

MOORE SMITH BUXTON & TURCKE, CHTD.
950 West Bannock Street, Suite 520
Boise, ID 83702
Telephone: 208-331-1800
Facsimile: 208-331-1202
BRUCE M. SMITH, ISB #3425
bms@msbtlaw.com

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
SEP - 4 2012	
By _____	Clerk
_____	Deputy Clerk

1031
Filed
9/4/12
1:30 pm

Attorney for J. R. ALLEN/ALLEN RANCH LLP

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

In Re Snake River Basin Adjudication
Case No. 39576

Subcase No: 65-23481

**AFFIDAVIT OF J.R. ALLEN IN
SUPPORT OF MOTION TO FILE
LATE CLAIM**

STATE OF IDAHO)
) ss.
County of Ada)

COMES NOW, J. R. ALLEN and declares as follows:

1. My name is J.R. Allen. I am over the age of 18 and I make the following statement based on my own personal knowledge.

2. I am the general partner in Allen Ranch LLP. Through the partnership, I own a ranch in Valley County, Idaho, near Lake Cascade. The ranch is primarily a cattle ranch on which

my father and grandfather and I have historically run cattle and now lease grazing rights to other ranchers for grazing.

3. My father and my grandfather ran the ranch before me. The family ownership dates to about 1913 when the land was homesteaded.

4. Allen Ranch has water right 65-3111X which was decreed in the Snake River Basin Adjudication for 2.7 cfs for irrigation of 83 acres during the period 4/15-10/15. The Snake River Basin Adjudication decreed right came from a claim filed in the Payette adjudication. The Payette Claim came from rights established under the 1930 Allen v Withers decree. I believe my grandfather helped file the Payette claim. Attached as Exhibit 1 is a copy of the Payette claim from Idaho Department of Water Resources records.

5. The Payette Adjudication claim did not include livestock as a use because, as I understand, livestock use was not required in the Payette adjudication. However livestock watering has always been a use on the ranch since my family started it.

6. The ranch has an upper area on the north end of the ranch that we call the Home Place. There is a ridge between the northern part of the ranch and the southern part.

7. The ranch has always been irrigated since it was homesteaded. As far back as I can remember, the northern part of the ranch, the Home Place, was irrigated from what was known as Little Rock Creek. The southern part of the ranch was irrigated from Rock Creek. Because Rock Creek has greater flows, my grandfather and his friends constructed a diversion and ditch to convey water from Rock Creek to Little Rock Creek. This has always been referred to as the Upper Diversion.

8. The reason water is conveyed in Little Rock Creek through the Upper Diversion is

because physically water from Rock Creek cannot be conveyed to the Home Place from lower reaches of Rock Creek because that would require water to run uphill. The Upper Diversion has been in place since at least 1915 – 1920.

9. In the 1950's, my father sold off some of the ranch and conveyed a portion of the water right to the purchasers.

10. The sold off part of the ranch was subdivided into lots and sold to individual homeowners. In the past few years some of the homeowners have begun to complain about the watering of the livestock and the diversion of water from Rock Creek to Little Rock Creek for irrigation of the Home Place.

11. The watering of livestock and conveyance of water from Rock Creek to Little Rock Creek through the Upper Diversion to irrigate the Home Place has been ongoing and continuous since long before any lots were sold or houses built.

12. Attached as Exhibit 2 is a Court Decree from 1931 that dealt with a dispute that came out of the 1930 Allen v. Withers Decree. This Decree in paragraph 2 references the Upper Diversion as being in existence in 1931. Exhibit 3 is a map from the same case showing the Upper Diversion ditch that conveys water from Rock Creek to Little Rock Creek.

13. Because of the complaints from some of the homeowners about the diversion and use of water, the Idaho Department of Water Resources began looking at the records regarding 65-3111X as well as 65-3111A, which was a split from the original right. Water right 65-3111A is held by the homeowners association for the area that was sold off. The Idaho Department of Water Resources review showed the points of diversion for both rights were incorrect in the Snake River Basin Adjudication records.

