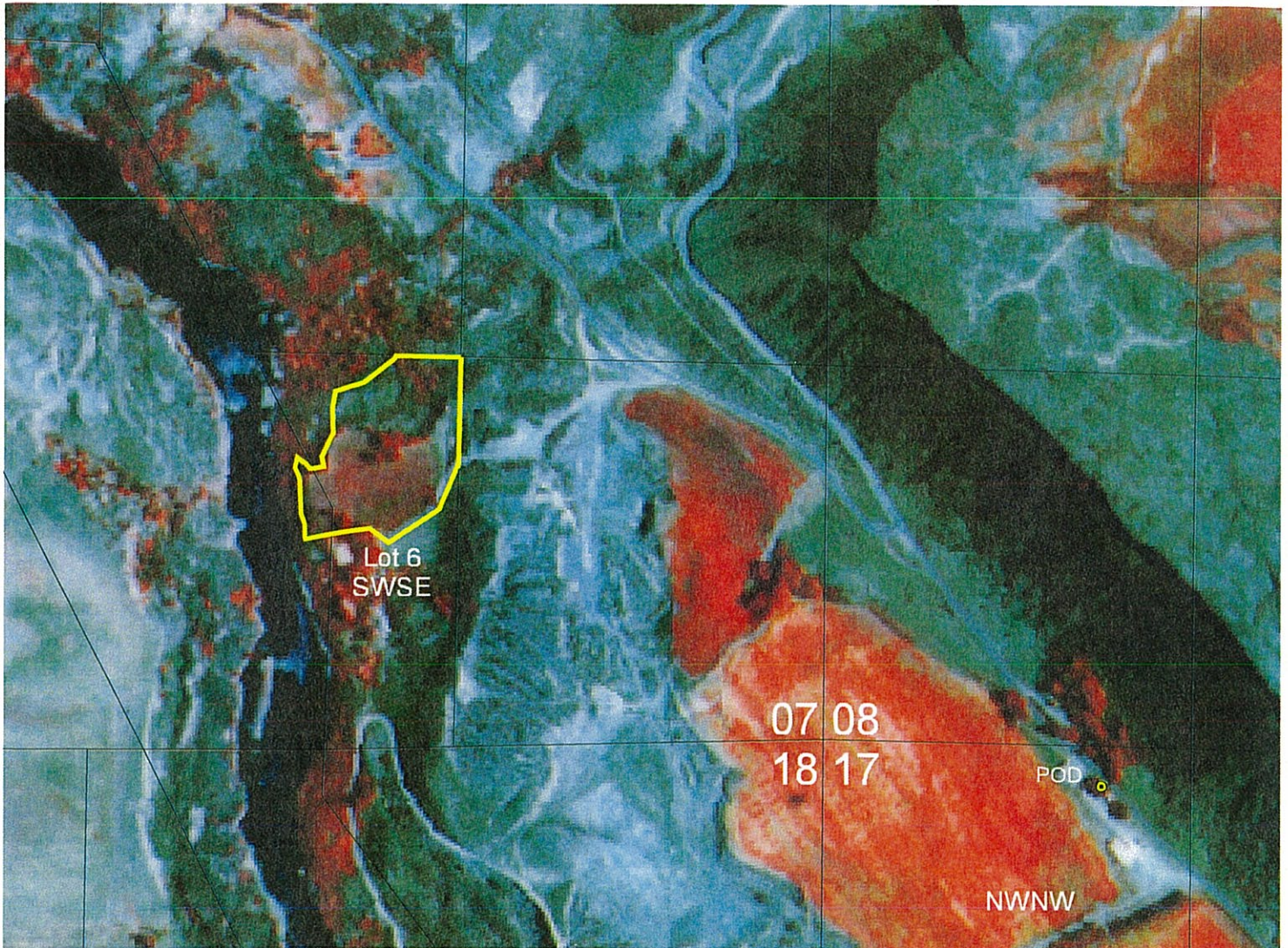


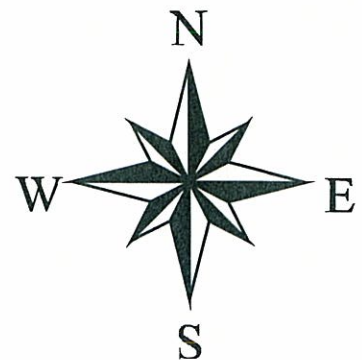
37-10398B



900 0 900 1800 Feet

T06S R12E S07

Map prepared by: Carter Fritschle
Date prepared: 03/31/05 - Revised 04/25/06
1987-1988 NAPP photography
Idaho Department of Water Resources



03/31/2005

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 37-10398B

NAME AND ADDRESS: THOMAS E KING
PO BOX 254
HAGERMAN ID 83332

SOURCE: SPRING

TRIBUTARY: SNAKE RIVER

QUANTITY: 0.060 CFS

The quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day.

The appropriator is entitled to the quantity of water described for stockwater purposes at a point of measurement where the delivery ditch enters the place of use described.

