

PD

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number 31-11440
Date Received: 10/19/00
Receipt No:
Received By:

EO26271
ABR 10/23/00

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

LARRY SINGLETON Phone: (208)458-4416

266 N 2400 E
ST ANTHONY ID USA 83445

A3111440



2. Date of Priority: 06/21/1902

3. Source: DRY CREEK Trib. to: Camas Creek

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County
13N	40E	19	SW SE SW	CLARK
13N	39E	26	NE NE NE	CLARK
13N	40E	19	SW SW SW	CLARK

5. Description of diverting works:

WATER IS DIVERTED FROM DRY CREEK THROUGH A GATED DIVERSION. THEN INJECTED INTO THE INTERMITTENT CHANNEL OF SPRING CREEK FOR REDIVERSION WITHIN THE OWNERS PROPERTY FOR STOCKWATER USE.

6. Water is used for the following purposes:

Purpose	From To	C.F.S.	(or) A.F.A
STOCKWATER	05/01 10/31	0.09	

7. Total Quantity Appropriated is:
0.09 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
13N	39E	26	NW	NE	STOCKWATER	
			SW	NE	STOCKWATER	
			NE	NW	STOCKWATER	
			SE	NE	STOCKWATER	

11. Place of use in counties: CLARK

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks:

STOCKWATER: 400 CATTLE OR 1000 SHEEP.

15. Basis of Claim: Beneficial Use

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Larry Singleton Date: 10/23/00
 _____ Date: _____

State of Idaho)
 County of BANWICK) SS.

Subscribed and sworn (or affirmed) before me this 23rd
 of October 2000 Larry B. Ruben

Notary Public

Residing at FRANK FALUS ROAD

My commission Expires 09/23/03

T13N, R39E

T13N, R40E

Larry Singleton
31-11440
Stockwater

Dry Creek

T13N, R39E

T13N, R40E

27 26
34 35

25 30
36 31

12/06/2000

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 31-11440

NAME AND ADDRESS: LARRY SINGLETON
266 N 2400 E
ST ANTHONY, ID 83445

SOURCE: DRY CREEK

TRIBUTARY: CAMAS CREEK

QUANTITY: 0.09 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED
13,000 GALLONS PER DAY.

PRIORITY DATE: 06/21/1902

POINT OF DIVERSION:	T13N R39E S26	NENENE	Rediversion	Within CLARK County
	T13N R40E S19	SWSWSW	Injection	Within CLARK County
	T13N R40E S19	SWSESW		Within CLARK County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
STOCKWATER	05-01 10-31	0.090 CFS

PLACE OF USE:

<u>STOCKWATER Within CLARK County</u>			
T13N R39E S26	NWNE	T13N R39E S26	SWNE
T13N R39E S26	SENE	T13N R39E S26	NENW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE
EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE
ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER
THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6),
IDAHO CODE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

STOCKWATER 400 CATTLE OR 1000 SHEEP

RECEIVED

SEP - 7 2001

COPY

Department of Water Resources

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

A. Subcase 31-11440

In Re SRBA)

Case No. 39576)

OBJECTION FORM

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Margaret Hagenbarth, David J. Hagenbarth, James F. Hagenbarth

Address: P.O. Box 1128
Dillon, MT 59725

Daytime Phone: (406) 683-2163

Name and address of Attorney, if any:

Givens Pursley LLP
Michael C. Creamer
John M. Marshall
P.O. Box 2720
Boise, ID 83701
(208) 388-1200

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Larry Singleton

Address: 266 N. 2400 E.
St Anthony, ID 83445

D. We object to the following elements as recommended in the Director's Report.

1. Priority Date and basis of claim:

The priority date recommended for this stockwater right is June 21, 1902, based on beneficial use. Water right No. 79 decreed to Bert H. Miller in Sauve v. Abbott et al., Case No. 635,

United States District Court, District of Idaho, Eastern Division (1930), with the same priority date, was found to have been abandoned by Leo Singleton and his predecessors in interest in United States of America v. Leo Singleton, Civil No. 2083, United States District Court, District of Idaho, Eastern Division (1959). The priority date of this stockwater right should be after the date of the Singleton abandonment decree, which was December 29, 1959.

E. REASONS SUPPORTING OBJECTION:

As stated above, the June 21, 1902 decreed water right of Leo Singleton was found to have been abandoned by the United States District Court in Civil Cause No. 2083 on December 29, 1959. Therefore, the priority date of this water right is questionable. If in fact this is a valid stockwater right, the priority date should be based on beneficial use after December 29, 1959.

F. VERIFICATION

State of Montana)
) ss.
County of Beaverhead)

James F. Hagenbarth, duly sworn, upon oath, deposes and says:

That I am the party/claimant filing this objection on behalf of Margaret Hagenbarth, David J. Hagenbarth and myself, as defined by I.C. § 42-1401A(1) and (6) and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

James F. Hagenbarth
James F. Hagenbarth

Subscribed and sworn to before me on: September 4, 2001

Patricia L. Rowland
Notary Public for Montana
Residing at: Dillon, Montana
My Commission Expires: 1/1/04

G.

CERTIFICATE OF MAILING

I certify that on September 4, 2001, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to (**Sent certified mail**):

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

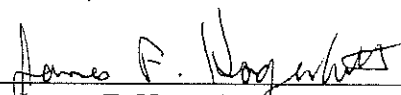
Name: Larry Singleton
Address: 266 N. 2400 E.
St Anthony, ID 83445

3. Copies to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724


James F. Hagenbarth

Eclerk
Evans

Ruberry, Allen

From: McHugh, Candice
Sent: Friday, August 23, 2002 11:52 AM
To: Adjudication Attorneys
Cc: Ruberry, Allen; Tuthill, Dave; Carlsen, Ernie
Subject: Orders on SJ

SM Bilyeu denied Hagenbarth's motions for summary judgment in the Hillman and the Singleton cases. The issue in both cases concerned what water rights were required to be filed in the prior adjudications of the water source. In both cases, the Department recommended water rights with priority dates that pre-dated the prior decrees based on the Department's conclusion that 1) the source was not included in the prior decree for the Hillman case and 2) that the prior decree did not require or decree diverted stockwater rights in the Singleton case.

In Hillman she determined that the scope of the rights to be included in the prior decrees was ambiguous and that although Bear Creek is tributary to Camas Creek, no rights to Bear Creek were decreed in the prior decrees. Thus, a genuine issue of fact remains regarding the scope of the rights to be included in the prior decrees.

In Singleton she determined that the term "use" as it relates to stockwater use is ambiguous and it is unclear whether the *Sauve v. Abbott* decree required all stockwater uses to be filed. Thus, a genuine issue of fact remains regarding what claims were required. However, she noted that the claimant, if he can prove the prior decree does not prevent him from claiming a priority date prior to the decree that he may have the burden of proving the priority date because the Director's Report presumption "bubble" has burst.

Also, in her decisions, SM Bilyeu states that the rules of evidence do not allow an expert to give legal conclusions and that such opinions are inadmissible. However, she called me and said that she does not believe we need to exclude such conclusions from our affidavits if in fact that was part of our basis but that she will not adopt those findings and that such conclusions could be struck depending on what occurs at trial. In the affidavits on these cases that I submitted, I tried to relay the information in as fact specific manner as possible. However, much of the basis was based on legal conclusions of what the prior decrees did or did not preclude.