14. The Idaho Department of Water Resources has directed that while the points of diversion for those two rights are corrected, that sufficient water be left in Rock Creek to satisfy 65-3111A. This amount is .05 cfs. There is sufficient flow in Rock Creek to allow the late claim as well as fulfill the .05 cfs for 65-3111A. If there is insufficient flow, I have agreed to allow that amount to continue down Rock Creek so that the homeowner's association right is met. The late claim only involves an additional .14 cfs for livestock. Because the ranch was a homestead, watering of livestock occurred year round. That can still occur today

15. The late claim does not seek increased diversion rate, increased areas or an earlier priority date.

16. However the actual historical use of water on the ranch is also different from the period of use as decreed in 65-3111X. Irrigation, depending on any given year, starts as early as March 15 and continues after October 15, sometimes to as late as November 30. I irrigate as early and late as possible in order to get the best pasture and grazing conditions I can. This is the actual historical use for as far back as I can remember and is the basis for the late claim.

17. Sandra Chess and Jim Bunce, two homeowners, have objected to my motion to file a late claim. I had my attorney check Idaho Department of Water Resources water right records and both Ms. Chess and Mr. Bunce have groundwater rights. Neither has a water right in Rock Creek or Little Rock Creek. Their main objections appear to be based on their preference for the aesthetics of water in Rock Creek and their objection to my watering of livestock. I believe both Ms. Chess and Mr. Bunce both bought their lots and/or built their homes after the use of water by the ranch had been in existence since at least the 1920's. Since they have groundwater rights, not rights in rock Creek or Little Rock Creek I do not understand how they can be injured by allowing my late

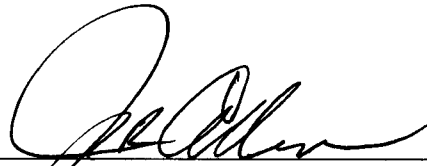
claim to be filed. Even if the late claim were recommended and decreed, they would not be injured. Their water rights from the Idaho Department of Water Resources records are attached as Exhibit 4.

18. Attached as Exhibit 5 is a letter from Dave Tuthill at Department of Water Resources explaining that livestock rights were not included in the Payette adjudication.

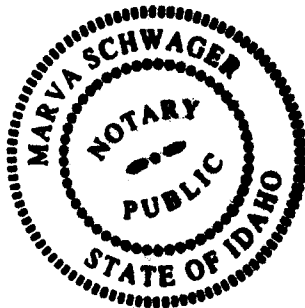
19. Attached as Exhibits 5 and 6 are letters from Pat Healey and Clayton Simpson, people who have worked on the irrigation ditches on the ranch over many years. These letters describe maintenance work done on the Upper Diversion that conveys water from Rock Creek to Little Rock Creek to irrigate the Home Place.

Further your affiant sayeth not.

DATED this 4th day of September, 2012.


J. R. Allen

SUBSCRIBED AND SWORN to before me this 4th day of September, 2012.




NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Idaho
My Commission Expires: June 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **AFFIDAVIT OF J. R. Allen** was this ____ day of September, 2012 served upon the following individuals and in the corresponding manner:

Idaho Department of Water Resources
Western Region
2735 Airport Way
Boise, Idaho 83705-5082

____ US Mail
 x Hand Delivered
____ Faxed
____ Emailed

Sandra M. Chess
1200 Lizaso Ave
Boise, Idaho 83709

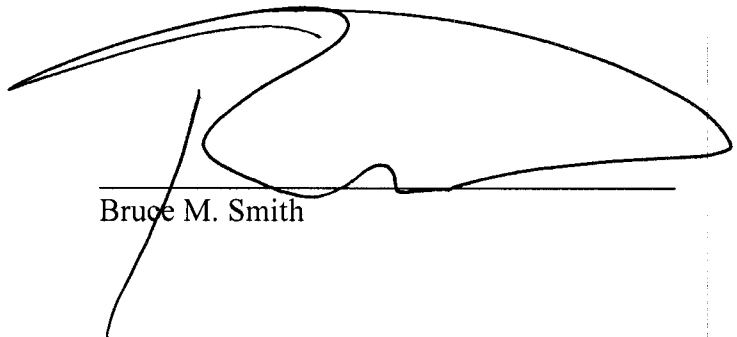
____ US Mail
 x Hand Delivered
____ Faxed
____ Emailed

James T. (Jim) Bunce
PO Box 890
Cascade, Idaho 83611-0890

 x US Mail
____ Hand Delivered
____ Faxed
____ Emailed

Allen Ranch, LLP
C/O J.R. Allen
2624 S. Inglenook Pl
Meridian, ID 83642

____ US Mail
 x Hand Delivered
____ Faxed
____ Emailed



Bruce M. Smith

JUDICIAL DISTRICT

J. D. No. <u>25-3711</u>		Map No. <u>1</u>	
Fee Paid <u>1.00</u>		Receipt No. <u>1</u>	

DRAINAGE BASIN. WATER RIGHT

Notice is hereby given that E. K. Allen for Money Old

claims a right to the diversion

and beneficial use of the surface or groundwater, of or tributary to the State of New

(1) Date of priority: (When was the water first applied to a beneficial use, or priority date of decreed, licensed or permit right).

