

RECEIVED

JAN 13 2004

Department of Water Resources

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

2004 JAN 8 AM 10 04

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 GRANTING AMENDED LATE
) CLAIM FOR STOCKWATER
)
) For water right claims: 65-22814 and 65-
) 22815
)
)
)

I.

PROCEDURAL BACKGROUND

This matter came before the Court pursuant to a hearing on a *Motion to File a Late Notice of Claim* for in-stream stock water and wildlife use not to exceed 13,000 gallons per day held on December 16, 2003. The claimant, Janet L. Hedge, appeared *pro se*. At the hearing the Court had questions regarding the legal basis supporting an in-stream wildlife claim. The claimant moved the Court to omit the portion of the claim pertaining to the in-stream wildlife use. The Court agreed to amend the claim as requested but still took the matter under advisement to address the in-stream wildlife claim.

II.

LEGAL STANDARD FOR LATE CLAIMS

1. A *Motion to File a Late Notice of Claim* is reviewed under the same legal standard as I.R.C.P. 55(c), which provides for setting aside the entry of a default. See **SRBA Administrative Order 1 (AOI)** § 4.d.(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria). In addition, **AOI** § 4.d.(2)(k) provides that "leave to amend a notice of claim shall be freely given when justice so requires." The I.R.C.P. 55(c) standard

applies a "good cause" for untimeliness standard. The "good cause" standard takes into account the following factors:

- 1) Whether the default (failure to timely file) was willful;
- 2) Whether setting aside the judgment (granting the late claim) would prejudice an opponent; and
- 3) Whether a meritorious position has been presented.

See McFarland v. Curtis, 123 Idaho 931, 936, 854 P.2d 274, 279 (1993).

III.

IN-STREAM WILDLIFE CLAIMS

Idaho Code § 42-1401A(11) provides for a *de minimus* wildlife use claim. "'Stock watering use' means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen (13,000) gallons per day." I.C. § 42-1401A(11). However, a diversion is required in order to establish a wildlife right.¹ Although I.C. § 42-1401A defines "stock watering" as including both livestock and wildlife use, the Idaho Supreme Court specifically delineated between livestock use and wildlife use for purposes of establishing an in-stream flow right. In *In re SRBA Case No. 39576, Minidoka Nat'l Wildlife Refuge*, SRBA Subcase No 36-15462, 134 Idaho 106, 996 P.2d 806 (2000), (a.k.a. the "Smith Springs" case), the Idaho Supreme Court specifically held:

Only two exceptions to the diversion requirement [for state-based rights] exist. No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering. In addition, State entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens. . . . *Although the stock watering exception applies to appropriations made under the constitutional method, it applies only to watering livestock and does not extend to beneficial use for wildlife habitat.*

Id. at 112, 996 P.2d at 812 (emphasis added)(citations omitted).

Furthermore, I.C. § 42-113, which authorizes the in-stream watering of livestock, applies only to "livestock" as opposed to stock water or wildlife use. For these reasons the Court cannot find a legal basis for decreeing an in-stream flow right for wildlife use

¹ This issue was addressed but never resolved in Basin-Wide Issue 12. *See Memorandum Decision and Order Re: Basin-Wide Issue 12*, SRBA case no. 91-00012 (April 25, 1997).

to a private party. As such, the claimant does not meet the meritorious defense standard of I.R.C.P. 55(c) for the granting of a late in-stream claim for wildlife.

At the hearing, counsel for IDWR represented IDWR's policy is to recommend a wildlife use as being "incidental" to a stock water right. The Court did not confirm whether the policy applies to only to diversionary rights or whether the policy also applies to in-stream rights. Further, it was not clear to the Court whether IDWR's use of the term "incidental" refers to the inclusion of an added or expanded purpose irrespective of an appropriator's original intent to appropriate for wildlife or whether the term simply refers to a combined use right where the appropriator's intent was to appropriate for both livestock and wildlife and IDWR has recommended a combined use limitation for the two rights. To the extent IDWR's policy applies to diversionary rights only and the incidental wildlife right is supported by intent to also appropriate for that purpose, the policy is consistent governing law.

