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Department of Water Resources

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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	)	Subcases 31-11700 & 31-11701
	)	
	)	CLAIMANTS HILLMAN'S BRIEF
	)	IN OPPOSITION TO OBJECTORS'
Case 39576	)	MOTION FOR SUMMARY
	)	JUDGMENT
	)	

COMES NOW, Claimants, Nick R. Hillman, Randy J. Hillman and Ron R. Hillman ("Claimant Hillman"), by and through counsel of record, Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chartered, and hereby files this brief in opposition to Objectors James F. Hagenbarth, David J. Hagenbarth, and Margaret Hagenbarth's ("Objectors") Motion for Summary Judgment and accompanying brief with attachments:

1. Standard of Review:
 - a. Facts are to be liberally construed in favor of party opposing motion for summary judgment, and that party is also to be given the benefit of all

CLAIMANT'S BRIEF IN OPPOSITION TO OBJECTORS'
MOTION FOR SUMMARY JUDGMENT - Page 1 of 8

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favorable inferences which might be reasonably drawn from the evidence.

Burgess Farms v. New Hampshire Insurance Group, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985), I.R.C.P. 56(c).

- b. Motion for summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact. *Burgess Farms v. New Hampshire Insurance Group*, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985), I.R.C.P. 56(c).
- c. In summary judgment proceedings, facts are to be liberally construed in favor of party opposing motion, who is also to be given benefit of all favorable inferences which might be reasonably drawn from the evidence. *Smith v. Idaho State University Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982), I.R.C.P. 56(c).
- d. Based upon the records on file and affidavits filed by the Idaho Department of Water Resources in this matter, Summary Judgment should be denied when said record and affidavits: (1) create a genuine issue of material facts, and (2) which, when construed liberally in favor of Claimant Hillman and against Objectors, and (3) when the benefit of all favorable inferences which might be reasonably drawn from the evidence is afforded Claimant Hillman.

2. Argument.

- a. Objectors' basis to object to Claimant Hillman's claims 31-11700 and 31-11701 is entirely founded upon the res judicata effect of prior court decrees to which Claimants' predecessors were parties. (Objectors' opening Brief in Support of Motion For Summary Judgment, page 6).
- b. Objectors fail to address or answer the basis for IDWR's recommendation of claims 31-11700 and 31-11701 as more fully set forth in the Affidavit of Allen Ruberry, dated June 1, 2002 (a copy of which is attached hereto and incorporated herein by reference as "Ruberry Affidavit").
 - i. Rather than address the basis of the Ruberry's Affidavit, Objectors ignore it completely and go so far as to claim that the department was apparently "unaware of at least one of the prior decrees" (Objectors' opening Brief in Support of Motion For Summary Judgment, page 2). However, the Ruberry Affidavit clearly does address the prior decrees (*Ruberry Affidavit*, Paragraphs 9-11) and specifically concludes that said decrees do not preclude Claimant Hillman the right to claim a beneficial use right for claim numbers 31-11700 and 31-11701 and further that they are not duplicates of 31-82 as alleged by Objectors (*Ruberry Affidavit*, Paragraph 8-11).
 - ii. The basis upon which Claimant Hillman may continue to claim a beneficial use right for claim numbers 31-11700 and 31-701 is as follows:

District Court, District of Idaho, 1930) and the *Cartier v. W. W. Buck et al* Decree (District Court, County of Fremont, 1902). Bear Gulch Creek, the source of both claims, was not adjudicated in either decree.

- (2) An old mortgage produced to the department by Claimant Hillman clearly evidences that both claims are for points of diversions in Bear Gulch Creek as opposed to West Camas Creek (see mortgage attached to *Ruberry Affidavit*). The said mortgage also establishes the priority dates of both claims and that each claim is independently based.
- (3) Neither decree (*Sauve* and *Cartier*) intended to address all water rights of every nature. A comparison of the two decrees clearly evidences that water rights not decreed in the earlier decree were then decreed to be valid water rights in the later decree. A good example is covered by Mr. Ruberry in his affidavit (*Ruberry Affidavit* paragraph 10).
- (4) Neither decree (*Sauve* and *Cartier*) specifically addressed Bear Gulch Creek and therefore Claimant Hillman's water right claim in Bear Gulch Creek was not intended to be decreed by either Decree.

