

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)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 75-10475

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
SEP 23 2009	
By _____	Clk _____

NAME AND ADDRESS: SILVER PEAK RANCH TRUST
C/O MYRTHUS AUSTIN/RON AUSTIN
63 HWY 93 N
SALMON, ID 83467-5292

SOURCE: JESSE CREEK TRIBUTARY: SALMON RIVER

QUANTITY: 1.94 CFS

PRIORITY DATE: 04/01/1894

POINT OF DIVERSION: T21N R22E S01 SWNW Within Lemhi County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 10-31	1.94 CFS

PLACE OF USE:	Irrigation	Within Lemhi County
	T22N R22E S31	SENE 30.0
		NENE 0.4
		NESE 8.8
	S32 LOT 1	(NENW) 1.8
	LOT 3	(SWNW) 33.0
	LOT 4	(SWNW) 1.8
		SENW 9.0
	LOT 7	(NESW) 4.5
		NWSW 3.1
		LOT 3 (SENW) 7.7
		LOT 4 (SENW) 6.1
		LOT 6 (NWSW) 7.7
		LOT 7 (NWSW) 2.9
	122.2 Acres Total	

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

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).

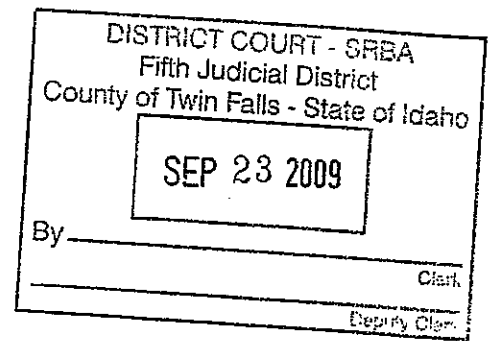
RULE 54(b) CERTIFICATE

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.

John M. Melanson
Presiding Judge of the
Spoke River Basin Appellate

RECOMMENDATION
SEP 23 2009
<i>Thomas A. Olson</i> SPECIAL MASTER

RECEIVED
SEP 25 2009
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

In Re SRBA	)	Subcases 75-14, et al. (see attached list
	)	of 16 "Jesse Creek" subcases)
Case No. 39576	)	
	)	SPECIAL MASTER REPORT
	)	AND RECOMMENDATION

Findings of Fact

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, Reporting Area 23, Basin 75* on January 11, 2007. The Director recommended the above 16 claims (including two claims split later) for between .03 cfs and 1.94 cfs from Jesse Creek, Jessie Creek or Pollard Canyon Creek¹ for domestic use between March 15 and November 15 or to irrigate between 4 acres and 122.2 acres in Lemhi County between April 1 and October 31 or November 1 with priority dates between June 1, 1868, and April 1, 1902, all based on a decree.

Blackadar Objections

Robert L. Blackadar filed *Objections* in 9 subcases on October 15 and 16, 2007:

75-14 – source: "Should be Pollard Creek; the only source from which this water right can be diverted is Pollard Creek."

¹ Just before trial, IDWR amended its recommended source in subcase 75-14: Jesse Creek became Pollard Canyon Creek.

75-19D, 75-19H, 75-20 and 75-24 – point of diversion: “With a priority date of June 1, 1868, this water right had to be delivered by way of a natural stream known as Jesse creek. This description [Mr. Blackadar’s suggested point of diversion] refers to the point where the water right is diverted from Jesse Creek.”

75-113A, 75-113B and 75-113C – point of diversion: “With a priority date of 04/01/1894, this water right had to be delivered by way of a natural stream known as Jesse creek. This description [Mr. Blackadar’s suggested point of diversion] refers to the point where the water right is diverted from Jesse Creek.”

75-14124 – point of diversion: “With a priority date of May 1, 1884, this water right had to be delivered by way of a natural stream known as Jesse creek. This description [Mr. Blackadar’s suggested point of diversion] refers to the point where the water right is diverted from Jesse Creek.”

Splits

On September 29, 2008, IDWR filed *Notices of Completed Administrative Proceedings* splitting 75-20 (75-14533 and 75-14534) and 75-24 (75-14535 and 75-14536).

