

8-16

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

MOTION TO SET ASIDE PARTIAL DECREE

For: Jerry R. Rigby

CERTIFICATE OF MAILING

I certify that on August ____, 2011, I mailed the original and copies of this objection, including all attachments, to the following persons:

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

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

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

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


For: Jerry R. Rigby

Jerry R. Rigby (ISBN 2470)
RIGBY, ANDRUS
& RIGBY, Chartered
Attorneys at Law
25 North Second East
Rexburg, Idaho 83340
Telephone: (208) 356-3633
Facsimile: (208) 356-0768

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: 22-4046

Case 39576

**MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE PARTIAL
DECREE**

The Claimant, Dale Daw, moves to set aside the Partial Decree for water right 22-4046 on the grounds of mistake, inadvertence, and excusable neglect, pursuant to the Idaho Rules of Civil Procedure (60(b)(1) and 54(b)).

BACKGROUND

Clinton Peterson filed a claim for water right 22-4046 in the Snake River Basin Adjudication (hereinafter SRBA) for irrigation, industrial, recreation, and domestic purposes out of three wells. During the water rights review period in Basin 22, multiple attempts were made to contact Mr. Peterson in order to verify the historical use of his claim. Mr. Peterson did not reply to the Idaho Department of Water Resources (IDWR) in any meaningful way to verify the historical use. Mr. Peterson's grandson, and successor in interest, Trent Jensen, did provide some information to IDWR, but the information given by Mr. Jensen was both inadequate and

inaccurate because he was inexperienced with the farm and was not familiar with the historical use of the water on the farm. As a result of the lack of proper information, 22-4046 was only recommended for domestic use. The land claimed for irrigation for this right has been purchased by the Claimant, Dale Daw.

Water right 22-4046 has historically been used to irrigate land additional to Mr. Peterson's property. Although Mr. Peterson only claimed his 173 acres in the SRBA, he had actually developed a portion of the right on an additional 135 acres which he rented from his neighbors. This use of the water on the other properties predated the SRBA, which commenced in 1987, and was therefore an accomplished transfer. The right has also been used historically for industrial purposes for Mr. Peterson's potato warehouse. An affidavit submitted in support of the late claim from Erla Daw established both that this water was used at least by the late 40's and that the water was used for industrial purposes as well. A copy of this affidavit is attached as "Exhibit A." The original copy of that particular affidavit was filed with the Court during the late claim process.

The Daw family is one of the aforementioned families who rented ground to Mr. Peterson. In addition to renting ground to Mr. Peterson, the Daw family helped the Kerb's family farm Mr. Peterson's property during Mr. Peterson's latter years. (*Aff. of Dale Daw* pg. 2, attached as "Exhibit B"). Due to the fact that an accomplished transfer took place which would have allocated water to the Daw's property, and the fact that Mr. Peterson did not adequately provide information to IDWR to prove up the water right, the Daws have lost their ability to use a water right which was properly developed on their ground.

As discussed above, the information given to IDWR during the water rights review period

for Basin 22 was both inadequate and inaccurate. Claimants believe that Mr. Peterson may not have responded to IDWR with more information due to old age and illness. Some of the information was inaccurate due to the inexperience of Mr. Peterson's grandson and successor in interest, Trent Jensen. One example is that Mr. Jensen told IDWR that the land was irrigated with only surface water from a ditch. However, Mr. Jensen at the time considered water that was pumped out of the ground and then ran through a ditch as surface water. (*Aff. of Trent Jensen*, attached as Exhibit C.)

Claimants believe that other information which IDWR relied upon in their recommendation of this right is inaccurate as well. The claimants dispute the evidence IDWR relied upon, such as IDWR's assertion that only canal company water was used to irrigate the farmed ground, and that the wells on Mr. Peterson's property have not been used for years.

Attached to this motion and memorandum as "Exhibit D" are records which show that Mr. Peterson actually sold most of his shares in the Fall River Irrigation Company in 1947. Also attached as "Exhibit E" is a letter from Dale Swensen, the Secretary of the Southeast Idaho Canal Company which has merged with the Fall River Irrigation Company. Mr. Swensen claims that the records of Fall River show that Mr. Peterson only owned one share in Fall River since 1946. While these records are disparate by one year, it's clear that Mr. Peterson lacked the shares of water needed to irrigate his farm with surface water as suggested by IDWR.