PRIORITY DATE: 04/01/1888

POINT OF DIVERSION:

T06S R13E S17 NENWNW Within GOODING County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
STOCKWATER	01/01 12/31	0.020 CFS
IRRIGATION	03/15 11/15	0.060 CFS

PLACE OF USE: IRRIGATION Within GOODING County

T06S R13E S07 Lot 6 SWSE 3.3

STOCKWATER same as IRRIGATION

3.3 ACRES TOTAL

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

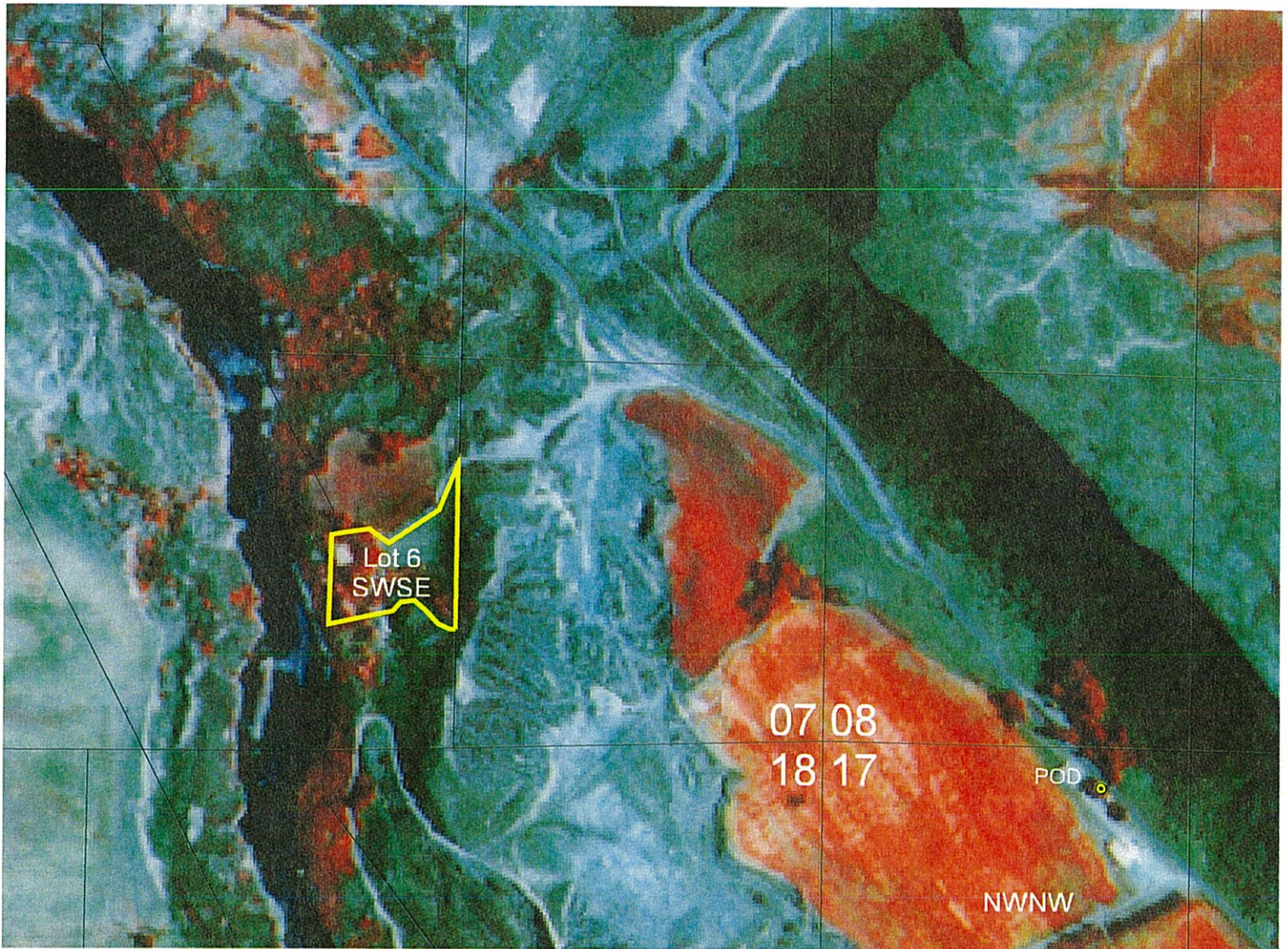
The quantity of water decreed for this water right for stockwater use is not a determination of historical beneficial use.

EXPLANATORY MATERIAL: Decreed

Source is also known as Montana Mining Company Ditch Spring No. 11.

37-10398B

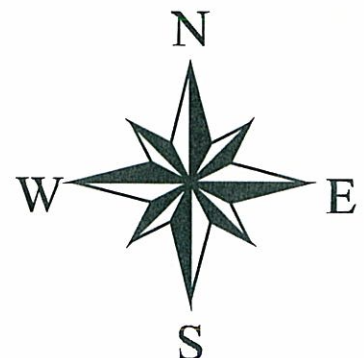
SUPERSEDED



900 0 900 1800 Feet

T06S R12E S07

Map prepared by: Carter Fritschle
Date prepared: 03/31/05
1987-1988 NAPP photography
Idaho Department of Water Resources



RECEIVED

DEC 12 1997

STATE OF IDAHO
IDAHO DEPARTMENT OF WATER RESOURCES

NOTICE OF CHANGE OF WATER RIGHT OWNERSHIP

Please print or type. Attach pages with additional information. Instructions are on the back of this page.
Incomplete forms will be returned.

