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DISTRICT COURT Fifth Judicial District County of Twin Falls, State of Idaho	
JUL - 7 1995	
By _____	Dep _____

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

BOB BLACKADAR,
Plaintiff/Counterdefendant,

vs.

MYRTHUS AUSTIN,
Defendant/Counterclaimant.

) Case No.: 94-00004
)
) **MEMORANDUM DECISION AND**
) **ORDER GRANTING PARTIAL**
) **SUMMARY JUDGMENT**
)
) **ORDER DENYING MOTION TO**
) **SUPPRESS EVIDENCE**
)

Jay D. Sudweeks, Attorney, for Plaintiff

Myrthus Austin, Pro Se Defendant

BACKGROUND AND HISTORY

This case involves claims of damage and trespass, made by Plaintiff Bob Blackadar (Blackadar), against Defendant Myrthus Austin (Austin). First filed in Small Claims Court, Blackadar's initial action was successful. Austin appealed to Judge James Martsch of the Magistrate Division, and Blackadar prevailed there as well. Austin appealed these judgments to the District Court, the Honorable James Herndon. As a result of Austin's claim of collusion between Blackadar's attorney and Judge Herndon, and in order to avoid any appearance of impropriety or impartiality, the Judge recused himself from the appeal. The case was then assigned to the Honorable Theodore Wood, who remanded the case to the Magistrate Division for a trial *de novo*.¹ At this point, the case was assigned to its fifth judge, Magistrate Brent Moss.

¹ The new trial was ordered because tape recordings of the original trial were "indecipherable."

Austin appealed Judge Wood's decision to remand the case and the Court of Appeals affirmed in February, 1992. Following discovery in the remanded case, Judge Moss, for reasons which are not clear, assigned the case to Magistrate Mark Rammell for trial.

Before trial, issues relating to the validity of Austin's water rights surfaced and Judge Rammell construed *Young Harvey Walker v. Big Lost River Irrigation District*, 124 Idaho 78, 856 P.2d 868 (1993) as divesting his court of jurisdiction. Judge Rammell's October 20, 1994 Notice of Assignment and Order transferred venue to this court. Pursuant to I.R.C.P. 40(e), the Supreme Court confirmed this change of venue on November 29, 1994.²

Blackadar filed a *Motion for Summary Judgment (Motion)* and a *Brief in Support of Plaintiff's Motion for Summary Judgment (Brief in Support)* on March 3, 1995. A hearing was held on the *Motion* in Salmon, Idaho on Wednesday, March 15, 1995.

DISCUSSION

Blackadar and Austin are the owners of real property located just outside the city limits of Salmon. Two ditches are at issue in this action: the "red" ditch and the "green" ditch. This case arose as a result of Austin's entry upon Blackadar's land in an effort to clean and maintain the green ditch, by burning it, and the red ditch by using a small tractor and "V"-shaped blade to clear it and to define the channel's bed and banks. *Brief of Counterclaimant* at 1, 2 (April 20, 1994). Austin claims the right to use waters from Jesse Creek and asserts a right to use both ditches to run this water to his place of use.

The complaint seeks monetary relief for damages occasioned by the burning of the green ditch and alleged excavation of the red ditch. The complaint also alleges common law trespass for Austin's entry on Blackadar's land to work on the red ditch. Austin claims the right to use the green ditch as his primary irrigation ditch, while he claims the use of the red ditch only during times of "high water." The green ditch runs through Blackadar's land, while the red ditch, asserted by Blackadar to have been excavated in 1989, leaves the green ditch and cuts across the northeastern corner of Blackadar's property. *Amended Complaint*, at 2 (April 23, 1992).

