BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 5639 IN THE NAME OF K&W DAIRY	))))))	**ORDER DENYING MOTION FOR SUMMARY JUDGMENT**

BACKGROUND

This matter comes before the Hearing Officer for the Idaho Department of Water Resources ("IDWR") as a result of K&W Dairy ("K&W") filing its *Motion for Summary Judgment in Light of Change in Scope of Local Public Interest Evaluation Together with Supporting Argument* on April 24, 2003. On May 7, 2003, Protestant Lee Halper filed a *Response to Motion for Summary Judgment*, and on May 8, 2003, Protestant Bill Chisholm filed *Protestant Bill Chisholm's Response to Motion for Summary Judgment*. Protestants Halper and Chisholm also filed several affidavits in support of their responses. The Hearing Officer in entering this order has not relied upon information or statements contained in the affidavits. On May 13, 2003, K&W submitted a *Reply in Support of Motion for Summary Judgment*.

This matter concerning K&W Dairy's Application for Transfer No. 5639 has an extensive procedural history. The Protestants appealed IDWR's final order of April 9, 2001, approving the water right transfer application to the district court. The district court reversed and remanded the decision to IDWR for further proceedings concerning the local public interest decision criterion under Idaho Code § 42-203A(5) as it relates to the adequacy of the odor control measures for the proposed dairy. *Chisholm v. IDWR,* No. CV 01-00239 (5th Jud. Dist. Ct. Gooding Co., Nov. 30, 2001).

Following a second hearing before IDWR, the Hearing Officer issued a *Preliminary Order on Remand* on June 21, 2002, denying the transfer application due to K&W's failure to meet its burden as set out by the district court for satisfying the local public interest standard. K&W Dairy appealed the *Preliminary Order* to the Director. In addition, K&W requested that the Director grant a stay of the proceedings to provide it further opportunity to submit detailed information for evaluation of the odor control measures proposed for the dairy facility. On December 16, 2002, the Director granted the requested stay and a motion to supplement the record. The Director remanded the matter to the Hearing Officer for further hearing, which is set for May 20, 2003. Based upon the analysis below, the Hearing Officer denies the *Motion for Summary Judgment*.

MOTION FOR SUMMARY JUDGMENT

K&W Dairy filed its *Motion for Summary Judgment* in light of the passage of House Bill (HB) 284 by the 2003 Idaho Legislature. The Governor signed HB 284 on April 15, 2003, without an emergency effectiveness provision. The legislation takes effect on July 1, 2003. The current definition of the "local public interest" appearing in Idaho Code § 42-203A(5)(e) is "the affairs of the people in the area directly affected by the proposed use." The new definition under HB 284, to be codified at Idaho Code § 42-202B(3), is "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." 2003 Idaho Sess. Laws, Ch. 298. K&W acknowledges that the changes to the statute are substantive in nature and not merely procedural. *Motion for Summary Judgment*, p. 2.

K&W argues in its *Motion* that because HB 284 eliminates secondary effects, such as odor, as a consideration in transfer proceedings before IDWR, the issues raised before the district court in this case and remanded to IDWR are "moot." K&W thus argues that it is entitled to a

decision in its favor as a matter of law and requests that IDWR approve its transfer application with an effective date of July 1, 2003. Before acting on the *Motion*, it is necessary to consider whether K&W is correct in its argument concerning the effect of HB 284 on this transfer proceeding. This consideration requires an assessment of the extent to which the provisions of HB 284 are applicable to water right proceedings pending before IDWR prior to July 1, 2003, the effective date of the legislation.

Effect of HB 284 Prior to its Effective Date

Because K&W asks the Hearing Officer to give effect to the provisions of HB 284 at the hearing scheduled for May 20, 2003, it is necessary to consider whether IDWR can apply the new "local public interest" definition prior to July 1, 2003, the effective date of the legislation. In Idaho, legislation has no effect and does not become law until its effective date. In this regard, Idaho Code § 67-510, provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session . . . except in case of emergency, which emergency shall be declared in the preamble or body of the law." *See also* Art. 3, § 22, *Idaho Const.* (no act to take effect until sixty days from the end of the session without declared emergency). Although the 2003 Idaho Legislature did not adjourn *sine die* until May 3, 2003 (59 days prior to July 1), the Legislature through passage of HB 451 declared an emergency, which allows HB 284 to become effective on July 1, 2003. 2003 Idaho Sess. Laws, Ch. 344.

