UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Falcon West Helicopters, Inc.	)	FIFRA-10-97-0168
	)	
Respondent	)	

Initial Decision

This case was initiated on October 2, 1997 with the filing of an Administrative Complaint by the U.S. Environmental Protection Agency, Region 10 ("EPA" or "Complainant") pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), as amended, 7 U.S.C. § 136l(a), and 40 C.F.R Part 22 (Consolidated Rules of Practice) for the assessment of a civil penalty. The Complaint alleges three violations of Section 12(a)(2)(G) of the Act, 7 U.S.C. § 136j(a)(2)(G), which states that it is unlawful "to use any registered pesticide in a manner inconsistent with its labeling."

All of the alleged violations stem from an aerial application of pesticides by Respondent Falcon West Helicopters, Inc. ("Respondent" or "Falcon") on May 1, 1997. EPA alleges that, on that date, Falcon applied three registered pesticides (Tordon 22K, for which the active ingredient is Picloram, EPA Registration Number 62719-6, Banvel, for which the active ingredient is Dicamba, EPA Registration Number 55947-1, and Cleancrop 2, 4-D Weed Killer, for which the active ingredient is 2,4-D, EPA Registration Number 34704-120) in a manner inconsistent with their respective use labels in that the pesticides were applied beyond their intended location, the Timm Family Ranch, and, either through drift or direct spraying, the pesticides reached desirable and sensitive plants on Wildlife Mitigation Site Number 12 ("Site 12"or "Site"), an area of land owned by the Colville Confederated Tribes' Reservation in the State of Washington.

The Complaint originally sought a proposed civil penalty of $5,500 ($4,400 for the violation associated with Tordon,; and $550 each for the violations associated with

Banvel and 2,4-D), but after receiving information about the size of Respondent's business, EPA now seeks a total of $4,620 for the three alleged violations. A Hearing was held from July 21, 1998 through July 24, 1998 in Wenatche, Washington.

For the reasons which follow, the violations and the penalties sought by EPA are affirmed.

I. The Applicable Law

As set forth above, the three violations charged all involve Section 12(a)(2)(G) of FIFRA, and its provision making it unlawful "to use any registered pesticide in a manner inconsistent with its labeling." Several cases have addressed this rather straightforward provision. As recognized in these cases, the obvious starting point for determining whether the provision has been violated is the label. It was on that basis that Administrative Law Judge Thomas B. Yost, when faced with the same statutory provision In the Matter of: Orkin Exterminating Co., Inc., I.F.& R. Docket No. III-301-C, 1998 EPA ALJ LEXIS 12, January 15, 1988, examined the details of the label for the pesticide in issue, finding that the application was made "in a manner inconsistent with the label instructions." Id at *8. Similarly, in the case captioned In the Matter of: Erisman Spraying Company, Inc., FIFRA Docket No. VII-1134C-92P, 1994 EPA ALJ LEXIS 76, April 7, 1994, ("Erisman") Administrative Law Judge Jon Lotis noted that the label for the pesticide in issue warned that users were not to allow the pesticide to drift onto neighboring crops or non-crop areas or to otherwise use the product other than in accordance with its directions. In the Matter of Haveman Grain Co., Docket No. I.F.& R.- VII-1211C-93 P, 1995 EPA ALJ LEXIS 95, December 12, 1995, ("Haveman") Administrative Law Judge Spencer T. Nissen looked to the label directions, noting that the pesticides identified in the Complaint were restricted use pesticides, limited to use on specific crops. In Hygienic Sanitation Company, Inc., I.F. &: R Docket No. III-184 C, 1979 EPA ALJ LEXIS 7, September 18, 1979, Judge Nissen, in upholding the Section 12(a)(2)(G) violation before him, applied a "reasonable construction" of the label to decide whether a product could be mixed or used indoors. Id. at * 13.

