

RECEIVED

JUN 2 2000

Department of Water Resources

Robert E. Williams
FREDERICKSEN, WILLIAMS & MESERVY
117 South Adams Street
P.O. Box 168
Jerome, ID 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135
IDAHO STATE BAR NO. 1693

Attorney for Gunning Dairy

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DIVERSION)
AND USE OF WATER NOT IN)
CONFORMANCE WITH) AFFIDAVIT IN SUPPORT OF
CONDITIONS OF APPROVAL OF) PETITION FOR RECONSIDERATION
TRANSFER NO. 5197 INVOLVING) OF PRELIMINARY ORDER DATED
WATER RIGHTS NOS. 36-02457B,) MAY 25, 2000
36-07760B, AND 36-08063F IN THE)
NAME OF F.F. GUNNING)

STATE OF IDAHO)

:ss

County of Jerome)

ROBERT E. WILLIAMS, having been first duly sworn on oath, deposes and says:

1. I am the attorney for the Gunning family.
2. Since the letter of the Department of Water Resources to me dated March 20, 2000, negotiations with Gooding County involving the issues of the Gunning dairy operations allegedly being in violation of local law have been ongoing. A copy of that letter is attached hereto as Exhibit "A."

AFFIDAVIT IN SUPPORT OF PETITION FOR RECONSIDERATION OF PRELIMINARY ORDER
DATED MAY 25, 2000

C:\bsb\Docs\Data\Gunning.family\recon.affd.wpd

3. A copy of my letter to Judy Daubner, Planning and Zoning Administrator for Gooding County, dated March 24, 2000, is copied and marked as **Exhibit "B"** to this Affidavit. Prior to that letter, a meeting with the Gooding County Commissioners, myself, a representative of the Gunning Family and others interested in the matter was held on the 14th day of February, 2000.

4. After the meeting and initial correspondence, several discussions have been held regarding the resolution of this matter with Philip Brown, attorney for Gooding County. Telephone conversations were held with Mr. Brown on the following dates: March 14, 2000; April 12, 2000; May 11, 2000. I had other informal discussions with Mr. Brown as we encountered each other at the courthouse. During the May 11, 2000 conversation, I mentioned to Mr. Brown the necessity of filing a declaratory judgment action to seek a judicial resolution, given the lack of closure on the issues. Mr. Brown asked me to forbear the filing of the declaratory judgment action to give him more time to talk to the county commissioners to see if a settlement agreement could be reached. I was waiting to hear back from Gooding County when the Preliminary Order was received.

5. After receiving the Preliminary Order on May 25, 2000, I telephoned Phil Brown that afternoon. We discussed the receipt of the preliminary order. Mr. Brown professed no knowledge of its issuance.

6. I advised Mr. Brown that I would be notifying the Department of Water Resources that negotiations had been continuing to resolve the issues between the Gunnings and Gooding County at least through May 25, 2000, and reminded him that my clients had forgone the filing of a declaratory judgment action at an earlier posture because of his request for more

time to negotiate. Mr. Brown then informed me for the first time that he believed that under the current circumstances no further negotiations were possible and that the Gunning family should proceed with its declaratory judgment action. I advised him that my clients would do that in the very near future.

7. It is apparent that the matters regarding the status of the Gunning Family's dairy operations *vis-a-vis* the local ordinances of Gooding County, will now need to be fully litigated. Among the issues that will be addressed in the declaratory judgment action are:

- a) The legality of Ordinance No. 60, the current Gooding County zoning ordinance.
- b) Whether the Gooding County zoning administrator had, or has, authority under present and past ordinances, to reject the Gunning Family's application for a CAFO Siting permit.
- c) Whether the applications for siting permits were lawfully rejected;
- d) The legality of Gooding County Ordinance No. 66, the current Gooding County CAFO ordinance, to the extent this question has not been resolved by other litigation currently pending in Gooding County, Idaho.
- e) Whether Gunnings were required to file a siting permit application under Ordinance No. 66;
- f) Whether Gooding County, by laches or estoppel, can enforce any of its ordinances in such a way as to deprive the Gunning Family of the right to operate its dairy;
- g) Generally, whether the Gunning Family can lawfully operate a dairy at its present location, and the parameters of the operation.

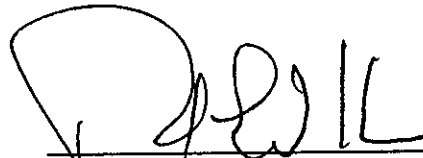
There are also several legal subissues within each of the principal issues set forth.

8. These are substantial issues which will have a profound impact on all parties to this proceeding. It is plain that the resolution of the issues should take place in a court of law, not in a hearing before the Department of Water Resources, which although possesses great expertise in matters concerning water, is not a court of general jurisdiction.

