

Idaho Dept. of Health & Welfare
Administrative Procedure Section
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BEFORE THE BOARD OF HEALTH AND WELFARE
STATE OF IDAHO

JOE SIEVERS,)
LAWSON FARMS, INC.)
)
Appellants,)
)
vs.)
)
IDAHO DEPARTMENT OF HEALTH)
AND WELFARE,)
)
Respondent.)
_____)

Docket Nos. 0114-91-16
0114-91-19

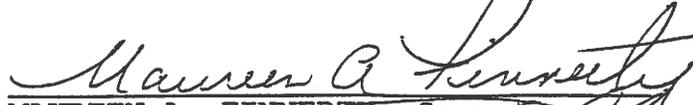
O R D E R

The Board, having reviewed the record, the Hearing Officer's Report, Respondent's Exceptions to the Hearing Officer's Report, the Briefs and Arguments of the parties, and the recommendation of the Soil Conservation Commission, hereby adopts the Hearing Officer's Report and **AFFIRMS** the decision of the Kootenai-Shoshone Soil Conservation District relating to the appeal of Joe Sievers for non-compliance with its contract and **AFFIRMS** the decision of the Benewah Soil and Conservation District relating to the appeal of Lawson Farms, Inc.

DATED this 6th day of ~~October~~^{November}, 1992.


WILLA D. BARSNESS, Ph.D., Chair


ROBERT C. STANTON, Vice Chair


MAUREEN A. FINNERTY, Secretary


DAVID R. MEAD
Member


MARGUERITE G. BURGE
Member


G. BERT HENRIKSEN
Member


DONNA L. PARSONS
Member

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of ~~October~~ ^{November}, 1992, I mailed a true and correct copy of the foregoing ORDER to the following named individuals by first class mail:

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JUN 02 1992
DOCKET NO.

BEFORE THE BOARD OF HEALTH AND WELFARE

STATE OF IDAHO

* * * * *

JOE SIEVERS,
LAWSON FARMS, INC.

Appellants,

vs.

IDAHO DEPARTMENT OF HEALTH
AND WELFARE

Respondent.

)
) Docket No. 0114-91-16
) Docket No. 0114-91-19
)

) HEARING OFFICER'S REPORT
)
)
)
)
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* * * * *

INTRODUCTION

Appellants Joe Sievers and Lawson Farms, Inc., both farmers, entered into contracts with their local Soil Conservation Districts. The contracts required each Appellant to perform certain farming management practices intended to reduce soil erosion, and thus benefit water quality. In return for the satisfactory performance of these practices, each Appellant was to receive certain grant funds to reimburse, in part, the expense of the designated management practices. Appellants failed to perform the management practices in the manner designated by their respective contracts, and the reimbursement benefits have been denied for the 1990 crop year. Sievers and Lawson Farms, through counsel, concede failure to perform according to the strict terms of the contracts, but raise several defenses.

1 Sievers and Lawson Farms, Inc., are unrelated, but their cases
2 have similar facts, involve similar legal issues, arose within the
3 same farming season, and both Appellants are represented by the
4 same attorney. Throughout informal discussions between counsel and
5 the hearing officer, the cases have been discussed as if
6 consolidated. The Department's¹ Motion for Summary Judgment
7 discusses the cases together, including both entities within one
8 caption, and the response from Appellants follows suit. Although
9 there has been no formal request for consolidation, it appears that
10 no party resists consolidation. Because of the unity of issues and
11 in the interests of administrative economy, the two cases should be
12 considered together, with due regard for the unique facts of each
13 case where appropriate.
14

15 **BACKGROUND**

16 Section 208 of the Clean Water Act of 1972, as amended,
17 requires each state to adopt programs to curtail water pollution
18 from non-point sources. In response, the Idaho Agriculture
19 Pollution Abatement Plan was established in 1979, with amendments
20 following in 1983. Generally, the Abatement Plan identifies
21 sources of pollution and recommends agricultural practices which
22 are designed to improve the quality of surface waters. To
23 implement the Plan, the State Agriculture Water Quality Program was
24

25 ¹For reasons discussed infra, I have recommended that the
26 Department be considered a party in interest, but not a
"respondent". I have, therefore, referred to the named parties as
"Appellants" and "Department".

2 created, and in 1980 the enabling legislation was amended to allow
3 water pollution control account funds to be used for grants.

