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DEPARTMENT OF
WATER RESOURCES

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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 MOTION FOR FURTHER AUGMENTATION OF THE RECORD MADE BY BIG SKY FARMS LTD. PARTNERSHIP
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COMES NOW, the Applicant, Big Sky Farms Limited Partnership, by and through its attorney of record Robert E. Williams, of Fredericksen, Williams, Meservy & Lothspeich, LLP, and hereby responds to the Order for Augmentation of the Record issued November 19th, 2007, in the above-entitled matter and moves for an order further augmenting the record as follows:

1. In response to the Findings of Fact, Conclusions of Law and Order of the Jerome County Commissioners dated November 1st, 2007, the Applicant has filed a Petition for Judicial Review now pending as Case No. CV-07-1242 in the Fifth Judicial District of the state of Idaho in and for the county of Jerome. A copy of the Petition is attached hereto as **EXHIBIT A**.

2. If the contentions of the Petition for Judicial Review are confirmed by the District Court, the Findings of Fact, Conclusions of Law and Order entered by the Jerome County Board of

Commissioners dated November 1st, 2007, are subject to being set aside. It is also possible that the District Court may remand the matter to the Jerome County Board of Commissioners for further proceedings that would lead to the granting of the Livestock Confinement Operation Permit the Applicant is seeking. Idaho Code §67-5279(3) provides, with respect to Petitions for Judicial Review, that: "If the agency action is not affirmed, it shall be set aside, in whole or in part and remanded for further proceedings as necessary."

3. Idaho Code §42-222, in pertinent part, with respect to applications for water transfer such as that currently now pending, provides that: "The Director of the Department of Water Resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions..."

4. Idaho Department of Water Resources has frequently conditioned approval of water transfer applications on the procurement of all permits necessary from other agencies to conduct the beneficial use proposed by the Applicant.

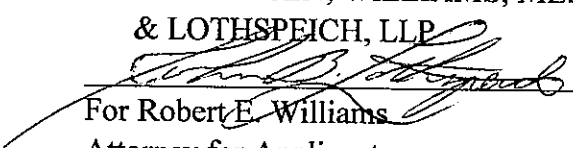
WHEREFORE, Applicant Big Sky Farms Limited Partnership requests relief from the Hearing Officer as follows:

1. That the record in this matter be further augmented with a copy of the Petition for Judicial Review, copied and attached hereto as EXHIBIT A;

2. That the Hearing Officer proceed to issue a Preliminary Order in this matter, and that if the Application is approved, that it be made subject to a condition, pursuant to I.C. §42-222, that the transfer is approved subject to the entry of an Order by a court having jurisdiction, or by the Jerome Board of County Commissioners, that the Applicant herein has been granted the Livestock Confinement Operation Permit which was the subject of the November 1st, 2007, Findings of Fact, Conclusions of Law and Order cited by the Hearing Officer in his Order for Augmentation of the Record dated November 19th, 2007.

DATED this 29th day of November, 2007.

FREDERICKSEN, WILLIAMS, MESERVY
& LOTHSPREICH, LLP


For Robert E. Williams
Attorney for Applicant

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
Lee Justus Halper 331 S 230 W Jerome ID 83338	Gary Funderburg 255 Blue Lakes Blvd N PMB 617 Twin Falls ID 83301
C E Brockway P E Brockway Engineering 2016 North Washington St-Ste 4 Twin Falls ID 83301	Don McFarland Big Sky Farms Ltd. PO Box 5178 Twin Falls ID 83303-5178
Deborah Gibson Idaho Department of Water Resources PO Box 83720 Boise Idaho 83720-0098	IDWR – Southern Region 1341 Fillmore St Ste 200 Twin Falls ID 83301-3380
Document Repository Idaho Department of Water Resources PO Box 83720 Boise Idaho 83720-0098	

☒ By depositing copies of the same in the United States mail, postage prepaid, at the post office at Jerome, Idaho.

☐ By hand delivering copies of the same to said person at _____

By telecopying copies of same to said person at telecopier number _____,
and by then mailing copies of same in the United States mail, postage prepaid, at the post
office at Jerome, Idaho.