The Environmental Appeals Board has employed the same approach in measuring whether a violation has been established. In re: Richard Rogness and Presto-X Company, I.F.& R. Docket Nos. VII- 1075C-91P & 1088C-91P,1997 EPA App. LEXIS 13, July 17, 1997, the Board looked to the label to determine whether a violation had occurred and concluded that the object in issue had to be affirmatively listed on the label as a permitted use. Id. at *31-*33.

The cases have also addressed evidentiary aspects. In Haveman, as in the case at hand, the judge noted there that the pesticides used in that instance were applied "*to non-crop sites*" and "*not on land intended for the planting of soybeans*." 1995 EPA ALJ LEXIS 95, *31 (emphasis added). Although the judge in Erisman, upon finding that there were several aerial spraying services in the area and facing conflicting testimony about the time the application was made, determined that EPA failed to meet its burden of proof, he also distinguished the case before him from In the Matter of: Ealy Spraying Service, IF &R Docket No. VII- 403 - 81 P, 1984 EPA App. LEXIS 4, September 28, 1984, ("Ealy"). Judge Lotis described Ealy as one where the *respondent* only advanced "conjecture that someone else might have sprayed the properties in question." Id at *10. In Ealy, as in this case, EPA charged that the respondent allowed the pesticide to drift onto adjoining property and supported the charge with laboratory test sample results. On appeal, the Chief Judicial Officer affirmed the Ealy initial decision, noting that "[l]ow concentrations of the pesticide as shown by the sample results, coupled with the neighbors' testimony is sufficient to establish a prima facie case that Respondent ... allowed ... drift onto ... other than the intended site." Id. at *4. On the same basis as Judge Lotis's decision in Erisman, Administrative Law Judge Nissen in Thomsen Aerial Spraying Inc., Docket No. I. F. & R VII- 1123C- 92 P, 1994 EPA ALJ LEXIS 84, August 9, 1994, held that EPA did not meet its burden of proof, upon finding that other applicators were in the area and that, in such circumstances EPA has a duty to produce evidence of their activities at the time in question. Last, in the case captioned as In re Evergreen Helicopters, Inc., IF & R No. IV- 538- C, March 8,

1984, ("Evergreen") Administrative Law Judge Thomas B. Yost determined that the threefold test identified by Judge Marvin Jones was also present in his case. The three items were Respondent's admission to applying herbicide to land adjacent to the non-target area, eyewitness testimony that the herbicide drifted onto the non-target land and laboratory analysis of soil and foliage showing the presence of the herbicide.

II. The Pesticide Labels

The Tordon label warns: "**Do not apply or otherwise permit Tordon 22k ... to contact crops or other desirable broadleaf plants.**" Complainant Exhibit 9, Tordon label at page 3,(Boldness in label). The Banvel label advises under the bold print heading "**Sensitive Crop Precautions**" that it "may cause injury to desirable trees and plants ... and other broadleaf plants when contacting their roots, stems or foliage." Users are instructed to "[a]void making applications when spray particles may be carried by air currents to areas where sensitive crops and plants are growing ... [and to] [l]eave an adequate buffer zone between area to be treated and sensitive plants." Complainant Exhibit 9, Banvel label at page 3. Last, the 2,4-D label warns under the bold print heading "**ENVIRONMENTAL HAZARDS**" that it is not to be applied "directly to, or permit to drift onto ... desirable crop or ornamental plants..."

