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5 *Attorneys for Intervenor Rockview Farms, Inc.*

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7
8 BEFORE THE STATE ENVIRONMENTAL COMMISSION
9 STATE OF NEVADA

10
11 *In re:*
12 Appeal of Permit NV0023027

13 **MOTION TO DISMISS**

14 COMES NOW, Intervenor, Rockview Farms, Inc., as operator of the Ponderosa Dairy,
15 and hereby moves the Nevada State Environmental Commission to enter an order dismissing the
16 appeals filed by John F. Bosta and Antonio Guerra Martinez. Rockview Farms' Motion is based
17 on the following points and authorities, all documents on file with the Nevada Division of
18 Environmental Protection (NDEP), and any oral argument the Commission may require.

19 NDEP renewed Rockview Farms' water pollution control permit (NV0023027) on
20 October 25, 2007. Two individuals, John Bosta and Antonio Guerra Martinez, appealed NDEP's
21 renewal of the permit.¹ The Commission has scheduled a hearing on the appeal for July 9 and 10,
22 2009. Appellants' Opening Statement, which states the basis for the appeal, was filed with the
23 Commission and served on NDEP and Rockview Farms on June 12, 2009.

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26
27 ¹ The Commission has allowed Amargosa Citizens for the Environment ("ACE") to participate in the appeal, but
28 ACE's participation depends on the validity of the original appeal. If the original appellants lack standing to bring
their appeal, then the appeal must be dismissed and there is no proceeding in which ACE may intervene.

1 By this motion, Rockview Farms asks that the Commission dismiss the appeals because
2 the appellants have failed to demonstrate that they are “aggrieved” within the meaning of the
3 statute that confers standing to bring appeals before the Commission. Bosta and Martinez are
4 dissatisfied with NDEP’s decision to renew the permit and they object to the operation of the
5 Dairy, but such generalized grievances are not sufficient to invoke the Commission’s appellate
6 authority. The law does not envision (and the Commission has never ruled) that simply living or
7 recreating in the general vicinity of a permitted facility provides sufficient grounds for
8 administrative appeal.
9

10
11 **ARGUMENT**

12 **Bosta and Martinez have failed to allege that their personal or property rights**
13 **have been adversely or substantially affected by NDEP’s decision to renew the**
14 **permit, and therefore, they are not aggrieved parties under NRS 445A.605.**

15 By law, only a person aggrieved by the renewal of a water pollution control discharge
16 permit may appeal to the Commission. NRS 445A.605. An administrative appeal is not perfected
17 and the Commission has no authority to proceed with an appeal if the appellant does not satisfy
18 the aggrievement standard. *City of North Las Vegas v. Eighth Judicial Dist. Ct.*, 122 Nev. 1197,
19 147 P.3d 1109 (2006). Therefore, the Commission must decide whether Bosta and Martinez have
20 standing under NRS 445A.605 before it can proceed to hear the appeal.
21

22 The legislature expressly limited the right to appeal to those parties who can show that
23 they are aggrieved by an NDEP decision. Although the legislature has defined the term
24 “aggrieved” under other statutes,² it has not defined the term under NRS 445A.605.³ When the
25

26 ² NRS 278.3195(1); *Cf. Kay v. Nunez*, 122 Nev. at 1106.

27 ³ *Cf. Helms v. State*, 109 Nev. 310, 849 P.2d 279 (1993). *Helms* is one of the only Nevada Supreme Court cases
28 involving an appeal of a water pollution control permit, however, the Court did not discuss the standing requirement
under NRS 445A.605. Moreover, the appellant in *Helms* actually owned property bordering the site of Douglas
County’s proposed municipal sewage treatment plant.

