

Kelly, Vicki

From: Spencer, Nick
Sent: Wednesday, August 12, 2009 3:05 PM
To: Jones, Doug
Cc: Christensen, Kelly; Kelly, Vicki
Subject: FW: Struthers 37-2593
Attachments: 20090803 Gardner Water Right Lease .pdf; 20090803 Gardner Affidavit 37-2593.pdf

fyi

From: Office Beeman [mailto:office@beemanlaw.com]
Sent: Wednesday, August 12, 2009 12:56 PM
To: Spencer, Nick
Cc: Jo Beeman
Subject: Struthers 37-2593

Hi Nick

Regarding 37-2593, attached are the August 3, 2009 Affidavit from Robert and Kathryn Gardner and a copy of the August 3, 2009 Water Right Lease.

Joyce Angell
Legal Assistant
Beeman & Associates
208.331.0950

8/13/2009

WATER RIGHT LEASE

1. **PARTIES:** The names and addresses of the parties to this Lease are:

LESSOR: Robert J. Struthers, Jr.
762 ROBERT ST.
Bellevue, Idaho 83313
(hereinafter "Lessor")

LESSEE: Robert E. Gardner and Kathryn A. Gardner, husband and wife,
Box 1200
HAILEY, Idaho 83333
(hereinafter "Lessee")

2. **DESCRIPTION OF LEASED WATER RIGHT:** Pursuant to the terms of this Lease, Lessor leases to the Lessee that certain ground water expansion right which was developed prior to November 19, 1987, as an expansion of ground water right license no. 37-2593 for beneficial use upon and irrigation of 300 acres of land located within the following place of use situated in Blaine County, Idaho:

T01N R19E § 18 SWNE, SENE, NESE, NWSE, SWSE, SESE
T01N R19E § 19 NENE, NWNE

and with the same point of diversion as ground water right license no. 37-2593 (hereinafter "the ground water expansion right"). This Lease confers no right upon Lessee to use ground water right license no. 37-2593, such right expressly being reserved to Lessor.

3. **RENTAL:** Lessee agrees to pay to Lessor the amount of \$ 1000⁰⁰ PER MO as payment for use of the ground water expansion right during the term of this Lease. The terms of payment are as follows: PUMP POWER AND REPAIR AS NEEDED
-
-

4. **TERM OF THIS LEASE:** The term of this Lease shall commence on 8.3
2009, and shall automatically and without notice terminate on 11.3
2009. The term of this Lease may be extended or renewed only upon written agreement of Lessor and Lessee, and neither shall be under any obligation to consent to such extension or renewal.

5. OBLIGATIONS OF THE LESSEE: The Lessee agrees to perform the following obligations at the Lessee's expense:

- (a) To apply the ground water expansion right to beneficial use for the purpose of irrigation during the term of this Lease.
- (b) To indemnify, save and hold harmless the Lessor from and for any and all losses, claims, actions, judgments for damage or injuries to persons or property and losses and expenses caused or incurred by Lessee, its agents, employees, guests and business invitees as a result of or in anyway related to Lessee's diversion of, or application to beneficial use, the ground water expansion right.
- (c) To repair and replace the water distribution systems that may be damaged due to accident or negligence of the Lessee, its agents, employees, guests and business invitees.

6. OBLIGATIONS OF THE LESSOR: The Lessor agrees to perform the following obligations:

- (a) To allow the Lessee the right to the exclusive use of the ground water expansion right during the term of this Lease; provided however, that Lessor shall in no way be liable for, and shall be held harmless by Lessee, from any loss sustained by Lessee as a result of (i) administration of the ground water expansion right, including the curtailment thereof, by the Idaho Department of Water Resources and its agents, including the watermaster, if any (hereinafter collectively referred to as "IDWR"), and (ii) failure of the well and diversion system to produce a sufficient quantity of water to irrigate the place of use of the ground water expansion right. It is expressly acknowledged that Lessee has inspected the well and diversion system and has evaluated the risks associated with the administration of the ground water expansion right by IDWR pursuant to Idaho law and hereby assumes any and all risks of loss associated with the use of the existing well, diversion system, and ground water expansion right.
- (b) To allow Lessee access to the well and diversion system for the ground water expansion right during the term of this Lease.

