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Department of Water Resources

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

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BY *[Signature]*
DEPUTY CLERK

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5639 IN THE)
NAME OF K&W DAIRY)

Case No. CV-2003-1335

LEE HALPER AND BILL CHISHOLM,)
Petitioners,)

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES, an agency of the State of)
Idaho, and K&W Dairy,)
Respondents,)

MEMORANDUM DECISION AND ORDER ON JUDICIAL REVIEW

I. Statement of Case

This case is a Second Appeal from an Administrative Decision of the Idaho Department of Water Resources (IDWR) approving an application to transfer certain multiple water rights.

On August 31, 1999, K&W Dairy (K&W) filed an Application for Transfer of Water Rights No. 5639 (Application) with IDWR proposing to transfer a total of 1.92 cfs and 295.2 acre feet of water from an irrigation use to year round stock water and commercial use in connection with a proposed Dairy. The Application, if approved, would change the point of diversion, nature of use, period of use and place of use of the listed water rights.

After the filing of the Application, IDWR published notice of the Application and subsequent thereto, the Application and proposed transfer was protested by Petitioners Bill Chisholm and Lee Halper (Petitioners).

IDWR held administrative hearings, where it took and received evidence and testimony concerning the proposed transfer and subsequent thereto, IDWR issued a Second Amended Preliminary Order on April 9, 2001 approving the transfer Application. After said Order became final, Petitioners sought Judicial Review of the Second Amended Preliminary Order. (Gooding County Case No. CV-2001-239).

On November 30, 2001, District Judge R. Barry Wood issued an Order on Judicial Review, wherein the District Court overruled the objections of Petitioners and affirmed the Second Amended Preliminary Order dated April 9, 2001 in all respects, "with the exception of the narrow and limited factual issue regarding odors from the proposed new dairy."

As to this limited issue (odor) the matter was remanded to the IDWR hearing officer. The hearing officer was to make factual findings under the local public interest criteria as to whether odors that may be emitted from the proposed new dairy would be consistent with the local public interest requirement and whether the odors will be reasonable so as to be in compliance with Idaho law. Judge Wood emphasized in his Order that a "finding of NO odor was not required to approve the application.

Upon Remand, IDWR conducted further hearings and additional evidence was taken on April 11, 2002 and May 20, 2003. The May 20, 2003 hearing was held pursuant to an Order of Remand^(5c) to the hearing officer dated February 3, 2003 issued by the Director of IDWR. Ultimately on August 1, 2003, a Second Preliminary Order on

Remand was issued by the IDWR hearing officer. Said Order became final when the Petitioners Motion for Reconsideration was not granted.

Petitioners have timely filed a Petition for Judicial Review with this Court on September 11, 2003. The Petition for Judicial Review asserts that the Second Preliminary Order on Remand should be reversed on the following grounds:

- (1) The decision is in violation of constitutional or statutory provisions.
- (2) The decision was in excess of the statutory authority of the agency.
- (3) The decision was made upon unlawful procedure.
- (4) The decision is not supported by substantial evidence on the record as a whole.
- (5) The decision is arbitrary, capricious and an abuse of discretion.
- (6) That the Petitioners substantial rights have been prejudiced.

Petitioners in their respective briefs only raise the issues of whether the decision of the hearing officer was supported by substantial evidence and whether the decision was arbitrary, capricious and an abuse of discretion. (Brief of Appellant Lee Halper filed January 2, 2004, page 3). The opening Brief of Petitioner Bill Chisholm does not identify the issues to be addressed, however, a review of Petitioner's arguments in the Brief appear to be consistent with the issues identified by Petitioner Lee Halper.

II. Matter Deemed Fully Submitted for Decision

Oral Argument before the District Court in this matter was held on April 13, 2004. 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, i.e. April 14, 2004.

III. Issues Presented on Appeal

If an issue presented on appeal is not supported by propositions of law, authority or argument, it will not be considered on appeal. Matter of Estate of Freeburn, 101 Idaho 739, 620 P.2d 773 (1980). If a party raises an issue on appeal but fails to provide argument and authority, the party is deemed to have waived the issue. East v. West One Bank, 120 Idaho 226, 231, 815 P.2d 35, 40 (Ct. App. 1991).

The following are the issues presented by the Petitioners:

- (1) Whether IDWR's conclusion that the water rights transfer is in the local public interest is supported by substantial evidence.
- (2) Whether IDWR's findings, inferences, conclusions, or decisions were arbitrary and capricious or an abuse of discretion.