1 legislature fails to define the term “aggrieved” under a statute, the Nevada Supreme Court applies
2 the general appellate definition of the term. *Dickinson v. American Medical Response*, 124 Nev.
3 ___, ___, 186 P.3d 878 (2008). *Dickinson* involved an appeal of an administrative decision in a
4 workers’ compensation case. 186 P.3d at 879. Under the statute applicable in *Dickinson*,
5 NRS 616C.315(3), any person who is aggrieved by an administrator’s decision in a worker’s
6 compensation case may administratively appeal. *Id.* At 882. In *Dickinson*, the Court applied the
7 general appellate definition of aggrieved for the purpose of finding that the appellant was an
8 aggrieved party under the statute. Here, just like the statute in *Dickinson*, NRS 445A.605 does
9 not define the term aggrieved. Therefore, because NRS 445A.605 does not define who is an
10 aggrieved party, the Commission should review Bosta and Martinez’s standing under the general
11 appellate definition of aggrieved.
12

13
14 For general appellate purposes, an aggrieved party is “one whose personal or property
15 right has been ‘adversely and substantially affected,...’” *Kay v. Nunez*, 122 Nev. 1100, 1106, 146
16 P.3d 801, 806 (2006) (quoting *Estate of Hughes v. First National Bank*, 96 Nev. 178, 180, 605
17 P.2d 1149, 1150 (1980)); see also *Esmeralda Cty. v. Wildes*, 36 Nev. 526, (1913) (stating that the
18 word aggrieved refers to a substantial grievance); *Kondas v. Washoe County Bank*, 50 Nev. 181,
19 186, 254 P. 1080 (1927); *Kenney v. Hickey*, 60 Nev. 187, 189, 105 P.2d 192 (1940); *Valley Bank*
20 *of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994). Other jurisdictions have
21 applied a similar definition of an aggrieved party for the purposes of an administrative appeal.
22 *See, Hoke v. Moyer*, 865 P.2d 624, 628 (Wyo. 1993) (stating that an aggrieved or adversely
23 affected person is one who has a legally recognizable interest in that which will be affected by the
24 action). Accordingly, the Appellants must show that a “personal or property right” has been
25 “adversely and substantially affected” in order to have standing to appeal NDEP’s decision.
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1 Here, Bosta and Martinez have made no attempt to satisfy the aggrievement standard
2 under NRS 445A.605. The Opening Statement includes generalized allegations that appellants
3 reside “near the Dairy” and that they “depend upon the aquifer” underlying the valley, but offers
4 no specific facts upon which the Commission could reasonably conclude that their personal or
5 property rights have been “adversely and substantially” affected by NDEP’s decision to renew the
6 water pollution control permit. In fact, available evidence indicates that they have no such
7 rights.
8

9 According to a search of the Nye County Assessor’s online database, John Bosta owns
10 two parcels of real property in Amargosa Valley (assessor parcel numbers 019-631-55 and 56).
11 These parcels are located more than a mile northeast of the Ponderosa Dairy property. But the
12 groundwater flow in the area does not flow toward Bosta’s property. In Amargosa Valley,
13 groundwater generally flows from the northeast and north towards the south and southwest.
14 USGS, 2004. Groundwater for the Dairy flows to the east and southeast as stated in the Dairy’s
15 draft groundwater monitoring plan. *See, Exhibit 1, attached hereto.* Accordingly, even if the
16 Dairy’s operations caused any adverse effect on the quality of groundwater at the Dairy,
17 groundwater beneath Bosta’s property would not be affected because groundwater does not flow
18 in that direction.
19

20 A similar search of the public records for Martinez did not reveal that he owns any real
21 property within Amargosa Valley or Nye County and that his residence is located approximately
22 six miles south of the Ponderosa Dairy. Accordingly, even if the Dairy’s operations caused any
23 adverse effect on the quality of groundwater at the Dairy, groundwater beneath Martinez’s
24 residence would not be affected because he does not reside near the Dairy and the groundwater
25 does not flow toward his residence. In addition to the direction of groundwater flow, the depth to
26 groundwater and other factors make it unlikely that Bosta or Martinez’s interests would be
27
28

1 adversely and substantially affected by the actions authorized under the Dairy's permit. First, the
2 depth to groundwater at the Ponderosa Dairy is between 81 and 95 feet below ground surface.
3 See, NV0023027, NDEP Fact Sheet (p. 4). Second, pumping groundwater from the Dairy's
4 production wells locally may draw the groundwater flow inward, toward the Dairy's property.
5 Because the decision at issue in the appeal is a water pollution control permit, appellants must
6 demonstrate an interest in the water that is the subject of the permit. Their objections to the
7 sights, sounds and smells of the Dairy are irrelevant to the NDEP decision to renew the water
8 pollution control permit.
9