7. NO PARTNERSHIP BETWEEN LESSOR AND LESSEE: This Lease shall not be construed as creating the relationship of partners, joint venturers, principal and agent, or any other form of joint enterprise between Lessor and Lessee. Neither party shall be liable for any debts or obligations incurred by the other, and neither party shall have authority to bind the other in any contract with third parties.

8. DEFAULT BY THE LESSEE: The happening of any of the following events shall constitute a default by the Lessee under this Lease:

- (a) Delinquency in the payment of rent or on breach by the Lessee of any of the terms, covenants and conditions of this Lease.
- (b) An attempt by Lessee to sublease the ground water expansion right or any part thereof without the prior written consent of Lessor.
- (c) An attempt by Lessee to assign Lessee's rights under this Lease without the prior written consent of the Lessor.

If a default occurs, Lessor may immediately upon serving Lessee with a notice of default retake the ground water expansion right and prevent further delivery of the ground water expansion right to Lessee.

If within fifteen (15) days from the date of service of the notice of default, Lessee cures the default and provides notice to Lessor of such cure, Lessor shall allow Lessee to receive delivery of the ground water expansion right pursuant to the terms of this Lease.

If within fifteen (15) days from the date of service of the notice of default, Lessee fails to provide Lessor with notice that the default has been cured, this Lease shall automatically and without further notice terminate, and Lessor shall be entitled to keep all rental payments or other proceeds paid by Lessee to Lessor pursuant to this Lease as liquidated damages, which damages shall be deemed in addition to, and not a limitation of, all other remedies at law and equity available to Lessor as a result of Lessee's default under this Lease.

9. TIME IS OF THE ESSENCE: Time is of the essence of this Lease.

10. WAIVER: It is agreed that the waiver by the Lessor of any breach of any covenant, condition or stipulation contained in this Lease shall not be considered to be a waiver of any subsequent breach of the same or any other covenant, condition or stipulation of this Lease nor affect or prejudice any of the rights or remedies of the Lessor under this Lease.

11. ASSIGNMENT: This Lease cannot be assigned, transferred or sublet, either wholly or in part, by the Lessee without the written consent of the Lessor. Lessor specifically retains the right to refuse to allow the assignment, transfer or sublease of the obligations under this Lease for sound business reasons. Lessor further retains the right to hold Lessee responsible should any subtenant or sublessee fail to perform under the terms of this Lease. Any assignment, transfer or sublease shall be void if the Lessor does not consent in advance. The Lessor may assign any or all rights of the Lessor under this Lease.

12. FURTHER ASSURANCES: Lessee expressly acknowledges and agrees that Lessee's rights to the ground water expansion right are limited by the terms of this Lease and that Lessee has not heretofore and shall not subsequent to the date of this Lease make any claim in any

administrative or judicial tribunal, including the Snake River Basin Adjudication, of any right of ownership, title or interest in or to the ground water expansion right apart from the leasehold interest created by this Lease.

13. ORDINANCES AND STATUTES: Lessee shall comply with all state statutes and administrative rules now enforced, or which may hereafter be enforced, pertaining to the use of the ground water expansion right by Lessee.

14. INDEMNIFICATION OF LESSOR: Lessor shall not be liable for any damage or injury to Lessee, or to any other person, or to any property occurring as a result of Lessee's use of the ground water expansion right, and Lessee agrees to hold Lessor harmless from any loss, damage, liability or claims for damages of any nature, no matter how caused.

15. GOVERNING LAW: This Lease shall be governed by the laws of the State of Idaho.

16. INTERPRETATION: All parties hereto have either: (i) been represented by separate legal counsel; or (ii) have had the opportunity to be so represented. Thus, in all cases, the language herein shall be construed simply and in accordance with its fair meaning and not strictly for or against a party, regardless of which party prepared or caused the preparation of this Lease.