4 The current grant program, administered by the Idaho State
5 Board of Health and Welfare, is designed to protect and enhance
6 "the quality and the value of the water resources of the State of
7 Idaho by financially assisting soil conservation districts in the
8 control and abatement of water pollution from agricultural lands",
9 Title 5, Chapter 3, Rules and Regulations of Agricultural Water
10 Quality Program, Rule 16.01.14002.

11 The Department of Health and Welfare provides grant funds to
12 participating soil conservation districts (SCDs). SCDs, in turn,
13 enter into contracts with farmers who wish to participate in soil
14 conservation practices. The contracts set out best management
15 practices (BMPs) which are designed to reduce soil erosion, and the
16 farmer is paid money pursuant to the contract for following these
17 practices. The extent to which designated BMPs are actually
18 effective in producing the desired result is in dispute between the
19 parties.

20 BMPs are not negotiated freely between the SCDs and the
21 farmer. A document entitled "Field Office Technical Guide",
22 developed by the federal Soil Conservation Service, contains
23 certain standards and specifications from which BMPs are developed
24 and identified in the Abatement Plan. Through a process not
25 entirely clear from the record, local SCDs select BMPs which should
26 be appropriate for the geographic region of that SCD. These
selected BMPs, or some of them, are to be included in the contract

1 between a given SCD and a given farmer. Participation in the
2 program, by the farmer, is entirely voluntary. An agreement to
3 participate, and subsequent failure to comply with the designated
4 BMPs, results in the farmer being required to surrender grant funds
5 received, and to forego unreceived grant funds otherwise promised.
6 No other sanctions result.
7

8 **PROCEDURAL BACKGROUND**

9 The parties agree to the procedural background of the case,
10 which is set forth in the Department's brief. The Department's
11 statement is set forth here verbatim:
12

13 "On February 11, 1991, Joe Sievers appealed to the Board of
14 Health and Welfare ("Board") the determination made by the
15 Kootenai-Shoshone Soil Conservation District that Mr. Sievers
16 violated the terms of the Agricultural Water Quality Contract
17 entered into between the District and Mr. Sievers.

18 "On April 4, 1991, Lawson Farms, Inc. appealed to the Board
19 the determination made by the Benewah Soil Conservation District
20 that Lawson Farms had violated the terms of the Agricultural Water
21 Quality Contract entered into between the District and Lawson
22 Farms.

23 "By Notices of Hearing dated May 7 and 8, 1991, the two
24 appeals were set for hearing before a hearing officer on June 12
25 and 13, 1991. The Notices name the Department of Health and
26 Welfare ("Department") as the Respondent to the appeals. Both of
these hearings were reset for July 2, 1991.

1 "On June 5, 1991, the Soil Conservation Districts ("SCDs")
2 entered appearances, and on July 18, 1991, the Idaho Soil
3 Conservation Commission ("SCC") filed a Notice of Appearance.
4

5 "At the request of the Appellants, on June 27, 1991, the
6 hearings were vacated.

7 "On August 7, 1991, the SCC filed its recommendation to the
8 Board that the Board uphold the determinations made by the SCDs.

9 "On October 30, 1991, it was agreed by the Department, the
10 Appellants, and the other parties who have appeared that the
11 Appellants would submit Offers of Proof and that the other parties
12 would have an opportunity to submit briefs arguing whether, on the
13 basis of the Offers of Proof, the Appellants were entitled to
relief in these proceedings.

15 "On December 26, 1991, Appellants filed their Offers of Proof.
16 Respondent filed its memorandum in support of its Motion for
17 Summary Judgment."

18 Appellants were thereafter offered an opportunity to respond,
19 and did so by memorandum dated March 20, 1992.²

20
21 **OFFICIAL NOTICE**

22 The Department has requested that the record include a number
23 of submitted documents, and Appellant has lodged no objection.

24 In addition, Appellant has requested inclusion of several
25 documents. The Department has not objected. All documents should

26

²This sentence suggested by Appellants.