9. I will provide a copy of the declaratory judgment complaint to the Department when it is filed. The declaratory judgment action is now being drafted and will be filed during the week of June 4, 2000.

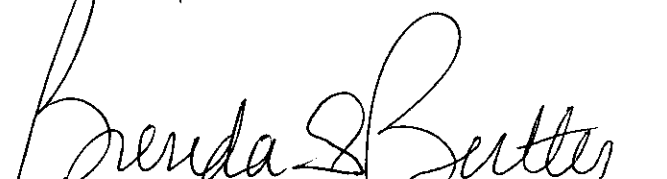
Dated this 1st day of June, 2000.

FREDERICKSEN, WILLIAMS & MESERVY



ROBERT E. WILLIAMS

SUBSCRIBED AND SWORN to before me this 1st day of June, 2000.



Notary Public for Idaho
Residing at: Gardiner
Comm. Expires: 3/5/2004

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing instrument to be served upon the following:

L. Glen Saxton
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

Philip A. Brown
Prosecuting Attorney
PO Box 86
Gooding, ID 83330

Idaho Department of Water Resources
1341 Fillmore St Suite 200
Twin Falls, ID 83301

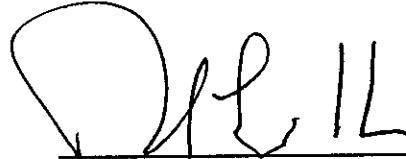
Don Cogger
2923 South 2200 East
Wendell, ID 83355

Marv Patton
Idaho Department of Agriculture
Bureau of Dairying
2270 Old Penitentiary Road
PO Box 790
Boise, ID 83701

Patrick D. Brown
109 South Adams Street
Jerome, ID 83338

 x By depositing copies of the same in the United States mail, postage prepaid, at the post office at Jerome, Idaho.

DATED: June 1, 2000



ROBERT E. WILLIAMS



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

March 20, 2000

Robert E. Williams
Fredericksen, Williams & Meservy
P.O. Box 168
Jerome, Idaho 83338-0168

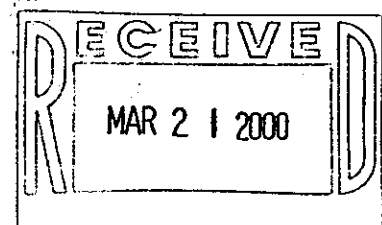
Re: Water Right 36-02457B (Gunning)

Dear Mr. Williams:

Thank you for your letter of February 23, 2000, discussing the status of the county permits for the Gunning Dairy. The Department of Water Resource's interest in this matter relates to a condition of approval on Transfer No. 5197 issued to the Gunnings allowing ground water to be used at the dairy. This condition states:

The dairy operation authorized under this approval shall comply with applicable city and county zoning and use requirements.

A letter written November 4, 1999 by Gooding County Administrator, Judy Daubner, indicated that the Gunning Dairy is not in compliance with Gooding County ordinances and is not grandfathered from compliance with the ordinances. Based upon this representation from the county, IDWR issued an order to show cause on December 7, 1999 (reissued on January 4, 2000 to updated addresses) to allow the Gunnings an opportunity to demonstrate that they are in compliance with county ordinances. The order was not intended to provide additional time for the Gunnings to obtain county approval. Without information in the Department's files showing that there is some basis in fact or law that the dairy is in compliance with county requirements, the Department should move to enforce its transfer approval condition.



Robert E. Williams
March 20, 2000
Page 2

Your letter indicates that discussions with Gooding County on this matter should be finalized soon. I further understand that you intend to initiate a civil action to resolve this matter if an agreement is not reached with Gooding County. Based upon this understanding, the Department hereby extends the time within which to respond to the order to show cause until May 1, 2000. Please keep me advised of progress on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Norman C. Young". The signature is fluid and cursive, with the first name "Norman" and last name "Young" clearly distinguishable.

Norman C. Young
Administrator
Water Management Division

c: Susan Gunning
Marv Patton, Idaho Dept. of Agriculture
Francis Gunning
Allen Merritt, Idaho Dept. of Water Resources
Patrick D. Brown
Judy Daubner, Gooding Co. Planning & Zoning
Don Cogger

FREDERICKSEN, WILLIAM & MESERVY
ATTORNEYS AT LAW
117 South Adams Street
P. O. Box 168
Jerome, Idaho 83338-0168



EUGENE D. FREDERICKSEN
ROBERT E. WILLIAMS
JAMES C. MESERVY

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-mail: fwmattys@northrim.net

March 24, 2000

Gooding County Planning and Zoning Commission
Attn: Judy Daubner, Administrator
PO Box 417
Gooding ID 83330

In re: Gunning Family

Dear Judy:

I am responding on behalf of the Gunning Family to your letter of March 2, 2000, regarding their alleged violation of CAFO Ordinance No. 66.