III. Findings of Fact

On May 6, 1997 Mr. Robert Fischer, a wildlife biologist for the U.S. Corps of Engineers, was on Site 12 with Mr. Kris Ray, the Colville Tribe Contractor. Site 12 adjoins land to the west described as the Timm Family Ranch. A fence, running north to south, divides the two properties. EPA Exhibits 1A, 1B, and 2. At that time he noticed apparent herbicide damage to plants on the Site. Tr. 29-32. As reflected in his memorandum of May 7, 1997 (EPA Exhibit 2), he and Mr. Ray noticed a variety of herbaceous plants, including lupine, toadflax, and mustard, which showed signs of herbicide damage and he also observed damage on Russian Olive Trees. The damage he observed extended at least 60 feet into the Site from the fence line and he noted the same symptoms of damage across the fence on the Timm Ranch side. Tr.39, Exhibit 2. Prior to the May 6th visit he had not observed any herbicide damage, a significant fact, given that he has been involved with the subject site and the other sixteen mitigation sites, since their inception in the early 1980's, walking them several times a month. Tr. 11, 12, 17, 87. Mr. Fischer, who has a Bachelor of Science Degree, and a separate B.S. Degree in Wildlife Management, is experienced by virtue of his studies and work experience in weed management, identification, and analysis and he has a current pesticide application license. Tr. 8,10, 11. While he recognized the symptoms of herbicide damage, as evidenced by the twisting, thickening, wilting, browning and dieback to the broadleaf vegetation, the particular type or types of herbicide could not be identified by the firsthand observation. Tr. 45. He did not feel that the damage he observed was attributable to winter damage. Tr. 144.

Mr. Fischer met with the Okanogan County Noxious Weed Control Office and the Colville Confederated Tribes on May 27, 1997, at which time there was an effort made to have interested parties, including Falcon, jointly visit Site 12 for the purpose of taking vegetation samples. There is a conflict in the testimony as to why a joint visit did not occur. However, regardless of the reason, a joint visit did not occur. Instead Mr. Fischer went to the Site and took samples from there on June 4th.

Four types of samples were taken, consisting of non-irrigated leaf tissue samples ("NILTA"), irrigated leaf tissue samples ("ILTA") and soil samples. The areas where

the samples were taken from are marked on Exhibit 1B, as NILTA and ILTA. Tr. 67-68. The sampling protocol called for the collection of samples from ten different locations and then these were all mixed together in a bucket. Tr. 67-68. The samples were then made into two sets, one of which was sent to Cascade Analytical, Inc. and the other to Manchester Environmental Laboratory. Cascade had the ability to look for Tordon (Picloram) and Banvel (Dicamba). Tr. 72. EPA Exhibit 3 reflects the laboratory results from these samples. These show that no herbicides were detected in any of the soil samples, but that both laboratories found herbicides in the leaf samples. Manchester Lab detected Picloram, Dicamba and 2,4-D, and Cascade found Picloram and Dicamba in the leaf samples. Id. Mr. Fischer expressed his view that the soil samples did not detect herbicide for two reasons: first, only a light cover of herbicide was involved; and second, most of the soil in the area sampled had actively growing leaf cover over it. He also noted that the plant samples actually contained the damaged plant parts. Tr. 76-77, 162-163.

Mr. Fischer also testified that the winter of 1996-1997 had been unusually harsh. He visited that site on two occasions during April 1997, and walked its entire length, but observed no evidence of herbicide damage. Tr. 156-157. In his May 1997 visit, he saw no evidence of any vehicles having been on the site, something he believed he would have noted, as the area was boggy then. Tr. 80-81. The record of pesticide applications, maintained by the Colville Tribe, was also checked. This record, as reflected in a letter dated July 15, 1997, revealed that there had been no such applications at the site in the five previous years. EPA Exhibit 4.

EPA's second witness, Mr. Kris Ray, has been employed as a natural resource specialist for the Colville Tribes since 1993 and is the person responsible for the day to day operation of Site 12. He visited the site in April 1997, but did not notice any herbicide damage at that time. In contrast, he did observe herbicide damage at the site during his May 5th visit to the site. Tr.171. He was also at the site the following day, with Mr. Fischer. Tr. 179.

