BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT NOS. 29-8162 AND 29-8164 IN THE NAME OF CRAIG LYON AND VICKI LYON (Previously in the name of Lazy V Ranch)	)))))	**FINAL ORDER**

Lazy V Ranch filed two applications to appropriate water with the Idaho Department of Water Resources ("IDWR"), numbered as 29-8162 and 29-8164. Lazy V Ranch is not a corporation as represented on the applications but is a business operated by Thayne and Karen Vargason. The applicants will hereafter be referred to as ("Vargasons"). The applications were protested by George Katsilometes ("Katsilometes"), Evelee Hill-Rush ("Rush"), John Mehlhaff ("Mehlhaff"), and Duke Walden ("Walden"). A hearing was conducted on October 23 - 24, 1997, regarding the protests. The hearing officer issued a recommended order on May 14, 1997, approving the applications with conditions.

Vargasons and Katsilometes filed petitions for reconsideration and the petitions were denied by an order dated July 1, 1998.

Vargasons and Katsilometes filed timely exceptions to the recommended order

On July 24, 2008, IDWR received a document titled *Assignment of Application for Permit.* The assignment, executed by Thayne and Karen Vargason, principals in Lazy V. Ranch, conveyed applications nos. 29-8162 and 29-8164 to Craig and Vicki Lyon ("Lyon" or "Lyons").

ISSUES RAISED BY KATSILOMETES

Katsilometes raised several issues from the recommended order. The issues raised by Katsilometes will be listed as margin headings below and will be discussed individually.

The water applied for is not "wastewater."

The hearing officer recognized a disagreement about whether the water discharging from the Lava Hot Springs Foundation's delivery system through a bleeder valve with air is necessary

for operation of the system. IDWR employees who investigated the system stated that the system design was consistent with acceptable engineering practices. Although the use of water does not employ the most efficient method of application of water to a beneficial use, the diversion and application of water is reasonable.

Even though "bleeding" water is an acceptable method of operation, the applicant did not quantify how much water must discharge from the bleeder valve to operate the system delivering water for the Lava Hot Springs Foundation ("Foundation") uses. The applicant or the Foundation must establish the quantity of water that is required to discharge from the bleeder valve to operate the Foundation's system. Permit no. 29-8162 shall be limited to the rate of flow needed to operate the bleeder valve.

"Waste" of water is prohibited.

Water diverted and applied in a reasonable manner may have a component that is not directly used for the primary purpose but may have some secondary worth in accomplishing the primary purpose. If this component of the total water delivered is not consumed, IDWR has traditionally classified the water as "wastewater." Application no. 29-8162 proposes diversion of water that fits this definition of wastewater.

There is no factual basis for a finding of fact that the owners of the condominiums objected to a pipeline crossing condominium property.

Conflicting evidence was presented at the hearing about whether the operator of the condominiums objected to a pipeline crossing the condominium property. Charles Sudweeks, engineer for the Foundation, and Bob Meline, manager for the Foundation, both testified that the operator of the condominiums objected. The hearing officer chose to believe the testimony of Sudweeks and Meline. Even if the assertion by Katsilometes is true, it would not change the decision. The Foundation could have contracted with Vargasons/Lyons even if the operator of the condominiums had not objected.

Perforation of well casing.

Katsilometes argues that findings about perforations in the well casings were erroneous. Findings about casing perforations were irrelevant and were deleted from this final decision.

The recommended decision attempts to adjudicate the water rights of Katsilometes.

The water rights owned by Katsilometes are not being adjudicated by this decision. Some analysis of the development of the water rights is necessary for this decision, however.

There are no facts in the record substantiating findings about the hydrologic relationship of the protestant's diversions and the Foundation's diversion.

Katsilometes submitted well drilling reports and testified about changes in water temperatures and water levels. The protestants testified about their diversion locations, changes in water temperature, and changes in their ability to divert water. The protestants also attempted to associate the changes to activities of the Foundation. The hearing officer analyzed all the testimony of the protestants and testimony about the Foundation's activities and found that diversion of water by the Foundation is not injuring the protestants. In an administrative hearing, IDWR should apply its technical expertise to the evidence in the record. This decision affirms the hearing officer's findings.

Application for permit nos. 29-8162 and 29-8164 should be denied because the applicant failed to satisfy the criteria of Idaho Code § 42-203A.

