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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

Keith Lintson

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

Case No. 94-00012

Case No. 39576

MEMORANDUM DECISION

NORMAN RILEY and ROBIN
RILEY, husband and wife,

Plaintiffs,

v.

CATHERINE ROWAN,

Defendant.

I. BACKGROUND

This action contesting ownership of a water right was filed in the Snake River Basin Adjudication (SRBA) by Norman and Robin Riley against Catherine Rowan. This follows the case of *Rowan v. Riley*, Madison County Case CV-93-350, in which the Honorable James C. Herndon, Presiding District Judge, held that he did not have subject matter jurisdiction to resolve the ownership of the water right at issue. The dispute is about a water right license issued in the names of two deceased people. The enabling permit for the license is Water Permit 22-07280. Trial was held followed by briefing by the parties. The following decision constitutes this court's findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. THE PARTIES

Plaintiffs, Norman and Robin Riley, husband and wife, (the Rileys) own and farm land in Madison County. Robin Riley is the daughter of James "Jim" Howe. Jim Howe died on March 4, 1992. By agreement with her sisters, Robin Riley is entitled to any farming interest including water from her father's estate. The Rileys claim that Water Permit 22-07280 is a personal property farming interest of Jim Howe's estate which entitles them to ownership of the water license that followed from the permit.

Defendant, Catherine Rowan, is a Utah resident who owns real property in Madison County. Catherine Rowan leases her land to the Rileys for farming purposes. Catherine Rowan was the sister of Jim Howe and is Robin Riley's aunt.

B. THE LAND

Catherine Rowan and Jim Howe owned a vested remainder in 756 acres of land (the Farm) deeded to them by the Webster-Soule Farm Corporation in 1944. This deed reserved a life estate in their mother, Lucille Howe (Lucille).

From 1969 to the date of Lucille's death in 1983, Jim Howe leased and farmed the land that constituted Lucille's life estate. Therefore, prior to Lucille's death, Jim Howe leased and farmed the land in which he and Catherine Rowan held a future interest. After Lucille's death, the Farm passed to Jim Howe and Catherine Rowan as tenants in common in fee simple absolute.

Between 1983 and 1988, Jim Howe continued to farm all of the land--his one half and Catherine Rowan's half under a lease. Facing bankruptcy in 1987 and 1988, Jim Howe sought loans to be secured by his ownership interest in the Farm. In 1988 Catherine Rowan desired to partition the Farm to avoid personal liability for Jim Howe's debt.

On March 31, 1988, cross deeds were executed dividing the Farm into two halves. Jim Howe was deeded the northern half with all appurtenances and Catherine Rowan was deeded the southern half with all appurtenances. (Exhibits J, K, M, N.)

The disputed water is drawn from a well located on the land deeded to Catherine Rowan. The water from the "south well" was primarily used to irrigate the south half of the Farm and, secondarily, to supplement the irrigation of the north half. The original cross deeds did not grant an interest in the water from the "south well" to Jim Howe for use on his land.

In order to service loans, Jim Howe's lender required him to secure a right to water from the "south well" located on Catherine Rowan's land, as well as an easement to maintain the delivery system to the north lands. Jim Howe sought and Catherine Rowan granted an easement (Corrected Agreement, August 3, 1988, Exhibit P) and a one-half interest in the water from the "south well" (Correction Grant Deed, August 11, 1988, Exhibit R). Jim Howe continued to farm his north land and Catherine Rowan's southern half under a lease.

On December 5, 1991, Jim Howe executed a Bill of Sale of Goods and Chattels (Bill of Sale) to the Rileys. The Bill of Sale lists "any and all water rights including . . . application approved permit #22-7280 which is the water right associated with the well on Catherine Rowan's southern portion of land." Six months after Jim Howe's death in March 1992, the Rileys filed the Bill of Sale in Madison County.

After Jim Howe's death, the Rileys farmed both halves of the original Farm pursuant to a lease with Catherine Rowan for her southern half. In 1995 the working relationship between Catherine Rowan and the Rileys deteriorated to the point that Catherine Rowan wanted to discontinue renting her land to the Rileys. The Rileys have continued to lease Catherine Rowan's land by court order issued in the original Madison County case.