From a practical standpoint, in most cases wildlife will also be able to take avail of a water supply so long as it is being delivered for the livestock, irrespective of whether or not wildlife use is specifically included in the decree. However, an issue arises if the wildlife use is specified as an added use albeit intended to be incidental to, or dependant on, the stock water right where an appropriator did not originally intend to appropriate for wildlife. To the extent the wildlife use is included in the decree, incidental or not, the inference is that the right was originally appropriated also with the intent to use for wildlife. The issue arises with respect to whether the wildlife use survives independently of the livestock water right. At best the decree becomes ambiguous.

IV. ORDER GRANTING LATE CLAIM FOR IN-STREAM STOCKWATER (LIVESTOCK)

Following the amendment of the late claim to omit the in-stream claim for wildlife the *Motion* complied with all procedural requirements under **SRBA** *Administrative Order 1*, and no objections were made to this late Notice of Claim.

THEREFORE, IT IS ORDERED, that the *Motion to File a Late Notice of Claim* for water rights 65-22814 and 65-22815 is **granted**. The original *Notices of Claim*, as

well as any attached filing fees, and a copy of this **Order** will be forwarded to the Idaho Department of Water Resources for further action.

Dated January 7, 2004



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

BRUCE F. HEDGE
JANET L. HEDGE
5801 PEACHTREE STREET 208-859-4737
BOISE, ID 83703

92-379 3513
1241
3634402345

2872

Date

8/11/03

Pay to the
Order of

J.D.W.R.

\$25.00

Twenty-five & no/100

Dollars



Security Features
Included
Details on Back



Wells Fargo Bank Northwest, N.A.
7700 Fairview Ave.
Boise, ID 83704
www.wellsfargo.com

Memo

65-22814

Janet L. Hedge

⑆124103799⑆3634402345⑆ 2872

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 65-22874
Date Received _____
Receipt Number _____

NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant (s) Bruce F and/or Janet L. Hedge Phone (208) 938-2334
Mailing Address 5801 Peachtree St, Boise, Id Zip 83703

2. Date of Priority (Only one (1) per claim) 1-1-1870

3. Source of water supply (a) SPRINGS
which is tributary to (b) SINKS

4. a. Location of existing point of diversion is: Township _____ Range _____ Section _____,
_____ 1/4 of _____ 1/4 of _____ 1/4, Govt. Lot, _____ B.M., County of _____

Additional points of diversion if any: _____

b. If instream flow, beginning point of claimed instream flow is: SPRING PT. OF DIVERSION
Township 7N Range 1E Section 13, SE 1/4 of SW 1/4 of SW 1/4,
Govt. Lot _____ B.M., County of GEM
ending point is: Township 7N Range 1E Section 13, _____ 1/4 of _____ 1/4 of
_____ 1/4, Govt. Lot _____ B.M., County of GEM

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc),
including the dates of any changes or enlargements in use, the dimensions of the diversion works as
constructed and as enlarged and the depth of each well.

IN STREAM STOCK WATER AND WILDLIFE

6. Water is claimed for the following purposes:

(both dates are inclusive)

(cfs)

(acre feet)

For IN STREAM STOCK purposes from 1/1 to 12/31 amount .02 or _____
and wildlife

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) .02 (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is _____ acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.) Approx 10-100 STOCK CATTLE PR

10. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RNG	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	
7N	1E	13											S						

Total number of acres irrigated _____

11. In which county (ies) are lands listed above as place of use located? Gem

12. Do you own the property listed above as place of use? Yes X No _____
If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above. _____ or None ()

