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SEP 11 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.

PROTESTANT LEE
HALPER'S BRIEF

COMES now Lee Halper and submits his brief in this matter.

STATEMENT OF FACTS

Idaho Department of Water Resources (IDWR) is an administrative agency within the executive department of the State of Idaho created pursuant to the provisions of Title 42, Chapter 17, Idaho Code. Pursuant to Idaho Code 42-108 and 42-222, IDWR is charged with the statutory responsibility of receiving applications to transfer permits and licenses issued by

IDWR, providing for the appropriation and use of public waters of the State of Idaho, protests to such applications and for acting in a quasi-judicial capacity to resolve such applications and protests.

Preceding this matter, the local public interest was defined as the "affairs of the people in the area directly affected by the proposed use." I.C. 42-203A(5).

The new and ruling local public interest definition is found at Idaho Code 42-202(B)(3) “as the interests that the people in the area directly affected by a **proposed water use have in the effects of such use on the public water resource.**”

IDWR is required by Idaho Code 42-222 to consider the local public interest as one of the criteria in a water transfer protest.

The Director of IDWR (Director) is also required under IDAPA 37.03.08.045.03(a) to “consider the potential benefits both direct and indirect, and that the proposed use would provide to the state and local economy.”

Under IDAPA 37.03.08.045.01(e)(ii, iii) the Director shall consider “The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use” and “Compliance with applicable air, water and hazardous substance standards.”

Under IDAPA 37.01.01.052, Liberal Construction, “Unless required by statute, the Idaho Rules of Civil Procedure and Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency.”

Under IDAPA 37.01.01.600, Rules of Evidence, “Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.”

Under IDAPA 37.01.01.604, Objections—Offers of Proof, “An offer of proof for the record consists of a statement of the substance of the excluded evidence. When a party objects to the admission of evidence, the presiding officer will rule on the objection, or, if the presiding officer is a hearing officer, the presiding officer may receive the evidence subject to later ruling by the agency head or refer the matter to the agency head.”

Under IDAPA 58.01.01.066.04, odor is an “air pollutant”.

Under IDAPA 58.01.01.066.05, air pollution is defined in part as the presence in the outdoor atmosphere of any air pollutant or combination thereof in such quantity of such nature and duration and under such conditions as would interfere unreasonably with the enjoyment of life or property.

Under IDAPA 58.01.01.776, polluting the air is unlawful: "No person shall allow, suffer, cause or permit the emission of odorous gasses, liquids or solids into the atmosphere in such quantities as to cause air pollution.

Under I.C. 39-103 are these definitions:

"Air contaminant" or "air contamination" means the presence in the outdoor atmosphere of any dust, fume, mist, smoke, radionuclide, vapor, gas or other gaseous fluid or particulate substance differing in composition from or exceeding in concentration the natural components of the atmosphere.

"Air pollution" means the presence in the outdoor atmosphere of any contaminant or combination thereof in such quantity of such nature and duration and under such conditions as would be injurious to human health or welfare, to animal or plant life, or to property, or to interfere unreasonably with the enjoyment of life or property.

"Emission" means any controlled or uncontrolled release or discharge into the outdoor atmosphere of any air contaminant or combination thereof. Emission also includes any release or discharge of any air contaminant from a stack, vent or other means into the outdoor atmosphere that originates from an emission unit.

Idaho Code 6-202 reads in pertinent part:

6-202. ACTIONS FOR TRESPASS. Any person who, without permission of the owner, or the owner's agent, enters upon the real property of another person... without lawful authority, is liable to the owner of such land...

Idaho Code 6-202A reads:

DEFINITION OF TERMS. As used in section 6-202, Idaho Code, "enters" and "entry" mean going upon or over real property, either in person or by causing any **object, substance or force** to go upon or over real property. (Emphasis mine)

ISSUES

There are two issues that must be addressed here, odor/public interest and estimation of water use by the animals.

ODOR/PUBLIC INTEREST

Since the legislature changed the public interest definition in Idaho Code, odor, and its associated toxins and health effects, has been cut out of being considered as an issue in CAFO water transfer protests. However, Idaho Code 42-202(B)(3) defines the local public interest "as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." This protestant presented a DEQ fact sheet as an exhibit that stated the irrefuted fact that ammonia, a major component of CAFO odor, affects the public water resource in a negative way. Odor thereby complies with the new Code as an issue to be considered and opens the door for odor to be considered as a possible reason to deny this transfer. The negative effect of odor from thousands of animals is a well known and irrefuted fact that was recognized by Judge Wood in the K&W water transfer when he wrote important observations that the hearing officer and Director should consider.