In considering an application to appropriate water, IDWR must determine whether the proposed diversion and use will reduce the quantity of water for existing water rights, whether the water supply is sufficient for the purpose sought, whether the application is filed in good faith or filed for delay or speculation, whether the applicant has sufficient financial resources to complete the project, whether the proposed use of water will conflict with the local public interest, and whether the proposed use is contrary to conservation of water resources in the state of Idaho.

Issues were raised regarding the adequacy of information to show the amount of water required for fish propagation, the sizing of the fishery facilities, the amount of water available from the source, and the adequacy of contracts establishing easements for delivery of the water. Questions about the amount of water required for the proposed fish propagation, the size of the fishery facilities, and the amount of water available from the source all relate to the sufficiency of the water supply. An applicant should establish the flow rate from the source that can be available for diversion. This was established by Charles Sudweeks when he testified about his design of the Foundation system to divert all of the available water.

The only evidence in the record regarding the amount of water required for fish propagation and the design of the fish rearing facilities, other than showing the successful operation using flows passed at the bleeder valve by the Foundation, was information taken from a trout rearing graph provided by IDWR. Keith Wilson testified at the hearing that the graph was prepared as a guideline for the amount of the water needed to rear trout not tilapia. Without additional information, the linkage between the quantity of water available for appropriation and the amount needed was not established.

The conclusions of law of the recommended order and this final order discuss the statutes that created the Foundation and the implied statements that the low temperature geothermal water arising and flowing on Foundation property be used for pleasurable or therapeutic human uses.

The Foundation has traditionally used the low temperature geothermal water either directly or indirectly for these public purposes. Direct diversion and use of the low temperature geothermal water arising or flowing on Foundation property by a third party for rearing warm water fish is not in the local public interest. Nevertheless, after the Foundation has beneficially used the water (including the water passed through the bleeder valve), a third party can appropriate the low temperature geothermal water on Foundation property for fish propagation or other uses not associated with the public enjoyment of the low geothermal water.

The recommended order issued by the hearing officer should be amended to reject application for permit no. 29-8164 because the application is not in the public interest and the sufficiency of the water supply for the purpose sought was not proven. Approval of application no. 29-8162 is affirmed because Vargasons showed that tilapia could be raised with the current system in place.

ISSUES RAISED BY VARGASONS

Vargasons/Lyons contest a condition requiring written consent from the Foundation for the development of low temperature geothermal water prior to development or diversion of water under the two permits approved. Vargasons/Lyons argue that the condition creates law in excess of authority of IDWR, rejects the history of the agreements between the Foundation and Vargasons/ Lyons, interferes with the rights of third parties, dictates the manner in which the Foundation is to discharge its authority, and improperly delegates authority of IDWR to another branch of government. The concern is no longer at issue because this decision rejects application for permit no. 29-8164, and express approval by the Foundation is no longer required.

FINDINGS OF FACT

1. Applications for permit nos. 29-8162 and 29-8164 propose diversion of low temperature geothermal water arising or artificially captured on lands owned by the State of Idaho and administered by the Lava Hot Springs Foundation ("Foundation"). Vargasons/Lyons own 17 acres of property adjoining the west side of the Foundation property.

2. Application for permit no. 29-8162 proposes the following:

Purpose:	Diversion to Storage Storage for Fish Propagation
Flow Rate:	3.0 cubic feet per second ("cfs")
Storage Volume:	0.5 acre feet
Period of Use:	January 1 through December 31

Proposed Priority:	November 20, 1995
Point of Diversion:	Lot 7 (NWSE[1]), Section 21, T9S, R38E, B.M. (Two diversions)
Place of Use:	Lot 6 (NESW), Section 21, T9S, R38E, B.M.
Source:	Wastewater

3. Karen Vargason testified that application for permit no. 29-8162 proposes two points of diversion after low temperature geothermal water is beneficially used by the Foundation. The specific description of the points of diversion will be discussed later in the decision.

4. Application for permit no. 29-8164 proposes the following:

Purpose:	Diversion to Storage Storage for Fish Propagation
Flow Rate:	7.0 cfs
Storage Volume:	0.5 acre feet[2]
Period of Use:	January 1 through December 31
Proposed Priority:	January 5, 1996
Point of Diversion:	Lot 8 (SENESE), Section 21, T9S, R38E, B.M.
Place of Use:	Lot 6 (NESW), Section 21, T9S, R38E, B.M.
Source:	Spring located on Foundation property

5. The Portneuf River flows through the center of the City of Lava Hot Springs. In general, the private property of the town site is located on the south side of the river. The State

1 In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be Lot 7 (NW1/4SE1/4), Section 21, Township 9 South, Range 38 East, Boise Meridian.

