

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

JUDY R. KIBLER and)	
LARRY A. KIBLER, JR.,)	
)	
Appellants,)	
)	
v.)	Appeal No. 2010-05
)	
JOSEPH JACKEWICZ,)	
)	
Appellee,)	
)	
and)	
)	
COLLIN O'MARA, SECRETARY)	
OF THE DEPARTMENT OF)	
NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL OF)	
THE STATE OF DELAWARE,)	
)	
Agency below-Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of the time and place of the hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board ("Board") on August 24, 2010, in the Auditorium of the Richardson and Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were Nancy J. Shevock (Chair), Sebastian LaRocca, Michael Horsey, Gordon Wood, Dean Holden, Harold Gray and Stanley Tocker, Ph.D. No Board members disqualified themselves or were otherwise disqualified. Deputy Attorney General Robert W. Willard represented the Board.

Appellants Judy Kibler and Larry Kibler, Jr. (collectively “the Kiblers”) appeared *pro se*. Joseph Jackewicz (“Jackewicz”) did not appear, nor did counsel appear on his behalf. Deputy Attorney General Robert F. Phillips represented the Appellee Collin O’Mara, Secretary of the Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

The Kiblers brought an action on July 31, 2009 pursuant to 7 *Del. C.* § 6031, which provides that the Secretary shall, when the use of water pursuant to an allocation granted under 7 *Del. C.* § 6010 causes the depletion or exhaustion of an existing use of water, require as a condition of such allocation that the recipient take action to provide free of charge to the affected person an alternative source of water supply at least equal in quality and quantity to that existing at the time of the granting of the allocation. The Kiblers sought relief in the form of a replacement water supply, claiming that an irrigation system maintained by Jackewicz had depleted their water supply. A public hearing was conducted by DNREC Hearing Officer Robert P. Haynes (“the Hearing Officer”) with the parties on January 28, 2010. A court reporter was not retained. Rather, an attempt was made to tape record the proceeding. However, the tape recording failed and therefore the record presented to the Board was incomplete.

At the public hearing, the Hearing Officer concluded that the Kiblers had failed to prove that their lack of water was directly attributable to the system maintained by Jackewicz. The report filed by the Hearing Officer indicated that Jackewicz’s irrigation system was a likely cause of the seasonal water problems experienced by the Kiblers, but

that other causes may also have contributed to their problems, including problems with their own well and usage by other nearby wells. The Hearing Officer did recommend that an award of \$300 be ordered to be paid by Jackewicz to the Kiblers as his system was at least partially responsible for the Kiblers' problems.

The Secretary issued an undated Order thereafter adopting the recommendation of the Hearing Officer. The Kiblers thereafter filed a timely appeal of that decision to the Board.

SUMMARY OF THE EVIDENCE

Prior to the hearing, and in accordance with EAB Regulation 4.0, the Board was provided with the Chronology, consisting of the record below. In addition, the Board heard additional evidence, including testimony from various witnesses, as well as argument, from the Appellants and DNREC.

The Kiblers' Evidence

The Honorable Walter Kee, Secretary of the Delaware Department of Agriculture, testified that he met informally with the parties in 2009 in an attempt to resolve the problem but was unable to accomplish a resolution.

Clifford Bramble also testified. Mr. Bramble is the uncle of Larry Kibler and he testified that he worked on the Kiblers' well, trying to get it to produce water. Another pipe was run into the well and the Kiblers had water for one day and then lost it again. After the irrigation system stopped running at the Jackewicz site, water was again available.

Betty Bennett, the mother of Larry Kibler, testified that the Kiblers came to her home every other day during one period of time to obtain water. From June to October in 2007, 2008 and 2009 the Kiblers regularly had a problem getting water from their well.

Ed Santana testified that he came to the Kiblers' house in June, 2009 and heard Jackewicz's irrigation system running, even though it was raining at the time. He was present in July, 2009 when the Kiblers lost their water supply.

Mr. Santana's wife, Carla, also testified that she was present in March 2010, when a pregnant woman was living there and there was no problem with the Kiblers' water supply at that time.

Paul Schreppler testified that he is the manager of the Jackewicz farm. He said Judy Kibler came to the Jackewicz farm in 2009 and discussed the problems with her well. In October 2009, Jackewicz received a letter from William Cocke, Program Manager of the Water Allocation Program, indicating that the irrigation system was not in compliance with regulations, and that production from that well should cease until water supply issues of others had been resolved.

Mr. Schreppler said the well had been installed in 2003, pursuant to an allocation granted by the Department. It has been used since the October 2009 letter. Mr. Schreppler explained that the Jackewicz farm personnel were under the impression that the well could be used in spite of that letter, once the hearing before the Hearing Officer took place and the Secretary issued his decision.