IV. Applicable Standard of Review

In Gooding County Case No. CV-2001-239, Judge Wood correctly identified the appropriate standard of review as it relates to Petitions for Judicial Review of Administrative actions which is adopted by this Court and stated hereinafter.

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 Section 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code Section 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 Section 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, conclusion, 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 Section 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 Section 67-5279(3), and that a substantial right of the party (petitioner or appellant) has been prejudiced. Idaho Code Section 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 substantial¹ 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:

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 conclusions the hearing officer reached. Mann v.

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

Idaho Code Section 42-222 establishes four criteria for evaluating the transfer of water rights, which 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.

To prevail, the Petitioners must affirmatively establish an error with respect to one or more of the four criteria, and must show it to be an error, which prejudiced a substantial right. Judge Wood, in Gooding County Case No. CV-2001-239 had previously determined that Petitioners had failed to affirmatively establish error in IDWR's decision with respect to criteria 1, 2, and 4 and that with respect to the local public interest criteria, had failed to affirmatively show error, except as to the issue of "odor." Therefore, in this Petition for Judicial Review, Petitioners must affirmatively

Safeway Stores, Inc., 95 Idaho 732, 518 P.2d 1194 (1974); see also Evans v. Hara's Inc., 125 Idaho 473,

establish an error with respect to the local public interest criteria as it concerns the issue of odor and must show it to be an error which prejudiced a substantial right of the Petitioners.

V. Whether or not the Proposed Transfer is in the Local Public Interest as it Concerns the Issue of Odor.

At the time of the filing of the Application, the local public interest was defined “as the affairs of the people in the area directly affected by the proposed use.” I.C. Section 42-203A(5). The determination of what elements of the public interest are impacted and what the public interest requires is committed to the sound discretion of IDWR. Collins Bros. Corp. v. Dunn, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988); Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985).

The district court in Gooding County Case No. CV-2001-239 previously found that there was substantial and competent evidence that the transfer was in the local public interest as to the economic element, and the element of ground water contamination. Judge Wood also concluded there was no support in the position held by Petitioner that the proposed transfer would violate the Federal Clean Water Act. As to the element of “undesirable odor” Judge Wood concluded that the hearing officer’s factual findings and conclusions of law “as to odor (was) not supported by substantial evidence in the record as a whole as it relates to the local public interest factor.” It was for this reason that Judge Wood remanded the issue of odor back to the hearing officer as to whether the odors to be emitted from the proposed new dairy would be consistent with the local public interest requirement and whether the odors will be reasonable so as to be in compliance with Idaho law.

478, 849 P.2d 934, 939 (1993).

Therefore, with respect to the Second Preliminary Order on Remand dated August 1, 2003, this Court's focus should be as to:

Findings of Fact

9. Tremblay Consulting of Jerome, Idaho prepared a Nutrient Management Plan for the proposed dairy utilizing a "flush system" of waste removal, which plan has been approved by the Idaho Department of Agriculture (see Applicant's Exhibit 6). The applicant, however, intends to revise the Nutrient Management Plan to utilize a "scrape system" for removal of dairy waste from the holding pens and alleys.

10. To control odor from the proposed dairy, the applicant proposes to compost solid waste in order to keep the bacterial action on the solid waste aerobic. The compost sites are planned at the dairy site and at another site about 4 miles east of the dairy site on land owned by the applicant. The applicant plans to land-apply liquid waste during the summer months using drop hoses and low pressure sprinkler nozzles, emptying the lagoon at least every week to prevent the generation of odors through anaerobic bacterial action and to store the liquid waste during the winter while the land is frozen. The proposed pivot location for land application of the waste is within the NW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 32 and SW $\frac{1}{4}$ Section 33, T8S, R15E, B.M.

11. The applicant has developed a Manure Management Plan together with a Vicinity Plan and a Site Plan ("plans") and has submitted the plans to the Idaho Department of Agriculture for review and comment even though the plans are not required for the operation of the proposed dairy. (See Applicant's Exhibit 21, R.,

Vol. V, page 470). The applicant also has submitted the plans to the Waste Management Engineer of the Cooperative Extension System of the University of Idaho for review and comment. The plans include scraping manure from alleyways and open lots to a collection point from where the manure and all solids generated will be conveyed to screw-press separators to obtain optimal moisture content for composting solids. The moisture from the manure will be piped to concrete gravity separators before entering the storage pond. The liquid in the storage pond will be applied to lands of the applicant in accordance with the Nutrient Management Plan for the facility. The water to be land applied is proposed as a mix of 1 part lagoon water and 9 parts irrigation water.

