory parties and work cooperatively with the signatory parties to achieve the objectives of this MOU.

GENERAL PROVISIONS

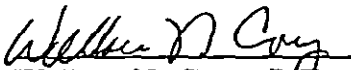
- 1) Nothing in this agreement shall be construed as surrendering existing statutory or regulatory authority of any party. However, the IDEQ and the EPA recognize the lead role of the ISDA in inspecting dairies as set forth in this MOU and will exercise their authorities accordingly.

- 2) Nothing in this agreement shall be construed to release a dairy from complying with applicable local, state, and federal environmental statutes, regulations, permits, or consent orders.
- 3) The term of this agreement shall be 5 years, unless otherwise revoked by any one of the signatory parties following 30 day notice to all parties. This agreement may be amended or extended through mutual agreement of the parties. This agreement, when accepted by each agency, will be effective from date of the last signature.

SIGNATORY PARTIES:



John Hatch, Director
Idaho Department of Agriculture
Date: 9/22/95



Wallace N. Cory, P.E.
Administrator
Division of Environmental Quality
Idaho Department of Health and Welfare
Date: 9/25/95



Chuck Clarke, Administrator
Region 10, U.S. EPA
Date: 10/4/95

Pete Lizaso
Chairman
Idaho Dairymen's Association, Inc.
Date: 

9-22-95

SCHEDULE B

1997 U.S. Dist. LEXIS 21401 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff, v. CONAGRA, INC., Defendant.

Case No. CV 96-0134-S-LMB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

1997 U.S. Dist. LEXIS 21401

December 31, 1997, Decided

December 31, 1997, Filed

CORE TERMS: groundwater, summary judgment, affirmative defense, water, pollutant, upset, stricken, effluent, surface water, discharged, bypass, declaration, permittee, monthly, wastewater, genuine issue of material fact, navigable waters, civil penalty, monitoring, notice, limine, unauthorized, nonmoving party, maximum, economic benefit, Clean Water Act, subject matter jurisdiction, regulation, reporting, genuine

COUNSEL: [*1] For USA, plaintiff: D Marc Haws, AUSA, US ATTORNEY'S OFFICE, Boise, ID. Douglas M Conde, OFFICE OF ATTORNEY GENERAL, Boise, ID. Lois J Schiffer, Patrick M Casey, US DEPT OF JUSTICE, Washington, DC. Mark A Ryan, Ted Yackulic, US DEPT OF JUSTICE, Seattle, WA. Pataima Z Ahmad, US DEPT OF JUSTICE, Washington, DC. Marc Ryan, EPA REGION X, Boise, ID. Keith E Cobon, ENVIRONMENTAL PROTECTION AGENCY, Seattle, WA.

For CONAGRA INC., defendant: John J Schirger, Thomas C McGowan, MCGRATH NORTH MULLIN & KRATZ, Omaha, NE. Kristen R Thompson, THOMPSON ASHCRAFT & BURNHAM, Boise, ID.

JUDGES: LARRY M. BOYLE, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: LARRY M. BOYLE

OPINION: MEMORANDUM DECISION AND ORDER

Currently pending before the Court are the United States' Partial Motion for Summary Judgment On Defendant ConAgra, Inc.'s Affirmative Defenses 1-18 (Docket No. 87), United States' Motion for Partial Summary Judgment as to Liability (Docket No. 89), Defendant's Motion for Partial Summary Judgment (Docket No. 91), Defendant's Third Motion in Limine (Docket[*2] No. 94), ConAgra's Motion to Dismiss Under F.R.C.P. 12(b)(6) (Docket No. 96), Defendant's Second Motion in Limine (Docket No. 98), Defendant's Motion to Strike Declaration of Joseph Roberto in Support of Summary Judgment on Affirmative Defenses (Docket No. 112), Defendant's Motion to Strike Declaration of Joseph Roberto in Support of Liability Summary Judgment (Docket No. 114), Plaintiff's

Motion to Strike Statement of Facts Re: Groundwater (Docket No. 128), Defendant's Motion for Order Denying Subject Matter Jurisdiction (Docket No. 140) and Defendant's Motion to Supplement Record (Docket No. 150).

Having carefully reviewed the record, considered oral arguments, and otherwise being fully advised, the Court enters the following Memorandum Decision and Order.

1.

BACKGROUND

Defendant ConAgra, Inc. owns and operates a beef slaughterhouse and a cattle feeding operation at its facility in Nampa, Idaho. Cattle are slaughtered and processed in the slaughterhouse, and the Concentrated Animal Feeding Operation ("CAFO") holds cattle in preparation for slaughter.

Defendant generates large amounts of wastewater during the slaughtering process. The wastewater, which is contaminated[*3] with blood and other animal waste, is treated in the facility's wastewater treatment plant prior to discharge into Indian Creek. Defendant's wastewater treatment consists primarily of a treatment pond followed by mechanical and chemical wastewater treatment.

The operations at the facility are regulated by two federal pollution discharge permits: a National Pollution Discharge Elimination System ("NPDES") permit dated June 27, 1985; and a CAFO permit dated March 27, 1987. Plaintiff United States alleges that Defendant has been discharging numerous pollutants in violation of the permits, and brought the instant enforcement action seeking civil penalties for the alleged violations.

The action is presently before the Court on several dispositive motions filed by the parties as well as on several pretrial motions in limine.

II.

CONAGRA'S MOTION TO DISMISS

Defendant has moved to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, arguing that the complaint does not meet the requirements of notice pleading set forth in Fed. R. Civ. P. 8 because it is overly vague. See Docket No. 96. Defendant[*4] claims that it was only able to determine what Plaintiff considered to be violations when Plaintiff filed its motions for summary judgment which contained details from discovery of what Plaintiff actually alleged Defendant had done in violation of federal law and regulations.

The First Claim for relief contained in Plaintiff's complaint alleges that at "numerous times from January 1992 through February 1996, ConAgra discharged pollutants not authorized" by ConAgra's NPDES permit. See Amended Complaint, at PP 15, 22. The Second Claim for relief alleges that at "numerous times from January 1992 through at least February 1996, ConAgra discharged pollutants in excess of effluent limitations" in ConAgra's permit. See id. at PP 16, 24. The Third Claim for relief alleges that at "numerous times from April 1992 through January 1994, ConAgra failed to comply with monitoring and reporting violations. See id. at PP 17, 28. Finally, the Fourth Claim for relief alleges that at "numerous times from January 1992 through October 1992, ConAgra failed to comply with records contents requirements." See id. at PP 18, 28.

First, Defendant argues that the above cited allegations are too[*5] vague, and do not give them notice sufficient to defend against the possible claims. However, Plaintiff has responded that the allegations state a relevant time period, and explain which statutes it claims were violated. The violations come from documents within ConAgra's possession, and are thus self reported. Under these circumstances, the notice pleading requirements of Rule 8 are clearly met.

Next, Defendant argues that Plaintiff is required to plead each of the approximately 600 alleged violations as separate claims pursuant to Fed. R. Civ. P. 10(b). Rule 10(b) does provide that "each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count," however, the Rule continues to state

that such claims "shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth." (Emphasis added). Thus, claims must be separated only when such separation clarifies the matters set forth, but claims are not required to be separated. In this action, Plaintiff argues that it would not clarify matters to plead each of the approximately 600 violations as separate claims. Rather, the Complaint[*6] is made more clear by grouping the alleged violations by type, as Plaintiff has done. The Court concludes that it is not necessary in this action for Plaintiff to separately plead each of the approximately 600 alleged violations.

As this Court has held in earlier decisions in this same action, Plaintiff's Amended Complaint is sufficient under Fed. R. Civ. P. 8 to give Defendant notice of Plaintiff's claims. The process of discovery is designed to give Defendant further notice of what specific actions Plaintiff claims constitute violations. In this action, the parties have done just that, and in the discovery process have submitted interrogatories which ask the opposing party to list out the claims or affirmative defenses. The Court concludes that this process has fairly notified all parties of the opposition's position, and meets the requirements of the Federal Rules of Civil Procedure. Accordingly, Defendant's motion to dismiss for failure to state a claim is denied.

III.

SUBJECT MATTER JURISDICTION

Defendant has moved to dismiss the claims regarding groundwater from this action for lack of subject matter jurisdiction arguing that this Court only has jurisdiction over[*7] pollutants discharged into surface water, while the State of Idaho has exclusive jurisdiction over pollutants discharged into groundwater. Plaintiff's main allegations against Defendant stem from violations of the CWA from alleged discharge of pollutants into the surface water of Indian Creek. The Court clearly has jurisdiction over those alleged violations pursuant to the CWA. However, Plaintiff has indicated that it also intends to prove at trial "additional violations of the CWA, including, but not limited to unauthorized discharges of pollutants from french drains into Indian Creek and unauthorized discharges of pollutants via ground water from ConAgra's wastewater land application site." Memorandum, at 1, n. 2 (Docket No. 90). It is the alleged violations which stem from alleged discharge of pollutant via french drains and groundwater over which Defendant claims this Court lacks subject matter jurisdiction.

