IN THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT RIDDLE, dba FAIRBANKS PUMPING and THAWING, Appellant, vs. ERIC LANSER, Appellee.	Supreme Court No. S-15780 Trial Court No. 4FA-11-03117 CI

APPEAL FROM THE SUPERIOR COURT,
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE BETHANY S. HARBISON

APPELLANT'S REPLY BRIEF

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Marilyn May, Clerk

By: _____
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Alaska Statutes

AS 09.45.235. Agricultural Operations as Private Nuisances.

(a) An agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations. For purposes of this subsection, the time an agricultural facility began agricultural operations refers to the date on which any type of agricultural operation began on that site regardless of any subsequent expansion of the agricultural facility or adoption of new technology. An agricultural facility or an agricultural operation at an agricultural facility is not a private nuisance if the governing body of the local soil and water conservation district advises the commissioner in writing that the facility or operation is consistent with a soil conservation plan developed and implemented in cooperation with the district.

(b) The provisions of (a) of this section do not apply to

(1) liability resulting from improper, illegal, or negligent conduct of agricultural operations; or

(2) flooding caused by the agricultural operation.

(c) The provisions of (a) of this section supersede a municipal ordinance, resolution, or regulation to the contrary.

(d) In this section,

(1) "agricultural facility" means any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment that is used or is intended for use in the commercial production or processing of crops, livestock, or livestock products, or that is used in aquatic farming;

(2) "agricultural operation" means

(A) any agricultural and farming activity such as

(i) the preparation, plowing, cultivation, conserving, and tillage of the soil;

(ii) dairying;

(iii) the operation of greenhouses;

(iv) the production, cultivation, rotation, fertilization, growing, and harvesting of an agricultural, floricultural, apicultural, or horticultural crop or commodity;

(v) the breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock;

(vi) forestry or timber harvesting, manufacturing, or processing operations;

(vii) the application and storage of pesticides, herbicides, animal manure, treated sewage sludge or chemicals, compounds, or substances to crops, or in connection with the production of crops or livestock;

(viii) the manufacturing of feed for poultry or livestock;

(ix) aquatic farming;

(x) the operation of roadside markets; and

(B) any practice conducted on the agricultural facility as an incident to or in conjunction with activities described in (A) of this paragraph, including the application of existing, changed, or new technology, practices, processes, or procedures;

(3) "livestock" means horses, cattle, sheep, bees, goats, swine, poultry, reindeer, elk, bison, musk oxen, and other animals kept for use or profit.

Alaska Rules of Court

Civil Rule 33. Interrogatories to Parties.

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject toRule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

Civil Rule 34. Production of Documents, Electronically Stored Information, and Things, and Entry Upon Land for Inspection and Other Purposes.

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a

request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information--or if no form was specified in the request--the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a)with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Civil Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

(4) *Expenses and Sanctions.*

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without

court action, or that the opposing party's nondisclosure, response or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Civil Rule 56. Summary Judgment.

(f)When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Civil Rule 65. Injunctions.

(a)(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

Civil Rule 82. Attorney's Fees.

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

Federal Regulations.

40 CFR 503.33. Vector Attraction Reduction.

(a) (5) One of the vector attraction reduction requirements in §503.33 (b)(9), (b)(10), or (b)(12) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site and one of the vector attraction reduction requirements in §503.33 (b)(9) through (b)(12) shall be met when domestic septage is placed on an active sewage sludge unit.

(b)(10)(i) Sewage sludge applied to the land surface or placed on an active sewage sludge unit shall be incorporated into the soil within six hours after application to or placement on the land, unless otherwise specified by the permitting authority.

ARGUMENT

I. Alaska's Right to Farm Act.

All 50 states have enacted Right-To-Farm laws[1] in order to protect farmers from nuisance lawsuits and to prevent judges from assuming farm-management roles. However, if there is one thing unique about Alaska's Right to Farm Act it is that, more so than most right-to-farm laws, Alaska's statute is very broadly written in order to better protect agricultural facilities and agricultural operations from the above-mentioned threats. The breadth of Alaska's Right to Farm Law is likely due to the fact that, even after 56 years of statehood, agriculture is still very much an infant industry in Alaska.[2]

The Brief of Appellee [Brief] attempts to minimize the important facts in evidence, largely relegating the evidence of Robert Riddle's commercial farming to footnotes in an apparent effort to trivialize the significance of that evidence. Robert is confident that the Court will not be so easily led and can assess the factual evidence while it conducts its review of the Alaska's Right to Farm Act.

