

**BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO**

RECEIVED

JUN 25 2015

**DEPT OF WATER RESOURCES
SOUTHERN REGION**

IN THE MATTER OF THE APPLICATION FOR

Petitioners Objection to Applicants

PETITION TO NOT TRANSFER no. 79384,

Exceptions to change the ruling made by

79357 AND 79380 (In the name of Thomas

Hearing Officer May 29, 2015

And Dorothy Leno)

We are the protesters to the 3 water transfers, (79384, 79357 and 79380): Margaret Winsryg, Leroy Elliott, Pam Ritter, Betty Slifer, Richard Parrot, Delea Miller, Jimmie Condor, Michael Humphries, Ed Smith, Lois Rice, Victoria Henson, Eric Parrot, William Humphries, Leslie Ellsworth (as spokesperson for 12 other people), Jeanie and Fred McCreary, Barbara and Lynn Stephens and Martin Hackard.

We are objecting to the applicants Thomas Leno, Cedar Ridge dairy LLC and Four sisters dairy, exception to the Hearing Officers denial of the proposed transfer (79384) and limiting pumping (79357 and 79380) as well as denial to transfer the priority date.

1. #79384

In the applicant's objection to the denial of petition 79384, under background last paragraph, it says, "to have a new place of use in existing well near Berger?" This would require a new petition.

Page 1 - Would address statement about "best available scientific evidence shows no injury to neighboring domestic wells." Restate that it does show injury. Their background statement states all homes are more than a mile from well pump site. Applicants background statement states "Application was protested by various domestic water right holders who lived less than one mile to several miles away. Truth is that 10 protestors live from 528 ft. to less than one mile from proposed well site.

Applicants state in argument some Protestants have experienced increases in ground water levels giving the example of the Ritter well. You cannot use the Ritter well as an example when so many problems came up in the drilling on the well. At the time of drilling in 1982 tailings were lost at 56 ft. so it is not known what kind of rock formations exist after the 56 ft. Static water level recorded at 240 ft. When pump was lowered hole had caved in and was not able to pump. Removed pump and cased. Well driller explained well was in an area of channels that were filled with talc and water and the channels would clear out. Once cleared out should have water but limited amount. (Ritter Testimony)

Static Water levels does not mean that there is an abundance of water. Mr. Sullivan acknowledged that the proposed well may not be able to produce 0.49cfs. (Sullivan Testimony) Squires in his testimony states (the capacity derived from the October 14 pump test on the proposed well would draw down to the bottom of the basalt aquifer before being able to pump 0.49cfs. (Squires Testimony)

Page 1 - Would address statement about "best available scientific evidence shows no injury to neighboring domestic wells." Restate that it **does** show injury.

Not true 6 wells are less than a tenth of a mile from proposed well site. There also was presented by Squires and that there has been injury to neighbors domestic wells. Just because they wells are at the same depth as 25 years ago, many have redugg their wells over the years, have issues in water supple, (Ritter, Slifer, Winsryg), and may never have had adequate well water.

The use of the ground water in the original petition for this was for irrigation. In the objection petition the water is being used for both irrigation and commercial cow use. More usage, longer use, and no monitor control of his use or our wells decrease, could cause more damage to the home owners in the area, and appears to be change of use, from irrigation to commercial cow use.

Page 2

Exception 1 - Brockway rejected the IWWRI hydraulic conductivity by choosing to calculate a new more conservative hydraulic conductivity. If Brockway felt so strongly that the IWWRI hydraulic conductivity is correct why not defend it as being correct and not go to the effort to calculate a new "more conservative" hydraulic conductivity. Other point mentioned in Kimball testimony is that broad based models make assumptions for large areas that may not be representative of a specific area. Kimball testimony macro versus micro level.

Exception 2 - 15.3 number is not conservative. There is a strong correlation as Kimball mentioned in his expert report to the conductivity and distance from the High Line Canal. Hydraulic conductivities are taken from Brockway's report.

Well	Hydraulic Conductivity	Approx. Distance to High Line Canal
11S16E9NENE	108	Immediate Vicinity
10S15E36SENW	10.2	Immediate Vicinity
11S16E5NWNE	28.5	0.25 miles
11S15E1NWNE	3.6	0.5 miles
11S16E6NWSE	0.4	1 mile
11S15E1SESW	0.8	1.25 miles
10S16E9NENE	0.3	1.25 miles
11S16E9NESE	0.3	1.5 miles

Would state that "reasonable" does not mean "correct". Would refer to Kimball's Theis equations and assumptions with lower hydraulic conductivity and state that they still did not match what actually occurred during the irrigation well pump test. One possible explanation is the storativity is incorrect.