1 be included in the record. The documents are official records
2 which are reasonably reliable, and the kinds of documents that
3 prudent persons rely on in the course of conducting their everyday
4 affairs. I.C. 67-5210. While many documents are not relevant in
5 my view, given the great discretion which I believe the Board may
6 exercise in this case, it is for the Board to determine how much
7 weight to give these documents, and they should not be excluded at
8 this stage of the proceedings. The following documents shall be
9 made a part of the record:

- 10 1. 1983 Abatement Plan
- 11 2. IDAPA §§ 16.01.14000 to 16.01.14999
- 12 3. State of Idaho Department of Health and Welfare Agreement
13 Covering the Offer and Acceptance of State Grant for
14 Application of BMPs for Benewah SCD Tensed-Lolo Project
15 No. AG-17
- 16 4. State of Idaho Department of Health and Welfare Agreement
17 Covering the Offer and Acceptance of State Grant for
18 Application of BMPs for Kootenai-Shoshone SCD
- 19 5. March 22, 1990 Application of Sievers
- 20 6. June 21, 1990 Sievers Contract Including:
 - 21 a. Agricultural Water Quality Plan
 - 22 b. Soil Conservation Service Standards and
23 Specifications
 - 24 c. Soils and Location Map and Soils Description
- 25 7. November 8, 1990 Finding of Fact Letter Regarding Sievers
- 26

- 1 8. November 8, 1990 Agreement Covering Non-Compliance
2 Regarding Sievers
- 3 9. November 16, 1990 Annual Status Review Regarding Sievers
- 4 10. December 13, 1990 Minutes of the Kootenai-Shoshone SCD
- 5 11. January 9, 1991 Letter from Kootenai-Shoshone SCD to
6 Sievers Regarding Decision
- 7 12. September 9, 1987 Application of Lawson
- 8 13. October 8, 1987 Lawson contract Including:
 - 9 a. Conservation Plan
 - 10 b. Soil Conservation Service Standards and
11 Specifications
 - 12 c. Location and Soil Maps and Soils Description
- 13 14. November 21, 1990 Minutes of the Benewah SCD
- 14 15. December 14, 1990 Annual Status Review Regarding Lawson
- 15 16. December 17, 1990 Finding of Fact letter from Cook to
16 Benewah SCD Regarding Violation
- 17 17. December 19, 1990 Minutes of the Benewah SCD
- 18 18. December 19, 1990 Letter of Notice from the Benewah SCD
19 to Lawson
- 20 19. February 21, 1991 Minutes of the Benewah SCD
- 21 20. March 4, 1991 Letter of decision from the Benewah SCD to
22 Lawson
- 23 21. U.S.D.A. Agricultural Handbook No. 537, "Predicting
24 Rainfall Erosion Losses - A Guide to Conservation
25 Planning".
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22. Idaho ESCS Bulletin No. ID 190-1-4, dated March 7, 1991, from Paul H. Calverly, Idaho State Conservationist, to Area Field and Sub-Field Offices, Idaho Soil Conservation Service, together with Idaho Conservation Compliance Crop Residue Burning Policy referenced therein.
 23. Alternative Conservation Systems - are I Idaho - And - Area IV Washington, Required Crop Residue Levels for Conservation Compliance Plans (Working Draft, pre-March 3, 1992).
 24. CPA-Revised Alternative Conservation Systems for Conservation Compliance, dated March 3, 1992, to All Field Offices - Area I and Moscow AO from Paul H. Calverly, Idaho State Conservationist, together with the enclosure referred to therein.

16
17

STATUS OF THE RECORD

18

FACTS PECULIAR TO SIEVERS

19 Both parties agree as to certain facts relating to the
20 Sievers' contract. Those facts are set forth immediately
21 below, and are taken directly from the Department's Memorandum
22 in Support of Motion for Summary Judgment. References to
23 attached documents are deleted.

24 "On March 22, 1990 Sievers submitted an application to
25 the SCD for participation in the program. On June 21, 1990
26 Sievers entered into a State Agricultural Water Quality

1 Program contract with the SCD which included an Idaho
2 Agriculture Water Quality Plan.

3
4 The contract provides that Sievers will apply

5 Best Management Practices in conformity with and as shown
6 in the attached water quality plan, which plan is hereby
7 made a part of this contract, according to the time
8 schedule of treatment and in accordance with the
9 standards and specifications adopted by the soil
10 conservation district and in effect as of this date;

11 Sievers' Contract No. 9, Part II, paragraph (1).

12 The contract further provides that Sievers will

13 forfeit all rights to further payments under the contract
14 and refund to the State of Idaho all payments received
15 thereunder upon his violation of the contract at any
16 stage during the time he has control of the operating
17 unit, if the soil conservation district determines that
18 such violation is of such a nature as to warrant
19 termination of the contract; or to make refunds or accept
20 such payment adjustments as the soil conservation
21 districts may deem appropriate if it determines that the
22 participant's violation does not warrant termination of
23 the contract;

24 Contract No. 9, Part II, paragraph (2).

25 "The plan specifies that conservation tillage
26 specification no. 329 "will be used to maintain at least 30%
ground cover on the soil surface at spring planting." Plan,
page 2.

