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SEP 18 2007
DEPARTMENT OF
WATER RESOURCES

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SEP 10 2007
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

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 DEAN
DIMOND'S BRIEF

In the matter of Big Sky Farms water transfer it must be denied for eight basic reasons.

1. At the hearing held July 26, 2007, the applicant never proved it was in the public interest. There was testimony offered as evidence against it being in the public interest. The applicant presented no evidence or even a reason to show how it is in the public's interest. The applicant testified that it is his plan to keep from contaminating the aquifer by using best management practices. This is not an acceptable guarantee and the applicant has no way of insuring these practices will happen when, as testified, the applicant does not even know who will operate the facility. In addition IDWR is considering the nutrient management plan approved by the ISDA as proof that best management practices will be adequate. DEQ allows for a certain amount of seepage from their ponds and the applicant did not prove that this allowable amount will not contaminate a neighboring well.

2. It is not in line with the conservation efforts of the state. At the July 26, 2007, hearing the conservation efforts of the state were never defined. Therefore no evidence was submitted to show it was in line with these efforts. The applicant has not participated in any of the mitigation efforts of the state and testimony given at the hearing is in direct conflict with mitigation efforts being made on the local and state levels. For IDWR to make water calls on every water user no matter how small their diversion rates may be is in direct conflict with IDWR history of not considering very small effects on the aquifer in water transfers.

Furthermore, IDWR must consider the fact that the applicant has NOT participated in mitigation efforts conducted to satisfy water calls made in recent years.

3. Despite the expert testimony offered at the hearing it was not proven to any reasonable likelihood that this transfer would not injure another water right. Testimony was offered that acknowledged there would be a negative effect on other wells. Dr. Brockway testified that the model showed there would be a small negative impact to one "reach" of the snake river. While he also testified it showed a positive effect on the

other two "reaches", no evidence was presented that showed these reaches with the positive impacts were senior to the reach with the negative impact. Therefore, the applicant did not show he was not taking water from senior users for the benefit of junior users. In addition the law states the transfer cannot injure any other water right. It does not say that as long as the injury is minor it is okay. Despite what Mr. Williams tried to show, it is not the duty of the public to show injury. The burden is upon the applicant to prove there will be no injury.

It was acknowledged at the hearing that testimony Mr. Brockway offered was as to the aquifer in general and not necessarily specific to this transfer. According to the testimony that was given the model did not account for the effects of the North Side Canal and the recharge effects also the effects that this transfer will have due to the increased water use when the recharge source is not available. If water information does not have to be site specific then there would be no reason for water hearings.

The burden of proof that this transfer will not injure any other water right is upon the applicant. In this case the applicant failed to show that the increase in water use while the recharge source is not available will not injure my water rights. Furthermore, the evidence says that this transfer WILL injure my water right.

4. Given the fact that the application that was submitted was amended and no clear distinction was made between the original application and the amended application it made it very confusing and did not prove the water that is being sought by the applicant is what water the LCO needs. Furthermore, the worksheets in the application did not show how the applicant arrived at the numbers used to prove that the numbers are correct.

5. The number submitted for water values contradicts with testimony offered at the hearing as well as expert testimony offered at the hearing. The application must clearly state how much water is needed and prove that this water will go to beneficial use. Whereas the application contains numbers that range for daily requirements for animals from 6 gallons/per day to 13 gallons/day with testimony up to 75gallon/per day no clear determination can be made as to how much water this LCO really will need.

6. The applicant failed to prove that forfeiture was not an issue. Testimony was given at the hearing that directly disputed information that the department used to determine that forfeiture was not an issue. The applicant failed to prove that there had been stock on the property within the last 10 years. There was clearly misinformation given to Mr. Stanton on the field visit. The intentional giving of false information should be reason enough for turning down the transfer. We have no way of knowing if Mr. Stanton's recommendation would have been the same if he had been given factual information.

7. There was not a nutrient management plan in the application. I further object to the submission of the letter the applicant produced the day of the hearing from the ISDA. Using the same logic the hearing officer used to disallow a letter from Dr. Ron Sheffield this letter should not be allowed as evidence. Along with the objections I argued at the hearing this letter cannot be allowed.

1. The signatory on the letter was not made available at the hearing for cross examination.

A. The applicant never proved the signatory even works for the ISDA

B. We have no way of knowing if this plan was simply approved, approved with conditions or if ISDA had any concerns regarding the plan.

C. The opposition never had a chance to find out if ISDA considered all the pertinent information. Did they consider the fact that the applicant does not intend to operate this facility and will very likely sell it without all the ground currently associated with the CAFO. Furthermore, the applicant testified that any new owner would have to come up with their own nutrient management plan. Don McFarland testified he would not be the one that operated or managed this CAFO.

8. There was testimony given at the hearing that said the diversion rate of the current pumps would not be changed even though the amount of time pumping allowed would be doubled from the current six months usage to year round. I argue that this will result in the increased use of water and I maintain that it will. However, even if you use the applicants flawed math it does not matter. The simple fact is that this transfer will reduce the restrictions that are currently applied to this water right thus creating an expansion of the water right. In addition to the increased amount of time the current rate of water is allowed to be pumped it also would do away with the current restriction of the diversion rate being based on the maximum use of water. A question Mr. Williams asked me when I testified was, "Do you think the amount of water used should be based upon the highest amount of water the cows will Drink?" My answer was yes. The correct answer is that is the way IDWR regulates the current water use on the highest amount the crop uses so if the transfer amount is not based on the highest amount the cows will use then that is an expansion of the water right.

There has been a number of procedural errors with this application. The first one I pointed out in a letter to IDWR bringing out this is a new feedlot and not an expansion as it was also falsely printed in the newspaper notice. This mistake was obviously made because of the false information in the application about there already being to small feedlot on the property. We have no way of knowing if more people would have protested if it had been published as a NEW feedlot a not just a MAJOR expansion.

The laws also require the public notice to state how much water is being transferred. The original publication did not contain this required information. Furthermore, the applicant changed his plans after the publication so the amount of water being sought should have changed as well. This is also omitted from the public notice which information is required by LAW.

In conclusion this application does not even come close to meeting the basic requirements of the law. The application contains false information and there have been procedural errors. At best this application must be turned down and the applicant must reapply fixing all the misinformation, procedural errors, cow numbers, water usage calculations and providing site specific evidence that no injury will occur. To be fair to all this application must be denied.



Dean Dimond