2 This is the same storage volume included in application no. 29-8162.

of Idaho owns several hundred acres of land located immediately north of the City of Lava Hot Springs.

6. The Idaho Legislature created the Foundation by enacting Title 67, Chapter 44 of the Idaho Code. The Foundation is charged with the duty of managing the state lands in the vicinity of Lava Hot Springs and the unique low temperature geothermal water located thereon.

7. Protestants' exhibit K generally depicts the location of the state property, the City of Lava Hot Springs, and the properties owned by the protestants.

8. Since its creation, the Foundation has built and promoted the construction of public hot pools, a natatorium (assumed to be a swimming pool) that collapsed or was irreparably damaged during a flood event, and in later years, a swimming pool complex and some condominiums. The Foundation has contracted with concessionaires to operate businesses on the property of the Foundation. The condominiums are operated privately by a concessionaire through a lease arrangement.

9. The Foundation claimed water rights for the beneficial use of the low temperature geothermal water in the Snake River Basin Adjudication ("SRBA"). These water rights were decreed by the SRBA Court. Three decreed water rights authorize use of water by the Foundation for a commercial purpose: 29-4178 (2.03 cfs), 29-2283 (0.5 cfs), and 29-10219 (0.02 cfs), for a total flow of 2.55 cfs. Partial decrees for the Foundation's SRBA rights authorizing commercial purposes are attached as **Attachment A**. The Foundation holds water rights authorizing diversion of a total of 2.55 cfs from geothermal springs for commercial purposes.

10. In approximately 1990, the Foundation decided to improve the delivery of water to the swimming pool complex for heating the pool water and associated buildings, and initiated a reconstruction of its hot water delivery system. Prior to reconstruction, water in the pool and space in the associated buildings were heated with natural gas.

11. Water can be captured for delivery to the swimming pool complex from two sources on Foundation property. The first source of water discharges from the public bathing pools, located at the east side of the Foundation property. The second source of water is springs (or shallow underground flows) located south and west of the public bathing pools. The springs once supplied hot water to the natatorium.

12. The Foundation decided to construct a primary delivery system and an auxiliary system for back up that could also serve future expansion. The systems were designed so that water from the two sources would not commingle.

13. Two parallel water delivery systems were constructed alongside each other. The systems will be referred to as system no. 1 and system no. 2. The pumps, pump basins, and

pipelines of the systems will be assigned the same number as the system of which they are a component.

14. System no. 2 is the primary system for delivery of the Foundation's low temperature geothermal water and is designed to pump 780 gallons per minute ("gpm"), or 1.74 cfs.

15. System no. 1 is an auxiliary or back up system. Pump no. 1 was designed to divert approximately 1,200 gpm, or 2.67 cfs.

16. Together, the pumps were designed to divert 1,980 gpm, or 4.41 cfs. The engineer for the project, Charles Sudweeks ("Sudweeks"), testified that the pumps were designed to divert all of the available water.

17. Water from both sources is delivered to a single location in a divided structure referred to in the evidence as a cistern, a pump house, a collection box, and a well. For purposes of this decision, the structure will be referred to as the "main pump house."

18. The main pump house has two compartments. This decision will refer to the compartments as pump basin no. 1 and pump basin no. 2. Water is diverted from both sources continuously and delivered into pump basin nos. 1 and 2. The testimony and evidence refers to pumps in and pipelines extending from the compartments as pump nos. 1 and 2, and pipeline nos. 1 and 2, respectively.

19. During construction of the main pump house, the contractor excavated from five to ten feet below ground surface. A concrete floor was constructed in pump basin no. 1. The floor in pump basin no. 2 was not covered with concrete, but was left open after the excavation. Protestants allege that pumping of water from the excavated pump basins is drying up springs that once flowed on Foundation property and is also reducing temperatures and water levels in wells and springs from which the protestants divert water.

20. Sudweeks testified that the old natatorium site was cleared, and new pipelines were connected to the old pipelines that capture spring water and once supplied water to the natatorium. Water from the spring flows by gravity to pump basin no. 2. A ten horsepower pump and motor, referred to as pump no. 2, delivers water into pipeline no. 2.

21. Water flowing from the public bathing pools discharges into pump basin no. 1. A 20 horsepower pump and motor, referred to as pump no. 1, pumps water into pipeline no. 1.