Page 5 - Would restate Duane Kimball's testimony that there are impacts. Squires were in agreement in his testimony.

Page 6 - Argument against using non-representative well. State does not feel that Brockway's analysis was very conservative and consider being non-conservative.

Page 7 - The irrigation well pump test was the most accurate to use because it is where the aquifer characteristics are most important. The irrigation pump test was at a standard no lower than the other pump tests that Brockway used to determine aquifer characteristics. Squires and Kimball testimony requesting a real pump that meets standards to determine aquifer characteristics.

Page 8 - Is Brockway saying that it is scientifically supportable to use unrepresentative wells (High Line influenced) that are a greater distance away?

-Restate that the wells away from the High Line Canal all have hydraulic conductivity below 1.0.

Page 9 - May want to indicate that Parrott wells are pre-1978 are held to the higher standard of historical pumping levels and not reasonable pumping levels.

Page 12 - Discuss inaccuracies of groundwater measurements at two points in time (seasonal fluctuation and someone pumping nearby).

Jurisdiction

The application for transfer of the Leno water identified as transfer number 79384 was not complete at the time it was filed. David A. Coleman, attorney for Margaret Winsryg and Leroy Elliott, raised this objection at the beginning of the hearing on the transfer and the issue has been preserved on the record. The legal basis is as follows:

It is well settled law in the state of Idaho that water is treated as real property. In *Federal Land Bank of Spokane v. Union Central Life Insurance Company*, 54 Idaho 161, at 168, the Idaho Supreme Court states "A water right is real property and may be sold and transferred separately from the land upon which it has been used, *the same as any other real property.*" (Emphasis added). In fact, this principal has been codified by the Idaho Legislature in Idaho Code §55-101 in which it reads, "Real property or real estate consists of : (1) Lands, possessory rights to lands, ditch and *water rights*, and mining claims, both lode and placer. (emphasis added).

Since a water right in Idaho is by its very nature real property, transfer from one person to another must meet the requirements for transfer of real property. Idaho Code §9-505 provides:

9-505. Certain agreements to be in writing.-- In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, thereof, of the agreement cannot be received without the writing or secondary evidence of its contents:

...

4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Additionally, in that Idaho is a community property state, if any real property is held in the name of a husband and wife, it is required that both the husband and wife sign any writing that transfers such property. Idaho Code §32-912 provides:

32-912. Control of community property. -- Either the husband or the wife shall have the right to manage and control community property, and either may bind the community property by contract, *except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which real estate is sold, conveyed or encumbered...*(Emphasis added).

The Idaho Department of Water Resources records indicate that the water right is in the name of Thomas and Dorothy Leno. The record shows that the application was signed only by Thomas Leno. Dorothy Leno was deceased prior to the application being filed. There is no evidence in the record that the application ever included the estate of Dorothy Leno. When this objection was raised at the hearing by attorney David A. Coleman, the hearing officer noted the objection and allowed the applicant to supplement the record after the hearing to show that the water right had been transferred to Thomas Leno.

On April 22, 2015, the applicant's attorney, Travis L. Thompson, submitted to the hearing officer a document identified as Notice of Closing Order in the Matter of the Estate and Person of Dorothy Mae Leno. A copy of such notice is attached hereto as exhibit "1." This Notice has attached to it a document identified as exhibit "A" which is entitled "Approval of Final Accounting, Decree of Distribution and Closing Order." This document is an order of the probate court. It states in paragraph 3 that "the persons entitled to distribution of the Estate is the surviving heir, Thomas Glen Leno." This Court order simply states that Thomas Glen Leno is entitled to distribution of the estate of Dorothy Mae Leno, **it does not transfer her interest to**

him as required by Idaho law. Furthermore, even if it was construed as a transfer of the real property, it was done after the application for transfer of Thomas Leno was filed with the Idaho Department of Water Resources. There is nothing in the record to indicate that Dorothy Mae Leno's interest in the water right was part of the application.

James Cefalo, the hearing officer for the Idaho Department of Water Resources in this matter, erred when he allowed the case to proceed without requiring the community interest of Dorothy Mae Leno to be a part of the application. The record is devoid of any indication that Dorothy Mae Leno's interest was actually transferred to Thomas Leno. The most that the record provides is the probate Court's order that Thomas Leno is "entitled" to Dorothy Mae Leno's interest in the estate but there is no writing to show that it was actually transferred as required by Idaho Code §9-505(4). Thus, any claim that Dorothy Mae Leno's interest was included is invalid and the Idaho Department of Water resources lacked jurisdiction to hear this transfer application. The order denying the transfer should stand.