1. Water Right No(s).: A 45 - 11550 A 37 10398
Adjudication Claim No(s).: A - 37 - 10398 (Civil Action # 14642)
(IN # 79672)
2. The following REQUIRED information must be submitted with this form:
 - ☒ A. A copy of the most recent DEED, TITLE POLICY, CONTRACT OF SALE or other legal document indicating your ownership of the property and water rights or claims in question, WITH ATTACHED LEGAL DESCRIPTION.
 - AND
 - ☒ B. PLAT OF PROPERTY or SURVEY MAP for parcel of ten acres or less. (These are usually attached to your deed or on file with the county.) copy -
 - OR
 - C. For water rights or adjudication claims involving ten or more irrigated acres, a USDA Farm Service Agency AERIAL PHOTO with irrigated acres outlined and point(s) of diversion clearly marked.
3. Name and Address of Former Owner/Claimant GERILYN FEUSTEL
P.O. Box 88 Bliss ID 83314
4. New Owner/Claimant(s) Tom E. King
Name Connector (Check one): ☒ and, ☐ or, ☐ and/or
New Mailing Address P.O. Box 254
City, State and ZIP Code Burley ID 83318
New Telephone Number (208) 678-9181 - (1 day)
5. Date you acquired the property Nov 4th 1996
6. If you have acquired only a portion of the former owner's property, IDWR may need to split the water right(s) or adjudication claim(s). If this applies, describe in detail your portion of each water right or adjudication claim in the spaces below. If necessary, attach additional pages.
Number of acres you irrigate 6.387 Number and type of stock various
Diversion rate in CFS 1.264 Number of homes 2 Other uses Farm
0.2 x 6.32 = 1.264 See Notes
If a water right or adjudication claim is being split and you are not sure how to identify your portion of the original right or claim, please contact the nearest IDWR office for assistance.
7. Signature of New Owner or Claimant(s) Tom E. King (208 678-7181)
- (Corporations or other organizations must submit a list of directors and/or officers demonstrating authority to sign form.)
8. For Snake River Basin Adjudication Claims: Please attach a Notice of Appearance completed by your attorney, if you wish IDWR to correspond with him or her for all matters related to your claims..

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WARRANTY DEED

For value received A. GERILYN FEUSTEL, a single person dealing with her sole and separate property, hereinafter called the grantor, hereby grants, bargains, sells and conveys unto TOM E. KING, P. O. Box 254, Burley, Idaho 83318, hereinafter called the grantee, the following described premises, in Gooding County, Idaho, to-wit:

SEE ATTACHED EXHIBIT "A"

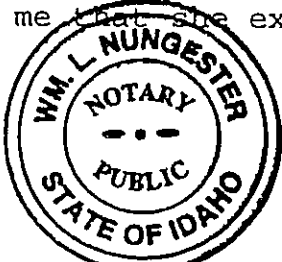
TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee and to the Grantee's heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises; that they are free from all incumbrances except as described above and that Grantor will warrant and defend the same from all lawful claims whatsoever.

Dated this 4th day of November, 1996.

A. Gerilyn Feustel
A. GERILYN FEUSTEL

STATE OF IDAHO)
County of Twin Falls) ss.

On this 4th day of November, 1996, before me, a Notary Public in and for said State, personally appeared A. GERILYN FEUSTEL, a single person dealing with her sole and separate property, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.



WLN\61459.WD

Wm. L. Nungester
NOTARY PUBLIC FOR IDAHO
Residing at: Buhl Id
Commission Expires: 1-11-97

COPY

WARRANTY DEED - 1

LEGAL DESCRIPTION
FOR
GERILYN FEUSTEL

A PARCEL OF LAND LOCATED IN GOV'T LOT 6 OF SECTION 7,
TOWNSHIP 6 SOUTH, RANGE 13 EAST, BOISE MERIDIAN, GOODING
COUNTY, IDAHO AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID SECTION 7,
FROM WHICH THE MEANDER CORNER OF SECTIONS 7 AND 18 ON THE
RIGHT BANK OF THE SNAKE RIVER BEARS N88°34'57"W-1775.39 FEET,
THENCE N88°34'57"W ALONG THE SOUTH BOUNDARY OF THE SE1/4SE1/4
OF SECTION 7 FOR A DISTANCE OF 1301.84 FEET TO THE SOUTHEAST
CORNER OF GOV'T LOT 6 OF SECTION 7, THENCE N00°05'44"W ALONG
THE EAST BOUNDARY OF GOV'T LOT 6 FOR A DISTANCE OF 942.34
FEET TO A POINT ON THE NORTH SIDE OF AN EXISTING ACCESS ROAD
AND BEING THE TRUE POINT OF BEGINNING:

THENCE S23°57'08"W ALONG THE NORTH SIDE OF THE EXISTING
ACCESS ROAD FOR A DISTANCE OF 177.09 FEET;

THENCE S55°37'56"W ALONG THE NORTH SIDE OF THE EXISTING
ACCESS ROAD FOR A DISTANCE OF 215.00 FEET;

THENCE N55°09'09"W ALONG THE NORTH SIDE OF THE EXISTING
ACCESS ROAD FOR A DISTANCE OF 85.32 FEET;

THENCE S81°55'56"W ALONG THE NORTH SIDE OF THE EXISTING
ACCESS ROAD FOR A DISTANCE OF 69.83 FEET;

THENCE S78°44'00"W ALONG THE NORTH SIDE OF THE EXISTING
ACCESS ROAD FOR A DISTANCE OF 155.81 FEET TO A POINT ON THE
APPARENT HIGH WATER LINE ON THE RIGHT BANK OF THE SNAKE
RIVER;

THENCE ALONG THE RIGHT BANK OF THE SNAKE RIVER ON THE
APPARENT HIGH WATER LINE OF THE SNAKE RIVER ON THE FOLLOWING
COURSES:

- N08°57'54"W--6.52 FEET;
- N01°29'23"W--45.23 FEET;
- N18°11'21"W--42.05 FEET;
- N04°12'03"W--54.83 FEET;
- N02°57'57"W--74.39 FEET;
- N25°29'51"W--37.81 FEET;
- N12°33'52"E--35.78 FEET;
- S56°36'33"E--40.93 FEET;
- S35°29'42"E--20.64 FEET;

COPY

EXHIBIT A

COPY

N80° 23' 02"E--47.90 FEET;
N08° 37' 01"W--36.97 FEET;
N23° 10' 43"E--50.79 FEET;
N25° 10' 05"E--41.49 FEET;
N01° 43' 18"W--90.83 FEET;
N09° 37' 26"E--56.96 FEET;
N71° 26' 51"E--102.01 FEET;
N51° 12' 05"E--136.01 FEET;
N35° 55' 46"E--15.30 FEET TO A POINT ON THE
NORTH BOUNDARY OF GOV'T LOT 6 OF SECTION 7;

THENCE S89° 17' 49"E ALONG THE NORTH BOUNDARY OF GOV'T LOT
6 FOR A DISTANCE OF 228.42 FEET TO THE NORTHEAST CORNER OF
GOV'T LOT 6 OF SECTION 7;

THENCE S00° 05' 44"E ALONG THE EAST BOUNDARY OF GOV'T LOT
6 OF SECTION 7 FOR A DISTANCE OF 378.60 FEET TO THE TRUE
POINT OF BEGINNING.

CONTAINING 6.39 ACRES, MORE OR LESS

TOGETHER WITH AND SUBJECT TO:

1- AN EASEMENT FOR THE PURPOSE OF INGRESS AND EGRESS
OVER, ON AND ACROSS A STRIP OF LAND THAT IS ADJACENT TO
AND ON THE NORTHERLY AND SOUTHERLY SIDES OF THE SOUTHERLY
BOUNDARY OF THE BEFORE DESCRIBED PARCEL, SAID EASEMENT BEING
ENCOMPASSED BY THE FOLLOWING DESCRIBED BOUNDARY:

COMMENCING AT THE SOUTHEAST CORNER OF THE BEFORE
DESCRIBED PARCEL, WHICH IS LOCATED N00° 05' 44"W-942.34 FEET
FROM THE SOUTHEAST CORNER OF GOV'T LOT 6 OF SECTION 7, AND
BEING THE TRUE POINT OF BEGINNING;

THENCE S00° 05' 44"E ALONG THE EAST BOUNDARY OF GOV'T 6
FOR A DISTANCE OF 29.45 FEET;

THENCE S23° 57' 08"W FOR A DISTANCE OF 153.60 FEET;

THENCE S55° 37' 56"W FOR A DISTANCE OF 208.41 FEET;

THENCE N34° 22' 04"W FOR A DISTANCE OF 4.00 FEET;

THENCE S55° 37' 54"W FOR A DISTANCE OF 15.52 FEET;

THENCE N55° 09' 10"W FOR A DISTANCE OF 87.70 FEET;

THENCE S81° 55' 57"W FOR A DISTANCE OF 66.46 FEET;

THENCE S78° 44' 00"W FOR A DISTANCE OF 155.90 FEET TO A
POINT ON THE APPARENT HIGHWATER OF THE SNAKE RIVER;

THENCE N08° 57' 54"W ALONG THE APPARENT HIGHWATER LINE FOR
A DISTANCE OF 14.52 FEET TO AN ANGLE POINT;

THENCE N01° 29' 23"W ALONG THE APPARENT HIGHWATER LINE FOR
A DISTANCE OF 1.51 FEET;

THENCE N78° 44' 00"E FOR A DISTANCE OF 155.51 FEET;

THENCE N81° 55' 55"E FOR A DISTANCE OF 73.20 FEET;

THENCE S55° 09' 09"E FOR A DISTANCE OF 82.94 FEET;

EXHIBIT A

THENCE N55°38'03"E FOR A DISTANCE OF 4.48 FEET;
THENCE S34°22'04"E FOR A DISTANCE OF 8.00 FEET TO A
POINT ON THE SOUTHEASTERLY BOUNDARY OF THE BEFORE DESCRIBED
PARCEL;

THENCE N55°37'56"E ALONG THE SOUTHEASTERLY BOUNDARY FOR
A DISTANCE OF 205.01 FEET;

THENCE N23°57'08"E ALONG THE SOUTHEASTERLY BOUNDARY FOR
A DISTANCE OF 177.09 FEET TO THE TRUE POINT OF BEGINNING.

The cost of all improvements, maintenance and repair of road used by both the Grantor and Grantee for ingress and egress to their respective properties shall be divided between the Grantor and the Grantee and their successors in interest based upon the number of homes or residences using said road for ingress or egress. All improvements to the road must be consented to in writing by all parties who will share in the cost of improvements prior to incurring any expense. Prior consent will not be required for normal costs of maintenance and repair. Grantor, by signing this deed and Grantee by accepting this deed bind themselves, their heirs, successors and assigns to the obligation to share in the above referred to costs.

Together with 6.32 miner's inches of water of Water Right No. 37-10398 claimed under Snake River Basin Adjudication (SRBA) ID # A-37-10398 and a one-half interest in the rights obtained in Gooding County Civil Action No. 16642 recorded with Gooding County Recorder on November 2, 1979 as Instrument No. 79672.

