

Lee Halper
331 S 230 W
Jerome, Idaho 83338
208-324-2240

RECEIVED
DEC 05 2007
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 72435

Big Sky Farms,

Applicant,

Dean T. Dimond, Harold S. Dimond,
Richard Bullers, Cyrus Bullers,
James Stewart, Brenda Herrmann,
Dennis H. Dimond, Blaine E. Miller
James Wyatt, Rita Ayers & Lee Halper,

Protestants.

Source: Groundwater

County: Jerome

RESPONSE TO ORDER FOR
AUGMENTATION OF THE
RECORD AND RESPONSE TO
APPLICANT'S MOTION
TO FURTHER AUGMENT
THE RECORD AND
MOTION TO FURTHER
AUGMENT THE RECORD

COMES NOW Protestant Lee Halper (Halper) and responds to IDWR's Order for Augmentation of the record, Applicant's motion to further augment the record and makes a motion to further augment the record.

Halper agrees with IDWR that augmentation of the record with the County's Findings of Facts and Conclusions of Law (FFCL) is appropriate and relevant.

Halper disagrees with the applicant as to their conclusions of what may happen in Court. There are other possibilities such as the Court remanding the matter back to the Board to write their FFCL's in a more professional and complete manner and thereby supplement the record. Although the FFCL's entered into the record by IDWR reflect the fact that two of the three County Commissioners voted to deny the CAFO permit application, the third County Commissioner signed the FFCL thereby making the decision unanimous.

If the matter is remanded with the Court's directive to supplement the FFCL's, the Board has available a FFCL written by Commissioner Obenauer (attached). This FFCL was produced later than the signed FFCL in the record and the only reason that Commissioner Joe Davidson did not consider or sign it was because of Prosecutor Mike Seib's wrongful and negligent legal advice. He told Mr. Davidson that he could not consider Ms. Obenauer's FFCL because the issues addressed were not addressed in the deliberation hearing. There is no requirement in the Code to support Mr. Seib's conclusion. In addition, Mr. Seib told Mr. Davidson that the Judge would throw Ms. Obenauer's FFCL's out. This unethical and negligent advice deterred Mr. Davidson from even considering Ms. Obenauer's supplementation of the FFCL's. Mr. Seib's advice is completely contrary to

67-5279(1)

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

And contrary to Mr. Seib's advice, the Board is required under I.C.67-6535 to consider the whole record, and provide

a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

Ms. Obenauer's FFCL's complies with I.C. 67-6535 in a more complete manner than the FFCL's on record which were written by Mr. Seib, though Mr. Seib's reflects the decision and findings of the Board, an irreversible condition.

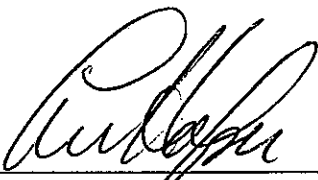
Halper now motions IDWR to include Commissioner Obenauer's FFCL in the record as evidence to support IDWR's contention in its Order that the County found that the proposed land use application is not a beneficial use nor in the public interest. IDWR will see that there are many reasons the County can use to deny this application as a matter of law and that any action in Court will not reverse these reasons.

Halper also motions that the facts contained in this Response be considered by IDWR on an equal par with the conclusions contained in the Applicant's Response and Motion.

In addition, IDWR should note that regardless of the outcome in Court, the County found that the application was not a beneficial use and would be hard pressed to change its decision and that it would be impossible to justify changing its decision.

For these and all the reasons raised in the transfer hearing, Halper requests the hearing officer DENY the transfer in a Final Order.

Dated this 4th day of December, 2007



Lee Halper, Protestant

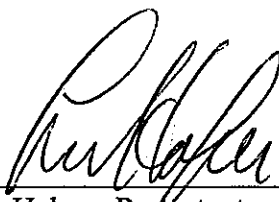
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing instrument to be served upon the following at the address and in the manner indicated below:

Dean T Dimond Eden Dimond 1454 Hwy 25 Jerome ID 83338	Harold S Dimond 3059 S 1800 E Wendell ID 83355
Richard Bullers 1482 Hunt Rd Jerome ID 83338	Cyrus Bullers 1545 Hwy 25 Jerome ID 83338
James Stewart 292 S 1250 E Jerome ID 83338	Brenda Herrmann 274 S 1250 E Jerome ID 83338
Dennis H Dimond 1424 Hwy 25 Jerome ID 83338	Blaine E Miller 366 S 1700 E Jerome ID 83338
James Leroy Wyatt Brenda Wyatt 376 S 1100 E Jerome ID 83338	Rita A Ayers 267 S 1250 E Jerome ID 83338
Gary Spackman Idaho Department of Water Resources PO Box 83720 Boise Idaho 83720-0098	Rob Williams 153 East Main Jerome, Idaho 83338

By depositing copies of the same in the United States mail.

DATED: December 4, 2007.