10 Because appellants are not "aggrieved" within the meaning of the statute, the
11 Commission should dismiss their appeals.
12

13 CONCLUSION

14 The Commission should dismiss Bosta and Martinez's appeals based on lack of standing.
15 Neither appellant is an aggrieved party under NRS 445A.605 and neither has offered specific
16 facts supporting their standing to bring these appeals. Accordingly, Rockview Farms respectfully
17 requests that the Commission dismiss the appeals based on lack of standing.
18

19 AFFIRMATION

20 Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding document
21 does not contain the Social Security number of any person.
22

23 PARSONS BEHLE & LATIMER

24 DATED this 29 day of June, 2009

25 By: 
26 Jim B. Butler, NSB# 8389
27 John R. Zimmerman, NSB# 9729
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INDEX OF EXHIBITS

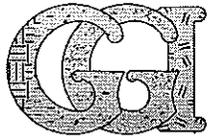
<u>Exhibit No.</u>	<u>Document</u>	<u>No. of Pages</u>
1	Ponderosa Dairy's Draft Groundwater Monitoring Plan	8

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EXHIBIT 1

EXHIBIT 1

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GLORIETA GEOSCIENCE, INC.

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June 19, 2009

Alexi Lanza, P.E.
Permits Branch, Bureau of Water Pollution Control
Nevada Division of Environmental Protection
901 S. Stewart St., Ste 4001
Carson City, NV 89701

RE: PONDEROSA DAIRY, NV0023027, DRAFT GROUND WATER MONITORING PLAN

Dear Mr. Lanza,

Thank you for the opportunity to present this proposed ground water monitoring plan for Ponderosa Dairy, NV0023027. Glorieta Geoscience, Inc. (GGI) has prepared draft proposed location and design information for four new on-site monitoring wells, including the required replacement of Monitoring Well 1 (MW-1A). The wells will be sampled for nitrate, TKN (Total Kjeldhal Nitrogen), chloride and Total Dissolved Solids (TDS). The ground water flow direction in the near vicinity of Ponderosa Dairy is to the east. Enclosed, please find the following items for your review:

1. Ponderosa Dairy Site Map with specified proposed locations of four new monitoring wells: MW-1A, MW-2A, MW-3, and MW-4, as well as Old MW-1 for plugging and abandonment
2. Ponderosa Dairy Schematic of design for MW-1A and other new monitoring wells
3. Bid Sheet for drilling and installation of four new monitoring wells
4. Bid Sheet for plugging and abandonment of Old MW-1
5. Potentiometric Surface Map constructed using April 2009 water level data

Hydrogeology of the Ponderosa Dairy Area

Ponderosa Dairy is located in the Amargosa Valley, in the Basin and Range province of the southwestern U.S. From the surface down, Ponderosa is underlain by Pleistocene basin-fill and playa lake sediments. Cenozoic limestone, basalt and volcanic rocks underlie the younger basin-fill sediments. The groundwater recharge area is to the north and east of the Dairy, in the Yucca Mountain area. Groundwater discharges at various locations to the southwest of the Dairy. Regionally, groundwater generally flows from the northeast and north towards the south and southwest (USGS, 2004). There are however, some areas where the direction of regional groundwater flow is to the west or north.

Groundwater for dairy and irrigation uses is produced from wells completed into the basin-fill deposits. As shown on the attached potentiometric surface map, groundwater beneath the dairy flows to the east and southeast. The local groundwater flow direction may be influenced by the dairy pumping its permitted water rights.

Green Water and Manure Management

Green water lagoons store water for subsequent irrigation reuse. All green water lagoons at the dairy are synthetically lined with current, state-of-the art, designs to protect water quality. The storage/settling ponds south of Barn 1 are clay lined. Since the green water lagoons and ponds store water year round and there is a constant head of water in them, Ponderosa proposes

to install monitoring wells downgradient of each green water storage lagoon. These wells will detect seepage from the synthetically lined lagoons in the unlikely event that the synthetic liner(s) leak.