* * *

13. Testimony conflicted on the direction the wind blows in the vicinity of the proposed dairy, but most witnesses testified that the wind sometimes blows from any direction. In addition, colder air tends to sink into the Snake River canyon together with odors that may be in the sinking air.

* * *

22. Marv Patten, Dairy Bureau Chief with the Idaho Department of Agriculture testified that waste lagoons are the biggest source of odor complaints made to the Department of Agriculture and that land application of liquid waste from lagoons without dilution of the liquid waste is the second biggest source of complaints. He stated that the dairy facilities most complained about are the "flush type" liquid waste facilities.

23. Dr. Ron Sheffield, Waste Management Engineer with the University of Idaho Cooperative Extension Service assessed the manure management plan and odor control strategy of the applicant as "comprehensive" and a "well thought out strategy" of how to handle manure and to address potential odor problems. He described the plan as flexible in terms of options and allowing for future modifications that could be accomplished without major retrofits or capital expense. (See Applicant's Exhibit 25). He testified that if the applicant follows the plans, there would be an "earthy" smell from the manure but not the "septic/rotten egg" smell associated with hydrogen sulfide and other reduced sulfur compounds.

24. The protestants are concerned about the cumulative impact of dairies in the general vicinity of the applicant's dairy and believe there is a potential for the dairy operations to adversely affect water quality, air quality and the overall environment. The protestants believe the application is not in the local public interest, since the dairy will add to the alleged existing odor problem in the area.

* * *

27. Several homeowners who live near the Clear Lakes Country Club located approximately 3.5 miles southwesterly from the proposed dairy site described that odors from existing dairies in the area decrease their quality of life, especially when the wind is relatively calm during summer afternoons and evenings and limit outdoor activities. The homeowners described that intolerable smells occur from 1 to 2 times a week. The homeowners also stated that real estate activity and sales of homes and property in the Clear Lakes Country Club area was slow and

was directly related to objectionable odors from dairies in the area. Steve Kats, president of the Buhl Chamber of Commerce and president of the Rural Magic Valley Economic Development Association, representing 3 counties and 13 cities, testified that economic development activities, such as attracting new business ventures to the area, are adversely affected by dairy odors which have become increasingly more noticeable each year. He specifically stated that he did not drive prospective business representatives down Bob Barton Road because of undesirable dairy odors.

28. There presently are about 97,000 dairy cattle in Gooding County with about 72,000 being located within an approximate 5-mile radius north of the applicant's proposed dairy site. This general area also was described in the hearing as a triangular area beginning along the Niagara-Wendell road to Wendell, then to Hagerman and then south along the Snake River to the Niagara-Wendell road. (See Protestant's Exhibit 1).

29. Witness David Erickson testified that within the Snake River canyon located just one mile south of the proposed dairy is a reach of public access to the canyon ("reach") that begins at Clear Lakes and extends upstream more than 6 miles. He testified that the reach is probably the best public access to the canyon from Hagerman to Burley being a distance of about 70 river miles. The reach is used for upland bird hunting, waterfowl hunting, hiking, photography and wildlife viewing. An existing equestrian trail extends through most of the reach that also includes the Magic Springs Wildlife Management Area and Niagara Springs State Park. Part of the proposed dairy site is located as close as ½ mile north of the

reach and is about midway through the reach. He described that existing dairy odors came from the north toward the Snake River canyon and that he first started noticing odors in the early 1990's.

30. Protestant Bill Chisholm lives about 7 miles west of the proposed dairy site and testified that existing dairy odors near the Bob Barton Highway located along the north boundary of the proposed dairy site are so bad that he drives an alternate route from his home to Wendell. The thrust of his testimony was that proposed projects should not be considered without consideration of the "cumulative impact" an additional dairy might have on the odors in a given area. When asked "Is there anything this applicant can do with his proposal to improve the management thereof that would satisfy you?" protestant Chisholm said "No." Chisholm's position was that "Any additional dairy in Magic Valley has to be turned down."

Conclusion of Law

10. Having evaluated and weighed the evidence and testimony relative to the applicant's proposed odor management methods and the local public interest, the proposed odor control measures for the dairy operation meet the local public interest standard.