COPY

EXHIBIT A

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 37-790

WATER RIGHT NUMBER: 37-790

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	FRED G BLISS
	, ZZ

Priority Date: 04/01/1888

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
SPRINGS	MONTANA MINING COMPANY DITCH

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	/ to /	2.500 CFS	
DOMESTIC	/ to /		
	<u>Total Diversion:</u>	2.500 CFS	

Location of Point(s) of Diversion

SPRINGS

Place of Use

IRRIGATION

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	12E	12				X L 5													
06S	13E	7			X				X L 2	X L 8						X L 7	X L 6		

DOMESTIC same as IRRIGATIONConditions of Approval:Remarks:

1. General P/U INCOMPLETE. SEE FILE. AC. IRR.= 168.08

Comments:Dates and Other Information:

$$\frac{2.50 \text{ cfs}}{168 \text{ ac.}} = 0.0149 \text{ cfs/ac.}$$

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 37-790

Dates and Other Information:

Licensed Date:
Decreed Date: 5/30/1913
Water Supply Bank Enrollment Accepted:
Water Supply Bank Enrollment Removed:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
State or Federal:
Owner Name Connector:
Water District Number: 37
Generic Max Rate Per Acre:
Generic Max Volume Per Acre:
Decree Defendant: E Bell, et al
Decree Plaintiff: Erastus West, et al
Civil Case Number:
Judicial District: Fourth District
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Carey Act Number:
Mitigation Plan: False

Element Reviewed/Verified Dates:

<u>Element</u>	<u>Last Reviewed Date</u>	<u>Reviewer</u>	<u>Last Verified Date</u>	<u>Verifier</u>	<u>Status</u>
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Verification Log:

<u>Element</u>	<u>Date Time Stamp</u>	<u>Reviewer</u>	<u>Log text</u>
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: **A37-10398B**
Date Received: 7/ 5/1988
Receipt No: X777777
Received By: _____

**COPY FOR
YOUR FILES**

**NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW**

**COPY FOR
YOUR FILES**

1. Name: TOM E KING
Address: PO BOX 254
BURLEY ID

208-678-7181

83318

2. Date of Priority: APR 1, 1888

3. Source: SPRINGS

Trib. to: MONTANA MINING DITCH

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4 of	Lot	County
06S	13E	8	SE	SW	SW		GOODING
		17	NW	NE	NW		GOODING
			SW	NW	NW	R	GOODING

5. Description of diverting works:

DITCHES & PIPELINES FROM 3 SPRINGS TO 4" PVC REDIV. PIPELINE

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION	04/01	11/01	0.126		
STOCKWATER	01/01	12/31	0.126		
FIRE PROTECTION	01/01	12/31	0.126		

7. Total Quantity Appropriated is:

0.126 C.F.S. (and/or)

A.F.A.

8. Total consumptive use is

Acre Feet Per Annum.

9. Non-irrigation uses:

VARIOUS STOCK, FP/ FIRE PROTECTION FOR LAND & BUILDINGS

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
06S	13E	7			STOCK	
			SW	SE	FIRE	
				6	IRR	6.4
					Section Acres	6.4
					Total Acres	6.4

11. Place of use in counties: GOODING

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

THIS RT. IS BASED ON A PORTION OF 37-0790 WHICH HAS BEEN IN LITIGATION WITH LYNN STEVENSON SINCE THE LATE 1970'S. REFER TO FEUSTEL VS STEVENSON CASE # 16642 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT. THERE ARE TWO SPRING SOURCES IN SESWSW SEC. 8, T6S, R13E. AMOUNT BEING CLAIMED IS 12.64 MINER'S INCHES OR 0.2528 CFS. SEE FILE IN SRBA WORKING FILES - STATE OFFICE UNDER FEUSTEL V. STEVENSON.

3/3/98 TF; CLAIM WAS SPLIT FROM A37-10398 PURSUANT TO THE PURCHASE OF 6.4 ACRES BY TOM E KING FROM FEUSTEL.

15. Basis of Claim: DECREED

Case Number:

Court : FOURTH

Decree date: 5/30/1913

WEST, ET. AL.
Decree Plaintiff

BELL, ET. AL.
vs Decree Defendant



State of Idaho

DEPARTMENT OF WATER RESOURCES

1341 Fillmore Street, Suite 200, Twin Falls, ID 83301-3380

Phone: (208) 736-3033 FAX: (208) 736-3037

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

March 3, 1998

Tom E. King
PO Box 254
Burley, Idaho 83318

RE: Snake River Basin Adjudication (SRBA)
Claim No: **A37-10398**

Dear Claimant:

Pursuant to the notification that you have purchased a portion of the property to which the above referenced adjudication claim is appurtenant, the Department has split the original claim into parts A and B. Your portion has been renumbered A37-10398B, and the part retained by Ms. Feustel to A37-10398A. Find enclosed your copy of the computer generated claim noting the changes. Please review the document for accuracy in all respects.

We are also in receipt of your Notice of Change of Ownership on adjudication claim number A45-11550 in Cassia County. In order to process this change, however, we must have a document conveying this property to you from Sun Valley Land Company, along with a survey map.

I have included a self-addressed envelope for your convenience. Should you have any questions or corrections, please notify this office.

