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AUG 25 2005
Department of Water Resources
Southern Region

DWR - SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3033

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 71604 (WATER)
RIGHTS NOS. 36-16195, 36-16197,)
& 36-4157F) IN THE NAME OF)
WILLIAM AND SUSAN MILLENKAMP)

ORDER GRANTING APPLICANTS'
MOTION IN LIMINE; ORDER
DENYING PROTESTANTS'
OBJECTION TO APPLICATION
AMENDMENT, MOTION TO
COMPEL DISCOVERY, AND
ALTERNATIVE MOTION IN LIMINE;
ORDER GRANTING MOTION TO
VACATE HEARING; AND
SCHEDULING ORDER

On March 23, 2005, Timothy J. Stover, attorney for applicants' William and Susan Millenkamp ("Millenkamps"), filed a Motion in Limine with the Idaho Department of Water Resources (IDWR). The motion generally sought a prohibition of "any argument or factual assertion concerning the local public interest" in the hearing proceedings that are "not strictly limited to the effect of the applicants proposed change of use solely. . . on public water resources." On August 15, 2005, Millenkamps amended the Motion in Limine to exclude specific documents identified by protestant Lee Halper ("Halper") as exhibits to be presented at the hearing. These exhibits included a transcript of the hearing for contested transfer no. 5639 in the name of K & W Dairy, and other documents that appear to discuss odor from confined animal feeding operations. The hearing officer has briefly reviewed these documents.

Idaho Code § 42-202B(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."

The K & W Dairy transfer was considered prior to codification of the local public interest definition in Idaho Code § 42-202B. The present definition of local public interest was enacted because of broad interpretations of the local public interest that were being applied in water right application matters. The transcript of the K & W Dairy hearing cannot be admitted as evidence in the present contested matter because (1) the standards for the local public interests were different in the hearing, and (2) the applicants in this matter did not have an opportunity to participate in the hearing. As a result, the transcript is not admissible evidence.

ORDER GRANTING APPLICANTS' MOTION IN LIMINE; ORDER DENYING PROTESTANTS'
OBJECTION TO APPLICATION AMENDMENT, MOTION TO COMPEL DISCOVERY, AND
ALTERNATIVE MOTION IN LIMINE; ORDER GRANTING MOTION TO VACATE HEARING;
AND SCHEDULING ORDER – Page 1

The other information submitted by Halper is related to the health risks caused by odors resulting from confined animal feeding operations. The hearing officer did not find a direct discussion of water resources in the text of the articles. Furthermore, even if the odors are being emitted from water, the definition of local public interest limits the review to the effects of a proposed use on the public water resource. The definition does not allow consideration of the effect of a proposed use on air quality or the public atmospheric resource. The hearing officer will not specifically prohibit the documents proposed as exhibits by protestant Halper. Halper must, however, show that the matter of public interest he is raising is a negative effect on the public water resources that is caused by the proposed water use. Foundational standards that Halper must satisfy are: (1) Halper must produce an expert witness at the hearing that is qualified to (2) lay a foundation for the articles or technical information that is sought to be presented that will (3) establish there will be an effect on the public water resource from the proposed water use. In addition, these effects of the proposed use must impact the interest of the people in the area directly affected by the proposal.

PROTESTANTS' VARIOUS MOTIONS

On August 8, 2005, Patrick Brown, the attorney for various protestants, deposed Roy Prescott ("Prescott"), a water right holder from whom Mellinkamps are obtaining the water right that is the subject of this application for transfer. In the deposition, Prescott identified lands from which water would be transferred that were different than the lands identified in the first amended application for transfer filed by Mellinkamps. As a result, on August 15, 2005, Mellinkamps filed another amended application for transfer.

The proposed amendment is not significant. IDWR has determined that republication of the application is not necessary.

Even though the application need not be republished, a change of water use on the lands that will no longer be irrigated is a factual matter that the protestants should have time to explore. The filing of the amended application for transfer approximately two weeks before the hearing does not give the protestants sufficient time to review and explore possible issues. As a result, the hearing scheduled for August 30, 2005 should be continued.

Applicants and protestants both assert that the opposing parties have not adequately responded to requests for discovery. In particular, the protestants have argued that applicants have not provided sufficient historical crop records. As a result, the protestants have moved to compel discovery, or, in the alternative, moved to limit the testimony that can be presented by the applicants.