DATED: November 29th, 2007.

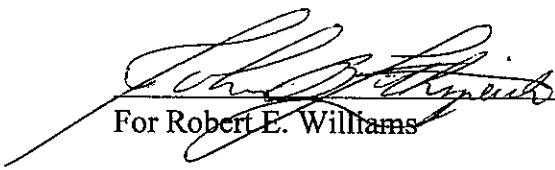
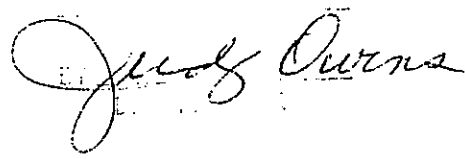

For Robert E. Williams

EXHIBIT A

07/17/08 11:01



JOHN B. LOTHSPREICH
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Attorneys for Petitioner

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

IN RE: DON McFARLAND	)	
d.b.a. BIG SKY FARMS,	)	
OF THE MEMORANDUM DECISION	)	Case No. CV 2007- <u>1242</u>
OF THE JEROME COUNTY	)	
COMMISSIONERS	)	
DATED October 22, 2007.	)	
)		PETITION FOR JUDICIAL REVIEW
)		
DON McFARLAND,	)	Fee Category: R.2
d.b.a. BIG SKY FARMS,	)	Filing Fee: \$78
Petitioner,	)	
)		
vs.	)	
)		
JEROME COUNTY, A POLITICAL	)	
SUBDIVISION OF THE STATE OF	)	
IDAHO, JOSEPH DAVIDSON,	)	
CHARLES HOWELL and	)	
DIANE OBENAUER, MEMBERS OF	)	
THE JEROME COUNTY BOARD OF	)	
COMMISSIONERS,	)	
Respondent.	)	
)		

ORIGINAL

COMES NOW Petitioner Don McFarland d.b.a. Big Sky Farms, by and through his attorney of record, John B. Lothspeich of the firm Fredericksen, William, Meservy & Lothspeich, LLP, and petitions this Court for judicial review of the decisions of the Jerome County Board of Commissioners, hereinafter the "Board", signed November 1, 2007, whereby an application of the Petitioner for a LCO (Livestock Confinement Operation) Permit was denied.

In support of the petition the Petitioner alleges:

1. This *Petition for Judicial Review* is brought against Jerome County, a Political Subdivision of the State of Idaho, Charles Howell, Joseph Davidson and Diane Obenauer, members of the Board.
2. This petition is brought before the Fifth Judicial District of the State of Idaho, in and for the County of Jerome.
3. The decision to which this petition applies is the decision by the Board, signed November 1, 2007, whereby the application of the Petitioner for a LCO Permit was denied. A copy of the decision of the Board to which the petition applies is attached hereto and incorporated herein by reference as "**Exhibit A**".
4. There was one (1) public hearing held which underlie the decision of the Board and two (2) dates specifically were held before the Board. Transcripts of all above referenced hearings were electronically recorded. Transcripts of the hearings of September 25, 2007 and

September 26, 2007 have been prepared and are referenced in the Board's written decision. Transcripts for the Board's deliberations and decision of October 9, 2007 and November 1, 2007 will need to be prepared.

5. The issues for judicial review underlying the petition are as follows:

- a. Whether the decision of the Board to deny the LCO Permit violated Idaho Code § 67-6519.
- b. Whether the decision of the Board to deny the LCO Permit violated Idaho Code § 67-6535.
- c. Whether the decision of the Board to deny the LCO Permit violated Idaho Code § 67-5279.