Conservation tillage specification no. 329 reads:

.1 Surface Residue Cover Requirements.

.1.1 Crop residue will not be burned.

.1.2 Where soil erosion by water is the major
problem, a minimum of 30% ground cover will be maintained
at the soil surface at planting.

.1.3 Where soil erosion by wind is the major
problem, a minimum of 1000 pounds per acre of flat small

1 grain equivalents will be maintained on the soil surface
2 at planting.

3 SCS Conservation Tillage Specification No. 329, October 1986
4 (emphasis added). This specification is made part of the
5 contract by paragraph (1) of Part II and by the plan itself.

6 "Paragraph (4) of Part II of the contract states that the
7 participant agrees "not to apply any practices which would
8 tend to defeat the purpose of the contract."

9 "In September 1990 Sievers burned his fields. A finding
10 of fact notice dated November 8, 1990, was sent to Sievers and
11 transmitted to SCD. It noted that Sievers had burned his
12 fields on or about September 6, 1990, and that the burning
13 activity had resulted in the non-compliance of eight contract
14 items. The SCD, therefore, sent Sievers an Agreement Covering
15 Non-Compliance with Provisions of Contract dated November 8,
16 1990, detaining the non-compliance. Sievers failed to sign
17 and return this agreement to the SCD.

18 "On November 16, 1990 an annual status review of Sievers'
19 contract found that 11 contract items were in non-compliance
20 due to Sievers' burning activity.

21 "On December 3, 1990, at SCD board of supervisor's
22 regular meeting, Sievers was present to discuss his non-
23 compliance.

24 "After careful consideration of the findings and
25 recommendations and Sievers' response, the SCD board of
26 supervisors determined that Sievers' contract should be placed
in non-compliance. The SCD determined that the contract

should be placed in non-compliance and made the following findings:

1. No payment would be made on the following contract item numbers: 11, 16, 21, 26, 31, 37, 42, 47.

2. The SCD would work with Sievers in the following areas:

a) To urge the SCS to use these fields as a field trail to monitor erosion after burning and use of a chisel planting system.

b) To urge the SCS to recognize that in some situations this is a viable management tool, and revise their specifications to allow some flexibility.

c) Along with the same lines as item b, the Kootenai-Shoshone Soil Conservation District would support the resolution presented at the recent IASCD Convention in regard to stubble burning. Id.

"The SCD also offered to extend the contract by a year to allow application of the practice according to SCD standards and specifications so that in the long run Sievers would obtain the payments to be withheld under the non-compliance.

"The SCD notified Sievers of its decision at the December 13, 1990 meeting and in a letter dated January 9, 1991.

"In response to the board of supervisors' determination of non-compliance, on February 11, 1992 Sievers filed this appeal with the Board.

1 **ADDITIONAL FACTS RELATING TO SIEVERS' CONTRACT ESPOUSED BY**
2 **APPELLANTS.**

3 "Prior to signing the application for participation in
4 the water quality contract, and again at the time of signing
5 the contract itself, Appellant Sievers was told that there
6 would not be a problem in burning the stubble prior to seeding
7 with a One-Pass Drill. There was no denial that Appellant
8 Sievers was told he could burn in the December 13, 1990
9 minutes of the Kootenai-Shoshone SCD meeting. In fact, those
10 minutes clearly reflect that burning was discussed on two (2)
11 different occasions. Neither do those minutes reflect that
12 the final decision by the SCD on Appellant Sievers' contract
13 was made in executive session, at which representatives from
14 the local SCS were present, but from which Appellant Sievers
15 was excluded.

16 "The SCD did not find that contract item numbers 2 and 7
17 were in non-compliance.

18 **FACTS PECULIAR TO LAWSON FARMS**

19 Both parties agree as to certain facts relating to the
20 Lawson Farms' contract. Those facts are set forth immediately
21 below, and are taken directly from the Department's Memorandum
22 in Support of Motion for Summary Judgment. References to
23 attached documents are deleted.

24 "On September 9, 1987, Lawson Farms, Inc. submitted an
25 application to the SCD for participation in the program. On
26

2 October 8, 1987, Lawson Farms entered into a SAWQP contract
3 with the SCD which included a conservation plan of operations.