- iii. Objectors fail to address nor refute the record which substantiates the beneficial use of the water claimed by Claimant Hillman back

to the priority dates of 1897 & 1898, but rather rest their entire summary judgment motion on their argument of res judicata. However, as set forth above, it is clear that because the “right” being claimed by Claimant Hillman differs from the rights addressed within the decrees of previous courts, the doctrine of res judicata does not apply.

- iv. Objectors must admit they too agree that the previous decrees and orders do not apply to all rights because Objectors themselves are presently litigating what they claim are beneficial use rights which were not intended to be covered by the previous decrees and judgments. This court should take judicial notice of Objectors’ claims made in water right no. 31-10740, wherein Objectors are standing in the same shoes as Claimant Hillman in asking the Court to grant a priority date earlier than the *Suave* decree which failed to decree the right in the first place. In fact, Objectors’ case is not exactly the same as this case for the fact that Objectors’ claimed source is in Dry Creek, a creek which is adjudicated in the *Suave* decree and therefore would be (by Objectors’ own argument) res judicata.

- (1) In fact, because Objectors are advancing their claims in other sub-cases (to the point of partial decrees) while simultaneously objecting to similar claims herein, requires

this Court to order that Objectors be estopped from asserting their objection against Claimant Hillman's claim.

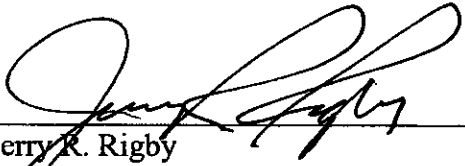
- (2) A form of estoppel applicable herein is quasi-estoppel. Quasi-estoppel does not require the typical misrepresentation or concealment claims, only that "the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit" See *KTVB v. Boise City*, 94 Idaho 279, 486 P.2d 992 (Idaho 1971) citing a line of several cases from the state of Hawaii.

- c. To grant this summary judgment would not be appropriate when this Court and the SRBA court in general has granted partial decrees to water rights with priority dates pre-dating decrees which, on their face, seem to address **all** water rights of every kind and nature.

3. Conclusion:

Based upon the foregoing, Claimant Hillman respectfully requests that this Court deny Objectors' Motion for Summary Judgment.

Dated this 16th day of July, 2002.



Jerry R. Rigby
of Rigby, Thatcher, Andrus, Rigby,
Kam & Moeller, Chartered
Attorney for Claimant Hillman

CERTIFICATE OF MAILING

I certify that on July 17th 2002, I mailed the original and copies of the foregoing brief to the following:

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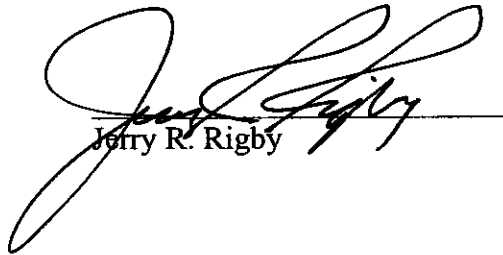
**CLAIMANT'S BRIEF IN OPPOSITION TO OBJECTORS'
MOTION FOR SUMMARY JUDGMENT - Page 7 of 8**

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase No. 31-11700 and 31-11701
	)	
Case No. 39576	)	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 Senior Water Resources Agent, I conduct field investigations for water right claims filed in the Snake River Basin Adjudication.

6. I understand that on May 16th the Court held a scheduling conference on subcase nos. 31-11700 and 31-11701. The parties involved in these subcases are: Claimants, Nick R. Hillman, Randy J. Hillman and Ron R. Hillman (Hillmans) and objectors, Margaret Hagenbarth, David J. Hagenbarth and James F. Hagenbarth (Hagenbarths). At that scheduling conference the Court requested an affidavit from the Department addressing whether or not the Department considered these two water rights to be duplicate claims of claim no. 31-82. This affidavit responds to that request.