22. Low temperature geothermal water must be lifted from the main pump house to reach the swimming pool complex. Sudweeks determined that water should be pumped from the main pump house uphill (approximately 400 horizontal feet and 30-40 vertical feet) in a

northwesterly direction to a point where the water would gravity flow downhill to the swimming pool complex (See applicant's exhibit no. 14).

23. Two twelve-inch diameter pipes exit the main pump house in a northwesterly direction (one from each pump basin) and ascend alongside each other to the apex discussed above. After reaching the apex, the pipelines descend parallel to each other in a westerly direction to a valve box (valve box no. 1).

24. Four valve boxes are spaced along the pipelines, and both pipelines intersect the valve boxes. The valve boxes were numbered during the hearing, and are identified on applicant's exhibit no. 14. The valve box numbers have no relationship to the system numbers.

25. Valve box no. 1 was built for possible future development. The valves in valve box no. 1 are not currently utilized for controlling water in the system.

26. A junction is constructed in pipeline nos. 1 and 2 in the second valve box (valve box no. 2). A single delivery pipeline, cross-connected to both pipeline nos. 1 and 2, was constructed south to the swimming pool complex. A bleeder valve was constructed in each cross connection. The bleeder valves can release air and water into pipeline no. 1 and pipeline no. 2 in a westerly direction. Parallel pipeline nos. 1 and 2 extend west from valve box no. 2 through two more unused valve boxes (valve box nos. 3 & 4) to the western boundary of the Foundation property. Pipelines constructed down gradient of valve box no. 4 will be referred to hereafter as the "pipeline extensions."

27. The initial plans of the Foundation, depicted on applicant's exhibit no. 14, proposed construction of the pipeline extensions along the western boundary of the Foundation property where the pipelines would discharge water to the Portneuf River. The pipeline extensions would have crossed the lands leased by the condominium concessionaire. When the contractor was in the field preparing for construction, the lessee of the condominium property objected to construction of the pipeline extensions across the leased property.

28. The contractor communicated the lessee's objection to the executive director of the Foundation, Robert Meline ("Meline").

29. The system reconstruction was planned for the spring of 1991, and completion was necessary before the swimming pool opened in May of 1991.

30. Meline felt that an extended dispute with the condominium concessionaire would unacceptably delay the construction and sought other options. He approached Thayne and Karen Vargason about constructing the pipeline extensions on the Vargason property that adjoins the west side of the Foundation property.

31. Vargasons agreed that the Foundation could construct its pipeline extensions on their property in exchange for the right to divert "excess water" from the Foundation's pipelines. Applicant's exhibit nos. 2 and 3 are copies of the documents underlying the agreement. Meline testified that he received consent for the agreement from three Foundation board members prior to signing the agreement. The pipeline extensions were constructed on Vargason's property. A pipeline to the Vargason property was tapped to line 2 in valve box no. 4 at the time of construction. Vargasons paid for the pipeline delivering water to their property. Valve box no. 4 is the location of one of two points of diversion proposed by application no. 29-8162.

32. Vargasons constructed a pond on their property to raise tilapia, a tropical fish that lives in warm water. Water from the bleeder valve was diverted to the pond. A research project, conducted by Shelley High School students, showed that young tilapia could be raised in the pond. Approximately 40,000 tilapia were reared in the pond.

33. The temperature of the water delivered to Vargason's pond is 102° F, and must be cooled to 84° F for rearing of tilapia. Vargasons constructed sprayers to aerate and cool the warm water to an acceptable temperature for the fish.

34. The Foundation's system operates automatically except on rare occasions. System no. 2 operates 24 hours a day year-round, except when occasional maintenance is necessary or a shut down occurs because of a power failure or mechanical failure. In most cases, pump no. 1 will operate when pump no. 2 is not operating.

35. To maintain the proper temperature in the Vargason pond, low temperature geothermal water must flow almost continuously into the pond. In March of 1996, the Foundation's automated delivery system malfunctioned. Flow of low temperature geothermal water to the Vargason pond ceased, and, as the water in the pond cooled, approximately 20,000 fish died.

36. Pump nos. 1 and 2 are variable speed pumps. The pumps operate at different speeds depending on demand at the swimming pool complex. Water is pumped to the apex of the pipelines. From the apex, water flows by gravity towards the swimming pool complex. At valve box no. 2, the bleeder valves previously discussed drain air out of the operating pipeline before the water flows toward the swimming pool complex. The purpose of the bleeder valve is to remove air that impedes the operation of the heat exchangers.

