

WPA
RECEIVED

SEP 29 2008

DEPARTMENT OF
WATER RESOURCES

Dean and Eden Dimond
1454 Hwy. 25
Jerome, Idaho 83338

Before the Department of Water Resources Of the State of Idaho

In the matter of application for transfer no. 72435

Motion to dismiss the pending water transfer and to further augment the record with the fact that Don McFarland DBA as Big Sky Farms no longer owns the property or the disputed water rights.

COMES NOW, Dean and Eden Dimond being a recognized protestant in the Big Sky Farms LCO ask the Department of Water Resources to dismiss with prejudice the pending water transfer.

1. We ask that the Department of Water Resources (henceforth the Department) add into the record the fact that Don McFarland has sold the property and water rights. Idaho Power has contacted Jim Stewart on behalf of the new owners seeking permission to cross the Stewart's property. Mike Gott has contracted with the new owner to farm the farm for the 2008 farming year. Mr. McFarland is quoted in the paper saying a sell was pending and to seek further information from his lawyers. Rob Williams is quoted in papers saying this is a private issue not relevant to the Judicial Review pending before the court. If the property had not been sold Mr. Williams would have simply said it had not been sold. The owner of a water right is relevant information before the Department. The Times News made a public records request to Jerome County and found that the Property in question now belong to Ryan Visser, Tony Visser and William Dejoung. The sale took place in Feb. 2008. John Lopspeach, a law partner of Rob Williams, Confirmed the sale in a public meeting before Jerome County Commisioners. Even if the Department allows an application to be transferred the applicant has NOT sought to do this. The applicant and his Attorney has tried to defraud the Department by not recording the sale and trying to cover it up as evident by the letter Mr. Williams submitted rebutting our April motion. IDAPA 37.01.01.205 allows for a substitution of Representative.

However, the Party must notify the agency and all parties IMMEDIATELY. Mr. Williams and Don McFarland have failed to do this waiting for over 7 months and still have not notified any of the parties. The rules provided to us at the hearing (IDAPA 37) do not allow for an application to be transferred. The burden of proof is placed upon the applicant. Not only has the applicant failed to provide the law in which they can transfer an application they have not even tried to transfer the application. They have not provided any proof that the lawful owners of this water right even want this transfer! Or that Mr. William represents them or their interests. William Dejoung and Rynn Visser have both said they do not wish to pursue this permit. For Mr. Williams and Mr. McFarland to pursue this is not only fraudulent and deceptive but can not and must not be allowed by the department. If water rights are allowed to be transferred just to show that it can be done will create a state of chaos and make a mockery of the Department. If the Department allows this application to proceed think of the sales fraud it could cause throughout the state. If a person who owns real property with a water right applies to transfer it then sells the property without telling the buyer about the transfer. Then if the department allows the transfer to go through under the seller's name the buyer would have a piece of property with no water rights.

2. The transfer of ownership significantly changes evidence/testimony offered in the application and the hearing. IDAPA 37.01.01.202.01 clearly defines who can represent a party. While it allows Don McFarland to represent Big Sky Farms LCO it does not provide a provision for Don McFarland to represent a future buyer. Furthermore, Rob Williams was retained to represent Big Sky Farms. This transfer in ownership makes the new owner the applicant and they were not represented at the hearing. Thus, the new applicant was a no show. The new applicant has not presented any evidence or even an application for the Department to consider. Thus they have also not provided an opportunity for the protestants to review their proposed transfer. Since McFarland has made no attempt to transfer this application after seven months, and he no longer owns the water rights thus this application must be denied.

In the first paragraph under 3 of the applicants closing Statement it reads in part "for a new Holstein heifer raising facility to be constructed by the applicant in eastern Jerome County." Since the property has been sold this statement can not be true. This alone should void the application.

3. While the Department does allow a water right to be transferred, There is no written procedure for transferring a pending application. Furthermore, there was a time frame in which a party could petition to become a party in the transfer. This time has more than passed and the new owners are not a recognized party in this transfer. The record has been closed and it is illegal for the applicant to submit new evidence that changes the scope of the transfer.