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[1] E. Rumley. "States' Right-To-Farm Statutes." National AgLaw Center. Online at: http://nationalaglawcenter.org/state-compilations/right-to-farm/ (last visited February 1, 2016).

[2] Testimony by Pete Fellman at the 2012 Preliminary Injunction Hearing was that agriculture had still not gained a good foothold in Alaska [Tr.301, Vol. II]. Bryce Wrigley also testified to the weak state of Alaska's "ag culture" in the 1980s [Tr.432-34, Vol.II]. Alaska's Right to Farm law was

In connection with the Right to Farm Act, AS 09.45.235, it is the appellate Court's purview to decide questions regarding the application, interpretation, and constitutionality of a statute, to which the Supreme Court applies its independent judgment. The Supreme Court interprets the Alaska Statutes according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law, as well as the intent of the drafters. The Court also uses its independent judgment to review whether the superior court applied an incorrect legal standard. *Grimm v. Wagoner,* 77 P.3d 423, 427 (Alaska 2003).

The outcome of Robert's case depends upon a correct analysis of the intent and the plain words of Alaska's Right to Farm law, something the trial court failed to do.

Alaska Statute 09.45.235 provides nuisance-suit protection to agricultural facilities that are "first-in-time." It does this by stating that an ag facility or ag operation "is not and does not become a private nuisance as a result of a *changed condition* that exists in the area" if the ag facility was not a nuisance at the time ag operations began.[3] In the present case, the evidence is that the "changed condition" occurred in 2007 when Eric Lanser began constructing residential housing on the

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enacted in 1986 and amended effective August 7, 2001.
[3] AS 09.45.235(a) (emphasis added).

lots Lanser had subdivided, with full advance knowledge that Arctic Fox Estates was right across the road from Robert Riddle's farm [Tr.466, 469, Vol. II, April 3, 2012]. The evidence is that Robert was first-in-time because Robert began ag operations in 2005 and, moreover, that Robert's farmland had served as an agricultural facility ever since the 1980s when VanReenan farmed there [Tr.766, Vol. IV, Preliminary Injunction Hearing of April 4, 2012;[4] Exc. 00005]. The Right to Farm statute very broadly provides that "the time an agricultural facility began agricultural operations refers to the date on which *any type of agricultural operation* began on that site regardless of any subsequent expansion" or the adoption of new technology.[5] There is no fixed time that ag operations must be in place. The Right to Farm Act provides nuisance-suit protection to Alaska farms from the farm's very inception.

The Right to Farm statute also very broadly defines an "agricultural facility" as a facility that "is used or is intended for use in the commercial production or processing of

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[4] The Brief of Appellee apparently takes exception to Riddle's citation to the Preliminary Injunction Hearing. See Brief of Appellee at 2 n1. However, the Rules of Civil Procedure, Rule 65(a)(2), specifically state that "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial of the merits becomes part of the record on the trial."

[5] AS 09.45.235(a) (emphasis added).

crops, livestock etc."[6] In an attempt to circumvent the solid statutory protections the legislature put in place, Appellee's Brief resorts to trivializing the indisputable evidence that Robert was engaged in commercial production [Brief at 9 fn 10; also at 22 fn 33]. The Brief even categorically denies the commercial nature of sharecropping. [Brief at 22].

