

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

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DEPARTMENT OF
WATER RESOURCES

December 13, 2007

Boise
Idaho Falls
Pocatello
Twin Falls

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

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WATER RESOURCES
WESTERN REGION

David R. Tuthill Jr. 
Idaho Department of Water Resources
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098

Gary Spackman
Idaho Department of Water Resources
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098

Re: DeRuyter Dairy Transfer Application
MTBR&F File No. 23167.0

Gentlemen:

I am writing you regarding an Application for Transfer of Water Right ("Application") filed by the DeRuyter Dairy, and received by the Department on January 13, 2006. To date, the Department has failed to properly process the Application in accordance with the provisions of Idaho Code Section 42-222. For example, though the Department has been in possession of the Application and all corresponding fees for the past eleven (11) months, it has failed to publish notice of the Application. As you are well aware, publication of notice is a crucial step in the administrative processing of the Application. Publication of notice sets in motion a number of processes (such as evidence gathering via administrative hearings should the Application be protested) that need be completed before a final decision on the Application can be made.

On Monday December 10, 2007, I and my associate Andy Waldera met with Dan Nelson at the Department's Western Region Office to inquire as to why the Department has put the processing of the Application on hold. According to Mr. Nelson, and documentation in the Department's file, the continued processing of the Application has been put on hold for the following reasons:

- Because the CAFO siting team designated the Dairy as a "high risk" location; and
- Because the Department is waiting for the Owyhee County Planning and Zoning Commission decision on the Dairy's pending conditional use permit application (presumably because if the Commission were to deny the application for permit,

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the Department believes that there is no point in further considering the Application).

Rather than citing to any legal authority (statute, regulation, or case law) in support of the Department's position, Mr. Nelson directed us to a February 15, 2006 e-mail exchange between Lori Graves and Helen Harrington; a February 16, 2006 letter from Lori Graves to Darwin Vander Stelt; and Administrator's Memorandum No. 24—Transfer Processing Policies & Procedures, dated October 30, 2002 (copies attached). Regarding the Graves/Harrington e-mail exchange discussing the "high risk" rating, the decision to put further processing of the Application on hold was based at least in part upon an unsubstantiated ("apparently adopted") policy of Gooding County, whereby Gooding County allegedly denies dairy applications for any site rated other than "low risk." First, whether this is an official policy of Gooding County is questionable. Second, Owyhee County is not Gooding County, and it cannot be said that the two operate under the same "apparent" mind set.

As for the February 16, 2006 Graves letter and Administrator's Memorandum No. 24 ("Memorandum"), Mr. Nelson implied that the Department is treating the as yet unreceived Owyhee County Planning and Zoning Commission decision as an additional information request of the Applicant under Section 5 of said Memorandum. This rationale is fatally flawed and inexplicable for a couple of reasons. First, the Memorandum expressly states that it is limited to the processing of applications to "Transfer Ground Water in the Eastern Snake River Plain Only." Not to belabor the obvious, but the DeRuyter Dairy is located in Marsing, Idaho which is nowhere near the Eastern Snake River Plain. Thus, the Memorandum, and the policies and procedures that it provides, do not apply. Second, Section 5 of the Memorandum deals, in pertinent part, with additional information requests of the "applicant," not Owyhee County. To our knowledge, the Department has not made any additional information requests of the applicant, or has suggested in any way that the Application is deficient on its face. Provided that the Application is in order, and that the necessary fees have been paid, the Application is complete for further processing, *i.e.*, publication of notice.

Regardless of the Department's flawed reasoning discussed above, Idaho Code Section 42-222 speaks in mandatory, non-discretionary terms. When it comes to the processing of the Application, "it ***shall be the duty*** of the director of the department of water resources to examine the same, obtain any consent required in section 42-108, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A." *Id.* (emphasis added). In simple terms, upon receipt of a complete application, the Department "shall" publish the necessary notice in order to commence the requisite administrative proceedings should the Application be protested. The word "shall," when used in a statute, is "mandatory." *Goff v. H.J.H. Co.*, 95 Idaho 837, 839 (1974).

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According to Mr. Nelson, and the documentation in the Department's file, the sole basis for the Department's processing hold on the Application is the Department's desire to first receive a decision from Owyhee County. Stated frankly, the Department's position is untenable, arbitrary, and capricious. The Department's failure to publish notice until such time as Owyhee County renders a decision leaves the DeRuyter Dairy in an unacceptable position. For example, if Owyhee County approves the Dairy's conditional use permit, and then the Department finally gets around to publishing notice in order to ferret out protestants, if any, Department-related administrative proceedings could hamstring dairy operations. Expanded dairy operations would be in place, but the attendant right to use the water to support those operations would not. Moreover, any decision of the Owyhee County Planning and Zoning Commission is far from determinative, as any decision it makes will likely be appealed by the other side. The Department's processing of the Application should not, and by law cannot, hinge upon the decision of the Owyhee County Planning and Zoning Commission.

I bring these matters to your attention in hopes that you will instruct the Department to properly process the DeRuyter Dairy Application that is currently pending. It is not my desire to take this matter any further than your review. However, if the Department continues to fail to perform its non-discretionary, mandatory, statutory duties, other means of enforcing Department obligations will be explored.

Thank you for your attention to this matter. If you have any questions or comments, please feel free to contact me at 345-2000.

Sincerely,


Scott L. Campbell

SLC/dll
Enclosures
cc: Nicolaas DeRuyter