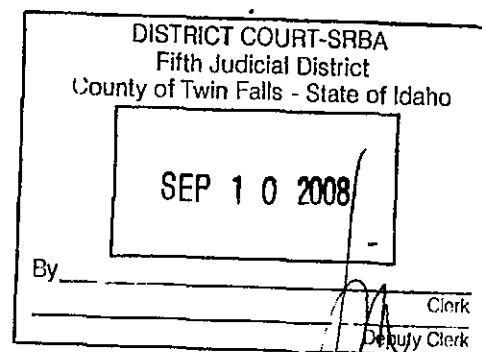


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Attorneys for Sarah Jane Smith



**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 No.: 63-7539

Case No. 39576

**SARAH JANE SMITH'S RESPONSE TO
 WHITTED'S MOTION FOR SUMMARY
 JUDGMENT/DISPOSITIVE MOTION**

Respondent Sarah Jane Smith hereby opposes Objector Craig Whitted's Motion for Summary Judgment/Dispositive Motion filed July 31, 2008, as follows:

Objector Craig Whitted has submitted a Summary Judgment/Dispositive Motion asserting, "[t]his water right should not exist on this well because it has been claimed in trespass." Claimant Sarah Jane Smith submitted her Summary Judgment Motion and supporting documents on July 31, 2008, which directly addressed the trespass issue Whitted raised in his Motion. Because Sarah Jane Smith has already addressed Whitted's trespass argument and in the interest of avoiding unnecessary briefing, Sarah Jane Smith hereby incorporates by reference her Memorandum in Support of Motion for Summary Judgment and the Affidavits of Sarah Jane Smith, David W. Vastine, M.D., and J. Will Varin in opposition to Whitted's Motion for Summary Judgment/Dispositive Motion.

In summary and as discussed in greater detail in Sarah Jane Smith's Memorandum in Support of Summary Judgment, pages 7-10, Whitted's Motion for Summary

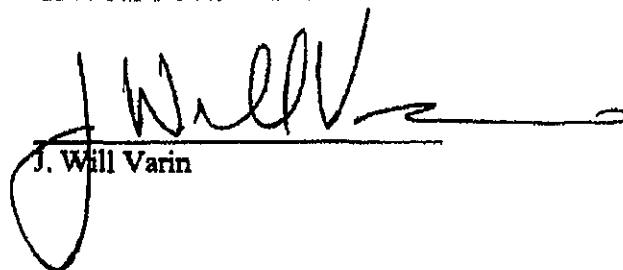
**SARAH JANE SMITH'S RESPONSE TO WHITTED'S MOTION FOR SUMMARY
 JUDGMENT/DISPOSITIVE MOTION - 1**

Judgment/Dispositive Motion premised upon trespass should be denied because Idaho case law recognizes that a ground water point of diversion can be established through prescription. *See e.g. Marshall v. Niagra Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912). The record in this matter establishes Sarah Jane Smith or her predecessors-in-interest established such a prescriptive easement.

Therefore, for all of the reasons and authorities cited in Sarah Jane Smith's Memorandum in Support of Summary Judgment, Whitted's Motion for Summary Judgment/Dispositive Motion should be denied and Sarah Jane Smith's Motion for Summary Judgment should be granted.

Dated this 10th day of September, 2008.

GIVENS PURSLEY LLP



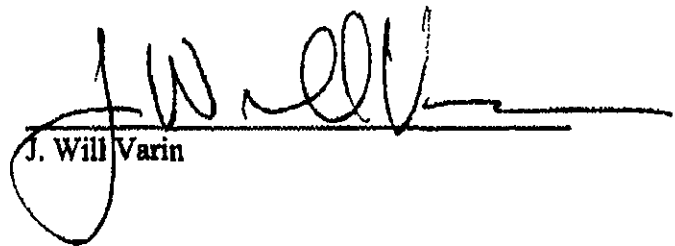
J. Will Varin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Kimball D. Gourley
Trout Jones Gledhill Furhman, P.A.
225 N. 9th Street, Suite 820
PO Box 1097
Boise, ID 83701-1097

☐ U.S. Mail
☐ By hand
☐ Overnight
☒ Facsimile


J. Will Varin