Lee Halper, Protestant

RECEIVED

DEC 05 2007

DEPARTMENT OF
WATER RESOURCES

BEFORE THE BOARD OF COUNTY COMMISSIONERS
IN AND FOR THE COUNTY OF JEROME, STATE OF IDAHO

IN THE MATTER OF:

The Request of Big Sky Farms, LP, for a
Livestock Confinement Operation located at
1485 U.S. Highway 25, Eden, Idaho

MEMORANDUM OF DECISION

This matter came before the Board of Commissioners for Jerome County (hereinafter referred to as the "Board") for consideration of an application for a Livestock Confinement Operation Permit filed by Big Sky Farms, Limited Partnership, for an Eight Thousand (8,000) animal unit facility, to be located on 1,204.61 acres at 1458 U.S. Highway 25, Eden, Idaho.

PROCEDURAL HISTORY

1. On May 3rd, 2007, an application (hereinafter referred to as the "Application") was submitted by Big Sky Farms Limited Partnership (hereinafter referred to as the "Applicant") to the Jerome County Planning and Zoning Administrator (hereinafter referred to as the "Administrator") requesting a Livestock Confinement Operation/Confined Animal Feeding Operation (hereinafter referred to as a "CAFO") Permit.
2. On August 23rd, 2007, legal Notice of Public Hearing was published in the North Side News, the official county newspaper, pursuant to I.C. §67-6512(b). All other required notices were provided pursuant to applicable state and county laws.
3. Pursuant to Jerome County Zoning Ordinance (hereinafter referred to as "JCZO") 13-5.02, the Application was sent to the Idaho Department of Agriculture Siting Team and a Suitability Determination was requested. On June 8th, 2007 the Board received a Suitability Determination from the Siting Team.

4. Pursuant to JCZO 13-6.03, on September 25th and September 26th, the Board held Public Hearings on the Application. According to applicable laws and statutes, persons were provided an opportunity to be heard, testimony was given and exhibits were admitted into evidence regarding the Application.

5. The individual Board members, acting as Quasi-Judicial decision makers and finders of fact, separately and individually reviewed the entire record, all evidence, arguments, testimony and background information contained therein.

6. On October 9th, 2007, the Board held a Deliberation Hearing regarding the Application. Following deliberations and by way of a motion, the Application was denied by a vote of two to one.

AUTHORITY

Idaho State Constitution

Idaho Code Title 67 Chapter 65

Jerome County Zoning Ordinance

Jerome County Comprehensive Plan

I.C. §67-6529 provides that a Board of County Commissioners shall enact Ordinances and Resolutions to regulate the siting of Confined Animal Feeding Operations and facilities, regulating the approval or rejection of sites for such operations and facilities. Jerome County Zoning Ordinance Chapters Five, Six, Thirteen and Twenty-Three establish such regulations.

Jerome County Zoning Ordinance Chapter 1-7.2 provides that "In those instances where this ordinance does not address a specific matter of concern, the laws of the state of Idaho shall apply in the same manner as if those provisions of the Idaho law were an

integral part of this ordinance. It is intended that this ordinance be in compliance with Idaho law at all times and in all circumstances.”

I.C. §67-6519 establishes that whenever a governing board grants or denies a permit it shall specify the ordinance and standards used in evaluating the Application, the reasons for approval or denial and the actions, if any, that the Applicant could take to obtain a permit.

I.C. §67-6535 provides that the approval or denial of any Application is to be in writing and based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county. Any approval or denial shall be accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record. Decisions made pursuant to I.C. §67-6535 should be founded upon sound reason and practical application of recognized principles of law.

JCZO Chapter 23-8, regarding decisions, provides that the Planning Commission or Zoning Commission, or the Board, as the case may be, shall render a decision within one hundred eighty (180) days after the date of the Hearing. The decision shall be in writing. The presiding officer shall sign it and it shall state the specific Findings of Fact and Conclusions of Law which support the decision. The criteria, standards, regulations, and recommendations found in the Comprehensive Plan and in such other Ordinances and Regulations of Jerome County that are used by the Planning Commission or Zoning Commission in making its decision shall be identified, and the manner in which they affect the final decision shall be stated.

In making its decision, the Board accepts the definition of EVIDENCE as “Sworn testimony and the exhibits that have been received into the record.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, upon consideration of the whole record before them, and taking notice of those facts which are in common knowledge or of which there is general public awareness, the Jerome Board of County Commissioners hereby DENIES the Application based upon the following findings and conclusions:

1. Based upon the evidence, testimony and information on record in this matter, the Board finds that a CAFO permit is a Conditional/Special Use Permit which this Board has the discretion to approve, approve with conditions or deny based on its interpretation of law and the record.

“There is a strong presumption that the actions of the Board of Commissioners, where it has interpreted and applied its own zoning ordinance, are valid” *Evans*, 139 Idaho at 74, 73 P.3d at 87.

I.C. §67-6512(a) allows for the granting of special or conditional use permits if the use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan. The Board finds that a CAFO Permit meets such specifications and as such qualifies as a special or conditional use permit.