31-11440 ORD.tif 31-11700 ORD.tif

Candice

Confidentiality Notice: This e-mail may contain confidential and privileged information exempt from disclosure under applicable law. This message is intended only for the use of the individual or individuals identified above. If you have received this message by mistake, please notify the sender immediately by replying to this message. Please delete the message from your system and do not review, disclose, copy, or distribute any information contained or attached to the message. Thank You

DONEY, CROWLEY, BLOOMQUIST & UDA, P.C.

Attorneys at Law
Diamond Block Building, Suite 200
44 West 6th Avenue
P.O. Box 1185
Helena, MT 59624-1185
(406) 443-2211 Fax: (406) 449-8443

108 South Washington
P.O. Box 1418
Dillon, MT 59725
(406) 683-8795
Fax: (406) 683-8796

FACSIMILE TRANSMISSION

Please deliver to named recipient.

TO: IDWR - Attn: Al Rueberry

FROM: Patti L. Rowland

SUBJECT: Singleton/Hagenbarth Agreement 31-11440

DATE: 9/17/02

PAGES: 4

FAX NO: (208) 525-7177

CLIENT NO: 377.2 Operator: plr

MESSAGE: Hello Al. John Marshall asked if I would send you a copy of the signed Agreement mentioned above. We hope to get it recorded sometime this week. If you need anything else, let me know. Patti

The information contained herein is **CONFIDENTIAL**, may be subject to the attorney-client privilege and is intended only for the use of the recipient named above. This transmission does not constitute a waiver of privilege. If you have received this transmittal in error, please immediately notify the sender by telephone and return this transmittal to the sender, by U.S. Postal Service at the above address.

When Recorded Return to:
John M. Marshall
Givens Pursley LLP
277 N. 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720

WATER RIGHTS SETTLEMENT AND SUBORDINATION AGREEMENT

THIS WATER RIGHTS SETTLEMENT AND SUBORDINATION AGREEMENT ("Agreement") is entered into effective the 16th day of September, 2002, by and between James F. Hagenbarth, David J Hagenbarth, and Margaret Hagenbarth ("Hagenbarth") and Larry D. Singleton and Robine Singleton ("Singleton").

RECITALS

a. Hagenbarth either claims or holds water right nos. 31-2274, 31-2275, 31-10245, and 31-10740 (collectively the "Hagenbarth Rights") in the Snake River Basin Adjudication ("SRBA"). The Hagenbarth Rights are stockwater and irrigation water rights from Dry Creek in Clark County, Idaho, for irrigation and stockwater use at the place of use owned by Hagenbarth described in Exhibit A hereto.

b. Singleton has claimed water right 31-11440 in the SRBA for stockwater use from Dry Creek in Clark County, Idaho, on a place of use owned by Singleton and described in Exhibit B hereto.

c. Hagenbarth filed an objection in the SRBA to the Idaho Department of Water Resources recommendation for water right 31-11440. Hagenbarth and Singleton have entered into this Agreement to settle the objection and allow a decree in the SRBA for water right 31-11440 on conditions stated herein.

NOW THEREFORE, in consideration of the above recitals and the warranties, covenants, agreements, terms and conditions set forth below, Hagenbarth and Singleton agree as follows:

1. The parties each represent and warrant to the other that they have the respective legal power, right and authority to enter into this Agreement and to perform the obligations hereunder.

2. The right to divert water under water right 31-11440 shall be, and is hereby, subordinated to the Hagenbarth Rights, however they may be decreed by the court in the SRBA. Additional details of subordination are as follows:

- a. the priority for the water right 31-11440 may not be asserted or relied upon, and shall be ineffective, against the priority of any of the Hagenbarth Rights for any purpose, including the purpose of effecting a delivery call or curtailment or other administration to deliver water to supply any diversion under water right 31-11440; and
- b. no delivery call to serve any diversion under right 31-11440 shall be made, honored, or enforced if it would cause or require, either directly or indirectly, curtailment of, or mitigation from, any of the Hagenbarth Water Rights;
- c. this subordination also shall apply to any use to which any such subordinated portion of the water right 31-11440 may be transferred or changed.
- d. this subordination shall be effective at all times that Dry Creek water ceases to flow beyond a point where Dry Creek's course currently passes under the road in the S½SE of Section 3, Township 12 North, Range 39 East, said road being commonly known as the "A2" County Road and shown on the map attached hereto as Exhibit C.
- e. this subordination does not limit Singleton's ability or right to divert water pursuant to water right 31-11440, with its associated priority date, if water is available at the point of diversion for this right regardless of the effect such diversion has on the Hagenbarth Rights.

3. The recitals, terms, conditions and covenants contained herein shall run with the land described in Exhibit A and Exhibit B hereto, and shall run with the Hagenbarth Rights and water right 31-11440 and shall be binding upon any person claiming, having or acquiring any right, title or interest in the Hagenbarth Rights, water right 31-11440, the land described in Exhibit A and Exhibit B attached hereto, or in any lot, parcel, portion or subdivision thereof, and upon their successors and assigns.

4. The partial decree for water right 31-11440 shall include a remark in the section entitled "Other Provisions Necessary for Definition or Administration of this Water Right" as follows:

This water right is subject to the terms and conditions of a subordination agreement recorded on _____ as Instrument No. _____ in the records of Clark County, Idaho.

5. In consideration of this Agreement and the covenants, conditions and terms set forth herein, Hagenbarth agrees to withdraw their objection in the SRBA to the recommendation for water right 31-11440.

6. This Agreement is binding upon and enforceable by the parties hereto and their respective successors and assigns.

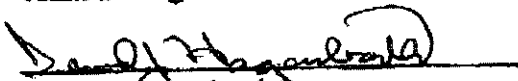
7. Neither party's failure to assert, or to seek enforcement of, any of the covenants, terms or conditions of this Agreement shall constitute a waiver by such party of the breach or default of any such covenant, term or condition unless otherwise expressly agreed to by such non-asserting party in writing.

8. If either party commences litigation for the enforcement, interpretation or rescission of this Agreement, the prevailing party shall be entitled to its reasonable attorney fees and costs.

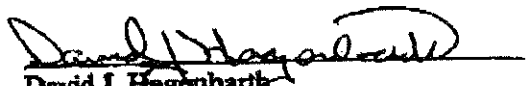
IN WITNESS WHEREOF, this Agreement has been executed by the parties, in the State of Idaho, as of the effective date set forth above.

HAGENBARTH

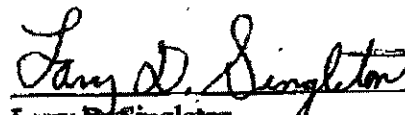

James F. Hagenbarth

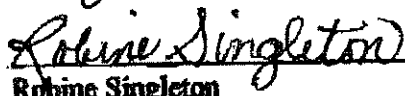

David J. Hagenbarth


James F. Hagenbarth
Co-Personal Representative for the Estate
of Margaret Hagenbarth


David J. Hagenbarth
Co-Personal Representative for the Estate
of Margaret Hagenbarth

SINGLETON


Larry D. Singleton


Robine Singleton

State of Montana)

) ss.