17. INVALID PROVISION: The invalidity or unenforceability of any particular provision of this Lease shall not affect the other provisions of this Lease, and this Lease shall be construed as if any invalid or unenforceable provision were omitted.

18. SECTION TITLES: The underlined paragraph headings used in this Lease are for convenient reference and shall not be resorted to for the interpretation of this Lease.

19. SUCCESSORS AND ASSIGNS: This Lease shall be binding upon and shall inure to the benefit of the parties and their respective heirs, successors and assigns.

20. ATTORNEY FEES AND COSTS: In the event either party shall commence an action in any court or administrative tribunal relating to the interpretation or enforcement of any provision of this Lease, the prevailing party to such action shall be entitled to reimbursement of all attorney fees and costs reasonably incurred by such party in defending or prosecuting such action.

21. NOTICE: Any notice to be given to either party to this Lease shall be deemed to have been sufficiently given by being personally served or by mailing said notice with postage prepaid thereon by certified mail, return receipt requested, addressed to the party at the address shown on the first page of this Lease or at any other address subsequently designated in writing and served by one party on the other party.

22. TIME FOR PERFORMANCE: Wherever under the terms of this Lease the time for performance falls upon a Saturday, Sunday, or legal holiday, such time for performance shall be extended to the next business day.

23. COUNTERPARTS: This Lease may be executed in counterparts, each of which shall constitute an original, but all together shall constitute one and the same Lease.

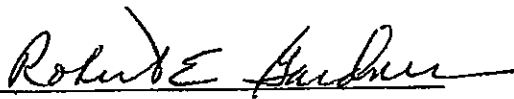
24. ENTIRE AGREEMENT: This instrument contains the entire agreement between the parties as to the terms of this Lease, and no prior agreement, communication, or understanding pertaining to the terms of this Lease shall be effective or used for any purpose whatsoever.

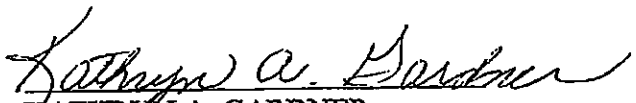
IN WITNESS WHEREOF, the undersigned have caused this Lease to be executed the
3rd day of Aug - 2009

LESSOR:


ROBERT J. STRUTHERS, JR.

LESSEE:


ROBERT E. GARDNER


KATHRYN A. GARDNER

STATE OF IDAHO)
) ss.
County of BLAINE)

On this 3 day of Aug., 2009, before me, a Notary Public for the State of Idaho, personally appeared ROBERT J. STRUTHERS, JR., known to me to be the person whose name is subscribed to the foregoing document, and acknowledged to me that he signed the same.

KATIE BRECKENRIDGE
NOTARY PUBLIC
STATE OF IDAHO

Katie Breckenridge
Notary Public for Idaho
Residing at PICABO, ID.
Commission Expires: 1.18.11

STATE OF IDAHO)
) ss.
County of BLAINE)

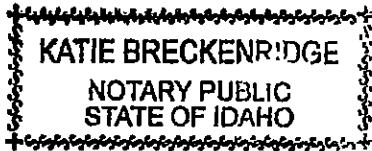
On this 3 day of Aug., 2009, before me, a Notary Public for the State of Idaho, personally appeared ROBERT E. GARDNER known to me to be the person whose name is subscribed to the foregoing document, and acknowledged to me that he signed the same.