My clients are very anxious to resolve the matter regarding their dairy operation east of Wendell with Gooding County. Perhaps a review of what has occurred in the past would be helpful to everyone.

Gooding County previously issued a CAFO Siting Permit for the dairy, Number 94-016 in 1993, for 473 lactating cattle and 204 calves. Uncontradicted, substantial evidence has been provided the county at previous hearings and in previous submissions establishing that the real property in question has been used as a dairy, and then as a substantial heifer feeding operation, continuously for decades.

The real property was purchased by my clients from the Farm Credit Bank of Spokane on March 2, 1995, and they immediately commenced the conversion of the facility to a milk cow operation. Despite Gooding County's initial decision not to allow electric power to the remodeled facility in the summer of 1996, Gooding County subsequently allowed power to be connected to the facility. General building permits for new structures had not been obtained as required by Ordinance No. 60. This is an obvious recognition of the principles announced in *Boise City v Blaser*, 572 P.2d 892, wherein the Supreme Court of Idaho excluded the operation of amendments to a zoning ordinance against an individual who commenced construction activities or otherwise relied, to his detriment, on existing law prior to the enactment of the amendment. Ordinance No. 62, the previous CAFO ordinance has been now ruled unlawful, as you know.

EXHIBIT

B

March 24, 2000

Page - 2 -

Although Ordinance No. 60 has not been ruled invalid by a Court to date, because that question has not been presented to a Court, substantial questions regarding its legality are present. Many of these questions have to do with the procedure under which the Gooding County Ordinance No. 60 was adopted, wherein zoning district boundaries were changed without individual notice to specific land owners whose rights were being affected.

On December 24, 1994, G.C. Gunning provided plans and other application materials which supported the family's proposal to remodel the existing CAFO operation into a 960 cow dairy operation. These materials were receipted for by Gooding County Planning and Zoning. It is un rebutted that the Planning and Zoning Administrator advised Mr. Gunning at that time that no ordinance of Gooding County existed which would require a permit for what he was undertaking.

On August 10, 1997, the Gunning Family submitted an application for a grandfathered CAFO operation under Ordinance No. 62. You subsequently rejected the application for siting permit required by Ordinance No. 62. As mentioned previously, Ordinance No. 62 has since been ruled unlawful.

Existing Paragraph III A of Gooding County Ordinance No. 66 requires that:

"Within six (6) months from the effective date of this ordinance, any person or entity ("Registrant") operating a CAFO existing as of said effective date, shall file a registration notice with the Administrator. CAFOs which have previously registered with the Administrator need not re-apply under this ordinance."

On the 1st day of April, 1999, the recommended order of the Department of Water Resources was issued, approving a water right transfer to the Gunning's property, sufficient for the operation of a 960 cow dairy facility. This order has now become final.

As set forth in this letter, the Gunning Family has filed a registration statement with your office on at least two (2) prior occasions. Further, a "grandfather permit" has been previously issued to this facility under Ordinance No. 50. Like prior Ordinance No. 62, Ordinance No. 66 gives the administrator authority only to determine whether the registration notice is complete and the information provided accurate. It gives the Administrator no other authority to review or deny a registration notice. On neither occasion of submission of registration material to your office (December, 1994 and August, 1997) was my client notified that the information they had provided was inaccurate or incomplete. Instead, your office denied the "grandfather permit" on the basis that the zoning was improper and other grounds, none of which were authorized under Ordinance No. 62. Because of this it is my client's position that they have registered this facility properly on prior

March 24, 2000

Page - 3 -

occasions and that any position by you or Gooding County to deny "grandfather" status is unlawful, whether under Ordinance No. 62 or Ordinance 66.

Having said the foregoing, my clients are again willing to submit the materials you require by Ordinance No. 66, Section III A, 1 through 7. They will do so if you request to me in writing that this be done. If the information is provided it will be under protest and subject to all the rights and positions stated in this letter.

My clients remain ready and willing to discuss other solutions to the problems Gooding County believes my clients have with their operation, without resorting to the track which we are now on. That track is litigation which we are confident will ultimately result in a vindication of my client's position, that they have a lawful right to operate a dairy operation of 960 cows on their facility at this time. If required to litigate, that will be the Gunnings' position. In the meantime as I have previously suggested to you and other Gooding County officials, my clients are willing to discuss, for settlement purposes, a resolution of this entire problem at a level of operation less than 960 mature cows.

Very truly yours,

FREDERICKSEN, WILLIAMS & MESERVY

A handwritten signature in black ink, appearing to read 'R. Williams', written over a horizontal line.

ROBERT E. WILLIAMS

REW/bsb

cc: Clients

Philip A. Brown, Prosecuting Attorney

C:\bsb\Docs\Data\Gunning.family\gdgp&z.ltr.wpd