Mr. Jed Januch, EPA's third witness, has been employed by EPA's Seattle pesticide unit since 1991. He holds a B.S. degree in agronomy,[(1)] has been a supervisory agricultural chemical investigator and has work experience in pesticide misuse. Tr. 226-231. He first visited Site 12 on June 11, 1997 and observed a variety of plants showing symptoms of herbicide exposure.[(2)] Tr. 235-238. He also felt that the damage observed was not attributable to the effects of winter or insects. Tr. 330. At that time he collected samples then and transported them to EPA's Manchester Lab the following day. He also took custody of Mr. Fischer's samples, which were duplicates from the samples taken for Cascade Analytical, and took statements from Mr. Steve Faulkner, Falcon Helicopter pilot, and Mr. Kris Ray. Tr. 261-265.

EPA witness Mr. Robert Rieck testified regarding the laboratory results from the field samples, and explained that the higher results from Cascade's tests was attributable to their correction for moisture in the sample, in contrast to the Manchester Lab, which did not make such a correction. Tr. 415, 427- 428.

EPA's final witness, Mr. Garrett Wright, as the Agency's case reviewer, explained the rationale behind the proposed penalty calculation. In his view the application of Tordon, Banvel, and CleanCrop to desirable broadleaf plants on the Site constituted a use inconsistent with their respective labels. Tr. 454-458.

Falcon's first witness was senior helicopter pilot Mr. Steve Faulkner who agreed that he applied pesticides on the Timm family ranch on May 1, 1997. Although he testified to exercising care in the application of the pesticides on that day, and identified tire tracks[(3)] in a photograph (Exhibit 8, photograph 27) in support of Falcon's theory that someone else must have manually applied pesticides from the ground, none of this outweighs the statement he signed, twice[(4)], shortly after the alleged overspray. As he conceded then, although he flew over the area prior to spraying, he "was not given any maps or documents to identify the areas to be sprayed or the locations of the wildlife areas..." Exhibit 9, Attachment M. Significantly, he admitted: "[a]t first, I thought the Wildlife area was part of the Timm's property and I tried to leave a 100 foot buffer around the trees. I also

did not notice the fence around the Wildlife area at first." Id.

I do not find Mr. Faulkner's late arriving explanation of his original statement that at first he thought the wildlife area was part of the Timm Ranch was a reference to three years earlier.(5) He had ample time to review the statement before signing it and it would have been natural for him to clarify this point when the statement was originally given in July 1997, not nearly a year later, in June 1998. As he conceded, the subsequent declaration was prepared by Falcon's lawyers and that its purpose was: "To - help mitigate this situation." Tr. 656.

Further, the suggestion that Falcon could simply not have made such an error because Mr. Faulkner was so careful in his pre-flight planning and the flight itself, is rebutted by his fundamental misunderstanding about the boundary, since he used the trees as his buffer zone starting point, and thought initially that the entire area was part of the Timm's land and did not notice the fence dividing the two properties. He also acknowledged that, even assuming that the wind was dead calm, the helicopter's rotor can cause spray drift. Tr. 674-676. The pilot also conceded that at the time he was applying herbicide on May 1st, he observed no herbicide damage on Site 12. Tr. 676. The suggestion that this simply could not have occurred is also rebutted by Mr. Faulkner's flying record which includes the payment of fines in connection with September 1994 and August 1996 charges of over spraying.(6)

I have considered the testimony of the three other Falcon witnesses, Ms. Sheila Kennedy, Ms. Mary Lou Peterson, and Mr. Rodney Thomas. Although Ms. Kennedy and her employee, Ms. Peterson, were of the view that the pesticide damage, which they admitted was present on Site 12, was the result of ground application spot treatment, I do not credit their testimony, as neither was a detached witness. Ms. Kennedy conceded that "we're one of the main factors in the helicopter program and *its our job to oversee that that program runs smooth*." Tr. 732. (Emphasis added). Ms. Kennedy also admitted that if there were a question of a pesticide misapplication, she would be held accountable and there would be questions to be answered to superiors. Tr. 742-743. Further, I find Ms. Peterson's assertion that her declaration, Respondent's Exhibit 2, was prepared entirely by herself, with no assistance, and her claim that the words in it were her own, to lack credibility. The declaration has a formality to it which is indicative of the involvement of a lawyer's hand, and not likely to be crafted by someone with a high school education. In addition, all six lines of Paragraph 7 of her declaration are *identical* to Paragraph 8 of the declaration of Ms. Kennedy.