(2) Describe the source of water: (Name of stream, lake, spring, etc., or groundwater)

(2) Describe the purpose for which the water has been used and the time during the year when you have used the right claimed:

Period of Use From 4/15 To 10/1

197 F (CFS, OPD, AF) (Domestic, Int'l, Police, State, etc.) (Both Dates Inclusive)

(CFS, GPD, AF.) (Domestic, Migration, Stock, etc.) (Mo., Day) (Mo., Day)
(Both Dates Inclusive)

Quantity	(CFS, GPD, AFD)	(Domestic, irrigation, stock, etc.)	(Mo., Day)	(Mo., Day)
			(Both Dates Inclusive)	
3.7				

(4) 216 TOTAL QUANTITY CLAIMED: 216
(CFS, OPD, AP.)

41. A) Point of Diversion: Give location of point where water is diverted from its source _____

STV

Give sizes and capacities; be as specific as possible. DIVERSIONAL GROVES AND DITCHES

(6) A) Describe location of use by listing number of irrigated acres within each 40-acre tract in appropriate box. If use is not

[illegible]

Total No. of acres 20.5

B) If water is used for other than irrigation, fully describe that use, being as specific as possible: _____

(7) Equipment, sewerage works, or return water from this use is discharged into _____

(8) If you are claiming water as a member of an organization, list name of organization, _____

(9) Remarks THIS PLANT WHEN COMBINED WITH PLANT 65-3112 SPONGE

102 146 20F/10/acc

(1b) Basis of claim (Check one) ☐ A) Right based on invention and beneficial int.
☒ B) Right decreed by court, cite title of case: ALLEN VS. WITMERS

☐ C) Right based on application, permit, license, or claim filed with the Idaho Department of

Water Resources. _____

true and accurate to the best of (his, her, their) knowledge. *Individual*

Re 10-28-78 1-4

11-13-98

State of _____ Organization _____ Organization _____ (Signature of Spouse)

County of _____

On this _____ day of _____, in the year _____, before

known to me to be the person(s) whose name(s) are subscribed to the above instrument, and acknowledged to me that (he, she,

corporation, partnership or _____, executed the same.

My commission expires _____

Notary Public residing at

My commission expires _____

EXHIBIT 1

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM

EXHIBIT 2

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM

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

MARY R. ALLEN)
D. K. ALLEN)
Plaintiffs)
-vs-)
W. H. WITHERS)
MAUD WITHERS)
Defendants)

DECEEE

FINDINGS and CONCLUSIONS

of

COMMISSIONER OF RECLAMATION

Re: DISTRIBUTION AND USE OF WATER
WHERE AN ORDER OF COURT HAS BEEN ENTERED

The complaint of Defendant WITHERS in the above entitled action with reference to the distribution and use of water under the decree: After examination on the ground and from the testimony of the plaintiff and the defendant in the above entitled action, together with that of other parties having knowledge of the facts, this department has arrived at the following findings-of-fact and conclusions as to the rights, duties, and obligations of the respective parties, to-wit:

1. That the State Commissioner of Reclamation of the State of Idaho is the public official having jurisdiction over the distribution and diversion of the water under and pursuant to the terms of the decree herein;

