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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 APPLICATIONS
FOR TRANSFER NOS. 72177 & 72178

DIAMOND A LIVESTOCK, INC.
Applicant

HEIDI OLSON, POLLY ANN HUGGINS,
NICOLE REED, STEVE PAULIN,
LEANN REED, & CHRISTINE DAVIS,

Protestants

SOURCE: Groundwater

County: Gooding

MOTION TO STRIKE, OR RULE
DOCUMENTS INADMISSIBLE, AND
RESPONSE TO SUBMISSION OF
MATERIAL BY PROTESTANTS

COMES NOW, Diamond A Livestock, Inc., Applicant herein, through ROBERT E. WILLIAMS, of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and moves the Hearing Officer, pursuant to Idaho Department of Water Resources ("IDWR") Rules of Procedure 260 and 600, for an Order striking from the record, or, alternatively, ruling as inadmissible certain documents recently provided by the Protestants.

This Motion is brought for the reasons that the material sought to be stricken is not responsive to the Order to Augment Record, dated August 24, 2006, and that the information is otherwise irrelevant to any issue before IDWR in this proceeding.

MOTION TO STRIKE, OR RULE AND RESPONSE TO SUBMISSION OF MATERIAL BY PROTESTANTS - 1

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- A. THE LETTER DATED SEPTEMBER 13, 2006 ADDRESSED TO THE "HONORABLE SPACKMAN" SIGNED BY HEIDI OLSON AND POLLY ANN HUGGINS, EXCEPT FOR THE FIRST THREE (3) PARAGRAPHS OF THE LETTER, ENDING WITH THE SENTENCE:

"THERE ARE ONLY 115,000 IRRIGATED ACRES IN GOODING COUNTY TO DISPOSE OF THE MANURE."

1. The Order to Augment Record, dated August 24, 2006 ("Order") as it pertains to Protestants, provides that:

"Protestants shall submit information about the meaning and significance of the numbers 26 and 40 handwritten above the last two spreadsheet columns in Protestants Exhibit "D" and any information about locations of the fields identified by the spreadsheet that are associated with or nearby the Diamond A operation... ..the Protestants may submit any more recent, additional information about relevant contaminate levels in Gooding County. This information should also identify its proximity to the Diamond A operation."

The Protestants' letter of September 13, 2006, (hereinafter "Letter") provided limited relevant information in the first three paragraphs of the letter. The rest of the Letter is non responsive to, and is outside of, the parameters of the Order. It is also otherwise inadmissible because it is irrelevant, as shown by:

- a. The fourth paragraph of the Letter quotes Dale Westermann, a soil scientist on a hearsay basis. The rest of that paragraph is argumentative and offers unsupported statements about the adequacy of irrigated agricultural land in Gooding County as a whole to adequately dispose of the waste from the Applicant's proposed truck wash facility. Nothing in that paragraph pertains to Applicant's request or its ability to agronomically apply the waste from its truck wash facility on its own property. The paragraph is also argumentative.
- b. The fifth paragraph of the Letter does not provide "more recent, additional information" about relevant contaminate levels in Gooding County. Instead, it references letters and other statements from individuals cumulative of evidence and arguments made by the Protestants during the hearing. The paragraph does

not address the Applicant's proposed operation or the proximity of "problem areas" to Applicant's property.