6. Petitioner's attorney hereby certifies that a copy of this petition has been served upon the Clerk for Jerome County.

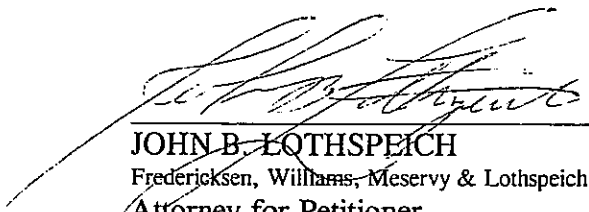
WHEREFORE, Petitioner prays as follows:

- A. That the Court set a briefing schedule and date for oral argument pending certification of the agency record;
- B. That following oral argument, the Court enter an order setting aside the decision of the Board and remanding it to the Board to apply the appropriate factors and criteria as to the issuance of the LCO Permit at issue, or in the alternative, order

that a permit be granted pursuant to the applicable criteria under the governing zoning law;

- C. For costs and attorneys fees incurred by the Petitioner in bringing this petition;
and
- D. For such other and further relief as the Court deems just and proper.

DATED this 12th day of November, 2007.



JOHN B. LOTHSPICH

Fredericksen, Williams, Meservy & Lothspeich, LLP
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the foregoing document to be served as follows:

Jerome County Clerk
233 West Main Street
Jerome, Idaho 83338

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand delivery

Jerome County Board of Commissioners
300 North Lincoln
Jerome, Idaho 83338

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand delivery

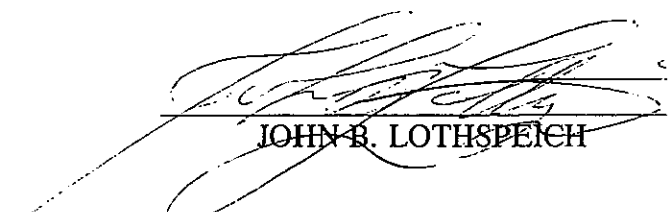
Jerome County Planning & Zoning
300 North Lincoln
Jerome, Idaho 83338

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand delivery

Michael J. Seib
Jerome County Prosecutor
233 West Main Street
Jerome, Idaho 83338

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand delivery

DATED 11/ 13 /07


JOHN B. LOTHSPIECH

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 for a Livestock)
Confinement Operation located at 1458 US)
Highway 25, Eden, Idaho)
_____)

MEMORANDUM DECISION

This matter came before Board of Commissioners for Jerome County ("Board") for consideration of an application for a livestock confinement operation. The Board provided appropriate notice, held a public hearing, and provided persons an opportunity to be heard according to applicable laws and statutes. Testimony and exhibits were admitted in evidence and considered by the Board, which now decides as follows:

PROCEDURAL HISTORY

Big Sky Farms Limited Partnership ("Big Sky") submitted to the Jerome County Planning and Zoning Administrator ("Administrator") an application on May 3, 2007, for a livestock confinement operation. The proposed facility was for 8000 Animal Units on 1204.61 acres located at 1458 US Highway 25, Eden, Idaho ("subject property"). Per Jerome County Ordinance 13-5.02, the application was forwarded to the Idaho Department Agriculture Siting Team, which made a visit to the Subject Property for a suitability determination. The Siting Team's evaluation of the site was sent to the Administrator on June 8, 2007. Per Jerome County Ordinance 13-6.03, the Board set a public hearing on the application for September 25 and 26, 2007, and then held a public meeting on the matter on October 9, 2007. At the October 9th meeting, the Board by way of motion denied the application by a two to one vote. The Board now submits this written decision in accordance with Idaho Code Section 67-6535.

AUTHORITY

Idaho Code Section 67-6529 holds that a board of county commissioners shall enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities, and which will also regulate the approval or rejection of sites for

such operations and facilities. *Id.* Chapters Five¹ and Thirteen of the Jerome County Ordinance encompass such regulations in Jerome County. A governing body's approval or denial of an LCO permit application shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the county. I.C. § 67-6535(a). Further, 67-6535(b) requires written findings from a governing body contain 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. *Id.*; *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501 (2006).

FINDINGS AND CONCLUSIONS

The Jerome County Comprehensive Plan ("Plan") and Ordinance ("Ordinance") set forth various standards and criteria considered relevant by the Board to this particular application. The majority of such criteria are set forth in Chapter 13 of the Ordinance. Specifically, Section 13-5.02 requires that only a completed application be filed with the Administrator. *Id.* An application is complete if all the requirements identified in subsections (a) through (m) of 13-5.02 have been complied with.