Supplemental Director’s Report

IDWR filed its *Supplemental Director’s Report* on March 2, 2009, “setting forth the basis for the Department’s recommendation for the source and point of diversion elements of these water rights.”² In its summary of the contested issues, IDWR wrote:

[T]he Department recommended the source and point of diversion elements for these rights according to common nomenclature. The recommendations are consistent with the Jesse Creek channel flowing eastward through town after its confluence with Pollard Canyon Creek, and Farmer’s Ditch diverging from Jesse Creek just downstream of this confluence.

...

For the majority of these rights, Department recommended the source as Jesse Creek and the points of diversion as the location where Farmer’s Ditch intersect[s] Jesse Creek [footnotes omitted].

² In its *Report*, IDWR reviewed 19 subcases, including 2 claims split into 4 new subcases. The *Report* also included 3 subcases (75-11614, 75-14063 and 75-14267) originally identified by IDWR as uncontested overlapping claims but which are now subject to late *Objections* filed by Mr. Blackadar on July 21, 2009 – 5 days after the trial held on July 16 / 17, 2009. A hearing on Mr. Blackadar’s motion to file late objections in those three beneficial use claims will be scheduled in due course.

...
Robert Blackadar disagrees with the way the source and points of diversion are described by the Department. Mr. Blackadar asserts that Farmer's Ditch is actually the historical conveyance of Jesse Creek and the channel running eastward through town is Pollard Canyon Creek.

...
Mr. Blackadar claims because Farmer's Ditch is not really a ditch but the natural channel of Jesse Creek, the points of diversion for the water rights should be described further down the channel, where the water right holders divert from Farmer's Ditch.

The Department respectfully disagrees with Mr. Blackadar and maintains the Farmer's Ditch should not be recharacterized as the natural channel of Jesse Creek. Not only are the channel's characteristics those of a ditch, but the channel has long been maintained and managed as a ditch

Report, at 2-4.³

IDWR concluded by stating: "There is significant evidence Pollard Canyon Creek is a natural tributary of Jesse Creek, and the Farmer's Ditch is diverted from the Jesse Creek Channel." *Report*, at 9. IDWR attached to the *Report* an 1892 BLM plat map (Attachment A) and a 1909 map (Attachment B) showing "Jessie Creek" or "N.F. Jessie Creek" flowing due east after it meets with "Middle Fork."

However, the *Report* noted that in these subcases, there is confusion because some maps as far back as 1919 suggest the Farmer's Ditch is actually Jesse Creek. For that reason, IDWR suggested that "the best understanding of the system comes from an examination of the actual physical topography and a discussion of historic water delivery." *Report*, at 6.

The *Report* stated IDWR Senior Water Resource Agent Monica Van Bussum visited the confluence of Jesse Creek and Pollard Canyon Creek multiple times and confirmed the two creeks commingle.

At this confluence, a deep channel continues down-gradient eastward and runs through town and another channel turns left (north) and runs along the same elevation. This second channel is what is commonly known as Farmer's Ditch.

...
The deep channel running through town bears the hallmarks of [a natural watercourse]. The second channel (Farmer's Ditch) appears to have been created to carry water, is manipulated by a diversion structure and does not reflect a natural channel or the topography of the area. Stream channels rarely make left turns when there is a down-gradient path available. It is the opinion of Agent Van Bussum that Farmer's Ditch has very few characteristics of a natural channel.

³ See IDWR Exhibit 2 attached for illustrative purposes. For the convenience of readers, this *Report* will use the names Jesse Creek, Farmer's Ditch and Pollard Canyon Creek as they were recommended by IDWR.

...
Jesse Creek has a history, as told by water masters who have served in the last 25 years, of water delivery as a single system with Pollard Canyon Creek tributary to Jesse Creek and the Jesse Creek channel running eastward through town to join the Salmon River in downtown Salmon. All three water masters indicate the channel running northward has historically been administered as Farmer's Ditch, and not a natural channel.

...
The water users on Farmer's Ditch and the past water masters of Water District 75-A have long considered the diversion structure in Jesse Creek near the confluence as the point of diversion for these water rights and Farmer's Ditch as the ditch that gets the water to their property. The Department sees no reason to change this.

Report, at 6-8.

Trial

A trial on Mr. Blackadar's *Objections* was held on July 16-17, 2009, in Salmon, Idaho. Mr. Blackadar appeared *pro se*, along with Matt McKeegan; Colleen Benedict appeared *pro se*; Joseph A. Proksch appeared *pro se*; and Garrick L. Baxter appeared for IDWR, along with Monica Van Bussum and Suzy Cooley-Denney.