C. THE WATER LICENSE FOR THE "SOUTH WELL"

On August 28, 1978, Jim Howe applied for a water permit from IDWR under the names of "Lucille W. Howe AND/OR Jim Howe." From what would be called the "south well," IDWR granted the Water Permit 22-07280 allowing the appropriation 10.81 cfs of ground water from the "south well." The permit application also stated that Lucille Howe owned the property that was to be the place of use. Question 9(c) of the permit application states: "If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." Question 9(c) was not completed by either Jim Howe or Lucille Howe reflecting that Jim and Lucille filed as owners of the land. The permit also required proof of construction of work and application of water to beneficial use to be submitted on or before August 1, 1983.

The well was constructed and Jim Howe timely filed a notice of completed development for Water Permit 22-07280 on February 7, 1983, with IDWR.

On August 23, 1989, IDWR issued a Beneficial Use Field Report for Water Permit 22-07280 listing the owner as "Lucille W. Howe or Jim Howe." The Beneficial Use Field

Report (August 23, 1989, Exhibit 5) confirmed that the conditions specified by the permit six years earlier had been completed.

On August 14, 1988, a Notice of Claim to a Water Right for the "south well," Water Permit 22-07280, was filed in the SRBA in the name of "Lucille W. Howe - Deceased, Jim W. Howe and/or Catherine Rowan."

On November 12, 1992, Robin Riley filed with IDWR a New Property Owner Notice of Change of Water Right Ownership (Notice of Change) listing the Rileys as claimants. The Notice of Change form asked if the change in ownership resulted in a splitting of the water right and the "yes" box was checked, listing Water Permit 22-07280 as having been split.

On November 24, 1992, IDWR sent a letter to Norman Riley indicating that Water Permit 22-07280 had been split into 22-07280A and 22-07280B. On December 2, 1992, IDWR issued Notices of Claim to a Water Right to both the Rileys (Notice of Claim 22-07280B) and to Catherine Rowan (Notice of Claim 22-07280A). The division of the original 10.81 cfs was 4.270 cfs to the Rileys and 6.540 cfs to Catherine Rowan.

On December 4, 1995, IDWR issued Water Right License 22-07280 in the name of Jim Howe and Lucille Howe, both deceased. In a December 6, 1995, letter to the Rileys and Catherine Rowan, IDWR informed them of their right to request a hearing to review the terms and conditions for Water Right License 22-07280 before IDWR pursuant to Idaho Code § 42-1701 A(3). Both parties filed petitions requesting a hearing.

The matter was heard on March 19, 1996, before an IDWR hearing officer. The officer concluded that a revocation of the license was not appropriate at that time. The officer believed that the ownership dispute did not undermine the authority of IDWR to issue the license under Idaho Code § 42-219, despite the fact that IDWR named two deceased persons as owners of the license.

The Rileys filed this *Complaint for Declaratory Judgment Regarding Ownership of Water Rights* in the SRBA.

III. DECLARATORY JUDGMENT STANDARDS

None of the parties have disputed the propriety of determining the issue of ownership of the water right under Idaho's declaratory judgment statute, Idaho Code § 10-1201, *et seq.* See

also, I.R.C.P. 57. The standard for determining justiciability in a declaratory judgment setting has been set by the United States Supreme Court:

The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aeta Life Insurance Company v. Haworth, 300 U.S. 227, 240-41 (1937).

This standard has been adopted by the Idaho Supreme Court, which held that "a declaratory judgment must clarify and settle the legal relations and issues, and afford relief from the uncertainty and controversy which gave rise to the action." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). See also, *State v. Rhoades*, 119 Idaho 594, 809 P.2d 455 (1991); *Sweeney v. American National Bank*, 62 Idaho 544, 115 P.2d 109 (1941). Based upon the facts presented at trial, the standard for declaratory judgment has been met. It is found that the SRBA court has jurisdiction over the parties and the subject matter of this declaratory judgment action.

IV. THE LEGAL RELATIONSHIPS AND DUTIES BETWEEN PARTIES

A determination of ownership of the water right requires a clear delineation of the property interests, legal relationships, and duties between the parties.

A. JIM HOWE 'S AND CATHERINE ROWAN'S PROPERTY INTERESTS IN THE FARM

The first inquiry is to determine Jim Howe's and Catherine Rowan's interests in the Farm when the initial application for the disputed water permit was filed on August 28, 1978. The 1944 deed sets forth Catherine Rowan's and Jim Howe's interests:

[R]emainder over in fee to her children, share and share alike, without restriction, the lands hereinafter describes. Provided, however, that if any of the children of the said Lucille Webster Howe die without issue, then their pro rata share shall pass to their surviving brothers and sisters, share and share alike, in fee. If any of them die leaving issue, then their issue shall share by right of representation in fee.