Big Sky filed such an application on May 3, 2007, and testified at the hearing that all requirements were fulfilled and that the application was therefore complete. However, testimony was also given to the contrary, indicating that the application was not complete for three reasons. The first being that comments from the Valley School District ("Valley") were not attached to the application at the time it was submitted to the Administrator; the second being that a domestic well that was within a mile radius of the proposed facility was not properly identified on the vicinity map; and the third being that sink holes were not properly identified on the site plan.

Subsection (l) of 13-5.02 holds that "[s]ite 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 Planning and Zoning Administrator. The Applicant is

¹ Chart 5-1.

required to submit these comments with his application". *Id.* (emphasis added). At the Hearing, Jim Stewart testified that it was determined at a February 6, 2007 Board meeting that comments from Valley would be sought by the Administrator and be included in the application. (Hearing Tr. pp. 208 and 313). Mr. Stewart argued that because the letter from Valley was not received until July 28, 2007, the application was not complete and should not have been accepted until that time.

Clearly, school districts (and specifically Valley in this case) are not one of the specified agencies listed 13-5.02(l). However, the issue presented by Mr. Stewart is whether Valley was an "other" agency designated by the Administrator that should have been included in the application. Mr. Stewart points to the February 6, 2007 hearing and argues that it was decided at that hearing that comment would be sought from Valley. (Hearing Tr. p. 170). The Administrator confirms this by stating that the Applicant was requested to seek Valley's comment. *Id.* However, both Mr. Stewart's and the Administrator's statements were made in response to questions posed by the Board, the nature of which makes it clear that the Board was simply interested in hearing Valley's comments prior to making a final decision in this matter; not that such comments necessarily needed to be submitted along with the application.² (*Id.*, 169 and 170). Therefore, it is clear that the Board merely wanted to hear from Valley before it made a decision in this matter, but there was no requirement from the Board or the Administrator that the Applicant would file such comments at the same time of the application. The Board finds that Valley was not made an "other agency" as included in 13-5.02(l). Therefore, Valley's comments did not need to be submitted at the time of the application, and because they didn't need to be, the application is not deemed to be incomplete for this reason.

Mr. Stewart also argued that the application was not complete on the bases that a domestic well was not shown on the vicinity map as required by 13-5.02(e)(1). Mr. Stewart only stated that a domestic well did exist and that it was within a mile radius of the proposed facility. However, he did not identify this well or point to where it was located. He simply stated, "But you can ask my father. He's got a domestic well that's

²Commissioner Obenauer asked Mr. Brown if a list was made of the agencies that the Board wanted to hear from for this decision making process, and asking Mr. Stewart about Valley wanting to be included in this dialogue.

within that mile range that is not on that map, so that part is incomplete." Mr. Stewart presented no other evidence in regard to this issue. His father, Mr. Fred Stewart, did testify that the map being used for reference purposes at the hearing did not show his culinary well (Hearing Tr. p. 46), although he did not state that such well was in fact less than a mile from the proposed facility.

Ordinance 13-5.02(e)(1) requires wells within a mile radius of the proposed facility to be indicated on the vicinity map that is submitted with the application. The vicinity map submitted by the Applicant in this matter identifies numerous irrigation and domestic wells that are located within a mile radius of the proposed facility. (Exhibit 7). Several of these irrigation and domestic wells are located in the areas identified as belonging to Mr. Fred Stewart. However, Mr. James Stewart claims that a domestic well exists within the mile radius that is not shown on the map. This claim however, is all Mr. James Stewart offers. He does not point to where on the map this "missing" well is located, or give any other type of evidence that would support its existence. Mr. Fred Stewart does identify a culinary well that is not on the map, but it is unclear whether this is the same well that Mr. James Stewart was referring to. Mr. Fred Stewart does not claim the missing well that he discusses is within the mile radius, or that it is missing on the vicinity map. His testimony is only that it is missing from the map that he is referring to at the hearing.