KATIE BRECKENRIDGE
NOTARY PUBLIC
STATE OF IDAHO

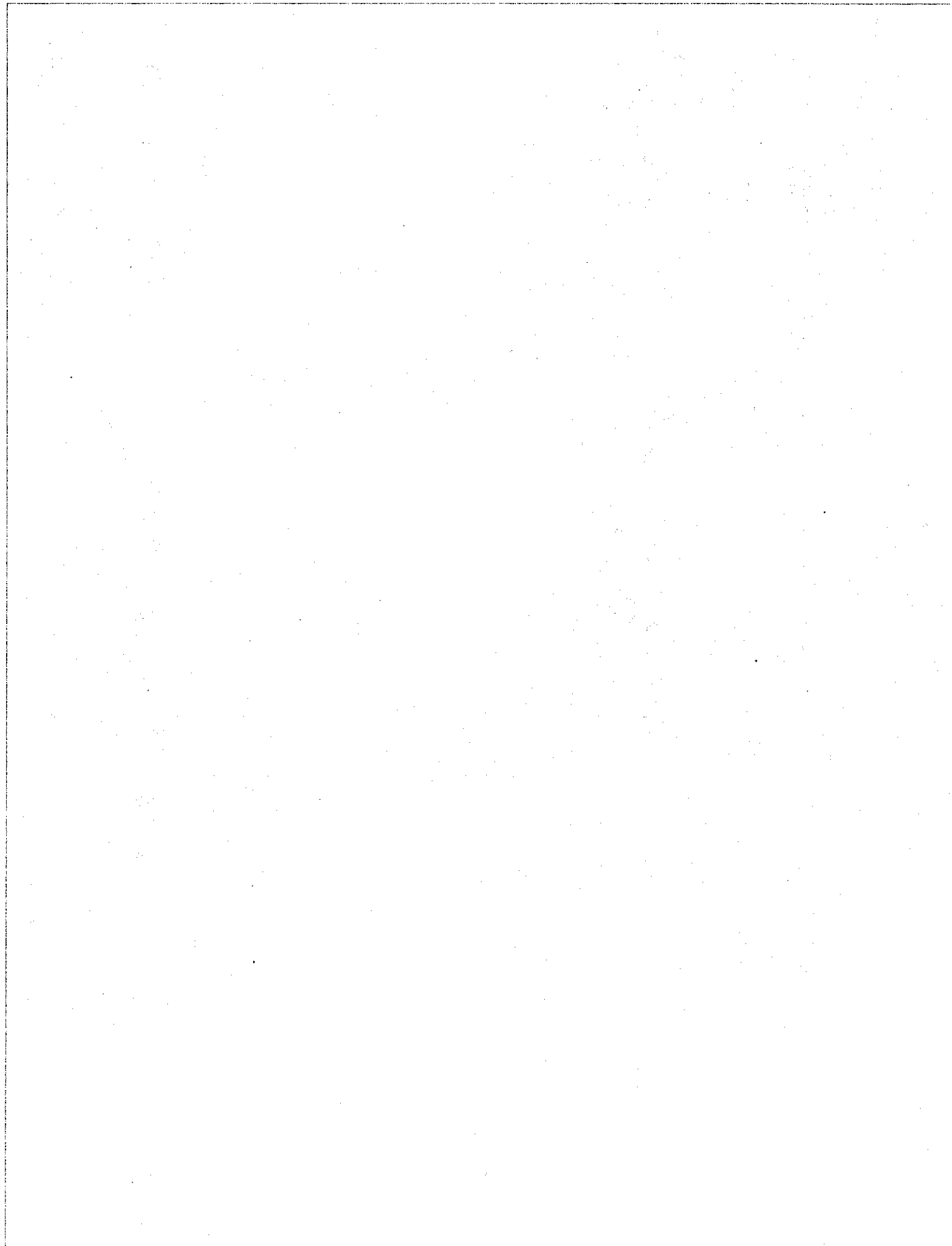
Katie Breckenridge
Notary Public for Idaho
Residing at PICABO, ID.
Commission Expires: 1.18.11

STATE OF IDAHO)
County of BLAINE)ss.

On this 3 day of Aug., 2009, before me, a Notary Public for the State of Idaho, personally appeared KATHRYN A. GARDNER known to me to be the person whose name is subscribed to the foregoing document, and acknowledged to me that she signed the same.