(Exhibit B.)

The deed reserved a life estate in Lucille Howe. Lucille's children were deeded the Farm in fee simple, contingent upon their dying with issue. Therefore, under the terms of the deed, Jim

Howe and Catherine Rowan possessed a contingent remainder in the Farm at the time Jim filed the water permit application.

Idaho Code §55-111 entitled Suspension of Power of Alienation states:

The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter . . . ; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators or trustors wishes are carried out to the greatest extent permitted by this act.

Here, the deed expressly states that the extent of Lucille's children's interest in the Farm is contingent upon whether or not the child dies with issue. This condition is subject to the limitations provided for by Idaho Code § 55-111. If the contingency provided for by the grantor could exist beyond the statutory period provided by Idaho Code § 55-111, the contingency must be struck.

Any valid limitation or condition within a gift must occur or fail within 25 years of a life in being at the time of creation of the restriction. Idaho Code § 55-111. The gift from the grantor to the "children of Lucille Howe" is a class gift. A class gift is a gift of "aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions; share of each being dependant for its ultimate amount upon the ultimate number." *Hepburn v. Winthrop*, 83 F.2d 566, 570, 65 App. D.C. 309 (1936). At the time of the creation of the deed, the ultimate number of Lucille's children with issue was indeterminable. Because there may have been unborn members of the class at the time of creation, the unborn member of the class cannot be considered a life in being for the purposes of Idaho Code § 55-111. At common law, a gift to a single class member in violation of the rule against perpetuities voided the gift for the entire class. *See for example, Betchard v. Iverson*, 212 P.2d 783, 786, 35 Wash. 2d 344 (1949). Because no member of the class of Lucille's children can be used as a measuring life, the only measuring life named within the gift is that of Lucille Howe.

Idaho Code § 55-111 states that the absolute power of alienation cannot be suspended by any limitation or condition for a period longer than the duration of the lives of persons in being

at the time of the creation of the condition and 25 years thereafter. Since, Lucille Howe is necessarily the measuring life, the contingency stated in the deed must be definitively settled within 25 years after Lucille Howe's death to be valid. The gift's contingency that Lucille's children must die with issue in order to take would not necessarily vest within 25 years of Lucille's death. The contingency in the gift is in violation of Idaho Code § 55-111.

Idaho Code § 55-111 provides that "no trust heretofore or hereafter created, whether testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provision, and in such a way that the [testators] wishes are carried out to the greatest extent permitted by this act." Therefore, the contingency contained in the deed is severable from the gift. Severing the contingency from the deed results in Catherine Rowan and Jim Howe owning a fully vested and indefeasible future interest in Lucille Howe's life estate at the time Jim Howe applied for Water Permit 22-07280.

**B. THE LEGAL RELATIONSHIP BETWEEN CATHERINE ROWAN AND JIM HOWE
CREATED BY THE SHARED INTEREST IN THE FARM**

During Lucille's lifetime, legal duties existed between Jim Howe and Catherine Rowan based on their co-ownership of the vested remainder interest in the Farm.

Idaho Code § 55-104 states that "[e]very interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, joint interest, or as community property." In Idaho there is a rebuttable presumption favoring tenants in common, with no right of survivorship. *Powell v. Powell*, 22 Idaho 531 (1912). The record contains no evidence that the interest in the Farm was anything other than a tenancy in common.

Tenants in common are entitled to the use, benefit, and possession of the common property, provided they do not exclude their cotenant from a like use, occupancy, and benefit. *Washington County Irrigation Dst. v. Talboy*, 55 Idaho 391 (1935). The same duty exists between co-remaindermen prior to a present possessory interest. *Givens v. Givens*, 387 S.W.2d 851 (1965); *Clark v. Lindsey*, 25 N.E. 422 (1890). Succinctly stated, the principle is:

Where there are two remaindermen, they, in their relations with each other concerning their respective interests in the property given to them together, may to a certain extent, be governed by the principles of law which govern the rights duties, and liabilities of cotenants generally. For example, where a life estate and remainders in two or more persons have been created in real estate, and the life

tenant is still living, the coremaindermen have fiduciary relationship to each other such that no one of them may impair the rights or interests of his coremaindermen. If one them acquires an outstanding title, he acquires it for all, subject to the duty of others to contribute to the cost of acquiring the title if they wish to take advantage of it.

51 Am. Jur. 2d § 1 (1970) (emphasis added).

Therefore, a fiduciary duty existed between Jim Howe and Catherine Rowan as tenants in common owning a vested remainder interest in the Farm.