7. I have attached a diagram as Figure 1 that provides an overview of the water rights discussed in this report as well as a visual perspective of their relationship to the Hagenbarths' water rights. The diagram shows West Camas Creek, Bear Gulch Creek and Crab Creek. The area around West Camas Creek and Crab Creek below the confluence of Bear Gulch Creek and West Camas Creek has many springs that contribute water to the main channel of West Camas Creek and Crab Creek. Bear Gulch Creek does not contribute significant amounts of water to West Camas Creek. The Hillmans water right nos. 31-11700 and 31-17701 are the only water rights from Bear Gulch Creek. As the diagram shows, the confluence of Bear Gulch Creek and West Camas Creek is downstream from the diversion used by objector, Hagenbarths. Water

right nos. 31-11700 and 31-11701 with the source as Bear Gulch Creek do not affect water users upstream from the Bear Gulch Creek confluence with West Camas Creek.

8. The following information sets forth the basis of my recommendation of Hillmans' water right nos. 31-82, 31-11700 and 31-11701. On April 9, 2001, I met with Nick Hillman concerning his water rights, which, include for purposes of this report, water right nos. 31-82, 31-11700 and 31-11701.¹ I did not consider 31-11700 and 31-11701 as duplicates of 31-82 for the following reasons:

9. The claim for 31-82 was from the source West Camas Creek based on a prior decreed right from the *Sauve v. Abbott* decree. *Sauve v. Abbott*, Case No. 635, Decree (Dist. Idaho Nov. 1, 1930). Both claim nos. 31-11700 and 31-11701 claim Bear Gulch Creek tributary to West Camas Creek as their source.

- a. In addition to having different sources than 31-82, claim nos. 31-11700 and 31-11701 also have a different basis. According to a Mortgage document I received from Nick Hillman, (a copy of which is attached hereto as Attachment A) claim no. 31-11700 is based on a posted notice dated October 19, 1897 and is referenced in the second single-spaced indented paragraph in the Mortgage document. Claim no. 31-11701 has a priority date of one year later, May, 1898, and is discussed in the third single-spaced indented paragraph in the Mortgage document which states that there is a water right based on a decreed right in a case titled *Cartier v. Buck*.²

¹ Hillmans have several other water rights from West Camas Creek that are not discussed in this report because they are not relevant. Those water right numbers include 31-83, 31-84, 31-85, 31-86.

² According to the Mortgage, this decree was entered by the District Court of Fremont County, Idaho on June 20, 1902, recorded in Book "A" of Judgments, page 570 in the Office of the Clerk of the District Court in Fremont County, Idaho.

b. The claimed (and recommended) points of diversions between 31-82 and 31-11700 and 11701 are also different. The point of diversion for 31-82 from the *Sauve v. Abbott* decree states that the point of diversion is "[o]ne-fourth mile up stream from the land to be irrigated (land located in Township 13 North, Range 38 East, Section 25, NW quarter)." However, the posted notice upon which claim no. 31-11700 is based discusses a point of diversion "[a]bout two miles West" of the land in the NW quarter of Section 25 Township 13 North, Range 38 East. Claim no. 31-11701 is mentioned in the Mortgage following reference to the Posted Notice for water from Bear Gulch Creek so I concluded that it too was a water right from Bear Gulch Creek.

c. The following chart provides a comparison of the three claims.

Claim No.	Source Claimed	Point of Diversion Claimed	Priority Date Claimed	Basis of Claim
31-82	West Camas Creek	13N 38E S22 NWSENE 13N R38E S23 SWSWSE	5/1/1898	Decreed <i>Sauve v. Abbott</i>
31-11700	Bear Gulch Creek	13N 38E S22 NWNENW	10/19/1897	Beneficial Use
31-11701	Bear Gulch Creek	13N 38E S22 NWNENW	5/1/1898	Beneficial Use

Given the above information, I did not consider 31-11700 and 31-11701 as duplicates of 31-82.