Mr. Rodney Thomas, Respondent's expert witness, is a helicopter pilot. Based on a review of photographs, available weather data, and his interview of Falcon's pilot, Mr. Faulkner, he concluded that the obvious herbicide damage on Site 12 was due to a ground application of herbicide, damage which he acknowledged was consistent with the application of Tordon, Banvel and Cleancrop. Tr.826, 829, 845. Although he reluctantly conceded that a pilot does not have complete control when applying pesticides from the air, essentially he opined that experienced pilots have virtually complete control. Yet he admitted that even a careful pilot can have herbicides go to unintended areas and that this has happened to him "on many occasions." Tr. 846. He acknowledged that he was cited by the State of Idaho for such an incident in 1994 involving the application of the herbicide Bronate on sugar beets.(7) Tr. 846, 847. Further, he elaborated that "in a long career, that's (i.e. a herbicide going to unintended areas) not unusual. Tr. 846.

Mr. Thomas's opinion is afforded little weight because he never personally viewed the Site, and relied upon photographs, his interview with Pilot Faulkner, and weather data for the general area. Reliance on the statements of Pilot Faulkner is obviously flawed in that they are obviously self serving. The weather data, being of a general nature, and not specific to the particular area sprayed, is similarly of minimal value. As for the reliance on the photographs, Mr. Thomas marked on Complainant's Exhibit 1A the areas that had been treated with herbicide on the Timm Ranch and agreed that the treated area was evident from the darkish hue and grayish color. The Court notes that the same coloration appears on Site 12 in the area

immediately adjacent to the affected area of the Timm Ranch. Similarly, regarding Respondent's Exhibit 8, when the witness's attention was directed to areas marked "A" and "B" on photograph 15 and "C" and "D" on photograph 16, with "A" and "C" being circled areas on Site 12 and "B" and "D" being circled areas on immediately adjacent Timm Ranch land, Mr. Thomas agreed that, in comparing the coloration between "A" and "B" and between "C" and "D" they were very similar. Tr. 863- 864. . Although there was an attempt to rehabilitate the witness by asking him whether he could discern a difference in the *treatment* between the respective Timm Ranch and Site 12 sides, even after attempting to rely upon photograph 17, ultimately he conceded he simply could not tell from the photographs. Tr. 880-884. The conclusions to be drawn are inescapable. The Court can not ignore the obvious. As Mr. Thomas conceded, the treated areas of the Timm Ranch and the immediately adjacent areas of Site 12 appear identical. Therefore the photographs reflect either that, through drift or direct spraying, herbicide intended for the Timm Ranch also reached Site 12 or the photographs do not reveal anything about herbicide effect on the adjacent properties. If the former, the photographs clearly show similar damage to the adjacent sites. If the latter is true, then Pilot Thomas's opinion ultimately rests only upon his interview with Pilot Faulkner.

IV. Falcon's Arguments

In its Post Trial Memorandum Falcon asserts that EPA failed to establish a prima facie case for each of the Counts and accordingly they should be dismissed. Citing Evergreen, Falcon argues that EPA can only establish a prima facie case through Falcon's admissions, eye-witness testimony that the pesticides were directly applied or through drift or otherwise reached the subject area and by laboratory analysis. In its view, since EPA did not produce eye-witness testimony of the aerial pesticide application, and failed to present evidence that the pesticides were "directly applied ...to plants" [on the site], did not present weather evidence to support the assertion that pesticides reached the site through drift, failed to present expert evidence that Falcon, through acts or omissions, applied inconsistently with their labels, nor produce evidence that Falcon failed to maintain a buffer zone between the Timm Ranch and the site, and did not produce reliable field test sampling because no sampling of Timm Ranch property was conducted, the complaint should be dismissed. Id. 3.