The *Amended Complaint* filed by Blackadar fails to state a cause of action attacking or even raising the issue of the validity of Austin's water rights. The issue of the validity of water rights

² The order of the Supreme Court inadvertently refers to I.C.R. 21 as the basis for the change of venue, instead of I.R.C.P. 40(e).

has arisen only at summary judgment. However, because this court was handed jurisdiction by way of *Young Harvey Walker v. Big Lost River Irrigation District*, 124 Idaho 78, 856 P.2d 868 (1993), both parties are inclined to go forward with such issues, there have been long delays in the resolution of this case, and because resolution of the issue of these claimed water rights is at least partially necessary for a final disposition of the case, this court will entertain Blackadar's reference to Austin's lack of water rights. Austin has been given the opportunity to dispute these new allegations raised in the *Motion for Summary Judgment* and is not prejudiced by them. Austin has argued against and offered evidence in opposition to Blackadar's contention that he has no water right.

The State of Idaho was not present at the hearing on the *Motion*, but became a party later as a result of an *Amended Counterclaim*, filed by Austin on April 12, 1995, asserting a claim of fraud against Judge Martsch. That claim was stricken for lack of jurisdiction on May 31, 1995 in the *Order Granting Motion to Strike*.

THE WATER RIGHTS

In the 1920's, water right no. 75-00009 was decreed to the Gilmore and Pittsburgh Railroad Company, with a priority of April 1, 1894, and an amount of 1.5 cfs. Water right no. 75-00003 was decreed to William Boomer with a priority of April 1, 1894, and an amount of 1.44 cfs. A Notice of Claim to water right no. 75-10475 was filed by Austin with IDWR in May of 1990. This claimed water right purported to combine water right nos. 75-00009 and 75-00003 for a total of 1.94 cfs.³ See *Brief in Support, Appendix, Notice of Claim to Water Right No. 75-10475*. Austin's claim to the use of the Railroad and Boomer water derives from his, or his trust's, current ownership of some or all of the land to which the water was decreed. However, the language of the deed conveying the Railroad's land to Matthias Austin specifically reserves the decreed waters of Jesse Creek that would, without specific reservation, be appurtenant to that land.⁴

³ The remarks portion of the Notice of Claim to water right no. 75-10475 states: "This claim is for combined decreed rts. 75-0009 and 0003 in in [sic] total." Although adding the amounts of the two combined decreed water rights yields 2.94 cfs, the Notice of Claim only asserts a claim to 1.94 cfs. The discrepancy is irrelevant to the decision of the court.

⁴ The specific language of the deed reads unequivocally that "[n]one of the decreed waters of Jesse Creek are conveyed by this deed." *Brief in Support, Appendix Section 2*.

Claim to water right no. 75-04471 was filed with IDWR on June 29, with a priority of April 1, 1941, and in an amount of 2.5 cfs. Both of these water rights, 75-10475 and 75-04471, are held in the name of the Silver Peak Ranch Trust, for which Myrthus Austin is Trustee. Because the methods of conveyance for the claimed water rights are asserted to be the green and red ditches, Austin claims his right to the use of the water as the basis for his entry upon Blackadar's land to maintain the ditches.

The Green Ditch

Austin testified that he has irrigated via the green ditch from approximately 1942 to June of 1989. *Brief in Support, Appendix Section 3*, at 16. Blackadar does not contest that assertion and conceded that the green ditch is the conduit through which Austin has irrigated his land for years. *Brief in Support*, at 3. The record establishes Austin's use of the green ditch. Blackadar asserts, however, that the green ditch has been abandoned based on non-use since 1989, when Austin moved to the red ditch for convenience and water conservation purposes. Blackadar's *Amended Complaint* requests damages for the fire, alleged to be "out of control," and for further damages due to the alleged trespass and excavation of or upon the red ditch. Blackadar claims Austin has failed to use the green ditch since that move in 1989, and, therefore, Austin's use of the green ditch has been abandoned. From the record, it appears that claimed water right no. 75-10475 is conveyed through the green ditch. *See Brief in Support, Appendix-Exhibit 5*. The issues of abandonment and forfeiture are important aspects of this claimed water right on the motion for summary judgment.