[Signature]
Notary Public for Idaho
Residing at PICASO, ID.
Commission Expires: 1.18.11



AFFIDAVIT

TO WHOM IT MAY CONCERN:

In the spring season of 1981, we began to utilize ground water right number 37-2593 that belonged to Margaret E. Struthers and subsequently belongs to Robert J. Struthers Jr. We used the water in the same manner as described in the past and current lease agreements with the Struthers on our 300 acres of land that is located in TOIN R 19E section 18 and 19.

Robert Gardner

Robert Gardner

8-3-2009

Date

Kathryn Gardner

Kathryn Gardner

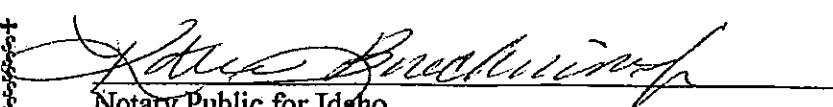
8-3-09

Date

STATE OF IDAHO)
)ss.
County of BLAINE)

On this 3 day of Aug., 2009, before me, a Notary Public for the State of Idaho, personally appeared KATHRYN A. GARDNER known to me to be the person whose name is subscribed to the foregoing document, and acknowledged to me that she signed the same.

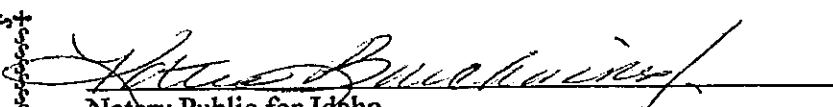
KATIE BRECKENRIDGE
NOTARY PUBLIC
STATE OF IDAHO


Notary Public for Idaho
Residing at PICABO, ID.
Commission Expires: 1.18.11

STATE OF IDAHO)
)ss.
County of BLAINE)

On this 3 day of Aug., 2009, before me, a Notary Public for the State of Idaho, personally appeared ROBERT E. GARDNER known to me to be the person whose name is subscribed to the foregoing document, and acknowledged to me that he signed the same.

KATIE BRECKENRIDGE
NOTARY PUBLIC
STATE OF IDAHO


Notary Public for Idaho
Residing at PICABO, ID
Commission Expires: 1.18.11

WARRANTY DEED

FOR VALUE RECEIVED, CLAUDE BROWN, Jr. and LARUE F. BROWN, husband and wife, PAUL R. OLSEN and JANE ANN OLSEN, husband and wife, DUANE S. PERKINS and ANNA C. PERKINS, husband and wife, of Ada County, Idaho, ("Grantors"), hereby grant, bargain, sell and convey unto ROBERT E. GARDNER and KATHRYN A. GARDNER, husband and wife, of Gannett Route, Bellevue, Idaho, 83313, ("Grantees"), certain real property situated in Blaine County, Idaho, and more particularly described in Exhibit "A" attached hereto and made a part hereof.

TO HAVE AND TO HOLD, The said real property, with its appurtenances unto the said Grantees and to the Grantees' heirs and assigns forever. And the Grantors do hereby covenant to and with the said Grantees, that the Grantors are the owners in fee simple of said real property, that said real property is free from all encumbrances except as above-described, and that the Grantors will warrant and defend the same from all lawful claims whatsoever.

DATED this 18th day of March, 1981.

Claude Brown, Jr.
CLAUDE BROWN, Jr.

Larue F. Brown
LARUE F. BROWN

Paul R. Olsen
PAUL R. OLSEN

Jane Ann B. Olsen
JANE ANN OLSEN

Duane S. Perkins
DUANE S. PERKINS

Anna C. Perkins
ANNA C. PERKINS

3.20.1981

STATE OF IDAHO,
COUNTY OF BLAINE
I HEREBY CERTIFY THAT THIS INSTRUMENT
WAS RECORDED IN THE PUBLIC RECORDS OF
IDAHO AT THE REC'D. OF
Sun Valley Title Co
AT 41.4.0 P. M.
MAR. 20, 1981
RECORDED IN BOOK 100 PAGE 100
BY Marie I. Uly
CLERK OF THE COUNTY
BY Hazel Barber
DEPUTY

ENTERED ☒ ENTERED ON MARGIN ☐
FILED ☐ INDEXED IN PARTY ☐
COMPARED ☐ INDEXED 2nd PARTY ☐

STATE OF IDAHO }
COUNTY OF Ada } ss.