#79357

"Reasonable pumping level", Applicants wants to change the pumping time from May 1 to September 30, to pump all the time all year because cows drink water all the time where plants are harvested and stop using water. This is a change of use, they said in their original request for transfer of the water right was not for more pumping time and added amounts. It has been used for irrigation water but now for commercial use? That requires more water use, no way to tract how much more he will use, and no recharge to the ground because animal use, not irrigation.

Original applicants use was for misters for cows. They are not used after September because temperatures are cool.

Applicants want to get original priority date, if they were not concerned with using too much water and causing Protestants to go dry why they would want about the priority date. PNZ says they need more water rights before they can expand and get more cows.

Jurisdiction

The application for transfer of the Leno water identified as transfer number 79357 was not complete at the time it was filed. David A. Coleman, attorney for Margaret Winsryg and Leroy Elliott, raised this objection at the beginning of the hearing on the transfer and the issue has been preserved on the record. The legal basis is as follows:

It is well settled law in the state of Idaho that water is treated as real property. In *Federal Land Bank of Spokane v. Union Central Life Insurance Company*, 54 Idaho 161, at 168, the Idaho Supreme Court states "A water right is real property and may be sold and transferred

him as required by Idaho law. Furthermore, even if it was construed as a transfer of the real property, it was done after the application for transfer of Thomas Leno was filed with the Idaho Department of Water Resources. There is nothing in the record to indicate that Dorothy Mae Leno's interest in the water right was part of the application.

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Jurisdiction

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separately from the land upon which it has been used, *the same as any other real property.*" (Emphasis added). In fact, this principal has been codified by the Idaho Legislature in Idaho Code §55-101 in which it reads, "Real property or real estate consists of : (1) Lands, possessory rights to lands, ditch and *water rights*, and mining claims, both lode and placer. (emphasis added).

Since a water right in Idaho is by its very nature real property, transfer from one person to another must meet the requirements for transfer of real property. Idaho Code §9-505 provides:

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...

4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Additionally, in that Idaho is a community property state, if any real property is held in the name of a husband and wife, it is required that both the husband and wife sign any writing that transfers such property. Idaho Code §32-912 provides:

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The Idaho Department of Water Resources records indicate that the water right is in the name of Thomas and Dorothy Leno. The record shows that the application was signed only by Thomas Leno. Dorothy Leno was deceased prior to the application being filed. There is no evidence in the record that the application ever included the estate of Dorothy Leno. When this objection was raised at the hearing by attorney David A. Coleman, the hearing officer noted the objection and allowed the applicant to supplement the record after the hearing to show that the water right had been transferred to Thomas Leno.

On April 22, 2015, the applicant's attorney, Travis L. Thompson, submitted to the hearing officer a document identified as Notice of Closing Order in the Matter of the Estate and Person of Dorothy Mae Leno. A copy of such notice is attached hereto as exhibit "1." This Notice has attached to it a document identified as exhibit "A" which is entitled "Approval of Final Accounting, Decree of Distribution and Closing Order." This document is an order of the probate court. It states in paragraph 3 that "the persons entitled to distribution of the Estate is the surviving heir, Thomas Glen Leno." This Court order simply states that Thomas Glen Leno is entitled to distribution of the estate of Dorothy Mae Leno, **it does not transfer her interest to him** as required by Idaho law. Furthermore, even if it was construed as a transfer of the real property, it was done after the application for transfer of Thomas Leno was filed with the Idaho Department of Water Resources. There is nothing in the record to indicate that Dorothy Mae Leno's interest in the water right was part of the application.

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#79380

"Reasonable pumping level", Applicants wants to change the pumping time from May 1 to September 30, to pump all the time all year because cows drink water all the time where plants are harvested. This is a change of use, they said in their original request for transfer of the water right was not for more pumping time and added amounts. It has been used for irrigation water now for commercial use? That requires more water use, no way to tract how much more he will use, and no recharge to the ground because animal use, not irrigation.

Original applicants use was for misters for cows. They are not used after September because temperatures are cool.

Get original priority date, if they were not concerned with using too much water and causing Protestants to go dry why they would care about the priority date. The priority date is the only protection we have against their bad decisions.