10. The objector Hagenbarths allege that the *Cartier v. Buck* decree was superseded by the *Sauve v. Abbott* decree and that water right nos. 31-11700 and 31-11701 are duplicates of water right no. 31-82 which was decreed in *Cartier v. Buck*. I have made a brief review of that decree since Hagenbarths have provided a copy. The *Cartier v. Buck* decree apparently sets

forth water rights from Camas Creek and its tributaries and has priority dates that range from April 1, 1883 to May 1, 1901. The *Cartier v. Buck* decree does not set out for each water right decreed, the source of that right or the place of use. A brief comparison between the *Sauve v. Abbott* decree and the *Cartier v. Buck* decree demonstrates that other water rights from tributaries to Camas Creek and Camas Creek itself existed in addition to the rights decreed in *Cartier v. Buck*. In other words, the *Cartier v. Buck* decree does not appear to decree all the water rights from Camas Creek and its sources. For example, water right 31-53 (decreed in *Sauve v. Abbot* as water right no. 29) is for 0.4 cfs (20 inches) from Camas Creek with a priority date of May 1, 1896. This water right is not decreed in *Cartier v. Buck* even though it is from Camas Creek with a priority date similar to the water rights decreed in *Cartier v. Buck*. Similarly, water rights 31-85 and 31-86 (decreed in *Sauve v. Abbott* as water right no. 41) are both for 4.0 cfs (200 inches) with a priority date of August 18, 1899 and August 17, 1899 respectively. The source for these two water rights is West Camas Creek a tributary to Camas Creek. However, water rights with these priority dates and amounts of water were not decreed in the *Cartier v. Buck* decree. Thus, although Hillman's predecessor, Frank Serfas, was decreed a water right in *Cartier v. Buck*, this does not necessarily mean that the one water right decreed to Mr. Serfas was the only water right he owned. As the above examples show, other water rights existed besides the ones decreed in *Cartier v. Buck*.

11. I recommended claim nos. 31-11700 and 31-11701 with a priority date that predated the *Sauve v. Abbott* decree because Bear Gulch Creek as a source was not specifically decreed in the *Sauve v. Abbott* decree. Thus, I recommend beneficial use irrigation rights from Bear Gulch Creek with priority dates that pre-dated the *Sauve v. Abbott* decree. However, if the source was specifically decreed in the *Sauve v. Abbott* decree, I recommended the irrigation water right with a priority date one day after the decree. For example, Hagenbarths claimed a

beneficial use irrigation water right from Dry Creek with a November 10, 1893 priority date. However, since Dry Creek was decreed in *Sauve v. Abbott*, I recommended Hagenbarths' claim no. 31-10740 with a November 2, 1930 priority date (one day after the *Sauve v. Abbott* decree). Hagenbarths have objected to this recommendation wanting the 1893 priority date.

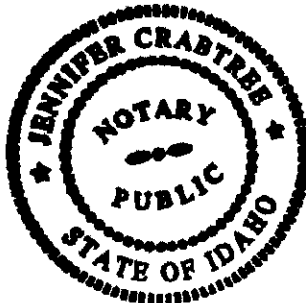
12. The information that I was provided for claim nos. 31-11700 and 31-11701, including the Posted Notice and the Mortgage, demonstrated that these water rights were valid historical beneficial use rights so I recommended them accordingly.

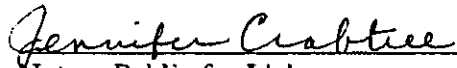
Further, your affiant sayeth naught.

DATED this 14 day of June, 2002.


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 Boise Idaho Falls, Idaho
My Commission Expires: 9/23/03