Sincerely,

Vikie Hancock
SRBA Records Clerk

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A37-10398
Date Received: 7/05/1988
Receipt No: 5000 705
Received By: AD

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: WILLIAM I. FEUSTEL 208-352-4248
Address: P.O. 88
BLISS, ID 83314

AND/OR

Name: A. GERILYN FEUSTEL 208-352-4248
Address: P.O. 88
BLISS, ID 83314

2. Date of Priority: APR 01, 1888

3. Source: SPRINGS Trib. to: MONTANA MINING DITCH

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
06S	13E	8	SE	SW	SW		GOODING
		17	NW	NE	NW		GOODING
			SW	NW	NW	R	GOODING

5. Description of diverting works:
DITCHES & PIPELINES FROM 3 SPRINGS TO 4" PVC REDIV. PIPELINE

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
IRRIGATION	04/01	11/01	0.252		
STOCKWATER	01/01	12/31	0.252		
FIRE PROTECTION	01/01	12/31	0.252		

7. Total Quantity Appropriated is:
0.252 C.F.S. (and/or) A.F.A.

8. Total consumptive use is 48.0 Acre Feet Per Annum.

9. Non-irrigation uses:
S/ 6 HORSES, FP/ FIRE PROTECTION FOR LAND & BUILDINGS

A37-10398

Page 1

Date: 07/05/88

MICROFILMED

FEB 25 1993

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
06S	13E	7			STOCK	
			SW	SE	6	FIRE
					IRR	16.0
					Section Acres	16.0
					Total Acres	16.0

11. Place of use in counties: GOODING

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

THIS RT. IS BASED ON A PORTION OF 37-0790 WHICH HAS BEEN IN LITIGATION WITH LYNN STEVENSON SINCE THE LATE 1970'S.
REFER TO FEUSTEL VS STEVENSON CASE # 16642 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT.
THERE ARE TWO SPRING SOURCES IN SESWSW SEC. 8, T6S, R13E.
AMOUNT BEING CLAIMED IS 12.64 MINER'S INCHES OR 0.2528 CFS.

15. Basis of Claim: DECREED

Water Right Number:

Case Number:

Court : FOURTH

Decree date: 5/30/1913

WEST, ET. AL.

Decree Plaintiff

vs

BELL, ET. AL.

Decree Defendant

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 1

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): *William [Signature]* Date: 7-5-8

Date: _____

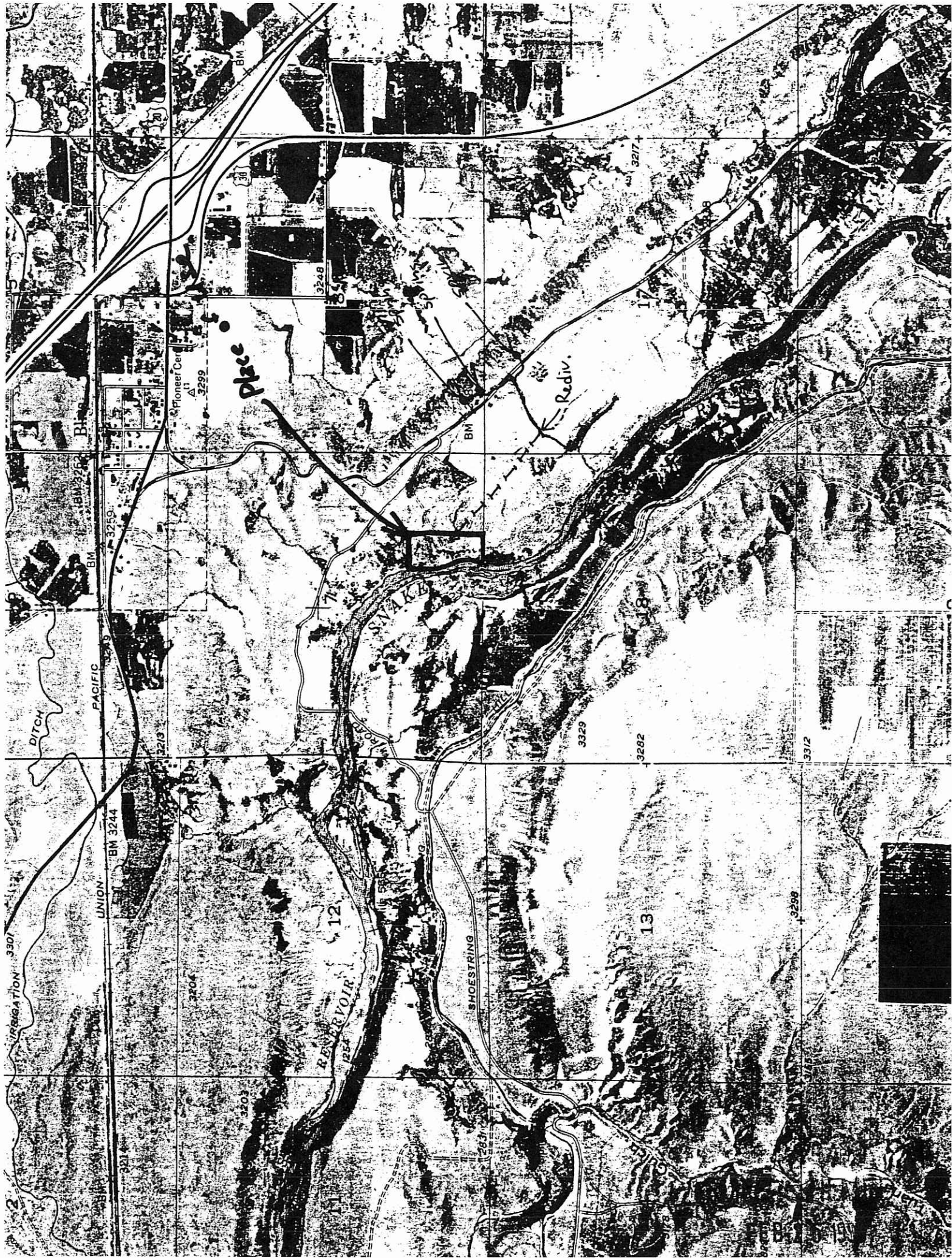
State of Idaho)
County of Twila Falls) SS.