There is a split of opinion and authority among courts which have addressed the issue of whether federal courts have subject matter jurisdiction over discharges to surface water via groundwater. The Ninth Circuit Court of Appeals has not yet addressed the issue. However, several[*8] district courts in the Ninth Circuit have addressed the issues presented here and, interestingly, there is also split of authority among those courts within the same circuit. Defendant urges the Court to follow and adopt the reasoning of those courts which have concluded that the Court lacks subject matter jurisdiction over discharges to surface water via groundwater, and seeks an order of the Court dismissing the claims based on such discharges. However, Plaintiff argues that the majority view is to retain jurisdiction of discharges to surface water via groundwater when the groundwater is hydro geologically connected to the surface water.

The most recent and comprehensive opinion on the issue of jurisdiction over waters discharged via groundwater is *Umatilla Water Quality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D.Or. 1997). In *Umatilla*, the district court thoroughly and in a scholarly manner analyzed the CWA, the legislative history behind the CWA, and the applicable case law, and concluded that "the [CWA] as written, as intended by Congress, and as applied in Oregon for over two decades does not regulate even hydrologically-connected groundwater." [*9] *Id.* at 1318.

In reaching this conclusion, the *Umatilla* decision begins with an analysis of the history and language of the CWA:

In 1972, Congress enacted the Clean Water Act (CWA) in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To carry out this goal, the Act provides that, "except as in compliance" with its provisions, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). . . . The CWA defines "discharge of a pollutant" to include . . . "any addition of any pollutant to navigable waters from any point source". . . . 33 U.S.C. § 1362(12). . . . "Navigable waters," for purposes of the CWA, are "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Courts have upheld EPA's broad interpretation of this term to include, essentially, any surface water body capable of affecting interstate commerce.

Id. at 1314 (citations omitted). The court continues by recognizing that the Ninth Circuit, like the EPA, has consistently given a broad definition to the term "naviga-

ble waters" for purposes of the CWA. *Id.* at 1316.[*10] However, the Ninth Circuit has not yet visited the issue of whether the CWA, as broad as it is, applies to discharges to underground waters. *Id.* at 1316-17.

While the Ninth Circuit has not yet addressed this precise issue, other courts are divided on whether the CWA applies to discharges to groundwater. Some courts have held that the CWA does apply to discharges to groundwater which are made through groundwater which affects surface water. See *Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995) (holding that the Tenth Circuit's decision in *Quivira Mining Co. v. United States Envtl. Protection Agency*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055, 106 S. Ct. 791, 88 L. Ed. 2d 769 (1986), foreclosed "any argument that the CWA does not protect groundwater with some connection to surface waters" because the Tenth Circuit had expansively interpreted the CWA's jurisdictional reach in a non-groundwater context); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989-90 (E.D.Wash. 1994) (holding that, although "Congress did not intend to include isolated groundwater as part of the 'navigable waters' "that[*11] the CWA regulates, the CWA does apply to discharges of pollutants that reach surface waters through groundwater); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D.Colo. 1993) (holding that discharges into "navigable waters" include discharges that reach navigable waters through groundwater); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1193-96 (E.D.Cal. 1988), vacated on other grounds, 47 F.3d 325 (9th Cir.), cert. denied, 516 U.S. 807, 116 S. Ct. 51, 133 L. Ed. 2d 16 (1995) (noting that although "Congress did not intend to require NPDES permits for discharges of pollutants to isolated groundwater," plaintiff could state a claim if it could "establish that the groundwater is naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act.").

However, the court in *Umatilla* found more persuasive those decisions which held that the CWA's permitting provisions do not apply to any groundwater. See *Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992) (deferring to the Army Corps' definition, which limited CWA coverage to surface waters); [*12] *Kelley v. United States*, 618 F. Supp. 1103, 1106-07 (W.D.Mich. 1985) (holding that Congress's intent was to leave regulation of contaminated groundwater to the states); *United States v. GAF Corp.*, 389 F. Supp. 1379, 1383-84 (S.D.Tex. 1975).

Further, the court concluded "that discharges of pol-

lutants into groundwater are not subject to the CWA's NPDES permit requirement even if that groundwater is hydrologically connected to surface water." Umatilla, 962 F. Supp. at 1320. The court reached that conclusion for four main reasons. First, the court examined the language of the statute itself, and concluded that as a matter of statutory interpretation, the CWA NPDES permit requirements do not apply to groundwater:

I note that when Congress wanted certain provisions of the CWA to apply to groundwater, it stated so explicitly. Thus, it commanded that "the Administrator shall prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters." 33 U.S.C. § 1252(a). Similarly, the Administrator shall "establish, equip, and maintain [*13] a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans" 33 U.S.C. § 1254(a)(5). In contrast, section 1342, which establishes the NPDES permitting system, makes no reference to groundwater.

962 F. Supp. at 1318.

Second, the court concluded in Umatilla that the quoted language indicated that Congress did not intend for the NPDES permit requirements to apply to groundwater:

The quoted references strongly indicate that Congress considered "ground waters" to be a different category of waters from "navigable waters." Indeed, throughout the CWA, Congress appeared to have four categories of waters in mind--"navigable waters," the contiguous zone; the ocean, and "ground waters." Only the first three of these, moreover, are included within the definition of "discharge of a pollutant," 33 U.S.C. § 1362(12), indicating that Congress did not consider discharges to groundwater to be discharges that would trigger the NPDES permit requirement. See 33 U.S.C. § 1342(a)(1).

Id.

Third, the court in Umatilla concluded that the legislative history indicated [*14] that Congress did not intend for the NPDES permit requirements to apply to groundwater:

The CWA's legislative history suggests that Congress did not intend to regulate groundwater in any form. As the Eastern District of California has noted:

The report accompanying the Senate version of the Clean Water Act stated:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations.

Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, P. 3668, 3749, reprinted in 2 Congressional Research Service of the Library of Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess., at 1491 (Comm. Print 1973) (hereinafter "Leg Hist.,").

In addition, the House specifically rejected an amendment introduced by Rep. Aspin that would have brought groundwater within the permitting and enforcement sections of the bill. 118 Cong. Rec. 10,669 (1972), [*15] 1 Leg. Hist. 597. In opposing this amendment, Rep. Clausen, a sponsor of the House bill, stated:

Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters, similar to that suggested by the gentleman from Wisconsin, was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.

118 Cong. Rec. 10,667 (1972, 1 Leg. Hist. 590-91 (remarks of Rep. Clausen). Thus, both the Senate and the House specifically rejected attempts to require permits for discharges to groundwater under the NPDES program.

McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. at 1194. The failure of a proposed amendment "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200, 95 S. Ct. 392, 401, 42 L. Ed. 2d 378 (1974).

962 F. Supp. at 1318-19.

Fourth, the Umatilla decision noted that because the EPA has offered no formal interpretation of the CWA

that[*16] would cover discharges to groundwater, no deference need be given the agency at this time:

EPA has offered no formal or consistent interpretation of the CWA that would subject discharges to groundwater to the NPDES permitting requirement. I note that an agency's interpretation of a statute that it administers is entitled to great deference. *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125, 105 S. Ct. 1102, 1107-08, 84 L. Ed. 2d 90 (1985); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2781-83, 81 L. Ed. 2d 694 (1984). Here, however, the most formal interpretations from EPA indicate that the NPDES program does not apply to discharges to groundwater. The Office of General Counsel advised EPA that:

Section 402 [33 U.S.C. § 1342] authorizes the Administrator to issue a permit "for the discharge of a pollutant." Under § 502(12) the term "discharge of a pollutant" is defined so as to include only discharges into navigable waters (or the contiguous zone of the ocean) Discharges into ground waters are not included. Accordingly, permits may not be issued, and no application is required, [*17] unless a discharge into navigable waters is proposed or is occurring.

Opinion, Office of General Counsel (December 13, 1973), as reprinted in *Exxon Corp. v. Train*, 554 F.2d 1310 at 1320 n.21 (emphasis added). Moreover, EPA twice promulgated regulations restricting its authority over groundwater in accordance with this opinion. 38 Fed. Reg. 13,528 (May 22, 1973), codified as 40 C.F.R. § 125.26(a)(1) (1977); 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). Courts interpreting the CWA's NPDES permit program as applying to hydrologically-connected groundwater have uniformly failed to address this interpretive history. *Friends of Santa Fe County*, 892 F. Supp. at 1357-58; *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. at 990-91; *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. at 1432-34; *McClellan Ecological Seepage Situation v. Weirberger*, 707 F. Supp. at 1195-96.