Also attached to this motion and memorandum as "Exhibit F" is an affidavit from Neal Hughes which establishes that the groundwater claimed for irrigation was indeed diverted to water potatoes in years that the Hughes rented Mr. Peterson's property.

APPLICATION

The Court has discretion to set aside a partial decree. It is allowed this discretion by the Idaho Rules of Civil Procedure 60(b)(1) and 54(b), and by prior case law.

I.R.C.P. 60(b)(1) gives the court the discretion to relieve a party or their legal representative from a final judgment, order, or proceeding for the reasons of mistake, inadvertence, surprise, or excusable neglect. The rule is not specific as to what kinds of mistake, inadvertence, surprise or excusable neglect must be shown in order for the moving party to be granted relief by the court. *Ausman v. State*, 124 Idaho 839, 864 P.2d 1126, Idaho, 1993. Nor does the rule state that it applies to any specific area of civil law or to any specific types of judgments or orders. *Id.* At 1130. This rule is simply a general rule of civil procedure, and whether or not a court grants a motion under this rule is entirely discretionary. *Id.*

In the case before the court, it is clear that the proper information was not given to IDWR in order for IDWR to recommend the water right according to the historical use of the right. One reason for this is that Mr. Peterson's age and illness kept him from doing so. Another is that Mr. Jensen was very inexperienced and unfamiliar with the irrigation of the farm at the time he gave information to IDWR. It should be noted that Mr. Jensen, who has now gained more experience, has expressed to the claimants the willingness to help by providing more factual and accurate information. He hand wrote an affidavit which provides such information.

Because correct information was never provided to IDWR, its recommendation of 22-4046 was inherently flawed. As such, the partial decree based on that recommendation is also flawed and does not represent the historical use of 22-4046. Unfortunately, the Claimants, as a third party, have been injured by the recommendation and partial decree. It is within the

discretion of the Court set aside the partial decree so that this water right may be properly adjudicated on its actual merits.

I.R.C.P. 54(b) states that in cases involving multiple claims, “any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.” The claims in the SRBA are clearly subject to this rule because this rule applies to judgments upon multiple claims or involving multiple parties. The SRBA has thousands of claims and thousands of parties. In fact, the SRBA specifically allows for appeals to partial decrees pursuant to I.R.C.P 54(b).

Administrative Order 1, page 22.

The Courts have also established precedent, inside the SRBA and outside of the SRBA, that the Court has the discretion to set aside a partial decree. In *Baker v. Pendry*, the Supreme Court of Idaho ruled that a judge may set aside a partial decree at any time prior to a final adjudication of claims. 98 Idaho 745, 748, 572 P.2d 179, 182 (1977). In that case, the Supreme Court relied on both IRCP 60(b)(1) and 54(b) to allow a lower court the discretion to set aside a partial decree even more than one year after the partial decree had been entered. The case currently before the Court is a multi-party case in which no final adjudication of claims has been entered. Relying on this precedent, the Court clearly has discretion to set aside a partial decree.

Recently, the SRBA Court set aside an order disallowing a claim for the claimant Bannock Jim Slough. Water Right Nos. 1-139 and 1-140. In that case, the Court had originally disallowed the water rights because the Claimants had simply not organized their irrigation company into a corporate form all the members could agree upon in a timely manner. While a

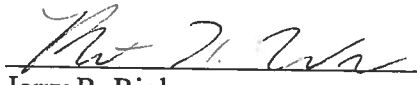
disallowance is not exactly the same as a partial decree, it is for all intents and purposes the same in that it is an order by the Court which essentially decrees the elements of the water right, or lack thereof. In that case, the Court set aside the order of disallowance and allowed the claimants to file a late objection, which resulted in the Claimants having the ability to divert the water they had historically diverted. The case currently before the Court is similar in that in the absence of the Court setting aside the partial decree of water right 22-4046, the Claimant in the current case will be forced to forego diverting the water he and his predecessors have historically diverted because of simple errors on the part of the claimant's predecessor in interest.

CONCLUSION

It is clear that the Court has the authority and discretion to set aside the partial decree of water right 22-4046. This authority and discretion is grounded in the Idaho Rules of Civil Procedure and precedent set by the Idaho Supreme Court and the Snake River Basin Adjudication District Court as well. If the Claimant is not allowed to set aside the Partial Decree, the Claimant will not be allowed to continue with the historic practice of diverting ground water for irrigation under water right 22-4046.

