STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LAWRENCE ("BUD") MOON, JR., et al,,

Plaintiffs,

vs.

NORTH IDAHO FARMERS ASSOCIATION, et al,.

Defendants.

Case No. **CV 2002 3890**

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTIONS FOR PERMISSION TO APPEAL

On August 19, 2002, this Court entered its "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss". On September 3, 2002, defendants McLean et al filed their Motion for Permission to Appeal that "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss", as well as a "Motion for Reconsideration" of that same order. The following day, September 4, 2002, defendants Lampert Farm & Ranch et al filed a "Motion for Permission to Appeal" as well as a "Motion for Stay Preliminary Injunction Pending Appeal" and they joined in McLean et al's Motion for Reconsideration. Lampert Farm & Ranch also moved for permission to appeal this Court's August 30, 2002 Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction. Plaintiffs filed their response to the Motion for Reconsideration on September 4, 2002. On September 5, 2002, defendants Meyer et al filed their Notice of Hearing on their Motions for Permissive Appeal and Motion for

Reconsideration, to be heard on September 12, 2002, along with a Motion for Order Shortening Time for hearing such motions on less than the 14 day required notice. On September 6, 2002, defendants McLean similarly filed their Notice of Hearing on their Motions for Permissive Appeal and Motion for Reconsideration, to be heard on September 12, 2002, along with a Motion for Order Shortening Time. Defendants Lampert Farm & Ranch et al did not notice up their Motion for Permission to Appeal or their Motion for Reconsideration, but their pleadings were reviewed and their counsel participated in the hearing on September 12, 2002. On September 11, 2002, plaintiffs filed "Plaintiffs' Combined Opposition to Defendants' Motion for Permission to Appeal and Motion to Stay Preliminary Injunction Pending Appeal". On September 12, 2002, oral argument was heard on defendants' Motion to Shorten Time (plaintiffs stated no objection so defendants' Motion to Shorten Time was granted), defendants Motion for Reconsideration, defendants' Motion for Permission to Appeal and defendants' Motion to Stay Preliminary Injunction Pending Appeal. At that hearing the Court denied defendants' Motion for Reconsideration, denied defendants' Motion to Stay Preliminary Injunction Pending Appeal, and took under advisement defendants Motion for Permission to Appeal.

The motions for permission to appeal are made pursuant to I.A.R. 12. McLean et al and Lampert Farm & Ranch et al claim there are "…grounds that said orders involve controlling questions of law as to which there is substantial grounds for differences in opinion and an immediate appeal will materially advance the orderly resolution of the litigation." McLean et al Motion for Permission to Appeal, p. 2; Lampert Farm & Ranch' et al's Motion for Permission to Appeal, p. 3. No further argument was made in the motions for permission to appeal, and no further briefing was filed. Oral argument was held on September 12, 2002. At oral argument, counsel

for plaintiffs indicated that discovery will move this matter forward.

At the September 12, 2002 hearing, Michael McNichols (counsel for McLean et al) was the only attorney to voice **what** issues of law he felt there existed different opinions. He listed 1) whether or not Idaho Code §52-108 applies, 2) whether Idaho Code §52-108 constitutes a taking, 3) whether smoke constitutes a trespass, 4) joint and several liability and 5) do defendants have the burden of proof on damages. At the present time, all that could be appealed is the order denying the motion to dismiss, and items 2, 4 and 5 were discussed, but not determined in such order. Thus, any opinion by the Supreme Court would probably be advisory. The Supreme Court has stated it "will not do" advisory opinions. September 25, 2002, Order Denying Respondent's Motion for Clarification" in *Wayne Meyer, et al v. District Court of the First Judicial District and Honorable John T. Mitchell, District Judge, First Judicial District, State of Idaho*, Supreme Court No. 28889. There may be different opinions as to the law on 1 and 2, but that is frequently the case in litigation. Idaho Appellate Rule 12 requires that in addition to the requirement that there be controlling questions of law as to which there is substantial grounds for differences in opinion, the must be the following additional requirement: "…**and** an immediate appeal will materially advance the orderly resolution of the litigation." This Court is convinced that an immediate appeal will not materially advance the orderly resolution of the litigation.