As noted, EPA has not since promulgated regulations asserting that hydrologically connected groundwater can be subject to NPDES permitting. Nor, apparently, has it published official guidance on this subject. Given the General Counsel's interpretation that the NPDES permitting program[*18] does not apply to ground water and EPA's previous regulatory activity confirming this interpretation, I do not believe that EPA's recent parenthetical comment in its discussion of storm water per-

mit application regulations, without more, should be accorded the power to reshape the CWA's plain language and almost twenty-five years of water quality regulation in Oregon.

Id. at 1319. Based primarily on the foregoing reasons, the court in *Umatilla* concluded "that discharges of pollutants into groundwater are not subject to the CWA's NPDES permit requirement even if that groundwater is hydrologically connected to surface water." *Id.* at 1320. This Court agrees with the well reasoned and scholarly opinion of the Oregon district court, and for the same reasons stated therein concludes that discharges of pollutants into groundwater are not subject to the CWA's NPDES permit requirement even if that groundwater is hydrologically connected to surface water. Accordingly, this Court does not have jurisdiction over the violations alleged by Plaintiff of discharges to the surface water of Indian Creek via groundwater.

However, the Court notes that Plaintiff in this instant action[*19] has alleged two distinct types of discharges other than direct discharges from surface water. Plaintiff has stated that it intends to prove at trial violations from discharges to surface water via groundwater and that it intends to prove at trial violations from discharges to surface water via french drains. As indicated above, the Court has concluded in this action that it does not have jurisdiction over the alleged permit violations from discharges via groundwater, however, Plaintiff has alleged and submitted evidence into the record that the discharges via the french drains are not discharges from groundwater, but are rather discharges from a point source. Accordingly, the Court concludes that there remain genuine issues of material fact regarding the Court's jurisdiction over those discharges. Accordingly, at the trial in this matter, the Court will determine from the evidence presented whether the discharges from the french drains are discharges from a point source or are discharges via groundwater.

IV.

MOTIONS FOR SUMMARY JUDGMENT

Presently before the Court are the United States' Partial Motion for Summary Judgment On Defendant ConAgra, Inc.'s Affirmative Defenses[*20] 1-18 (Docket No. 87), United States' Motion for Partial Summary Judgment as to Liability (Docket No. 89), Defendant's Motion for Partial Summary Judgment (Docket No. 91) and Defendant's Motion for Order Denying Subject Matter Jurisdiction (Docket No. 140).

However, before the Court can address the pending dispositive motions, in light of the pending motions to strike, it must first be determined what will be considered in support of and in opposition to those motions. Thus, the Court will first address the pending motions to strike, and will then proceed to address the parties' dispositive motions.

A. Motions to Strike

Defendant has filed a Motion to Strike Declaration of Joseph Roberto in Support of Summary Judgment on Affirmative Defenses (Docket No. 112) and a Motion to Strike Declaration of Joseph Roberto in Support of Liability Summary Judgment (Docket No. 114), and Plaintiff has filed a Motion to Strike Statement of Facts Re: Groundwater (Docket No. 128).

1. Motion to Strike Roberto Declaration in Support of Motion on Affirmative Defenses

In support of its motion for summary judgment on Defendant's affirmative defenses, Plaintiff has submitted the Declaration[*21] of Joseph Roberto. Defendant argues that such declaration should be stricken from the record because it is conclusory and because there is no way to determine whether it is based on the personal knowledge of Roberto. The Court denied this motion to strike at the August 4, 1997 hearing in this matter. This order memorializes that oral ruling.

2. Motion to Strike Declaration of Joseph Roberto Regarding Liability

In support of its motion for summary judgment on liability, Plaintiff submitted another declaration from Joseph Roberto. Defendant argues that this declaration should be stricken from the record because it is inherently unreliable and because it is not based upon his personal knowledge. At the August 4, 1997 hearing in this matter, the Court denied Defendant's motion to strike the declaration of Roberto submitted in support of the motion regarding liability and this order memorializes that ruling.

3. United States' Motion to Strike ConAgra's Statement of Facts Re: Groundwater Issues

Defendant submitted a statement of facts not in dispute regarding its motion for summary judgment after the dispositive motion deadline in this action. The Court previously[*22] struck from the record in this matter the motion for summary judgment and the memorandum in support thereof, but did not strike the statement of facts

submitted by Defendant in support of the stricken motions. Plaintiff has moved to have this statement of facts, as well as the exhibits attached to it, stricken from the record in this matter. One of the exhibits attached to the statement of facts is the affidavit of expert witness Malloite. Plaintiff argues that this affidavit should be stricken because the statements made by the affiant are not contained in his expert report.

Defendant has responded by explaining that the statement of facts is also relevant to the pending motion for summary judgment regarding the jurisdictional question which the Court allowed to be filed after the dispositive deadline.

At the August 4, 1997 hearing in this matter, the Court denied the motion to strike the statement of facts regarding groundwater and also denied the motion to strike the expert affidavit attached thereto. However, the Court indicated that in all fairness, Plaintiff should be allowed to depose Malloite on any opinions given in the affidavit which were not previously provided in his [*23]expert report. This order memorializes that oral ruling from the bench.

B. Summary Judgment Standard

Motions for summary judgment are governed by Fed. R. Civ. P. 56. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The United States Supreme Court has made it clear that under Rule 56, summary judgment is required if the nonmoving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he/she will bear the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the nonmoving party fails to make such a showing on any essential element of his case, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts[*24] immaterial." *Id.* at 323. n1

n1 See also Rule 56(e), which provides in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

U.S.S.C. Court Rules, Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1991).

Under Rule 56 it is clear that an issue, in order to preclude entry of summary judgment, must be both "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue is "genuine" when there is "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions[*25] of the truth at trial," *Hahn v. Sargent*, 523 F.2d 461, 463 (1st Cir. 1975) (quoting *First Nat'l Bank v. Cities Serv. Co., Inc.*, 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)), cert. denied 425 U.S. 904, 47 L. Ed. 2d 754, 96 S. Ct. 1495 (1976) or when the "evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 212 (1986). The Ninth Circuit cases are in accord. See *British Motor Car Distributors, Ltd. v. San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371 (9th Cir. 1989).

In ruling on summary judgment motions, the court does not resolve conflicting evidence with respect to disputed material facts, nor does it make credibility determinations. *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626 (9th Cir. 1987). Moreover, all inferences must be drawn in the light most favorable to the nonmoving party. *Id.* at 631. As the Ninth Circuit Court of Appeals has stated, "put another way, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment[*26] must be denied." *Id.*

In order to withstand a motion for summary judgment, the Ninth Circuit has held that a nonmoving party:

(1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when

the factual context makes the nonmoving party's claim implausible.

British Motor Car Distributors, 882 F.2d at 374 (citation omitted). Moreover, the Ninth Circuit has held that where the moving party meets its initial burden of demonstrating the absence of any genuine issue of material fact, the nonmoving party must "produce 'specific facts showing that there remains a genuine factual issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (citing *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 445 U.S. 951, 63 L. Ed. 2d 786, 100 S. Ct. 1600 (1980)).[*27]

The Ninth Circuit Court of Appeals has acknowledged that in recent years the Supreme Court, "by clarifying what the nonmoving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment." *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006, 98 L. Ed. 2d 650, 108 S. Ct. 698 (1988). As the Ninth Circuit has expressly stated: "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id.*

In addressing the application of the "Summary Judgment Test," the Ninth Circuit has specifically explained that:

A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

T. W. Electrical Serv., Inc., 809 F.2d at 630 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. [*28] 2505 (1986)) (emphasis added).