4 The contract provides that Lawson will apply

5 Best Management Practices in conformity with and as shown
6 in the attached water quality plan, which plan is hereby
7 made a part of this contract, according to the time
8 schedule of treatment and in accordance with the
9 standards and specifications adopted by the soil
10 conservation district and in effect, as of this date;

11 Lawson Contract No. T/L-SWQ-9, Part II, paragraph (1).

12 The contract further provides that Lawson will

13 forfeit all rights to further payments under the contract
14 and refund to the State of Idaho all payments received
15 thereunder upon his violation of the contract at any
16 stage during the time he has control of the operating
17 unit, if the soil conservation district determines that
18 such violation is of such a nature as to warrant
19 termination of the contract; or to make refunds or accept
20 such payment adjustments as the soil conservation
21 districts may deem appropriate if it determines that the
22 participant's violation does not warrant termination of
23 the contract;

24 Lawson Contract No. T/L-SWQ-9, Part II, paragraph (2).

25 "The plan specifies that conservation cropping sequence
26 specification no. 328 will be applied. The plan reads:

27 Conservation Cropping Sequence (328) Crop rotations which
28 result in a significant amount of crop residue for
29 management purposes is essential. Low residue crops may
30 not be grown in two consecutive seasons. Crop residue
31 will not be burned.

32 Lawson Contract No. T/L-SWQ-9, Conservation Plan of
33 Operations, page 1 (emphasis added).

34 "In addition, the plan at page 1 specifies that
35 conservation tillage specification no. 329 will be applied.

36 Conservation tillage specification no. 329 reads:

.1 Surface Residue Cover Requirements.

1 .1.1 Crop residue will not be burned.

2
3 .1.2 Where soil erosion by water is the major
4 problem, a minimum of 30% ground cover will be maintained
5 at the soil surface at planting.

6 .1.3 Where soil erosion by wind is the major
7 problem, a minimum of 1000 pounds per acre of flat small
8 grain equivalents will be maintained on the soil surface
9 at planting.

10 SCS Conservation Tillage Specification No. 329-1, October 1986
11 (emphasis added). This specification is made part of the
12 contract by paragraph (1) of Part II and by the plan itself.

13 "Paragraph (4) of Part II of the contract states that the
14 participant agrees 'not to apply any practices which would
15 tend to defeat the purpose of the contract'."

16 "In the fall of 1990, Lawson burned its fields. On
17 November 21, 1990, at the SCD's regular board meeting, Larry
18 Cook, of the federal SCS, reported that Lawson had burned its
19 fields. The SCD then reviewed the situation and determined
20 that a notice of contract violation should be sent to Lawson.

21 "On December 14, 1990, an annual status reviews of
22 Lawson's contract was prepared. In a finding of fact letter
23 dated December 17, 1990, Cook informed SCD that Lawson had
24 violated 16 items of its SAWQP contract, of which 9 items were
25 violated due to burning of crop residues. The SCD board of
26 supervisors reviewed the finding of fact letter at its
December 19, 1990 regular meeting and again determined that a
notice of contract violation must be sent to Lawson. Also on
December 19, 1990, the SCD sent a Notice of Contracts
Violation to Lawson. The noticed listed the nine contract

1 items which had been violated by the burning. The letter also
2 informed Lawson of its right to appear at a contract violation
3 review before the SCD board of supervisors if a written
4 request was received within 30 days.
5

6 "On February 21, 1991, both Richard and Nick Lawson
7 attended the regular meeting of the SCD board of supervisors
8 and discussed the contract violation with the board. After
9 careful consideration of the SCS finding and Lawson's
10 testimony, the SCD determined that Lawson had violated its
11 contract and made the following findings: (1) Lawson must
12 refund \$1,956 in previously paid cost-share monies, (2) Lawson
13 must forego payment of \$1,522 in cost-share payments due for
14 1990, and (3) modification of the contract to reschedule or
15 delete certain practices so that Lawson can recapture the
16 forfeited payments in later years will be allowed.

17 "On March 4, 1991, the SCD sent Lawson a letter detailing
18 the SCD board of supervisors' decision. The letter also noted
19 Lawson's right to appeal the decision to the Board of Health
20 and Welfare within 30 days. Subsequently, Lawson submitted a
21 letter of appeal to the Board of Health and Welfare dated
22 April 4, 1991."