County of)

On this 16th day of September in the year of 2002, before me, a Notary Public in and for said State, personally appeared James F. Hagenbarth, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Patricia A. Rowland
 Notary Public for Montana
 Residing at Dillon, Montana
 My Commission expires 11/04

On this 16th day of September in the year of 2002, before me, a Notary Public in and for said State, personally appeared David J. Hagenbarth, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

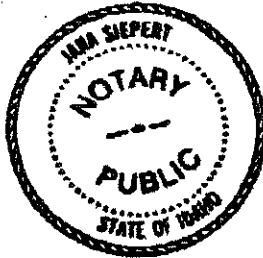
Patricia A. Rowland
 Notary Public for Montana
 Residing at Dillon, Montana
 My Commission expires 11/04

On this 16th day of September in the year of 2002, before me, a Notary Public in and for said State, personally appeared James F. Hagenbarth and David J. Hagenbarth as personal representatives of the Estate of Margaret Hagenbarth, known or identified to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

Patricia A. Rowland
 Notary Public for Montana
 Residing at Dillon, Montana
 My Commission expires 11/04

State of Idaho)
) ss.
 County of madison)

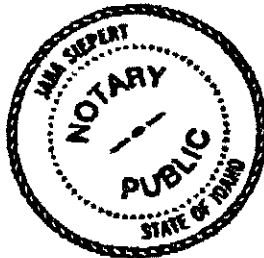
On this 10 day of September, in the year of 2002, before me, a Notary Public in and for said State, personally appeared Larry D. Singleton, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.



Dana Siepert
 Notary Public for Idaho
 Residing at Rexburg, ID
 My Commission expires 3-15-2007

State of Idaho)
) ss.
 County of madison)

On this 10 day of September, in the year of 2002, before me, a Notary Public in and for said State, personally appeared Robinc Singleton, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.



Dana Siepert
 Notary Public for Idaho
 Residing at Rexburg, ID
 My Commission expires 3-15-2007

Department of Water Resources

2002 AUG 22 PM 3: 50

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

ORDER ON SUMMARY JUDGMENT

Case No. 39576

SUBCASE NOS. 31-11440

I. PROCEDURAL BACKGROUND

Larry Singleton filed a claim for this water right April 9, 2001. The claim states the basis for this water right is “beneficial use.” *See, Notice of Claim to a Water Right Acquired Under State Law*. IDWR recommended this right essentially as claimed.

An *Objection* was filed by Margaret, David and James Hagenbarth. The *Objection* states that 31-11440 was based on right No. 79 decreed to Bert H. Miller in *Suave v. Abbott* No. 635 (U.S.D. Idaho, E. Div. (Nov. 1, 1930)) and later decreed abandoned in *U.S. v. Singleton*, No. 2083 (U.S.D. Idaho, E. Div. (Dec. 25, 1959)).

Objectors James, David and Margaret Hagenbarth filed a *Motion for Summary Judgment* July 1, 2002 arguing that this water right does not exist or that this water right has a priority date no earlier than December 30, 1959. The *Motion for Summary Judgment* relies on a legal theory that this claim is an improper attempt to reinstate a stockwater right that was previously decreed abandoned in *U.S. v. Singleton*. Hagenbarths argue that the doctrine of *res judicata* establishes as a matter of law that this water right cannot exist with a priority date of June 21, 1902. Hagenbarths filed the *Affidavit of Attorney Patti L. Rowland* with attachments including the *Counterclaim* of Bert H. Miller, James Bramwell and James Cochran *Notice of Water Right*, *Statement of Claim*, *Memorandum Opinion* and *Findings of Fact and Conclusions of Law* in *Suave v. Abbott*, and the file in *U.S. v. Singleton*. Singleton did not file any affidavits. This

ORDER ON SUMMARY JUDGMENT
G:/31 ORDERS/11440.ORDR.S.J.MOTN
8/22/02

Special Master requested that IDWR submit an affidavit explaining the basis of its recommendation. IDWR submitted the *Affidavit of Allen Ruberry*. The *Motion for Summary Judgment* was argued on July 31, 2002.

II. STANDARD OF REVIEW

A. General Standard for Summary Judgment

I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any. . .” to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). If the moving party properly supports the motion for summary judgment, the nonmoving party must then present opposing evidence.

The opposing party’s case must consist of more than speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *G & M Farms v. Funk Irrigation*, 119 Idaho at 517. The burden of proving the absence of material facts rests upon the moving party.

B. Effect of Presumption on Summary Judgment

In the SRBA, *Director’s Reports* have *prima facie* weight. Giving *Director’s Reports* *prima facie* weight confers a presumption that sufficient proof has been made to prevail on each element of a water right. In the context of a summary judgment motion, presumptions can operate for either a moving or opposing party. For example, in *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990), the Supreme Court upheld a summary judgment order where the nonmoving party failed to rebut the presumption of a product’s useful safe life. In *Olsen*, I.C. § 6-1403 established a rebuttable presumption that the “useful safe life” of a product was ten years. The Supreme Court held that plaintiff failed to rebut the presumption with opposing affidavits. “[T]he record is completely devoid of any evidence to rebut the statutory presumption that the product’s useful safe life had expired.” 117 Idaho at 714. Thus, summary judgment was proper

for defendants.

If affidavits are presented which rebut the presumption afforded *Director's Reports*, the presumption ceases to exist. However, if no affidavits are presented, the *Director's Report* remains un rebutted.

C. *Res Judicata*

The doctrine of *res judicata* precludes parties, and their privies, in a final litigation from relitigating in a second suit against the same parties, not only the same claim or demand, but also all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990).

III. RECORD ON SUMMARY JUDGMENT

The record submitted for this *Motion for Summary Judgment* includes the *Affidavit of Allen Ruberry*, the *Affidavit of Attorney Patti Rowland*, the claim, the *Objection*, and the *Director's Report*.

IV. FACTS OF RECORD

A. Prior Decrees

Bert H. Miller was served as a defendant in *Suave v. Abbott*. Miller filed a *Counterclaim of Defendant* asserting that he or his predecessor had diverted and used water for irrigation "of the hereinbefore described lands, and for domestic and other beneficial purposes. . ." *Affidavit of Attorney Patti Rowland* Ex. 1. The counterclaim refers to a posted notice accomplished by Miller's predecessors, James Bramwell and James Cochran. The posted notice states "The purpose for which said water is intended to be used is to irrigate lands claimed by use in Kilgore, Idaho. The place of intended use is Kilgore, Idaho." *Id.* Ex. 2.

The *Memorandum Opinion* in *Suave v. Abbott* states that "this suit involves the adjudication of the use of the waters of Mud Lake and its tributaries, and, like many others of the same general character, presents for solution questions difficult of adjustment in the administration of the irrigation laws in different localities." *Id.* Ex. 4.

The *Decree* in *Suave v. Abbott* states as a definition of use "water herein decreed for use on land shall be construed to include the usual ordinary and customary use thereof for irrigation,

for watering livestock, and for other domestic purposes.” *Id.* Ex. 6. The later *Judgment* in *U.S. v. Singleton* held that the right of Miller decreed in *Suave v. Abbott* was abandoned. *Id.* Ex. 7.

The *Affidavit of Allen Ruberry* sets forth the basis for the *Director’s Report* for this water right. IDWR considered the finding of abandonment in *U.S. v. Singleton*. Because of the finding in *U.S. v. Singleton*, IDWR recommended a separate claim 31-4095 with a priority date after the *U.S. v. Singleton* order. However, IDWR did not recommend this right with a priority date after *U.S. v. Singleton* based on IDWR’S interpretation of the purpose of use in *Suave v. Abbott*. *Affidavit of Allen Ruberry*.

B. Findings not Based on Affidavits

Several conclusions contained in this decision parallel opinions asserted in the *Affidavit of Allen Ruberry*. The court did not, however, rely on the opinions contained in the affidavit in reaching its findings, but made its own determinations of law.