A. Evidentiary Rulings

Petitioner Halper argues that the hearing officer abused his discretion in various evidentiary rulings and concludes on that basis that the findings of the hearing officer are arbitrary and capricious.

I.C. Section 67-5251 provides in part:

(1) The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

I.R.E. Rule 103 provides in part:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and,

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears in the record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

The Rules set forth above are consistent with the IDWR Rules of Procedure 600 and 604. Relevant evidence is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

The purpose of the hearing was to allow the hearing officer to take additional evidence on the local public interest issue of odor- i.e. "whether odors to be emitted from the proposed new dairy are consistent with the local public interest requirement... and

whether the odors will be reasonable so as to be in compliance with Idaho law.” (R., Vol. III, page 25).

It was not in dispute that existing dairy odors are a problem for the local public and that said odors were believed to be contributing to public health problems. The question to be resolved by the hearing officer is whether the odors that may be emitted from the proposed K & W Dairy would or would not be reasonable in light of the local public interest and in compliance with Idaho law.

Petitioners bear the burden of furnishing a record on review to substantiate a claim of error. State v. Stover, 126 Idaho 258, 265, 881 P.2d 553, 560 (Ct. App. 1994); State v. Murinko, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). A Court of review will not presume error by the hearing officer in the absence of an adequate record on review to support the petitioners’ claims. State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991). Missing portions of the record are presumed to support the findings of the hearing officer. State v. Mowery, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996); State v. Beck, 128 Idaho 416, 422, 913 P.2d 1186, 1192 (Ct. App. 1996).

Except as indicated below, most evidentiary error claimed by petitioners has not been preserved for review or the petitioners have failed to establish that a substantial right of the parties has been affected. A judgment may not be disturbed on appeal due to error in an evidentiary ruling unless the error affected a substantial right of the party. Wood v. Department of Health and Welfare, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995). Further, absent a plain or fundamental error, an objection to evidence is necessary to preserve the right to challenge the admission or exclusion of evidence on appeal. Hecla Mining Co. v. Star-Morning Mining Co., 122 Idaho 778, 839 P.2d 1192 (1992).

A1. Exclusion of Exhibits C, D, E, F, and G

The hearing officer excluded Exhibits C, D, E, F, and G on relevancy grounds. (Tr., V. I., Pages 227-233). Petitioner's attorney only argued that they were offered for "background information" concerning odor and/or health issues. (Tr., V. I., Pages 226-237). Although the hearing officer asked for an offer of proof, no offer was made other than as indicated. While the petitioners indicated that the exhibits or portions of the exhibits would contradict or impeach the Applicant's expert testimony and opinions, there was no offer of proof or foundation provided to the hearing officer as to what the statements were, nor could the petitioners identify those portions that they thought were relevant for that purpose. In fact the petitioners could have cross examined each witness as to such matters, yet did not take advantage of such testimony. There was no showing as to how those exhibits would be relevant to the key issue as to odor that may be emitted from K & W Dairy based on the proposed design. For example, there was no showing by Petitioners or their attorney as to how the exhibits would be relevant to odors that may be emitted from a dairy that employs a mechanical scraping system as part of a manure management plan. It cannot be said from the record that the hearing officer abused his discretion in refusing to admit the identified Exhibits. Further, the Petitioners during the hearing, were offered the opportunity to cross examine Respondent's witnesses as to portions of the Exhibits that were alleged to contradict or impeach the witnesses opinion testimony of Mr. Kator, yet nowhere did the Petitioners attempt such a cross examination.

In addition, said exhibits are not part of the record and the Petitioners have not moved the Court to augment the record in accordance with I.R.C.P. 84(1). As the court observed in Gibson v. Ada County, 138 Idaho 787,780, 69 P.3d 1048, 1051 (2003):