- c. The sixth paragraph of the Letter is a reiteration of arguments made during and after the hearing. It does not provide any "more recent, additional information" about relevant contaminate levels in Gooding County or the proximity of problem areas to Applicant's proposed operations.
- d. The seventh paragraph of the Letter is also a restatement of arguments made by the Protestants earlier and does not provide the "more recent additional information" sought by the Order.
- e. The eighth paragraph of the Letter also does not respond to the Order and is argumentative.
- f. The ninth paragraph of the Letter contains references to Caroline Elexpuru's letter, which also should be stricken or ruled inadmissible for the reasons explained hereafter. This paragraph also refers to litigation filed by Brian Ravenscroft against a dairy. On the basis of the personal knowledge of this writer, no such suit has been filed. A sixty day letter under the Clean Water Act has been filed by Mr. Ravenscroft against a dairy. However, the sixty day letter, and any law suit that may be subsequently filed, contains allegations only. Nothing Mr. Ravenscroft is doing is relevant to any issue pending in this transfer proceeding. Nothing in the ninth paragraph is related to Applicant's operation.
- g. The tenth paragraph of the Letter contains new information not produced at the hearing which is not in any way relevant to the issues which are lawfully before the IDWR in this transfer proceeding. The paragraph is also not responsive to the request for additional information regarding phosphorous levels on Applicant's operations, or nearby.

4. None of Ms. Elexperu's material is responsive to the Order's request for "more recent, additional information about relevant contaminate levels" in Gooding County. It is completely unresponsive to phosphorus management on the Applicant's property.

C. THE LETTER OF MR. DAVID MAESTAS, DATED SEPTEMBER 9, 2006 SHOULD ALSO BE STRICKEN OR DECLARED INADMISSIBLE IN ITS ENTIRETY. IT PROVIDES NO "MORE RECENT, ADDITIONAL INFORMATION ABOUT RELEVANT CONTAMINATION LEVELS IN GOODING COUNTY" AND IS ALSO IRRELEVANT BECAUSE:

1. Mr. Maestas is incorrect that the Idaho State Department of Agriculture has determined that dairy fields in the County have exceeded their "maximum contamination level." The threshold limits for nutrient management planning are just that and are not "maximum contamination levels". Mr. Maestas' comments also demonstrate a complete misunderstanding of nutrient management planning in Idaho. Because phosphorus threshold limits are exceeded does not mean the owner of the fields is in violation of the act and regulations constituting nutrient management planning. Exceeding threshold limits does not mean anyone has or will be injured thereby. Instead, as explained by the Applicant, exceeding threshold limits requires the Applicant to not apply nutrients at more than the crop uptake level. Idaho Code § 37-401(3) and (4) and their accompanying regulations require that less than the crop uptake level of nutrients be applied if phosphorous limits remain above the threshold limits. Mr. Maestas does not connect his comments to Applicant's proposed operations in any way.

2. Mr. Maestas' letter does not contain one scintilla of evidence relevant to Applicant's proposed operations or its ability to agronomically apply nutrients to its fields as it has proposed. None of the other letters or other evidence submitted by the Protestants does so either. The evidence submitted by the Applicants, that it will be able to comply with the Nutrient Management Planning standards by using its own property for such purpose remains unrefuted.

D. THE DECISION IN *DAVISCO FOODS V. GOODING COUNTY* IS A 2005 IDAHO SUPREME COURT CASE THAT HAS NO RELEVANCE TO ANY OF THE ISSUES LAWFULLY PENDING BEFORE THE IDWR ON THIS PENDING TRANSFER APPLICATION. LIKEWISE, THE DOCUMENTS FROM THE HAWLEY TROXELL ENNIS HAWLEY LAW FIRM DATED 2003 ARE IN THE SAME CATEGORY, AS IS THE JULY 1, 2001, NRDC PUBLICATION ENTITLED "*HEALTH EFFECTS OF LAGOONS AND SPRAY FIELDS*." NONE OF THE MATERIAL RESPONDS TO THE ORDER'S REQUEST TO PROVIDE "MORE RECENT, ADDITIONAL INFORMATION ABOUT RELEVANT CONTAMINATE

LEVELS IN GOODING COUNTY," NOR DO THEY DISCUSS THE APPLICANT'S OPERATIONS AND PROPOSALS.