Contrary to the position taken in Largent's Brief, the "commercial" character of sharecropping is succinctly stated in Subsistence and Economic Development as follows:

> In commercial cultures sharecropping allows farmers with full complements of implements to optimize their use by cultivating more land than they own. Owners of land receive rent in the form of shares of harvests, and the owners of implements, who perform all the labor of cultivation, increase their gross incomes by selling their shares of the harvest. The purpose of sharecropping, as practiced by farmers, is to increase money incomes by sharing the market risks between implement owners and landowners. This is commercial sharecropping.[7]

The testimony was that Francis Wozniak and Robert sharecropped since 2005, sharecropping for 20-25 percent of the crops, or the cash equivalent [Tr.665, 676, 679, 684, Vol.III, April 4, 2012; Tr.758-59, 775-76 Vol.IV, April 5, 2012' Tr.1853-54, 1864, Vol.VIII, July 18, 2013, Tr.2030-31, Vol.IX, July 19, 2013; Tr.2305, Vol.X, September 12, 2013; Tr.2388, Vol.XI, September 13, 2013]. The evidence of hay sales and sharecropping

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[6] AS 09.45.235(d)(1).

[7] Ronald E. Seavoy, Subsistence and Economic Development, Praeger Publishers, Westport, Conn. (2000).

supports the fact that Robert was running an agricultural facility that engaged in commercial production [Exc.000238 and 000239]. Moreover, in addition to the fact of commercial farming, including sales invoices, Robert testified also to his intent to further commercially expand his farming operations [Tr.2242, Vol.X; Tr.2459, Vol.XI].

That Robert's intent was to increase the quantity and the quality of his crops and livestock to attain to better commercial quality is important, inasmuch as AS 09.45.235(d)(1) defines an agricultural facility, not only by its use in commercial production, but also by the intent that the ag facility be used in commercial production. The legislature wisely included the intent element because the growing season at the 65th parallel is prohibitively short even in good years. Also, commercial production any given year is limited by the vicissitudes of available time, available money, and equipment down time.

Alaska's Right to Farm Act also encourages the preservation of agricultural land while at the same time providing farmers with a second layer of nuisance-suit protection with these words:

> An agricultural facility or an agricultural operation at an agricultural facility is not a private nuisance if the governing body of the local soil and water conservation district advises the commissioner in writing that the facility or operation is consistent with a soil

conservation plan developed and implemented in cooperation with the district.[8]

The Alaska Department of Natural Resources, Division of Agriculture, is the governing body that approves Farm Plans. With a Farm Plan in place, the Division of Agriculture implements a measure of oversight, ensuring that non-farm uses do not displace farmland [Tr.702-03, Vol.IV, April 5, 2012]. In this way, Farm Plans keep the farmland in agriculture. Defense expert, Dr. Charles Knight, testified that the purpose of a Farm Plan is to protect the farm in perpetuity for agricultural use [Tr.16-13-1615, Vol.VII; Tr.150, Vol.VIII, trial proceedings]. In turn, Alaska's Right to Farm Act encourages farmland preservation by providing that farmers with Farm Plans have a second layer of immunity from nuisance suits. The evidence in Robert's case is that existing Farm Plans ran with the farmland that Robert later purchased. Moreover, Robert also updated his Farm Plan with the Division's oversight and approval [Tr.702-03, Vol.IV, April 5, 2012].

At all times relevant to this action, Robert qualified for double legal protection from the plague of nuisance suits by virtue of his being first in time, being engaged in commercial production, intending to be engaged in commercial production and, in addition, also owning and farming a farmland that was

[8] AS 09.45.235(a).

governed by a Farm Plan.

Also, Alaska's Right to Farm Act purposefully does not lock farmers into certain farming methods or technologies. Rather, AS 09.45.235(b) expansively defines "agricultural facilities" and "agricultural operations" to include the broadest range of farming endeavors. Subpart (a) protects against nuisance suits irrespective of any "subsequent expansion of the agricultural facility or adoption of new technology."

The fact that Robert's holding ponds came to hold a greater volume of biosolids as time passed did not make his farm "become" a nuisance when his farm was not a nuisance when the farm began agricultural operations. Indeed, agricultural operations arguably began in the mid-1980s and most certainly were occurring in 2005 when Robert began actively farming there, including maintaining septage lagoons to support his farming operations. See testimony of Daniel Proulx, Alaska Division of Agriculture [Tr.701-04, Vol.4, April 5, 2012].