23 **ADDITIONAL FACTS RELATING TO LAWSON'S CONTRACT ESPOUSED BY**
24 **APPELLANTS.**

25 No residue measurements were taken on the Lawson Farms
26 ground covered by the contract.

1 **ADDITIONAL FACTS ESPOUSED BY APPELLANTS RELATING TO BOTH**
2 **CONTRACTS.**

3 Appellants Sievers and Lawson Farms concur in the
4 statement of facts set forth in Article III, Paragraph B and
5 C, of the Respondent's memorandum [facts set forth above],
6 with the following additions and modifications:

7 "No-till seeding (an acceptable tillage system pursuant
8 to Specification 329) presents economic problems which do not
9 exist with conventional seeding practices. These problems
10 include: plugging the drill with the surface residue, thereby
11 causing an uneven seed bed and lowering yields; causing a
12 heavier pull for the tractor used to pull the drill, thereby
13 increasing wear and tear; and leaving surface residue in the
14 furrow next to the seed bed, thereby increasing strawborne
15 diseases such as footrot, rootrot and Cephalosporium stripe
16 rust, and lowering yields.

17 "The reference in the conservation plans to Specification
18 329 and 30% ground cover quite clearly is made with reference
19 to "spring planting", whereas the alleged contract violations
20 at issue in these appeals occurred in the fall. The
21 Appellants actual seeding operation with the One-Pass Drill
22 was an acceptable tillage system according to Specification
23 329-1.3.1.

24 "There is no evidence whatsoever in the record that there
25 was any erosion of the farm land covered by the Appellant's
26 water quality contracts.

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"While it is true that the Appellants failed to sign and return the Agreement Covering Non-Compliance, the reason is that they disagreed with the determinations, and were within their rights to no sign and return that document.

"At the regular meetings of the SCD, the Appellants in both of these appeals were in attendance. However, when the actual determination was made with respect to their contract violations, the SCD was in executive session; present at this executive session were the local SCS technician and/or other local office personnel, but the Appellants were excluded."

ANALYSIS OF STIPULATED FACTS AND OFFERS OF PROOF

The positions of the parties seem to be thus:

Department:

Appellants failed to perform BMPs established in the contract, and therefore the SCDs were justified in withholding contract benefits.

Lawson-Sievers:

It is true that certain BMPs were not performed, but,

a) Sievers was told that he could burn in response to his questions prior to signing the application and at the time of signing the contract itself;

b) The findings of fact upon which the SCD decision was based contained errors, for instance, the finding that contract item numbers 2 and 7 were not in compliance;

1 c) In part, the findings and conclusions upon which the
2 decision to withdraw benefits under the Lawson contract were
3 based included inadequate crop residue. No residue
4 measurements were taken on Lawson Farms ground covered by the
5 contract;

6 d) No-till seeding presents numerous practical mechanical
7 problems, undesirable effects on seed bed and yields, and may
8 increase strawborne diseases;

9 e) Appellants actual seeding operation was an acceptable
10 tillage system;

11 f) There is no evidence of any actual erosion on the farm
12 land covered by Appellants' contacts;

13 g) Procedures relating to how the SCD should process alleged
14 contract violations were not complied with.
15

16
17 This is not a typical situation in which an administrative
18 agency has promulgated regulations which Appellants have allegedly
19 violated. The regulations in this case are procedures which
20 provide for issuing grant funds to participating soil conservation
21 districts, and thence to farmers who wish to participate in
22 rehabilitative farming practices. There is no question that in a
23 regulatory context flaws in the adoption or enforcement processes
24 may render an administrative rule unenforceable. Appellants argue,
25 in effect, that failure to adhere completely to various procedures,
26 relating either to contract promulgation or to the violation
hearing process, vitiates a finding of noncompliance. The

1 Department, in response, argues that the contracts between
2 Appellants and the soil conservation districts supersede the
3 regulations. Neither party has cited authority for its position,
4 and I can find no authority in support of either view.
5

6 Appellants are correct that there were certain procedural
7 errors. For instance, the SCD decision in Sievers contained a
8 finding that contract item numbers 2 and 7 were not in compliance
9 when in fact they were. Notification procedures to Appellants at
10 certain stages of the process arguably were faulty. References to
11 standards and criteria were not in all cases attached to pertinent
12 documents, and arguably should have been.