The party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision. See McAlpin v. Wood River Med. Ctr., 129 Idaho 1, 4, 921 P.2d 178, 181 (1996); Feld v. Idaho Crop Imp. Ass'n, 126 Idaho 1014, 1017, 895 P.2d 1207, 1210 (1995); McKay Const. Co. v. Ada County, 126 Idaho 923, 925, 894 P.2d 156, 158 (Ct.App. 1995); Ernst v. Hemingway & Moser Co., Inc., 126 Idaho 980, 983, 895 P.2d 581, 584 (Ct App. 1995). When a record or exhibit not included in the record on appeal is unavailable to the party who wishes to make it part of the record for appeal, it is incumbent on that party to move the district court, or petition this Court to order augmentation of the record on appeal with the relevant record(s) or exhibit(s). See State v. Hosey, 134 Idaho 883, 888, 11 P.3d 1101, 1106 (2000). When a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court. Orthman v. Idaho Power, 134 Idaho 598, 603, 7 P.3d 207, 212 (2000). We will not presume error from a "silent record or from the lack of a record." Brooks v. Brooks, 119 Idaho 275, 280, 805 P.2d 481, 486 (Ct. App. 1990) (citing Payette Farms Co. v. Conter, 103 Idaho 148, 645 P.2d 888 (1982)). Under the circumstances of this case, we presume that the missing portion of the record-the very documents at issue-support the district court's findings of fact, however cursory they may be. Therefore, the district court's findings of fact are not clearly erroneous.

Based on the record the Court cannot say that the hearing officer abused his discretion in excluding Exhibits C through G.

A2. Motion to Strike Testimony from Travis Kator

Travis Kator was an Agricultural Engineer hired by the Applicant to design the Manure Management Plan to control odor in the proposed dairy. In accord with Judge Wood's Order he prepared a detailed plan and design which was admitted as Exhibit 21. Mr. Kator also submitted an affidavit, Exhibit 23. These exhibits had been admitted originally without objection (Tr., Vol. II, pages 266-269).

During the course of the hearing Travis Kator testified extensively about the Manure Management Plan and the Idaho Odor Management Act. (Tr., Vol. II, pages 289-

359). It was then that Mr. Carlson, on behalf of Mr. Chisholm moved to strike portions of Exhibits 21 and 23 on the basis that Mr. Kator's opinion contained in those exhibits were without foundation or a legal conclusion. (Tr., Vol. II, pages 354-358). Petitioner did not object to any of Mr. Kator's oral testimony. "In determining whether these foundational requirements have been satisfied, the (trier of fact) must make various factual determinations..." Ryan v. Beisner, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct. App. 1992). If such findings have been made review is deferential. The hearing officer had the opportunity to judge the credibility of the witnesses first hand, and the Court will defer to the agency's finding. The hearing officer ruled that Mr. Kator was qualified and credible and could testify as to the effects of the Management Plan. Petitioner Halper argues that the basis of the objection was a "legal conclusion" yet provides no argument or evidence that the hearing officer abused his discretion, or that any right was substantially prejudiced.

In Exhibit 21 the Petitioner sought to strike the following statements/opinion:

1. "...generation below those levels normally associated with accepted agricultural practices in Idaho." (R., Vol. IV, page 462).

2. "The intent of the odor management on the facility is to maintain odor generations below those levels normally associated with accepted agricultural practices in Idaho." (R., Vol. IV, page 462).

In Exhibit 23 the Petitioners sought to strike the following statements/ opinion:

1. "...I am thoroughly familiar with the statutes and accompanying regulations of the State of Idaho that deal with the Management of odors generated from agricultural operations." (R., Vol. V, page 472).

2. "It is my opinion that the Manure Management Plan when constructed and implemented by K&W Dairy in accordance with the Plan dated January 6, 2003, will not generate odors in excess of accepted agricultural practices, as presently defined by Idaho Code and accompanying regulations." (R., Vol. V, page 472).

Pursuant to I.R.E. Rule 704, testimony in the form of an opinion that embraces the ultimate issue is not necessarily objectionable. The ultimate issue in this case is whether odors that may be emitted would be in the local public interest. Mr. Kator did not state any opinion in that regard. He merely opined that the odors would in his opinion be those "associated with the generally accepted agricultural practices in Idaho." This phrase is used in the Agricultural Odor Management Act. I.C. 25-3801, et seq.

A witness may refer to the law in expressing an opinion without the reference rendering the testimony inadmissible. Phillips v. Calhoun, 956 F.2d 949 (10th Cir. 1992). Witnesses may be called upon to aid or assist the trier of fact in understanding the facts in evidence, even if they are couched in legal terms. The opinions expressed by Mr. Kator on their face are not exclusively legal conclusions and do encompass factual issues.

The hearing officer did not err in overruling the petitioners' motion to strike portions of Exhibits 21 and 23. Any error in the ruling, if there be any, was harmless since his oral testimony was admitted and relied upon by the hearing officer without any objection.