Public Hearings were held as required by both I.C. §67-6512(b) and I.C. §67-6529, which requires:

At a minimum, a county's ordinance or resolution shall provide that the board of county commissioners shall hold at least one (1) public hearing affording the public an opportunity to comment on each proposed site before the siting of such facility.

It is well established in law and common knowledge that a Public Hearing is the forum wherein the public has the opportunity to comment on a proposed Application. As such, this requires that the finders of fact will consider the public's input and approve,

deny, or approve with conditions the proposed Application. To make a decision on an application without first holding a Public Hearing would simply be an administrative process, not subject to the discretion allowed by statute to the finders of fact. The Legislature, in its amendment of I.C. §67-6529 in 2003 recognized this fact as the reason for requiring a minimum of one (1) public hearing to be held for each proposed CAFO site. The Legislature voted almost unanimously for House Bill 283 (House 66-3-1 and Senate 30-5-0). The Statement of Purpose for the Bill reads:

Large confined animal feeding operations ("CAFO") are sited in various counties throughout the State. Such operations, provide numerous benefits to citizens of Idaho; however their effects are borne by citizens who reside in close proximity to CAFOs. The purpose of this legislation is to recognize the importance of local concerns regarding the siting of CAFOs by mandating that county boards of commissioners enact ordinances and resolutions regulating the siting of such operations; and requiring that no fewer than one public meeting be held wherein citizens whose primary residence is within one (1) mile, or such greater distance as determined by the county board of commissioners, of the proposed site may provide input to be considered in the county's siting decisions.

JCZO Use Chart 5-8 identifies "Sewage Lagoons" as requiring a special use permit.

The JCZO allows for conditions to be placed on a CAFO permit in 13-5.02L, which states:

"The Board of County Commissioners may place conditions on the Livestock Confinement Operation Permit as requested by the agencies."

Pursuant to I.C. §67-5201(2) an agency is defined as:

"Agency" means each state board, commission, department or officer authorized by law to make rules or to determine contested cases, but does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.

Commissioner Howell and the Administrator both supported the position that a Jerome County LCO Permit is a conditional use permit. The Administrator stated:

“Once you receive the hearing, then it’s your discretion on how you run your meeting because the Planning and Zoning {Ordinance} talks about what the Zoning Commission can put conditions on. This is an LCO hearing. There is no restriction in here that says that you can’t. You’re the last, you’re the CEO of the county, and therefore, you have the ability, as far as I can see, to put conditions on there, if you need to.” (Public Hearing Transcript p. 163 – 168)

The attorney for the Applicant references the JCZO 13-5.02(l) when he states “The Board of County Commissioners may place conditions on the LCO as requested by the agencies.” *(Public Hearing Transcript, Page 172 Line 7).*

It is this Board’s interpretation that the authority to regulate the siting of certain animal operations and facilities (in this case a CAFO) is provided by I.C. §67-6529. However, the specific authority to issue a special or conditional use permit is provided by I.C. §67-6512.

In consideration of the foregoing, the Board finds that a CAFO permit is a Conditional/Special Use Permit and that this Board has the discretion to approve, approve with conditions or deny a permit application based on its interpretation of law and the record.

2. Based upon the evidence, testimony and information on record in this matter, the Board finds that the Applicant has not met the burden of proving that any and all emissions of the proposed facility would be contained entirely within and not leave the premises. Nor has the Applicant proven that an approval of the Application would have no other negative impacts, such as negatively impacting air and water quality, quality of life, health and/or property values. Therefore, we find approval by the Board would place an undue burden upon the neighbors of the proposed site.

Article I of the Idaho State Constitution states:

INALIENABLE RIGHTS OF MAN. All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Article 2 of the Idaho State Constitution states:

POLITICAL POWER INHERENT IN THE PEOPLE. All political power is inherent in the people. Government is instituted for their equal protection and benefit...

The JCZO 1-6.01 states:

“This ordinance shall be interpreted in its various particulars to protect equally each citizen from the undue encroachment on his private property to the end that, within the plan established, each citizen shall have the maximum use of his property **without placing undue burden upon that of his neighbor.**”

Evidence and testimony presented at the Public Hearings related how this operation would negatively impact neighboring wells, air quality, quality of life, health and property values. The Applicant proffered no substantive evidence nor rebuttal evidence to refute this. The ultimate and final burden of proof in attaining approval of this Application lies with the Applicant, as per JCZO 23-7.03, which states “The burden of proving that the Planning and Zoning Commission should act favorably toward the petition under consideration rests solely upon the petitioner.”

It is this Board’s interpretation of its Ordinance that the same applies to the Board’s consideration of an application, in which case the burden rests with the applicant.

Further, I.C. § 67-6529B states:

“The legislature finds that:

Confined animal feeding operations increase social and environmental impacts in areas where these facilities are located.”

Though it is understood that the Jerome County Comprehensive Plan (hereinafter referred to as the “JCCP”) is not a regulatory document, it is a “vision of a desired future” and as such represents the ways in which Jerome County should grow and develop. This Board has considered the JCCP in its entirety and recognizes the importance of the issues, concerns and goals reflected within, and the importance of the JCCP in providing guidance and the intent of the JCZO, specifically with respect to Jerome County’s constitutional duty of protecting the health, safety and welfare of the public and their civil rights.