37. Some water discharges from the bleeder valves along with the air bled from the pipelines at the head of the delivery line to the swimming pool complex. Application no. 29-8162 proposes diversion of the water passing the bleeder valves for use in the fish pond.

38. The bleeder valves are operated manually. Sudweeks did not establish the quantity of water that must be passed with escaping air to properly operate the system.

39. Mehlhaff, one of the protestants, owns a company that designs heat exchangers. Mehlhaff testified that the system delivering water to the swimming pool complex does not require bleeder valves. Protestants also argue that, even if the bleeder valves are necessary, an excessive amount of water is being released to Vargasons.

40. Russell Rydalch, an engineer employed by IDWR, and Ken Baker, his supervisor, examined the Foundation's water delivery system. A report of the investigation was received into evidence as applicant's exhibit no. 4. Rydalch and Baker determined that there were several ways the system could have been constructed, but that the construction with bleeder valves was an acceptable method of constructing the system to insure proper delivery of water and operation of the heat exchangers.

41. Sudweeks' design is a sound engineering design that allows unsophisticated operation of the delivery system.

42. A large swimming pool, a small swimming pool, and several associated buildings are components of the swimming pool complex. The walls of the swimming pools are constructed with gunite. Gunite walls are susceptible to damage when the pools are drained. The walls could be damaged by pressure behind the pool walls caused by a high water table. The walls could also be damaged by frost. Sudweeks testified that the water required to supply the swimming pool complex varies depending on weather and human use of the swimming pools.

43. The pools are open for public access from the end of May through the first of September and are closed from September until May. The Foundation leaves water in the pools year-round to protect the pool structure from collapse or frost heaves, except during a short maintenance period. The Foundation buildings are heated year-round. The temperature of the water in the pools is at least 40° F through the winter months.

44. The swimming pools are annually drained in the fall for four or five days and cleaned. Although not clearly explained in the testimony, fall is probably the time when the ground water level in the soil behind the pool walls is the lowest and risk of wall failure because of hydrostatic back-pressure is reduced. During periods of maintenance, system no. 2 still supplies water to the buildings. In addition, water is used for cleaning and maintenance work.

45. Two heat exchangers heat water for the large swimming pool. One heat exchanger heats the water for the small swimming pool. Another heat exchanger heats the buildings of the Foundation near the pools. In addition, low temperature geothermal water is sometimes placed directly in the swimming pools.

46. Water used for heating purposes or discharging from the swimming pools is recollected in a pipeline that discharges to the Portneuf River as depicted in applicant's exhibit nos. 4 and 14. This discharge pipe is another point of diversion from which Vargasons propose

to divert wastewater under application for permit no. 29-8162, and will be referred to as the swimming pool complex outlet.

47. The delivery system for capture of wastewater discharges from the swimming pool complex outlet is not constructed.

48. Application no. 29-8164 proposes the diversion of water now flowing into pump basin no. 1 that is unused by the Foundation. Although the application lists the source of water as a spring, Karen Vargason testified that the application proposes diversion of water flowing from the public hot pools into the main pump house (pump basin no. 1) and spilling into the Portneuf River.

49. Karen Vargason testified that if application no. 29-8164 is approved, she will seek a right of way from the Foundation to construct a pipeline that will capture water flowing (not pumped) from pump basin no. 1 before it discharges into the Portneuf River. She also testified that, as an alternative, she might seek an agreement with the Foundation to deliver low temperature geothermal water to the proposed place of use through the existing Foundation delivery system. No specific plans for diversion and delivery of water were submitted into evidence.

50. Improvements for beneficial use of water from the bleeder valve have been constructed and are presently owned by Lyons. Karen Vargason testified that she could pay for the additional planned improvements from funds available in her savings account. Because Lyons purchased the proposed place of use after the hearing, there is no evidence of Lyons' financial resources to fund expansions of the present system.

51. Karen Vargason testified that 20,000 pounds of tilapia would be reared annually, equivalent to between 40,000 and 100,000 juvenile fish annually.

52. George Katsilometes (Katsilometes) owns a hotel on the south side of the Portneuf River in Lava Hot Springs southwest of the Foundation's main pump house. Katsilometes owns permit to appropriate water no. 29-7869, which authorizes the diversion of 0.50 cfs from ground water for commercial purposes. Katsilometes constructed an 80-foot deep low temperature geothermal well in 1990. A well driller's report of the well is one of the documents marked as protestants' exhibit J.