Land application fields are irrigated with fresh water and green water. All manure solids are collected from the corals and solids separator and composted under an approved permit from the NDEP Solid Waste Bureau. Green water is applied to the land application fields at agronomic rates in accordance with Ponderosa's approved Comprehensive Nutrient Management Plan (CNMP). Since green water is applied to the land application fields at agronomic rates, and soil sampling will be conducted according to the terms of the Discharge Permit, soil sampling will sufficiently address any potential vertical migration of nitrogen, or other regulated constituents, through the vadose zone. As such, no monitoring wells are necessary to monitor ground water quality beneath, or downgradient of, the land application areas.

Proposed Monitoring Wells

To ensure that groundwater quality is protected, in addition to the current discharge permit requirements, Ponderosa Dairy has voluntarily prepared and submitted this plan for installation and monitoring of four monitoring wells. One monitoring well will be located upgradient of the facility and three of the wells will be located downgradient of the active green water lagoons at Barns 1, 2, and 3. Monitoring well No. 1A will replace MW No. 1 that has gone dry and will monitor potential seepage from the Barn 1 green water lagoon and storage ponds. Monitoring well No. 2 will be located downgradient of the green water lagoons at Barn 2 and will monitor potential seepage from the Barn 2 green water lagoon. Monitoring well No. 3 will be located downgradient of the lined green water lagoon for Barn 3 and will monitor potential seepage from the Barn 3 green water lagoon. Monitoring well No. 4 will be located upgradient of the Dairy, along Mecca Road. A map showing the locations of the proposed monitoring wells is attached.

The new proposed monitoring wells will be installed, developed, and representative ground water samples will be collected by November 2009 so that the results of sample analyses will be available and submitted to your office by December 31, 2009. MW-1 Old will be plugged and abandoned during the same timeframe that the new wells are installed. The exact locations of MW-4, the up-gradient monitoring well, and the other wells will be determined based on proximity to production wells and infrastructure.

Since green water is applied to the land application fields at agronomic rates specified in the Comprehensive Nutrient Management Plan (CNMP), these four wells will serve as an early warning of potential seepage through the synthetic liners.

Soil Sampling of Land Application Areas

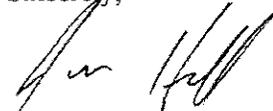
To protect ground water quality and to ensure that Ponderosa land applies green water in accordance with the requirements of its discharge permit, Ponderosa will sample and analyze soils on annually cropped land application areas every three years, or when a major change in crop rotation occurs. Ponderosa will sample and analyze soils on perennially cropped fields every five years. Soil samples will be analyzed in accordance with the permit requirements and NRCS Standard 590 for:

- Total -N
- Nitrate-N
- TKN
- Ammonia

- Total Phosphorus
- Soil pH
- Electrical conductivity
- Soil organic matter
- Potassium (K)
- Magnesium (Mg)
- Calcium (Ca)
- Sodium (Na)

Please contact me with any questions regarding this submittal at 505.983.5446 ext. 105, or Jay Lazarus at ext. 111. For any questions or comments regarding the dairy operations or discharge permit, please contact Jay Lazarus or Reddy Ganta at ext. 107.

