IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO SUPREME POTATOES, INC.,
an Idaho corporation,

Plaintiff,

vs.

STATE OF IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY,
an agency of the State of Idaho

Defendant.

Civil Case No. CV OC 02 02506D

MEMORANDUM DECISION

This matter is on appeal to this court from a determination by the Idaho Department of Environmental Quality (DEQ) that certain information supplied by Idaho Supreme Potatoes in connection with an application submitted by it for an operating permit required of the DEQ to operate its potato processing plant in Firth, Idaho, constituted open records of the DEQ pertaining to air pollution emission data, which records were subject to being turned over to third parties upon request under the Idaho open records laws. Idaho Supreme Potatoes objects to this classification, contending that the information supplied with its application are trade secrets of the company and are protected from disclosure to anyone. For the reasons stated herein, I sustain the determinations and orders of the DEQ.

Facts and Procedural History

The salient facts are not in dispute. In 1995, Idaho Supreme submitted an application to the DEQ for an air quality permit operate its processing plant near Firth, Idaho. This plant processes potatoes into dehydrated potato flakes and slices. The drying process puts a significant amount of steam and water vapor into the air. Because it uses gas-fired boilers to generate steam to heat its drying apparatus, the entire operation is subject to regulation by the DEQ as the administering agency under the Federal Clean Air Act, and an air quality permit from DEQ is required as part of the regulatory process.

If metering devices are not used the DEQ will accept estimates of contaminates in the air calculated under what is referred to as a "mass balancing method." The theory is that air emissions can be calculated by adding the weights of all physical inputs into the plant and subtracting the weights of all materials shipped out of the plant. Any remainder, if any, must have been emitted into the air. To comply with the requirements for the calculations under the "mass balancing method" Idaho Supreme submitted detailed schedules pertaining to the operations of its plant. It asserted then, and asserts now, that this information consists of proprietary trade secrets

The DEQ does not contest the claim by Idaho Supreme that the information supplied would ordinarily be considered proprietary trade secrets, and would ordinarily be exempt from disclosure under the open records laws. However, it contends that Idaho Code § 9-342A overrides the protection ordinarily provided to trade secrets when the information consists of air pollution emission data.

In June of 2001, the DEQ received a public records request for the mass balance calculations. According to its interpretation of the statute, and its finding that the information

supplied for the mass balance calculations constituted air pollution date as defined, the DEQ advised Idaho Supreme that the public record request would be honored. This appeal followed.

Analysis

The DEQ determined, and Idaho Supreme now challenges, that the information supplied for the "mass balancing method" calculations is "air pollution emission data" as defined by federal and state regulation. 40 CFR 2.301(2)(a): IDAPA 58.01.21.010.01. There is not a basis for the challenge. The information clearly fits squarely within the definition of "air pollution emission date" as defined in the identical state and federal regulations cited above.

The crucial issue appears to be whether the Idaho Statute, I.C. § 9-342A, requires disclosure of this data, notwithstanding the federal and state regulations, upon the undisputed contention that the information constitutes trade secrets to Idaho Supreme. This statute, in its relevant part, reads as follows:

> **§ 9-342A. Access to air quality and hazardous waste records -- Protection of trade secrets**
> (1) To the extent required by the federal clean air act and the resource conservation and recovery act for state primacy over any delegated or authorized programs, even if the record is otherwise exempt from disclosure under chapter 3, title 9, Idaho Code, any person may inspect and copy:
> (a) Air pollution emission data;
> (b) The content of any title V operating permit;
> (c) The name and address of any applicant or permittee for a hazardous waste treatment, storage, or disposal facility permit pursuant to chapter 44, title 39, Idaho Code; and
> (d) Any other record required to be provided to or obtained by the department of environmental quality pursuant to the federal clean air act and the resource conservation and recovery act, and the implementing state statutes, federal regulations and state rules, unless the record is a trade secret.
> (2) For purposes of this section, a record, or a portion of the record, is a "trade secret" if the information contained in the record is a trade secret within the meaning of the Idaho trade secrets act, > sections 48-801, et seq., Idaho Code, including commercial or financial information which, if disclosed, could cause substantial competitive harm to the person from whom the record was obtained.

(3) Any record, or portion of a record, provided to or obtained by the department of environmental quality and identified by the person providing the record as a trade secret shall not be disclosed to the public and shall be kept confidential according to the procedures established in this section.

The DEQ argues in this case that the first subsection of this statute controls – that is, the provision including "air pollution emission data" in the category of that which must be produced for inspection upon request.

A reading of the statute reveals an obvious ambiguity. Subsection (3) of the statute appears to declare that any record identified as a trade secret shall not be revealed, notwithstanding the disclosure requirements of subsection (1). Subsection (1) of the statute appears to declare that such records will be subject to disclosure under the public records act, notwithstanding that such information might be considered trade secrets. However, this section concludes in the final sentence to subpart (1)(d) with the phrase, "unless the record is a trade secret." It is not clear whether this final phrase refers only to the items in subpart (1)(d) of the statute (which is the grammatically correct construction), or to all of the subparts under section (which is an ungrammatical but not absurd construction). It is not entirely clear how to read subsection (1) consistently with subsection (3).

In this case, the DEQ has determined that the interpretation to be placed on this statute requires disclosure upon request if the information consists of "air pollution emission data," notwithstanding that the information disclosed would otherwise be a protected trade secret. I conclude that the agency determination is entitled to deference by this court under the criteria established in *J. R. Simplot Co. Inc. v. Idaho State Tax Commission,* 120 Idaho 849 (1991). The DEQ interpretation, and the circumstances under which it applied the determination, fit all of the criteria established in the controlling case

cited. I therefore conclude that the agency ruling in this case should be affirmed in all respects.

Conclusion

For the reasons stated, the decision of the Department of Environmental Quality that the information supplied by Idaho Supreme as part of the "mass balancing method" of calculations for the requested air quality permit constituted "air pollution emission date," and its further decision that such date was required to be released on request under Idaho Code § 9-342A notwithstanding that such information would otherwise be considered as a trade secret of Idaho Supreme, is affirmed in all respects. No attorney fees are awarded. The state is entitled to its costs.

Dated this 30 day of June, 2003.

Sr. Judge D. Duff McKee

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of July, 2003, I mailed(served) a true and correct copy of the within instrument to:

GREGORY P MEACHAM
ATTORNEY AT LAW
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IDAHO FALLS ID 83405

STATE OF IDAHO
DEPARTMENT OF ENVIRONMENTAL QUALITY
1410 NORTH HILTON
BOISE ID 83706

J. David Navarro
Clerk of the District Court

By _____
Deputy Court Clerk

CERTIFICATE OF MAILING