Similarly, the fact that Robert increased the application of septage to his fields as time passed did not waive his immunity from nuisance suits. Rather, under Alaska law, Eric Lanser is a Johnny-come-lately to the Eielson Farm Road farming neighborhood and, as a property owner beginning in 2007, Lanser has "come to the nuisance" and lacks priority of use under AS 09.45.235. The trial court should have dismissed Lanser's

nuisance claim and dismissed the case against Robert.

But it did not. In fact, Judge Harbison appeared to hold a dislike for Robert's farming operation because it involved septage lagoons and the land application of biosolids [Tr.45-6, Vol.I, trial proceedings]. In Judge Harbison's Order of November 7, 3013, the trial court found clear and convincing evidence of Robert's farming, sharecropping, and his intending to sell sod, beginning in 2005, as well as Robert's applying human septage for the purpose of soil enrichment. In spite of all those factual findings, the court nevertheless clearly erred in stating that Robert had not sold any hay [R.002487-90]. In a vain attempt to obscure the trial court's clear error, Lanser's Brief minimizes the hay sales evidence and outright denies the commercial character of sharecropping [Brief at 9 fn 10; at 22; at 22 fn 33].

Clear and convincing evidence of Robert's operating an ag facility and running an ag operation was presented with the testimony of Bernie Karl, President of the local chapter of the Farm Bureau, who stated that Riddle's farm was among the nicest of farming operations and should be a model for other operations to follow [Tr. 366, 378, Vol.II, April 3, 2012]. Frances Wozniak, who operates Hoffman Farms, for a number of years personally observed Robert working his farm and applying biosolids, and also testified to Robert's sharecropping, farming

equipment, and livestock [Tr.665-77, Vol.III, April 4, 2012]. Daniel Proulx, Alaska Division of Agriculture, personally inspected Robert's ag facility and Proulx's testimony confirmed that active farming was underway on Robert's farmland [Tr.707, Vol.IV, April 5, 2012]. Dr. Charles Knight, who has spent his life studying agriculture and soil chemistry, frequently visited Robert's farm even prior to Robert's owning the land. Dr. Knight testified to watching Robert's farm operation grow and become one of the nicer farms in the area [Tr.719-20, Vol.IV, April 5, 2012; Tr.1627-29, Vol.VII, July 17, 2013]. All the above witnesses concurred that Robert's operation was clearly a farm.

Interestingly, even the residents who testified in behalf of Lanser also testified to observing Robert's farming activities, farm equipment, and livestock. For example, Dean Lawson testified to living in the neighborhood and noticing farming activity on Robert's property including livestock, farm equipment in operation, soil being tilled, and observing what Lawson recognized as Robert growing commercial turf [Tr.77-78, 80-86, 95-6, 99, 106 Vol. I, trial proceedings]. Mark Renson testified to seeing a farm tractor, farming equipment, and cows on Robert's property [Tr.169, 203-04, Vol. I, trial proceedings]. Diane Long testified to observing livestock and a pen, equipment and a field being mowed [Tr. 231, 234, 236, Vol. I. trial proceedings]. John Brunsberg also testified to

observing livestock, soil being tilled, and tractors plowing [Tr.291-92, 361-62, Vol. II, trial proceedings]. Ron Illingsworth testified to observing fences, livestock, the application of septage, tilling, crops, tractors, and a pasture [Tr.750, 764-69, Vol. IV; Tr.1058-69, Vol. V, trial proceedings]. Stuart Davies testified to seeing fencing, cultivated fields, livestock, and hay on Robert's land. Interestingly, Davies also testified that he also had a serious interest in obtaining septage to build up his own soil but that he lacked any means of storing septage [Tr.925-8, 958-59, 968, 977-78, 985-86, Vol. V, trial proceedings].