Assertions of opinions of law by witnesses or affiants are generally inadmissible. Although witnesses are not prohibited from testifying on the “ultimate issue” to be reached in a case, I.R.E. 704 was not intended to allow experts to give legal conclusions. “If the expert’s opinion is purely legal conclusion or concerns the law of the case, it is inadmissible. Decisions on the law are not decisions that the jury, the factfinder makes. They are for the judge to make in his capacity as legal officer.” COMMENTS TO THE IDAHO RULES OF EVIDENCE (1985), Comment to Rule 704, p.2 (citations omitted).

V. ANALYSIS

Under the doctrine of *res judicata*, or “claim preclusion,” a final adjudication on a claim or demand precludes the parties to the first action, and their privies, from later relitigating against the same parties not only the same claim or demand, but in addition all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990).

There is no dispute that the *Suave v. Abbott* and *U.S. v. Singleton*. decrees are final adjudications. It is undisputed that Singleton’s predecessor was decreed a water right in *Suave v. Abbott* that was later decreed abandoned or forfeited in *U.S. v. Singleton*. Therefore, the dispositive issue is whether the stockwater claim 31-11440 is the same right that was abandoned in

U.S. v. Singleton or was a claim that should have been brought in *Suave v. Abbott*.

VI. CONCLUSION

This Special Master finds that the term “use” defined in *Suave v. Abbott* as water used for usual ordinary and customary use for irrigation, for watering livestock, and other domestic purposes is ambiguous. It is unclear whether the “use” intended by the *Suave v. Abbott* court meant to include all stockwater rights whether or not derivative of an irrigation right. Similarly, it is ambiguous whether *Suave v. Abbott* meant to require the filing of all stockwater rights, even those not related to irrigation. There is ample support of record indicating the term “use” in *Suave v. Abbott* intended only incidental stockwater use.

Many of the pleadings and orders focus primarily on the irrigation aspects of water rights, leaving an inference that the stockwater uses were incidental only. For example, Bert H. Miller’s *Counterclaim* asserts that Miller or his predecessors diverted and used the water for irrigation, domestic and other beneficial purposes. *Affidavit of Attorney Patti Rowland* Ex. 1. Miller’s predecessors originally established Miller’s water right by posting notice. The notice states “The purpose for which said water is intended to be used is to irrigate lands claimed by us.” *Id.* Ex. 2. (emphasis added)

The *Statement of Claims* of Bert H. Miller sets forth that “proof of the continuous and beneficial use of the water of Dry Creek herein it is shown that upward of 125 acres of said 160 acres has been continuously irrigated by the said Bert H. Miller and his predecessor in interest since 1903. . .” *Id.* Ex. 3. (emphasis added). The *Findings of Fact and Conclusions of Law* in *Suave v. Abbott* states that Bert H. Miller’s water rights were “to be irrigated and hereinafter described. . . .” *Id.* Ex. 5. (emphasis added)

On the other hand, there is language in *Suave v. Abbott* that could mean that all stockwater uses were intended to be included. The *Decree* in *Suave v. Abbott* states that “use” is “water herein decreed for use on land shall be construed to include the usual ordinary and customary use thereof for irrigation, for watering livestock, and for other domestic purposes.” *Id.* Ex. 6.

This Special Master finds there are genuine issues of material fact that remain as to whether the stockwater use claimed in 31-11440 was decreed in *Suave v. Abbott* and abandoned in

U.S. v. Singleton. Because of the ambiguity of the term "use" as it relates to stockwater uses, it is unclear whether the *Suave v. Abbott* adjudication required all stockwater uses to be filed. Genuine issues of material fact remain. THEREFORE, the *Motion for Summary Judgment* is denied.¹

DATED August 22, 2002.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

¹ This Special Master notes that the issues remaining for trial are quite narrow. The Claimant may face the prospect of a *Director's Report* where the "bubble has burst" as to the presumption on priority. The Claimant may be required to put on facts at trial regarding the *Suave v. Abbott* decree and *U.S. v. Singleton* decree. If the Claimant proves *Suave v. Abbott* and *U.S. v. Singleton* do not prevent him from claiming a priority date of June 21, 1902, he may have the burden of proving the priority date.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on August 22, 2002, with sufficient first-class postage to the following:

MARGARET HAGENBARTH

Represented by:
BLOOMQUIST, JOHN E.
DONEY, CROWLEY, BLOOMQUIST
108 S WASHINGTON
PO BOX 1418
DILLON, MT 59725
Phone: 406-683-8795

MARGARET HAGENBARTH

Represented by:
MICHAEL C. CREAMER
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

LARRY D SINGLETON

Represented by:
RAY W. RIGBY
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098



DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83728, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

DICK REMPELHOFER
GOVERNOR

MARK A. BOGGS
DIRECTOR

FAX Transmittal Cover Sheet

Number of pages including this one: 5

Date:

9-10-02

To:

Al Rakerny

Fax No.:

From:

V. MUSIC

Fax No.:

Phone No.:

327-7928

Subject:

Singleton affidavit

ALAN G. LANCE
Attorney General

CANDICE M. MCHUGH
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 372-7920
Fax: (208) 327-7866
ISB # 5908

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA)

Subcase No. 31-11440

Case No. 39576)

AFFIDAVIT OF ALLEN RUBERRY

State of Idaho)

) ss.

County of Ada)

Allen Ruberry, being first duly sworn, deposes and states as follows:

1. My name is Allen Ruberry. I am a Senior Water Resources Agent with the Adjudication Bureau of the Idaho Department of Water Resources ("IDWR" or the "Department"). This affidavit is based upon my own personal knowledge.
2. My work address is Idaho Department of Water Resources, 900 North Skyline Drive, Suite A, Idaho Falls, Idaho 83402. I reside in Idaho Falls, Idaho.
3. My educational background is as follows: BS Geology, Boise State Univ. 1980; Assoc. Degree, Civil Engineering, Idaho State Univ., 1979; Cert. Drafting and Design, 1968.

SCANNED

11/19/2002

AFFIDAVIT OF ALLEN RUBERRY - Page 1

P. 2

(208) 525-7177

IDWR Eastern Region

Jun 14 02 10:59a

4. My Department of Water Resources work experience includes the following: 1975 to 1977, IDWR, Hydrologic Aid, Adjudication Bureau; 1979 to 1980, IDWR, Water Resource Agent, Dam Safety; 1993 to Present IDWR, Sr. Water Resource Agent, Adjudication Bureau.

5. As part of my duties as Sr. Water Resources Agent, I conduct field investigations for water right claims filed in the Snake River Basin Adjudication. This Affidavit sets forth the basis of my recommendation of claim no. 31-11440.

6. On October 18, 2000, claimant, Larry Singleton (Claimant) called my office to discuss the filing of a stock water claim. On October 19, 2002, at Claimant's request, I filled out the claim according to his direction and mailed it to the Claimant for signature.

