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JUL 14 2006

DEPARTMENT OF
WATER RESOURCES

July 10, 2006

To Whom It May Concern:

This letter is in response to Objection Form 1 concerning Subcase 21-172 filed by Egbert Farms, c/o Z.J. or Kevin Egbert, Box 844, Ashton, Idaho 83420.

Egbert Farms have no evidence to substantiate their claim to water from Willow Creek, tributary to the Snake River, with an 1893 water right. All written documentation (deeds, court records and findings) place water in Willow Creek to be used on lands owned by Seeley Brothers or their predecessors. At no time was water from Willow Creek used on land owned by Egbert Farms. In 1957, Egberts placed pump(s) in the North Fork of the Snake River, commonly called the Ashton Reservoir, to irrigate additional lands.

In October, 1977, the District Court of the Seventh Judicial District of the State of Idaho in Fremont County decreed to Seeley Brothers 275 inches of water from Willow Creek with a priority date of 1893 and 125 inches of water from the mouth of Willow Creek with a priority date of 1947. At the same time, Egbert Farms was decreed 125 inches of water from the North Fork of the Snake River (Ashton Reservoir) with a priority date of 1957.

These findings were upheld by the Department of Water Resources as indicated by their recommendation to the Snake River Basin Adjudication Court. These are the recommendations (Subcase 21-172) that Egbert Farms are now objecting to.

Thank you for your attention in this matter.

Sincerely,

Seeley Bros by
Seeley Brothers
Alvin H. Seeley
Alvin H. Seeley

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JUL 14 2006

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)

A. Subcase 21-172
(Insert water right number
From the Objection Form)

Case No. 39576)

STANDARD FORM 2
RESPONSE TO OBJECTION

Please print or type the following information:

B.

NAME AND ADDRESS OF PERSON RESPONDING

Alvin H. Seeley, Arnold L. Seeley and Ernest R. Seeley, d/b/a
Name: SEELEY BROTHERS c/o ALVIN H. SEELEY

Address: P.O. BOX 654

ASHTON, IDAHO 83420

Daytime Phone: (208) 652-3262

Name & Address of Attorney, if any:

LYNN HOSSNER

109 NORTH 2nd WEST

ST. ANTHONY, IDAHO 83445

C. NAME AND ADDRESS OF PERSON WHO FILED THE OBJECTION TO
WHICH YOU ARE RESPONDING

Name: Z.J. EGBERT c/o Z.J. OR KEVIN EGBERT

Address: P.O. BOX 844

ASHTON, IDAHO 83420

D. I am responding to the objections to the following elements. (Please check the appropriate box(es)).

1. ☐ Name and Address
2. ☒ Source
3. ☐ Quantity
4. ☒ Priority Date
5. ☐ Point(s) of Diversion
6. ☐ Instream Flow Description
7. ☐ Purpose(s) of Use
8. ☐ Period of Year
9. ☐ Place of Use

11. Recommendation

- ☒ This water right should not exist.
- ☐ This water right was not recommended, but should be recommended with the elements described above.

E. VERIFICATION (Must be Completed)

State of IDAHO)
) ss.
County of FREMONT)

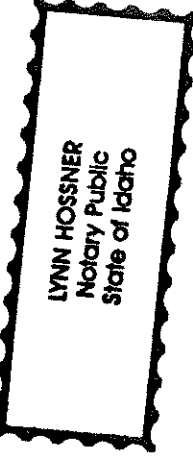
ALVIN H. SEELEY, duly sworn, upon oath, deposes and says:
(Name of person filing response)

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

Alvin H. Seeley
(Signature of person filing response)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on: July 11, 2006



Notary Public for Idaho
Residing at: Auton, Idaho
My Commission Expires: 4-12-10

INSTRUCTIONS FOR MAILING

You must mail the response, including all attachments, 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.

F. CERTIFICATE OF MAILING

I certify that on July 11, ²⁰⁰⁶~~XXXX~~, I mailed the original and copies of this response, including all attachments, to the following persons:

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: EGBERT FARMS, c/o Z.J. OR KEVIN EGBERT
Address: P.O. BOX 844, ASHTON, IDAHO 83420

3. One copy to the party who filed the objection at the following address:

Name: EGBERT FARMS, c/o Z.J. OR KEVIN EGBERT
Address: P.O. BOX 844, ASHTON, IDAHO 83420

4. Copies to:

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

United States Department of Justice
Environment & Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

