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DEPARTMENT OF
WATER RESOURCES

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Via Hand Delivery

November 9, 2006

Mr. Karl J. Dreher
Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Water Right Nos. 29-2284 and 29-2301

Dear Mr. Dreher:

I represent a party that is negotiating to acquire a financial interest in Southeast Idaho Energy, LLC ("SIE"), a potential purchaser of the above-captioned water rights. Per my prior discussions with your legal counsel, Phil Rassier, I am writing to seek written confirmation from the Department as to the law governing the use of these water rights.

For many years, these rights were used by their current owner, FMC Corp., LLC ("FMC"), and its predecessors for an industrial purpose (namely, the operation by FMC of an elemental phosphorous plant in Pocatello). The water rights were previously licensed, and partial decrees were issued on March 22, 2004.

The two water rights authorize diversion of 8.5 cfs in total, which may be used continuously year round. Accordingly, the annual volume is listed as 6,153.8 acre-feet (and thus is not really a limitation at all).

The FMC plant has been closed since 2001. Since it was closed, the water rights have been placed in the Idaho Water Supply Bank and have been leased to others on an annual lease. SIE now desires to purchase a portion of the plant site and the above-referenced water rights in their entirety.

SIE intends to utilize the water for an industrial purpose in connection with SIE's operation of coal gasification facilities to be constructed on the former FMC site to produce

fertilizer and transportation products. Under current plans, SIE will use the water within the same place of use and from the same points of diversion as described on the partial decrees. Due to the new industrial use, however, there may be changes in the pattern of water diversions, as well as effects on consumptive use and return flow.

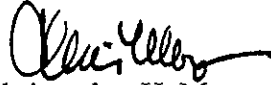
By this letter I request confirmation of the following:

1. The change from one type of manufacturing activity to another does not constitute a change in the nature of use, so long as both the old and new uses are "industrial." The fact that the prior specific industrial operation is described in the permit approvals and proofs of beneficial use does not change this. Accordingly, SIE would not be required to apply for a change (or transfer) of the water rights under Idaho Code § 42-222.
2. The water rights on their face do not specify any particular return flow or limit on consumptive use. Consequently, SIE (or its successor) would be allowed to modify the pattern of diversion and/or return flow (compared to the pattern in effect under FMC's operation) and could consume up to 100 percent of the authorized diversion in beneficial use of the water right. This would be true even if an element of the water right (other than the nature of use) were changed and the water rights were subjected to a transfer proceeding under Idaho Code § 42-222.
3. At this time, no change in any element of the water rights is contemplated. In the event, however, that it became necessary to add a new point of diversion or otherwise change some element of the water rights, we understand that the change would need to be approved by the Department pursuant to Idaho Code § 42-222.
4. In the event of such a change (not involving a change in the nature of use), the Department would not consider prior diversion patterns, return flow, consumptive use, or actual historical use or limit the water rights based on such considerations. Instead, the holder would be entitled to use the full diversion quantity on the face of the partial decree (so long as the nature of use is not changed).
5. Under no circumstance would the Department consider any allegation of partial or total forfeiture or abandonment based on non-use prior to the issuance of the partial decrees. (This is not intended to limit the authority of the Department to consider actual historic beneficial use in the event of a change in nature of use.)
6. Likewise, no issue or allegation regarding any condition, error, or deficiency in connection with any prior transfer or other action of the Department predating the 2004 partial decrees would be entertained. In other words, there is no need for the purchaser to conduct due diligence on the water with respect to the history of the water right prior to the partial decree.

Mr. Karl J. Dreher
November 9, 2006
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I thank you and your staff for your willingness to provide this critical guidance.