13 Though I can find no authority to support the position (or
14 reject it) it seems that scrupulous adherence to procedures
15 provides no meaningful safeguards in this instance. Where, as
16 here, the procedures ultimately result in a contract/grant being
17 awarded to Appellants, Appellants cannot in fairness reject the
18 terms of the contract, and then claim the contract benefits. At
19 most, it would seem, Appellants would be entitled to argue that
20 procedural irregularities misled them, and they should be released
21 from their contractual relationship.

22 In fact, that remedy is available to Appellants. Appellants
23 are under no obligation to continue to perform under the contract,
24 so long as they are willing to forego contractual benefits that
25 would otherwise accrue to them. Here, Appellants wish to argue
26 that they need not comply with the plain language of the contract,
but may still receive benefits under the contract.

1 The same analysis applies to the efficacy of the best
2 management practices contained in the contracts, or the
3 appropriateness of other, alternative practices. Whether or not
4 the best management practices are in fact appropriate and
5 effective, or whether other practices are superior, is irrelevant.
6 Appellants agreed to perform certain practices, and in return
7 therefor were to receive certain benefits. Should Appellants
8 determine that the itemized practices were not to their liking,
9 they were under no obligation to perform them; Appellants need only
10 reject the contract and its benefits.

11 In the event that the best management practices contained in
12 the contract are ineffective, or in the event that the contracts
13 are awarded or enforced in some arbitrary or discriminatory
14 fashion, Appellants need not go without a remedy. Appellants have
15 always had available to them the opportunity to seek declaratory
16 relief before the Board or a district court. Absent such arbitrary
17 or discriminatory practices, however, it would seem that the
18 Board's decision (implemented by the Department and thence the soil
19 conservation districts) to utilize federal generated BMPs is a
20 decision committed to agency discretion by law.

21
22 **STATUS OF THE PARTIES**

23 The Department argues that, while it is a real party in
24 interest, it should not be designated a Respondent in this case.
25 Department's argument is based upon the position that the
26 Department has performed no act nor failed to perform an act about

1
2 which Appellants complain. This appears to be true. While the
3 Department does have some administrative responsibilities relating
4 to contracts between farmers and SCDs, those responsibilities are
5 purely ministerial. Apparently, the Department does not qualify in
6 this instance as a person "against whom any complaint is filed or
7 investigation initiated . . .". Rules Governing Practice and
8 Procedure (contested cases), Rule III.

9 It would appear in this case that it would have been more
10 correct procedurally for Appellants to be designated Petitioners
11 with a caption styled "In re: Lawson Farms, Inc." and "In re: Joe
12 Sievers". The soil conservation districts, the Department and any
13 other entity who might wish to participate in those proceedings
could have sought to intervene.

15 As a practical matter, it appears that the Department will
16 continue to play a role in this appeal process, as an adversary to
17 the positions asserted by Sievers and Lawson Farms. Whether the
18 Department continues to participate as an interested
19 party/intervenor or as a respondent in this case will probably have
20 little effect on the outcome.

21
22 **DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

23 After reviewing the documents filed by Appellants for this
24 appeal, I conducted a conference call with counsel for all parties.
25 That conference was not on the record. During that discussion it
26 became clear that Appellants wished to make a record relating to
their allegations that contractually mandated BMPs were not

1 effective, and that farming practices actually utilized by
2 Appellants were effective, to reduce erosion. During that
3 discussion with counsel it appeared that such a hearing would
4 consume at least two days for Appellants case in chief, and the
5 response from the Department and/or the conservation districts
6 might very well take that much longer. The Department and the
7 districts argued strenuously that the evidence proposed by
8 Appellants was irrelevant and that the only issue before the Board
9 was the Appellants' breach of the terms of the contracts (which
10 breach Appellants readily acknowledged). At the time of that
11 conversation (late summer of 1991) Appellants were in the middle of
12 farming operations, and counsel requested that any lengthy hearing
13 be postponed until at least October of 1991. No party objected to
14 that request and the hearing date was indefinitely postponed with
15 no decision being made as to how the case should proceed.