C. CATHERINE ROWAN OWNED AN INTEREST IN THE WATER PERMIT AND THE LICENSE

When Jim Howe filed the application for a water permit in August 1978, he owed a fiduciary duty to Catherine Rowan to protect her ownership interest in the Farm. Any action taken by Jim Howe to exclude Catherine Rowan as a co-owner of the permit would violate that fiduciary duty.

Plaintiffs attach great importance to the fact that Jim Howe was a lessor of the Farm when he applied for the water permit. *Plaintiff's Post Trial Brief* at 19. They correctly argue that "water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator." *Plaintiff's Pretrial Brief* at 6. The law shields non-owners of land (lessors) after the lessor completes development of a proposed water right. In such instances, Idaho Code § 42-211 establishes the procedure by which anyone who has filed a permit application may change the place of use.

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place . . . of intended use or make other substantial changes in the method of diversion or proposed use or uses of water, he shall file an application for amendment upon forms to be furnished by the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application. . . .

Id. (Emphasis added.)

In August 1978, Jim Howe leased the Farm from Lucille; however, he was also the owner of a vested future interest in the Farm along with Catherine Rowan. He, therefore, held two simultaneous interests in the Farm: a leasehold and a vested future interest in common with

Catherine Rowan.

Idaho water law, as the Plaintiffs have argued, protects a lessor permittee by granting them the shield of a personal property interest in a water permit. *See, e.g., Marshall v. Niagara Springs Orchard Co. Ltd.*, 22 Idaho 144, 125 P. 208 (1912); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Hardy v. Higginson*, 123 Idaho 45, 849 P.2d 946 (1993). The law does not allow an owner permittee who leases from his cotenants to use this protection as a sword to divest the cotenants of their water right. To allow Jim Howe to use his leasehold to overcome Catherine Rowan's vested remainder, which she held in common with him, would violate two legal principles. First, it would allow Jim Howe to benefit from the lease, ignoring his ownership interest, by using Idaho water law as a sword against Catherine Rowan. Secondly, it would allow him to breach the fiduciary duty of due care, loyalty, and prudence owed to his vested remainder cotenant, Catherine Rowan. The law does not allow these results.

Further, the facts of the case do not support the result favored by the Plaintiffs. Jim Howe expressly acknowledged that the permit application was intended to benefit the complete set of farm owners, not just himself. When he filed the application in his and Lucille's names, he did not intend to disavow Catherine Rowan's ownership interest nor did he breach his fiduciary duty to her. The application form, Question 9(c), asked: "If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." Exhibit D. This was left blank indicating that no "arrangement," lease or otherwise, was the basis of Jim Howe's filing. He filed as a co-owner, not as a lessee.

Most significantly, following partition with Catherine Rowan, Jim Howe was required by his lenders to secure an interest in the "south well." Jim Howe and Catherine Rowan entered in the Correction Grant Deed (Exhibit R) reflecting Jim Howe's clear, unambiguous agreement and understanding that the permitted interest in the "south well" was shared with Catherine Rowan. That shared interest, as reflected in the Correction Grant Deed, served as the basis of Jim Howe's securing financing and is consistent with his fiduciary duty to Catherine Rowan.

The evidence in this case demonstrates that the Rileys knew their interest in the permit was shared with Catherine Rowan. Even after having recorded the Bill of Sale from Jim Howe which purported to convey the permit, Robin Riley filed a New Property Owner Notice of Change of

Water Right Ownership with IDWR. (Exhibit 2.) Where the form asks if the change in ownership results in a splitting of the right (into two or more rights), it is marked "yes." Robin Riley was correct in her statement to IDWR. Her position in this action has since changed.

The actions of Jim Howe, his application for the permit, his use of the permitted right to provide water for the Farm, his agreement to partition the Farm with Catherine Rowan, and his later acquisition of a one-half interest in Catherine Rowan's "south well," all reflect that Jim Howe understood and intended that he took an interest in the permit as an co-owner of land with Catherine Rowan, not as a lessor of the land. Any action otherwise would have breached his fiduciary duty to his sister. The only interest Jim Howe had in the permit was as an owner and was identical to that of Catherine Rowan. At Lucille's death, Jim Howe and Catherine Rowan became co-owners of the permit. To rule otherwise would allow Jim Howe, a co-owner, to strip water from his cotenant's Catherine Rowan, one-half of the Farm. Idaho Water law does not permit such a result.