Sincerely,



Christopher H. Meyer

Encl: Copies of the IDWR Water Right Reports and Partial Decrees

cc: Phillip J. Rassier, IDWR, Office of the Attorney General
Jeff Peppersack, IDWR
Southeast Idaho Energy, LLC
John K. Simpson, Barker, Rosholt & Simpson, counsel for FMC
Client

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Mar-16-2004

[Close](#)IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

11/09/2006

WATER RIGHT NO. 29-2284

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	FMC CORP LLC PO BOX 4111 POCATELLO, ID 83205 (208)236-8236
Original Owner	FMC CORP LLC PO BOX 4111 POCATELLO, ID 83205 (208)236-8236

Priority Date: 03/02/1949

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
INDUSTRIAL	01/01	12/31	4.5 CFS	3257.9 AFA
Total Diversion			4.5 CFS	

Location of Point(s) of Diversion:

GROUND WATER	SESESW	Sec. 12	Township 06S	Range 33E	POWER County
GROUND WATER	NENWNW	Sec. 13	Township 06S	Range 33E	POWER County

Place(s) of use:

Place of Use Legal Description: INDUSTRIAL POWER County

<u>Township</u>	<u>Range</u>	<u>Section</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>	<u>Lot</u>	<u>Tract</u>	<u>Acres</u>
06S	33E	12		SWSW			SESW							
				SWSE			SESE							
		13		NENE			NWNE			SWNE			SENE	
				NENW			NWNW			SWNW			SENW	
				NESE			NWSE							

Conditions of Approval:

1. C18

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.
2. F05

RIGHT NO. 29-2301 IS ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED IN NENWNW, 13-06S-33E.

Dates:

Licensed Date:

Decreed Date: 03/22/2004

Permit Proof Due Date:

Permit Proof Made Date:

Permit Approved Date:

Permit Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date:

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

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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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No 39576)
) Water Right 29-02301

NAME AND ADDRESS: F M C CORP
PO BOX 4111
POCATELLO, ID 83202

SOURCE: GROUND WATER

QUANTITY: 4.00 CFS
2895 90 AFY

PRIORITY DATE: 04/24/1951

POINT OF DIVERSION: T06S R33E S13 NWNWNE Within Power County
NWNWNE

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Industrial	01-01 TO 12-31	4.00 CFS 2895 90 AFY

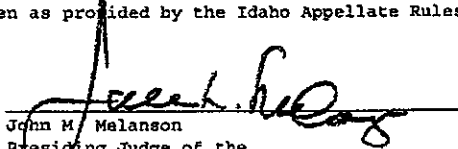
PLACE OF USE:	Industrial		Within Power County
	T06S R33E S12	SWSW	SESW
		SWSE	SESE
	S13	NENE	NWNE
		SWNE	SENE
		NENW	NWNW
		SNNW	SENN
		NESE	NWSE

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. Malanson
Presiding Judge of the
Snake River Basin Adjudication

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

11/09/2006

WATER RIGHT NO. 29-2301

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	FMC CORP LLC PO BOX 4111 POCATELLO, ID 83205 (208)236-8236
Original Owner	FMC CORP LLC PO BOX 4111 POCATELLO, ID 83205 (208)236-8236
Original Owner	ASTARIS IDAHO LLC 10300 OLIVE BLVD ST LOUIS, MO 63166 (208)236-8658

Priority Date: 04/24/1951

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
INDUSTRIAL	01/01	12/31	4 CFS	2895.9 AFA
Total Diversion			4 CFS	

Location of Point(s) of Diversion:

GROUND WATER|NWNWNE|Sec. 13|Township 06S|Range 33E|POWER County
 GROUND WATER|NWNWNW|Sec. 13|Township 06S|Range 33E|POWER County

Place(s) of use:

Place of Use Legal Description: INDUSTRIAL POWER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
06S	33E	12		SWSW			SESW							
				SWSE			SESE							
		13		NENE			NWNE			SWNE			SENE	
				NENW			NWNW			SWNW			SENE	
				NESE			NWSE							

Conditions of Approval:

1. F05 RIGHT NO. 29-2284 IS ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED IN NENWNW, 13-06S-33E.
 This partial decree is subject to such general provisions necessary for the definition of the
2. C18 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.

Dates:

Licensed Date:

Decreed Date: 03/22/2004

Permit Proof Due Date:

Permit Proof Made Date:

Permit Approved Date:

Permit Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date:

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Civil Case Number:
Old Case Number:
Decree Plaintiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

[Close](#)