A3. Testimony from Mr. Hill

Mr. Hill is a retired meteorologist who testified concerning air movement. The testimony indicated he had no background, training, knowledge or expertise with respect to odor or the movement of odor, although he did opine that odors would be expected to carry into the Snake River canyon. (Tr., Vol. II, pages 492, 498, 505-08). It is up to the hearing officer to give the testimony the weight to which it is entitled. It is not clear from the record whether or not the hearing officer struck any parts of Mr. Hill's testimony. (Tr., Vol. II, page 505). The hearing officer did acknowledge in his Findings of Fact that the evidence is in conflict as to wind and air movement in the area of the proposed dairy. Such an acknowledgment encompasses the totality of the evidence heard by the hearing officer and does not place undue reliance on some testimony over others, although that is within the hearing officer's discretion. Lastly, petitioners have made no adequate showing that a substantial right was prejudiced as it concerns Mr. Hill's testimony. It is the burden of the party bringing the appeal to demonstrate that the agency "erred in a manner specified in I.C. Section 67-5279(3), and then that a substantial right of the party has been prejudiced." Castaneda v. Brighton Corp., 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The petitioners have not met that burden.

Overall, it does not appear in review of the record as a whole that the hearing officer abused his discretion or acted in an arbitrary and capricious manner with respect to the evidentiary rulings.

B. The Record Supports IDWR's Findings of Fact and Conclusions of Law

As has been indicated previously, the matter was remanded to IDWR to make Findings and Conclusions on the issue of odor in the context of the local public interest requirement, i.e. will the odors to be emitted be reasonable and in compliance with Idaho law.

The law is clear that this Court is not to substitute its judgment for that of the hearing officer as to the weight of the evidence presented in the record and will defer to the hearing officer's Findings of Fact unless they are not supported by competent evidence and are clearly erroneous. Suits v. Idaho Board of Professional Discipline, 138 Idaho 397, ___ P.3d ___ (2003).

The petitioners in their brief and at oral argument failed to point to facts in the record that demonstrate that the hearing officer's Findings of Fact are clearly erroneous. They simply reargue the same facts that were decided against petitioner. Petitioners also assert that the hearing officer did not make adequate findings evaluating the evidence and demonstrating the basis for the agency decision. Petitioners seem to require that the hearing officer demonstrate the basis for his decision with point by point factual findings showing how the hearing officer weighed each piece of evidence and arrived at a final decision. This is not what is required. As Judge Wood noted in his previous Order, "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 findings of fact adequately demonstrate that the hearing officer took into account the entirety of the evidence, including the cumulative impact, when determining whether the odors from the proposed dairy meet the local public interest requirement.

As the issue of odor is concerned the record is clear that there does exist a current odor problem created by management practices of existing dairies in the general locale of the new proposed dairy to be operated and managed by K&W.

There is no dispute in the record that K&W are good stewards of the land and are good dairy managers. (R., Vol. III, page 19).

The record is also clear and undisputed that the odor problems that exist are the result of dairies that utilize the "flush system" in the manure management plans.

The record discloses that in order to mitigate against and reduce odor, that K&W will employ a "mechanical scrape system" as opposed to a "flush system." K&W employed Travis Kator, an agricultural engineer with Macedo Mitchell Engineering, to prepare the Plan and design for such a system. A detailed design and plan for the Manure Management Plan was introduced into evidence as Exhibit 21. The Plan as presented addresses the impacts and implications of the design as required in Shokal v. Dunn, Supra. The record also discloses that the Plan was reviewed and approved by the Department of Agriculture. (Testimony of Mr. Patten, Tr., Vol. II, pages 380-386; Exhibit 22 (letter) R., Vol. V, page 470).

There was testimony offered at the May 20, 2003 hearing through three experts Mr. Kator, Mr. Patten, and Mr. Sheffield, as well as the testimony of Dr. Burk at the hearing on April 11, 2002. The sum and substance of that testimony was that the dairy, if managed in accordance with the design and plan, would not emit odor at levels in excess of what is emitted using generally accepted agricultural practices. And that the odors emitted beyond the boundary of the property would be minimal and not offensive and

would be of an "earthy smell," not the septic/rotten egg odor associated with production and emissions of hydrogen sulfide.