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

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

2. Copies to:

Chief, Natural Resource Division
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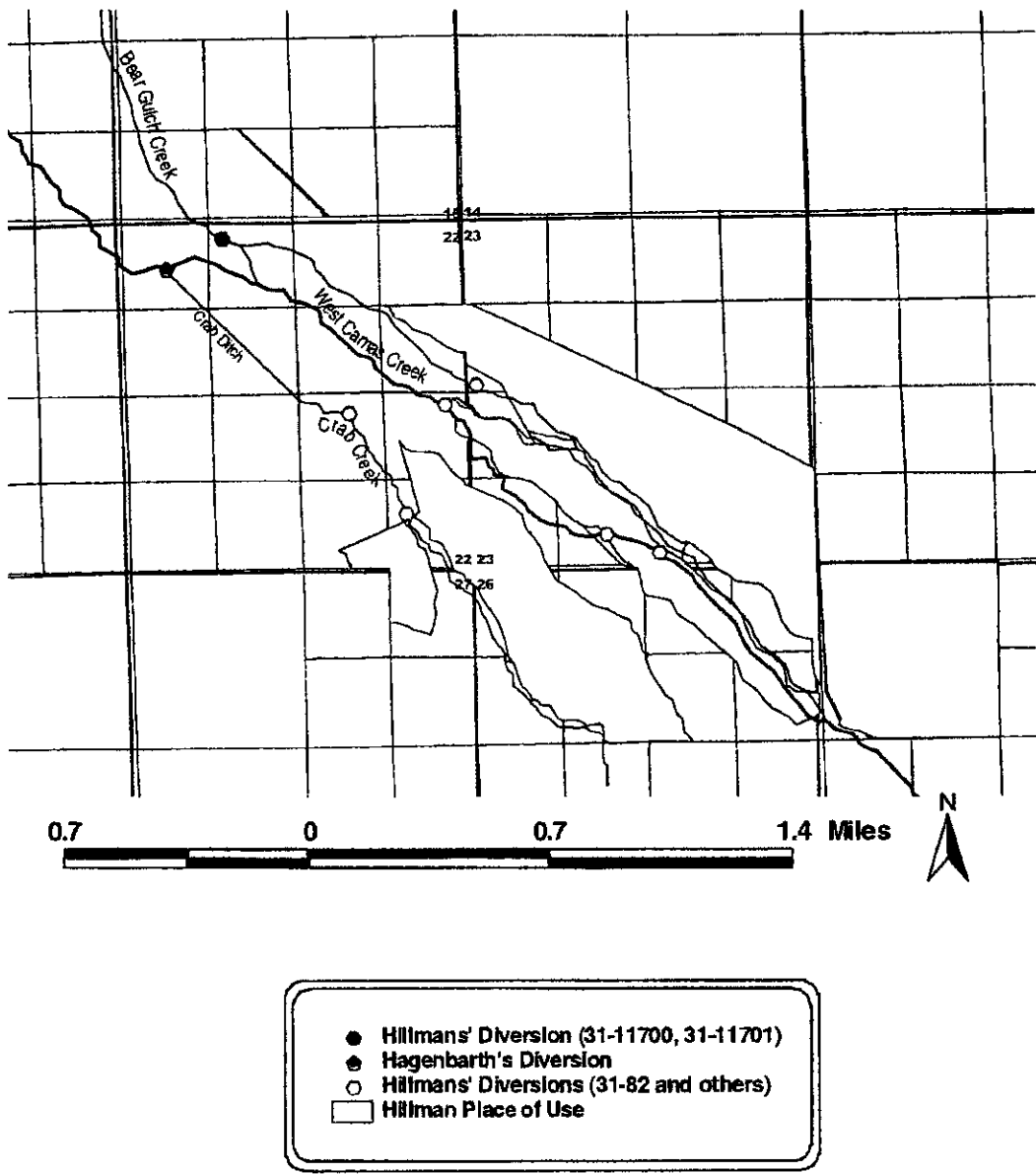
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Michael Creamer
Attorney for Margaret Hagenbarth
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Boise, ID 83701-1200

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☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Jennifer Crabtree
Signature of person delivering form

Figure 1



THIS INDENTURE, made the 20th day of September, in the year of our Lord, one thousand nine hundred and sixteen, between L. Hillman, and Elyahett Hillman, his wife, of Madison, County, State of Idaho, parties of the first part, and Chas. P. Bartlett, of Pocatello, Bannock County, State of Idaho, party of the second part,

WITNESSETH: That the said parties of the first part for and in consideration of the sum of Fourteen Thousand Five Hundred Dollars, (\$14,500.00) do by these presents, Grant, bargain, Sell and Convey unto the said party of the second part, and to his heirs and assigns forever, all that certain real property situated in the County of Fremont, and State of Idaho, and bounded and particularly described as follows, to-wit:

The Northwest quarter of Section 21; the North Half of Section 26; the South Half of the Southeast quarter, and the Southwest quarter of Section 22; the Northeast quarter of the Northeast quarter of Section 17; The Southeast quarter, the South Half of the Northeast quarter, the Northwest quarter of the Northeast quarter, and the East Half of the Northwest quarter of Section 22; all in Township 13, North Range 26, East of the Boise Meridian, in Fremont County, Idaho, containing 1120 acres, more or less, according to the Official plat of the survey of the said lands returned to the General Land Office by the Surveyor General.