7-15-32

2. That inasmuch as at the present time there are only about 40 inches of water in ROCK CREEK at Plaintiff ALLEN's upper diversion, whereas he has a prior decree for 160 inches, Defendant WITHERS has no right nor interest in or to the natural flow of ROCK CREEK at this time;
3. That LITTLE ROCK CREEK is not a tributary of ROCK CREEK and that Defendant WITHERS has a prior right under the decree to divert and use all of the water of LITTLE ROCK CREEK up to the amount of his decree, to-wit: 30 miner's inches;
4. That Plaintiff ALLEN has no right to divert and transfer water decreed to him for use upon a specific tract of land to other lands without securing a permit for such transfer from this department, which permit can be secured only by due process of law, with a showing that such diversion would not damage another appropriator;
5. That in this instance the diversion of water from the specific tract of land to which it was decreed to Plaintiff ALLEN for use upon other land would be a damage to Defendant WITHERS for the reason that in regular course and incident to the irrigation of such land said WITHERS now receives the benefit of the use of the return flow, seepage, and percolating waters from the irrigation of the land to which it was decreed, of which use he would be deprived by such change of place of use;

7-15-32

"A change of place of use of the water will not be permitted where to do so would damage another appropriator." Hall -vs- Blackman (22 Idaho 556)

6. That one WESLEY HARTLEY, who has attempted to divert, and in fact has actually diverted, water from LITTLE ROCK CREEK to irrigate what is known as the WORTHINGTON lands, was not, nor was his predecessor-in-interest, a party to the above entitled action, and the records of this office do not disclose that he has any right, title or interest in and to the waters of LITTLE ROCK CREEK or to any of the stream mentioned in the decree, so it would seem that by his action he is liable to prosecution for unlawful diversion of water and would be liable in damages to any one injured by his acts, but that is a matter outside of the jurisdiction of this department.

It is assumed that both the plaintiff and the defendant in the above entitled action have copies of the decree in their possession and are familiar with the terms and conditions and requirements thereof, but at this time this department desires to call special attention to the following provisions of the decree:

"IV.

That each of the parties hereto, their agents, servants, employees, successors, and all persons acting in their behalf, or on behalf of either of them, be perpetually enjoined from in any manner interfering with the rights of the other parties hereto to the use of said waters, and in any manner interfering with the ditches, canals, laterals, or other means of diversion or distribution of said waters;

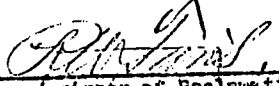
V.

That a miner's inch of water, as herein mentioned, is equivalent to a full 1/60 cubic foot of water per second.

That the parties to whom rights are herein allotted and their successors-in-interest shall, at their own cost and expense, install and maintain suitable and efficient headgates, controlling works, and measuring devices at their respective points of diversion from the streams from which water is diverted by them, and all waters herein allotted and decreed shall be measured at said points of diversion; said works and devices shall be built, installed and maintained in accordance with plans and specifications to be approved by the official charged by law with the duty of supervising the distribution of water; all such devices shall be of such design as to accurately measure the water diverted; all such headgates, control works, measuring devices and gauges shall, at all times, be subject to inspection by any party hereto and by the public officials or watermasters having jurisdiction over the distribution and diversion of the waters, and no dam or other obstruction to the natural flow of either of the streams from which water is taken shall be maintained so as to divert water from the channel thereof except through ditches, canals or other works provided with such headgates, control works, and measuring devices; each of the parties hereto is hereby perpetually enjoined from diverting from the channel of either of said streams any water to any ditch, conduit or other device not provided with such headgates, control works and measuring devices."

Under and pursuant to the terms and conditions of the decree and of Section 5617, Idaho Compiled Statutes, as amended by Chapter 19 (Senate Bill No. 21), Session Laws of 1927, all parties-in-interest are hereby advised and notified to provide suitable headgates, control works, measuring devices, and gauges; failing in which, action will be taken by this department pursuant to the terms of the above section of the law.