The effects of Idaho Code § 67-510 were analyzed in *Fox v. Board of County Com'rs*, 121 Idaho 686, 827 P.2d 699 (Ct. App. 1991). In that case, the Idaho Court of Appeals held that an amendment to a statute that took effect on July 1, 1989, "did not control or govern the district court's decision which was filed on April 7, 1989." 121 Idaho at 690, 827 P.2d at 703. It is thus

clear that it would not be appropriate for the Hearing Officer to apply the provisions of HB 284 during the hearing scheduled in this matter for May 20, 2003.

Prospective and Retroactive Effect of HB 284

Having determined that HB 284 cannot be relied upon until its effective date, it is necessary to consider the effect of HB 284 on water right transfers and other applications pending before IDWR on July 1, 2003. It is necessary to separately consider the effect of HB 284 on those applications, as in the present case, for which IDWR previously made a final decision that is now back before the agency for further proceedings following a remand from the district court. The purpose is to identify those proceedings to which HB 284 can be applied prospectively, and those proceedings for which application of HB 284 would be an inappropriate retroactive application of the legislation.

Prospective Application of HB 284

The general rule is that legislation is not to be applied retroactively unless such legislative intent is specifically set forth in the legislation. *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981) citing I. C. § 73-101 and *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979). Section 73-101, Idaho Code, provides that "[n]o part of these compiled laws is retroactive, unless expressly so declared." HB 284 contains no express provision that it is to be applied retroactively. Legislation is considered to have a retroactive effect only if it affects a substantive right of one of the parties to an action. 102 Idaho at 624, 636 P.2d at 746.

The Idaho Supreme Court in *Hidden Springs* held that the legislation that added the local public interest criterion to Idaho Code § 42-203 in 1978 was applicable to pending applications to appropriate water. In reaching that decision, it was significant to the Court that although a

hearing had been held on the pending Hidden Springs application a final decision had not yet been reached by IDWR. The Court noted that at the time the legislation was enacted "the status of the appellant [Hidden Springs] had progressed no further than that of an applicant with a pending application." *Id*. at 625, 747. The Court determined that the legislation could properly be applied to ongoing water right application proceedings because a water right permit applicant was "one who has *but initiated* the statutory process by the filing of an application for a water appropriation permit and whose application is properly pending while legislation is passed which impacts upon the permit application." *Id*. (emphasis added). The Court also held that there was no vested right affected by applying the new legislation because the "*mere initiation* of the statutory process for water appropriation grants no vested right." *Id*. (emphasis added).

The rationale for the Court's holding in *Hidden Springs* means that HB 284 may be applied to pending proceedings before IDWR that have not received a final agency decision. This conclusion is consistent with the decision in the *Fox* case where the Idaho Court of Appeals held that an amended statute did not bind a district court, which had made a final determination prior to the effective date of the legislation. Given the holdings and rationale in the *Hidden Springs* and *Fox* decisions, it is appropriate that IDWR only apply HB 284 to those pending applications for which the agency has not yet entered a final decision prior to July 1, 2003.

Precluded Retroactive Application of HB 284

Having concluded that HB 284 is applicable to pending applications for which IDWR has not issued a final decision prior to July 1, 2003, the opposite is true with respect to matters for which IDWR has entered a final decision prior to July 1, 2003.

In the present case, the Protestants appealed IDWR's final order of April 9, 2001, to the district court and the district court issued a decision reversing and remanding the case to IDWR

for further proceedings related to the local public interest. *Chisholm v. IDWR,* No. CV 01-00239 (5th Jud. Dist. Ct. Gooding Co., Nov. 30, 2001). The matter is still before IDWR on remand from the district court. The IDWR Hearing Officer has scheduled a second hearing on remand for May 20, 2003. The fact remains, however, that IDWR previously issued a final order in this matter on April 9, 2001, under the provisions of the present statute. Thus, similar to *Fox*, all hearings and the agency's initial final decision occurred prior to July 1, 2003, the effective date of the new "local public interest" definition under HB 284. Hence, like in *Fox*, the statute in effect at the time of the initial final decision by IDWR governs these proceedings, not the amended statute that goes into effect on July 1, 2003.