16 During subsequent conversations with all counsel, including
17 informal discussions of the issues, it became apparent to me that
18 any hearing would be nothing more than a critique of BMPs contained
19 in the contracts. The Department argued, and I became convinced,
20 that this was information irrelevant to my role in these
21 proceedings. Notwithstanding some procedural flaws, which I have
22 described above, all parties agreed that Appellants had not
23 complied with the plain language of the contract. The issue to be
24 raised, by Appellants, was in the nature of whether the Board
25 should grant Appellants relief from the contract breach.
26

1
2 In my view, the Board does have that authority. IDAPA
3 01.14401, 01 provides that the Board is a beneficiary of all
4 participant contracts and is empowered to enforce the terms of any
5 such contract. Necessarily, if the Board has the power to enforce,
6 as a beneficiary, it must also have the power to waive enforcement.
7 While the Board's discretion in this area is very broad, it does
8 not lend itself to precise analysis through findings of fact and
9 conclusions of law. It did not seem efficient to me to conduct a
10 multi-day hearing collecting testimony relating to the "fairness"
11 of the contract when I had no basis for knowing how the Board might
12 wish to utilize its discretion or how to formulate a
13 recommendation.

14
15 Discussing these thoughts with counsel I suggested that the
16 parties submit to me statements concerning their proposed evidence,
17 in the nature of offers of proof. I made it clear to counsel that
18 I expected no party to acquiesce in the offers propounded by
19 opposing parties. Rather, I expected counsel to agree that the
20 offers represented issues upon which that party would present some
21 evidence without the necessity of agreeing that such a party would
22 actually prevail on that factual issue. For instance, Appellants
23 indicated in their offer that they would present evidence of the
24 inadequacy of the BMPs; the Department and the soil conservation
25 districts could agree that such evidence would be presented,
26 without agreeing that the evidence would be persuasive.

Those offers have been made a part of the record and are available for the Board to review. The purpose of the offers is to

1 indicate for the Board the nature of the evidence that each party
2 would intend to present so that the Board can determine the scope
3 of the issues the parties wish to raise.

4 At about that time, I indicated to the parties in a conference
5 call (with follow-up correspondence which is a part of the record)
6 that I did not intend to conduct a hearing since the one issue I
7 considered germane (the contract violation) was not in dispute. I
8 advised counsel, however, that it was my opinion that the Board had
9 great discretion to hear the arguments of counsel and determine
10 that evidence on issues important to Appellants should be taken.

11 At that juncture the Department filed its motion for summary
12 judgment posturing the case so that I could make a recommendation
13 to the Board based upon the one undisputed fact which I believe
14 disposes of the case. Although, arguably, such a motion is not
15 appropriate in administrative proceedings, Appellants have not
16 objected and agree that their opportunity to present evidence
17 relating to best management practices and other similar issues lies
18 with the Board.

19 That is not to say that Appellants have conceded that my
20 recommendation is correct; Appellants have merely agreed that,
21 given my disposition to interpret the case narrowly on the contract
22 issue, summary judgment is not procedurally incorrect.

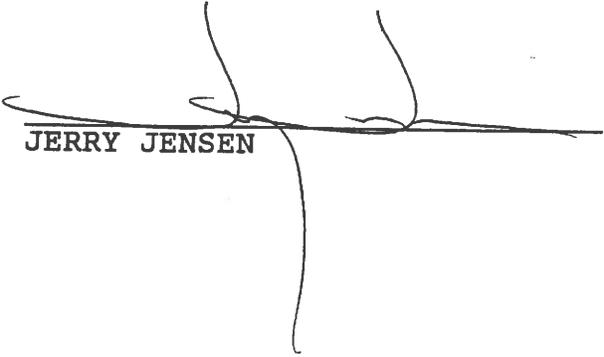
23
24 **RECOMMENDATION**

25 I respectfully recommend that the Board consider the arguments
26 of the parties as appended to this report, and as supplemented by

1 the parties' oral presentations to the Board. Thereafter, I
2 recommend that the Board find that Appellants Sievers and Lawson
3 Farms have violated the terms of their contracts with their
4 respective soil conservation districts.
5

6 I recommend that the Board thereafter determine whether it
7 wishes to consider modification of the contracts, offering
8 Appellants relief from compliance with the explicit terms of the
9 contracts, or whether the Board wishes to remand the matter for the
10 taking of evidence relating to the appropriateness of the best
11 management practices contained within the contracts.

12 RESPECTFULLY submitted this 31 day of May, 1992.

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16 JERRY JENSEN
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CERTIFICATE OF MAILING

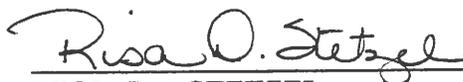
I hereby certify that on this 10th day of June, 1992, I mailed a true and correct copy of the foregoing HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION to the following named individuals by first class mail:

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