"Shokal also stands for the proposition that in order to be able to asses a project's impact on the local public interest, the project's design must be definite enough to reflect its impacts and implications." This project's design failed to provide any consideration of odor.

"With the evidence presented in this case, if one does not take into account the cumulative effect (of odor), then in reality one is not attributing much substance to the legal requirement of the local public interest."

"IDWR must affirmatively find that the transfer meets (or will meet) the local public interest. IDWR cannot legally "side-step" this statutory standard at the transfer application stage and pass it on down the line to the next agency to subsequently regulate. I.C. 42-222(1); Shokal v Dunn, 109 Idaho 330.

This application failed to provide any consideration of odor's effect on the resource or on the neighbors or on the local economy (other than the applicant's economy).

ESTIMATION OF WATER USAGE

The Applicant's expert witness, Dr. Brockway, admitted that he obtained the gallons per day per animal from Bob Ohlensehlen and Dean Falk. Their calculations and supporting documentation for these figures are not in the record and they were not present to be cross-examined. "Trust me" seems to be what the Applicant is saying to IDWR. The Applicant's water use figures should be removed from the record and the application, without this crucial evidence, should fail. This Protestant's expert witness, Corbin Knowles, an employee of IDWR, presented irrefutable evidence that the amount of water usage by dairy cows and heifers and calves was calculated by IDWR to be almost three times what Bob Ohlensehlen "estimated" in his negotiations for IDA with IDWR. Since IDWR doesn't believe Bob Ohlensehlen in their figuring of daily dairy cow water use, why should it believe him when he comes in the backdoor through Dr. Brockway.

CONCLUSION

Another hearing should be held to consider the facts concerning odor and its effects on the local public interest.

Idaho Code 42-222 requires "The director of the department of water resources shall examine **all** the evidence and available information..." Several of this Protestant's exhibits were not considered. Importantly, the exhibit proving the fatal flaw of the Nutrient Management Plans was not accepted even though the applicant's NMP and letter from ISDA certifying the NMP was approved were accepted. How can a flawed

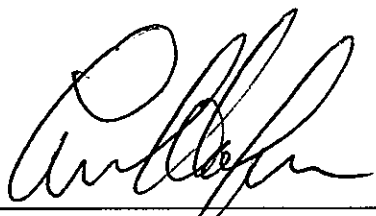
NMP be accepted by a State agency and then accepted by another State agency if the State agencies are following the law?

Evidence not offered cannot be considered. The applicant's summary of water use had no underlying factual basis or presentation of fact. The discrepancy of IDWR's water usage calculations versus the Idaho Dairyman's association of almost 300% is basis enough to delay, if not deny, this permit application until provable figures are available.

On December 1, 2000, in Judge Higer's Fifth District Court in Gooding, Halper & Chisholm vs. IDWR/Box Canyon Dairy, Case CV 00300, Judge Higer stated "There are no findings that show the hearing officer properly considered the positive and negative impacts and assessed these impacts on the 'local public interest.' Absent findings and evidence to support them, the hearing officer could not have exercised his proper discretion and assessed the project's impact on the local area. An abuse of discretion occurs where there is no, or at least inadequate, consideration of the factors needed to make the decision and facts to support them. Judge Higer's directive that "The ruling needs to set forth what public interests are affected and how the project outweighs them, if it does."

Judge Higer's opinion should be the guiding principle of the hearing officer and Director's decision in this matter when they find that this application should be denied.

Dated this 10th day of September 2007



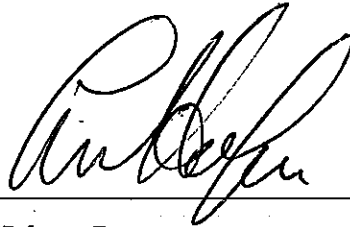
Lee Halper, Protestant

CERTIFICATE OF SERVICE

I hereby certify that on September 10th 2007, I caused to be served a true and correct copy of the foregoing to each of the persons named below by the method indicated below each of their names.

Robert E. Williams
117 South Adams Street
Jerome, Idaho 83338
Via U.S. Mail

Gary Spackman
IDWR
PO Box 83720
Boise, Idaho 83720-0098
Via U.S. Mail

A handwritten signature in black ink, appearing to read 'Lee Halper', is written over a horizontal line.

Lee Halper, Protestant