Mr. Schreppler said the irrigation system is only used when needed. It is expensive to operate and the farm obviously does not use it when it is not necessary to do so.

Judy Kibler testified that the problems began in 2007 and, at first, the Kiblers thought there might be some other reason for the problem. Someone suggested a drought caused their water problem, but they soon realized that could not be the problem. The Kiblers realized at one point that the irrigation system of the Jackewicz farm was causing the problem, noting that two weeks after the irrigation ceased, they no longer had a problem getting water. Water ceased being available in June 2007 when the irrigation started. The water level in the Kiblers' well was 86 feet on June 1, 2010, but shortly thereafter, as the irrigation system was being used, the level fell to 30 feet and then to 4 feet by June 18, 2010. Judy Kibler agreed that there was less rainfall than usual during the summer of 2009.

William Cocke testified that he performed a test shortly before this hearing. He noted that wells of different depths are affected differently by the use of this irrigation system. He noted that the Kiblers were affected about 10 % of the year, and if a new well cost \$3,000, then 10% of that would be \$300, and that was the source of the \$300 award to the Kiblers made by the Secretary. He noted, however, that this does not take into account the fact that the Kiblers had more than 90 days of problems and said they had suffered losses in their plant raising business as well.

John McFarland, a professional well driller, testified that the Kiblers had water in their well but were unable to pump it out. He stated that there would be no problem if

they had a 4-inch well. In order to really tell the effect of the irrigation system on the Kiblers' well, it would be necessary to run the irrigation system three consecutive complete days and measure the Kiblers' well at the same time. He thought it would cost about \$3,000 to install a new 4-inch well. He felt the Kiblers would still have problems even if the irrigation system was not running at all. When the Kiblers put in their well in 1992, 2-inch wells were fairly standard, but today, he will not do a 2-inch well.

Brandon Bonk also testified. Mr. Bonk sharecrops on Jackewicz's farm. He estimated that the cost of running the irrigation system is about \$1,000 for 24 hours of use, so the system is only used when necessary. This year's weather has made it necessary, as did the weather in 2009. The Jackewicz farm has two wells and generally runs them together, putting out about 864,000 gallons in 24 hours, at a rate of 300 gallons per minute per well. He also said that Jackewicz and his personnel believed the Secretary's decision in this case meant that the October 2009 letter telling them not to use the system until problems were resolved was no longer in effect and the system could be used again. They did not intentionally ignore that letter.

Larry Kibler testified that Judy Kibler has various medical problems and takes many medications. She is supposed to drink lots of water and they have not had water when the Jackewicz irrigation system runs. He has tried to fix this problem himself many times and thought at one point he had fixed it by adding a 1-inch pipe to his well. However, when the irrigation system started up thereafter, he once again had no water.

At the close of the Kiblers' case, DNREC's counsel sought a dismissal of the appeal, arguing that several factors affect the Kiblers' well and that the Kibler's had not shown that the Secretary's decision was wrong. The Board did not dismiss the appeal.

Board Member Harold Gray noted that the statute requires a transcript of the hearing before the Hearing Officer to have been kept, but there was none.

DNREC'S Evidence

William Cocke testified on behalf of DNREC. Mr. Cocke testified that he went to the Kiblers' well on several occasions and also to the Jackewicz well. He felt that at the hearing before the Hearing Officer, the Kiblers were unable to establish that the irrigation system caused their problem, but he also felt there was evidence in favor of the Kiblers that had not been presented. In reviewing all of the evidence he found there was a correlation in that complaints of a lack of water corresponded with use of the irrigation system. The Kiblers have a 2-inch well with a 1-inch pipe inside it. They probably can only draw water from 20 feet, rather than the usual 25 feet. Cocke noted that a 4-inch well could pump water from any depth. He said other neighbors also felt the irrigation system caused them problems as well, although they were not prepared to file a formal petition about it.

Mr. Cocke estimated that if Jackewicz's irrigation system ran for 30 days, the Kiblers' well would have a drawdown of 10 feet; but even running the well for a single day would affect the Kiblers' water supply. It was therefore clear that the irrigation system did have an effect on the Kiblers' well. However, he felt the Kiblers would still have some problems even absent the irrigation system.

Mr. Cocke said that even in a good year the irrigation system would cause problems for the Kiblers. He felt there were other causes as well, but it was clear that the Jackewicz well had an impact on the Kiblers water supply. The fact that the Kiblers have a 2-inch well makes them more susceptible to problems. Cocke stated that a 4-inch well would end the problem and, simply put, the 2-inch well is not good for this location. Cocke stated that the Jackewicz irrigation system appears to have the largest impact on the Kiblers' problems.