7. Claimant has two water right claims that are relevant for discussion in this report: claim nos. 31-4095 and 31-11440.

8. Claimant claimed a statutory claim, 31-4095. When making the recommendation for Claimant's water rights, I reviewed the documentation I had concerning his water rights. After I reviewed claim no. 31-4095 it was apparent that it was the same water right as decreed water right no. 79. Decreed water right no. 79¹ was decreed in *Sauve v. Abbott*, Case No. 635, Decree (Dist. Idaho Nov. 1, 1930) to Burt H. Miller, with a priority date of June 21, 1902, for 2.50 cfs from Dry Creek, a tributary of Camas Creek. Leo Singleton was Claimant's father and the successor in interest to Mr. Miller's land and decreed water right no. 79. Leo Singleton was the defendant in a lawsuit titled *United States v. Singleton*, Case No. 2083 (Dist. Idaho Dec. 29, 1959). The Judgment entered in *United States v. Singleton*, concluded, among other things that water right no. 79 had not been used "on the said land since May 1, 1924; and that said water right (water right no. 79) [had] been abandoned by the said defendant, Leo Singleton, and his

¹ *Sauve v. Abbott* decreed water right no. 79 was re-numbered by the Department as 31-150. I will refer to this right as decreed right no. 79 in this report since that was the number assigned to it in the *Sauve v. Abbott* decree.

predecessors in interest." *United States v. Singleton*, Case No. 2083, Judgment ¶ III. The Judgment also determined that the United States was entitled to 10.0 cfs of waters from Dry Creek. Leo Singleton did not appear and thus, the Judgment in the case was based on evidence provided by the Plaintiff only.

9. When I reviewed the *Sauve v. Abbott* Decree and the Judgment in *United States v. Singleton*, I determined that water right no. 79 for 2.5 cfs had been found abandoned by the court. Therefore, I recommended claim no. 31-4095 for irrigation for 2.5 cfs from Dry Creek with a priority date of December 30, 1959, one day after the Judgment even though there was evidence in the water master records that shows payment of irrigation delivery in years prior to 1959.

10. I then reviewed Claimant's stockwater right claim no. 31-11440 with a priority date of June 21, 1902. I concluded that the Judgment in *United States v. Singleton* did not preclude a beneficial use right for diverted stockwater for two reasons.

11. First, decreed right no. 79 only included an incidental stockwater right. "Use" is defined in the *Sauve v. Abbott* decree as "the usual ordinary and customary use thereof for irrigation, for watering livestock, and for other domestic purposes." *Sauve v. Abbott*, Decree, Part II, Schedule of Rights, Definitions. The water rights set out in the *Sauve v. Abbott* decree provide a quantity of water, with a priority date to be used on particular land but do not set forth separate water rights for stockwater. Thus, I concluded that the stockwater referred to in the *Suave v. Abbott* decree only meant incidental stockwater. Incidental stockwater is when stock drink water that is actually intended for irrigation purposes but as an incidental use is also used as stockwater. Thus, I recommended a separate beneficial use water right for diverted stockwater for Claimant under claim no. 31-11440.

SCANNED

JUN 19 2002

12. Second, claim no. 31-11440 is for a *de minimis* stockwater right and thus, I recommended it because I believed that since livestock grazing, and, therefore watering, never ceased that a stockwater right was appropriate. There is evidence of water delivery in the water master records to the property in question. It was therefore reasonable to conclude that water was being used to water stock and that livestock grazing and watering from Dry Creek have occurred continuously since June 21, 1902 on the lands recommended.

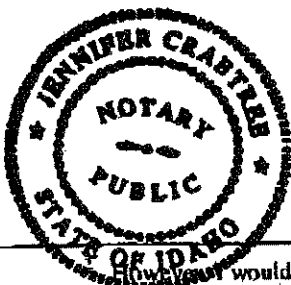
13. I also recommended beneficial use stock water rights to other water users, including Hagenbarths, with priority dates that pre-date the *Sauve v. Abbot* decree. For instance, Hagenbarths' stockwater water rights, 31-10255, 31-10256, and 31-10257 have already been partially decreed with priority dates of May 1, 1902, May 28, 1891 and April 1, 1889 respectively.

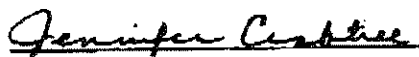
14. Based on the above, I recommended Claimant's claim no. 31-11440 for stockwater purposes with a priority date of June 21, 1902 and a season of use of May 1st thru October 31st.

Further your affiant sayeth naught this 14 day of June, 20002.


ALLEN RUBERRY
Senior Water Resources Agent, IDWR

SUBSCRIBED AND SWORN to before me this 14 day of June, 2002.




Notary Public for Idaho
Residing at Idaho Falls, ID
My Commission Expires: 9-23-02

However, I would have recommended a season of use longer than the irrigation season if that was what was claimed. I recommended a longer season of use on Hagenbarths' water rights 31-10255, 31-10256, and 31-10257 because the longer season was claimed.

SCANNED

CERTIFICATE OF MAILING

I certify that on June 14, 2002, I mailed and/or delivered the original and copies of this form, including all attachments, to the following interested parties, by placing them in sealed envelopes, addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☒ Facsimile

2. Copies to:

Chief, Natural Resource Division
Office of the Attorney General
Box 83720
Boise, ID 83720-0010

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

IDWR Document Repository
P.O. Box 83720
Boise, ID 83720-0098

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Ray Rigby
Attorney for Larry Singleton
P.O. Box 250
Rexburg, ID 83440-0250

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☒ Facsimile

Michael Creamer
Attorney for Margaret Hagenbarth
P.O. Box 2720
Boise, ID 83701-1200

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Jennifer Crabtree
Signature of person delivering form

SCANNED

JUL 19 2002

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2002 OCT -4 PM 4:45

In Re SRBA)
Case No. 19576)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 11-11440

FILED
CLARK COUNTY, IDAHO

NAME AND ADDRESS: LARRY D SINGLETON
266 N 2400 E
ST ANTHONY, ID 83445

SOURCE: DRY CREEK TRIBUTARY: CAMAS CRCEK

QUANTITY: 0.09 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED
13,000 GALLONS PER DAY.

PRIORITY DATE: 06/21/1902

POINT OF DIVERSION: T11N R39E S26 NENENE (Rediversion) Within Clark County
R40E S19 SWSWSW (Injection)
SWSWSW

PURPOSE AND
PERIOD OF USE: PURPOSE OF USE PERIOD OF USE QUANTITY
Stockwater 05-01 TO 10-31 0.09 CFS

PLACE OF USE: Stockwater Within Clark County
T11N R39E S26 NWNE
SENE NENW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

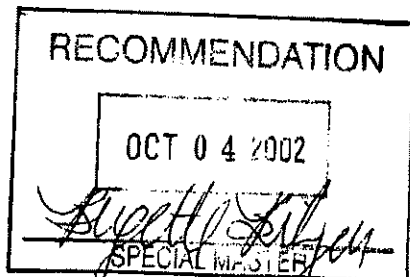
THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.

THIS WATER RIGHT IS SUBJECT TO THE TERMS AND CONDITIONS OF A
SUBORDINATION AGREEMENT RECORDED ON SEPTEMBER 24, 2002, AS
INSTRUMENT NO. 049868 IN THE RECORDS OF CLARK COUNTY, IDAHO.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT
B

FILED
 TWIN FALLS, IDAHO
 2002 OCT -4 PM 4:45

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

RECEIVED

OCT - 8 2002

Department of Water Resources

SPECIAL MASTER'S REPORT AND
 RECOMMENDATION; FINDINGS OF
 FACT AND CONCLUSIONS OF LAW

FOR WATER RIGHT 31-11440

I. FINDINGS OF FACT

A notice of claim was filed by Larry Singleton for this water right. The Director of the State of Idaho Department of Water Resources examined the water system for this reporting area. The *Director's Report* contained a recommendation for the elements of this water right.