Also all of our right, title and interest in and to any and all water appertaining to the said land, and more particularly all our right, title and interest in and to 4 cubic feet of water per second of time of the waters of Bear Creek and its tributaries in Fremont County, Idaho, as the same is shown and recorded in Book "2" of Notice of Water Rights, at page 74, in the Office of the County Recorder of Fremont County, Idaho, which said waters have since October 19, 1897, been used upon the northwest quarter of Section 25.

Also 80 miners inches of water dating from the 1st day of May, 1896, and used at all times since for the irrigation of the northwest quarter of Section 21, as shown in a decree of the District Court of Fremont County, Idaho, in the case of Levi Cartier vs. J. W. Egan, et al., said decree being entered by said Court June 20, 1902, and said decree being recorded in Book "1" of Judgments, page 179, in the Office of the Clerk of the District Court in Fremont County, Idaho.

Also all our right, title and interest in and to that certain water right to 4.8 second feet of the waters of Bartlett Springs, referred to in Permit #910, Certificate of Completion of Works, issued out of the State Engineer's Office August 17, 1907, recorded in Book "4" of Permits, page 910, in the office of the State Engineer.

Also that certain water right to 12 second feet of the waters of Goudy Spring, referred to in Permit #911, Certificate of Completion of Works, issued out of the State Engineer's Office, August 21, 1907, recorded in Book "4" of Permits, page 911, in the office of the State Engineer.

Also all our right, title and interest in and to the filings on high waters out of the West Fork of Camas Creek in said Fremont County, according to the records of Fremont County.

This mortgage is given subject to a certain subsisting mortgage on said property made by Chas. P. Bartlett and H. Bertha Bartlett, his wife, in the sum of \$2100.00, dated March 10, 1914, and recorded in Fremont County, Idaho,

This mortgage is given subject to a certain lease made by Chas. P. Bartlett, and H. Bertha Bartlett, his wife, to C. A. Colishaw, dated about May 1st, 1914, which said lease is for a period of five years and expires about May 1st, 1919.

This mortgage is given as a part of the purchase price of the land herein conveyed by Chas. P. Bartlett and H. Bertha Bartlett, his wife, this date, to the grantor herein.

Together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

And the said parties of the first part hereby agree to keep the buildings on said premises fully insured against loss by fire in some reliable fire insurance company, with loss, if any, payable to the party of the second part, as mortgagee, as his interest may appear.

THIS GRANT is intended as a mortgage to secure the payment of one certain promissory note of even date herewith executed

and delivered by said parties of the first part to the party of the second part, of which the following is a copy:

"\$14,500.00 (copy) Pocatello, Idaho. 1916
September 28, 1916.

Five Years after date, without grace, for value received, we, or either of us, promise to pay to the order of Chas. P. Bartlett, Fourteen Thousand Five Hundred Dollars, negotiable and payable at the office of FLETCHER R. BURRUS & COMPANY, #248 North Main Street, Pocatello, Idaho, without defalcation or discount, with interest at the rate of seven per cent. per annum, from date until paid. And if suit be instituted for the collection of this note, we agree to pay a reasonable attorney's fee.

Right is reserved of paying \$100.00 or more on this note on any interest paying date.

Interest payable annually.

(Signed) M. Hillman.

(Signed) Elizabeth Hillman. "

And these presents shall be void if such payment be made. But in case default shall be made in the payment of said principal sum of money or any part thereof as provided in the said note, or if the interest be not paid as therein specified, then it shall be optional with the said party of the second part, his executors, administrators, or assigns, to consider the whole of said principal sum expressed in said note as immediately due and payable; and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same according to law, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said promissory note, together with the costs of foreclosure suit, including reasonable counsel fees, and also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said second party, his heirs, executors, with the interest on the same, rendering the overplus of the purchase money (if any there shall be) unto the said parties of the first part, their heirs, executors, administrators, or assigns.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and delivered in the presence of:

James R. Wright M. Hillman
Elizabeth Hillman

STATE OF IDAHO,)
County of Madison.) ss.

On this 26th day of September, 1916, before me.

James R. Wright a Notary Public in and for said County and State, personally appeared M. Hillman and, Elizabeth Hillman, his wife, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

James R. Wright
Notary Public
Residing at Rexburg, Madison County, Idaho,
My Commission Expires February 5th, 1920.