The JCCP on page 38, recognizes the potentially negative impacts of CAFOs/LCOs when it notes:

“The Requirements of the ordinance {JCZO} attempt to minimize potential surface and groundwater contamination sources, as well as incompatibility of LCOs with neighboring land uses.”

The Comprehensive Plan further names pollutants entering water resources and the containment and treating of agricultural wastes on site as being issues and concerns identified by residents and local officials, and lists as an objective the assurance that water supplies are protected. (JCCP P. 33 and 40) With regard to land use and private property rights the Comprehensive Plan notes “The physical suitability of designated land uses and the compatibility of such uses with those of other affected properties determine the functional and physical character of the county as a whole. Further, county decisions regarding land use must, by state law, consider private property rights and values...” (JCCP p. 71) The JCCP also names as a goal maintaining land use compatibility and makes the recommendation as an appurtenant action that Jerome County “Consider natural resources and prevailing land use to limit further development.” (JCCP p. 79)

JCZO 1-3.01 PURPOSE states and I.C. §67-6502 supports:

This ordinance has been made in accordance with a comprehensive plan, which has been designed to protect and promote the health, safety, morals, and general welfare of the community. It is intended, therefore to provide:

- a. Support of property values by preserving existing uses and guiding future development.
- b. Protection from the menace to the public safety that would result from placing buildings or other structures in locations and in manners that would interfere with present or future traffic movement.
- h. Assurance that the important environmental features of the county are protected and enhanced.
- i. Avoidance of undue concentrations of population.
- j. Assurance that land is developed appropriately for its physical characteristics.
- k. Protection for life and property in areas subject to natural hazards and disasters.
- l. Protection for fish, other wildlife, and recreational resources.
- m. Security against undue pollution of air and water devaluation.

The JCCP sets forth standards considered relevant by the Board to this particular Application. The JCCP identifies hazardous areas as those areas in the county that currently has, or potentially has, the ability to threaten human health. (Jerome County Comprehensive Plan, P.35) The Comprehensive Plan cites Appendix B of the Comprehensive State Water Plan, developed by the IDWR (1993) and the DEQ 1995 Draft Middle Snake River Nutrient Management Plan, which documents name Confined Animal Feeding Operations among the primary sources of water quality degradation in the Mid-Snake River area.

The Nutrient Management Plan indicates that the proposed livestock confinement operation will produce 267,000 actual pounds of phosphate per year. (*Public Hearing Transcript p. 127 and 128*). Some of that phosphate will be used and absorbed by the crops grown on Big Sky's farmlands, which surround the livestock confinement area. (*Id., at 124-130*) However, the majority of that phosphate, and other waste, will need to be transported from the proposed facility. (*Id.*) 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 of. Big Sky has not provided sufficient assurances that this can and will be done appropriately, such as by showing whom it has contracted with to receive this animal waste. The Board needs to be assured that phosphate and other waste products will be disposed of properly. This will guarantee that Jerome County soils remain vibrant for future generations to come, and do not lose their prime soil qualities as a result of an ever-increasing accumulation of such waste.

The Scott's Pond Report was submitted as Exhibit R-4 by Dean Dimond. Jerome County is a signatory to this report along with the United States Department of Agriculture, Natural Resources Conservation Service, North Side Soil and Water Conservation District, North Side Canal Company and the Idaho Department of Environmental Quality. This cooperative water quality and protection project began around 1994 and a final report was issued July 2001. Page 29 of this report states, "About 90 percent of the dairies in the project area do not have adequate land available for land application of both solid and liquid wastes, based on phosphorous land application rate requirements." Page 30 summarizes with the 2001 inventory of animal numbers and irrigated acres in Jerome County and the project area:

“If all the cattle wastes produced in the project area were applied equally to every acre of cropland and pastureland in the project area, the application rate would be about 4 times the average maximum allowable rate for phosphorus application. If the same amount of waste were applied equally to all the cropland and pastureland in Jerome County, the rate would be about 1.3 cows/acre/year (still more than average maximum rate).”

During the Public Hearings and in the October 9th Deliberation Hearing Commissioner Davidson discusses the phosphorus loading and the question of whether Jerome County has more cows than it can sustainably support. When the Application was filed, Jerome County was in the process of instituting a Moratorium on CAFOS to alter its ordinance, which the Board found insufficient and inadequate to protect the health, safety and welfare of the public as required by the JCZO and the Idaho State Constitution. Commissioner Davidson referred to the fact that this Application was submitted right before finalization of the Moratorium by stating, “We had a week gap in there when this application was filed, so I guess I’d like to request and ask the Board to deny this application.” (*Public Hearing Transcript p. 124 – 129*) The oversaturation of cows in Jerome County is now being addressed at the Planning Commission level. To approve a large CAFO such as this without first allowing the Planning Commission an opportunity to adequately assess Jerome County’s present circumstances would rise to the level of negligence on the part of this Board, and a failure to meet the requirement of due diligence in the representation of the public and Jerome County’s best interest.