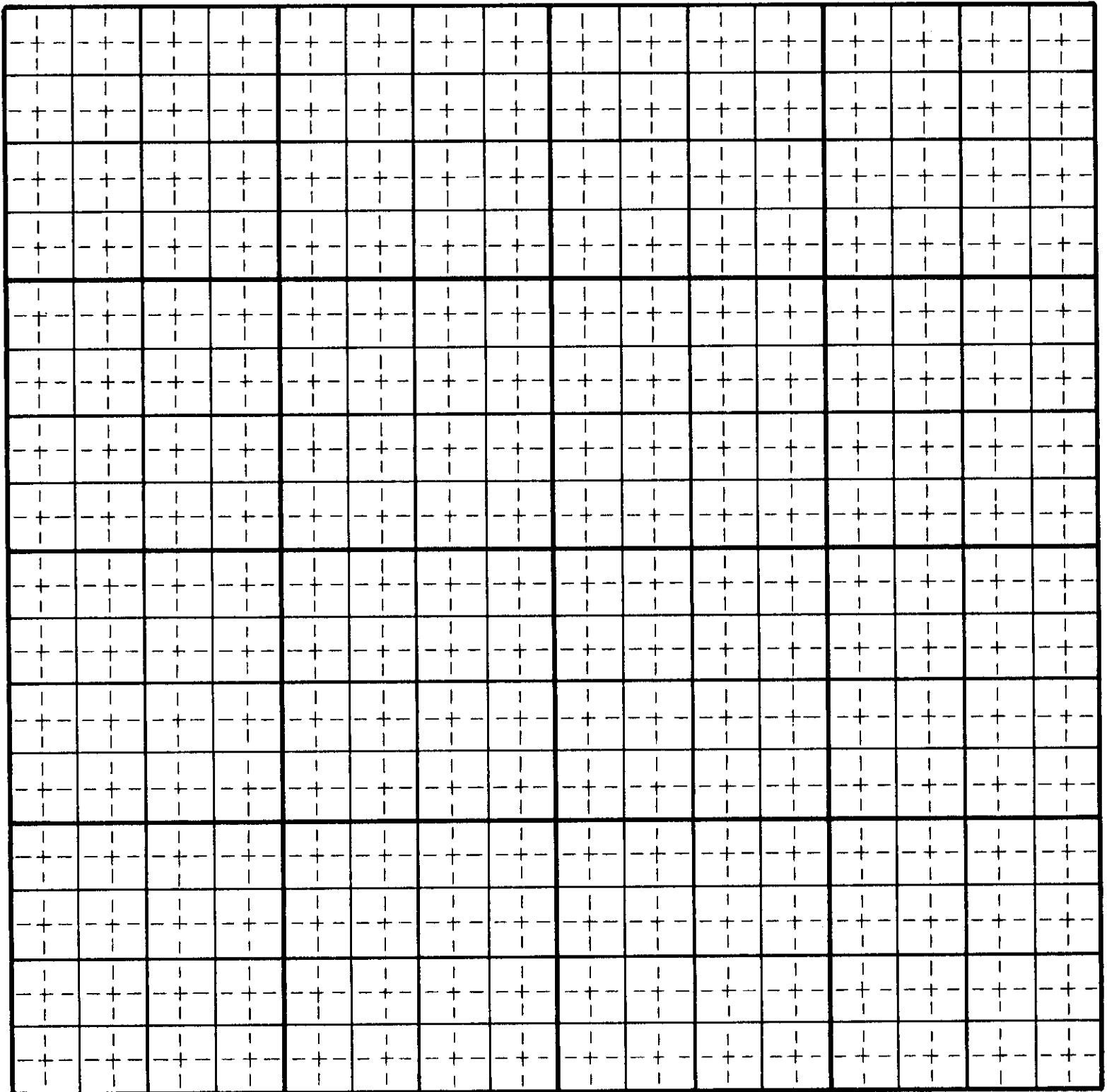
14. Remarks:

Last Name Hedge Ident No. 65-22814

Copies: White -State, Yellow-Claimant

Map of Project: show clearly the point of diversion, place of use, section number, township, and range number.