According to Applicants there has been no change in wells in the area in 20 years. The dairies also have been permitted for the same number of cows for 15 years and we all are existing without too much distress, so why do they suddenly need more water to water the same number of cows? Which over

time can cause harm to our wells? Look at California and we are heading that direction very quickly. California never thought they would be in such a mess, 5 years ago.

Jurisdiction

The application for transfer of the Leno water identified as transfer number 79380 was not complete at the time it was filed. David A. Coleman, attorney for Margaret Winsryg and Leroy Elliott, raised this objection at the beginning of the hearing on the transfer and the issue has been preserved on the record. The legal basis is as follows:

It is well settled law in the state of Idaho that water is treated as real property. In *Federal Land Bank of Spokane v. Union Central Life Insurance Company*, 54 Idaho 161, at 168, the Idaho Supreme Court states "A water right is real property and may be sold and transferred separately from the land upon which it has been used, *the same as any other real property.*" (Emphasis added). In fact, this principal has been codified by the Idaho Legislature in Idaho Code §55-101 in which it reads, "Real property or real estate consists of : (1) Lands, possessory rights to lands, ditch and *water rights*, and mining claims, both lode and placer. (emphasis added).

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Signatures:

Pam Rutter

E. Panto

Margaret Winson

Jerry Elliott

Ronald Parrett

William D. Hanby

Elizabeth Slifer

Jessie Allred

Maud F. Hubard

Barbara Stephens

Jessie McCleary

Date:

6/25/15

6/25/15

6/25/15

6/25/15

25 June 2015 4:25 pm

26 June, 2015 08:17

June 26, 2015

June 26, 2015

26 June 2015 3:55

6/26/15

6/26/15

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for Thomas Leno, Cedar Ridge Dairy LLC,
and Four Sisters Dairy, LLC*

RECEIVED

JUN 25 2015

DEPT OF WATER RESOURCES
SOUTHERN REGION

COPY

Exhibit A

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
TRANSFER NOS. 79357, 79380, & 79384
(in the name of Thomas & Dorothy Leno);
79466 (in the name of Four Sisters Dairy,
LLC)

**NOTICE OF CLOSING ORDER IN THE
MATTER OF THE ESTATE AND
PERSON OF DOROTHY MAE LENO**

TO: THE HEARING OFFICER, PARTIES, AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Travis L. Thompson, on behalf of Thomas Leno, Cedar Ridge Dairy LLC and Four Sisters Dairy LLC (the "Applicants") is hereby providing a copy of the following documents filed *In the Matter of the Estate and Person of Dorothy Mae Leno* (Twin Falls County Dist. Ct., Fifth Jud. Dist., Case No. CV-2011-5466) (attached hereto as Exhibit A):

- 1) *Approval of Final Accounting, Decree of Distribution and Closing Order*
- 2) *Final Accounting and Distribution*

At the beginning of the hearings in the above-referenced transfer applications, Mr. Coleman, attorney for Protestants Margaret Winsryg and Leroy Elliott, raised an objection

regarding the status of the Estate of Mrs. Leno and whether or not the Department had proper jurisdiction over the proposed water right transfers.

As set forth in the *Closing Order*, Mrs. Leno's husband, Mr. Thomas Leno, was recognized as the surviving heir and was entitled to the distribution of her estate. Mr. Leno is the sole owner of the water right (#47-17589) subject to the agreement with Cedar Ridge Dairy LLC, and has the necessary authority to sell and transfer the water right under Idaho law.

DATED this 22nd day of April, 2015.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

*Attorneys for Thomas Leno, Cedar Ridge Dairy,
LLC, and Four Sisters Dairy, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2015, I served a true and correct copy of the foregoing *Notice of Service*, by depositing same in the United States mail, postage prepaid, addressed to the following:

James Cefalo, Hearing Officer
IDWR – Eastern Regional Office
900 N. Skyline Dr., Suite A
Idaho Falls, Idaho 83402-1718
james.cefalo@idwr.idaho.gov

Elizabeth Slifer
3779 N 2250 E
Filer, Idaho 83328

Barbara Stephens
Lynn Stephens
P.O. Box 2118
Twin Falls, Idaho 83303-2118

Martin F. Hackard
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Twin Falls, Idaho 83301

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Twin Falls, Idaho 83301

Pam Ritter
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Richard M. Parrott
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Twin Falls, Idaho 83301

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David Coleman
Attorney for Margaret Winsryg & Leroy Elliot
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Victoria B. Henson
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Scott R. Houtz
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Twin Falls, Idaho 83301