V. WATER PERMIT 22-07280 BECAME A LICENSE BY OPERATION OF LAW DUE TO IDWR'S FAILURE TO MEET ITS STATUTORY DUTY

The failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-07280 became a license by operation of law.

Following is a chronology of IDWR's action on Water Permit 22-07280:

August 28, 1978	Application for Permit filed in the names of Lucille W. Howe and/or Jim W. Howe (Exhibit D). Permit approved by IDWR.
February 7, 1983	Proof of Beneficial Use submitted to IDWR in the name of Jim Howe (Exhibit I).
August 23, 1989	IDWR Beneficial Use Field Report prepared (Exhibit 5).
December 4, 1995	Water License 22-07280 issued to Jim W. Howe and Lucille W. Howe, both deceased (Exhibit KK).

The record establishes that Jim Howe timely filed proof of beneficial use under Water Permit 22-07280 on February 7, 1983. IDWR then had a statutory duty to examine various aspects of the submission. I.C. § 42-217. The legislatively mandated examination was not issued until August 23, 1989 (IDWR Beneficial Use Field Report - Exhibit 5); over six years after Howe's submission.

IDWR has a duty to timely issue licenses following proper application, permitting, proof of beneficial use, and department examination.

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

I.C. § 42-219(1) (emphasis added).

In this case, IDWR issued the license on December 4, 1995; 12 years and 10 months after the submission of proof of beneficial use and 6 years and 4 four months after IDWR completed its tardy Beneficial Use Field Report. Where the legislature has placed the duty on IDWR to examine and issue licenses, a delay of 12 years and 10 months constitutes a breach of that duty.

IDWR's breach of duty in issuing the license for this right caused the right to remain in a state of legal limbo. By holding the right in the permitting process, IDWR denied it the statutory recognition and benefits conveyed to licensed rights under Idaho Code § 42-220. IDWR's failure to timely exercise its duty left the permitted water right as a personal property interest, thereby denying it the real property right status to which it was legally entitled. Had IDWR met its duty, the ownership dispute may never have ripened because a license would have issued and become appurtenant to the land. This dispute has spawned lawsuits in Madison County and the SRBA and an administrative proceeding before IDWR. Had IDWR fulfilled its statutory obligation, none of these actions, with their substantial expense, would likely have been filed.

IDWR's breach of its duty to issue licenses in a timely manner takes on constitutional dimensions as well. The Idaho Constitution holds inviolate the right to appropriate water. IDAHO CONST. art. 15 § 3. The lengthy delay in issuing this license denied the water users their constitutional right to appropriate water. By leaving the right in the vulnerable permit status, it is not accorded the statutory recognition of a fully protected water right, as it would be when licensed.

The record in this case reflects that significant delays in issuing licenses is IDWR's usual practice statewide. This inattention to a legislatively mandated duty requires the court to rule that Water Permit 22-07280 is deemed to have become a license on February 7, 1983, the date Jim

Howe submitted proof of beneficial use. IDWR's examination and report issued six years later found the use was lawfully established and the license, issued 12 years and 10 months later, issued on the exact terms of the permit. Therefore, where a license issued is consistent with the terms of the permit application, the permit, and IDWR's examination and where IDWR has breached its duty to timely license the water right, this court deems the license to be effective and in force as of the date proof of beneficial use was submitted.

The effect of this ruling is that the right in dispute became a licensed real property right as of February 7, 1983. At Lucille Howe's death in October 1983, the owners of Water License 22-07280 became James Howe and Catherine Rowan. Therefore, after February 7, 1983, no permit existed as a personal property interest in water belonging to James Howe which could have been sold or bequeathed to the Rileys.

The license, effective February 7, 1983, was a real property interest which was part of the land. Its ownership was transferred by the various deeds between Jim Howe and Catherine Rowan. The current status of the license is governed by the Correction Grant Deed (Exhibit R) conveying a one-half interest in the water from the "south well" to Jim Howe, which has passed to the Rileys.

VI. CONCLUSION

Catherine Rowan owns a licensed (License 22-07280) one-half interest in the "south well." The Rileys own a licensed (License 22-07280) one-half interest in the "south well."

The gift by deed, reserving a life estate in Lucille W Howe, created a co-tenancy between Jim Howe and Catherine Rowan as vested remaindermen. Jim Howe's application for a water permit (22-07280) established in Catherine Rowan an interest in the permitted water. Jim Howe did not breach his fiduciary duty to her by taking action against his cotenant sister to strip her of her rightful interest. Catherine Rowan held the same ownership interest in Water Permit 22-07280 as Jim Howe.