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


Your signature or signature of attorney
mailing on your behalf

THE DOCUMENT TO WHICH THIS CERTIFICATE IS
ATTACHED IS A FULL, TRUE AND CORRECT COPY OF
THE ORIGINAL ON FILE AND OF RECORD IN MY
OFFICE, SAME HAVING BEEN FILED 10/28/77
ATTEST July 11 20 22
ABBIE MACE CLERK OF THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT IN AND FOR
FREMONT COUNTY, IDAHO.
BY Harold A. Rouse DEPUTY

7/30
FILED
JUL 11 1977
CLERK OF DISTRICT COURT
FREMONT COUNTY, IDAHO
HAROLD A. ROUSE
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

EGBERT FARMS, INC.,)

Plaintiff,)

) MEMORANDUM DECISION INCLUDING

vs.)

) FINDINGS OF FACT AND

ARTHUR L. LARSEN,)

Watermaster, WATER)

) CONCLUSIONS OF LAW

DISTRICT NO. 1, State)

of Idaho,)

) Defendants.)

This case was combined with the case of Alvin Seeley, et al,
v. Arthur Larson, Watermaster, for hearing.

It appeared from the evidence that Egbert Farms is a
corporation existing in the State of Idaho with its principal
place of business in Fremont County. The chief business of the
corporation appears to be the operation of farms belonging to the
corporation. Among other lands owned by the corporation are lands
described as the Northwest quarter of the Southwest quarter and
lots 6 and 7 of section 14; the Southwest quarter of the Northeast
quarter, lot 6, the Northeast quarter of the Southwest quarter and
the Northwest quarter of the Southeast quarter of section 22, in
Township 9 North, Range 42 East Boise Meridian.

In 1957 plaintiff placed two pumps in the North Fork of
the Snake River in the reservoir in said river created by the
Utah Power and Lighe dam. One pump was 3/8 of a mile east and
one pump was 3/8 of a mile west of the mouth of Willow Creek.
Through these pumps plaintiff diverted water from the reservoir
in the North Fork of the Snake River to its farming lands and
used the same for irrigation thereof.

Plaintiff claims to have had some understanding with
an Uncle Johnnie, John Spratling, that their property was provided
with an 1893 water right of 200 inches of water from Willow Creek.
If so, plaintiff did nothing about it until he placed his pumps in

the North Fork of the Snake River in 1957. The filing of a notice of location of a water right does not create such a right. It is simply a preliminary step to be followed by construction of dams, headgates and necessary conduits and by actual diversion and use of the water. No such right was perfected by plaintiff even if the location notice did intend the creation of such a right. A water right cannot be created or maintained by communication of an agreement to create one.

By placing his pumps in the Snake River plaintiff acquired a right to the use of water from the North Fork on the Snake River at the Utah Power and Light reservoir in the amount of 125 inches with a priority of 1957.

The court finds from the foregoing memorandum:

1. Plaintiffs did place pumps in the Utah Power and Light reservoir in the North Fork of the Snake River in 1957 at points 3/8 mile east and 3/8 mile west of the mouth of Willow Creek.

2. Through the pumps thus placed plaintiff diverted approximately 125 inches of water for irrigation of his land and has continuously placed the same to a beneficial use on lands described as: NW $\frac{1}{4}$ SW $\frac{1}{4}$ and lots 6 and 7 of section 14, SW $\frac{1}{4}$ NW $\frac{1}{4}$; lot 6; NE $\frac{1}{4}$ SW $\frac{1}{4}$; and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of section 22, in Twp 9, N. Range 42 B.M. since that time.

The court concludes that plaintiff has acquired a right to 125 inches of water from the Utah Power and Light reservoir in the North Fork of the Snake River with a priority date of 1957.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff has a right to the use of 125 inches of water from the North Fork of the Snake River at points 3/8 mile east and 3/8 mile west of the mouth of Willow Creek for use on lands described as:

NW $\frac{1}{4}$ SW $\frac{1}{4}$ and lots 6 and 7 of section 14, SW $\frac{1}{4}$ NW $\frac{1}{4}$; lot 6; NE $\frac{1}{4}$ SW $\frac{1}{4}$
and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of section 22, in Twp 9, N, Range 42 B.M. with a
priority date of 1957.

Done this 20th day of October, 1977.