4. It was asked by protestant, Lee Halper, at the preliminary hearing that the Applicant

wait and see the outcome of the county hearing before proceeding with the water transfer. Mr. Williams responded that his client did not wish to do this. The applicant should have waited for the county. He should have also identified who would own the CAFO and the property at the time a decision would be issued and while/after it was built. At the very least he should have disclosed that the property would likely be sold and the buyers' identity. The applicant instead chose to simply say "it is not determined at this time."

5. With the sale of the property the new owners will have to come up with a new NMP. Don McFarland even testified to this at the hearing. Since the property was sold while the water transfer is pending there is in effect no approved NMP in place for the pending transfer. Under 5. The last sentence in the last paragraph of the applicant's closing statement it reads in part "There is no evidence in this record that the Applicant could not, or would not, adhere to the requirements of the approved NMP." In the Letter from ISDA that Rob Williams submitted at the hearing it says in part "It is important that you follow your plan as it has been written." Since this was the only proof that the applicant submitted that there was a NMP and he has already failed to comply with the most basic requirement of that letter there is no reasonable way for the Department to be sure that other parts of the NMP plan would be followed. Therefore, there is not a currently approved NMP for Big Sky Farms Heifer Ranch. The new owners will have to come up with their own NMP and the one before the Department is not the plan that will pertain to this CAFO. If a NMP will not be followed it is not worth the paper on which it is written. It definitely does not meet the requirement of the Department. Since the new owners also own other dairies the ISDA requirements for a NMP changes. There is no evidence in the record that there is a NMP that will apply to a heifer ranch owned by Dejoungs and Vissers. Since the applicant refused to submit a copy of the NMP to the Department and all they submitted was a letter stating there was a NMP for Big Sky Farms the Department has no way of knowing if the proposed Big Sky plan meets the requirements of ISDA for a heifer ranch owned by dairymen.

6. This sale has changed testimony that was given at the hearing. One example of this is: Matt Thompson testified that Big Sky Farms had received a "low" risk rating from the state siting team. One of the reasons the siting team offered for lowering the rating from moderate to low was because of the amount of ground McFarland owned. Unless McFarland sold all the ground he owns to the buyer this is no longer the case. The State siting team also stated in their assessment that if anything changes with the application or the site it may affect the rating of the siting team. A sale of the property is a huge change to both the application and the site. Since the applicant and his attorney has tried to cover up the sale there has not been a new siting team assessment ordered by the county. Therefore, the Department has no way of knowing what the risk assessment is for this application.

7. Even "IF" Don McFarland DBA Big Sky Farms has maintained an interest in the

property he is no longer the controlling partner and Big Sky Farms has lost their standing as the applicant in the water transfer.

8. Since Big Sky Farms has caused undo hardship upon the neighbors and has not been forth coming with this new evidence. We request that he be required to pay all costs incurred by us and the Department.

9. We object to Deborah Gibson with the Department contacting the Applicant's attorneys and requesting the September, 2008 Memorandum Decision (More commonly know as a finding of opinions and conclusion of assumptions)of the Jerome County Commissioners granting an LCO permit for Big Sky Farms. If the Department wanted this information they should have obtained it from the county along with all of the other evidences opposing this permit. How many other times has people from the Department contacted the Applicant or his attorney?

10. Regardless of whether or not the county granted the permit the fact still stands Big Sky Farms has NOT provided valid evidence that this CAFO would be in the public interest. Furthermore, a Governing Agency (The National Park Service) still strongly opposes this CAFO. The National Park Service has made opposition to this permit clear in the numerous letters they have submitted to Jerome County.

11. If the Department is still even considering granting this permit to Big Sky Farms (Allowing them to transfer water they do not even own) then the same courtesy shown to the Applicant must be extended to the Protestants. The Department must wait for our appeal of the Commissioners' decision to be decided by the courts. If the Department seeks to review the record they will see that the Protestants have an extremely strong case and prevailing in court appears very likely. The Department and Applicant should know that a strong coalition of neighbors and national groups are gathering to protect Minidoka National Monument. This coalition has the money, and resources to achieve their goals. This clearly demonstrates this transfer is not in the public's best interest.

WHEREFORE, we request relief from the hearing officer as follows:

1. The hearing officer add to the record the transfer of ownership
2. Order that Big Sky Farms pay all costs related to this proceeding
3. The hearing officer officially DENY the permit

DATED: September 25, 2008

Dean and Eden Dimond
Dean and Eden Dimond

Cc. Rob Williams