Matt Thompson, the Applicant’s agricultural expert, states, “I think that original application didn’t have much detail on the best management, odor control.” (*Id. p. 137, lines 13 through 15*) We are not confident this Application supplies as much detail as all parties would desire. If the agricultural expert could not supply his full expertise to the first application, how are we to be convinced that this Application is not as admittedly lacking?

Matt Thompson also states, “So, we have really good soils which are soils that will seal tight for those lagoons to minimize any leaching potential that would be there.” (*Id. p. 103 and p. 104*) This Board is not convinced that “minimize” equates the assurance of prevention.

Matt Thompson then states, "Is that land Application of that waste, I said earlier, we expect this to be an evaporative system most times, but if that evaporative system is going to produce some odors that will impact neighborhoods, then we want that ability to get that land applied. We can tie it to the irrigation system, dilute that land application so there is very little, if any, impact to anyone that would be downwind to that facility." (*Id. p. 120, Lines 1 through 10*) Expectations are not sufficient to meet the required burden of proof that there will be no undue burden upon the neighbors from odors.

Further testimony and evidence presented in opposition to the Application on the basis of undue burden can be found in the record, specifically Exhibits CC-2 through CC-31 and testimony received at or about Public Hearing Transcript pages 18, 19, 59, 60, 67, 68, 77, 78, 79, 81, 82, 83, 157, 158, 184, 185, 186, 221, 222, 242, 299, 300, 313, 314, 315, and 316.

Brenda Herrman testified, "But my biggest issue, to me, is how it's going to affect our health. According to the US Centers for Disease Control and Prevention, that are known as CDC from now on, 'Farms on which animals are intensively reared can cause adverse health reactions in farm workers and their neighbors.' " (*Exhibit CC 15 and Public Hearing Transcript Page 82, Lines 8 through 14*). Ms. Herrman continues, "So, what I'm asking right now is that you deny him because it is going to affect my health, and I can't afford to buy another house." (*Public Hearing Transcript Page 83, Lines 22 through 24*).

Michelle Dimond testified, "My concern is, first off, the health of my children. I have one that has asthma and allergies. We have a note from her doctor saying that this could cause severe problems if this CAFO goes in, that it could cause her to have more allergy attacks, more asthma attacks." (*Public Hearing Transcript Page 299, Lines 13 through 18*). Ms. Dimond continues, "The smell alone, there is a dairy four miles and a CAFO five miles from our home. We already smell them. We're already affected by them. This would be a quarter of a mile from our home. He has no guarantees that it will not affect our well. He cannot prove to us that the runoff will not go down and affect our well. We're down the hill from him. He cannot prove to us that it will not dry up our wells. We have not seen anything to prove any of those yet." (*Public Hearing Transcript Page 300, Lines 8 through 12 and Lines 18 through 23*).

The Idaho Supreme Court in *Davisco Foods Intern., Inc. v. Gooding County* 141 Idaho 784, 118 P.3d 116 found “Therefore, though conflicting evidence was before the Board about the likelihood and severity of odors, substantial evidence in the record supports the Board’s decision to avoid the risk of odors and other problems that could be caused by the Project.” Although the above-referenced case was not a CAFO, the negative effects of odor and property devaluation mirror the instant case. The Board could substitute the issues of ‘air and water quality, quality of life, health and property values’ for the word ‘odors’ to support their avoidance of undue burden upon the neighbors.

In consideration of the foregoing the Board finds that the Applicant has not met the burden of proving to the Board that this Application is in full compliance with the JCZO and that approval would not be an undue burden on the neighbors or Jerome County. The Applicant proffered no substantive evidence or rebuttal evidence that the approval of this Application would in no way negatively impact the neighbors’ air and water quality, quality of life, health and property values. The Applicant did offer conflicting testimony as to the integrity of his Application, a matter that will be discussed in No. 4 of this Memorandum. The ultimate and final burden of proof for the approval of this Application lies with the Applicant, as per JCZO 23-7.03.

3. Based upon the evidence, testimony and information on record in this matter, the Board finds that the Application is not complete.

Section 13-5.02 of the JCZO specifies that “**Completed applications for LCOs will be filed with the Administrator.**” JCZO 13-5.02 further specifies items to be included in the permit application. As part of the application a vicinity map is required to show all wells and injection wells as per JCZO 13-5.02 (e)(1). The vicinity map with a complete site plan is required to show all rock outcroppings and sinkholes as per JCZO 13-5.02(f). At the Public Hearings evidence was submitted and testimony heard with regard to rock outcroppings, sinkholes, and at least one culinary well which were not included as required. (*At or about Public Hearing Transcript p. 46, 86, 87, 179, 180, 196-205, 208, 209, 240, 241, 247 and 248*).

The question of sinkholes is important, as they are a direct conduit for pollution to negatively affect the property of the State, the Eastern Snake Plain Aquifer. Polluting the aquifer would be a violation of law.