Therefore, the Claimant respectfully submits that the Court should set aside the Partial Decree on this claim so that Claimant may file a Motion to File a Late Objection and a Late Objection with the Court.

DATED this 12th day of August, 2011.

For: 
Jerry R. Rigby

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS
SNAKE RIVER BASIN ADJUDICATION DIVISION

In RE: SRBA

Case No. 39576

) Subcase:
)
)
)
)

AFFIDAVIT OF ERLA DAW

STATE OF IDAHO)

ss.

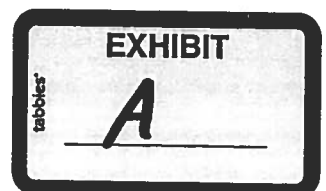
County of Fremont)

Erla Daw, having been duly sworn, states under oath as follows:

1. I have lived on the Century Farm farming area since I was born. My husband Dean Daw has lived on this farm all his life.

2. I do hereby witness that Clint Peterson drilled a well in the late 1940's and developed ground water to irrigate the Farm. I remember the noise from the big diesel generator that was used to pump water, which we could hear easily a short distance away from our home (as indicated on the map). I remember this so clearly because in 1953, we moved about a half mile away from our original home, the year our eldest son started school.

3. We learned that Peterson had drilled a well because he sold all but one of his Fall River shares to John Klein due to surface water being undeliverable to most of the farm because it was higher ground. A second well to the west was drilled later that year. Both wells were drilled on higher ground to allow for a new ditch system (see map attached hereto as Exhibit "A," wells numbered 1 & 2).



4. Peterson did not own all the property, but rented some from the neighbors: the Klein's, etc.

5. Peterson built a potato warehouse on the west end of his property after he developed the ground water. The Industrial portion of the ground water ran from the west well through ditches into a flume through the warehouse. The flume exited the warehouse after being used to process potatoes and out onto Klein's ground for irrigation.

6. I remember that Peterson used to fill the pit between the canals (SESE of Sec 20, T7N R41E) with ground water in order to push water across the southern field using a dike system. The pond was also used for swimming and ice skating.

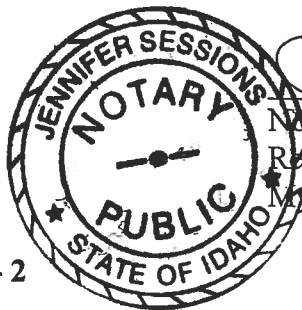
7. The Teton Dam Flood wiped out the canal systems and ruined some of the original farm ground that is still unusable today.

8. In 1978, repair began on the canal systems. Some canals were relocated for better efficiency. This allowed for surface water to be deliverable to parts of the Century Farm. Surface water was added back to certain portions of the farm and is now comingled with ground water on those portions.