An *Objection* was filed by David, James and Margaret Hagenbarth on September 7, 2001. The *Objection* was resolved on September 27, 2002 with the filing of a *Standard Form 5*. All parties to the subcase and IDWR are signatories to the *Standard Form*. The *Standard Form 5* refers to a *Water Rights Settlement and Subordination Agreement* between Claimant and Objectors that was filed in Clark County. The *Water Rights Settlement and Subordination Agreement* further defines the priority date for this water right, and is therefore referred to in the *Special Master's Recommendation for Partial Decree*. The *Water Right Settlement and Subordination Agreement* is attached hereto as Exhibit A.

II. CONCLUSIONS OF LAW

Under *SRBA Administrative Order 1*, a Special Master is required to make a recommendation to the Presiding Judge as to whether and how a water right should be decreed. Therefore, based on the file and record herein, IT IS RECOMMENDED that this water right be decreed with the elements set forth in the *Special Master's Recommendation for Partial Decree* attached hereto as Exhibit B.

DATED: October 4, 2002

BRIGETTE BILYEU

Special Master

Snake River Basin Adjudication

When Recorded Return to:
John M. Marshall
Givens Purkey LLP
277 N. 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720

2002 OCT -4 PM 4:45

FILED
ST-IDAHO

RECEIVED

OCT - 8 2002

Department of Water Resources

WATER RIGHTS SETTLEMENT AND SUBORDINATION AGREEMENT

THIS WATER RIGHTS SETTLEMENT AND SUBORDINATION AGREEMENT ("Agreement") is entered into effective the ____ day of _____, 2002 by and between James P. Hagenbarth, David J. Hagenbarth, and Margaret Hagenbarth ("Hagenbarth") and Larry D. Singleton and Robina Singleton ("Singleton").

RECITALS

a. Hagenbarth either claims or holds water right nos. 31-2274, 31-2275, 31-10245, and 31-10740 (collectively the "Hagenbarth Rights") in the Snake River Basin Adjudication ("SRBA"). The Hagenbarth Rights are stockwater and irrigation water rights from Dry Creek in Clark County, Idaho, for irrigation and stockwater use at the place of use owned by Hagenbarth described in Exhibit A hereto.

b. Singleton has claimed water right 31-11440 in the SRBA for stockwater use from Dry Creek in Clark County, Idaho, on a place of use owned by Singleton and described in Exhibit B hereto.

c. Hagenbarth filed an objection in the SRBA to the Idaho Department of Water Resources recommendation for water right 31-11440. Hagenbarth and Singleton have entered into this Agreement to settle the objection and allow a decree in the SRBA for water right 31-11440 on conditions stated herein.

NOW THEREFORE, in consideration of the above recitals and the warranties, covenants, agreements, terms and conditions set forth below, Hagenbarth and Singleton agree as follows:

1. The parties each represent and warrant to the other that they have the respective legal power, right and authority to enter into this Agreement and to perform the obligations hereunder.

WATER RIGHTS SETTLEMENT AND SUBORDINATION AGREEMENT - 1
C:\dfr\077\Water - to Agreements of Subordination Agreement SRBA\T.doc

EXHIBIT
A

2. The right to divert water under water right 31-11440 shall be, and is hereby, subordinated to the Hagenbarth Rights, however they may be decreed by the court in the SRBA. Additional details of subordination are as follows:

- a. the priority for the water right 31-11440 may not be asserted or relied upon, and shall be ineffective, against the priority of any of the Hagenbarth Rights for any purpose, including the purpose of effecting a delivery call or curtailment or other administration to deliver water to supply any diversion under water right 31-11440; and
- b. no delivery call to serve any diversion under right 31-11440 shall be made, honored, or enforced if it would cause or require, either directly or indirectly, curtailment of, or mitigation from, any of the Hagenbarth Water Rights;
- c. this subordination also shall apply to any use to which any such subordinated portion of the water right 31-11440 may be transferred or changed.
- d. this subordination shall be effective at all times that Dry Creek water ceases to flow beyond a point where Dry Creek's course currently passes under the road in the S½SE of Section 3, Township 12 North, Range 39 East, said road being commonly known as the "A2" County Road and shown on the map attached hereto as Exhibit C.
- e. this subordination does not limit Singleton's ability or right to divert water pursuant to water right 31-11440, with its associated priority date, if water is available at the point of diversion for this right regardless of the effect such diversion has on the Hagenbarth Rights.

3. The recitals, terms, conditions and covenants contained herein shall run with the land described in Exhibit A and Exhibit B hereto, and shall run with the Hagenbarth Rights and water right 31-11440 and shall be binding upon any person claiming, having or acquiring any right, title or interest in the Hagenbarth Rights, water right 31-11440, the land described in Exhibit A and Exhibit B attached hereto, or in any lot, parcel, portion or subdivision thereof, and upon their successors and assigns.

4. The partial decree for water right 31-11440 shall include a remark in the section entitled "Other Provisions Necessary for Definition or Administration of this Water Right" as follows:

This water right is subject to the terms and conditions of a subordination agreement recorded on _____ as Instrument No. _____ in the records of Clark County, Idaho.

5. In consideration of this Agreement and the covenants, conditions and terms set forth herein, Hagenbarth agrees to withdraw their objection in the SRBA to the recommendation for water right 31-11440.

6. This Agreement is binding upon and enforceable by the parties hereto and their respective successors and assigns.

7. Neither party's failure to assert, or to seek enforcement of, any of the covenants, terms or conditions of this Agreement shall constitute a waiver by such party of the breach or default of any such covenant, term or condition unless otherwise expressly agreed to by such non-asserting party in writing.

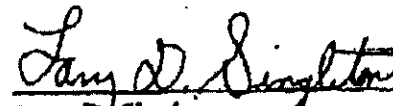
8. If either party commences litigation for the enforcement, interpretation or rescission of this Agreement, the prevailing party shall be entitled to its reasonable attorney fees and costs.

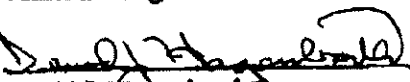
IN WITNESS WHEREOF, this Agreement has been executed by the parties, in the State of Idaho, as of the effective date set forth above.

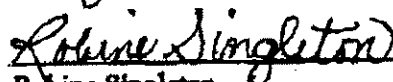
HAGENBARTH

SINGLETON

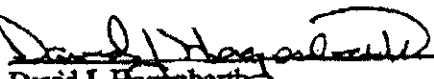

James F. Hagenbarth


Larry D. Singleton


David J. Hagenbarth


Robine Singleton


James F. Hagenbarth
Co-Personal Representative for the Estate
of Margaret Hagenbarth


David J. Hagenbarth
Co-Personal Representative for the Estate
of Margaret Hagenbarth

State of Montana)
) ss.
County of)

On this 16th day of September in the year of 2002, before me, a Notary Public in and for said State, personally appeared James F. Hagenbarth, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Patricia L. Rowland
Notary Public for Montana
Residing at Dillon, Montana
My Commission expires 11/1/04

On this 16th day of September in the year of 2002, before me, a Notary Public in and for said State, personally appeared David J. Hagenbarth, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

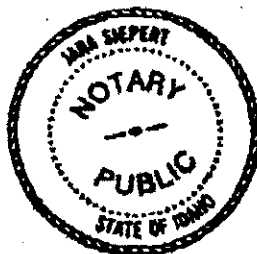
Patricia L. Rowland
Notary Public for Montana
Residing at Dillon, Montana
My Commission expires 11/1/04

On this 16th day of September in the year of 2002, before me, a Notary Public in and for said State, personally appeared James F. Hagenbarth and David J. Hagenbarth as personal representatives of the Estate of Margaret Hagenbarth, known or identified to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

Patricia L. Rowland
Notary Public for Montana
Residing at Dillon, Montana
My Commission expires 11/1/04

State of Idaho)
) ss.
County of Madison)

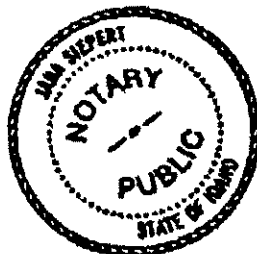
On this 10 day of September, in the year of 2002, before me, a Notary Public in and for said State, personally appeared Larry D. Singleton, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.