Mr. Cocke stated that the fact that the Jackewicz farm ran their irrigation system after the October 2009 letter indicated they should not do so until the water problems of others had been resolved and by doing so could result in an enforcement action against the farm when all records for 2010 have been received.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation and careful review of all of the evidence, the Board finds in favor of the Appellants, Larry Kibler and Judy Kibler. The Board finds that the Kiblers met their burden of proof by clearly establishing their right to relief. While it may be true that their water supply is being affected by other factors as well, it is clear from the evidence that the Jackewicz irrigation system has caused the Kiblers to go without water or with a greatly reduced water supply for months at a time. The testimony of Mr. Cocke, a DNREC employee who appears to be a disinterested witness, seems to establish that the Jackewicz irrigation system has the greatest impact on the Kiblers' water supply.

Under the provisions of 7 *Del. C.* § 6031(a)(2), the Secretary shall, when the use of water pursuant to an allocation granted by the Department causes the depletion or exhaustion of an existing use of water, require as a condition of such allocation that the

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recipient of the allocation provide free of charge to the affected person an alternative source of water supply at least equal in quality and quantity to that existing at the time of the granting of the allocation. The Board reverses the decision of the Secretary and finds in favor of the Kiblers.

While there was some testimony that a new 4-inch well system, including an appropriate submersible pump, piping and electrical requirements, might cost only \$3,000, the Board believes that the cost of such a well might be substantially higher and the Board wants to insure that the Kiblers will be able to get a well that will resolve their problems. Therefore, the Board holds that Mr. Jackewicz must pay up to \$5,000 to the Kiblers for the purchase of a new water supply, including a 4-inch well system with an appropriate submersible pump, piping and electrical requirements. Mr. Jackewicz must pay only the cost of the new water supply, which may be less than \$5,000.

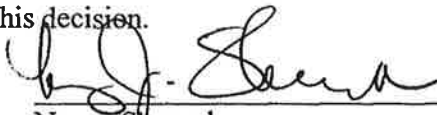
In closing, the Board feels compelled to comment on the manner in which the case was handled previously by DNREC. Section 6031(c) expressly requires a verbatim transcript of the initial hearing before the Hearing Officer to be prepared. Due to the failure of the Hearing Officer to procure a court reporter to transcribe the proceedings, and the fact that the attempt to tape record the hearing failed, the Board was left without a thorough record to review. In addition, the Board notes that both Jackewicz and the Kiblers were the unfortunate victims of the Hearing Officer's omission because a transcript would have assisted both sides in their respective preparation and presentation of this case to the Board.

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The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.

IT IS SO ORDERED, this 19th day of November, 2010.

The following Board members concur in this decision.



Nancy Shevock
Chairperson

Sebastian LaRocca
Board Member

Gordon Wood
Board Member

Dean Holden
Board Member

Harold Gray
Board Member

Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2010-05

The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.

IT IS SO ORDERED, this 19th day of November, 2010.

The following Board members concur in this decision.

Nancy Shevock
Chairperson


Sebastian LaRocca
Board Member

Gordon Wood
Board Member

Dean Holden
Board Member

Harold Gray
Board Member

Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2010-05

The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.

IT IS SO ORDERED, this 19th day of November, 2010.

The following Board members concur in this decision.

Nancy Shevock
Chairperson

Sebastian LaRocca
Board Member

 11/15
Gordon Wood
Board Member

Dean Holden
Board Member

Harold Gray
Board Member

Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2010-05

The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.


IT IS SO ORDERED, this 17 day of November, 2010.

The following Board members concur in this decision.

Nancy Shevock
Chairperson

Sebastian LaRocca
Board Member

Gordon Wood
Board Member



Dean Holden
Board Member

Harold Gray
Board Member

Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2010-05

The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.

IT IS SO ORDERED, this 19th day of November, 2010.

The following Board members concur in this decision.

Nancy Shevock
Chairperson

Sebastian LaRocca
Board Member

Gordon Wood
Board Member

Dean Holden
Board Member



Harold Gray
Board Member

Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2010-05

The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.

IT IS SO ORDERED, this 19th day of November, 2010.

The following Board members concur in this decision.

Nancy Shevock
Chairperson

Sebastian LaRocca
Board Member

Gordon Wood
Board Member

Dean Holden
Board Member

Harold Gray
Board Member

Stanley Tocker Stanley Tocker, Ph.D. 11/15/10
Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2010-05

The vote in favor of the Kiblers is 6-1, with Mr. Horsey voting to deny the appeal.

IT IS SO ORDERED, this 19th day of November, 2010.

The following Board members concur in this decision.

Nancy Shevock
Chairperson

Sebastian LaRocca
Board Member

Gordon Wood
Board Member

Dean Holden
Board Member

Harold Gray
Board Member

Stanley Tocker, Ph.D.
Board Member

Board member Michael Horsey does not concur with the Board's decision.



Michael Horsey
Board Member