Subscribed and sworn (or affirmed) before me this 5th day
of July 19 88

[Signature]
Notary Public

Seal

Residing at Kinsley, Id.
My Commission Expires 6/30/1992





State of Idaho

DEPARTMENT OF WATER RESOURCES

(208) 327-7900

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - [REDACTED]

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

M E M O R A N D U M

TO: File Claim No. A-37-10398

DATE: April 11, 1989

FROM: Josephine P. Beeman

RE: Feustel vs. Stevenson

There is a pending lawsuit in the Snake River Basin Adjudication working files that should be referenced. It is entitled Feustel vs. Stevenson.

MICROFILMED

FEB 25 1993

A37-10398

JOHN C. ARKOOSH
ATTORNEY AT LAW
116 FOURTH AVENUE WEST
P.O. BOX 32
GOODING, IDAHO 83330
(208) 934-8401

March 13, 1989

RECEIVED

MAR 16 1989

Department of Water Resources
2148 4th Avenue East
Twin Falls, Idaho 83303

Department of Water Resources
Southern Region Office

RE: Snake River Basin Adjudication Claim Number A37-10398
William I. Feustel and R.A. Gerilyn Feustel

Dear Sirs:

Please be informed that I represent Mr. Lynn Stevenson of Fairfield, Idaho. Mr. Stevenson owns property located next to Mr. Feustels along the Snake River. I am writing on Mr. Stevenson's behalf to protest Mr. Feustel's claim as follows:

1. Mr. Feustel is claiming .252 cfs from 04-01 to 11-01 for irrigation purposes for 16 acres of ground. While Mr. Feustel may own 16 acres of ground, he only irrigates by his sworn testimony in Gooding County Case Number 16642 approximately 6 1/2 acres. The ASCS map show him only irrigating approximately 3.2 acres. It is Mr. Stevenson's contention that Mr. Feustel can not put to beneficial use the .252 cfs that he is claiming as a water right.

2. Mr. Feustel is claiming stock water and water for fire protection in the amount of .252 cfs from 01/01 through 12/31. For your information, please find enclosed a copy of the Judgment in Case Number 16642 and of a Stipulation in the same matter. You will note the Judgment in no way discusses stock water or irrigation water. The Stipulation however does, and further provides that Mr. Feustel shall only have water for those purposes "to a maximum of 4 inches". Also it might be noted that it is Mr. Stevenson's contention that this water should be made available to Mr. Feustel only when he can use and in such amounts that he can use. Water is delivered to the Feustel property through a plastic pipe that comes out of Mr. Stevenson's ditch. If water is not used by Mr. Feustel, Mr. Stevenson uses it by putting it through a fish pond and a hydroelectric generator which ends up in the Snake River. Mr. Feustel is pushing to have water delivered to him all winter long through this plastic pipe for fire protection and stock water. As far as we know, Mr. Feustel presently has one horse and maybe he has up to four at various times. Obviously these four horses do not need 4 inches of stock water.

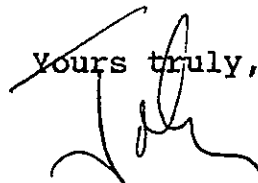
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FEB 25 1993

Department of Water Resources
March 13, 1989
Page 2

It is my intent at the appropriate point in time in the Snake River Adjudication, to file a formal protest based upon the above objections. Please put me on your list as far as getting notice as to the appropriate time to be filing these objections. If you require any further information or have any questions, please feel free to contact me.

Yours truly,



John C. Arkoosh

JCA/db

cc: Boise Office
Jo Beeman
James Kennedy, Jr.
Lynn Stevenson

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FEB 25 1993

DISTRICT COURT
GOODING CO. IDAHO
FILED

HEPWORTH, NUNGESTER & FELTON
1020 Main, Buhl, Idaho 83316
Tel. No. 208-543-4368
Attorneys for Plaintiffs

'78 APR 24 AM 11:42

73672

STATE OF IDAHO, COUNTY OF GOODING, ss.

Filed for record at the request of *James*

4 min. past *9* o'clock *2* M. this *22* day
of *Nov* 19 *77*

MARGARET F. CLEMENTS Recorder

By Judy A. Lamberson, Deputy

*Office sent to
attorneys 4/24/78*

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

* * * * *

WILLIAM I. FEUSTEL and
A. GERILYN FEUSTEL, husband
and wife,

Case No. ~~15778~~

16642

Plaintiffs,
Counterdefendants,

vs.

JUDGMENT

LYNN STEVENSON, a single man,
and GERALD R. STEVENSON,

Defendants,
Counterclaimants.