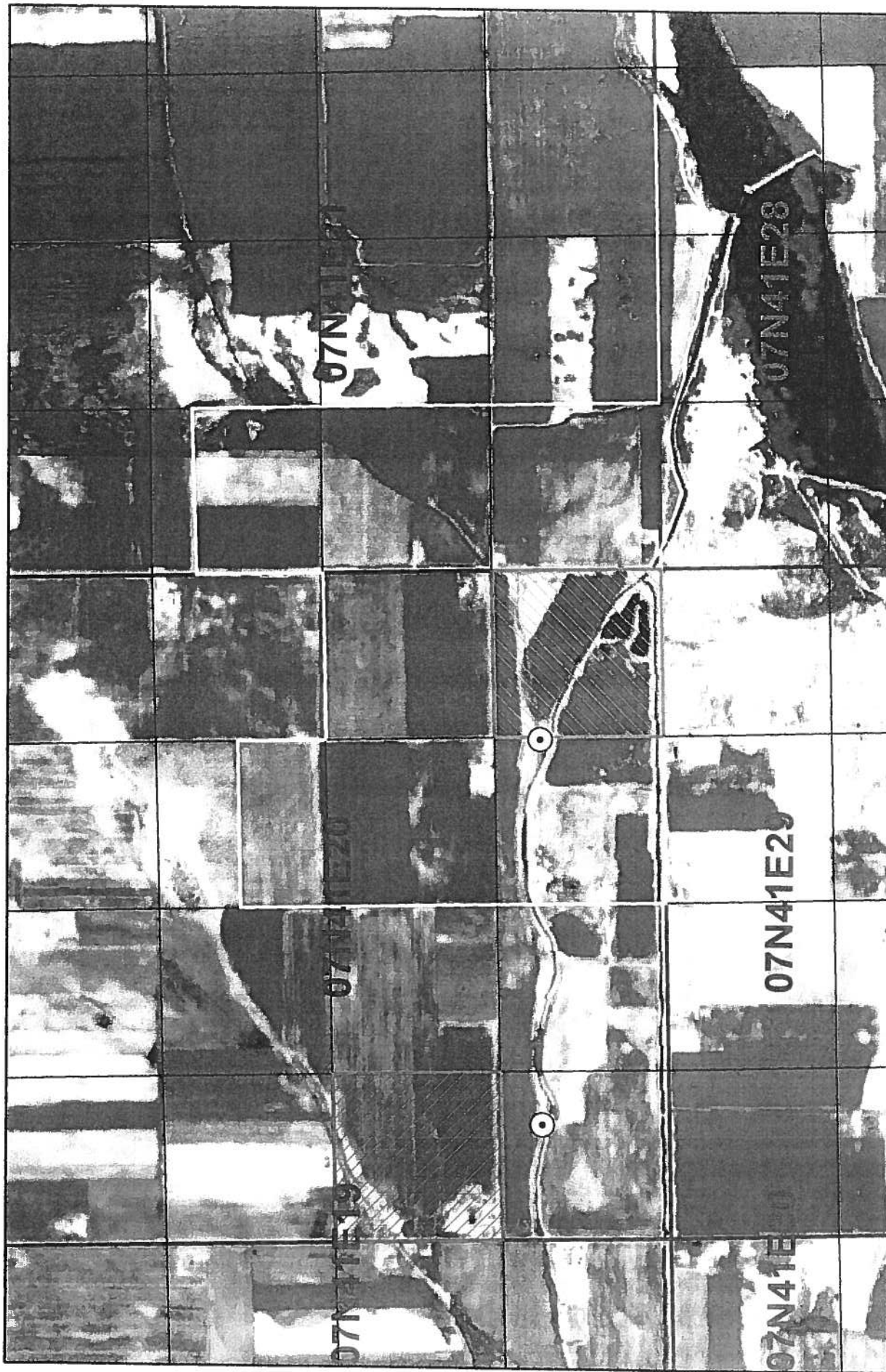
Respectfully submitted, this 28th day of march, 2009.

Erla Daw
Erla Daw

SUBSCRIBED AND SWORN to before me this 28th day of march, 2009.



Jennifer Sessions
Notary Public for Idaho
Residing at: St. Anthony
My Commission Expires: 8-4-11



1987 Photography

Claim to a Water Right Dale Daw

Legend

Claimed POU Claimed POU

Purpose

- Irrigation
- Industrial
- Recreation

Section

- Section
- QQ

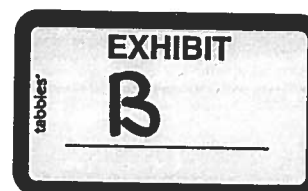


IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

**AFFIDAVIT IN SUPPORT OF
MOTION TO SET ASIDE PARTIAL
DECREE**

County of Madison)

5. One reason I remember seeing the ground being irrigated with the groundwater, is that I remember seeing potatoes being planted by the Kerbs family. The ground which is watered by



this right is approximately 100 feet from my father's house, so I was very aware of what was being planted and how it was being irrigated.

6. I remember occasionally having helped the Kerbs on this ground when I was a senior in high school, and I know that they were using the groundwater pump to irrigate potatoes in the years they planted potatoes.

7. I am personally aware that soon after Mr. Kerbs ceased renting the property from Clint Peterson, that Rex and Neil Hughes began renting the ground from Clint Peterson for the purpose of growing potatoes.

8. Although I didn't help the Hughes like I had helped the Kerbs, I vividly remember seeing them pump groundwater out of a well which is located approximately 250 feet from my father's house.

9. I remember that at the end of the Kerb's rental relationship with the Petersons, there was a dispute over the power bill, and neither party was willing to pay the electric company. Because of this, the electricity to their pump was cut off, and therefore, the Hughes had to use a power generator to power the pump at the well.