The Red Ditch

The red ditch is a high water ditch which leaves the green ditch at the northeastern corner of Blackadar property. Austin testified that, while living on, owning, and working the same land for more than forty years, he had never used the red ditch. *Brief in Support, Appendix Section 3*, at 17. On June 29, 1983, a Notice of Claim to water right no. 75-04471 was filed with IDWR for 2.5 cfs of water from Jesse Creek. The red ditch is the claimed channel for delivery of this water to Austin's property. *Defendant's Brief Re: Motion to Quash*, at 4. (March 16, 1995). Ownership of this claimed water right is also in Silver Peak Ranch Trust, for which Myrthus Austin is a trustee.

SUMMARY JUDGMENT

Summary judgment will be granted where there is no genuine issue of material fact after the pleadings, depositions, admissions, and affidavits have all been liberally construed in a light most favorable to Austin, the party opposing the motion. I.R.C.P. 56; *Bennett v. Bliss*, 103 Idaho 358, 647 P.2d 814 (Ct. App. 1982). If any genuine issue of material fact remains, summary judgment is improper. *McKinley v. Fanning*, 100 Idaho 189, 595 P.2d 1084 (1979); *Farmer's Ins. Co. v. Brown*, 97 Idaho 380, 544 P.2d 1150 (1976). Austin must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of Blackadar and establish a genuine issue of material fact. *Olson v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *Celotex v. Catrett*, 477 U.S. 317 (1986).

ABANDONMENT

In his *Motion*, Blackadar claims that Austin has abandoned both water rights and ditch rights on the red and green ditches. He further asserts that, since Austin had no water rights or ditch rights, he had no right to enter upon the property to maintain an asserted easement. Blackadar asserts that Austin has abandoned any right to the use of water from Jesse Creek, if indeed, he ever had a right. Blackadar makes this claim in reliance on I.C. § 42-245 which states:

Any person claiming the right to divert or withdraw and use waters of the state who fails to file a claim as provided in section 42-243, Idaho Code, shall be conclusively deemed to have waived and relinquished any right, title, or interest in said right.

The provisions of this section shall not apply if a claim to the right is filed in a general water rights adjudication proceeding commenced prior to June 30, 1988, under the provisions of chapter 14, title 42, Idaho Code. I.C. § 42-245 (1994).

The Idaho Supreme Court in *Jenkins v. Idaho Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982) found "forfeiture," under Idaho Code to be a statutory procedure, but found that "actual" abandonment may occur outside the statutory requirements. See also, *Carrington v. Crandall*, 65 Idaho 525, 532, 147 P.2d 1009 (1944); Hutchins, *THE IDAHO LAW OF WATER RIGHTS*, 5 Idaho L. Rev. 1, 73 (1968). Other cases have mixed the terms and used them interchangeably. See, e.g., *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). The Idaho Supreme Court has held that the two terms relate to different legal concepts. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). The court in

Jenkins set forth the requirements for abandonment:

Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a *per se* abandonment. Intent to abandon is a question of fact to be decided by the trier of fact.

103 Idaho 389, 647 P.2d at 1261 (1982) (citations omitted).

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right.

101 Idaho at 847, 623 P.2d at 459.

Austin defends his claims to the right to the use of Jesse Creek water from two different positions. He claims a water right appurtenant to his land under I.C. § 42-1402, and in the alternative, he claims a constitutional appropriation under article 15, § 3 of the Idaho Constitution and I.C. § 42-243.

Austin has previously claimed his right to the use of water from Jesse Creek, the source of water in both the red and green ditch, as having derived from his predecessor-in-interest on the land, his brother Matthias Austin. Matthias Austin, however, received no right to the use of water from the deed which conveyed land to him from the Gilmore & Pittsburgh Railroad. *See Brief in Support, Appendix Section 2.* Despite I.C. § 42-1402, which states that decreed water rights are appurtenant to, and pass with the land on which they are beneficially used, water rights which are specifically excluded or reserved by deed will not pass with the land.⁵ The deed conveying that particular property to Matthias Austin specifically reserves all decreed water rights from Jesse Creek. Myrthus Austin can possess no Jesse Creek water right by his successive interest in the land. This court finds water right no. 75-00009 to have been reserved by deed.