IDWR

At trial, Ms. Van Bussum was designated as an expert in stream channel assessment and water rights. She confirmed the contents of IDWR's *Supplemental Director's Report* – she was its principal author. She said the key considerations in evaluating IDWR's recommended sources and points of diversion here are topography, stream channels and how the water rights have been historically administered. She considered such factors as the cross sectional shape of the channels, stream bed composition, human activity at the point of diversion and down gradient, vegetation around the stream channels and the presence of fish and bugs. She recalled walking the areas above and below the diversion works on Jesse Creek and from the diversion works down the Farmer's Ditch.

Ms. Van Bussum concluded from all those factors that the Farmer's Ditch has all the characteristics of a man-made channel. If there were no concrete diversion works and significant berming at the point of diversion, the water of Pollard Canyon Creek and Jesse Creek would flow east down the Jesse Creek Channel through town and not north in the Farmer's Ditch.

IDWR called Mickey Verbeck, the Salmon public works superintendent from 1978 through the present. He was also Water District 75-A water master from 1994 till 1999. He agreed with IDWR's description of the point of diversion for Farmer's Ditch as the diversion structure in Jesse Creek and said water has not been regulated down the Farmer's Ditch, only at the point of diversion from Jesse Creek.

IDWR also called Harry Shanafelt, Salmon's assistant public works superintendent and Water District 75-A water master from 2000 till 2008. He, too, never administered water below the Farmer's Ditch point of diversion from Jesse Creek. He agreed water would flow down Jesse Creek through town if there were no diversion structure.

Finally, IDWR called Paul Stokes, Salmon's water treatment plant manager 1993 through present. He has been familiar with the Farmer's Ditch point of diversion since 1967, because the water treatment plant is nearby. He agreed there has been no administration of water down the Farmer's Ditch.

Blackadar

At various points during Mr. Blackadar's cross-examination of IDWR's witnesses, he noted that the water masters who testified only go back 14 years. His main concern is who is responsible for the Farmer's Ditch. If it is indeed a ditch, the users are solely responsible. But if it is a natural stream channel, the city and/or the state are responsible and water rights must be administered along the channel.

Mr. Blackadar called Richard Hadlock, a resident of Salmon, to testify. Mr. Hadlock recalled spring flooding of his home in 1991 or 1992, caused by French Creek, the creek that flows through town. He always thought what IDWR calls the Farmer's Ditch is Jesse Creek.

Mr. Blackadar offered 21 plats and maps dated as early as 1892 and as recent as 2006, with various depictions of: 1) Jessie Creek (Left and Right Forks) or Jesse Creek (Left Hand and Right Hand Forks) converging and flowing east; 2) Jesse Creek flowing north and *not* converging with Pollard Canyon Creek flowing east; 3) Jessie Creek flowing east through town and *not* converging with North Branch Jessie Creek flowing north; 4) Pollard Canyon (Jesse Creek) flowing east through town; 5) Jesse Creek flowing north and *not* converging with Pollard Creek flowing east through town. Additionally, Mr. Blackadar offered an 1882 "Indenture" referring to "Jesse or Bridge creek." Blackadar Exhibit 6.

Mr. Blackadar also offered the “Findings of Fact and Conclusions of Law,” dated September 30, 1893, from the Lemhi County District Court case *Andrews v. Martin*. Blackadar Exhibit 1. In that document, Judge D. W. Standrod wrote:

About the year 1870 J.S. Crane and the said Anthony Hornbach constructed a ditch from the left hand fork of Jesse creek by means of which they conveyed water to and upon lands then owned by them, lying along Jesse creek for the purpose of irrigating agricultural crops growing thereon. . . .⁴

In the interest of full disclosure, Mr. Blackadar offered the 1981 “Jessie Creek Acres” subdivision plat recorded with the Lemhi County Recorder. Blackadar Exhibit 18. The attached map shows Pollard joining Jessie Creek just above the subdivision and then flowing east through town.⁵