Sincerely,

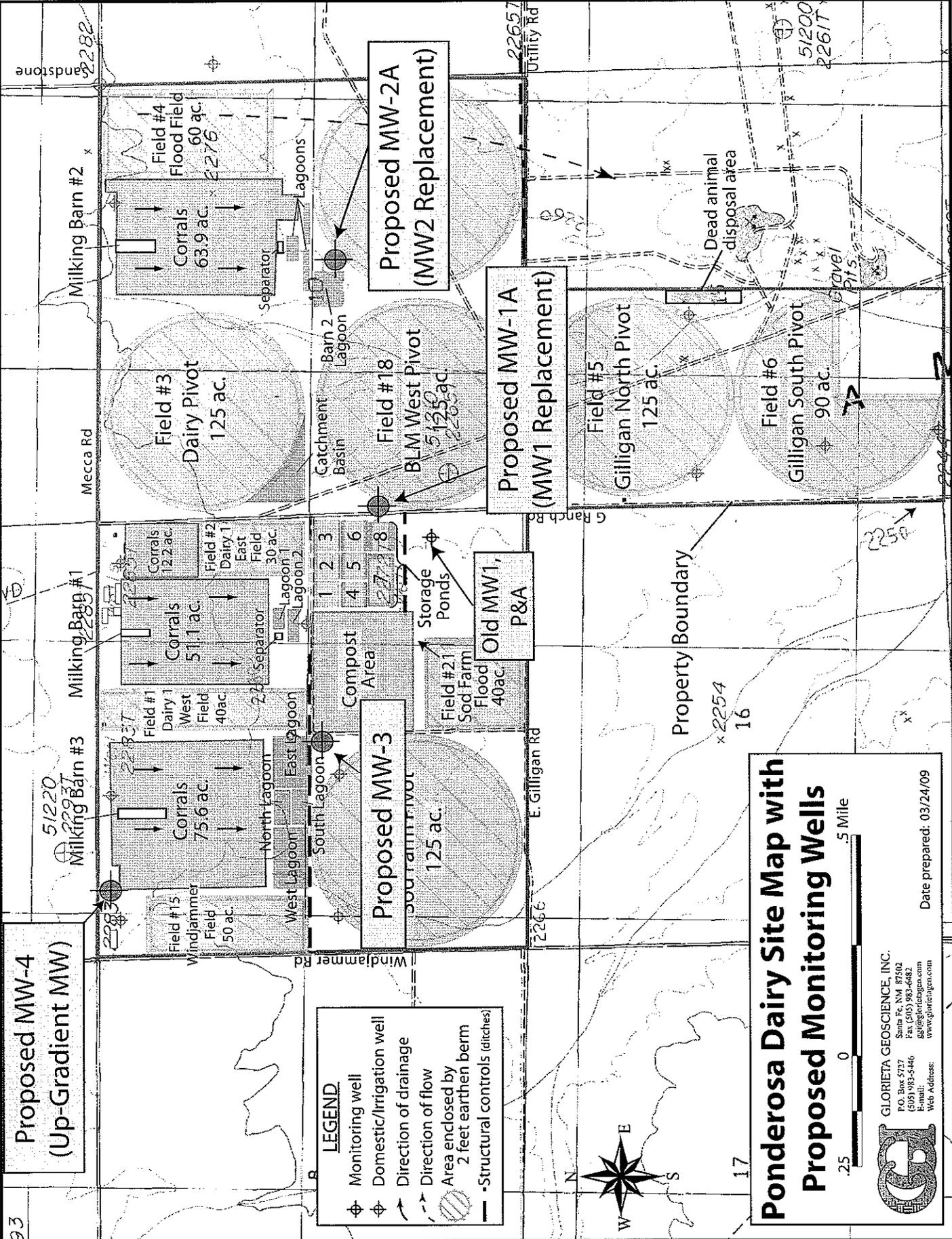


Jason Hall
Glorieta Geoscience, Inc.

Cc: Nevada Division of Environmental Protection, Attn: Valerie King, Supervisor of Enforcement and Compliance, Bureau of Water Pollution Control
Glorieta Geoscience, Inc., Attn: Reddy Ganta, Sr. Agronomist/Project Manager
Ponderosa Dairy, Attn: Michael Kwiatkowski, P.O. Box 70, Amargosa Valley, NV 89020
Ponderosa Dairy, Attn: Ed Goedhart, P.O. Box 70, Amargosa Valley, NV 89020

Reference:

U.S. Geological Survey, 2004, Death Valley Regional Ground-Water flow System, Nevada and California- Hydrogeologic Framework and Transient Ground-Water Flow Model, Scientific Investigations Report 2004-5205



**Proposed MW-4
(Up-Gradient MW)**

Proposed MW-3
125 ac.