Even Eric Lanser, the subdivider and residential contractor who constructed "farmettes" in an established agricultural area - right on Eielson Farm Road, no less, - conceded that he knew when he started his subdivision that the bordering property was farmland. Lanser also acknowledged that, considering that he had rezoned his subdivision to Rural Farm 4, he would simply have to live with manure and animal smells associated with pigs, cows, and chickens. Concerning the smell from a hypothetical neighboring "big chicken farm" right where Robert's farm is located, Lanser testified that "You live with it, I guess. You live with it. Yeah." [Tr.596-604, Vol.III, April 4, 2012]. In short, Lanser's complaints did not center on the prospects of animal farmyard odors, which Lanser expected and accepted in

concept but, instead, centered on the odors originating from human-based septage, a concept that was personally repugnant to Lanser, even though it is largely accepted and encouraged as good remediation and a progressive agricultural technology. Important to recall is that the use of human waste is *specifically encouraged and supported by the EPA*.[9]

Clearly, there was ample clear and convincing evidence that Robert owned and operated an ag facility.

However, in her November 7, 2013 Order, Judge Harbison improperly assumed a farm management role, adjudging that Robert's lagoons held septage, an enriching soil amendment, but finding that Robert's rate of application did not rise to the level of the judge's own personal expectations and, therefore, did not deserve the nuisance protection provided in the Right to Farm Act. Judge Harbison also found evidence of hay sales, sharecropping, and of Robert's intention to develop his relatively young farm into a bigger commercial operation. But, Judge Harbison's ruling went beyond simply applying the law. Rather, the ruling spilled over into areas beyond what the statute provides, with Judge Harbison extending the law and deciding that Robert's farm was not "primarily" commercial, i.e.

[9] *See* EPA, "Domestic Septage Regulatory Guidance," September 1993, p. 10, EPA 832-B-92-005, available Online at: http://nepis.epa.gov/Exe/ZyPDF.cgi/200041HP.PDF?Dockey=200041HP.PDF (last visited August 21, 2015).

did not turn a profit and, on that basis, ruling that Robert's farm was not an ag facility or operation of sufficient proportion to earn the protection of AS 09.45.235. Judge Harbison's farm management role even seeped into Robert's management decisions for his business, Fairbanks Pumping & Thawing [FP&T]. Judge Harbison's decision to not afford Robert the protections of AS 09.45.235 were clearly based on the fact that Robert reduced FP&T's operating expenses, as well as Robert's farm expenses, by using household septage as fertilizer to amend the soil on his farm. Respectfully, it is submitted that the Right to Farm Act does not allow for such judicial "gerrymandering" of solid statutory boundaries.

Alaska's Right to Farm Act was drafted to avoid having judges manage farm operations. In essence, Judge Harbison unilaterally assumed the layperson role of deciding when and in what amounts a farm "should" land-apply biosolids, overruling the farmer's decisions based on soil permeability, weather, ability to incorporate the septage into the soil within the six-hour legally prescribed time limit,[10] as well as other factors.

Simply stated, the trial court's decision that Robert Riddle's farmland is not entitled to the protections of AS 09.45.235 plainly undermines the purposes of Alaska's Right to Farm Act and should be reversed.

II. **Not a Private Nuisance**.

Appellant's Brief thoroughly relates that there was an abundance of contrasting testimony regarding whether Robert's farm emitted bothersome smells, both at the Preliminary Injunction Hearing and at the trial. From that contrasting testimony, it is apparent that whether a farm odor is deemed to be objectionable is highly subjective and depends largely upon a person's past exposure to farm smells.

The private nuisance issue that faced the court was whether Robert's farm created a nuisance for Eric Lanser while Lanser constructed residential housing in his subdivision. As to Lanser's claim of suffering a private nuisance, Lanswer testified to first smelling septage odors in May 2010, at which time he contacted Robert to "fix it" [Tr.1035-36, Vol.V, trial proceedings]. When Lanser once again noted a septage smell, he contacted the FNSB permitting and then the DEC permitting [Tr.1037-38, Vol.V, trial proceedings]. Lanser testified extensively to being frustrated that the agencies "were doing nothing about" his complaints. To summarize Lanser's entire testimony in support of his private nuisance claim, Lanser testified to only a limited exposure to actually smelling septage, and not at all to explaining how the smells allegedly impacted his life or his work. In fact, Lanser spoke much more

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[10] 40 CFR 503.33(a)(5) and (b)(10)(i).

at length regarding his dealings with the Borough and the DEC [Tr.1037-40, 1085-89, 1101-04, 1107, 1115-18, 1145-53, Vol.V, trial proceedings].