Somewhat contrary to this testimony is that of Mr. Matt Thompson's, Big Sky's consultant, who testified, "We've gone through a tremendous amount of effort to give you an application that is as detailed as possible. I would dare say this is probably the most detailed CAFO application that Jerome County's received." (Hearing Tr. p. 114).

In consideration of all the above, the Board finds and concludes that the vicinity map submitted by the Applicant does identify several domestic wells in the area of that property identified as Mr. Fred Stewart's. These wells are within a mile radius of the proposed facility and thus are correctly identified on the map. The evidence does not support that there is an additional domestic well that is not one of those already identified on the vicinity map. Therefore, the Board finds the application complete as to this issue.

Finally, Mr. James Stewart argues that the application was not complete on the bases that that sink holes were not identified on the site plan as required by 13-5.02(f).

Mr. Stewart is correct in that no sinkholes were identified on the site plan. However, his argument that this is a defect in the application is made on the assumption that sinkholes are in fact present on the subject property. Mr. 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." (Hearing Tr. p. 208). There was no evidence presented at the hearing that directly contradicted Mr. McFarland's statements. Even Mr. Stewart himself admitted through his testimony that it is not known whether sinkholes are on the subject property or not. (*Id.*, at 315). Mr. Stewart states, "[M]aybe they're there, maybe they're not ..." *Id.*

It appears that allegations of sinkholes existing on the subject property are based on the proposition that because neighboring properties have sinkholes; it is only logical to believe that the subject property has them as well. (*See*: testimony of Mr. Metzler starting at 86; and Mr. GanGuet starting at 196). However, as stated, there is no direct evidence contradicting Mr. McFarland who has testified that there are no sinkholes on the site. Therefore, the Board finds the site plan to be accurate in this regard (that there are no sinkholes that should be identified on the plan) and the application is therefore deemed complete.

The Board finds that the criteria relevant to this application, as set fourth in Chapter 13 of the Ordinance, has been met and complied with by the applicant. The Board then considers the application in view of relevant standards. The comprehensive plan sets fourth standards considered relevant by the Board to this particular application. The Plan identifies hazardous areas as those areas in the county that currently has, or potentially has, the ability to threaten human health. (*Jerome County Comp. Plan*, p. 35). Pollutants, deriving from man-made, waste disposals, contribute to the creation of some types of hazards. *Id.* Confined animal feeding operations are identified as one such pollutant source. (*Id.*, at 36).

The Nutrient Management Plan indicates that the proposed livestock confinement operation will produce 267,000 actual pounds of phosphate per year. (Hearing Tr., 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 the 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 who it has contracted with to receive this animal waste. The County 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 die from an ever-increasing accumulation of such waste.

ORDER

Therefore, based on the Board's concern over the various hazard sources in the county, and confined animal feeding operations having been identified as one such source, the Board finds that the proposed facility will only add to and increase these concerns. Therefore, the application is denied.

The Applicant is notified of its right to request a regulatory taking analysis pursuant to section 67-8003, Idaho Code.

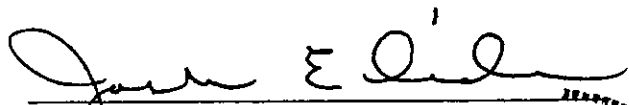
Dated this 1st day of ^{November}~~October~~ 2007.

Board of Jerome County Commissioners

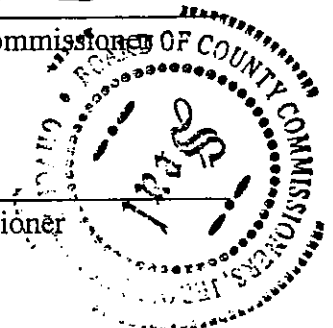

Charles "Charlie" Howell, Chair

ATTEST:

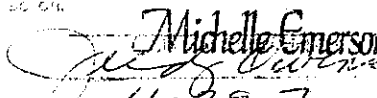

MICHELLE EMERSON, Clerk


Joseph "Joe" Davidson, Commissioner

(Absent)
Diana Obenauer, Commissioner



I hereby certify that the foregoing is a full, true and correct copy of the original on file in the above entitled office.


11-29-7