Scale: 2 inches equals 1 mile



SEE ATTACHED MAP

Last Name Hedge

Ident No. 65-22814

Copies: White-State, Yellow-Claimant

15. Basis of Claim (check one) Beneficial Use X Posted Notice _____ License _____ Permit _____
Decree _____
If applicable provide IDWR Water Right Number _____
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

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 (2)

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant (s) Janet L Hedge Date 8-1-03

Date _____

For Organizations: I do solemnly swear or affirm that I am _____

Title

of _____, that I have signed the foregoing
Organization

document in the space below as _____ of _____
Title Organization

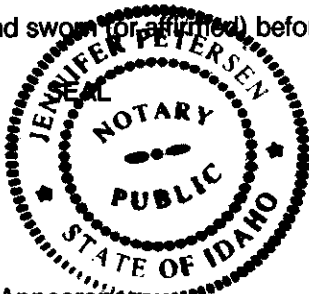
and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____

Title and Organization _____ Date _____

State of Idaho or _____)
County of Ada) SS.

Subscribed and sworn (or affirmed) before me this 1st day of August 1st 2003



Notary Public Jennifer Petersen

Residing at Kuna Id

My Commission Expires 9/30/08

Please Print Name

17. Notice of Appearance:

Notice is hereby given that I, _____ will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