C. Plaintiff's Motion for Summary Judgment Regarding Liability

Plaintiff has moved for partial summary judgment on the issue of liability. Plaintiff argues that it is undisputed that Defendant discharged pollutants into waters of the United States on at least nine occasions without a NPDES permit, that it is undisputed that Defendant discharged pollutants into waters of the United States in excess of the effluent limitations contained in its NPDES

permit, and that it is undisputed that Defendant failed to comply with the monitoring, reporting and record keeping requirements of its NPDES permit, resulting in 632 violations of the CWA. n2

n2 The Court notes at this time that Plaintiff's motion only addresses the alleged discharges into the surface waters of Indian Creek. However, Plaintiff has indicated that it intends to prove additional violations at trial stemming from unauthorized discharges of pollutants from french drains and via groundwater. It is the additional allegations regarding french drains and groundwater which are the subject of Defendant's motion regarding subject matter jurisdiction. There has been no challenge raised to the Court's subject matter jurisdiction over the allegations of violations addressed in the instant motion for summary judgment on liability for violations of the NPDES permit requirements regarding discharges to surface water.

discharges of pollutants from point sources other than 010 and 004. See Undisputed Facts, PP 20-26. These violations allegedly occurred on January 11, 1992, December 30, 1992, June 25, 1993, July 2, 1993, July 8, 1993, December 1, 1994, and February 8, 1996. In addition to those self reported violations, on March 26, 1994, an EPA inspector observed two discharges of cow manure into Indian Creek at points other than 010 or 004. n3

n3 The other requirements for a prima facie case are met: (1) ConAgra is a corporation which is a "person" as defined by the CWA, see 33 U.S.C. § 1352(5); (2) all of the discharges contained "pollutants" as defined by 33 U.S.C. § 1362(6) and 40 C.F.R. § 401.11(f), see Plaintiff's Statement of Facts, at P 9, (3) the discharges were from a "point source" as defined in 33 U.S.C. § 1362(12), (14), and (4) Indian Creek is a water of the United States.

[*29]

In response to Plaintiff's motion, Defendant claims that it has raised affirmative defenses to each of the nine alleged violations, and claims that those affirmative defenses raise a genuine issue of material fact. Specifically, Defendant has raised an "upset defense" in response to Plaintiff's allegations of violations on January 11, 1992; June 25, 1993; July 2, 1993; December 1, 1994 and February 8, 1996. Defendant's permit defines an "upset" as follows:

an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors outside of the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, lack of preventative measures, or careless or improper operation.

NPDES Permit, at 6, P 6 (emphasis added). In order for Defendant to avoid liability based on an "upset defense" it has the burden to establish that:

- a. An upset occurred and that the permittee can identify the cause(s) of the upset;
- b. The permitted facility was at the time being properly operated;
- c. [*30] The permittee submitted notice of the upset as required under Part II.I. Twenty-four Hour Notice of Noncompliance Reporting; and
- d. The permittee complied with any remedial measures required under Part III.D. Duty to Mitigate.

NPDES Permit, at 12 (emphasis in original). Proper operation of a plant requires the permittee to "properly operate and maintain all facilities and systems of treatment and control . . . which are installed or used by the permittee to achieve compliance with the conditions of this permit." NPDES Permit, at 10. Defendant's duty to mitigate includes taking "all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment." NPDES Permit, at 10.

In support of this defense, Defendant has cited the Court to the notices of upset condition sent to Plaintiff, which Plaintiff has used as evidence of the violations. After carefully considering the evidence contained in the record, as well as the legal positions made in briefing and oral arguments, the Court is of the opinion that a genuine issue of material fact exist with respect to the application[*31] of the "upset defense" to the alleged violations of January 11, 1992; June 25, 1993; July 2, 1993 and December 1, 1994. Accordingly, summary judgment with respect to these alleged violations is denied.

Regarding the alleged unauthorized discharge on December 30, 1992, Defendant argues that Plaintiff's

evidence offered to support the existence of a violation is ambiguous and is insufficient to support summary judgment. Exhibit 11, attached to Plaintiff's Motion for Summary Judgment, allegedly supports Plaintiff's claim that on December 30, 1992, an unauthorized discharge of 65,000 gallons of untreated effluent from Armour holding ponds was made into Indian Creek. However, Exhibit 11 states only that there was a "discharge of 65,000 gallons on December 30, 1992 due to the repair of a frozen line. There was chlorine added to the effluent during this discharge to maintain a low fecal coliform count." The Court concludes that this raises a question of fact regarding the issue of whether Defendant discharged untreated wastewater into Indian Creek on December 30, 1992. Accordingly, summary judgment is not appropriate.

Regarding the discharge admitted to have occurred on July 8, 1993, Defendant [*32]acknowledged that approximately 300,000 gallons had been discharged into Indian Creek, but asserts that the water had been properly treated and was in compliance with the permit. See Ex. 11, attached to Plaintiff's motion. The Court concludes that such is sufficient to create a question of fact regarding the issue of whether pollutants were discharged in violation of the NPDES permit.

Regarding the alleged unauthorized discharge on February 8, 1996, Defendant argues that the evidence supports a finding only that "it is possible that a small amount [of effluent] could have went [sic] into Indian Creek." Galliher letter, Ex. 11, attached to Plaintiff's Motion (Docket No. 89). The Court concludes that Joseph Roberto's testimony that when Defendant called to report the spill, its wastewater treatment plant manager told the EPA that 200 gallons of raw wastewater spilled into Indian Creek, is contradicted by the letter stating that it is possible that some wastewater spilled into the Creek. This conflict is sufficient to create a genuine issue of material fact as to the alleged unauthorized discharge on February 8, 1996.

However, in the Court's view, Defendant has not met its burden[*33] of coming forward with evidence supporting its affirmative defenses on the two violations which occurred on March 26, 1994. Accordingly, the Court grants Plaintiff's motion for summary judgment on the two unauthorized discharges which occurred on March 26, 1994.

Based on the foregoing, Plaintiff's motion for partial summary judgment as to liability on nine claims of unauthorized discharge of pollutants is granted in part and denied in part. The motion is granted as to the two

discharges of March 26, 1994. The motion is denied as to the violations alleged to have occurred on January 11, 1992, December 30, 1992, June 25, 1993, July 2, 1993, July 8, 1993, December 1, 1994 and February 8, 1996.

2. Alleged Discharges in Excess of Effluent Limitations in Permit

Plaintiff's Second Claim alleges that Defendant discharged pollutants in excess of the effluent limits of its slaughterhouse permit. In order to establish a prima facie case against ConAgra for discharging in violation of its permit effluent limits, Plaintiff must establish (1) that Defendant is a "person", and (2) that Defendant discharged effluent in excess of the limit set in its NPDES permit. See *SPIRG v. P.D. Oil* [*34] & Chem. Storage, Inc., 627 F. Supp. 1074, 1090 (D.N.J. 1986).

In the instant action, it is clear and undisputed that Defendant is a "person" as contemplated in the CWA. In support of its conclusion that Defendant discharged effluent in excess of the amounts allowed in its permit, Plaintiff uses the Daily Monitoring Report ("DMR") submitted by Defendant itself. Plaintiff argues that the DMRs, like other records that must be kept as part of a valid regulatory scheme, are admissions for the purpose of establishing civil liability. See *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1492 (9th Cir. 1987), vacated on other grounds, 108 S. Ct. 1102-03 (1988), judgment reinstated, 853 F.2d 667 (9th Cir. 1988) (holding that self-monitoring reports constitute conclusive evidence of an exceedance of a permit). Plaintiff directs the Court to the DMRs submitted by Defendant in support of its claims that Defendant exceeded its daily maximum 79 times, and violated its monthly maximum over 6 months, for a total of 181 days of violation. Based on these numbers, Plaintiff claims that Defendant acted in violation of its NPDES permit 260 times. n4

n4 This number is reached by taking the daily maximum discharge violations (79) and adding to it the 181 days during which the monthly limits were exceeded. The reason there are 181 violations for 6 months of daily average violation is that when a person violates the daily average effluent discharge limit in any given month, that violation is one separate violation for each day of the month. See *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1139 (11th Cir. 1990).

[*35]

Defendant does not contest the fact that it exceeded its effluent discharge limit on the occasions cited by Plaintiff. Rather, Defendant attempts to avoid liability on the violations alleged in Plaintiff's Second Claim for relief by arguing that those discharges were made at outfalls 10A, B, and C which are not governed by the NPDES permit, and by arguing that the NPDES permit which governs Defendant's discharges does not contain a monthly discharge limit.

Because Defendant has not contested the fact that it admitted to violating the effluent limits with those discharges made from outfall 010, the Court concludes that Plaintiff's motion for summary judgment regarding the 79 violations of the daily maximum effluent limit should be granted.

Regarding the monthly average violations for the 6 months alleged, Defendant argues that its NPDES permit does not set a monthly average limit, and thus concludes that it cannot be held liable for any alleged violations of a monthly average. While the actual language of the permit does not state a "monthly average" limit, it does provide for a "daily average limit." The permit goes on to provide that the "daily average limits" are calculated based[*36] on a monthly average of effluent data collected by Defendant. Thus, Defendant's claim that its permit does not provide a limit for monthly averages is merely a conflict over terms which mean the same thing. See *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d at 1139-40, n.20 ("for purposes of discussion, a violation of the daily average will be referred to as a 'monthly violation' to differentiate it from a 'daily violation' which refers to a violation of the daily maximum."); *United States v. Aluminum Co. of America*, 824 F. Supp. 640, 649-50, n.15 (E.D.Tex. 1993) ("The term 'daily average' is often referred to as 'monthly average.' The terms may be used interchangeably."). Plaintiff has submitted evidence of 181 daily average limit violations under the permit, which arise out of violations spanning 6 months. Defendant does not dispute the fact that those violations occurred, and the Court concludes that Plaintiff's motion for summary judgment on this issue should be granted.