However, at hearing, Austin claimed a constitutional right to the use of waters from Jesse Creek. His claimed use of Jesse Creek water from the green ditch from 1942 to 1989 is not

⁵ Decreed or licensed rights to the use of water "shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted." Such is a codification of the law as it has existed since 1903. See 1903 Idaho Sess. Laws, p. 233, § 9. As stated in the text of this order, chapter 14 of title 42 carries with it a similar provision in I.C. § 42-1402. However, despite this law of appurtenant water rights, there is an exception. The water right will be appurtenant unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed. *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990); See also, *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911).

contested. Blackadar's claim of abandonment is based on Austin's non-use of the green ditch following 1989, when he moved to the red ditch. From the record, and based on filings of Notices of Claim with IDWR, Austin has made two claims to the use of water from Jesse Creek. Austin, believing he owned the appurtenant right to the use of the water, began using the Jesse Creek water in about 1941 or 1942. *Brief in Support, Appendix Section 3.*

Austin claims that, since the water right originally decreed to the Railroad "has not been transferred to any other land or person," it belongs to him. Ownership of this water right cannot, at least within the framework of this private dispute, inure to the benefit of Austin simply by way of filing a claim in the SRBA. The claim to water right 75-10475, filed in May of 1990, was filed pursuant to the statutory provisions in I.C. §§ 42-243 and 42-245.

While Austin has claimed water right no. 75-00009 as an appurtenant right which derived from the Railroad and Matthias Austin, he also asserts that he is the rightful owner of water right no. 75-00003.

Claimed water right nos. 75-04471 and 75-10475 are currently owned by the Silver Peak Ranch Trust, Myrthus Austin as trustee. Austin contends, by way of the Notice of Claim, that no. 75-10475 is the claimed right which consists of "combined decreed rights 75-00009 and 75-00003 in total." The record in this case does not contain sufficient evidence to rule upon the ownership or validity of a claim to water right no. 75-00003.

Idaho's change in 1971 to a mandatory permit system for claims to the use of water included an exception for constitutional claimants who had, pursuant to Art. 15, § 3 of the Idaho Constitution and the common law of water rights, diverted water and applied it to a beneficial use. A failure to file a constitutional claim pursuant to I.C. §§ 42-243 and -245 constitutes a waiver and relinquishment of any right to the use of the water.

Water right nos. 75-00009 or 75-00003 are claimed by Austin because he is the owner or trustee of the land to which those rights would have been appurtenant. However, because of the Railroad's reservation, water right no. 75-00009 is not appurtenant to the Austin land, and has most likely been forfeited by the Railroad, and insufficient evidence exists in the record to determine the status of water right no. 75-00003. However, regardless of the status of 75-00003, if Austin has been using water according to these two rights, as he believed they were his, Austin may very likely possess a valid claim to a constitutional water right from Jesse Creek. However,

as the record fails to reveal the amounts of Austin's water use, it is not clear whether he has received water for water right no. 75-00009. But Austin's several decades of use of the green ditch and Jesse Creek waters for irrigation make it clear that he does possess a water right which is conveyed by way of the green ditch. Blackadar acknowledges, in the *Amended Complaint*, an "existing ditch easement across the Plaintiff's property." Austin has developed the right to the use of the green ditch after his forty-plus years of irrigation solely by way of that method of conveyance. Austin will not be precluded from use of the green ditch or Jesse Creek waters merely because he entered upon Blackadar's land for the purpose of utilizing the red ditch for conservation and convenience.

Austin has failed to use the green ditch only because of his move to the red ditch. He has relied on and has assumed that he had a legal right to do so and had no requisite intent to abandon the right to use the green ditch. He will not be held to have abandoned or forfeited the green ditch because of his move to the red ditch. To bar Austin from using the green ditch or Jesse Creek water on such a theory would deprive him of a basic constitutional right, and is against public policy. This court will not deprive Austin, under a theory of abandonment or forfeiture, of a forty-plus year diversion and application of water to a beneficial use because of his move to the red ditch for five years prior to returning to the green ditch. This court finds specifically that the green ditch was not abandoned nor forfeited by Austin.