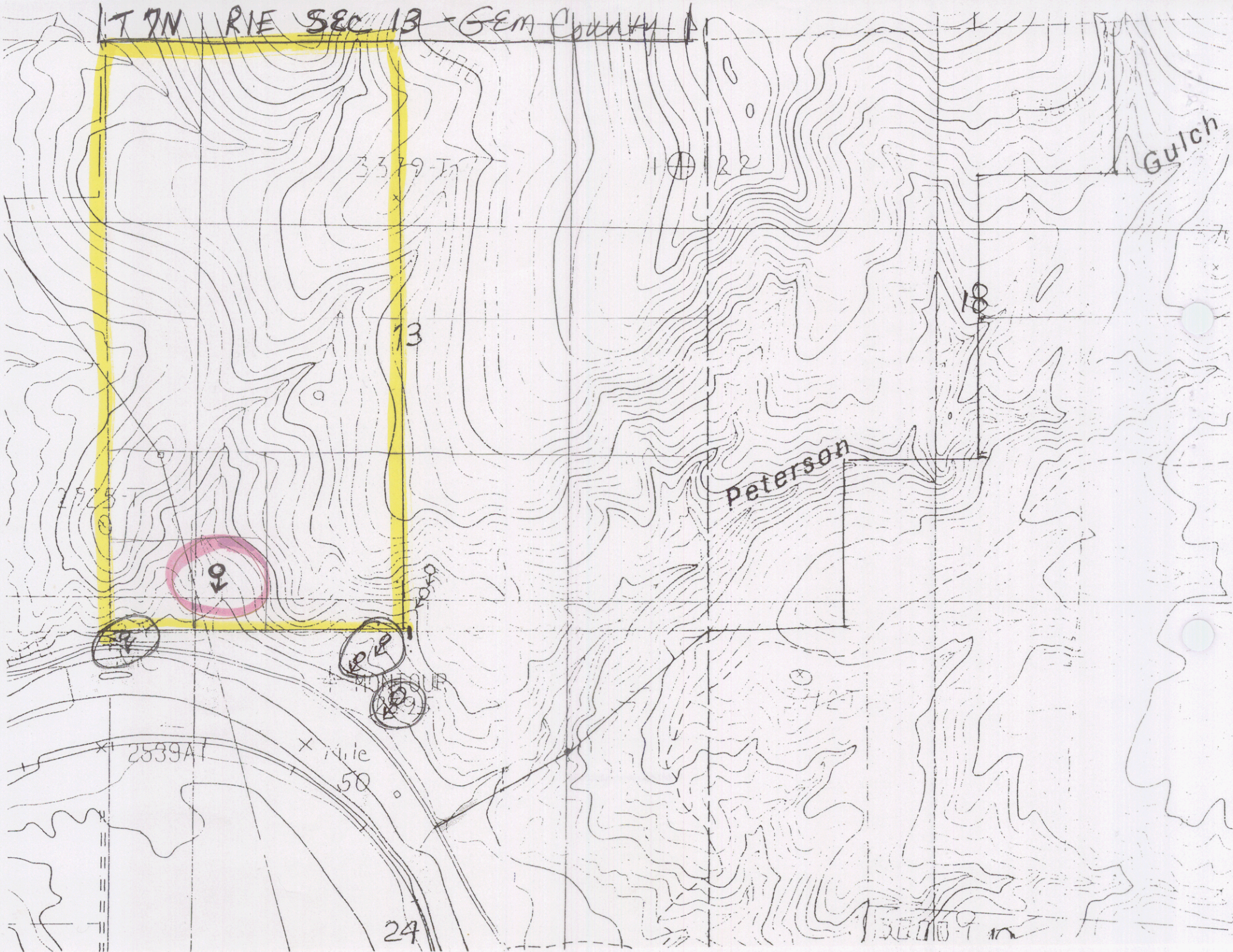
Signature _____

Address _____

Date _____

Last Name Hedge Ident. Number 65-22814

T 7N R 1E SEC 13 - GEM COUNTY



***To the United States of America
To all to whom these presents shall come, Greeting:***

IDI-34003 FR

WHEREAS

Bruce F. Hedge and Janet L. Hedge

are entitled to a land patent pursuant to Section 206, Act of October 21, 1976, as amended (43 U.S.C. 1716) for the following described land:

Boise Meridian, Idaho

T. 7 N., R. 1 E.,
Section 13, NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$.

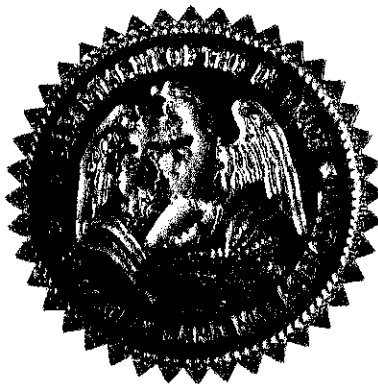
Containing 280 acres.

NOW KNOW YE, that there is, therefore, granted by the **UNITED STATES** unto Bruce F. Hedge and Janet L. Hedge, the land described above; **TO HAVE AND TO HOLD** the said land with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, there unto belonging, unto Bruce F. Hedge and Janet L. Hedge, and to their heirs and assigns, forever; and

EXCEPTING AND RESERVING TO THE UNITED STATES:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States. Act of August 30, 1890 (43 U.S.C. 945).
2. The right to itself, its permittees or licensees, to enter upon, occupy and use any part or all of said land lying within 50 feet of the center line of the transmission line right-of-way of Idaho Power's Hells Canyon Power Project No. 1971, or right-of-way No. IDI 23372, for the purposes set forth in and subject to the conditions and limitations of Section 24 of the Federal Power Act of August 26, 1935, as amended (16 U.S.C. 818) as to the W $\frac{1}{2}$ SW $\frac{1}{4}$ of section 13, T. 7 N., R. 1 E., B.M.

SUBJECT TO those rights for access and service road purposes granted to Idaho Power Company, its successors or assigns, by right-of-way No. IDI 33880, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761), as to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the W $\frac{1}{2}$ SW $\frac{1}{4}$ of section 13, T. 7 N., R. 1 E., B.M.



IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat.476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Boise, Idaho, the thirtieth day of April in the year of our Lord two thousand and three and of the Independence of the United States the two hundred and TWENTY-SEVENTH.

By William H. Lee
William H. Lee
Acting Branch Chief, Lands and Minerals
Resource Services Division

Patent No. 11-2003-0055