Dated, this 25th day of May, 1931

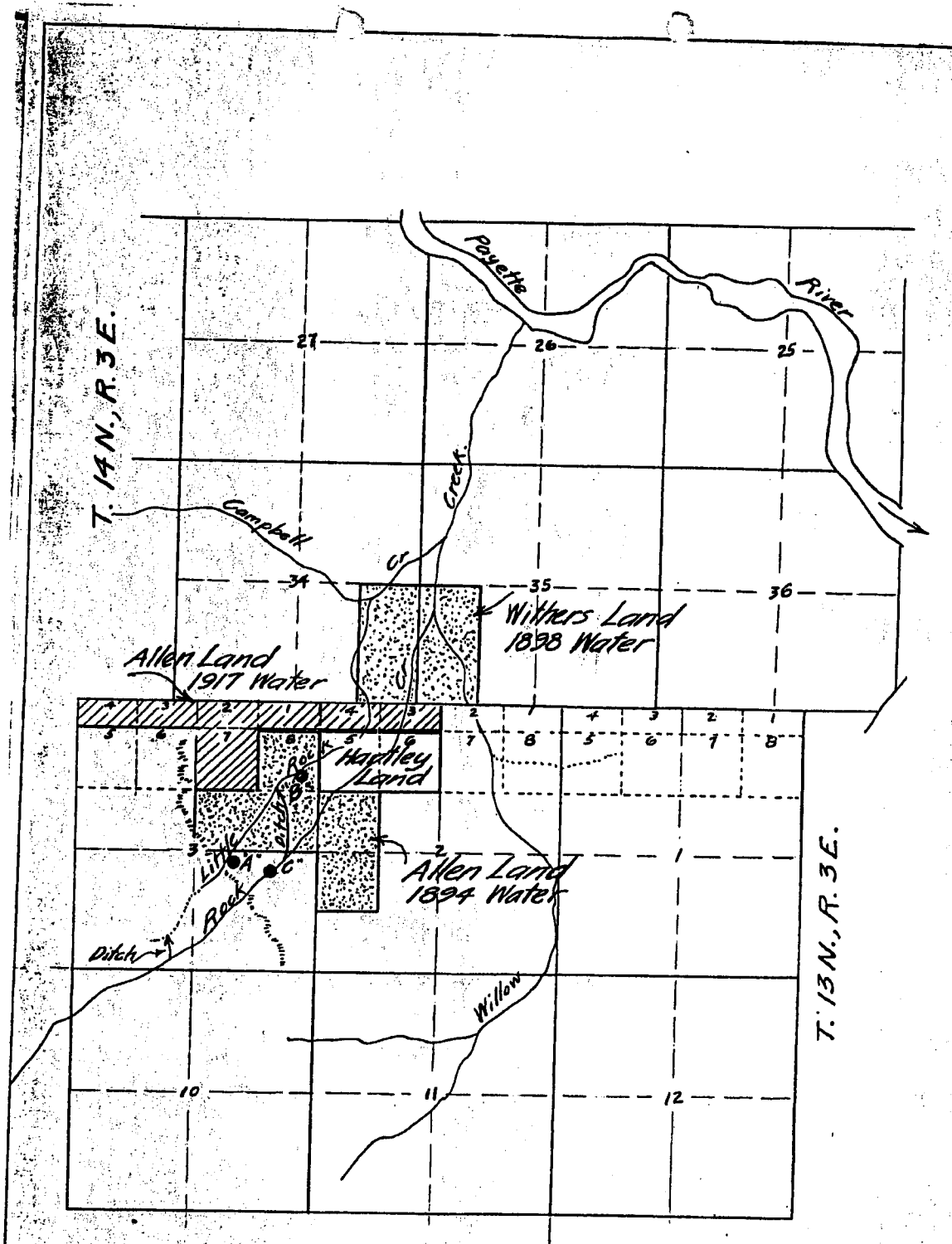

Commissioner of Reclamation

To: D. K. ALLEN
cc: W. N. WITHERS

7-15-32

EXHIBIT 3

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM



ALLEN vs WITHERS DECREE
 Rock Creek & Little Rock Creek
 Valley County Idaho

EXHIBIT 4

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

9/2/2012

WATER RIGHT NO. 65-17056

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	LAWRENCE J CHESS
Current Owner	SANDRA M CHESS
	1200 LIZASO AVE
	BOISE, ID 83709
	208-850-8933
Original Owner	JANE RONCHETTI
Original Owner	W J RONCHETTI
	2309 TERRACE
	CALDWELL, ID 83605
	(208)459-3513

Priority Date: 10/19/1982

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
DOMESTIC	1/01	12/31	0.02 CFS	
Total Diversion			0.02 CFS	

Location of Point(s) of Diversion:

GROUND WATER	NWSE	Sec. 03	Township 13N	Range 03E	VALLEY County
--------------	------	---------	--------------	-----------	---------------

Place(s) of use:

Place of Use Legal Description: DOMESTIC VALLEY County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
13N	03E	3		NWSE										

Conditions of Approval:

1.	N13	THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.
2.	N11	THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.
3.		PARCEL NO. RP 000990010050A

Dates:

Licensed Date:

Decreed Date: 11/20/1998

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date:

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector: AND

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

[Close](#)**IDAHO DEPARTMENT OF WATER RESOURCES**
Water Right Report

9/2/2012

WATER RIGHT NO. 65-17976

Owner Type	Name and Address
Current Owner	ISABEL A BUNCE
Current Owner	JAMES T BUNCE
	2306 GRANDEE ST
	BOISE, ID 83704
	(208)375-8882

Priority Date: 05/31/1983

Basis: Decreed

Status: Active

Source	Tributary
GROUND WATER	

Beneficial Use	From	To	Diversion Rate	Volume
DOMESTIC	1/01	12/31	0.04 CFS	
Total Diversion			0.04 CFS	

Location of Point(s) of Diversion:

GROUND WATER	SWNE	Sec. 03	Township 13N	Range 03E	VALLEY County
--------------	------	---------	--------------	-----------	---------------

Place(s) of use:

Place of Use Legal Description: DOMESTIC VALLEY County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
13N	03E	3		SWNE										

Conditions of Approval:

1.	N13	THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.
2.	N11	THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.
3.		PARCEL NO. RP000050020560A PROPERTY ALSO KNOWN AS LOT 56, ALLENS 4TH SUBDIVISION #2.

Dates:

Licensed Date:

Decreed Date: 11/27/1998

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date:

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector: OR

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

EXHIBIT 5

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0096
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

May 4, 2001

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

Dear Basin 65 water user.

This letter is to inform you that you may be eligible to file a stockwater claim with the Idaho Department of Water Resources (IDWR) in connection with the Snake River Basin Adjudication (SRBA). IDWR is sending this letter to water users in Basin 65 who might have relied upon the non-irrigation season stockwater provision in the Payette Adjudication. This provision states:

"When stockwater is not a specifically mentioned use for a right that includes irrigation, a reasonable flow is implied and included for the watering of livestock during the non-irrigation season."

In another basin, the Idaho Supreme Court struck down general provisions that contained similar language. The non-irrigation season stockwater language quoted above was not included in the General Provisions for Basin 65 because of the Idaho Supreme Court's ruling.

IDWR recognizes that in reliance on the non-irrigation season stockwater language in the Payette Adjudication, water users might not have filed stockwater claims in the SRBA to cover the non-irrigation season period. Individuals who historically watered livestock during the non-irrigation season without a separate stockwater claim might desire to file a new stockwater claim with IDWR.

To be eligible for a new non-irrigation season stockwater claim:

- 1 You must have actually and historically watered livestock during the non-irrigation season without a separate stockwater right.
- 2 You must have filed a surface water irrigation claim in both the Payette Adjudication and the SRBA.
- 3 You must not have filed a stockwater claim with the surface water irrigation claim.

If you meet these three requirements, you may file a Notice of Claim form for stockwater with IDWR. **To have a timely filing you must file this claim with IDWR by May 25, 2001.** IDWR will waive filing fees for these stockwater claims if filed before this deadline. Failure to file your claim in a timely manner may prevent you from claiming it in the future. Notice of Claim forms are available on IDWR's website at www.idwr.state.id.us/info/water/srba/forms.htm or from any IDWR office. Claimants can call IDWR, Western Region at (208) 334-2190 to make an appointment if they need assistance filling out a Notice of Claim form.

Sincerely,

David R. Tuthill, Jr., P.E.
Adjudication Bureau Chief

EXHIBIT 6

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM

8/24/2012

To whom it may concern

20 yrs ago Garrison Backhoe was hired to fix a washout for the Allen Ranch.

I was the operator that fixed and re-diverted the water back into the original creek that feed the water to the Homeland of the Allen Ranch.

Pat Healy

EXHIBIT 7

AFFIDAVIT OF J. R. ALLEN IN SUPPORT OF MOTION TO FILE LATE CLAIM

8/23/2012

To Whom it may concern:

- I have been Allen Ranch's backhoe operator for the past 10-12 years. I went up on West Mountain to what is called Rock Creek to where the Allen's have a water right for what is known as their home ranch which is an early homestead ranch. In looking at the diversion in Rock Creek, it is the only place that I can see that water can be diverted to irrigate the north end of the home ranch. There is an existing creek known as Little Rock Creek that has been there for, according to my estimations, several decades.

Simpson Excavation

Clayton Simpson
Clayton Simpson