A final written document Mr. Blackadar offered was the 1961 “Agreement” between the Aldouses and the City of Salmon wherein the Aldouses agreed to exchange with the City 200 inches of their decreed 1867, 1868 and 1894 water rights from Jessie Creek. Blackadar Exhibit 17. In consideration for the water, the City agreed to install and maintain a pump station and irrigation system to deliver 150 inches of water to the Aldouses’ ranch lands “near Salmon.” The interesting portion of the Agreement is how the pumped water was to be delivered, suggesting it would be the Farmer’s Ditch and not Jesse Creek:

It is further understood and agreed that the water to be pumped in accordance with this agreement shall come from the **large ditch or canal** just North of Salmon, Idaho, in which the parties of the first part [Aldouses] have an interest and said interest to the extent of 200 inches in said ditch or canal is hereby assigned to the party of the second part [City] during the term of this agreement, and said party of the second part shall pay its portion of the ditch or canal maintenance on the basis of said 200 inches, or namely 4 cubic feet of water per second [emphasis added].

At the close of his case, Mr. Blackadar offered the testimony of Scott R. Ziegler, water master of District 75-A in the early 1980s, from 1983 to 1987. He termed the conveyance heading north and east from the Pollard Headgate “Jesse Creek.” The Pollard Headgate is where

⁴ From the record, it is not clear whether this ditch is the Farmer’s Ditch, a ditch connecting Pollard Canyon Creek with Jesse Creek or some other ditch. Also, it is uncertain whether the land lies along the Farmer’s Ditch or Jesse Creek.

⁵ It must be noted that Mr. Blackadar was remarkably candid in submitting evidence both in support of his positions and in opposition. The Special Master appreciates his candor in helping prepare a complete factual record. Near the end of the trial, Mr. Blackadar volunteered that he incurred significant expenses preparing for trial. It was abundantly clear that his passion for history, in addition to his personal interests, led him to thoroughly investigate historical confusion over Jesse Creek and the Farmer’s Ditch.

water from Chipps Creek, Pollard Canyon and Jesse Creek converge. As water master, he delivered water from the confluence along what some call the Farmer's Canal or Jesse Ditch. The "Lower Ditch" or "Blackadar Ditch" diverts water from Jesse Creek about 100 yards downstream from the confluence. In 1987, the District 75-A water master and administration changed. There were plenty unauthorized withdrawals of water from Jesse Creek – people stealing water.

Site Visit

On the second day of trial, just before closing arguments, Mr. Blackadar, IDWR's representatives and the Special Master visited the area above and below the confluence of Pollard Canyon Creek and Jesse Creek as well as several sites along the Farmer's Ditch. The site visit lasted 1½ hours.

Conclusions of Law

The weight of evidence is that IDWR correctly recommended the sources and points of diversion for the claims. Ms. Van Bussum, an expert in stream channel assessment and water rights with IDWR, concluded that Pollard Canyon Creek is a tributary of Jesse Creek which flows east through town. She also concluded that the Farmer's Ditch diverts from Jesse Creek downstream from the confluence of Pollard Canyon Creek and Jesse Creek. IDWR Exhibit 2 correctly depicts the facts on the ground.

Ms. Van Bussum found that from the actual physical topography and history of water delivery, the characteristics of Farmer's Ditch are those of a ditch and not a natural channel. The Special Master agrees with Ms. Van Bussum's conclusions. Extensive work has been done over the years to divert water from Jesse Creek northward into the Farmer's Ditch toward irrigated lands and the Farmer's Ditch has historically been maintained and managed as a ditch. Without this diversion, most of the water of Jesse Creek would flow eastward through town.

The site visit and a 2009 aerial photograph (IDWR Exhibit 2 attached) confirm IDWR's recommendations. Water from Pollard Canyon Creek forms braided channels just before it converges with Jesse Creek indicating a slight bend to the right (east) where its water and Jesse Creek water would flow if unimpeded. Admittedly, under high flow conditions, some water might flow northward from the confluence even without the diversion works. But absent that

circumstance, the diversion works turn nearly all the water of Jesse Creek into the Farmer's Ditch often leaving only a minimal flow down the natural channel.

The various maps depicting Jesse Creek and the differing understandings of just which channel is Jesse Creek clearly demonstrate confusion over the past 117 years. Perhaps that could be cleared up if there were better records of the significant human-caused "reconstruction" in the area, but the record is lacking. All we are left with are the actual physical topography and history of water delivery.