Further, Falcon maintains that its defense established that sufficient pre-flight and flight precautions were followed, that the weather, the application method and the "location, nature, and scope" of the contamination belies a conclusion that there was pesticide drift on to the Site, and that the evidence, including tire tracks, support the conclusion that the pesticides at the Site were caused by someone other than Falcon. Id. 4.

The short answer to all of the arguments raised by Falcon is that they are all trumped by the direct and informed observations of Mr.Fischer and Mr. Ray made shortly after the herbicides were applied and the confirming laboratory results demonstrating the presence of the pesticides in issue. If Falcon is actually suggesting that EPA can only prevail where an eyewitness actually observes the pesticide spraying, that proposition is rejected. While Evergreen does adopt Administrative Law Judge Jones' threefold test, I do not read that opinion as implying that one may *only* make out a prima facie case by supplying an eyewitness to the actual spraying activity. In addition, the "eyewitness" element, providing that "an eye-witness testif[y] that the subject herbicide drifted onto or reached the non-target area allegedly contaminated by Respondent's herbicide" (Evergreen at 8) in my view is sufficiently encompassing to include those eyewitnesses who visit the subject site while evidence of herbicide damage still exists. Mr. Fischer, Mr. Ray, and Mr. Januch each satisfy this construction of an eyewitness requirement. Alternatively, to the extent that Evergreen can be construed as requiring that EPA must produce an eyewitness to the pesticide application *while it is ongoing*, I reject such a construction on two grounds. First, it would be unreasonable to require that EPA, or a witness on its behalf, actually be present during the time a pesticide is being applied. Evergreen regurgitated the eyewitness requirement

because there happened to have been one present, but that case as well as the two decisions it referred to, reflect that although eyewitnesses were present and that they *can* be part of establishing a prima facie case, this is one way, but not the only way, to prove a Section 12(a)(2)(G) violation. Second, even if this Court's interpretation is erroneous, it is well established that the opinion of another administrative law judge is not binding on other judges. Clarksburg Casket, 1998 EPA ALJ Lexis 39, *30.

Falcon's other arguments are similarly unpersuasive. There is no requirement to present weather evidence to establish a herbicide misapplication, nor a need for expert witnesses to show that Falcon applied herbicides inconsistently with the label and failed to maintain a buffer zone. Again, the testimony of EPA's witnesses and the laboratory results establish an application which was inconsistent and an obviously inadequate buffer. Nor was there a requirement for EPA to take samples on the adjoining Timm Ranch property. The Timm property was not the site of concern. When the direct observations made by the witnesses presented by EPA is coupled with the laboratory results and the fact that Falcon acknowledges it applied the very herbicides in issue on land bordering Site 12 shortly before the herbicide damage was detected, only one ineluctable conclusion can be reached. Clearly, Falcon, not some mysterious interloper, was responsible for the herbicide damage to the desirable plants on Site 12.[(8)]

V. Penalty Determination

As mentioned at the outset of this initial decision, EPA has proposed a total penalty of $4,620.00 for the three violations. During the hearing the Court explained that, unless the Respondent was able to identify factors which EPA should have, but did not, consider or factors, which, while considered, were inadequately evaluated, the Court would be obligated to adopt the Agency's proposed penalty. In the Court's view Falcon has not challenged the EPA's method of computation, nor questioned its adherence to the Enforcement Response Policy ("ERP"). Instead, Falcon's arguments have all been directed toward dismissal of the three violations.