- E. RICHARD CARLSON'S PUBLIC RECORDS REQUEST TO THE IDAHO DEPARTMENT OF AGRICULTURE DATED JULY 29, 2005 IS ALSO IRRELEVANT TO THE ISSUES OF THIS CASE AND IS UNRESPONSIVE TO THE ORDER FOR THE REASONS PREVIOUSLY STATED.
- F. THE REST OF THE MATERIAL ATTACHED TO THE LETTER CONSISTS OF LETTERS FROM PARTICIPANTS AND RELATED MATERIALS FROM PROCEEDINGS BEFORE THE GOODING COUNTY PLANNING AND ZONING COMMISSION AND GOODING COUNTY BOARD OF COMMISSIONERS WHICH EITHER LED TO THE ISSUANCE OF THIS APPLICANT'S SPECIAL USE PERMIT, OR WHICH LED TO THE DENIAL OF PERMITS SOUGHT BY OTHER PERSONS. THE PROTESTANTS VIEW THE HEARING OFFICER'S ORDER AS AN INVITATION FOR THE IDWR TO OVERRULE WHAT GOODING COUNTY HAS ALREADY DONE, BECAUSE THE GOODING COUNTY PROCEEDINGS WERE CONTESTED BY THEM. NO LINK BETWEEN ANY OF THESE MATERIALS AND THE STATUTORY ELEMENTS FOR APPROVAL OF A WATER TRANSFER HAS BEEN SHOWN. NONE OF THESE MATERIALS DISCUSSES THIS APPLICANT'S ABILITY TO MANAGE PHOSPHORUS AT ALL. NONE OF THE MATERIALS ARE RESPONSIVE TO THE ORDER FOR THE REASONS PREVIOUSLY STATED.

CONCLUSION

In an apparent effort to obtain additional evidence on the issue of potential injury to the quality of groundwater in the area of the Applicant's proposed truck wash facility, the Hearing Officer entered an Order to Augment the Record, seeking clarification of some data in Applicant's Nutrient Management Plan and additional information regarding the existence of phosphorus levels in the area. Applicant responded by providing affidavits of Robert Ohlensehlen and accompanying exhibits which are directly responsive to the Order. Test data was provided showing that the very fields where Applicant proposes to apply liquid and solid waste from its facilities do not exceed the present threshold phosphorus limit of 20 ppm currently.

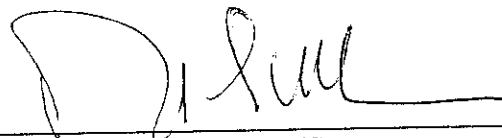
Protestants provided a letter containing three (3) paragraphs of arguably responsive material explaining the written numbers on one of their exhibits referenced Nutrient Management Planning Threshold Phosphorus Limits. The rest of the letter and other submissions collectively amount to an emotional diatribe generally condemning dairies (not livestock truck wash facilities) and asking IDWR to overrule the Conditional Use Permit already issued by

Gooding County, and to ignore the statutes, regulations and rulings of the Idaho Department of Agriculture, the Idaho Department of Environmental Quality and other agencies which apply to Applicant's proposed facilities, because the Protestants do not agree with the Conditional Use Permit or the rest of the law. The IDWR has no authority to do this. The majority of the Protestant's letter of September 13, 2006, and all materials submitted with it, should be stricken from the record and/or ruled irrelevant, because none of the documents respond to any of the issues of the Order or are relevant to any issue lawfully before the IDWR in this transfer proceeding.

Applicant continues to maintain that the record in this proceeding establishes that it has met, and will meet, each requirement of law pertaining to the proper management of nutrients or any other aspect of its proposed truck wash facility.

Dated this 5 day of October, 2006.

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPERICH, LLP



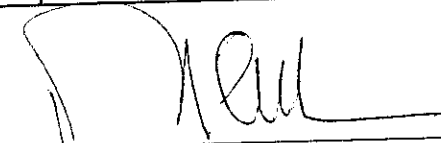
ROBERT E. WILLIAMS
Attorney for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 5 day of October, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

IDWR Document Repository PO Box 83720 Boise ID 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express
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