It is also held that Water Permit 22-07280 became a license by operation of law on February 7, 1983. IDWR's failure to carry out its legislatively mandated duty to examine and license water rights following submission of proof of beneficial use requires this result. Therefore, the license became effective prior to Lucille Howe's death. When Lucille died in

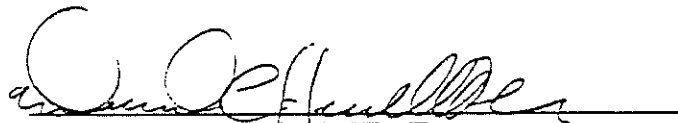
October 1983, the property and Water License 22-07280 vested in Jim Howe and Catherine Rowan as cotenants. The license followed the conveyances between Jim Howe and Catherine Rowan resulting in a one-half ownership interest now in Catherine Rowan and the Rileys.

VII. ORDER

Based on this decision, **IT IS ORDERED** that the Idaho Department of Water Resources examine Water License 22-07280 and issue separate licenses to Catherine Rowan and Norman and Robin Riley, husband and wife, consistent with the Correction Grant Deed (Exhibit R) and its examination. These licenses shall issue and be filed with this court on or before October 1, 1997.

IT IS SO ORDERED.

DATED August 28, 1997.

A handwritten signature in dark ink, appearing to read "Daniel C. Hurlbutt, Jr.", is written over a horizontal line.

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 was mailed on August 28, 1997, with sufficient first-class postage to the following:

Steven R. Parry
Anderson, Nelson & Hall
PO Box 51630
Idaho Falls, ID 83405-1630

Roger D. Ling
Ling, Nielsen & Robinson
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Rupert, ID 83350

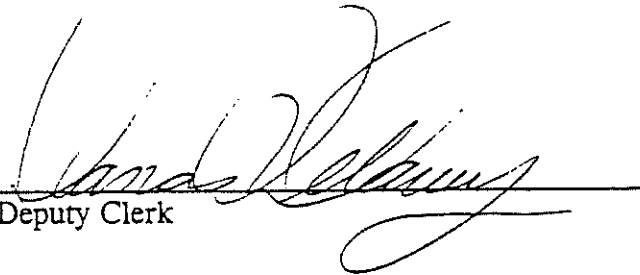
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IDWR
PO Box 83720
Boise, ID 83720-0098

Courtesy copy to:

Hon. James C. Herndon
District Judge, 7th Judicial District
PO Box 717
Blackfoot, ID 83221


Deputy Clerk

State of Idaho
Department of Water Resources

Water Right License

WATER RIGHT NO. 22-07280B

Priority: June 27, 1978

Maximum Diversion Rate:

4.77 CFS

Maximum Diversion Volume:

*

This is to certify, that NORMAN RILEY
ROBIN RILEY

1623 W 3400 S

REXBURG ID 83440

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated June 27, 1978; and has submitted Proof of Beneficial Use on February 7, 1983. An examination indicates that the works have a diversion capacity of 9.530 cfs of water from a GROUNDWATER source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/1 to 10/31	4.77 CFS	*

LOCATION OF POINT(S) OF DIVERSION:

SWSW , Sec. 11, Township 05N, Range 40E
MADISON County

<u>PLACE OF USE:</u>	<u>IRRIGATION</u>	<u>PRIMARY SERVICE LAND</u>				
<u>TWN RGE SEC</u>		<u>ACRES</u>		<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
05N 40E 10	SENE 24	24	NESE 24	24	SESE 6.5	54.5
11	SENW 25	25	SWNW 40	40	NESW 27	
	NWSW 40	40	SWSW 11	11	SESW 10	153

Total acres irrigated as primary right: 207.5

<u>PLACE OF USE:</u>	<u>IRRIGATION</u>	<u>SUPPLEMENTAL SERVICE LAND</u>				
<u>TWN RGE SEC</u>		<u>ACRES</u>		<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
05N 40E 2	Lot 4(SWNW)	30	NESW 9	9	NWSW 40	
	SWSW	14.5	SESW 10	10		103.5
3	Lot 1(SENE)	22	NESE 25	25	SESE 9	56

Total acres irrigated supplemental to Right 22-02223: 159.5

CONDITIONS OF APPROVAL AND REMARKS

- * 1. The annual volume allowed to be diverted under this right shall not exceed 727.0 af per year for the primary service lands and 559.0 af per year when combined with Right 22-02223 for the supplemental service lands.
2. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the lands above.
3. The issuance of this right does not grant any right-of-way or easement across the land of another.