On this 13 day of March, 1981, before me, the undersigned, a Notary Public in and for said State, personally appeared CLAUDE BROWN, Jr. and LARUE F. BROWN, husband and wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto affixed my official seal the day and year in this certificate first above written.

James P. Speed
Notary Public for Idaho
Residing at: Ketchikan
My Commission expires: Lifetime

STATE OF UTAH }
COUNTY OF Utah } ss.

On this 13 day of March, 1981, before me, the undersigned, a Notary Public in and for said State, personally appeared PAUL R. OLSEN and JANE ANN OLSEN, husband and wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto affixed my official seal the day and year in this certificate first above written.

Dr. Ann Thomas
Notary Public for Utah
Residing at: Garland Ave
My Commission expires: 7-24-81

STATE OF IDAHO }
COUNTY OF Ada } ss.

On this 18th day of March, 1981, before me, the undersigned, a Notary Public in and for said State, personally appeared DUANE S. PERKINS and ANNA C. PERKINS, husband and wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto affixed my official seal the day and year in this certificate first above written.

James P. Speed
Notary Public for Idaho
Residing at: Ketchikan, ID
My Commission expires: Lifetime

EXHIBIT "A"

Township 1 North, Range 19 East, Boise Meridian, Blaine County,
Idaho:

Section 18: SW $\frac{1}{4}$ NE $\frac{1}{4}$; all of SE $\frac{1}{4}$ NE $\frac{1}{4}$ lying
West and South of State Highway 23
right of way; all of SE $\frac{1}{4}$

Section 19: N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$

N $\frac{1}{2}$ N $\frac{1}{2}$ NE

SUBJECT TO the following encumbrances:

1. Right of way for irrigation ditch contained in Deed from Hugh C. Wallace and Mildred F. Wallace, husband and wife, George E. Cahoon, John Boyd Cahoon and Vera Cahoon, husband and wife, to Utah and Idaho Improvement Company, dated July 2, 1917, recorded August 15, 1917, in Book 108 of Deeds, page 5, records of Blaine County, Idaho.
2. Reservations contained in Deeds from the State of Idaho to William J. Buhler, dated June 11, 1951, recorded June 18, 1951, in Book 162 of Deeds, pages 164 and 166, records of Blaine County, Idaho, reciting: "Subject to the provisions of Section 58-604, Idaho Code, which grants over all lands belonging to the State a right of way for ditches constructed by authority of the United States; and to the provisions of Section 47-701, Idaho Code, reserving to the State all mineral rights in lands sold subsequent to the 8th day of May, 1923."

TOGETHER WITH 50% of each of the following-described water rights appurtenant thereto:

- (1) 60.0 inches of District Canal No. 45 priority No. 52-C3 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886.
- (2) 20.0 inches of District Canal No. 45 priority No. 52-C10 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886.
- (3) 20.0 inches of District Canal No. 45 priority No. 52-1 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886.
- (4) 39.0 inches of District Canal No. 45 priority No. 52-K10 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886.
- (5) 153.0 inches of District Canal No. 45 priority No. 70-B1 as originally decreed to Horace C. Lewis on 6-23-1888.
- (6) 81.0 inches of District Canal No. 45 priority No. 78-A1 as originally decreed to Horace C. Lewis on 8-2-1889.
- (7) 40.0 inches of District Canal No. 45 priority No. 86-D2 as originally decreed to Utah & Idaho Imp. Co. on 6-15-1891.
- (8) 120.0 inches of District Canal No. 45 priority No. 86-D4 as originally decreed to Utah & Idaho Imp. Co. on 6-15-1891.
- (9) 40.0 inches of District Canal #45 priority No. 86-H1 as originally decreed to Utah & Idaho Imp. Co. on 6-15-1891.
- (10) 77.0 inches of District Canal #45 priority No. 86-T5 as originally decreed to Utah & Idaho Imp. Co. on 6-15-1891.