During discussions at the telephonic prehearing conference, the parties determined that, given the hearing would be postponed, a schedule for exchange of information would suffice. As a result, the motions by the protestants should be denied.

ORDER

IT IS HEREBY ORDERED that the applicants' Motion in Limine is **GRANTED** in part. No part of the transcript for contested case no. 5639 in the name of K & W Dairy shall be admitted into evidence. In addition, all presentation of evidence must fall within the definition of the local public interest contained in Idaho Code § 42-202(B).

IT IS FURTHER ORDERED that the Application for Amendment of Transfer, received on August 15, 2005, is **ACCEPTED** by IDWR and notice of the application will not be republished.

IT IS FURTHER ORDERED that the hearing scheduled for August 30, 2005 is **VACATED**.

IT IS FURTHER ORDERED that the protestants' Motion to Compel and Motion in Limine are **DENIED**.

IT IS FURTHER ORDERED that the parties shall adhere to the following schedule for exchange of information:

1. On or before August 31, 2005, the parties, the expert witnesses, and the attorneys retained by all of the parties shall meet, either in person or telephonically. At the meeting, the parties shall discuss the information that will be presented at the hearing, and any information that each of the parties and experts needs from the other party to evaluate for hearing preparation. At the meeting, the experts shall also consult their calendars, and determine, with the parties and the attorneys, available dates for a hearing in the months of October and November, 2005. A schedule of the hearing officer's calendar is enclosed herewith to determine available dates. Following this meeting, a summary of the information requested, the available times for hearing, and any other appurtenant information shall be submitted to the hearing officer. The applicants shall prepare the report after consultation at the meeting. This summary will replace all previous discovery requests.

2. On or before September 21, 2005, the parties shall provide the requested information to other parties. In particular, the applicant is responsible for providing all historical crop information on the entire farm owned by Roy Prescott from which water is proposed to be transferred for at least the last 10 years when crops were grown. Because the applicant is proposing the transfer of the Prescott water rights, the applicant is responsible for persuading Prescott to provide the information or obtained Prescott's authorization to review the information. Failure by the parties to timely provide the information is cause for the hearing officer to further postpone the hearing, to limit presentation to information not provided, or to sanction the parties according to IDWR Rules and/or the Idaho Rules of Civil Procedure.

3. On or before October 7, 2005, the parties must submit expert analysis of the information that was exchanged.

4. On or before October 14, 2005, the parties must exchange any rebuttal information in response to the original expert analysis.

DATED this 23rd day of August, 2005.

A handwritten signature in cursive script, appearing to read "Gary Spackman", written in black ink.

GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August 2005, the above and foregoing **ORDER GRANTING APPLICANTS' MOTION IN LIMINE ORDER DENYING PROTESTANTS' OBJECTION TO APPLICATION AMENDMENT, MOTION TO VACATE HEARING, MOTION TO COMPEL DISCOVERY, AND ALTERNATIVE MOTION IN LIMINE AND SCHEDULING ORDER** in the matter of Application for Transfer No. 71604, in the name of William and Susan Millenkamp, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

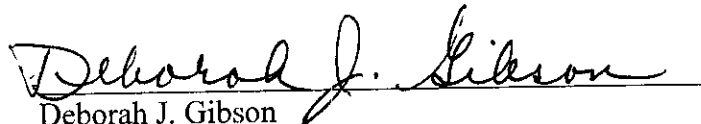
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DEL KOHTZ
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EDEN ID 83325


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

October 2005

October 2005						
S	M	T	W	T	F	S
2	3	4	5	6	7	1
9	10	11	12	13	14	8
16	17	18	19	20	21	15
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30	31					29

November 2005						
S	M	T	W	T	F	S
6	7	1	2	3	4	5
13	14	15	16	17	18	12
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27	28	29	30			26

Monday	Tuesday	Wednesday	Thursday	Friday	Sat/Sun
					October 1
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3	4	5	6	7	8
	Updated: Regional Manager/Bureau Chief Meeting (Boise)		Annual Leave		
					9
					10
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November 2005

November 2005						
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December 2005						
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18	19	20	21	22	23	24
25	26	27	28	29	30	31

Monday	Tuesday	Wednesday	Thursday	Friday	Sat/Sun
	November 1	2	3	4 8:00am Annual Leave	5
					6
7	8	9	10	11	12
Annual Leave					
					13
14	15	16	17	18	19
					20
21	22	23	24	25 8:00am Annual Leave	26
					27
28	29	30			