The Applicant, Don McFarland testified, "I owned that property for a considerable number of years prior to selling it, and then buying it back. And I am not aware of any sinkholes on the farm. I'm aware of some sinkholes on adjacent properties, but not on that farm itself, and I have been over the entire farm many times." (*Public Hearing Transcript, Page 208, Lines 3 through 9*). Mr. McFarland does not testify that he actually farmed the land, simply that he has "been over" it an unstated number of times.

Mr. Metzler testified, "My family has been associated close to the site for the last—well, since 1940. And my dad farmed the farm that is currently being considered as a CAFO. Under surface irrigation at that time, you had to watch your water or it was gone. I mean, there is cracks in the lava out there." (*Public Hearing Transcript Page 86, Lines 18 through 24*).

Terry Ganguet testified, "My property lies west of this proposed CAFO site. The surrounding area has numerous blowouts, cracks, sinkholes in the ground. In the spring when the snow melts and the rain runoff occurs, I have witnessed this water going into these cracks and sinkholes in this area. I am concerned that when thousands of tons of manure are applied in the fall and winter to this ground that the potential runoff would go down into these areas and contaminate the groundwater." (*Public Hearing Transcript Page 196, Lines 14 through 24*).

Mr. Ganguet continues, "The flow of the aquifer from this proposed CAFO leads to potential hazard to my family and my livelihood, as well as my neighbors. I feel that the Idaho Department of Agriculture sighting (sic) team, as well as the Idaho Department of Water Resources have done a very poor job inspecting this property. Knowing the geological structure of this area, they must realize that there is a very high potential for contamination to our groundwater. And the Sugar Loaf recharge site is right next to the property of this CAFO, which is still being used." (*Public Hearing Transcript Page 197, Lines 7 through 19*).

The Applicant's Engineering consultant, Mr. Harding, is asked by Commissioner Obenauer during the Public Hearings to identify any sinkholes on the McFarland property:

Mr. Harding: I'm not aware of any.

Mr. Ganguet: Did anybody walk this property and check for them or—

Chairman Howell: So, the question would be: Is the site team responsible to check the whole farm or just the site where they have CAFO applications going?

Mr. Harding: I think they are responsible for checking where the CAFO application is going. Any place where manure is applied, that has to meet the Department of Agriculture requirements.

Mr. Brown: Mr. Chairman, the application is supposed to identify all sinkholes on the property, and then that would go to the Idaho Department of Ag, who does research to evaluate those issues. . And if there a sinkhole that has been notified, they're to look at that at this point. There was no notification of any sinkholes, so they inspected the site. They walked the whole site. They walked the perimeter where everything was going for the CAFO location of the pens and lagoons. (Public Hearing Transcript Pages 200 and 201, Lines 9 through 25 and Lines 1 through 9 respectively).

This testimony continues on Page 204:

Commissioner Obenauer: Art, is there a way that we can validate to the ISDA whether those sinkholes sites were inspected on the entire property?

Mr. Brown: The site team comes down with the information that's presented to us. If there is a sinkhole or something like that, the applicant should notify us what is on their property so they can evaluate it. They don't go out and investigate areas. If it's identified in the application, they will review that site location.

Commissioner Obenauer: So, wouldn't the ISDA, in their on-site inspection, do a walk around on the property to assess regardless of what was said, regardless of what was presented as far as whether there was or wasn't sinkholes?

Mr. Brown: No, they would not.

Commissioner Obenauer: Why not?

Mr. Brown: Because there is no evidence there are any sinkholes by the applicant. The applicant is suppose to provide that.

(Public Hearing Transcript Pages 204 and 205, Lines 18 through 25 and Lines 1 through 4 and Lines 12 through 22 respectively)

If the Applicant has not supplied all pertinent required information and/or raised the possibility of potential problems to assist the Siting Team in the complete and accurate evaluation of the site, the Applicant has not complied with the requirements of the JCZO and has failed to meet the required burden of proof.

In Fred Stewart's Exhibit CC-7, the second paragraph states " We have three deep wells and **one** culinary well within the impact area on these properties." In his testimony before the Board he stated " We have three deep irrigation wells and **one** culinary well within the impact area on these properties. I would like to digress a little bit. As I look at your plan, I see the irrigation well is slightly out of it, just very slightly, 90 percent to irrigate is within the impact area. The plat there doesn't show my culinary well, but it's there." (Public Hearing Transcript Page 46, lines 18-25) Mr. Stewart approaches the plat to show where his property is and where the well is. Chairman Howell agrees by saying, "I would like that". "Mr. Stewart states, "I have one culinary well and three irrigation wells." Chairman Howell repeats, "One culinary well". (*Id.* p. 48) Mr. Fred Stewart proceeds to show the board where the missing item(s) should be on the map, "One slightly outside here. And the culinary well here." (*Id.* p. 49, Lines 2 and 3) Later, Jim Stewart testifies, "But can you ask my father. He's got a domestic well that's within that mile range that is not on that map, so that part is incomplete". (*Id.* p. 315, Lines 1 through 3)