10. I remember seeing a truck with the generator being backed up to a point where it was connected to power cables which were connected to the pump at the well in order to provide the necessary power to the well.

11. I remember seeing the truck with the generator until probably 2002 or 2003, when Trent Jensen began farming his grandfather's property himself.

12. When the Kerb's and Hughes grew potatoes during the potato rotation, it was very

evident that the ground water was being pumped to water the ground because I could see the sprinklers.

13. I have been informed by Trent Jensen that his grandfather also ran the pump at the well with a generator off and on.

14. I know that in years when the Kerb's and Hughes were not renting the ground to grow potatoes, Clint Peterson and Trent Jensen would grow grain. While they didn't use sprinklers on the grain, they would flood irrigate the ground in order to irrigate the grain.

15. I began renting a portion of this ground in 2006, and continued renting it until I purchased it in 2009.

16. Soon after I began renting the ground, I had Fall River Electric hook the pump up to their power supply, and have used Fall River to power the pump since then.

17. On years when I grow potatoes, I use groundwater from the well to irrigate the potatoes.

18. I am aware that the Idaho Department of Water Resources doubts whether this water has been used consistently on this ground.

19. Because I have lived near this ground and well for my whole life, I know that the water has been used for every crop rotation when potatoes were grown on the property.

20. Further, Trent Jensen has informed me that the water has at least sometimes been used on years when grain was planted instead of potatoes.

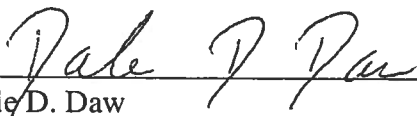
21. Due to the farm being irrigated every year that I remember, I know that water has been put on this ground for the last 35 years.

Affidavit in Support of Motion to Set Aside Partial Decree

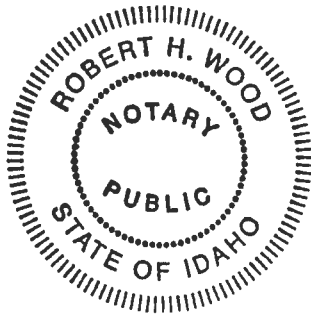
Page - 3

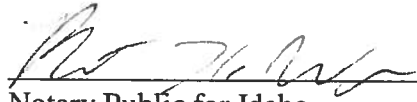
sb/dawdale.aff

DATED This 5th day of August, 2011.


Dale D. Daw

SUBSCRIBED AND SWORN To before me this 5th day of August, 2011.




Notary Public for Idaho
Residing at: Rexburg
Commission Expires: 8/20/2015



I Trent Jensen, after Reading your information, Do not agree with the findings. Clint Peterson and I used the 2 wells for irrigating our farm, I have Read in your notes that I have only used surface irrigation, but in my mind when we pumped the water to the surface it was then considered surface water irrigation. The 50 Hp well had been run with a generator off and on since Clint Did not agree with Fall River elect. Co on power charges. The 25 Hp well has been hooked up to power every year up untill 2009, when excavation was being done from New Home to my new domestic well

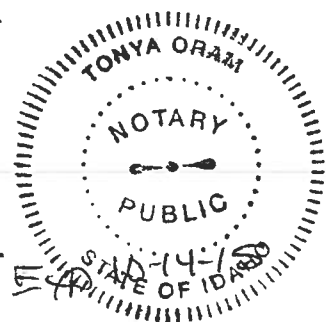
I have seen both of these irrigation wells being used for irrigating this farm land

Trent D. Jensen

8-4-11

State of Idaho
County of Stewart

[Signature]
Notary Public



Sedgewick

Certificate No. 722

Nov 11 - 1894

Issued to

John Allen

Dated Mar. 28, 1947

Transferred from	Number Original Certificate	Number Original Shares	Number Shares Transferred
B.H. Johnson	671	12	11

Received this Certificate

John Klein

EXHIBIT

Dr. L. J. Sedgwick

Certificate No. 723

For One Share
Issued to
E. H. Nelson

Dated Mar. 28 1947

Transferred from	Number Original Certificate	Number Original Shares	Number Shares Transferred
CH Johnson	671	12	1
The other share was transferred on Oct. # 92			

Received this Certificate

J. H. Johnson

