

Opposing sides argue positions in groundwater pollution case

Yakima Herald, June 8, 2013

By Ross Courtney

Whether cow manure is a dangerous waste or a useful product was the issue Friday as powerful lawyers descended on the federal courthouse in Yakima for the first hearing in an environmental lawsuit that has attracted national attention.

The case could set a precedent for how the country and the legal system view livestock manure.

“This case and this argument have national implications,” said attorney Debora Kristensen, the Boise, Idaho, attorney representing five Yakima Valley dairies being sued for pollution by environmentalists in U.S. District Court.

The opposing attorney, Charlie Tebbutt, agreed with Kristensen about the importance of the case but on nothing else. Tebbutt represents the Granger-based Community for the Restoration of the Environment, or CARE, an environmental group with a long history of legal battles against large cattle feeding operations.

Tebbutt, based in Eugene, Ore., argued that dairies are in business to produce milk, not fertilizer, and therefore are responsible for the waste that has contaminated groundwater.

“Manure is the unwanted waste in the production of milk,” he said in court.

In February, CARE sued five Yakima Valley dairies under federal solid waste laws, contending their methods of handling manure are so insufficient they amount to open dumping and the contamination of thousands of private drinking water wells — contamination that has been verified by numerous studies.

Both sides have recruited heavy legal hitters because of the potential for the outcome to set precedents for the handling of manure. Environmentalists consider manure a waste byproduct of the production of milk, while dairies argue that it is useful as bedding, fertilizer and compost.

Friday’s hearing dealt only with a motion to dismiss by the dairies but marked the first time the two sides met in the courtroom.

U.S. District Judge Thomas Rice asked questions but did not decide on the dismissal, promising to do so in writing at an unspecified later date.

However, he said that courts across the country so far have not called manure waste.

“Nobody has jumped to this conclusion yet,” he said.

Supporting CARE is the Center for Food Safety, a Washington, D.C., nonprofit that promotes organic farming. Listening by phone was Seattle attorney Brad Moore of the firm Stritmatter Kessler Whelan and Coluccio, and a board member of Public Justice, a coalition of public interest lawyers, also based in Washington, D.C.

Siding with the dairies, the Idaho Dairymen's Association has promised to pay half the defense costs.

The case is really five separate lawsuits against Cow Palace of Granger, George DeRuyter and Son Dairy of Outlook, D&A Dairy of Outlook, Liberty-Bosma Dairies of Zillah and R&M Haak and Sons Dairy of Sunnyside. All are located north of the Yakima River in the heart of the Yakima Valley, one of the state's most fertile and productive farming regions known more for fruit than cows.

The cases were consolidated only for Friday's hearing.

The same five dairies were singled out last November by the U.S. Environmental Protection Agency as being a likely source for groundwater contamination that has left up to 20 percent of tested private wells with nitrate levels that exceed federal drinking water standards. Such wells provide drinking water to 24,000 Lower Valley residents, many of them poor.

Excessive nitrates can harm infants and those with compromised immune systems. The presence of nitrates, which can come from a variety of sources, can be an indicator of other contaminants, such as bacteria and pesticides.

In March, four of the five dairies signed legally binding agreements with the EPA to monitor nitrate levels in groundwater and provide clean drinking water to neighbors over an eight-year period.

Only Rick and Marlene Haak did not sign the agreements because the mandates were too expensive, said Jay Gordon, executive director of the Washington State Dairy Federation. The family instead quit the business, auctioning off their cows late last month, Gordon said.

Roughly 30 people attended Friday's hearing. Dairy owners and industry representatives sat on the left, the same side as their attorneys, while the environmentalists, including CARE president and founder Helen Reddout, took the right.

Besides claiming that manure is useful and not waste, Kristensen, from the law firm Givens Pursley of Boise, argued that the environmental lawyers sued under the Resource Conservation and Recovery Act, the 1976 U.S. law that governs the disposal of solid waste, though they didn't mention the statute in their notices of intent to sue, which precede federal lawsuits and give the potential defendants a chance to settle.

"If you don't put it in your notices of intent, you can't sue about it later," she told Rice.

Also, she said, four of the five dairies are operating under the EPA agreements to enforce federal clean water statutes, making solid waste claims “duplication.” Meanwhile, any pollution already is prohibited by the state Department of Agriculture and National Conservation Service laws, she said.

There is nothing left to sue about, said Kristensen, sitting at the table with four colleagues from Boise.

“The plaintiffs are asking this court to second-guess the EPA,” she said.

But Tebbutt argued that the EPA agreements are insufficient because they were drafted outside public scrutiny, give too much time for dairies to comply, allow them to apply manure to fields at rates beyond what the plants can use, don’t mandate synthetic liners to prevent manure storage lagoons from leaking, and don’t ensure clean drinking water for enough neighbors. He was flanked by Elisabeth Holmes, a San Francisco attorney with the Center for Food Safety.

State regulations also have failed, he said. Tebbutt promised to prove such claims if the judge lets the case go to trial.

“The government has dropped the ball so badly,” he said.