Dana Siepert
Notary Public for Idaho
Residing at Rexburg, ID
My Commission expires 3-15-2007

State of Idaho)
) ss.
County of Madison)

On this 10 day of September, in the year of 2002, before me, a Notary Public in and for said State, personally appeared Robine Singleton, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.



Dana Siepert
Notary Public for Idaho
Residing at Rexburg, ID
My Commission expires 3-15-2007



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A, Idaho Falls, ID 83402-1718 • Phone: (208) 525-7161 FAX: (208) 525-7177

OCT - 8 2002

EASTERN REGION

Department of Water Resources

2002 OCT - 8 PM 4:45
DICK KEMP THORNE
Governor

KARL E. BREHER
Director

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)

Case No. 39576)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

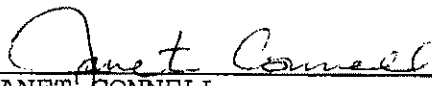
Water Right(s): 31-11440

On October 04, 2002, Special Master BRIGETTE BILYEU issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED October 04, 2002.


JANET CONNELL
Deputy Clerk



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A, Idaho Falls, ID 83402 Phone: (208) 525-7161 FAX: (208) 525-7177

EASTERN REGION

OCT - 8 2002

Department of Water Resources

2002 OCT 7 PM 4:45
DIRK KEMPTHORPE
Governor

KARL J. DRESHER
Director
IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)

Case No. 39576)

CERTIFICATE OF MAILING

Water Right(s): 31-11440

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on October 04, 2002, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

MARGARET HAGENBARTH

Represented by:
BLOOMQUIST, JOHN E.
DONEY, CROWLEY, BLOOMQUIST
108 S WASHINGTON
PO BOX 1418
DILLON, MT 59725
Phone: 406-683-8795

MARGARET HAGENBARTH

Represented by:
MICHAEL C. CREAMER
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

CERTIFICATE OF MAILING

PAGE 1
10/04/02



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A, Idaho Falls, ID 83402-1718 • Phone: (208) 525-7161 FAX: (208) 525-7177

EASTERN REGION

Represented by:

RAY W. RIGBY

PO BOX 250

REXBURG, ID 83440-0250

Phone: 208-356-3633

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

JANET CONNELL

Deputy Clerk

RECEIVED

JAN - 8 2003

Department of Water Resources

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2003 JAN 6 AM 11 28

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

)
) **ORDER OF PARTIAL DECREE**
)
) **For Water Right 31-11440**
)

On October 4, 2002, a *Special Master's Report and Recommendation* was filed for the above water right. No Challenges were filed to the *Special Master's Report and Recommendation* and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and *SRBA Administrative Order 1*, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the *Special Master's Report* and wholly adopts them as its own.

Therefore, IT IS ORDERED that water right 31-11440 is hereby **decreed** as set forth in the attached *Partial Decree* Pursuant to I.R.C.P. 54(b).

DATED January 6, 2003



ROGER S. BURDICK

Presiding Judge

Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

2003 JAN 6 AM 11 28

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 31-11440

NAME AND ADDRESS: LARRY D SINGLETON
266 N 2400 E
ST ANTHONY, ID 83445

SOURCE: DRY CREEK TRIBUTARY: CAMAS CREEK

QUANTITY: 0.09 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED
13,000 GALLONS PER DAY.

PRIORITY DATE: 06/21/1902

POINT OF DIVERSION: T13N R39E S26 NENENE (Rediversion) Within Clark County
R40E S19 SWSWSW (Injection)
SWSWSW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Stockwater	05-01 TO 10-31	0.09 CFS

PLACE OF USE:	Stockwater	Within Clark County
	T13N R39E S26	NWNE SENE
		SWNE NENW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.

THIS WATER RIGHT IS SUBJECT TO THE TERMS AND CONDITIONS OF A
SUBORDINATION AGREEMENT RECORDED ON SEPTEMBER 24, 2002, AS
INSTRUMENT NO. 049868 IN THE RECORDS OF CLARK COUNTY, IDAHO.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

2003 JAN 06 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

)
)
)
)

CERTIFICATE OF MAILING

Water Right(s): 31-11440

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE
PURSUANT TO I.R.C.P. 54(b) for WATER RIGHT 31-11440 was mailed
on January 06, 2003, with sufficient first-class postage prepaid
to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

MARGARET HAGENBARTH
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BOYD & LORRAINE BARKER
BOYD BARKER
LORRAINE BARKER
1629 HISLOP DR
OGDEN, UT 84404
Phone: 801-394-6264

ROBBIN HALL
Chief Deputy Clerk

Ruberry, Allen

From: McHugh, Candice
Sent: Friday, August 23, 2002 11:52 AM
To: Adjudication Attorneys
Cc: Ruberry, Allen; Tuthill, Dave; Carlsen, Ernie
Subject: Orders on SJ

SM Bilyeu denied Hagenbarth's motions for summary judgment in the Hillman and the Singleton cases. The issue in both cases concerned what water rights were required to be filed in the prior adjudications of the water source. In both cases, the Department recommended water rights with priority dates that pre-dated the prior decrees based on the Department's conclusion that 1) the source was not included in the prior decree for the Hillman case and 2) that the prior decree did not require or decree diverted stockwater rights in the Singleton case.

In Hillman she determined that the scope of the rights to be included in the prior decrees was ambiguous and that although Bear Creek is tributary to Camas Creek, no rights to Bear Creek were decreed in the prior decrees. Thus, a genuine issue of fact remains regarding the scope of the rights to be included in the prior decrees.

In Singleton she determined that the term "use" as it relates to stockwater use is ambiguous and it is unclear whether the *Sauve v. Abbott* decree required all stockwater uses to be filed. Thus, a genuine issue of fact remains regarding what claims were required. However, she noted that the claimant, if he can prove the prior decree does not prevent him from claiming a priority date prior to the decree that he may have the burden of proving the priority date because the Director's Report presumption "bubble" has burst.

Also, in her decisions, SM Bilyeu states that the rules of evidence do not allow an expert to give legal conclusions and that such opinions are inadmissible. However, she called me and said that she does not believe we need to exclude such conclusions from our affidavits if in fact that was part of our basis but that she will not adopt those findings and that such conclusions could be struck depending on what occurs at trial. In the affidavits on these cases that I submitted, I tried to relay the information in as fact specific manner as possible. However, much of the basis was based on legal conclusions of what the prior decrees did or did not preclude.



