

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)
_____)

A. Subcase 69-4122
(Insert water right number)

STANDARD FORM 1
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Harold A. and Evea H. Powers

Address: 7680 Appaloosa Ln.
Emmett, ID 83617

Daytime Phone: 208-365-3776

Name & Address of Attorney, if any:

William G. Myers III

Holland & Hart LLP

P.O. Box 2527, Boise, ID 83701

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Jack and Ava E. Rubelt

Address: 2280 Old Hornet Rd.
Council, ID 83612

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
Should be: _____
2. ☐ **Source**
Should be: _____
3. ☐ **Quantity**
Should be: _____
4. ☒ **Priority Date**
Should be: May 6, 1901
5. ☐ **Point of Diversion**
Should be: _____
6. ☐ **Instream Flow Beginning and Ending Point**
Should be: _____
7. ☐ **Purpose(s) of Use**
Should be: _____
8. ☐ **Period of Year**
Should be: _____
9. ☐ **Place of Use**
Should be: _____
10. ☐ **I object because:**
 - ☐ This water right Should not exist.
 - ☐ This water right was not recommended, but Should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTIONS(S): See attached supplement.

F.

VERIFICATION (must be completed)

State of Idaho)
)ss.
County of Ada)

William G. Myers III, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

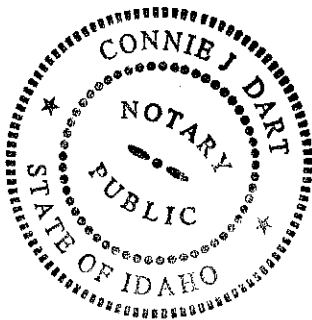
That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

William G. Myers III
(Attorney signing in representative capacity)

Subscribed and sworn to before me on: May 25, 2006

Connie J. Dart
Notary Public for Idaho
Residing at: Boise, Idaho
My Commission Expires: 7-20-2010



INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on May 26, 2006, I ^{had}mailed the original and ^{hand-delivered}copies of this objection, including all attachments, to the following persons: ₁ ^{mailed}

1. Original to:

Clerk of the District court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

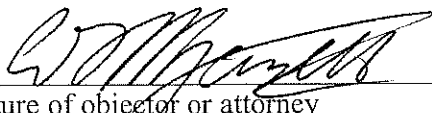
Name: Jack and Ava E. Rubelt
Address: 2280 Old Hornet Rd.
Council, ID 83612

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449



Signature of objector or attorney
mailing on Objector's behalf

William G. Myers III (ISB No. 5598)
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
wmyers@hollandhart.com

Attorneys for Harold A. and Evea H. Powers

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	)	Subcase 69-4122
	)	
Case No. 39576	)	SUPPLEMENT TO STANDARD
	)	FORM 1 OBJECTION

Harold A. and Evea H. Powers offer this supplemental information supporting their objections in Subcase 69-4122 regarding the priority date. The Director's Report for Basin 69 recommends that Water Right 69-4122, in the name of Ava E. Rubelt and Jack Rubelt, should have a priority date of April 2, 1888. For reasons set forth below, this date is inaccurate. The correct priority date is May 6, 1901. This water right is located on land surrounded by the Payette National Forest. A vicinity map is attached as Exhibit 1. The place of use is within the southeast quarter of Section 10, T18N, R03W, within Adams County, Idaho.

Prior to May 20, 1971, surface water rights could be established by diverting the water and applying it to beneficial use. The priority date for such water right is the date

the water was first put to beneficial use. Prior to 1903, Idaho had a “posted notice” statute which provided for posting a notice at the point of diversion and recording the notice in the county recorder’s office followed by actual diversion and beneficial use. The priority date for posted notice water rights is the date of the posting of the notice.