Austin has filed Notices of Claim to the right to use such water, and it seems clear that he possesses a water right, based either on a constitutional claim or in water right 75-00003, especially in light of this court's finding that there was no abandonment or forfeiture in 1989. Because of the great potential for disputes regarding priority, amount, and ownership of water flowing in Jesse Creek, this court defers ruling upon the specific elements of Austin's water right until a Director's Report can be filed for the basin and any disputes over the elements of Austin's claimed water right can proceed within the framework of the adjudication. Proceeding in this manner will allow for an investigation of Austin's claim and will also allow for a final decree of this court to bind all parties in the adjudication. Until such time as investigation, reporting, objection and response periods, and/or hearing may take place in Basin 75, Austin's water shall be delivered in such amounts and with such priority as existed prior to his use of the red ditch in 1989.

However, Austin has never had any right to use the high water red ditch which runs northeasterly from Blackadar's land. While Austin does not assert adverse possession, this court recognizes that intermittent use of the red ditch only during times of high water would be considered continuous if such were normal use.⁶ Nevertheless, Austin has conceded that he had never used the red ditch prior to 1989. *See Brief in Support, Appendix Section. 3.*

With regard to the red ditch, abandonment is neither a relevant nor necessary line of inquiry, as there exists substantial and competent evidence that Austin has never used the red ditch and he conceded as much at a November 4, 1994 deposition. *See Brief in Support, Appendix 3.* This court finds an analysis of abandonment unnecessary. This finding of the court is despite, and with full awareness of the fact that courts have said repeatedly that abandonment is not favored in the law. A. Hutchins, *THE IDAHO LAW OF WATER RIGHTS* 70 (1956). There is substantial and competent evidence that Austin has never used the red ditch so that its use may be abandoned.

EASEMENTS OR DITCH RIGHTS OF WAY

In *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945), the Idaho Supreme Court held:

The law should not be so construed as to deny or materially abridge the rights of either party to prosecute their agricultural pursuits, or deprive them of any of the incidents necessary to cultivate and improve their lands. . . . [One] should not be permitted to make his estate more valuable by an act which renders the estate of the [other] less valuable. This general doctrine is . . . founded upon substantial reasons of justice and equity.

Id. at 478, 397.

Austin cannot unreasonably increase the burden of the easement on the servient estate held by Blackadar, and cannot make his land more valuable by an act which unnecessarily renders the servient estate less valuable. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 808 P.2d 1289 (1991). Austin, despite his intentions, did not maintain the green ditch in a reasonable way. Idaho Code § 42-1102 requires Austin, in his attempt to keep the ditch in good repair and condition, to refrain from causing damage to Blackadar's property. This court finds that the burning and excavation done by Austin has caused injury to the Blackadar property in an amount

⁶ It is enough that "the frequency of use ... is normal for the kind of easement claimed." *Merrill v. Penrod*, 109 Idaho 46, 704 P.2d 950 (1985), citing R. Cunningham, W. Stoebeck & D. Whitman, *THE LAW OF PROPERTY* § 8.7 at 455 (1984).

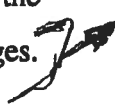
to be determined at a later date, and upon proof of damages. Austin has caused these damages as a result of "neglect or accident" and is liable under I.C. 42-1102 for the damages he has caused.

TRESPASS

Recovery for damages under the traditional common law requirements for trespass to land include (1) an invasion (2) which interferes with the right of exclusive possession of the land, and (3) which is a direct result of some act committed by the defendant. An interference with the exclusive right of possession generally involves an entry onto the land. *Mock v. Potlatch Corp.*, 786 F.Supp. 1545, 1548 (D. Idaho 1992).