Based on the foregoing, the Court concludes that there are no genuine issues of material fact and that Plaintiff's motion for summary judgment as to liability on its Second Claim for Relief[*37] should be granted. Accordingly, Defendant is liable for 260 violations of its daily maximum and daily average ("monthly average") effluent limitations set in its NPDES permit, which constitutes 260 violations of the CWA.

3. Alleged Failure to Monitor and Report Effluent

Plaintiff's Third Claim for relief alleges that Defendant violated the terms of its NPDES by failing to comply with its monitoring and reporting requirements. In order to establish a prima facie case for failure to comply with monitoring and reporting requirements, Plaintiff must demonstrate (1) that Defendant is a "person", (2) who discharged, (3) pollutants, (4) from a point source, (5) to waters of the United States, (6) without complying with the monitoring or reporting requirements of its NPDES permit. See *Sierra Club v. Simkins Indust.*, 847 F.2d 1109 (4th Cir. 1988), cert. denied, 491 U.S. 904, 105 L. Ed. 2d 694, 109 S. Ct. 3185 (1989).

The NPDES permit issued to Defendant requires it to monitor and report its discharges of pollutants to Indian Creek from outfalls 010 and 004. See NPDES Permit, at 7. Defendant is required to report the monitoring results to EPA on DMRs each month. See [*38] *id.* Plaintiff claims that the DMRs submitted by Defendant between April 1992 and November 1992 did not include the required monitoring data in at least 51 instances. In support of its conclusion that the DMRs from that time period failed to properly report the monitoring results, Plaintiff has submitted the Declaration of Joseph Roberto. Roberto is a compliance officer with the EPA. Roberto personally reviewed the DMRs submitted by Defendant for 1992 through 1996. In reviewing those DMRs, Roberto discovered 51 instances in which Defendant failed to properly monitor and report effluent discharges to Indian Creek or failed to properly monitor and report stream conditions in Indian Creek. Roberto Decl., at P 6, Ex. 9 to Plaintiff's Motion (Docket No. 89). Each deficient DMR was signed by a representative of Defendant. *Id.*

In response to Plaintiff's motion and the evidence submitted, Defendant has not come forward with evidence to create a question of fact regarding the issue of whether it failed to comply with its monitoring and reporting requirements. Accordingly, Plaintiff's motion for summary judgment as to liability on its Third Claim for Relief is granted. Defendant is liable[*39] for 51 violations of the monitoring and reporting requirements set forth in its NPDES permit.

4. Allegations That Defendant Failed to Properly Maintain Records

Plaintiff's Fourth Claim for Relief alleges that Defendant failed to maintain records relating to its

wastewater discharges as required by the terms of its NPDES permit. Regarding the requirement of maintaining records, Defendant's NPDES permit provides that records be kept for a minimum of three years. On October 7 and 24, 1994 and on April 25, 1995, the EPA sent information requests to Defendant pursuant to section 308 of the CWA. Part of the information requested was copies of backup documentation required to be maintained in Defendant's files by its NPDES permit. Because the requests came in 1994 and 1995, Defendant should have supplied all information it was required to maintain pursuant to its permit from 1991 forward. In reviewing the documentation provided by Defendant, Roberto was unable to locate 312 documents which should have been maintained pursuant to the permit. Roberto Decl., at P 7.

Defendant has not responded with any evidence that it did in fact maintain those records as required by the permit. [*40] Rather, Defendant has responded by arguing that because the permit only requires records to be maintained for three years, a complaint brought in 1996 cannot allege violations stemming from records missing from 1992. However, the records were requested in 1994 and 1995, well within the three year maintenance requirement. Because they were not produced, a civil penalty action was filed in 1996. The statute of limitations on CWA violations is five years, so filing the complaint in 1996 does not violate any applicable statute of limitations, and the complaint seeks a penalty for Defendant's failure to produce records for the previous three years when requested in 1994 and 1995. Thus, Defendant's arguments regarding timing and the statute of limitations are without merit.

Because Defendant has offered no proof or evidence that it did in fact maintain the records sought by Plaintiff in 1995, there is no genuine issue of material fact before the Court. Accordingly, Plaintiff's motion for summary judgment on its Fourth Claim for relief is granted and Plaintiff is liable for 312 violations of the records maintenance provision of its NPDES permit.

D. Plaintiff's Motion for Summary Judgment [*41] Regarding Affirmative Defenses

Plaintiff has also moved for partial summary judgment on each of Defendant's eighteen affirmative defenses, arguing that there is no basis in fact or law for any of the defenses.

1. Defendant's First, Third and Tenth Affirmative Defenses

Plaintiff has moved for summary judgment on Defendant's first, third and tenth affirmative defenses arguing that they were inserted merely as a matter of form and are otherwise lacking in content.

a. First Affirmative Defense

Defendant's first affirmative defense states that "Defendants [sic] deny each and every allegation of Plaintiff's Complaint unless specifically admitted herein."

The Court concludes that Defendant's first affirmative defense is really a general denial which is adequately covered in the Answer, and to the extent it is contemplated as an affirmative defense it should be stricken.

b. Third Affirmative Defense

Defendant's third affirmative defense states that "Plaintiff fails to provide adequate information or specific parameters as to the type, date, and extent of any alleged violations. Therefore, Defendant asserts as an affirmative defense that the complaint[*42] is inadequately drafted to permit a responsive answer." Plaintiff argues first that this is not an "affirmative defense" and second, that the issue has already been resolved and the Court has held that the complaint is not overly vague.

Because the Court has previously concluded that Plaintiff's complaint is not overly vague, and denied Defendant's motion to dismiss on that basis, the issue raised here is moot and no further action is necessary.

c. Tenth Affirmative Defense

Defendant's tenth affirmative defense states that "Plaintiff mischaracterizes types of alleged violations." Specifically, Defendant maintains that Plaintiff has improperly counted single alleged violations as multiple violations. Defendant maintains that at trial it will demonstrate that two violations were counted as seventy. Again, Plaintiff argues that this is not an affirmative defense and should be stricken.

The proper characterization of the violations will be an element that Plaintiff will be required to prove at trial. The Court agrees and Defendant's tenth affirmative defense will be stricken.

2. Defendant's Second, Fourth Through Ninth and Eleventh Through Eighteenth Affirmative Defenses [*43]

Plaintiff claims that Defendant's second, fourth through ninth and eleventh through eighteenth affirmative defenses are conclusory and are unsupported.

a. Defendant's Second Affirmative Defense

Defendant's second affirmative defense states that "Plaintiff's complaint fails to state a claim upon which relief can be granted." As the Court has already denied Defendant's motion to dismiss the complaint for failure to state a claim, Plaintiff's motion to strike this affirmative defense is moot and no further action is necessary.

b. Defendant's Fourth Affirmative Defense

Defendant's fourth affirmative defense states that "Plaintiff's claims are barred by the doctrines of estoppel and laches." Plaintiff argues that under the circumstances present in this action, neither of those affirmative defenses is supportable.

The Ninth Circuit has explained that "the doctrine of equitable estoppel is available if the following elements are present: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant[*44] of the true facts; and (4) he must rely on the former's conduct to his injury." *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir. 1981) (citations omitted). "In addition, to invoke estoppel against the Government, the party claiming estoppel must show 'affirmative misconduct' as opposed to mere failure to inform or assist." *Id.* Plaintiff argues that summary judgment on the defense of estoppel is appropriate at this time because Defendant has come forward with no evidence of "affirmative misconduct" on the part of the Government to support such a defense.

Additionally, the defense of laches is not available as a defense against the United States when it is acting to enforce a public right or interest. See *Costello v. United States*, 365 U.S. 265, 281, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961).

The documents which provide the alleged basis in the instant action were sent to Plaintiff. To establish affirmative misconduct, Defendant maintains that, at the time the complaint was filed, Plaintiff was aware that backup documents might not exist because Defendant was only required to maintain records for three years. Defendant further argues that Plaintiff intentionally waited to file[*45] the complaint until Defendant's operator was unavailable to testify and that documents were

wrongfully removed by disgruntled employees. Finally, Defendant asserts that Plaintiff's failure to renew or modify Defendant's request for a permit for over seven years constitutes affirmative misconduct.

The Court concludes that the allegations of affirmative misconduct contained in the answer and briefing do not create a genuine issue of material fact which is sufficient to withstand summary judgment. Accordingly, Defendant's fourth affirmative defense is stricken to the extent that Defendant seeks to avoid liability based on this defense.