The southeast quarter of Section 10 was homesteaded by Menial Oling. On May 4, 1901, Menial Oling filed a Homestead Application for the Southeast Quarter of Section 10. *See* Exhibit 2. On or about that same day, one Alfred Johnson posted a Notice of Water Right for ten cfs of water with the place of use to be the homestead of Manuel (sic) Oling.¹ *See* Exhibit 3, ¶ 3. In that notice, Johnson, on behalf of Oling, stated “It is intended to use said waters for irrigating the following described lands [describing a portion of Section 11 now within the Payette National Forest] and the SE1/4 of Section 10.” *Id.* at ¶ 4. Johnson further stated “It is intended to have the works for diversion and use of said water as aforesaid completed within five years.” *Id.* at ¶ 5. According to the affidavit below the Notice, the Notice was posted on May 6, 1901. *Id.*

Actual diversion and beneficial use of the water occurred sometime before May 8, 1907 as indicated on the United States Department of Agriculture, Forest Service, Report on Agricultural Settlement, attached hereto as Exhibit 4. The Forest Officer examined the claim of Menial Oling on May 8, 1907 and found that 120 acres of the southeast quarter of Section 10 were “under ditch.”

¹ Sometimes written erroneously as Manuel Oling. They are one and the same person.

Assuming an unbroken chain of title to the water rights between Menial Oling and the Rubelts as present-day owners, this “posted notice” water right has a priority date of May 6, 1901. The water right and adjudication files of the Idaho Department of Water Resources contained a notarized statement of Ruth E. Dewhirst dated August 22, 2005, submitted on behalf of Rubelts. *See* Exhibit 5. In her affidavit, Ms. Dewhirst states that Menial Oling was her grandfather, that he moved to America from Sweden in 1887, homesteaded on the Crooked River, and sent for his family to come to America in 1896. *Id.* at ¶ 2. The Statement does not state when the family arrived in America, but it does say that “[w]hen they arrived he had cleared most of the land and was irrigating.” *Id.* The implication is that Menial Oling had cleared most of the land and had been irrigating sometime between 1887 and 1896.

This implication is contradicted, however, by the records from the National Archives and Records Administration. Exhibit 3 indicates that the earliest claim for water was that filed by Alfred Johnson on behalf of Menial Oling on May 4, 1901 (Exhibit 3) with an intention to divert and use the water sometime in the future. *Id.* Menial Oling, himself, stated in his written testimony in support of his Homestead Application that he built his house on Section 10 in October, 1901 and established his residence on October 26, 1901. (Exhibit G, answer to question 4.) In his first season of cultivation (1902), he had cleared two of the 160 acres. By 1906, he had cleared eighteen acres for cultivation. *Id.*, answer to question 7. Thus it appears that he had not cleared any land, much less irrigate land, by the time his family arrived in 1876. He

did not reside on the land until 1901. The only evidence of irrigation is that provided in the Agricultural Report, Exhibit 4, stating that by 1907, 120 acres were “under ditch.” The government issued Mr. Oling a patent on November 14, 1907. *See* Exhibit 7.