WILLARD C. BURTON
District Judge

THE DOCUMENT TO WHICH THIS CERTIFICATE IS
ATTACHED IS A FULL, TRUE AND CORRECT COPY OF
THE ORIGINAL ON FILE AND OF RECORD IN MY
OFFICE, SAME HAVING BEEN FILED 7/23/80
ATTEST 20
ABBIE MAIZE CLERK OF THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT IN AND FOR
FREMONT COUNTY, IDAHO
BY Maize DEPUTY

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF FREMONT

ALVIN H. SEELEY, et ux,)
ARNOLD L. SEELEY, et ux, &)
ERNEST R. SEELEY, et ux,)
Plaintiffs,)
vs.) ORDER
ARTHUR L. LARSON, Watermaster)
of Water District No. 1 of)
the State of Idaho,)
Defendant.)

Defendant's and Plaintiffs' motions to amend Memorandum Decision
Including Findings of Fact and Conclusion of Law were heard by this court
on July 7, 1980. Defendants motion is denied except insofar as it asks for
a correction of the legal description of Plaintiffs' land in the court's
decree of water right. Plaintiffs' motion for the same correction is granted.

This Court's Memorandum Decision dated October 21, 1977 shall be
amended at page 8 to read as follows:

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED:

Plaintiffs have a right to the use of 275 inches of water from the two
branches of Willow Creek - 150 inches from East Willow and 125 inches from
West Willow Creek - with a priority date of 1893 on land described as:

The Southeast Quarter of the Northeast Quarter; Northeast
Quarter of the Southeast Quarter; Southeast Quarter of the
Southeast Quarter North of the River; Section 15, Township
9 North, Range 42 East, Boise Meridian.

The Northwest Quarter of the Northeast Quarter; Northeast
Quarter of the Northwest Quarter; West half of the North-
west Quarter, Section 14, Township 9 North, Range 42 East,
Boise Meridian.

South 60 rods of the Southeast Quarter of the Southwest
Quarter; Southeast Quarter, Section 11, Township 9 North,
Range 42 East, Boise Meridian.

It is also ordered, adjudged and decreed that plaintiffs have
a right to the use of 125 inches of water from Willow Creek at a point
between the confluence of its two branches and its mouth with a priority
date of 1947 on the lands described in the paragraph next herein above.

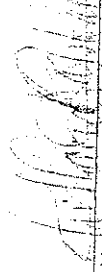
CASE NUMBER 7128
DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

County of Fremont, State of Idaho

7/23/80
FILED

BY Maize DEPUTY

Done this 21 day of February, 1980.



WILLARD C. BURTON
District Judge

THE DOCUMENT TO WHICH THIS CERTIFICATE IS
ATTACHED IS A FULL, TRUE AND CORRECT COPY OF
THE ORIGINAL ON FILE AND OF RECORD IN MY
OFFICE, SAME HAVING BEEN FILED 10/28/77
ATTEST 10 20 1977
ABBIE MACE CLERK OF THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT IN AND FOR
FREMONT COUNTY, IDAHO
BY David Spratling DEPUTY

7738
FILED
OCT 27 1977
CLERK OF DISTRICT COURT
FREMONT COUNTY, IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

ALVIN H. SEELEY, et ux,)
ARNOLD L. SEELEY, et ux, &)
ERNEST R. SEELEY, et ux,)

MEMORANDUM DECISION INCLUDING

) Plaintiffs,)

) FINDINGS OF FACT AND

vs.)

) CONCLUSIONS OF LAW

)
ARTHUR L. LARSON, Watermaster)
of Water District No. 1 of)
the State of Idaho,)

) Defendant.)

This case was tried before the court sitting in St. Anthony, Idaho, without a jury on the 10th day of August, 1977, all as provided in the notice given in all respects as required by law. Plaintiff, Alvin Seeley was present with his attorney, Lynn Hossner, as was Hyrum Seeley, a protestor in an accompanying case, with his attorney. Josephine Beeman, Assistant Attorney General and attorney for the Department of Water Resources, was present representing the defendant water master.

It appeared from the evidence that Alvin H. Seeley and wife, Arnold H. Seeley and wife, Arnold L. Seeley and wife, and Ernest R. Seeley and wife, plaintiffs, are the owners of real property situated in Fremont County, State of Idaho and described as: SE $\frac{1}{4}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ SE $\frac{1}{4}$ North of river section 15 Twp 9 North, Range 42 E. B.M.; NW $\frac{1}{4}$ NE $\frac{1}{4}$; W $\frac{1}{2}$ NW $\frac{1}{4}$ Section 14, Twp 9, Range 42 E. B.M.; South 60 rods SE $\frac{1}{4}$; SE $\frac{1}{4}$ Section 11 Twp 9 N., Range 43 E.B.M. This property was once owned by Hyrum Spratling.