53. Katsilometes constructed a bathing pool for guests at the hotel. He installed a five horsepower pump in the well at a depth of 72 feet. The pump produced a flow of 80 gpm.

54. Katsilometes testified that he needs 40 gpm to maintain the pool at an optimum bathing temperature of approximately 108° F. Protestants' exhibit J contains a summary of a pump test conducted by Katsilometes' well driller, Rodney Hendricks (Hendricks). Hendricks measured a temperature of 122° F after pumping the well for 17.5 hours.

55. Katsilometes testified that water was pumped from his well 24 hours a day for the entire year.

56. From 1991 through 1995, water levels in Katsilometes' well declined. Katsilometes testified that the water temperature in his well also declined from 122° F to 104° F.

57. In 1995, Katsilometes constructed additional bathing pools. Because of the additional water demand, and the reduction in the water level and temperature in the first well, Katsilometes drilled another well in 1995. The well driller's report for the second well is also a part of protestants' exhibit J.

58. Between 1990 and 1995, Katsilometes installed a 7.5 horsepower pump in the first well, lowered the intake, and installed a pump in the second well. He increased his total pumping capacity from 80 gpm to between 200 and 230 gpm.

59. Katsilometes submitted evidence of a test of the two wells conducted in 1995 by an employee of Hendricks. A summary of the test is included as part of protestants' exhibit J.

60. Katsilometes testified that when water is being pumped from the second well, the water temperature in the first well rises. He speculated that pumping by the Foundation moved the hot water east of his property. He hypothesized that pumping from the second well draws some of the hot water back from the east to the first well. He testified that the 1995 test by Hendricks' employee supports this theory.

61. Katsilometes also testified that he observed an increase in water levels and water temperatures in his wells and that the water diverted from his wells "clears up" when the Foundation ceases pumping.

62. Katsilometes' property is located west and south of the Foundation's main pump house. He testified that the ground surface elevation at his property is lower than the ground surface elevation of the Foundation's property. He testified that the hottest well (the second well drilled in 1995) is approximately 130 yards away from the Foundation's main pump house. He testified that the first well (the well drilled in 1990) is located approximately 60 feet west of the second well.

63. Mehlhaff testified that he owns a domestic well located almost directly across the river from the Foundation's main pump house. Mehlhaff testified that he noticed a decline in both water temperature and pressure after the Foundation reconstructed its system. He testified that, during the summer months, he is now unable to divert low temperature geothermal water. His domestic well is approximately 20 feet deep and is a four (4) inch diameter well.

64. Walden is or was the proprietor of the River Side Inn. He testified that his water rights are some of the oldest water rights authorizing diversion of low temperature geothermal water. He testified that he diverts water both from a well and a low temperature geothermal spring. He derives approximately 80 percent of his water from the spring and 20 percent of his water from the well. Walden's spring arises in the Portneuf River just upstream and across the river from the Foundation's main pump house. A cistern is constructed in the river to prevent mixing of water from the spring with the river water. The temperature of the spring is 133° F; one of the warmer springs in the area. Walden's well is approximately 16 to 18 feet deep.

65. Walden testified that he observed significant fluctuations in water levels after the Foundation reconstructed its system. Nevertheless, he has at all times been able to divert water pursuant to his water rights.

66. Rush owns property located south and east of the Foundation's main pump house. Rush and Waldon divert water from the same spring. Rush is concerned about future declines in water levels of the spring from which she now diverts or proposes to divert water.

67. According to the well driller's reports of the Katsilometes wells contained in protestants' exhibit J, both the wells were completed to a depth of 80 feet. The wells were constructed entirely within a rock stratum that is permeable to surface water infiltration. The geothermal water is not separated from cold water flowing in the Portneuf River by an aquitard. The water in the Portneuf River interacts directly with warm geothermal water rising through underground fractures or faults.

68. If pumping by the Foundation causes declines in water levels and water temperature, the most dramatic declines would be noticed in the geothermal diversions nearest to the Foundation's main pump house. Although Walden testified he had noticed fluctuations of water levels in his spring, the changes were not significant compared to allegations by Katsilometes that the pump in his well would not pump from a depth of 72 feet because there was not enough water. Both Walden and Mehlhaff should observe significantly greater effect from pumping by the Foundation than Katsilometes.