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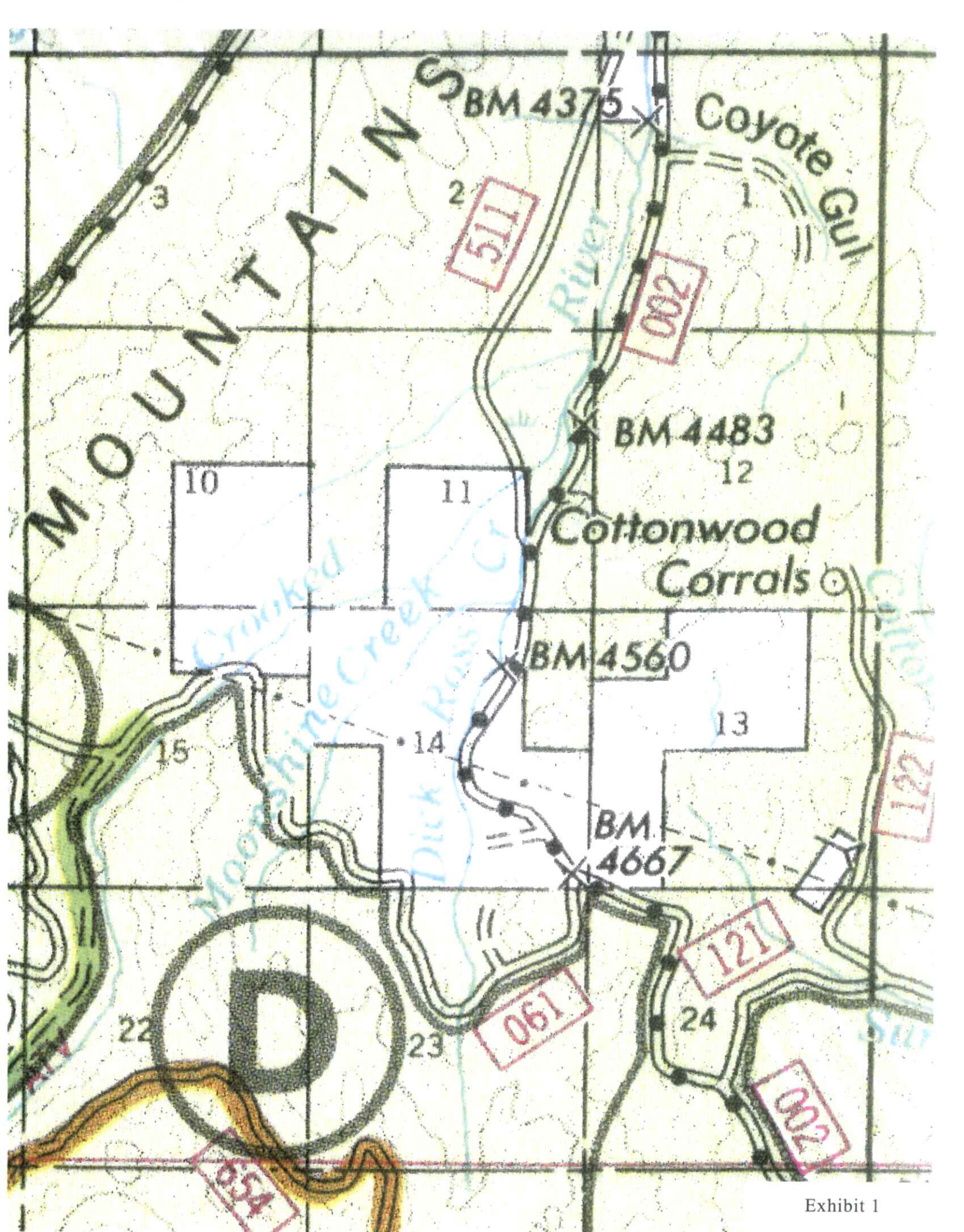


Exhibit 1

HOMESTEAD.

APPLICATION }
No. 5184 }

Land Office at Boise Idaho.

May 4 1901

I, Manuel Oling, of Dale
Idaho do hereby apply to enter, under Section 2289, Revised
Statutes of the United States, the SE 1/4
of Section 10, in Township 18 North of
Range 3 West, containing 160 acres.

Manuel Oling

Land Office at Boise Idaho.

May 4 1901

I, James King, Register of the Land Office,
do hereby certify that the above application is for Surveyed Lands of the class which the
applicant is legally entitled to enter under Section 2289, Revised Statutes of the United
States, and that there is no prior valid adverse right to the same.

James King
Register.

Archives - Clinton

Notice of Water Right.

State of Idaho)
County of Washington) SS

To All Concerned, Notice is Hereby Given:

1st. That Alfred Johnson, of Dale, Washington County, Idaho, hereby claims the use of the waters of Crooked River to the extent of ten (500 cubic inches) cubic feet per second.

2nd. It is intended to divert said water at or near the point where a copy of this notice is posted, and more definitely described as follows: On the North side of said Crooked River, near the center of the NE $\frac{1}{4}$ of Section 15 in Township 18 North of Range 5 West

3d. The purpose for which said water is intended to be used is domestic, irrigation stockwater, and other beneficial uses. The place of intended use is on the homestead of one Manuel Oling.

4th. It is intended to divert said water by means of dams ditches and flumes, and headgate. The general course of the proposed canal is Northeast. The length of the proposed canal is about three fourths mile. It is intended to use said waters for irrigating the following described lands; S $\frac{1}{2}$ NW $\frac{1}{4}$ W $\frac{1}{2}$ SW $\frac{1}{2}$ of Section 11 and SE $\frac{1}{4}$ of Section 10 in Township 18 North of Range 5 West.

5th. It is intended to have the works for diversion and use of said water as aforesaid completed within five years; (this must in no case exceed five years.)

