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DEC 10 2007

DEPARTMENT OF
WATER RESOURCES

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DEPT. OF WATER RESOURCES
SOUTHERN REGION

Before the Department of Water Resources Of the State of Idaho

In the matter of application for transfer no. 72435

Objection to applicants motion to further augment the record as request by the applicants attorney Robert E. William Dated the 29th day of November, 2007.

COMES NOW, Dean and Eden Dimond being a recognized protestant in the Big Sky Farms LCO case strongly object to the motion of the Applicant to further augment the record and their request to issue a Preliminary Order.

1. In response to the request to include the Applicant's Petition for Judicial Review we strongly object. While the augmentation the Department of Water Resources (henceforth the Department) made was based on facts and conclusion of law of a Governing Board the Petition for Judicial Review is nothing more than a paper filed in the court system by the applicant expressing his OPINION that the governing board was wrong.

- A. If Opinions and conjecture regarding the possible outcome are allowed to be included in the record, then the Department must recognize the fact that if the Applicant's position is upheld under Judicial Review the best he can hope for is it to be remanded back to the Commissioners for full reconsideration. At this point, the Applicant has no way of knowing what the Commissioners final decision might be.
- B. Even if the commissioners reverse their decision and eventually vote to approve the permit, we, the protestants still have the right to request Judicial Review.
- C. If the Department chooses to consider Mr. McFarland's Judicial Review motion in the record then, in fairness and equity, it must wait and see if the protestants file for Judicial Review and then consider that review as well.

2. Even if the Petition for Judicial Review is confirmed by the court, the Applicant will have succeeded on a mere technicality. The finding of facts by the commissioners still stand in that they voted it was NOT in the public interest. The ruling reads in part "The Concern here is that there is too little available acreage off the site for the waste produced by this facility to be sufficiently disposed. Big Sky Farms has not provided sufficient assurances that this can and will be done appropriately." So even if the courts remand it

back to the County Commissioners this fact still stands and Big Sky Farms have not proved it to be in the public interest.

3. The WHEREFOREs of the Judicial Review filing section B reads in part, "order that a permit be granted pursuant to the applicable criteria under the governing zoning law;" Idaho Code 67-5279 strictly prohibit the court from doing this. Therefore it is highly unlikely the Applicant will prevail since they are asking the court to rule outside of the law.

4. The record has been closed, and it is illegal for the Applicant to submit new evidence. It was asked by protestant, Lee Halper, at the preliminary hearing that the Applicant wait and see the out come of the county hearing before proceeding with the water transfer. Mr. Williams responded that his client did not wish to do this. For the applicant to now request that the hearing officer wait until after his petition for Judicial Review is ruled upon is in direct conflict with the applicant's previous demands to move forward without regard to this procedural matter.

5. In response to the applicant's request to approve this transfer upon the condition they eventually are successful on the Judicial Review is improper. The burden of proving that the Department issue a transfer is the sole responsibility of the Applicant. Waiting to see what a court decides places that burden upon the court. Furthermore, Idaho code allows for a governing board to approve permits upon conditions. The Department has no way of knowing what conditions the Board of Commissioners might place upon this application if it is remanded back to the Board of Commissioners. Idaho Code 67-5279 is very clear in stating that the court shall not substitute its judgment for that of the agency. The court is not allowed to grant the permit after the Board of Commissioners have turned it down.

6. The Applicant indicates that this is the only issue left for the Department to consider before issuing a Preliminary Order of approval. We contend that there was sufficient evidence presented at the hearing that must be considered before making a decision. This process has gone on for months and we are assuming that is because the hearing officer IS considering ALL the evidence. Unless the applicant has received something we have not we are still waiting to see what the hearing officer decides on the WHOLE record.

7. In the Order for augmentation issued by the Department an order was also issued for anyone seeking relief of the augmentation to the record request a hearing on the matter before December 10, 2007. The applicant has not made such a request but instead seeks a motion to further augment the record. Therefore, the Applicant is not seeking relief from the augmentation order, rather, he is seeking to submit new evidence after the official deadline date of the closing arguments and the hearing process.

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

1. The applicant's motion to further augment the record be denied.

2. The hearing officer officially DENY the permit based on the evidence presented at the hearing as well as the finding of facts of the Jerome County Commissioners.

DATED: December 3, 2007

Dean and Eden Dimond
Dean and Eden Dimond

cc. Robert E. Williams