In December of 1893 Wayne Spratling and Ernst Spratling who were brothers of Hyrum Spratling filed a notice of water right in the records of Fremont County which notice claims an appropriation of 200 inches of water from the East Branch of Willow Creek and a similar appropriation of 200 inches from the West Branch of Willow Creek. The recorded notice states that the water was diverted from the East Branch and from the West Branch of Willow

Creek by means of dams and headgates placed into a ditch running about one-half mile or more to the property to be benefited thereby. A considerable part of the property now owned by plaintiffs is described as property intended to receive the benefit of the water appropriated as described in the notice.

The original diversion of water as indicated by the notice happened many years ago and no witnesses were called who had personal knowledge of the transaction. Deeds conveying the property now owned by plaintiffs have described as an appurtenance, 400 inches of water from Willow Creek.

Hyrum Seeley, father of the plaintiffs remembered that there was such a ditch from the two branches of Willow Creek used for irrigation of the property in 1920 when he was a boy. He has farmed the property since 1931 and has throughout used water from the East and West Branches of Willow Creek. He has diverted the water as was done in earlier days by means of dams and headgates and through a ditch carrying the water to his property. Though he claims to have used for such irrigation all the water in the respective branches of Willow Creek he admits that he has not been able to divert and use more than 150 inches from East Willow Creek and 125 inches from West Willow Creek. This amount of water has been diverted and used by him throughout his ownership of the land and it is now being used by plaintiffs in a similar manner.

Some of the water flowing in the two branches of Willow Creek has been lost at the points of diversion through seepage and has flowed on down the creeks. As the years have passed he has been able to improve conditions over the diversion point so that not so much is lost now by seepage as was formerly lost. All the water is needed for the proper irrigation of the property.

The diversion used by the plaintiff and apparently also used by previous owners of the property was from each of the branches of Willow Creek. Some distance downstream from the points of diversion the two branches come together and continue thence as a single creek to the North Fork of the Snake River. At this point in the North Fork the Utah Power and Light Company has placed a dam and has created a reservoir. Willow Creek flows into the back waters of this reservoir. Between the diversion points in the separate branches and the mouth of the creek in the reservoir there are several springs which, together with seepage from the diversionary works, tend to partially fill the creek again.

In 1947 Hyrum Seeley installed a pump in the creek between the diversion point and the mouth of the creek and commenced pumping about 125 inches of water from the creek for use upon his farm. This use of water from the creek was continued by Hyrum Seeley for about eight or nine years or until about 1957. Then Hyrum Seeley discontinued use of the pumps because they were too expensive. No one seems to be sure just when or how much the pumps were used thereafter, but it appears that they were not used until 1964 or 1965.

Meanwhile, the Egberts had installed pumps in the reservoir created by the Utah Power and Light Company dam in the North Fork of the Snake River. One of the pumps thus installed by Egberts was located about $\frac{3}{8}$ of a mile east, the other was located about $\frac{3}{8}$ of a mile west of the mouth of Willow Creek. The Egberts have used these pumps more or less continuously since 1957 and have pumped about 125 inches of water for irrigation of their property.

Residents of the State of Idaho may acquire a water right by taking the water from its natural channel and applying it to a beneficial use on their land. 42-103 I.C. and 42-104.

The law also provides for priority between appropriators;

"As between appropriators the first in time is first in right." 42-106 I.C.

These statutory provisions are derived from the Idaho State Constitution which provides for appropriation of water and for priority in the right to the use thereof. There are other statutory provisions in our law which require posting and recording of notice and the commencement and prosecution of work within prescribed time limits in order to appropriate water. Both methods of appropriation are recognized by our courts.

"A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and Recording his notice and commencing and prosecuting his work within the statutory time." Nielson v. Parker, 19 I. 727; 115 P. 488.

The law of this state recognizes the importance of water to its citizens. It has declared that all waters when flowing in their natural channels are the property of the state. But it recognizes the right of its residents to use the same. The right acquired by such use is declared by the law not to constitute a property right in itself. Rather, it is declared to be a right complementing or appurtenant to the land on which it is used or applied. 42-101 I.C.

In our case evidence has been introduced concerning the recording of notice. Whether it was followed by the required commencement and prosecution of work is not clearly shown. Nor is it shown that the water actually diverted and used complied with the notice recorded. We are concerned in this case, therefore, with rights acquired under what has been called the

constitutional appropriation, actual diversion and use of the same, although the recording of notice may be useful in determining the date of appropriation.