**Proposed MW-1A
(MW1 Replacement)**

**Proposed MW-2A
(MW2 Replacement)**

**Ponderosa Dairy Site Map with
Proposed Monitoring Wells**

0 25 50 5 Mile

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 Web Address: www.gglorieta.com

Date prepared: 03/24/09

- LEGEND**
- ⊕ Monitoring well
 - ⊕ Domestic/Irrigation well
 - Direction of drainage
 - Direction of flow
 - ⊕ Area enclosed by 2 feet earthen berm
 - Structural controls (ditches)

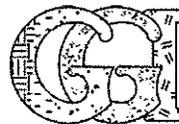
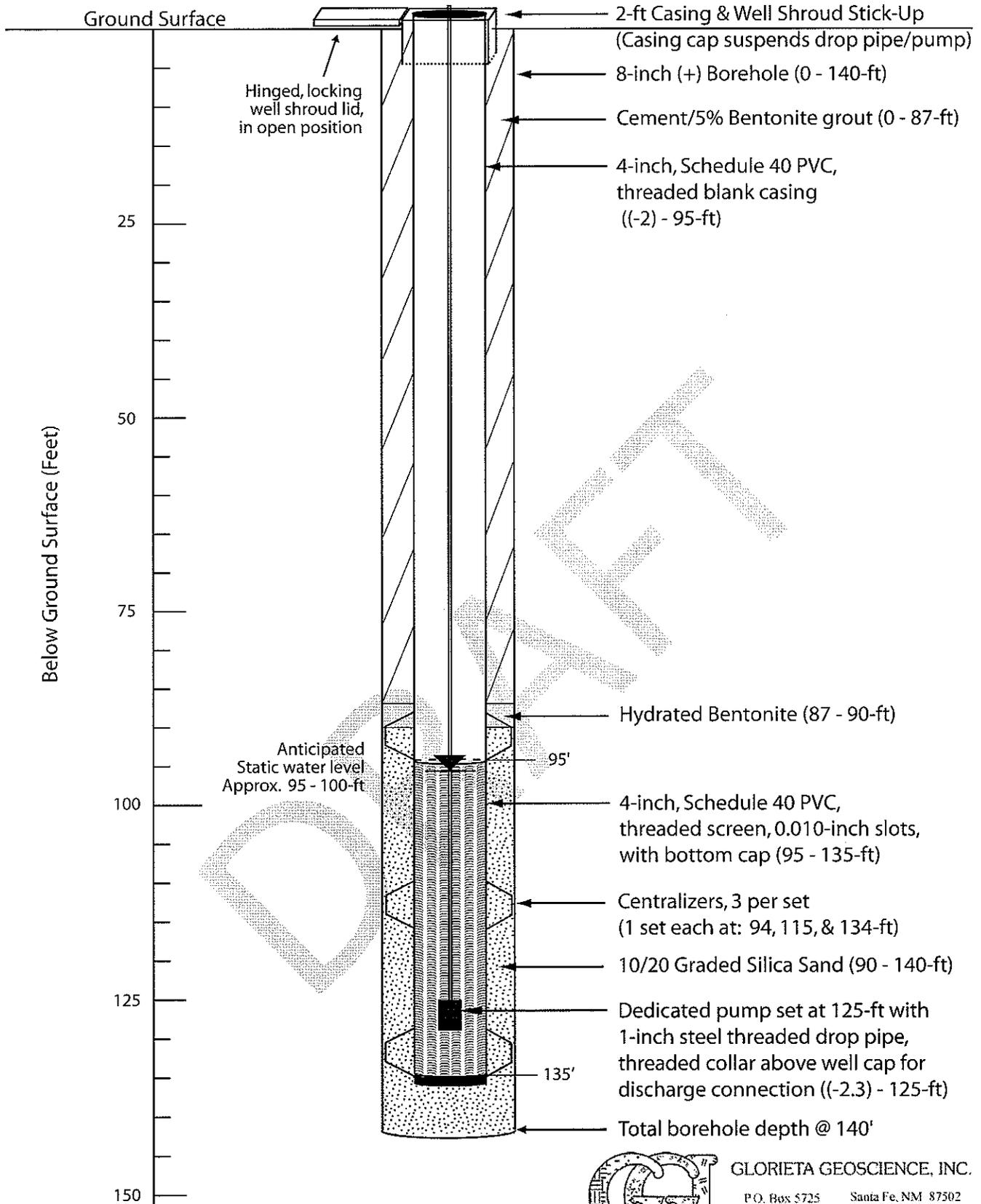


Property Boundary
x2254
16

93

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Ponderosa Dairy MW-1 Replacement Well Schematic