31-11440 ORD.tif 31-11700 ORD.tif

Candice

Confidentiality Notice: This e-mail may contain confidential and privileged information exempt from disclosure under applicable law. This message is intended only for the use of the individual or individuals identified above. If you have received this message by mistake, please notify the sender immediately by replying to this message. Please delete the message from your system and do not review, disclose, copy, or distribute any information contained or attached to the message. Thank You

9/10/02 MEET Candice @ 4:30-5:00 PM at DINNER @ 6 PM Hotel Lobby

Eastern

Not Found

ALAN G. LANCE
Attorney General

CANDICE M. MCHUGH
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 372-7920
Fax: (208) 327-7866
ISB # 5908

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase No. 31-11440
	)	
Case No. 39576	)	AFFIDAVIT OF ALLEN RUBERRY
	)	
	)	
	)	
	)	

State of Idaho)
) ss.
County of Ada)

Allen Ruberry, being first duly sworn, deposes and states as follows:

1. My name is Allen Ruberry. I am a Senior Water Resources Agent with the Adjudication Bureau of the Idaho Department of Water Resources ("IDWR" or the "Department"). This affidavit is based upon my own personal knowledge.
2. My work address is Idaho Department of Water Resources, 900 North Skyline Drive, Suite A, Idaho Falls, Idaho 83402. I reside in Idaho Falls, Idaho.
3. My educational background is as follows: BS Geology, Boise State Univ. 1980; Assoc. Degree, Civil Engineering, Idaho State Univ., 1979; Cert. Drafting and Design, 1968.

4. My Department of Water Resources work experience includes the following: 1975 to 1977, IDWR, Hydrologic Aid, Adjudication Bureau; 1979 to 1980, IDWR, Water Resource Agent, Dam Safety; 1993 to Present IDWR, Sr. Water Resource Agent, Adjudication Bureau.

5. As part of my duties as Sr. Water Resources Agent, I conduct field investigations for water right claims filed in the Snake River Basin Adjudication. This Affidavit sets forth the basis of my recommendation of claim no. 31-11440.

6. On October 18, 2000, claimant, Larry Singleton (Claimant) called my office to discuss the filing of a stock water claim. On October 19, 2002, at Claimant's request, I filled out the claim according to his direction and mailed it to the Claimant for signature.

7. Claimant has two water right claims that are relevant for discussion in this report: claim nos. 31-4095 and 31-11440.

8. Claimant claimed a statutory claim, 31-4095. When making the recommendation for Claimant's water rights, I reviewed the documentation I had concerning his water rights. After I reviewed claim no. 31-4095 it was apparent that it was the same water right as decreed water right no. 79. Decreed water right no. 79¹ was decreed in *Sauve v. Abbott*, Case No. 635, Decree (Dist. Idaho Nov. 1, 1930) to Burt H. Miller, with a priority date of June 21, 1902, for 2.50 cfs from Dry Creek, a tributary of Camas Creek. Leo Singleton was Claimant's father and the successor in interest to Mr. Miller's land and decreed water right no. 79. Leo Singleton was the defendant in a lawsuit titled *United States v. Singleton*, Case No. 2083 (Dist. Idaho Dec. 29, 1959). The Judgment entered in *United States v. Singleton*, concluded, among other things that water right no. 79 had not been used "on the said land since May 1, 1924; and that said water right (water right no. 79) [had] been abandoned by the said defendant, Leo Singleton, and his

¹ *Sauve v. Abbott* decreed water right no. 79 was re-numbered by the Department as 31-150. I will refer to this right as decreed right no. 79 in this report since that was the number assigned to it in the *Sauve v. Abbott* decree.

predecessors in interest.” *United States v. Singleton*, Case No. 2083, Judgment ¶ III. The Judgment also determined that the United States was entitled to 10.0 cfs of waters from Dry Creek. Leo Singleton did not appear and thus, the Judgment in the case was based on evidence provided by the Plaintiff only.

9. When I reviewed the *Sauve v. Abbott* Decree and the Judgment in *United States v. Singleton*, I determined that water right no. 79 for 2.5 cfs had been found abandoned by the court. Therefore, I recommended claim no. 31-4095 for irrigation for 2.5 cfs from Dry Creek with a priority date of December 30, 1959, one day after the Judgment even though there was evidence in the water master records that shows payment of irrigation delivery in years prior to 1959.

10. I then reviewed Claimant’s stockwater right claim no. 31-11440 with a priority date of June 21, 1902. I concluded that the Judgment in *United States v. Singleton* did not preclude a beneficial use right for diverted stockwater for two reasons.

11. First, decreed right no. 79 only included an incidental stockwater right. “Use” is defined in the *Sauve v. Abbott* decree as “the usual ordinary and customary use thereof for irrigation, for watering livestock, and for other domestic purposes.” *Sauve v. Abbott*, Decree, Part II, Schedule of Rights, Definitions. The water rights set out in the *Sauve v. Abbott* decree provide a quantity of water, with a priority date to be used on particular land but do not set forth separate water rights for stockwater. Thus, I concluded that the stockwater referred to in the *Suave v. Abbott* decree only meant incidental stockwater. Incidental stockwater is when stock drink water that is actually intended for irrigation purposes but as an incidental use is also used as stockwater. Thus, I recommended a separate beneficial use water right for diverted stockwater for Claimant under claim no. 31-11440.

12. Second, claim no. 31-11440 is for a *de minimis* stockwater right and thus, I recommended it because I believed that since livestock grazing, and, therefore watering, never ceased that a stockwater right was appropriate. There is evidence of water delivery in the water master records to the property in question. It was therefore reasonable to conclude that water was being used to water stock and that livestock grazing and watering from Dry Creek have occurred continuously since June 21, 1902 on the lands recommended.

13. I also recommended beneficial use stock water rights to other water users, including Hagenbarths, with priority dates that pre-date the *Sauve v. Abbott* decree. For instance, Hagenbarths' stockwater water rights, 31-10255, 31-10256, and 31-10257 have already been partially decreed with priority dates of May 1, 1902, May 28, 1891 and April 1, 1889 respectively.

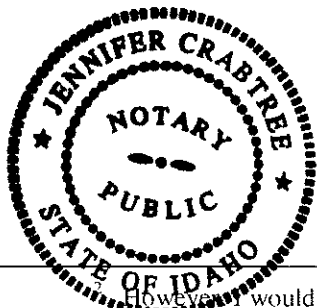
14. Based on the above, I recommended Claimant's claim no. 31-11440 for stockwater purposes with a priority date of June 21, 1902 and a season of use of May 1st thru October 31st.

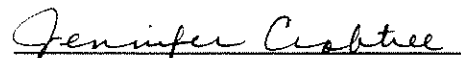
Further your affiant sayeth naught this 14 day of June, 2002.



ALLEN RUBERRY
Senior Water Resources Agent, IDWR

SUBSCRIBED AND SWORN to before me this 14 day of June, 2002.





Notary Public for Idaho
Residing at Idaho Falls Id
My Commission Expires: 9-23-02

However, I would have recommended a season of use longer than the irrigation season if that was what was claimed. I recommended a longer season of use on Hagenbarths' water rights 31-10255, 31-10256, and 31-10257 because the longer season was claimed.

CERTIFICATE OF MAILING

I certify that on June 14, 2002, I mailed and/or delivered the original and copies of this form, including all attachments, to the following interested parties, by placing them in sealed envelopes, addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☒ Facsimile

2. Copies to:

Chief, Natural Resource Division
Office of the Attorney General
Box 83720
Boise, ID 83720-0010

☐ Overnight Mail
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IDWR Document Repository
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☐ Hand-Delivered
☐ Facsimile

Jennifer Crabtree
Signature of person delivering form