WITNESS my hand at Dale, Washington County, Idaho, this 4th day of May 1901.

Alfred Johnson,
Claimant.

State of Idaho)
County of Washington) SS

Alfred Johnson, being first duly sworn deposes and says that he is of lawful age and the claimant of the water right mentioned in the foregoing notice and whose name is subscribed thereto. That the statements in said notice are true and that the original notice, of which the foregoing is a true copy, was posted in a conspicuous place at or near the place of intended diversion (as provided by law) on the 6th day of May 1901 at 12 o'clock

M Alfred Johnson

Subscribed and sworn to before me this 10th day of May 1901. And I further certify that on the date last above given personally appeared before me the affiant above named, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand the day and year in this certificate first above written:

Wm Winkler

Justice of the Peace

Filed at request of Alfred Johnson at 9 o'clock A M this 11th day of May A D 1901

I F Smith

Ex-Officio Recorder

Fees \$1.00

(Water Rights-2-26-

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

INDEXED.

Referred to

LANDS.

REPORT ON AGRICULTURAL SETTLEMENT

Weiser National Forest Reserve,

1. Location of settlement or farm: S.E. 1/4 of Sec 10 T18.
N. R. 3. W. B. M.
 (If land is surveyed, describe it by subdivisions; if unsurveyed, describe by streams or other natural landmarks, distances, and directions. Add a sketch map, if necessary.)

2. Name of present claimant or owner: Mannuel Oling.
 Address of present claimant or owner: Council, Idaho.

3. If claimant has a family, of what members does it consist? Wife and four
children. It is their only home.
 (Is their only home on this claim?)

4. Is the land patented or held as a homestead or other entry, mining claim, or simply as a squatter location? Give number of entry: N. E. No 5184.

5. Improvements:

Description of house by size and materials of which built, and number of rooms: Newed log house 15 x 28 shed kitchen built on. 4 rooms.

6. Description of barn and other outbuildings by size and materials: wood shed & blacksmith shop and chicken house.

7. Land:

How much of the land is suited to tilling? between 80 & 90 acrs.

Acres of land under plow: 35 acrs. Acres of land under fence: 160 acrs.

Acres of land under ditch: 120 acrs.

State of Idaho
Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

August 22, 2005

Re: Irrigation on Crooked River
Claim number 69-04122.

I am writing this on behalf of Jack and Ava Rubelt proving water rights on Menial Oling my grandfather.

My grandfather Menial Oling was born in 1865 in Sweden. He came to America in 1887 and homesteaded on Crooked River. He sent for his family to come to America nine years later in 1896. When they arrived he had cleared most of the land and was irrigating.

My father Victor Oling left home and married. He moved back on the Oling homestead on Crooked River in 1936. As a child I can remember my father irrigating and me and my sisters playing in the ditch.

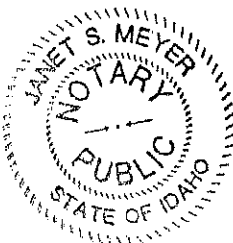
Sincerely;

Ruth Dewhirst daughter of Victor Oling

Ruth E. Dewhirst

Ava Rubelt and Jack Rubelt

Ava Rubelt
Jack Rubelt
Janet S. Meyer
8/31/03



HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

Merrial Oling, being called as a witness in his own behalf in support of homestead entry, No. 5184, for Sec 10, Tp 18 N, R 3 W B M testifies as follows:

Ques. 1.—What is your name as you wish it to appear in your patent, age, and post-office address?

Ans. Merrial Oling, age 42 years, Council, Washington Co., Idaho

Ques. 2.—Are you a native born citizen of the United States, and if so, in what State or Territory were you born?*

Ans. I am a naturalized citizen.

Ques. 3.—Are you the identical person who made homestead entry, No. 5184, at the Boise, Idaho land office on the fourth day of

Ans. May, 1901, and what is the true description of the land now claimed by you?

Sec 10, Tp 18 N., R 3 W.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. I built my house in October, 1901, and I established my residence there Oct. 26, 1901.