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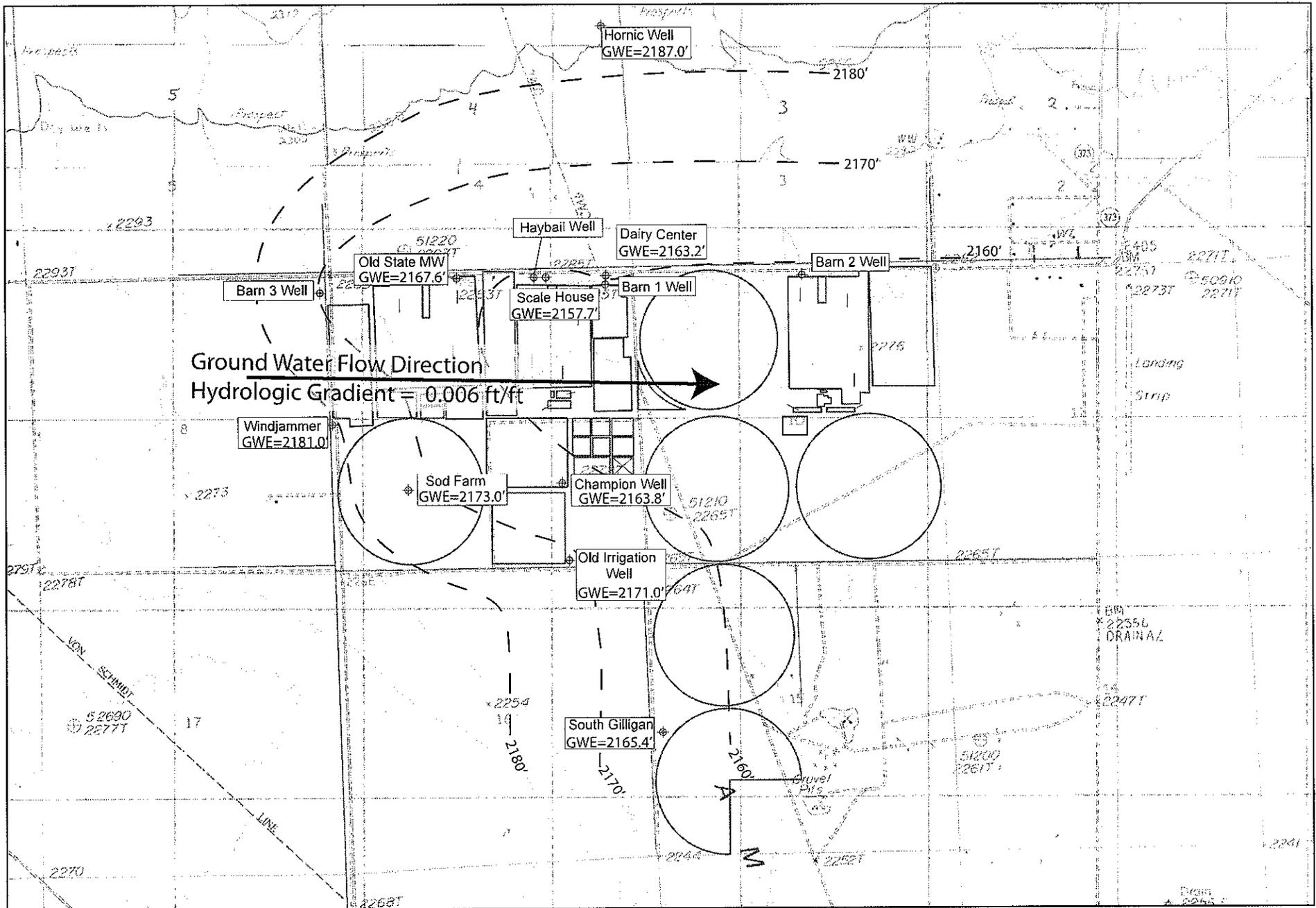
**BID SHEET FOR DRILLING AND INSTALLATION OF FOUR MONITORING WELLS,
APPROXIMATELY 140-ft DEEP EACH
Ponderosa Dairy, Nye County, Nevada**