While at the September 12, 2002 hearing, counsel for McLean et al (Michael McNichols) and Meyer et al (Peter Erbland) argued there were controlling issues of law to which there are different opinions and orderly resolution of litigation would be facilitated by appeal, those parties have also indicated the advantage of moving the litigation along. Five days later, defendants Meyer, et al, in their "Objection to Plaintiffs' Motion for Order Shortening Time for Hearing Plaintiffs' Emergency Motion and

Objection to Emergency Motion to Modify Preliminary Injunction and/or Issue New Preliminary Injunction", filed September 17, 2002, argued that a full presentation of evidence and legal authorities is required by order of the Supreme Court. *Id.* p. 3. They argued: "The Petition for Writ of Prohibition [which they filed with the Idaho Supreme Court] and Memorandum in Support with supporting affidavits made references to the need for discovery; orderly development of evidence and other due process rights (Memorandum in Support, p. 2); and the need for the orderly development of evidence through discovery (Memorandum in Support, p. 9)." *Id.* p. 4. They added defendants "…are entitled to a full presentation of evidence and legal authorities on questions of preemption and compliance with the State Implementation Plan." *Id.* p. 6. Then they argued: "Finally, defendants are entitled to a full hearing on the question of whether the plaintiffs have established that a causal connection exists between smoke from Kentucky blue grass, their alleged injuries, and a connection to any individual farmers in this case." *Id.*

Similarly, defendants McLean et al in their "Objection to Notice of Hearing on Plaintiffs' Motion for Order Shortening Time for Hearing Plaintiffs' Emergency Motion and Plaintiffs/ Emergency Motion to Modify Preliminary Injunction and or Issue New Preliminary Injunction", p. 2, filed September 17, 2002, to which the Lampert Farm & Ranch et al defendants joined on September 17, 2002 as well, wrote:

> Defendants are diligently preparing to make a "full presentation of the facts and legal authorities." For example, defendants have noticed several medical depositions for this week, and defendants are also in the process of arranging the depositions of plaintiffs and their medical care providers.

Plaintiffs and defendants have indicated the desire to move this litigation along, to engage in discovery and to determine the facts.

The Idaho Supreme Court in its September 12, 2002 "Order Granting Petition for

Writ of Prohibition" in *Wayne Meyer, et al v. District Court of the First Judicial District and Honorable John T. Mitchell, District Judge, First Judicial District, State of Idaho*, Supreme Court No. 28889, ordered "…this order prohibiting enforcement of the preliminary injunction is issued without prejudice to the District Court's or the Court's right to consider these issues ***after there has been a full presentation of evidence and legal authorities.***" *Id.,* p. 2.

The Court also should consider the fact that if an appeal were allowed now, there may be appeals after final judgment is entered, and that could burden the appellate courts. *Budell v. Todd,* 105 Idaho 2, 665 P.2d 701 (1983). The Supreme Court intended by I.A.R. 12 to create an appeal in the exceptional case and did not intend to broaden the appeals which may be taken as a matter of right under I.A.R. 11. *Id.*

As to the preliminary injunction, the Supreme Court has prohibited the district court from enforcing such, rendering a permissive appeal at this point, moot. As to the Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, this Court determines that it is in the best interests of all the parties that the litigation and discovery should go forward, rather than an immediate appeal of that order. A complete and full presentation of the facts will better enable the Idaho Supreme Court to address any later appeal. This Court specifically finds that an immediate appeal of the Memorandum Opinion and Order Denying Defendants' Motions to Dismiss will not materially advance the orderly resolution of the litigation. This Court acknowledges this is a discretionary decision, *Willis v. Larsen,* 110 Idaho 818, 718 P.2d 1256 (Ct.App. 1986), and acts accordingly. *State of Idaho v. Billy G. Sheahan,* 2002 Opinion No. 74, 02.21 ICAR 964 (Ct.App. Sept. 27, 2002).

IT IS HEREBY ORDERED the motions to for permission to appeal filed by the various defendants are DENIED in all respects.

Entered this _____18th_____ day of November, 2002.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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Secretary