On remand, the respondents offered testimony on the issue of odor as follows:

(1) Travis Kator, an agricultural engineer for Macedo Mitchell, which is an engineering firm hired by K&W to design a manure management system. The system plays a part in controlling odor. This system is based on a manure scraping system as opposed to a flush system. In this plan, manure is scraped from the alleys. It is then pumped into a pit and run through a separator where minimal amounts of water are added, then through a concrete settling basin and into ponds. The purpose is to reduce the amount of manure in the storage ponds to limit organic material that degrades in the pond which provides odor emissions. The waste water is stored in ponds only during months of colder condition. During those months of warmer weather, the effluent is applied to land regularly with 1 part effluent to 9 parts irrigation water using drop hoses and low pressure nozzles to limit the probability of aerosols and drift. In the opinion of Mr. Kator, odor impact in the general area from this dairy would be minimal and not offensive. According to Mr. Kator, this design is intended to keep biological material out of the settling ponds so as to reduce the anaerobic reaction which produces emissions and odor. Mr. Kator stated that composting reduces emissions that may be released by reason of land application of the solid and effluent materials. His opinions were based on experience of one or two similar systems, University studies and research. (Tr., Vol. II, pages 289-358).

(2) Marv Patten, Dairy Bureau Chief from the Department of Agriculture confirmed that dairies that use a "flush system" are problematic for odor. In his opinion,

odor levels in Magic Valley have declined since enactment of the Odor Management Act. The facilities that have used the scrape system have not been found to be in violation of the Odor Management Act. Mr. Patten and an engineer in his department reviewed the proposed plan of K&W and determined it would have minimal impacts on adverse odor in the local area. Mr. Patten indicated that because the design is not a liquid waste system it does not require Department approval, yet the Applicant sought such approval. He had his engineering department provide feedback on the design and based on that feedback he determined that the system would have minimal impact on the locale as to the concern of odor. He indicated that there are one or two other similar designs in the State and in his opinion if all comparable facilities in the Magic Valley had similar designs there would be a significant reduction of odors in the locale. As with any design, management is an important component of the performance of that design. (Tr., Vol. II, pages 359-435).

(3) Ron Sheffield, Assistant Professor and extension waste management engineer for the University of Idaho. In his opinion, the K&W Management Plan is a comprehensive and well thought out plan for controlling odor. In his opinion the plan will not produce the offensive odors associated with flush type systems, i.e. the septic rotten egg smell associated with the production of hydrogen sulfide. The odor, if any would be of an "earthy smell." The Plan, while it will not reduce odors that already exist in the area, odors generated will not significantly increase in the area. (Tr., Vol. II, pages 436-487).

The hearing officer found the testimony of these experts to be credible.

The petitioners argue that the hearing officer did not consider, and in fact, ignored the issue of "cumulative effect." This Court disagrees. The fact that the hearing officer commented in his analysis that "it is not fair for respondent to be held accountable for a condition that it did not create," does not establish bias or that the hearing officer ignored the cumulative effect. Judge Wood's Order did not require that findings be made that the design would reduce existing odor levels, only that the levels emitted would be reasonable so as to satisfy the public interest requirement and be in compliance with Idaho law.

The record is clear that the odor levels, if managed within the requirements of the Plan and design will be within compliance with Idaho law, i.e. the Odor Management Act. The record also shows that the odor emitted would not significantly increase existing odors, and would be of an "earthy" nature, and generally non-offensive.

Petitioners argument is not supported by the record. It is clear that the hearing officer did consider and weigh evidence concerning the cumulative effects of dairy odor (Findings of Fact 24, 27-30). The hearing officer in his analysis again acknowledges the testimony concerning "cumulative effect" of adding cows in an area where an odor problem already exists. In his analysis it is clear that the hearing officer took into account all tenets of the local public interest. Petitioners focus on a single sentence in the analysis to suggest that the hearing officer ignored the cumulative effect of adding another dairy and 6,000 cows. That sentence was: "On balance, it does not seem reasonable that the applicant should be held responsible for an odor problem that was not of the applicant's making and over which the applicant has no control." To this Court such a statement does not suggest that the hearing officer ignored and did not consider cumulative effects, but

was a statement in response to Petitioners testimony that given the existing odor problem no additional dairies should be permitted. The findings and the record as a whole reflect that the hearing officer did consider cumulative effect and concluded that the dairy would not have a cumulative impact if operated in accordance with the proposed plan and design.

In fact, at the April, 2002 hearing, the petitioners acknowledged they had no facts to suggest otherwise. For example, Mr. Halper testified as follows:

Q. You heard Mr. Burk testify that this dairy management testified to would not have any effect on you or other people outside the boundaries of this facility. Do you have specific facts that cause you to disagree that the system will not work as it's been testified to?

