

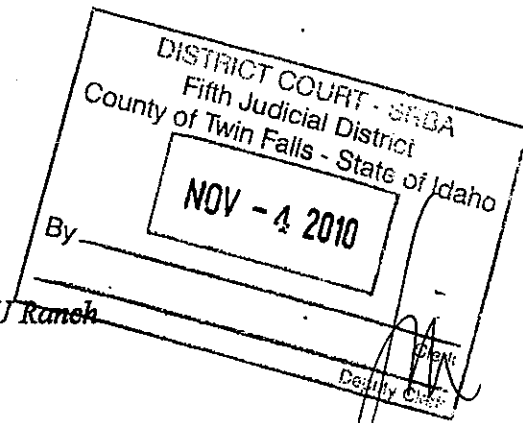
BUTTE COUNTY

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Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Telford Lands LLC, Mitchell D. Sorensen, and PU Ranch



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

TELFORD LANDS LLC, an Idaho Limited
Liability Company, MITCHELL D.
SORENSEN, an individual, and PU RANCH,
a general partnership,

Plaintiffs/Counterdefendants,

vs.

DONALD WILLIAM CAIN and CAROLYN
RUTH CAIN, husband and wife, and JOHN
DOES 1-20, individuals, and JANE DOES 1-
20, individuals

Defendants/Counterclaimants.

Case No. CV-10-20

AFFIDAVIT OF ERNEST CARLSEN

COPY

STATE OF IDAHO

County of Blaine

)
) ss.
)

I, Ernest Carlsen, do solemnly swear (or affirm) that the testimony given in this sworn statement is the truth, the whole truth, and nothing but the truth, that it is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

And being so sworn I depose and say:

1. I am over the age of 18 and competent to testify as to the matters contained herein.
2. I received a Bachelor of Science Degree in Biology from Boise State University in 1972, after which I enlisted in the United States Army.
3. When I was discharged from the United States Army, I returned to Idaho, and began working for the Idaho Department of Water Resources ("IDWR") Eastern Regional Office in Idaho Falls, Idaho, in June of 1976.
4. I was employed with IDWR from June of 1976 until January of 2010, a period of over thirty-three (33) years.
5. During my employment with IDWR, I worked in the following capacities: Water Resource Agent, Senior Water Resource Agent, Water Rights Supervisor, and Water Resource Program Manager.
6. I was employed as the Water Rights Supervisor from 1987 unto 2007, which included fulfilling responsibilities of IDWR during the Snake River Basin Adjudication (the "SRBA").
7. From 2007 until my retirement in January 2010, I was the Water Resource Program Manager, and in that position I oversaw both the SRBA and the water right program in the Eastern Region Office of IDWR.
8. I am currently the Eastern Idaho Manager for Idaho Water Engineering, a company that includes many former IDWR employees, including former IDWR Director David R. Tuthill, Jr., who recently retired from that position on June 30, 2009.
9. During my tenure with IDWR, I became familiar with the policies and procedures of describing water rights in the SRBA, and with IDWR policies with regards to the administrative processing of water rights.

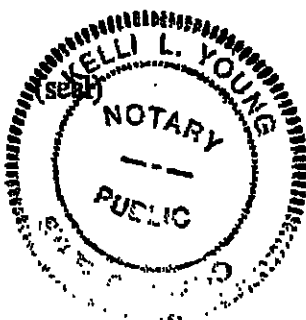
10. The final step in the SRBA is the issuance of a partial decree from the presiding judge of the SRBA. The partial decree contains the elements of a water right, which include the water right owner, the source of water, the quantity of water (which can be described in both a diversion rate and a volume, or both), the priority date, the legal description of the point of diversion, the purpose of use of the water, the season (or period) of use within which a water right can be exercised, the legal description of the place of use, conditions on the exercise of the water right, and remarks that may clarify one of the above water right elements. These standards are set forth in Idaho Code § 42-1411.
11. For example, I have reviewed the partial decree for Water Right No. 34-7077, which is attached hereto as Exhibit A. This partial decree contains the elements set forth in the preceding paragraph. Of particular importance for purposes of this affidavit is the legal description of the point of diversion, which is located in the following place: Township 5N, Range 26E, Section 21, SW1/4NW1/4NW1/4. It is my understanding that this is the location of a well that has been commonly referred to as the "Burnett Well" by the parties to this litigation.
12. In reviewing the partial decree, there is no condition or reference defining how water diverted under this water right is delivered to the water right holder's place of use. The delivery system (i.e., a canal or pipeline) is not an element of the water right.
13. On January 14, 2009, I approved Transfer No. 74921, a copy of which is attached hereto as Exhibit B. A water right transfer is an administrative process in which the water right holder can change elements of his/her water rights.
14. In approving water right transfers, it has been the practice of IDWR to include conditions that require the water right holder to do or refrain from doing something. In these instances, the term "shall" is included in a condition that requires or limits exercise of the water right. For example, condition of approval No. 2 of Transfer No. 74921 states (with my emphasis in bold and underline) that the combined water rights "**shall** not exceed a total diversion rate of 37.03 cfs, and **shall** not exceed a total annual diversion volume of 6,947.5 af at the field headgate." This condition limits the exercise of the quantity element and place of use element of the water right.

15. Additionally, IDWR will also sometimes include remarks in a transfer approval that are added for explanatory purposes only, generally to provide information to the state-employed water master to aid in on the ground delivery of water diverted under the water right. For example, condition of approval No. 10 of Transfer No. 74921 for Water Right No. 34-7077 states: "Water delivered through the Moore Diversion and Timberdome Canal." This reference does not use the term "shall" and therefore does not require that water diverted under the water right must be delivered through the Moore and Timberdome Canals. Rather, it informs the watermaster that as of the date of the transfer approval, water actually is delivered through the Moore and Timberdome Canals. None of the conditions IDWR includes in its water right administrative orders purports to grant or convey easements or rights-of-way for delivery of water. Easement and right-of-way issues are separate matters over which IDWR has no authority.
16. I have been retired for less than one year from IDWR, but understand that their position has not changed as to their inability to grant easements of rights-of-way since my retirement.

DATED this 5th day of October, 2010.

Ernest Carlsen
Ernest Carlsen

SUBSCRIBED AND SWORN TO before me this 5th day of October, 2010.



Kelli L. Young
Notary Public for Idaho
Residing at 7111 N. 1st St., Idaho
My Commission Expires: 8-22-2011

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 10th day of October, 2010.

DOCUMENT SERVED: AFFIDAVIT OF ERNEST CARLSEN

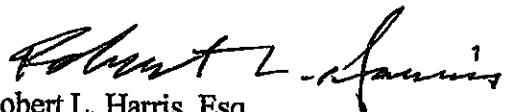
ATTORNEYS AND/OR INDIVIDUALS SERVED:

Gary D. Slette
Robertson & Slette, PLLC
PO Box 1906
Twin Falls, ID 83303-1906

(☒) First Class Mail
(☐) Hand Delivery
(☐) Facsimile
(☐) Overnight Mail
(☒) Email

Courtesy Copy to:
Honorable Joel E. Tingey
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, ID 83402

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Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

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EXHIBITS TO AFFIDAVIT ON FILE WITH THE COURT

To request a copy, (\$1.00 per page) please contact
Clerk of the Court at 208-736-3011.