However, Defendant has argued that even if the defenses of estoppel and laches cannot form the basis for a complete bar of Plaintiff's claims, at least they should be considered as a factor in mitigating any amount that must be paid as a civil penalty. The Court agrees. Although evidence supporting the existence of estoppel and laches shall not be introduced to support an affirmative defense, Defendant shall have the opportunity to submit such evidence regarding Plaintiff's conduct which would have a mitigating effect upon possible damages should that[*46] issue be reached.

c. Defendant's Fifth Affirmative Defense

Defendant's fifth affirmative defense claims that "excursion allegation, if defined, may be due to a bypass and are therefore excusable under the permit." Defendant's NPDES permit defines bypass as "the intentional diversion of waste from any portion of a treatment facility." NPDES Permit, at 6, P 7. The permit prohibits bypasses unless the following conditions are met:

- (1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- (2) There were no feasible alternatives to the bypass . . . and
- (3) The permittee submitted notices as required under [the permit].

Id. at 11.

Plaintiff argues that Defendant has failed to provide facts to support the affirmative defense. According to Plaintiff, Defendant has failed to make a showing of unavoidability, alternatives, and submission of notice. Defendant urges the Court to examine Figure 1, which includes facts contained in Exhibit 9, at page six of its brief in opposition to Plaintiff's motion for summary judgment, to determine whether a factual dispute has been created.

After reviewing Figure 1, along with[*47] the arguments presented by the parties, the Court concludes that summary judgment is inappropriate. A genuine issue of material fact regarding the applicability of this defense has been created. Accordingly, Defendant's fifth affirmative defense will not be stricken.

d. Defendant's Sixth Affirmative Defense

Defendant's sixth affirmative defense is that "excursion allegations, if defined, may be due to an upset or exceptional incident beyond the reasonable control of the Defendant and are therefore excusable under the permit." Defendant's NPDES permit defines an upset as:

An exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

NPDES Permit, at 6, P 6. Defendant's permit also states that such an upset will be an affirmative defense as long as Defendant can

Demonstrate, through properly[*48] signed, contemporaneous operating logs, or other relevant evidence that:

- a. An upset occurred and that the permittee can identify the cause(s) of the upset;
- b. The permitted facility was at the time being properly operated;
- c. The permittee submitted notice of the upset as required under Part II.I. Twenty-four Hour Notice of Noncompliance Reporting; and
- d. The permittee complied with any remedial measures required under Part III.D. Duty to Mitigate.

Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

NPDES Permit, at 12.

Defendant maintains that it sent the required notice. To support a finding that upsets occurred, Defendant relies upon a letter sent by Plaintiff's expert, Brian Harrington, in which he stated that there were upsets at

the facility. Defendant asserts that not only does the defense apply to technology-based limitations, but also to water based limitations pursuant to *National Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 209-10 (D.C. Cir. 1988). Defendant asserts that the D.C. Circuit, in *National Resources Defense Council*,[*49] held that the EPA's failure to extend the upset defense to water quality-based limitations was arbitrary and capricious. Finally, Defendant maintains that all of the conditions are supported by the facts outlined in Figure 1.

First, Plaintiff argues that this defense is inapplicable to Defendant's ammonia, chlorine, and fecal coliform effluent violations because these are water quality-based limits and not technology based. Plaintiff concedes that Brian Harrington was of the opinion that upsets had occurred, however, his use of the word was made under the common meaning, which includes causes expressly excluded by Defendant's permit. Further, Plaintiff maintains that Defendant has failed to produce sufficient facts to create a genuine dispute with regard to the four required conditions relating to technology based limitations.

National Resources Defense Council held that the EPA acted arbitrarily and capriciously in not extending the upset defense to water quality-based limitations and ordered EPA to "conduct further proceedings to determine whether to extend the upset defense to violations of water quality-based permit limitations." 859 F.2d at 210. The current regulation does[*50] not extend the upset defense to water quality-based limits. See 40 C.F.R. § 122.41(n). Inasmuch as the agency has not extended the defense, water quality-based limits are not defensible with the upset defense.

With respect to the technology-based limitations, the Court is of the view that Defendant has provided sufficient facts to create a genuine issue of material fact. Therefore, Defendant's sixth affirmative defense shall not be stricken.

e. Defendant's Seventh Affirmative Defense

Defendant's seventh affirmative defense states that "excursion allegations, if defined, may be due to severe property damage or damage to the treatment facilities and are therefore excusable under the permit." This defense relates to and is part of a bypass defense. As discussed above, in order to establish a bypass defense, Defendant must establish three conditions, i.e. the bypass was unavoidable to prevent damage, no alternatives to the bypass existed, and notice was given. NPDES Permit, at 11.

In support of this defense, Defendant cites Figure 1, which provides all of the required factual basis. Upon careful consideration of the evidence contained in the record, the Court concludes[*51] that a genuine issue of material fact exists regarding this defense. Accordingly, Defendant's seventh affirmative defense shall not be stricken.

f. Defendant's Eighth Affirmative Defense

The eighth affirmative defense is that "excursion allegations, if defined, may be due to the potential for substantial loss of natural resources and are therefore excusable under the permit." This defense relates to a bypass defense. In support, Defendant points to Figure 1. The existing record creates a genuine issue of material fact with respect to the applicability of this defense. Therefore, Defendant's eighth affirmative defense shall not be stricken.

g. Defendant's Ninth Affirmative Defense

Defendant's ninth affirmative defense is that the "excursion allegations, if defined, may be due to damage to the treatment facility which caused the facility to become incapable of operation and are therefore excusable under the permit." Again, this relates to and is part of a bypass defense, therefore, the ninth affirmative defense shall not be stricken.

h. Defendant's Eleventh Affirmative Defense

The eleventh affirmative defense is that "Defendant is not required to pay [*52]the alleged Twenty-five thousand dollars (\$ 25,000) per violation." This is not an affirmative defense and is insufficient to defeat any asserted liability for alleged CWA violations. While not technically an affirmative defense in the traditional sense, it is a general denial and the Court will construe it as such. Accordingly, the eleventh affirmative defense shall not be stricken but may be asserted to reduce the amount of civil liability should that issue be reached.

i. Defendant's Twelfth Affirmative Defense

Defendant's twelfth affirmative defense is that "Defendant did not willfully or negligently violate permit conditions." Whether Defendant acted willfully or negligently is irrelevant. Plaintiff is not required to prove willfulness or negligence since liability is strict under Section 309(b) and (d) of the CWA. See *United States v. Brace*, 41 F.3d 117, 122 (3d Cir. 1994). Accordingly, Defendant's twelfth affirmative defense

shall be stricken.

j. Defendant's Thirteenth Affirmative Defense

Defendant's thirteenth affirmative defense that "Defendant may have had no feasible alternative to bypass and therefore, without more specific data on each allegation, [*53] Plaintiff cannot take an enforcement action against the Defendant" relates to a bypass defense for which a genuine issue of material fact exists based on the record. Accordingly, Defendant's thirteenth affirmative defense shall not be stricken.

k. Defendant's Fourteenth Affirmative Defense

"Defendant may have had bypass conditions identifiable during times when the facility was being operated properly and may have complied with remedial measures as required." This defense shall remain inasmuch as a genuine issue of material fact has been created by the evidence contained in the record.

l. Defendant's Fifteenth Affirmative Defense

Defendant asserts the defense of "an Act of God." This defense is not provided in the CWA or in the case law as a defense to the instant action. Liability for the alleged violations at issue here is strict. Further, there is no evidence submitted in the record to establish that an act of God occurred. Accordingly, Defendant's fifteenth affirmative defense is stricken.

m. Defendant's Sixteenth Affirmative Defense

Defendant claims that "alleged violations, if any, may have resulted from the acts of third parties not employed[*54] by or under the control of the Defendant." Defendant asserts that sampling errors, sample breakage and frozen samples are all third-party actions. This defense is not recognized by the CWA. Liability under Section 301 of the CWA is strict. Inasmuch as the defense is not applicable to the claims asserted by Plaintiff, Defendant's sixteenth affirmative defense is stricken.

n. Defendant's Seventeenth Affirmative Defense

Defendant's seventeenth affirmative defense is that the "alleged violations, if any, may be due to sampling, testing or laboratory error." Defendant asserts that Figure 1 along with Exhibits 9 and 10 establish that sufficient factual support exists to withstand summary judgment on the affirmative defense of testing errors. According to Defendant, lab error was held to be a partial defense under an NPDES Permit under the CWA. In

support of this assertion, Defendant cites the Court to Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc., 817 F. Supp. 1164 (D.N.J. 1993).