JCZO 13-5.02(l) states,

" Site assessment comments are required from the appropriate Highway District, Irrigation Delivery Department, South Central Health District, Department of Agriculture, Department of Water Resources, and/or other agencies designated by the Administrator. The Applicant is required to submit these comments with his application. The Board may place conditions on the LCO Permit as requested by the agencies." (Amended 3-25-2004; 9-9-04; 4-27-2006, 8-20-07)

The Board is required to obey all laws, especially its own Ordinance. As such, it has no authority to excuse any non-compliance with the JCZO. The Board does have the discretion and the ability to solicit and/or review evidence from other agencies as stated

in the above section of the JCZO. This solicitation and review with regard to the Department of Fish and Game was done during the Public Hearings. The Applicant stated that it had complied with these five (5) required agency comments but there is concern regarding the Highway District submission.

Page 231 of the Application contains a letter from the Hillsdale Highway District dated March 16, 2007. It requires the Applicant to do a "full traffic impact study...to be presented to the Board of Highway Commissioners." It further states that after review, the Board of Highway Commissioners "will inform Jerome Planning and Zoning of its recommendations." Most importantly, the letter requests "that Jerome County **NOT** allow an application to be heard until the traffic impact study is completed and the Hillsdale Highway District Board of Commissioners approve the traffic study."

According to the Memorandum Decision issued by Prosecutor Mike Seib under Procedural History, this Application was submitted May 3, 2007. According to testimony by the Administrator at the Deliberation Hearing held October 9th, 2007, the Application was submitted on April 30th, 2007. Following is an unofficial transcription from the tapes of the Deliberation Hearing:

Charlie Howell: So Mr. Brown was the application filed in a timely manner and...

Art Brown: Yes, it was.

Charlie Howell: And, would you address the area of the time frame of after the discussion of the moratorium and before the discussion of the moratorium.

Art Brown: And, what aspects are you looking for?

Charlie Howell: I think there was some general concern previously of, that it was filed after the moratorium was put into full effect.

Art Brown: The moratorium was effective, put into effect on May 15th, 2007. This is Art Brown speaking. And this application was filed on the 30th of April 2007.

Diana Obenauer: Were there any supplemental application, I mean supplemental material given to you prior to April 30th, or After April 30th?

Art Brown: No.

Diana Obenauer: Were there any additional information or testimony submitted after April 30th on the Applicant's paper permit request?

Art Brown: The, this is Art Brown speaking, I received a letter from the North Side Canal on eight thirty-one, received a letter from Idaho Historical Society on nine six, this is comments from the neighbors, or the agencies, on nine six I received from the Historical Preservation, the North Side Canal Company on nine seven again, Bureau of Land Management on nine seven and on nine seven was an e-mail to National Trust.

Charlie Howell: Charlie Howell, so this last application that was originally applied for, not the first one that was withdrawn but this application was April 30th?

Art Brown: Yes

Regardless of whether the Application was submitted on April 30th, 2007 or May 3rd, 2007, the Highway District letter (Exhibit Ag5) is dated May 15th, 2007. This letter is a general informational letter and NOT the required Traffic Impact Study. As the JCZO requires an application to be complete upon submission, the May 15th letter should not have been in the Application as it was obviously submitted after April 30th and May 3rd, 2007. Even if the May 15th letter had been submitted WITH the Application, the Application would still be, and remains incomplete, as there is no Traffic Impact Study included in the application as requested/required.

In consideration of the foregoing the Board finds that the Application is not complete as required by JCZO Chapter 13. The Applicant proffered no substantive evidence or rebuttal evidence, as required by the JCZO, to prove:

1. That sinkholes do not exist on the property;
2. That the missing well(s) was shown on the vicinity map;
3. That all rock outcroppings were indicated on the site plan;
4. That the required comment/approval from the Hillsdale Highway district was included in the completed Application.

The ultimate and final burden of proof in gaining the approval of this Application lies with the Applicant as per JCZO 23-7.03.

4. **Based upon the evidence, testimony and information on record in this matter, the Board finds that there is inconsistent testimony and evidence in the record supplied by the Applicant.**

During the Public Hearings the Applicant's attorney stated, "There's no waste storage planned on property not a part of this Application." (*Public Hearing Transcript p. 7, lines 22 and 23*) He further states "There is no manure off-site storage plan for this facility." (*Id. p. 10, lines 8 and 9*) However, when the Applicant's agricultural expert, Matt Thompson, is asked by Commissioner Obenauer, "Are you using additional land in which to apply your Nutrient Management Plan residue than what you have right here." Matt Thompson replies, "Yes, we are." (*Id. p. 109, Lines 3 through 7*)

During the Public Hearings the Applicant's attorney affirmatively states, "There are no upgrades required that are set forth in Exhibit 12, the Highway District letter." (*Id. p. 11, Lines 9 and 10*) This statement is disingenuous in that Exhibit 12 is a letter requiring a full Traffic Impact Study and never refers to "upgrades".

In consideration of the foregoing the Board finds that the Application has inconsistencies that do not rise to the level of providing the burden of proof necessary to convince the Board that they should act favorably toward the Application under consideration as this burden rests solely upon the Applicant.