69. Pumping by Katsilometes is probably drawing warm water away from its boundary with the cold water of the Portneuf River, and the declining water temperature is probably caused by intrusion of cold water into Katsilometes' wells.

70. Water levels are declining in the Mehlhaff well and the spring from which Walden and Rush divert water probably because of pumping by Katsilometes not because of pumping by the Foundation.

71. Diversion by the Foundation from its pump basins does not affect the availability of water to the protestants. Even if the Foundation pumping is affecting other water rights, the claimed priority dates of the Foundation's water rights are earlier in time than the priority dates

of the water rights held by the protestants, and, if the Foundation is not diverting more than it is beneficially using (including reasonable waste), diminishment of water available to the protestants resulting from diversion by the Foundation is not injury.

72. Diversion of water from the outlet of the swimming pool complex will not adversely affect other water users.

73. Diversion of excess water bled from the bleeder valves at the cross connection where water is delivered to the swimming pool complex will not adversely affect other water users.

74. Diversion of water now leaving the Foundation's hot pools, either through the existing pipeline, or through a new pipeline, will not adversely affect diversions by other water users.

75. Meline testified that the proposal by Vargasons to the Foundation to divert water not presently used by the Foundation had been discussed with the Foundation's board, but the board had tabled any action regarding the proposal pending the review and the decision regarding the protests to these applications. Meline testified that he was not prepared to state the position of the Foundation regarding the pending applications.

76. Karen Vargason testified that the quantities sought for appropriation were determined with the help of Keith Wilson, an employee of IDWR. Keith Wilson testified that the flow rate sought for appropriation was taken from an IDWR graph that relates flow rate to the number of fish proposed for rearing. The graph is intended for determining the flow rate necessary for trout rearing and propagation.

77. The information submitted by Keith Wilson was the only technical information submitted to IDWR related to the quantity of water necessary for fish rearing and the size of the rearing facilities.

CONCLUSION OF LAW

1. Idaho Code § 42-203A provides, in pertinent part, as follows:

> In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of

water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof regarding the criteria set forth in Idaho Code § 42-203A.

3. Title 67, Chapter 44 of the Idaho Code creates the Lava Hot Springs Foundation and grants the Foundation authority to manage the state property and the geothermal resources at Lava Hot Springs. The law does not describe a preference for one use of the geothermal water over another use. Furthermore, the law does not expressly charge the Foundation with any public interest responsibility.

4. The traditional uses of low temperature geothermal waters by the Foundation have been for bathing and heating. Idaho Code § 67-4404 refers to "hot springs, bathing facilities, and sanitarium and hospital . . ." and implies that the intended use is for some human therapeutic activity. Idaho Code § 67-4405 and § 67-4408 refer to "bathing facilities, pleasure resort, hospital or sanitarium. . . ."

5. Idaho Code § 67-4402 states that the Foundation has the authority to lease property under its control "not used or needed by the Foundation . . .."

6. The statutory charge to the Foundation to manage water on the lands it controls and the statutory language discussing traditional uses of the water creates an oversight authority in the Foundation to determine the best use of the water for the public good. IDWR should not approve an application filed by someone other than the Foundation for diversion of low temperature geothermal water directly from sources located on Foundation property for fish propagation. Application no. 29-8164 is not in the public interest.

7. The diversion and use of water delivered from the bleeder valve as proposed by application for permit no. 29-8162 will not injure other water rights.

8. The testimony established that 4.41 cfs is available from the sources now diverted by the Foundation. Nonetheless, the Foundation's water rights only authorize the diversion of 2.55 cfs that could be captured as wastewater under application for permit no. 29-8162. There is insufficient water to satisfy the 3.0 cfs flow rate proposed for diversion by permit no 29-8162, and the flow rate should be limited to a maximum flow of 2.55 cfs.

9. Because construction of the bleeder valve delivery system and the pond for beneficial use is complete, that portion of application 29-8162 is not speculative or filed in bad faith.

10. In addition, because the pipe connection from the bleeder valve to the Lyon pond is complete, Lyons have sufficient financial resources to construct the already competed portion of the project.

11. Use of the trout water-sufficiency-curve to determine how many fish can be raised did not establish the facility volumes and flow necessary to raise tilapia.

12. Application for permit no. 29-8162 proposes diversion of wastewater. The term has always referred to water that has been beneficially used and can be diverted by the original right holder or another downstream user prior to reaching a public water supply. Water exiting a bleeder valve is wastewater, provided no more water is bled from the valve than is necessary to accomplish the delivery in the existing system.