Plaintiff argues that Defendant has failed to specify or submit any facts into the record that would support actual sampling errors. Further, Plaintiff argues[*55] that the controlling law has been pronounced by the Ninth Circuit Court of Appeals in that a permittee may not impeach its own reports by showing sampling error. *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491-93 (9th Cir. 1987) vacated on other grounds, 485 U.S. 931 (1988).

The Court concludes that this defense is not allowed by the Ninth Circuit, as cited above, and accordingly, Defendant's seventeenth affirmative defense is stricken.

o. Defendant's Eighteenth Affirmative Defense

Defendant's eighteenth affirmative defense states that "alleged violations, if any, provided no economic benefit to the Defendant." While this factor may be relevant to the Court's imposition of an appropriate penalty, it will not act as a bar to liability. Accordingly, Defendant's eighteenth affirmative defense is stricken.

Based on the foregoing, Plaintiff's motion for partial summary judgment with respect to Defendant's affirmative defenses is granted in part and denied in part. The motion is granted with respect to Defendant's first, fourth, tenth, twelfth, fifteenth, sixteenth, seventeenth, and eighteenth affirmative defenses. The motion is denied with respect to Defendant's[*56] fifth, sixth, seventh, eighth, ninth, eleventh, thirteenth, and fourteenth affirmative defenses. The motion is moot with respect to the second and third affirmative defenses.

E. Defendant's Partial Motion for Summary Judgment Defendant's partial motion for summary judgment seeks an order from the Court that the penalty sought by Plaintiff in its Amended Complaint, of up to \$ 25,000 per day for each violation, is contrary to the specific terms of the NPDES permit issued to Defendant, which provides that the maximum penalty for violation is \$ 10,000 per day for such violation.

Plaintiff's Amended Complaint does in fact seek a penalty of up to \$ 25,000 per violation for each time Defendant is found to have violated the terms of its NPDES permit. The NPDES permit under which Defendant operates became effective June 27, 1985. The permit was to expire by its own terms at midnight on

June 26, 1990. However, Defendant filed a renewal application before the permit was to expire, and the parties agree that the permit was thereafter administratively extended in its entirety without modification. Defendant has been and continues to operate under the terms of the June 27, 1985 NPDES[*57] permit.

Regarding penalties for violation of the terms of the permit, the permit provides in part:

B. Penalties for Violations of Permit Conditions: The Clean Water Act provides that any person who violates a permit condition implementing § 301 . . . of the Clean Water Act is subject to a civil penalty not to exceed \$ 10,000 per day of such violation.

NPDES Permit, at 10, Ex. A to McGowan Aff. n5 Defendant argues that because the permit specifically provides that the penalties for violation will not exceed \$ 10,000 per day of such violation, Plaintiff is bound by the terms of the permit and should be prohibited from seeking a fine of up to \$ 25,000 per day for each violation.

n5 The penalties provision does continue to state that "any person who willfully or negligently violates permit conditions" is subject to a fine of not more than \$ 25,000 per day of violations. See *id.* However, Plaintiff does not appear to be arguing, nor is there any evidence to support a finding, that Defendant willfully or negligently caused the alleged violations to occur.

[*58]

Plaintiff has responded by explaining that in 1985, when this permit was issued, the CWA did in fact provide that civil penalties for violation of the Act could not exceed \$ 10,000 per day for such violation, and thus the permit refers to that when it states, the "Clean Water Act provides that any person who violates a permit condition . . . is subject to a civil penalty not to exceed \$ 10,000 per day" However, in 1987 the CWA was amended to provide that a person who violates the Act could be subject to a civil penalty not to exceed \$ 25,000 per day per violation. See CWA § 309(d), 33 U.S.C. § 1319(d). Plaintiff argues that the reference to the CWA in the permit indicates that the permit penalties are meant to be the same as those under the Act, and thus concludes that for violations after 1987, Defendant is subject to a penalty of up to \$ 25,000 per day per violation.

In support of its conclusion that the \$ 25,000 per day per violation penalty should apply, Plaintiff directs the Court to a series of cases in which different courts have held that for violations before 1987, the \$ 10,000 per day penalty applies, while for violations after 1987, the \$ 25,000[*59] per day per violation penalty applies. See e.g., *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1138 (11th Cir. 1990) (holding that where a party violated its NPDES permit both before and after 1987, "maximum penalties must be assessed in accordance with both pre- and post-amendment language of the statute"). However, as Defendant notes, none of the cases cited by Plaintiff state whether the NPDES permit in each action contained language similar to the language in Defendant's permit regarding the maximum penalties for violations. In the absence of any language in the permit subjecting it to statutory changes, the Court concludes that the permit language must control. Accordingly, Defendant is subject only to "a civil penalty not to exceed \$ 10,000 per day of such violation."

Next, Defendant seeks an order from the Court holding that the language "not to exceed \$ 10,000 per day of such violation" means that for each day of violation, the fine cannot exceed \$ 10,000. Plaintiff argues that the language of the permit and of the CWA allows it to seek penalties of up to \$ 10,000 per day per violation. Thus, under Plaintiff's reading, if Defendant[*60] had five violations on one day, it could be fined up to \$ 50,000 for those violations. Whereas under Defendant's reading of the permit, it could only be fined \$ 10,000 per day even if it were found to have ten violations in that day.

The language in Defendant's permit mirrors the pre-1987 amendment language, which has been interpreted to allow the government to seek a \$ 10,000 penalty per violation and not to cap the potential fine at \$ 10,000 per day. In *Atlantic States*, 897 F.2d at 1139, the Eleventh Circuit concluded "that the slight change in wording in the 1987 amendment points to the proper interpretation of the statute as originally written." The court noted that "the Conference Report accompanying the amendment makes clear that under the Senate bill, section 309 of the Act 33 U.S.C. § 1319 was amended in part 'to increase the civil judicial penalty limit from \$ 10,000 to \$ 25,000 per violation, [and] to clarify that each distinct violation is subject to a separate daily penalty assessment of up to \$ 25,000" H.R.Rep. No. 99-1004, 99th Cong., 2d Sess. 132." *Id.* The court reasoned that "Congress' indication that it intended by its amendment simply to 'clarify' [*61] the language in the statute as previously written convinces us to . . . find that

Congress intended the fines to attach to each violation of an effluent limitation separately" under the pre-1987 amendment language. *Id.*

This Court agrees with the Eleventh Circuit's analysis of the Congressional intent behind the statute, and concludes that the language in Defendant's permit which provides for a civil penalty "not to exceed \$ 10,000 per day of such violation" means that a penalty not to exceed \$ 10,000 can be levied for each violation found in one day.

Based on the foregoing, Defendant's motion for summary judgment is granted in part and denied in part. The motion is granted insofar as it seeks an order holding that Plaintiff can only seek a penalty of up to \$ 10,000 per day per violation, but is denied insofar as it seeks to cap or limit the possible penalty at \$ 10,000 total per day.

V.

MOTIONS IN LIMINE

Defendant has filed two motions in limine which the Court has not yet addressed. Defendant's Second Motion in Limine (Docket No. 98) seeks an order from the Court excluding from the trial in this matter the expert reports and testimony of Brian T. Harrington[*62] of Metcalf & Eddy and Dr. Gail B. Coad of Industrial Economics, Inc. Defendant's Third Motion in Limine (Docket No. 94) seeks an order from the Court barring Plaintiff from presenting evidence at trial relating to alleged unreported violations of the CWA occurring before the commencement of this action, evidence of violations of the CWA occurring at other facilities owned and operated by Defendant and evidence purporting to establish an economic benefit accruing to Defendant before the date of the instant complaint from violations alleged in the complaint.

1. Second Motion in Limine

Defendant moves the Court to exclude the expert report and testimony of both Brian T. Harrington and Dr. Gail B. Coad. Defendant objects to Harrington's report and testimony due to reliance upon documents previously excluded by the Court. Because Dr. Coad relied upon Harrington's report, Defendant seeks to exclude her report and testimony as well.

On April 29, 1997, the Court ordered the exclusion of documents attached to the affidavit of Thomas C. McGowan. Order Regarding Discovery Motions, at 2 (Docket No. 84). The documents excluded,

which are relevant to the present motion, included Exhibits[*63] 22 and 24. Exhibit 22 included a letter dated July 17, 1996 from Gregory Sindt, Bolton & Menk, to Robb Casseday and Wes Potter, ConAgra Red Meat Companies, regarding review of wastewater treatment facilities. Affidavit of Thomas C. McGowan (Docket No. 50). Exhibit 24 included a draft report of Armour Fresh Meats, Nampa, Idaho, "Engineering Pre-Design Report Wastewater Treatment Improvements" dated August 1993. Id.

Trial judges have broad discretion in determining the admissibility of expert evidence, and will be upheld unless the decision is manifestly erroneous. *Rogers v. Raymark Ind., Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991) (citing *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 8 L. Ed. 2d 313, 82 S. Ct. 1119 (1962)).