5. **Based upon the evidence, testimony and information on record in this matter, the Board finds that the Applicant has not met the burden of proving that the approval of this Application will in no way negatively impact the Minidoka National Monument nor further degrade the conditions at the Wildlife Management Areas.**

The Minidoka National Monument (hereinafter referred to as the "MNM") and the Wildlife Management Areas (hereinafter referred to as the "WMA") are also neighbors of the proposed operation and can suffer the same undue burden outlined in No. 2 of this Memorandum.

A. The Wildlife Management Areas:

Evidence solicited by the Board and presented by the Fish and Game Representative, Mike McDonald, was vague and not definitive enough to make a determination of potential impacts, other than to establish the fact that as a result of a lack of maintenance, previously healthy and intact upland bird population had already been severely degraded throughout the region. He also admitted that if these tracts were improved, it could provide nesting habitat for pheasants. (*Public Hearing Transcript Pages 232 - 238*)

Evidence presented by Cheri Condie supplied the foundation of why the Federal Government designated these WMA's to be natural, undisturbed habitat preserves for wildlife, a widely supported positive goal. In addition, Ms. Condie supports the reasons for which the Board instituted the Moratorium by stating "The time to start preserving the land for WMA's and around WMA's would be now while there is still an opportunity to look into zoning regulations." (*Id. p. 42 - 45*) The Board agrees.

B. The Minidoka National Monument

Extensive testimony was given at the Public Hearings concerning the history of the MNM and the probable impacts that the approval of this Application would have on it. Also heard were numerous pleadings to protect a site that belongs to the people of the United States of America (*At or about Public Hearing Transcript pages 26 through 39, 51, 58, 59, 60, 61, 73 and 74*). Terri Schorzman of the National Trust for Historic Preservation states, "There is insufficient data and analysis to support a conclusion that the proposed LCO will not impact the monument and the community. Because of the Application's lack of adequate information and consideration of potential adverse effects to the monument and the community, the Commission cannot make a fully informed decision that includes all relevant information regarding the proposed LCO's effects, and the public is equally unable to participate in a meaningful, informed manner. Until the full extent of the impacts from the proposed LCO are known and all interested parties and

affected people have an adequate and meaningful opportunity to participate in the decision-making process, this Application shouldn't move forward."

The JCZO provides that:

"The Preservation Zone applies to land which possesses such unique characteristics, benefiting the public at large, that its present unique character should remain undisturbed." (JCZO 4-8.01)

The Board believes the MNM qualifies as just such land. And, though the JCZO fails to list the MNM specifically, it is the Board's contention that the omission of the MNM reflects a flaw in its Ordinance, which further reads:

"Sites of significant historical interest and value should be included in the Preservation Zone if such inclusion is reasonable and possible." (JCZO 4-8.04)

The Board agrees with Ms. Schorzman.

The Idaho State Attorney General's Opinion No. 92-5 addresses the question of whether lands under the jurisdiction of the State of Idaho are subject to zoning laws enacted by a county. Although this Opinion does not address Federal lands, we cannot see how it would not apply, as well, since local, State and Federal laws cannot conflict. The Opinion is summarized by a section of I.C §67-6528, which states,

In adoption and implementation of the plan and ordinances, the governing board or commission shall take into account the plans and needs of the state of Idaho and all agencies, boards, departments, institutions, and local special purpose districts.

The JCCP includes among the objectives of Jerome County the "...preservation of cultural and historical resources..." (JCCP p.21) and encourages the County to "Support the preservation and enhancement of historical trails, sites and architectural resources." Page 109 of the JCCP, with regard to "Special Sites" reads:

"Much of the character of Jerome County lies with its historic sites. These sites enhance the quality of life and give the county a special sense of place...Unless historically significant sites that lend character to Jerome County **are** {not} protected, they may be subject to insensitive restoration or demolition...more effort is needed to rehabilitate and preserve sites of architectural or historic importance."

In consideration of the foregoing, the Board finds that approval of the Application would pose a serious threat of further detrimental impact and undue burden upon these areas, and that based upon the evidence provided this operation would not improve these areas, but potentially further degrade them, resulting in the destruction or loss of a historic feature important to the public. In addition, the Applicant did not provide substantive evidence or rebuttal evidence to meet the required burden of proving that the approval of this Application would in no way negatively impact the Minidoka National Monument nor further degrade the conditions at the Wildlife Management Areas.

ORDER

WHEREFORE, upon consideration of the whole record before them, and taking notice of those facts which are in common knowledge or of which there is general public awareness, the Jerome Board of County Commissioners hereby **DENIES** the Application based upon the above stated findings of fact and conclusions of law.

DATED this _____ day of November 2007.

Jerome Board of County Commissioners

Charles Howell

ATTEST:

Joseph Davidson

Michelle Emerson, Clerk

Diana Obenauer

Notice to Applicant – Right to Request Regulatory Taking Analysis

Idaho Code §67-8003(2) provides that:

Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this section shall be considered public information.