13. When water is not being delivered to the swimming pool complex, no wastewater should be delivered to Lyons pursuant to permit no. 29-8162.

14. The proposed use of wastewater is not contrary to conservation of the water resources of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that application for permit no. 29-8164 is REJECTED and issuance of a permit is REFUSED.

IT IS FURTHER ORDERED that permit no. 29-8162 is APPROVED with the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before February 1, 2011.

2. Subject to all prior water rights.

3. The permit holder or the Lava Hot Springs Foundation must establish and report to IDWR and to the protestants prior to diverting water under permit no. 29-8162 the quantity of water that must discharge from the bleeder valves to operate the Foundation's system. Diversion of waste water must be limited to the established waste flow from the bleeder valve.

4. This right only authorizes one point of diversion at the bleeder valve located within Lot 7 (NWSE), Section 21, T09S, R38E.

5. The right holder shall not assign or sell the permit without first securing the written approval of the Department of Water Resources.

6. Use of water under this approval shall comply with applicable state water quality standards.

7. The issuance of this right does not grant any right-of-way or easement across the land of another.

8. Use of water under this water right shall be nonconsumptive.

9. Use of water under this water right will be regulated by the watermaster of State Water District no. 29, Portneuf River.

Dated this 13th day of January, 2009.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2009, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order and Explanatory Information sheet for a Final Order when a hearing was held.

CRAIG AND VICKI LYON
273 NORTH 2400 WEST
BRINGHAM CITY UT 83402

JACK H ROBISON
JONES CHARTERED
415 S ARTHUR
PO BOX 967
POCATELLO ID 83204-0967

GREGORY W MOELLER
RIGBY THATCHER ANDRUS
RIGBY KAM & MOELLER
PO BOX 250
REXBURG ID 83440

BOB MELINE
LAVA HOT SPRINGS FOUNDATION
420 EAST MAIN
LAVA HOT SPRINGS ID 83246

JOHN MEHLHAFF
1424 HIGH ST
AUBURN CA 95603

FL DUKE WALDEN
PO BOX 127
LAVA HOT SPRINGS ID 83246

EVELEE HILL RUSH
PO BOX 4905
POCATELLO ID 83205-4905

Deborah J. Gibson
Administrative Assistant
Water Management Division

2004 MAR 22 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

ATTACHMENT A

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 29-04178

NAME AND ADDRESS: LAVA HOT SPRINGS FOUNDATION P
LAVA HOT SPRINGS FOUNDATION P
O BOX 669
LAVA HOT SPRINGS. ID 83246

SOURCE: SPRINGS TRIBUTARY: PORTNEUF RIVER

QUANTITY: 2 03 CFS

PRIORITY DATE: 06/13/1902

POINT OF DIVERSION: T09S R38E S22 LOT 10 (SWNWSW) Within Bannock County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Commercial	01-01 TO 12-31	2 03 CFS

PLACE OF USE: Commercial Within Bannock County
T09S R38E S22 LOT 10 (SWSW)

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
Snake River Basin Adjudication

2004 MAR 22 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	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 29-02283

NAME AND ADDRESS: LAVA HOT SPRINGS FOUNDATION P
LAVA HOT SPRINGS FOUNDATION P
O BOX 669
LAVA HOT SPRINGS, ID 83246

SOURCE: GROUND WATER

QUANTITY: 0.50 CFS

PRIORITY DATE: 01/14/1949

POINT OF DIVERSION: T09S R38E S22 LOT 10 (SENWSW) Within Bannock County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Commercial	01-01 TO 12-31	0.50 CFS

PLACE OF USE: Commercial Within Bannock County
T09S R38E S22 LOT 10 (NWSW)

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
Snake River Basin Adjudication

2004 MAR 22 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	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 29-10219

NAME AND ADDRESS: LAVA HOT SPRINGS FOUNDATION P
LAVA HOT SPRINGS FOUNDATION P
O BOX 669
LAVA HOT SPRINGS, ID 83246

SOURCE: GROUND WATER

QUANTITY: 0.02 CFS

PRIORITY DATE: 06/01/1961

POINT OF DIVERSION: T09S R38E S22 LOT 10 (SWSWSW) Within Bannock County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Commercial	01-01 TO 12-31	0.02 CFS

PLACE OF USE: Commercial Within Bannock County
T09S R38E S22 LOT 10 (SWSW)

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
Snake River Basin Adjudication