We can speculate whether the ditch Judge Standrod mentioned in 1893 was in fact what IDWR calls the Farmer's Ditch or perhaps like others, the Judge may have thought of water diverted from Jesse Creek and flowing in a ditch as Jesse Creek. Even as late as 1961, the Aldouses and the City of Salmon were less than clear of any distinction between Jesse Creek and the Farmer's Ditch.

Obviously, it would have been helpful if there was some evidence of when the Farmer's Ditch was built or when water users and government agencies first used the name. But we are left with an incomplete record and must draw inferences as best we can. And those inferences support IDWR's recommendations of sources and points of diversion in these claims.

The claimants are entitled to partial decrees for water rights as recommended by IDWR at trial (IDWR Exhibit 1) and as described in the attached *Special Master Recommendations for Partial Decrees for the following Water Rights*:

75-14	Colleen & Ralph Benedict / Hallie & Joesph Proksch
75-19D	Lois Blackadar
75-19H	Robert L. Blackadar
75-113A	Lois Blackadar
75-113B	Sandra & Richard Bills
75-113C	Robert L. Blackadar
75-10475	Silver Peak Ranch Trust
75-14123	Angelia & James Brownlee
75-14124	Ilona & Leonard Skunberg
75-14125	Tamara & Gary Power
75-14533	Margaret W. Gaver
75-14534	Jami Gaver
75-14535	Margaret W. Gaver
75-14536	Jami Gaver

Recommendation

THEREFORE, IT IS RECOMMENDED that claims 75-20 and 75-24 be **disallowed** because the claims have been split.

DATED September 22, 2009.