Under the law in effect in Idaho at all times with which this case is concerned, a water right once acquired, either by appropriation and use or by compliance with statutory requirements of notice and recording, can be lost by abandonment. The law abhors a forfeiture so abandonment must be clearly shown and if use is resumed at a later date abandonment will not be found unless it is clearly shown that other rights have intervened. But if abandonment is shown then the right is lost.

"Section 41-216 ICA (more recently known as Section 42-216 I.C., repealed in 1967) provides in part as follows: All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to a beneficial use for which it was appropriated, and when any right to the use of water shall be lost through non-use or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter...

"A decreed right is not immune from a showing that it has been abandoned and such showing does not impeach the decree upon which such right was based where the evidence received with reference to the abandonment relates to a time subsequent to the decree. To hold otherwise would defeat a well settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law. We think this

statute applies equally to rights to the use of water based upon a decree with that of rights based upon an appropriation and actual use, and that such abandonment begins at the time the appropriator claiming under a decree fails to apply the water to a beneficial use, and when such failure continues for the statutory period and the other required conditions are shown to exist, the right may be lost." Graham v. Leek, 144 P. 2d 475.

In the instant case plaintiffs through a prior owner, their father, pumped water from a point between their points of diversion in Willow Creek and the mouth of the creek. He started so using it in 1947. By his own admission, however, he abandoned that right in or about 1956. Hyrum Seeley said he used the pump for eight or nine years and his son said he was so using it when he entered the army in 1954, but had quit so using it when he returned in 1957. Hyrum said he did not resume its use but that his sons pumped water when they took the property. The son, Alvin, said use was resumed in 1964 when renters used pumps in the creek.

The evidence indicates quite clearly that pumps were not used for a period of more than five years. During that period of non-use another party -- Egbert -- claims to have obtained a conflicting right. However, Egbert's right is to water in Henry's Fork of the Snake River. He has not shown that use of water through pumps in Willow Creek have any effect on his use of water from the Henry's Fork. Nor does it appear that his claim was sufficiently notorious, hostile or open to have shown an intent to acquire a right against the right claimed by plaintiffs. So, while there is evidence that plaintiffs suffered their use of this water to lapse for a period longer than five years, the evidence of an intervening right is not sufficiently

clear to justify a claim of an abandonment. Proof of abandonment must be clear and convincing.

From the foregoing memorandum the court picks the following ultimate findings of fact:

1. Prior owners of property now owned by plaintiffs diverted from the two branches of Willow Creek about 275 inches of water. This water was put to a beneficial use on land now owned by plaintiff and the water has been used on the land since that time by plaintiffs and prior owners.

2. The date when use of Willow Creek water was begun on lands now owned by plaintiff was 1893.

3. In 1947 Hyrum Seeley started using water through pumps from a point in Willow Creek between the diversion points and the mouth of the creek part of which water was seepage from the original diversion points.

4. There was a lapse in the use of this pumped water from about 1956 to 1964.

5. Use of pumps in Willow Creek was recommenced in 1964 before any conflicting rights had been obtained and has continued to date.

6. The amount of water taken from Willow Creek through these pumps was and is 125 inches.

From the foregoing memorandum the court draws the following conclusions of law:

1. By actual diversion and use plaintiffs' predecessors in interest acquired the right to use 275 inches of water from the two branches of Willow Creek with a priority date of 1893.

2. By diversion through pumps plaintiffs' predecessor acquired the right to use 125 inches of water from Willow Creek at a point below the confluence of the two branches and the mouth with a priority date of 1947.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED:
Plaintiffs have a right to the use of 275 inches of water from the two branches of Willow Creek - 150 inches from East Willow and 125 inches from West Willow Creek - with a priority date of 1893 on land described as: SW $\frac{1}{4}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ NW $\frac{1}{4}$; north of the river, section 15, Twp 9 North Range 42 East Boise Meridian NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$; W $\frac{1}{2}$ NE $\frac{1}{4}$; section 14 Township 9 North, Range 42 East Boise Meridian; South 60 rods SE $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$; section 11, Township 9 North, Range 42 East Boise Meridian.

It is also ordered, adjudged and decreed that plaintiffs have a right to the use of 125 inches of water from Willow Creek at a point between the confluence of its two branches and its mouth with a priority date of 1947 on the lands described in the paragraph next herein above.

Done this 21st day of October, 1977.


WILLARD C. BURTON
District Judge