Austin's admitted entry upon the Blackadar land for maintenance and cleaning of the green ditch was proper, but his excursion to other portions of Blackadar's land to excavate upon or clean the red ditch was outside of the scope of the green ditch easement and constituted a trespass. Austin is liable for any damages which may have resulted from his trespass and efforts to pronounce, clean, or maintain the red ditch which can be proven. Austin is hereby precluded and restrained from entering the Blackadar property to irrigate through or to work upon the red ditch. Austin shall not increase the size or nature or use of the existing green ditch easement across Blackadar's property, and shall not create or attempt to create any new ditches across that property.

DAMAGES

The correct measure of damages when land has been temporarily injured is the cost of restoring the land to its former condition. *Bradford v. Simpson*, 97 Idaho 188, 541 P.2d 612 (1975); *Smith v. Big Lost River Irrigation District*, 83 Idaho 374, 364 P.2d 146 (1961). This court finds sufficient evidence in the record to conclude that the Defendant Myrthus Austin is liable for damages caused to Plaintiff Robert Blackadar's property in attempting to maintain or improve the red and green ditches, as well as damages, if any, which may have resulted from the trespass itself. This court will proceed at further hearing on the limited issue of damages. 
I.R.C.P. 56(c).

CONCLUSION

Based on the court's records and the evidence submitted in favor of and in opposition to the *Motion*, the Plaintiff Bob Blackadar is granted partial summary judgment against Defendant

Myrthus Austin as to claims made in reference to his use of the red ditch. Austin is liable to Blackadar for any damages he may have caused in excavation, and is liable for trespass. He is also liable for damage occasioned by his neglect in maintaining his green ditch easement. He has not, however, abandoned the right to use the green ditch. .97

While it seems that the red ditch existed, at least in some form, prior to Austin's entry upon the Blackadar land, its existence prior to 1989 is not an issue in this lawsuit. The existence of the red ditch prior to 1989, as well as the method of construction implemented are irrelevant. Because Austin never had the right to use the red ditch, a discussion of abandonment or forfeiture is unnecessary. The court finds that there is no genuine issue of material fact as to Austin's lack of use of the red ditch and water right no. 75-04471. He acknowledges in deposition that he has never used that ditch, and summary judgment is granted with regard to that issue.

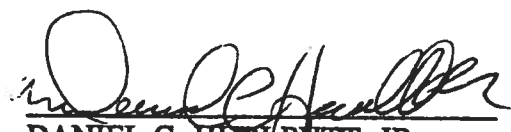
Going upon Blackadar's land to pronounce the red ditch's bed and banks was a trespass, and Austin is liable for both the damages surrounding his action on the red ditch as well as the trespass. He did and does, however, possess a right to use water from Jesse Creek, and the ditch right to use the green ditch. Austin had the right, and by this order, has the right, to enter Blackadar's property for the limited purpose of cleaning and maintaining the green ditch, but he is also responsible for the damage he causes, if any, in negligently doing so. The specific elements of Austin's claim to Jesse Creek waters are to be determined during the normal course of proceedings in the Snake River Basin Adjudication and following investigation and the filing of a Director's Report for Basin 75. →

MOTION TO SUPPRESS EVIDENCE

A *Motion to Suppress Evidence* was filed with the court asking that the deposition of Myrthus Austin be suppressed. That motion cites various sections of the Idaho Criminal Rules. As this action is civil in nature, those rules are wholly inapplicable. That motion is **DENIED** in its entirety. →

IS SO ORDERED.

DATED July 7, 1995.


DANIEL C. HURLBUTT, JR.
Presiding Judge

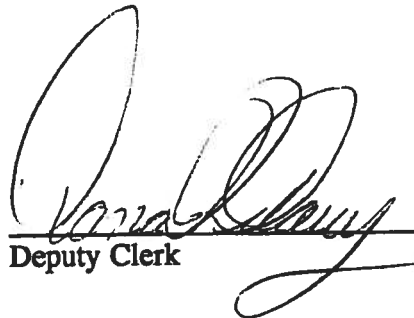
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **MEMORANDUM DECISION AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT and ORDER DENYING MOTION TO SUPPRESS EVIDENCE** was mailed on July 7, 1995, with sufficient first-class postage to the following:

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Deputy Clerk