My house is 14 x 16 ft. - four rooms, shingle roof, 3 doors, 3 windows, Barn 30 x 40 ft and 10 x 10 ft, blacksmith shop, chicken house, well, etc. etc. Total value 600.00

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. My wife and four children. We have resided there continuously.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. I have never been absent except for a week or two at a time, when I would be away working for wages with which to provide for my family and improve my homestead.

Ques. 7.—How much of the land have you cultivated each season and for how many seasons have you raised crops thereon? If used for grazing only, describe fencing, state number and kind of stock grazed and by whom owned.

Ans. The first season I cultivated about 2 acres. Sec. season between five and six acres. 3d season 9 or 10 acres. 4th season 10 or 11 acres. This season about 18 acres in cultivation. I have raised a crop every season.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town or used in any way for trade and business?

Ans. No.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality and for what purpose it is most valuable.

Ans. It is farming land. Some timber. Most valuable for farming.

Ques. 10.—Are there any indications of coal, salines, or minerals, of any kind, on the land? (If so, describe what they are; and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans. No.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. No.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral) made by you since August 30, 1890.

Ans. Have never made any other entry. (This testimony given separate of apart from witnesses, without their knowledge or hearing and I do not know how they testified.)

(Sign plainly with full christian name.) Merrial Oling

* (In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen, or of his naturalization, or a copy thereof, certified by the officer taking this proof, must be filed with the case. Evidence of naturalization is only required in final (five-year) homestead cases.)

I HEREBY CERTIFY that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 19th day of November, 1906, at my office at Cambridge, Washington County, Idaho
[SEE NOTE BELOW.] R. E. Wilson
U.S. Comm

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

TITLE LXX.—CRIMES.—Chapter 4.

SEC. 5392.—Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully, and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See § 1750.)

Original Application No. 51812
Final Certificate No. 2597
Approved: May 23, 1907
Admission Granted
Receiver
For sale by Henry N. Corp. Washington, D. C.
12/1/06 Suspended
from being re-entitled for 1 year
Wilson

OLING (4-369.)
HOMESTEAD PROOF.
LAND OFFICE AT
BOISE, IDAHO

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

SECTION _____ OF THE REVISED STATUTES OF THE UNITED STATES.
Manuel Oling, having made a Homestead entry of the SE 1/4
Section No. 10 in Township No. 18 N.
of Range No. 3 W. subject to entry at Boise, Idaho
under section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto
by virtue of section No. 2291 of the Revised Statutes of the United States; and for that purpose do
solemnly swear that I am a naturalized
citizen of the United States; that I have made actual settlement
upon and have cultivated and resided upon said land since the 26 day of October, 1901,
to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised
Statutes, but that I am the sole bona fide owner as an actual settler; that I will bear true allegiance to the Government
of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead
laws of the United States, except _____

(Sign plainly with full christian name.)

R. E. Wilson, U.S. Commissioner of Cambridge, Idaho
do hereby certify that the above affidavit was subscribed and sworn to before me this 19 day of
November, 1906, at my office at Cambridge, Washington County, Idaho
R. E. Wilson
U.S. Comm

THE UNITED STATES OF AMERICA,

To All to whom These Presents Shall Come, GREETING:

Homestead Certificate No. 2577

Application 5184

WHEREAS, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Boise, Idaho, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of

MENIAL OLING

has been established and duly consummated, in conformity to law, for the SOUTHEAST QUARTER OF SECTION TEN IN TOWNSHIP EIGHTEEN NORTH OF RANGE THREE WEST OF THE BOISE Idaho MERIDIAN, containing one hundred sixty acres,

according to the Official Plat of the Survey of the said land, returned to the General Land Office by the Surveyor General:

NOW KNOW YE, that there is, therefore, granted by the United States unto the said Menial Oling the tract of land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said Menial Oling and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

(SEAL)

United States
General
Land Office

GIVEN under my hand, at the City of Washington, the fourteenth day of November, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

By the President: Theodore Roosevelt

By F. M. McKean, Secretary.

H. W. Sanford

Recorded, Vol. 684, Page 305.

Recorder of the General Land Office.

Recorded at the request of L. L. Burtenshaw at 10 minutes past 9 o'clock A. M. this 25th day of May, 1926.

Fees \$1.00

Matilda Moser
Recorder