

ALAN G. LANCE
Attorney General

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

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JUN 13 2002

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

Case No. 39576

Subcase No. 31-11440

AFFIDAVIT OF ALLEN RUBERRY

_____)
State of Idaho)
) ss.
County of Ada)

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

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

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

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

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

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

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

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

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

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

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

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

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

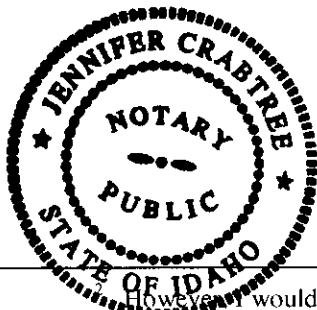
13. I also recommended beneficial use stock water rights to other water users, including Hagenbarths, with priority dates that pre-date the *Sauve v. Abbott* decree. For instance, Hagenbarths' stockwater water rights, 31-10255, 31-10256, and 31-10257 have already been partially decreed with priority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

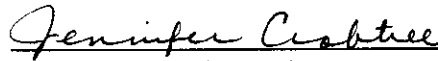
14. Based on the above, I recommended Claimant's claim no. 31-11440 for stockwater purposes with a priority date of June 21, 1902 and a season of use of May 1st thru October 31st.

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


ALLEN RUBERRY
Senior Water Resources Agent, IDWR

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




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

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

CERTIFICATE OF MAILING

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

1. Original to:

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

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☒ Regular Mail
☐ Hand-Delivered
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2. Copies to:

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

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

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

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

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

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
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Jennifer Crabtree
Signature of person delivering form