WARRANTY DEED

FOR VALUE RECEIVED, LOREN BLICKENSTAFF and KATHRYN BLICKENSTAFF, husband and wife, of Ada County, Idaho, ("Grantors"), hereby grant, bargain, sell and convey unto KATHRYN A. GARDNER, a married woman, dealing in her sole and separate property, of Gannett Route, Bellevue, Idaho, 83313, ("Grantee"), certain real property situated in Blaine County, Idaho, and more particularly described in Exhibit "A" attached hereto and made a part hereof, subject to that certain Mortgage dated March 18, 1981, made by Grantors as the mortgagors therein, and Silver Sun Ranch Corporation, an Idaho Corporation, as the mortgagee therein, and recorded in the office of the County Recorder for Blaine County, Idaho, as Instrument No. 213177.

TO HAVE AND TO HOLD, The said real property, with its appurtenances unto the said Grantee and to the Grantees' heirs and assigns forever. And the Grantors do hereby covenant to and with the said Grantee, that the Grantors are the owners in fee simple of said real property, that said real property is free from all encumbrances except as above-described, and that the Grantors will warrant and defend the same from all lawful claims whatsoever.

DATED this 16th day of June, 1981.

Loren Blickenstaff
LOREN BLICKENSTAFF

Kathryn Blickenstaff
KATHRYN BLICKENSTAFF

STATE OF IDAHO)

COUNTY OF Blaine)

ss.

On this 16 day of June, 1981, before me, the undersigned, a Notary Public in and for said State, personally appeared LOREN BLICKENSTAFF and KATHRYN BLICKENSTAFF, husband and 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 affixed my official seal the day and year in this certificate first above written.

Wendell A. Ramsey
Notary Public for Idaho
Residing at: Harley
My Commission expires: Lifetime

CERTIFICATE OF RECORDING

STATE OF IDAHO)
) ss.
COUNTY OF BLAINE)

I heroby certify that this instrument was filed for
record at the request of HOGUE & SPECK, P.A. at _____ o'clock
_____ M., this _____ day of March, 1981, in my office, and duly
recorded as Instrument No. _____ in the Records of Deeds.

MARIE IVIE LILYA, Recorder

By _____
Deputy

MAIL DEED TO:

HOGUE & SPECK, P.A.
P. O. Box PP
Ketchum, Idaho 83340

EXHIBIT "A"

Township 1 North, Range 19 E., B.M., Blaine County, Idaho

Section 19: S2N19E4

SUBJECT TO reservations contained in Deed from State of Idaho to William J. Duhler dated June 11, 1951, recorded June 18, 1951, in Book 162 of Deeds, page 164, records of Blaine County, Idaho, reciting: "Subject to the provisions of Section 58-604, Idaho Code, which grants over all lands belonging to the state a right of way for ditches, constructed by authority of the United States, and to the provisions of Section 47-701, Idaho Code, reserving to the State all Mineral rights in lands sold subsequent to the 8th day of May, 1923."

TOGETHER WITH 7.14% of each of the following-described water rights appurtenant thereto:

- (1) 60.0 inches of District Canal No. 45 priority No. 52-C3 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886
- (2) 20.0 inches of District Canal No. 45 priority No. 52-C10 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886
- (3) 20.0 inches of District Canal No. 45 priority No. 52-1 as originally decreed to Utah & Idaho Imp. Co. on 6-12-1886
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- (10) 77.0 inches of District Canal No. 45 priority No. 86-T5 as originally decreed to Utah & Idaho Imp. Co. on 6-15-1891

RECORDED
INDEXED
FILED
MAR 1 1951
SUN VALLEY TITLE CO.
BLAINE COUNTY, IDAHO