Tasks and Materials	Estimated Quantity	Units	Unit Price	Total Price
DRILL ONE BORING, NO LESS THAN 8-INCH DIAMETER, TO 140-FT BELOW GROUND SURFACE (bgs) Using hollow stem auger, or air-rotary method with a temporary surface conductor. (Drill cutting samples collected every 5 ft and/or split spoon every 10 ft)	140	Lin. Ft		
INSTALL ONE 140-FT MONITORING WELL Install 40 feet of 4-inch ID, sch. 40, threaded PVC screen, 0.010 mill slot, with bottom cap. Install centralizers (3 per set) at top, middle, and bottom. Land casing ~5 ft above boring total depth, approx. 135 ft bgs	40	Lin. Ft		
Install 100 feet of blank, 4-inch ID, sch. 40, threaded PVC casing with 24-in. stick up (above ground surface)	100	Lin. Ft		
Install well cap with capacity to suspend drop pipe/pump	1	Each		
Install 10/20 silica sand from 140 - 90 ft (50 feet) via tremie pipe (approximately 0.3 cu.ft. per lin. ft), settle filter pack via surging or bailing inside well screen	50	Lin. Ft		
Install 1/4" bentonite pellet seal from 90 - 87 ft (3 feet) and hydrate pellets after placement (approximately 0.3 cu.ft. per lin. ft)	3	Lin. Ft		
Install cement/5% bentonite grout via tremie (approximately 0.3 cu.ft. per lin. ft) from 87 ft to ground surface (87 feet)	87	Lin. Ft		
SURFACE COMPLETION & DEVELOPMENT Set steel monitoring well shroud: 6x6-inch square or 6-inch (nominal) diameter, with hinged, locking lid. Shroud in open position should be set with exactly the same stick up height as the top edge of the well casing.	1	Each		
Set concrete pad at well surface: minimum 2x2-ft x 4-inch thick, sloping away from well head	1	Each		
Development time (air lifting or wireline bailer)	8	Hours		
Bollards	4	Each		
SET DEDICATED PUMP Furnish 1/2 hp pump with shroud and set at 125-ft bgs	1	Each		
Approx. 130-ft of 1-inch threaded steel drop pipe, with threaded collar above well cap for temporary discharge pipe connection when purging and sampling well.	130	Lin. Ft		
135-ft of electrical wire rated for pump size and depth	135	Lin. Ft		
SUBTOTAL FOR ONE 140-FT MONITORING WELL DRILL, INSTALL AND DEVELOP				
Mob/Demob	1	Lump Sum		
Steam Cleaner	1	Lump Sum		
TOTAL ESTIMATED COST FOR FOUR WELLS (not including NVGRT):				

**BID SHEET FOR PLUGGING AND ABANDONMENT OF ONE MONITORING WELL,
APPROXIMATELY 95-ft DEEP
Ponderosa Dairy, Nye County, Nevada**

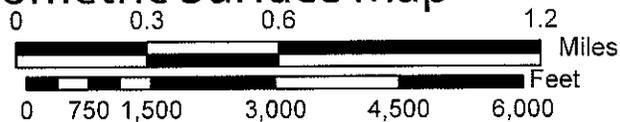
Tasks and Materials	Estimated Quantity	Units	Unit Price	Total Price
PLUG AND ABANDON ONE 4-INCH DIAMETER MONITORING WELL FROM 95-ft BELOW GROUND SURFACE (bgs) TO GROUND SURFACE Install cement/5% bentonite grout into 4-in well via tremie pipe (approximately 0.1 cu.ft. per lin. ft) from 95-ft bgs to ground surface (95 feet)	95	Lin. Ft		
REMOVE SURFACE COMPLETION Remove steel monitoring well shroud stick up and well casing stick up above existing well pad. Leave well pad in place for future protection of aquifer water quality.	1	Each		
Mob/Demob	1	Lump Sum		
TOTAL ESTIMATED COST FOR P&A ONE WELL (not including NVGRT):				

DRAFT



Ponderosa Dairy Potentiometric Surface Map

2009 DTW measurements
 Well DTW measured by Dairy staff, 4/22/09
 surface elev. estimated from 1:24k scale USGS
 topo quadrangle, CI=10'



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