The Court finds that EPA's calculation of the penalty was made consistent with the ERP and, there being no basis to depart from the calculation, affirms the proposed penalty figure. Under the circumstances of this case, the Court determines that the penalty of $4,620.00 is proper and consistent with the penalty policy. In addition, upon consideration of the entire record and the FIFRA statutory penalty criteria of the size of the Respondent's business, its ability to pay the proposed penalty and to remain in business, and the gravity of the violation, as set forth at Section 14(a)(4) of the Act, the Court independently affirms the proposed penalty amount.

Accordingly, the Respondent is ordered to pay the above sum by forwarding a certified check for the above amount, made payable to the Treasurer of the United States of America, within 60 days after receipt of this Initial Decision, and mail to EPA Region 10, Regional Hearing Clerk, P.O. Box 360903M, Pittsburgh, PA 15251.

So Ordered.

_____

William B. Moran
United States Administrative Law Judge

Dated: April 28, 1999

1. Agronomy is the scientific study of field crops.

2. Although Mr. Januch stated that he observed spray drift symptoms on the river side, this does not advance Respondent's suggestion that, in this isolated area, someone else applied the same pesticides that Falcon applied on the Timm Ranch. In addition, Mr. Faulkner admitted that he "did fly on the river edge down what downstream some." Tr. 573.

3. Despite the assertion of the witness, the Court finds there is no obvious evidence of tire tracks depicted in Respondent's Exhibit 8, photograph 27, and that, in any event there is no indication of the age of the tracks. While Respondent's Exhibit 6, page 14, photograph "A" does depict tire tracks, the Court notes the obvious vegetative growth over the tracks, an observation that is consistent with the testimony of Inspector Fischer that the tracks were made by a work tractor utilized by the Corp in 1996, which testimony the Court adopts. See Tr. 893 - 894.

4. Mr. Faulkner signed the statement on July 2, 1997 and *again* on October 24th of that year.

5. Although it is not necessary to support the court's conclusion that Mr. Faulkner's first statement is the more reliable one, I also note that while Falcon maintained that Mr. Faulkner had sprayed this property in previous years, and therefore by implication knew of the boundary line between the Timm Ranch and Site 12, Falcon did not offer into evidence any work order, such as that reflected in Exhibit 9, Attachment G, to establish that Mr. Faulkner in fact had sprayed this area before. Additionally, even if he had sprayed the Timm Ranch in prior years, such a hypothetical does not preclude a determination that during the May 1, 1997 spraying, herbicide reached Site 12, due to overspray or drift, simply by accident. Given the eyewitness observations of the herbicide damage to plants on Site 12 shortly after the May 1st spraying and the laboratory confirmations that the *very* herbicides which had been applied on the adjoining Timm property were found on Site 12 and the absence of any other reasonable explanation of the source of the herbicides, the conclusion that they derived from the Falcon spraying is supportable no matter how many times Mr. Faulkner *may* have previously sprayed the area. As reflected by Mr. Faulkner's *own* history of misapplying pesticides by helicopter, errors do indeed occur.

6. This decision considers Mr. Faulkner's prior transgressions as a relevant consideration *only* in rebuttal of the assertion that the pilot was so careful that a misapplication, either through drift or direct application, was simply beyond the realm of possibilities.

7. The Court recognizes that Pilot Thomas presented as an explanation for the sugar beet incident that the pesticide reached the non-target area through soil and erosion migration and not through his acts. No determination is made about that incident other than the pilot's acknowledgment that he was cited for the event by the State of Idaho. More important was his admission that having herbicides go to unintended locations has happened to him "on many occasions" and that, in a long career such events are "not unusual." Tr. 846 - 847.

8. Although it is not necessary to the Court's determination of liability, it may be that the application of herbicide on Site 12 was intentional, as Ms. Peterson conceded that knapweed on Site 12 was a source of concern in that the Timm Ranch did not want knapweed on its property. Tr. 802. Thus, there may have been an incentive to spray over part of Site 12 to prevent a knapweed invasion onto the Timm Ranch.