MICROFILMED

DEC 30 1998

State of Idaho
Department of Water Resources

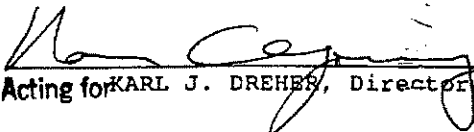
Water Right License

WATER RIGHT NO. 22-07280B

CONDITIONS OF APPROVAL AND REMARKS

4. After specific notification by the department, the right holder shall install a suitable measuring device or shall enter into an agreement with the department to estimate the amount of water diverting using power records and shall annually report the information to the department.
5. Issuance of this license does not designate ownership of the irrigation system, or any part thereof, to any person nor does it in any way designate those who control the irrigation system.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Signed and sealed this 30TH day of NOVEMBER, 1978.


Acting for KARL J. DREHER, Director

MICHEL

DEC 30 1998

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
BENEFICIAL USE FIELD REPORT

A. GENERAL INFORMATION

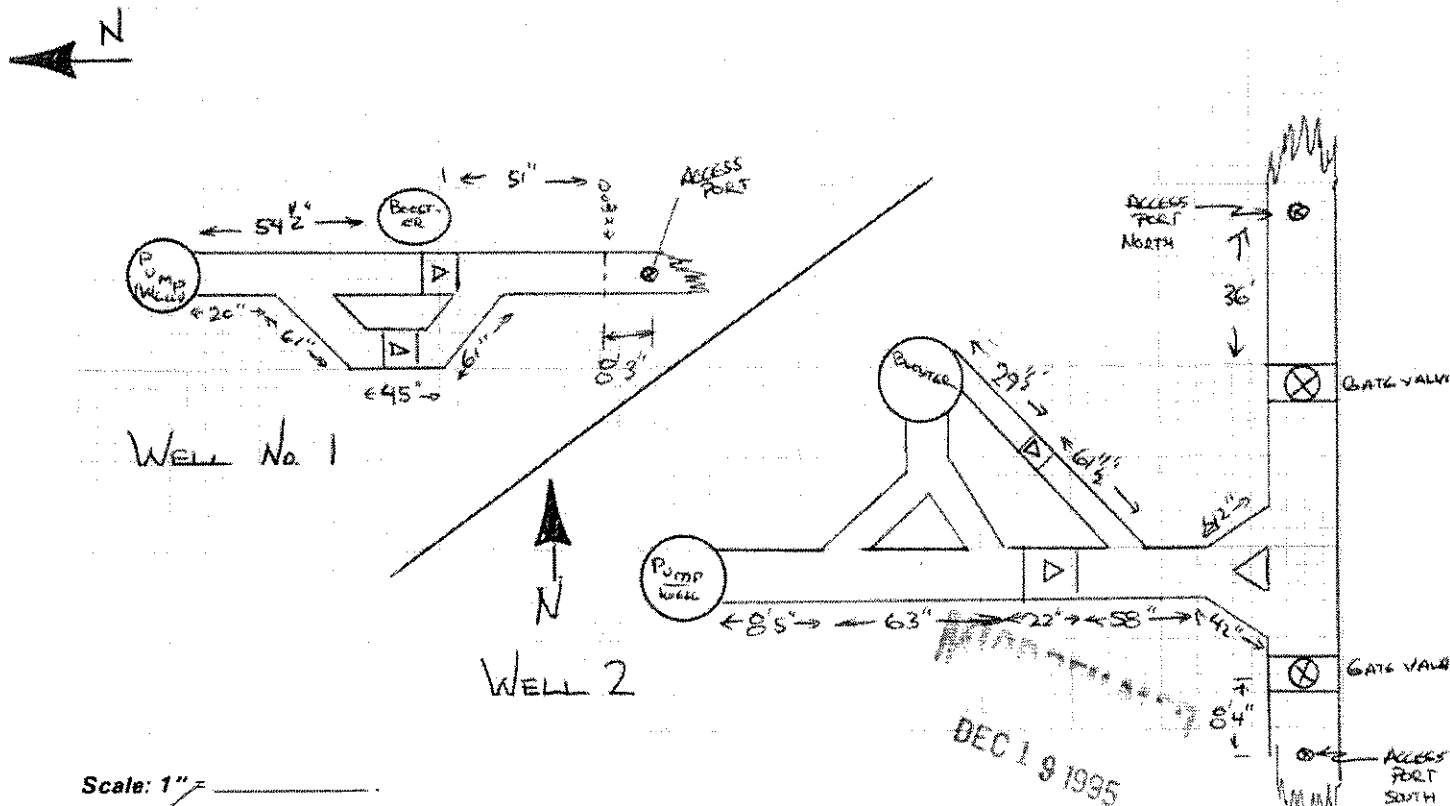
Permit No. 22-7280
Phone No. 356-3027
1. Owner: LUCILLE W. OR SIK W. HOWE
Current Address: Box 803, REXBURG, ID. 83440
2. Accompanied by: NORMAN RILEY EXAM. DATE: 29-JUNE-1987
Address: 1623 W. 3400 S., REXBURG, ID 83440 Phone No. 356-5873
Relationship to Permit Holder: SON-IN-LAW / OPERATOR
3. Source: GROUNDWATER tributary to _____