The Appellant's Brief adequately pointed out that the court had not made a single finding of fact that the smells interfered with Lanser's work or livelihood in any particular way. Indeed, Lanser provided no testimony to that effect. Regardless, the Order summarily stated, "The odors clearly interfere with Lanser's outdoor activities on the land, which include building houses and preparing the land for development." [R.002496]. It is submitted that, inasmuch as Lanser did not testify to any interruption with his work or with his employees' ability to work, it was clear error for the Order to conclude that the "odors clearly interfere with Lanser's outdoor activities." The trial court erred in deciding that Robert Riddle created or maintained an odor nuisance. The court ruling should be reversed.

III. Award of Attorney Costs and Fees.

a. The superior court's finding of bad faith was clearly erroneous and the enhancement of Rule 82 was an abuse of discretion.

The superior court's finding that Robert's Right to Farm Act defense was brought in bad faith was clearly erroneous. The superior court's finding that Robert "may have intended to use his property for farming operations down the road" was not

supported by the facts. [Exc.228]. The evidence at trial demonstrated that Robert was growing crops, operating farming equipment, spreading septage, tilling the soil, and had livestock on the property. [Tr. 77-78, 80-86, 95-96, 99, 106, 231, 234, 236, Vol. I, 291-92, 361-62, Vol. II, 750, 764-69, Vol. IV; Tr. 1058-69, Vol. V, trial proceedings]. James McGinnis, a retired DEC employee, testified that he was contracted by the DEC in 2011 to visit Robert's farm to determine whether the septage lagoons supported a farming operation. [Tr. 1414-15, Vol. VI, trial proceedings]. Mr. McGinnis testified that Robert's lagoons supported a farm. [Id.]. Mr. McGinnis further testified that the DEC made recommendations based upon that site visit and that Robert remained in compliance thereafter. [Tr.1338-39, Vol. VI, trial proceedings]. Robert was clearly operating a farm.

Both Appellee's position and the superior court's conclusion are premised on the fact that Robert gained an additional financial benefit by maintaining septage lagoons in association with his business. [Brief at 32-33, Ex. 227-29]. Although neither the superior court nor Appellee explicitly applied the ill-conceived "primary use" test, the superior court's conclusion clearly relied upon this standard. No provision of the Right to Farm Act precludes a farmer from receiving additional, non-farming benefits from his farming

activity. It is respectfully submitted that the superior court focused on Robert's business because it could not conclude that Robert was not engaging in farming activity after being presented with the evidence demonstrating that Robert was operating a farm and was complying with DEC recommendations.

Lanser indicated in his brief that the superior court clearly discerned between litigation and non-litigation expenses. [Brief at 35-36]. However, the superior court specifically relied upon Robert's alleged misrepresentations to the DEC and FNSB when deciding that Robert acted in bad faith and raised an unreasonable defense. [R.003879-80]. Specifically, the superior court stated that enhanced fees were justified because

> Riddle misrepresented his use of his property and did not bring his Right to Farm defense in good faith. "Riddle made material misrepresentations to both the Borough and to the DEC when he applied for his original permits" regarding his intended use of the land. [R.003879].

Contrary to Lanser's position, this alleged pre-litigation conduct was clearly a factor for a finding of bad faith. As such, the superior court's award of enhanced Civil Rule 82 fees was an abuse of discretion.

With respect to Lanser's own bad faith conduct, it is respectfully submitted that the superior court should have considered such conduct in its determination of enhanced fees.

Lanser argues that the superior court is not required to consider ones bad faith when making a Civil Rule 82 adjustment. [Brief at 37]. Civil Rule 82(b)(2), however, permits variations both upward and downward. It is respectfully submitted that it is an abuse of discretion to consider only one party's conduct when making an award variation. In this case, Lanser's own conduct significantly contributed to the costs of litigation. Lanser failed to supplement Rule 26 disclosures, Robert was forced to seek a protective order when Lanser disseminated private discovery disclosures, and conducted numerous records depositions without noticing Robert. [R.002796-2805, 002804, 000936-92, 002804, 003830]. Lanser's own discovery violations and bad-faith conduct in disseminating discovery contributed to a significant amount of unnecessary legal fees during the course of litigation. Robert should not be forced to shoulder an enhanced award for bad faith while Lanser's own bad faith was not considered in the calculation.

b. The superior court's award of discovery sanctions was an abuse of discretion.