Bonnie Seaman
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Filer, Idaho 83328


Travis L. Thompson

Exhibit A

✓ M. LYNN DUNLAP, P.C. SBN 3200

Attorney at Law

415 Addison Avenue

P.O. Box 2754

Twin Falls ID 83303-2754

Telephone: (208) 734-5885

Facsimile: (208) 736-2074

Attorney for Petitioner

DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2014 AUG 26 PM 5:00

BY _____ CLERK

DEPUTY

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

In the Matter of the Estate and Person of

DOROTHY MAE LENO,

Deceased

Case No. CV-2011-5466

**APPROVAL OF FINAL
ACCOUNTING, DECREE OF
DISTRIBUTION AND CLOSING
ORDER**

THIS MATTER came before the Court on the Personal Representative's motion for the Court's approval of the final accounting, decree of distribution, and closing of this estate.

No party appeared to contest the petition. The Court finds that all required notices have been given or waived, the estate has been administered according to the laws of this State and the orders of this Court, and the estate should be closed.

NOW, THEREFORE, IT IS HEREBY ORDERED AND DECREED as follows:

1. The Estate of Dorothy Mae Leno is hereby formally probated.

2. The appointment of Thomas Glen Leno as Personal Representative of the estate is hereby confirmed.

3. The persons entitled to distribution of the Estate is the surviving heir, Thomas Glen Leno.

4. That any accounting by the Personal Representative has been submitted to the heirs.

5. The Personal Representative is hereby directed to distribute any remaining funds of the estate as is outlined in the Final Accounting.

6. Upon making such delivery and distribution and duly filing receipts with the Court, the Personal Representative shall be fully and finally released and discharged from his trust, and any and all liability arising in connection with the performance of his duties as Personal Representative and the administration of this estate shall be closed.

Dated this 24 day of August, 2014.

51 CALVIN H. CAMPBELL
Honorable Calvin H. Campbell
Magistrate Judge

M. LYNN DUNLAP, P.C. SBN 3200
Attorney at Law
415 Addison Avenue
P.O. Box 2754
Twin Falls ID 83303-2754
Telephone: (208) 734-5885
Facsimile: (208) 736-2074

Attorney for Petitioner

DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

2014 JUL 29 PM 2:23

BY _____

CLERK

DEPUTY

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

In the Matter of the Estate and Person of

DOROTHY MAE LENO,

Deceased

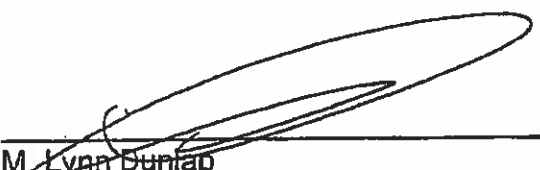
Case No. CV-2011-5466

FINAL ACCOUNTING AND
DISTRIBUTION

COMES NOW the Personal Representative, Lynn Dunlap, by and through his counsel of record, M. Lynn Dunlap, and submits the following final accounting of the assets, income and expenses of the estate which have come into the Personal Representative's possession or knowledge, together with the Personal Representative's proposed distribution of the estate. The time for creditors to file claims has expired and the estate is in a position for distribution and closing.

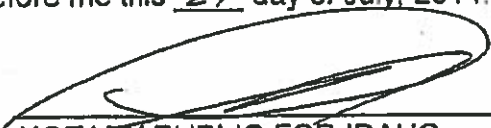
ESTIMATED ESTATE VALUE PER INVENTORY & APPRAISEMENT:

REALTY	<u>\$44,961.00</u>
VEHICLES	<u>\$3,500.00</u>
ESTATE PERSONAL PROPERTY	<u>\$1,500.00</u>

TOTAL**\$49,961.00**Dated this 29 day of July, 2014.
M. Lynn Dunlap
Attorney for Personal Representative**VERIFICATION**STATE OF IDAHO)
 :SS
County of TWIN FALLS)

Thomas Glen Leno, being first duly sworn upon oath deposes and states that:

I am the Personal Representative in this matter; I have read the within and foregoing FINAL ACCOUNTING & PROPOSED DISTRIBUTION; the statements therein contained are true to the best of my knowledge and belief.


Thomas Glen LenoSUBSCRIBED AND SWORN, before me this 29 day of July, 2014.
NOTARY PUBLIC FOR IDAHOResiding At TWIN FALLS, ID
Commission Exp. 4/3/14