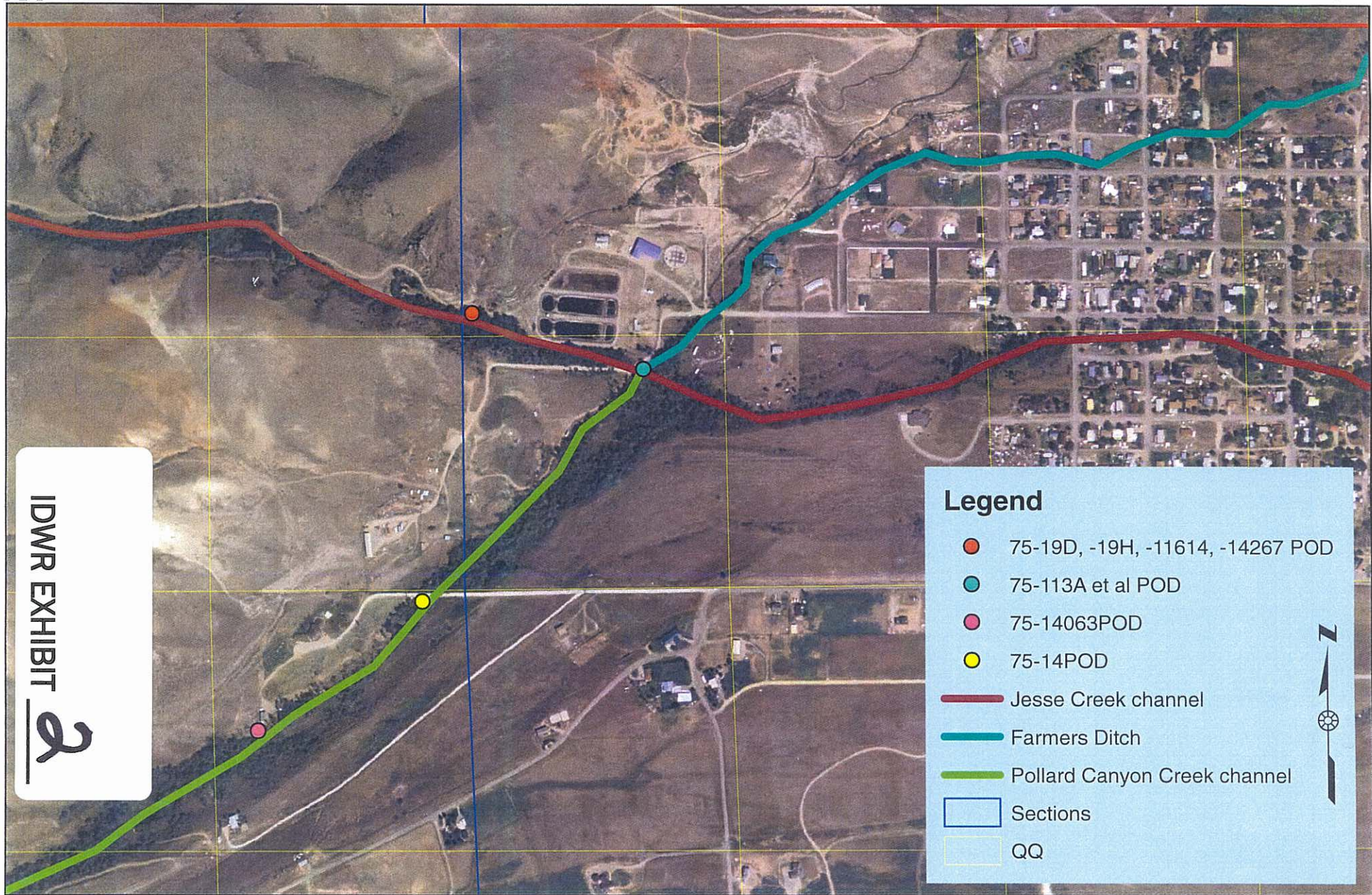


TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

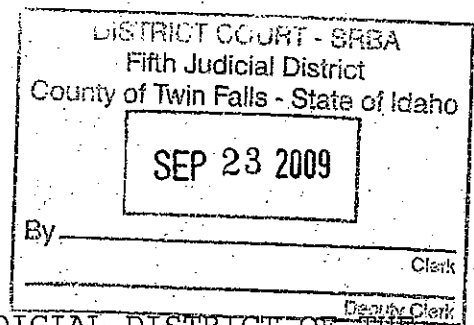


Idaho Department of Water Resources

Overview of Jesse Creek and Pollard Canyon Creek confluence



Prepared by Monica Van Bussum
On July 13, 2009
2004 Aerial Photography



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

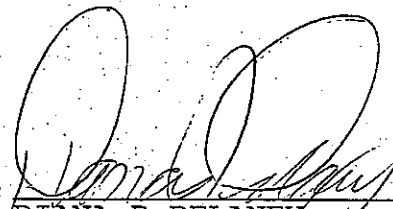
Water Right(s): 75-00014
(SEE ATTACHED EXHIBIT A)

On September 23, 2009, Special Master TERRENCE A. DOLAN 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 September 23, 2009.

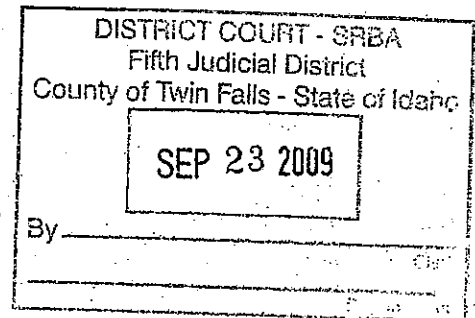


DIANA R DELANEY
Deputy Clerk

Exhibit A

Subcase Nos:

75-00014
75-00019D
75-00019H
75-00020
75-00024
75-00113A
75-00113B
75-00113C
75-10475
75-14123
75-14124
75-14125
75-14533
75-14534
75-14535
75-14536



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): 75-00014
(SEE ATTACHED EXHIBIT A)

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 September 23, 2009, with sufficient first-class postage prepaid to the following:

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

JOE BEEMAN

Represented by:

JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702
Phone: 208-331-0950

CERTIFICATE OF MAILING

PAGE 1
09/22/09

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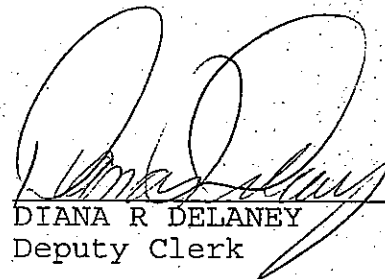
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DIANA R DELANEY
Deputy Clerk

Exhibit A

Subcase Nos:

75-00014
75-00019D
75-00019H
75-00020
75-00024
75-00113A
75-00113B
75-00113C
75-10475
75-14123
75-14124
75-14125
75-14533
75-14534
75-14535
75-14536