A party has the right to make objections to discovery requests. *See* Alaska R. Civ. P. 33(b), 34(b). Furthermore, a propounding party will not receive reasonable costs if the objecting party's nondisclosure "was substantially justified, or that other circumstances make an award of expenses unjust."

Alaska R. Civ. P. 37(a)(4)(A). Lanser propounded 30 requests for production and 28 interrogatories, many of which included detailed requests relating to FP&T business operations including FP&T employees' names and contact information, FP&T revenue records, FP&T payroll records, FP&T professional licensing information, operator license information for FP&T employees, and FP&T's operating costs. [R.000291-000307]. Robert reasonably objected to providing this kind of information that had no bearing on whether Robert was farming on the Eielson Farm Road property. Put simply, these business record requests, which would have required Robert, in part, to provide personal information as to his employees, had no bearing upon a private nuisance claim.

Additionally, Lanser requested information regarding the crops grown and sold on the property despite Judge Olsen's finding that Robert was running a "legitimate farm" on the property. Alaska R. Civ. P. 65(a)(2) supported Robert's position that Judge Olsen's finding, which was explicitly determined to be a finding, rendered the requests for production irrelevant. [R.003860]. The superior court even acknowledged Judge Olsen's preliminary findings and indicated that evidence need not be repeated at trial. [R.00924]. Robert was substantially justified in objecting to these requests, and did so in good faith. As such, the superior court's finding that Robert was unreasonable

in his objections was clearly erroneous and the award of Rule 37(g) sanctions was an abuse of discretion.

It is respectfully submitted that $15,000 for Lanser's costs and attorney's fees to address Robert's objections to requests for production and interrogatories is, on its face, unreasonable. As set forth in Appellant's Brief, Lanser could have avoided a significant amount of these costs and fees. [Ap.Br.73-82]. Instead, Lanser chose to file numerous motions instead of allowing the superior court to make a determination. Lanser would have the court believe that he was forced to file a motion for expedited consideration, an Alaska Civil Rule 56(f) motion, numerous records depositions which, parenthetically, were not noticed to Robert, respond to a motion to quash a records deposition that was not noticed to Robert, and an estimated cost to update Lanser's expert report. [Ap.Br.38-48; R.000275, 000602-26]. The fact of the matter is that Lanser created his own emergencies. Lanser was served with Robert's Motion for Summary Judgment on September 20, 2012. [R.000337]. However, Lanser did not file his Motion for Civil Rule 56(f) Continuance until October 10, 2012, and waited until October 24, 2012 to file the Motion to Compel. [R.0002075, 000677]. Lanser's conduct and delays are what caused excessive amounts of attorney's fees and expenses to accrue, not Robert's objections to discovery requests. It was an abuse of discretion to sanction

Robert with Lanser's unreasonable response to Robert's objections.

Conclusion

It is undisputed that the subject property in this matter was a farm with an approved farm plan and a history of farm production long before Lanser ever came to Eielson Farm Road to build his farmettes. It is clear that good farming and environmental practices support the use of biosolids in farming. While Lanser may have personally foreseen his farmettes as being an idyllic Shangri-La in a quiet farming community, the reality is that farming is noisy, dirty, stinky, and generally distasteful, involving animal slaughter, noxious smells, and filth. AS 09.45.235 was purposefully enacted to provide farmers with immunity from private nuisance suits, and should be given great deference, especially when the Department of Agriculture estimates that U.S. net farm income for 2016 will be down 55% from 2013.[11] The judgment of the trial court should be reversed.

DATED this 15th day of April, 2016.

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[11] http://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/highlights-from-the-farm-income-forecast.aspx (last visited March 17, 2016).