With respect to the July 17, 1996 letter, Plaintiff maintains that, while Harrington did rely upon the letter, the information relied upon was also gathered from independent sources. Inasmuch as Harrington's report can be substantiated with his own independent research without referencing the July 17, 1996 letter, the Court will not exclude either Harrington's or Coad's report for reliance upon the July 17, 1996 letter.

Plaintiff maintains that[*64] the reports should not be excluded due to reliance upon the August 1993 draft report. Harrington relied upon a final report dated December 1993. Plaintiff points out that the final draft of December 1993 is not the August 1993 draft report excluded by the Court. Further, the final report was disseminated by ConAgra in 1994 to the EPA, prior to the onset of the instant litigation. Defendant sought exclusion of the August 1993 draft on the basis of privilege. Because the documents are substantially similar, Defendant asserts that the Court should similarly exclude evidence which relies upon the December 1993 final report.

The December 1993 report was not included in the documents that the Court excluded in its April 29, 1997 order. Defendant disseminated the December 1993 final report to the EPA in 1994. Accordingly, the Court will not exclude testimony due to reliance upon the December 1993 final draft.

Based upon the foregoing, Defendant's second motion in limine is denied.

2. Third Motion in Limine

Plaintiff seeks to introduce evidence at trial to increase

the amount of penalty that this Court should impose in the case liability is established. The current motion revolves[*65] around a dispute as to whether the Court should consider evidence regarding a history of violations and economic benefits which occurred outside the applicable statute of limitations. Additionally, Defendant seeks to exclude evidence of violations at plants which it owns.

The civil penalty provision contained in the Clean Water Act sets out a maximum penalty amount for daily violations. "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). Courts have applied different approaches in determining the appropriate amount of penalties under this provision.

Some courts first determine the maximum amount that could be assessed in light of the number of daily violations. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990). Once the maximum penalty has been established, the court may reduce the amount based upon[*66] factors listed in section 309(d). Id. Other courts determine the amount of the economic benefit that the violator has enjoyed due to non-compliance and then increase that amount based on 309(d) factors. *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806 (D.M.D. Penn. 1996). While civil penalties are mandatory under the CWA, "the amount to be assessed is wholly within the discretion of the court." *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1394 (D.Hawaii 1993) (citing *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d at 1142). The evidence supporting the different 309(d) factors is critical in the Court's determination of a proper penalty.

The civil penalty provisions of the CWA are designed to both deter and punish violations. In order to achieve this policy, the penalty must "encompass the economic benefit of noncompliance to ensure that the violator does not profit from its violation of the law . . . [and] the penalty must include a punitive component in the form of a sum in addition to economic benefit which accounts for the degree of seriousness and/or willfulness of the violations." *Municipal Authority of Union* [*67] *Township*, 929 F. Supp. at 806.

While the CWA does not contain a specific statute of

limitations, courts have generally applied the five-year limit contained in 28 U.S.C. § 2462 to CWA civil penalty actions. See *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). The five-year limitation contained in 28 U.S.C. § 2462 is designed to preclude stale claims. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982). As Plaintiff points out, the statute of limitation at issue was designed to limit claims, but not to limit the evidence that may be introduced in support of timely claims. Defendant maintains the position that, if Plaintiff is allowed to increase the potential penalty for the timely claims through the introduction of evidence of stale claims, the policy of the statute of limitations will be circumvented. In essence, Defendant argues that Plaintiff should not be allowed to accomplish indirectly that which it is prohibited from attempting directly.

In support of its position that section 309(d) requires a consideration of evidence outside the statute of limitations period, Plaintiff cites the Court to [*68] *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.*, 786 F. Supp. 743 (D.N.D. Ind. 1992). In *Atlantic States*, the court determined that the statutory maximum penalty should not be decreased because the defendant had a history of violations which predated the violations at issue by almost ten years. 786 F. Supp. at 751. However, while the court did not mitigate the maximum penalty because of the history of abuses outside the statute of limitations period, it also was not used to increase the penalty. In determining the economic benefit that the defendant received due to non-compliance, the court limited its analysis to events which occurred during the limitations period. 786 F. Supp. at 749-51.

In *United States v. Roll Coater, Inc.*, 1991 U.S. Dist. LEXIS 8790, 21 ELR 21073, 21076 (D.S.D. Ind. 1991), the court held that history of violations occurring outside the limitations period was appropriate, but found that the defendant did "not have a history of violations because it has not been found guilty of a violation previous to the one at bar." Alleged violations were not considered in relation to the 309(d) factors in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 956 F. Supp. 588, 606 n. 17 (D. S.C. 1997) because the court determined that 309(d) referred to violations "that form the basis of the penalty being contemplated and not past violations . . . that are not before the court."

The Court must determine an appropriate penalty in order to achieve the policies of deterrence and punishment of the CWA. If this were the only concern, the

Court would include all prior violations of Defendant's NPDES permit. However, the Court must also limit Plaintiff's ability to recover for alleged violations which pre-date the statute of limitations. While the Court must impose a penalty upon a showing of liability, the amount of the penalty is within the discretion of the Court. In order to achieve a proper balance, the Court concludes that, as in *Roll Coater*, Defendant's prior history of violations will be examined on a limited basis and only to the extent that it has previously been found guilty of such violations. Evidence relating to the 309(d) factors will not include evidence of allegations of past violations or economic benefit which is alleged to have occurred prior to the statute of limitations [*70] period. Accordingly, Defendant's motion as it relates to the exclusion of evidence of violations and economic gain occurring outside the limitations period is granted.

Not only does Defendant seek to exclude evidence outside the statute of limitations, but Defendant also seeks to exclude evidence of violations at other plants which it owns and operates. Defendant maintains that such evidence is highly prejudicial and as a result, should not be considered. Evidence of permit violations at one plant has been admitted to determine the appropriate penalty for violations at another plant. *Public Interest Research Group v. Hercules, Inc.*, 830 F. Supp. 1525, 1544-45 (D.N.J. 1993). The *Hercules* court stated that the adjudicated violations at a different plant were relevant under 309(d) to determine the appropriate penalty for the violations at issue. *Id.* Yet, the court only allowed the evidence of past adjudicated violations after a Federal Rule of Evidence 403 analysis. At this time, the Court denies Defendant's motion to exclude evidence of adjudicated violations at other plants. However, the Court reserves the opportunity to exclude such evidence pursuant to directions and [*71] an evidentiary ruling at trial. Without the opportunity to view the evidence in its proper context, the Court is unable to properly perform a Rule 403 analysis.

VI.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. United States' Partial Motion for Summary Judgment On Defendant ConAgra, Inc.'s Affirmative Defenses 1-18 (Docket No. 87) is GRANTED IN PART and DENIED IN PART and MOOT IN PART as addressed above.
2. United States' Motion for Partial Summary Judgment

as to Liability (Docket No. 89) is GRANTED IN PART
and DENIED IN PART as addressed above.

3. Defendant's Motion for Partial Summary Judgment
(Docket No. 91) is GRANTED IN PART and DENIED

8. Motion to Strike Declaration of Joseph Roberto in
Support of [*72] Liability Summary Judgment (Docket
No. 114) is DENIED.

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Attorneys for Respondents Calvin and Mark DeKruyf

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF JEROME**

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 5597 IN THE
NAME OF CALVIN DeKRUYF,
AND/OR MARK DeKRUYF

LEE HALPER,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, CALVIN DeKRUYF and
MARK DeKRUYF,

Respondents.

Case No. SPOT00-120

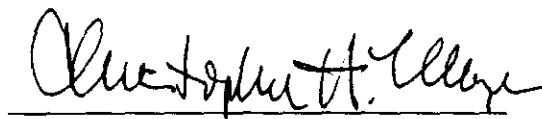
NOTICE OF APPEARANCE

Please take notice that Christopher H. Meyer and Gary G. Allen of the firm Givens Pursley LLP hereby enter their appearance as attorneys of record for Respondents Calvin and Mark DeKruyf. Givens Pursley LLP has been associated to serve as co-counsel. Fredericksen, Williams & Merservy will continue to serve as lead counsel.

DATED this 27th day of April, 2001.

Respectfully Submitted,

GIVENS PURSLEY LLP

A handwritten signature in black ink, appearing to read "Christopher H. Meyer", written over a horizontal line.

Christopher H. Meyer

*Attorneys for Respondents Calvin DeKruyf and
Mark DeKruyf*

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2001, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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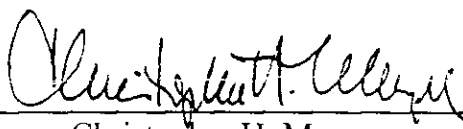
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