A. No. But I hope that if this goes through, that it works, that it becomes the standard for the rest of the dairy industry and the rest of the dairy industry picks up on it and does it and fixes the problem as they've been trying to promise for a long time,...(Tr., Vol. I, April 11, 2002, page 251, line 24-page 252, line 8).

Similarly, Mr. Chisholm testified as follows:

Q. I understand you believe there's a mess now. I'm asking you for any facts that you have in your possession why this particular Odor Management system design is going to add to the mess?

A. I don't believe I have any facts that its going to add. I don't believe there are any facts that it's not going to add. (Tr., Vol. I, April 11, 2002, page 240, line 21- page 241, line 1).

As Judge Wood noted in his opinion dated November 30, 2001, the matter was remanded because there was inadequate or no competent evidence in the record addressing the "mechanical scrape system" as required in Shokal and there was no evidence addressing the issue of odor that may be emitted from the dairy operations utilizing such a design in order to allow the Court or the hearing officer to assess the reasonableness of such odor emissions and whether they may be in the local public interest and in compliance with Idaho law.

(1) Evidence does now exist in the record concerning the use of a mechanical scrape system to control odors that did not exist at the time of Judge Woods decision. The evidence indicates that the odors emitted would be of a reasonable level, i.e. "earthy smell- not the septic rotten egg odor." All of the experts testified that, given the design of the system, the decomposition of the manure would be of an aerobic decay and not the anaerobic decay that is the result of the flush type systems and is the primary cause or result of the offensive odors.

(2) Evidence was presented at the hearing on remand concerning the mechanical scrape system. The Plan was reviewed in detail, (Testimony of Travis Kator and Exhibit 21), and was also reviewed by the Department of Agriculture and Ron Sheffield. The evidence was also undisputed at the hearing on remand and by Judge Wood that K&W are good stewards of the land and good dairy managers. The project design is sufficiently

definite to reflect its impacts and implications, as required in Shokal v. Dunn, 109 Idaho at 339.

(3) As to the issue of cumulative impact, again the evidence is that the odors that may be emitted would be minimal and of an earthy smell, unlike those associated with a flush system. Further, the consensus of opinion was that the impacts would be minimal and would not significantly impact existing odors that are being experienced by the general public in the general locale.

As the court observed in Shokal "a permit cannot issue which would allow construction of a project contrary to the authority of the Board of Health in policing water for pollution." Likewise, IDWR cannot and should not approve a water right transfer application for a dairy contrary to the authority of the Department of Agriculture in policing the Odor Management Act.

In Shokal, the court stated that IDWR had the authority to withhold a permit application until it received a proposed plan which appeared to be in compliance with water quality standards. Supra, 340-41. The record as a whole supports the conclusion with substantial competent evidence that the proposed design, a mechanical scraping system, will comply with the Odor Management Act and other requirements of the Department of Agriculture.

The respondent has put forth a design and plan for the new proposed dairy to deal with odor. The design, while not put to extensive use in Idaho by other dairies, has been employed in other states and in its limited use in Idaho has not been associated with odor problems. The design appears to address the primary cause of the offensive odors and

there is no evidence conflicting or otherwise, to suggest that the proposed plan and design will not work as the experts have testified. Overall, the hearing officer was not arbitrary or capricious in making the determination that the proposed design meets the local public interest requirement and the findings and conclusions of the hearing officer are supported by the evidence in the record.

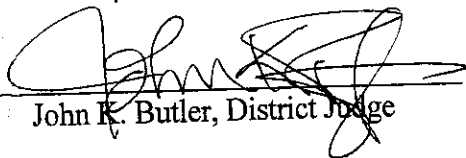
VI. Conclusion and Proceedings Pursuant to I.C. Section 67-5279(3)

Based on the foregoing and for all of the reasons set forth above, the Court overrules Petitioners' objections and affirms the Findings and Conclusions of the hearing officer that the Application for Transfer No. 5639 in the name of K&W Dairy complies with and meets the local public interest requirement as to the issue of odor and that the Second Preliminary Order on Remand, dated August 1, 2003, is hereby **AFFIRMED** in all respects.

DATED:

4/28/04

SIGNED:


John R. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 28 day of April, 2004, a true and correct copy of the foregoing Memorandum Decision and Order on Judicial Review was mailed, postage paid, and/or hand-delivered to the following persons:

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