Protestant Chisholm argues that the doctrine of the "law of the case" also serves to preclude application of the new definition of the "local public interest" to this case. The "law of the case" doctrine arises when a trial court enters a final judgment and an appeal is brought before an appellate court that in turn remands the case for further proceedings before the trial court. The trial court is required to follow the law as set forth by the appellate court. In *Swanson v. Swanson*, 134 Idaho 512, 515-16, 5 P.3d 973, 976-77 (2000), the Idaho Supreme Court stated:

> The doctrine of 'law of the case' is well established in Idaho and provides that 'upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. . . .'

Id. (citing *Suitts v. First Sec. Bank of Idaho*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc*., 180 Mont 434, 591 P.2d 196, 197 (1979)). The Idaho Supreme Court in *Swanson* rejected the argument that the law of the case doctrine did not apply to appeals from the magistrate to the district court where the case did not reach a higher court. *Id*. Thus, there is a basis to also apply the doctrine to a district court sitting in an appellate

capacity of an administrative agency's final decision. Hence, when a case is remanded to an agency for further consideration of a particular issue, the appellate court's determination of the law as established during the appeal compels the agency to follow that court's instruction. *See Ada County Highway Dist. v. Smith*, 113 Idaho 878, 880, 749 P2d 497, 499 (1988).

Therefore, if a case has been remanded to IDWR from a district court (or other higher appellate court) to consider an issue that is within the current "local public interest" standard, the agency is required to apply the law as established in that case. Idaho case law does not address the "law of the case" in the context of a proceeding in which the Legislature acted to change applicable law following an appellate court's decision but before action is taken by the lower court on remand. K&W argues that, "The law of the case doctrine is inapplicable if the controlling law changes between the time of the first appellate determination and the time the case is tried on remand, or brought to a second appeal." 5 Am. Jur. 2d *Appellate Review* § 613 (2002). The cases cited by Am. Jur. in support of this statement of the law, however, indicate that this result may only be appropriate in instances where the retroactive application of the new law is permissible. *Id*. In the present case, Idaho Code § 73-101 requires that HB 284 not be applied retroactively because the Legislature did not expressly so declare. Whether or not the law of the case is applicable in this case, the rationale behind the doctrine is consistent, in this instance, with the holdings and rationale in the *Hidden Springs Trout Ranch, Inc.* and *Fox* cases.

Protestant Chisholm raises two additional legal arguments in support of his position that HB 284 should not apply to the present proceeding. The first is that HB 284 is unconstitutional because the statutory redefinition of the local public interest was not first made through an amendment of the State Water Plan in accordance with the provisions of Art. 3, § 7, Idaho Const. Because the Hearing Officer is without authority to rule on the constitutionality of a statute, this

argument will not be addressed. IDAPA 37.01.01.415.[1] The second additional argument raised by Protestant Chisholm is that K&W is precluded by the doctrine of judicial estoppel from seeking application of the provisions of HB 284 to the present proceeding. This argument is based upon the fact that Adrian Boer, the owner of K&W Dairy, testified before the Legislature that the amended statute would not apply to his particular case. While Chisholm has cited several cases applying the doctrine of judicial estoppel, none of the cases purport to preclude a party from taking a position in a judicial or administrative proceeding that is contrary to an opinion expressed before a legislative committee. The Hearing Officer declines to make such a ruling in response to Chisholm's argument in this proceeding.

CONCLUSION

The provisions of HB 284 amending the definition of the "local public interest" under Idaho law should not be applied prior to the bill's effective date on July 1, 2003. The provisions of HB 284 can be applied prospectively to pending proceedings before IDWR where a final agency decision has not been entered in the proceeding. HB 284 does not apply to proceedings for which a final agency decision previously was appealed to the district court and the matter is before the agency on remand from the district court. The present proceeding will continue under the current statutory standards.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that the *Motion for Summary Judgment* filed by K&W Dairy in this proceeding is DENIED. The matter shall proceed to hearing on May 20, 2003, as scheduled, limited to consideration of evidence addressing the

[1] It is noted that a legal guideline from the Idaho Attorney General's Office to Senator Laird Noh, dated March 20, 2003, concludes that an amendment of the Idaho State Water Plan was not a prerequisite for the Legislature to amend the statutory definition of the "local public interest."

adequacy of the odor control measures to be relied upon during the operation of the proposed dairy facility.

Dated this 13th day of May 2003.

____/Signed/____
L. GLEN SAXTON
Hearing Officer