B. OVERLAP REVIEW

1. Other water rights with same place of use: 22-2223 (PORTION)
_____ ☐ Copies Attached
2. Other water rights with same point of diversion: 22-2223 (WELL No. 1) 3.87 cfs
_____ ☐ Copies Attached ☐ Copies of Field Exam's Attached

C. SYSTEM DESCRIPTION

1. **Diversion System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable. ☐ Alternative diagram attached



Scale: 1" = _____

2. ☒ Copy of U.S.G.S. Quadrangle Attached
Showing location(s) of point(s) of diversion and
place(s) of use (required).
☒ Photo of Diversion and System Attached
(required for all but single household domestic groundwater, and stockwater).
☒ Aerial Photo Attached
(required for irrigation of 10 acres or more).

RE-EXAMINATION FIELD REPORT

A. GENERAL INFORMATION

Permit No. 22-07280

B. MEASUREMENTS:

Date: 16 Nov 1998

Note: Measurements taken with 2 different diameter tapes & thickness mikes

North Well #1: o.d. = 11.850" - 12.050" Thickness = 0.110" - 0.113"

South Well #2:

North mainline:

o.d. = 14.000" - 14.040" Thickness = 0.102" - 0.105"

South mainline:

o.d. = 15.990" - 16.025" Thickness = 0.136" - 0.139"

C. FLOW CALCULATIONS:

$$i.d. = [o.d.] - [2(T)]$$

i.d. = inside diameter

o.d. = outside diameter

T = wall thickness

$$Q_{cfs} = (i.d.)^2(\sqrt{H})(C) \div 448.8 \text{ gpm/cfs}$$

H = differential pressure inches H₂O

C = Annubar Constant

C for 12" = 3.99

C for 14"-16" = 4.01

Assumptions: o.d. = maximum measured outside diameter

T = minimum measured thickness

H = use differential pressure measured original exam (6-29-87)

NORTH #1 WELL: $i.d. = [12.050] - [2(0.110)] = 11.830$ $H = 12.9'$ $C = 3.99$

$$Q_{cfs} = (11.830)^2(\sqrt{12.9})(3.99) \div 448.8 = 2005.567 \text{ gpm} \div 448.8 \text{ gpm/cfs}$$

$$Q_{cfs} = 4.469 \text{ cfs} = 4.47 \text{ cfs}$$

SOUTH #2 WELL:

North Mainline: $i.d. = [14.040] - [2(0.102)] = 13.836$ $H = 4.9'$ $C = 4.01$

$$Q_{cfs} = (13.836)^2(\sqrt{4.9})(4.01) \div 448.8 = 1699.274 \text{ gpm} \div 448.8 \text{ gpm/cfs}$$

$$Q_{cfs} = 3.786 \text{ cfs} = 3.79 \text{ cfs}$$

South Mainline: $i.d. = [16.025] - [2(0.136)] = 15.753$ $H = 6.7'$ $C = 4.01$

$$Q_{cfs} = (15.753)^2(\sqrt{6.7})(4.01) \div 448.8 = 2575.777 \text{ gpm} \div 448.8 \text{ gpm/cfs}$$

$$Q_{cfs} = 5.739 \text{ cfs} = 5.74$$

9.53 for S well

TOTAL CALCULATED FLOW RATE: $Q_{TOTAL} = 4.47 \text{ cfs} + 3.79 \text{ cfs} + 5.74 \text{ cfs} = 14.00 \text{ cfs}$

D. AUTHENTICATION:

Field Examiner's Name:

KEITH C WILSON

MICROFILMED

DEC 30 1998