* * * * *

The above-entitled matter having been settled by oral
agreement between the parties and their attorneys on the 9th day
of August, 1977, and plaintiffs having reduced that oral agreement
to writing which stipulation was and remains unsigned to date,
and plaintiff having filed with this Court their Motion For
Specific Performance of Settlement asking that the agreement
entered into between the parties on or about the 9th day of
August, 1977, be specifically enforced, which Motion has been

JUDGMENT -1-

AW OFFICE
HEPWORTH
NUNGESTER
And
FELTON
Buhl, Idaho

1 argued before this Court, and at which time testimony was presented
2 in support of that Motion, and this Court having, on the 6th day
3 of April, 1978, filed its Memorandum Opinion directing that
4 plaintiffs' Motion For Specific Performance be granted,

5 IT IS HEREBY ORDERED, ADJUDGED and DECREED that the
6 plaintiffs are the owners of Lot Six (6), Block Seven (7),
7 Township Six (6) South, Range Thirteen (13) E., B.M., Gooding
8 County, Idaho, and that any and all water rights referred to
9 hereinafter, and granted pursuant to the Stipulation referred to
10 hereinabove shall be appurtenant thereto.

11 That the defendant, Lynn Stevenson, is the owner of
12 real property located in Gooding County, Idaho, to wit:

13 Township Six (6) South, Range Thirteen (13) E., B.M.,
14 Section Eight (8): Southwest Quarter of the Southwest Quarter
15 (SW $\frac{1}{4}$ SW $\frac{1}{4}$); Section Seventeen (17): North Half of the Northwest
16 Quarter (N $\frac{1}{2}$ NW $\frac{1}{4}$), the Southeast Quarter of the Northwest Quarter
17 (SE $\frac{1}{4}$ NW $\frac{1}{4}$), the Southeast Quarter of the Northwest Quarter
18 (SE $\frac{1}{4}$ NW $\frac{1}{4}$), Lots One (1) and Two (2); Section Eighteen (18): Lot
19 Seven (7).

20 That a pipeline and measuring device shall be con-
21 structed for the purposes of water delivery to the property of
22 plaintiffs herein described, and that the same shall be of
23 sufficient dimension so as to allow delivery of no less than
24 twelve and sixty four one hundreds (12.64) miner's inches of
25 water, and shall in no event be of a lesser quality than class
26 eighty (80) P.V.C. plastic pipe.

27
28 JUDGMENT -2-

BY OFFICES
EPWORTH
UNGERER
And
FELTON
Said, Idaho

1 That the defendant, Lynn Stevenson, shall be respons-
2 ible for installation of the system, and that the same shall be
3 completed on or before January 1, 1978.

4 That the costs of construction shall be borne equally
5 by the parties, but in no event shall the plaintiffs be required
6 to pay in excess of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500),

7 The pipeline shall run from a point approximately Six
8 Hundred (600) feet to the Southwest of a series of fish ponds
9 owned by the defendant, and located upon his property near High-
10 way 30, proceeding in the most direct and economically feasible
11 manner to a point where the existing channel utilized by the
12 plaintiffs to convey water leaves defendant's property and
13 enters the State owned gravel beds, thence across the said gravel
14 beds, in the aforesaid existing channel to the point where it
15 enters the plaintiffs' existing irrigation system and is diverted
16 to the property of the plaintiffs, provided, however, that this
17 route is subject to alteration conditioned upon the ability of
18 the plaintiffs to obtain necessary easements and releases from
19 the State of Idaho so that a more direct route may be established.
20 The measuring device installed shall be approved by the Idaho
21 Department of Water Resources.

22 That the water to be delivered to the plaintiffs shall
23 have its origins in that spring referred to in the decree entered
24 in the case of Erastus West, et al. v. E. Bell, et al., dated
25 the 20th day of May, 1913, and fully described therein, to wit:

26 "Spring Number Eleven (11) in the Norhtwest
27 Quarter of the Northwest Quarter (NW¼ NW¼)
28

1 of Section Seventeen (17), Township Six
2 (6) South, Range Thirteen (13) E., B.M.,
3 Gooding County, State of Idaho."

4 Said water right is subject to the priorities of said decree.

5 That the defendant, Lynn Stevenson, shall provide and
6 deliver a quantity of water not to exceed 12.64 miner's inches
7 of water through the said pipeline for the beneficial use of the
8 plaintiffs.

9 That the plaintiffs shall demand no greater quantity
10 of water than can be beneficially used, either for irrigation
11 or otherwise, so as to make any excess supply of water available
12 for the beneficial use of the defendants. However, plaintiffs
13 shall determine the amount of water that may be put to beneficial
14 use at any point in time, not to exceed 12.64 miner's inches.

15 The plaintiffs shall notify either the defendant, Lynn Stevenson,
16 his agents, or employees that an amount of water in excess of
17 that required, is being furnished when the situation so justifies
18 in order that defendant, Lynn Stevenson, his agents, or successors
19 can use said water beneficially at such times as plaintiffs are
20 not so beneficially using the same.

21 That the defendant, Lynn Stevenson, shall in good faith
22 attempt to obtain the necessary materials, including pipe, for
23 completion of the project, at the least possible price, and shall
24 give the plaintiffs the benefit of any cost savings achieved by
25 him. The size of the pipeline to be installed shall be of suf-
26 ficient diameter to insure the delivery of at least 12.64 miner's
27 inches of water.

28 JUDGMENT -4-

1 That all parties shall verify any and all costs in-
2 curred; and that all parties shall be allowed to furnish labor
3 and/or the use of equipment in the pursuit of the completion of
4 the project, provided that the parties agree as to the compensa-
5 tion in advance of any work done, costs incurred, or equipment
6 used.

7 That the defendant, Lynn Stevenson, shall have full
8 responsibility for the maintenance of any fixture or pipeline
9 constructed for that pipeline and fixtures beginning at the
10 origin of the pipeline and ending at the point where the line
11 leaves the real property of the defendant. That plaintiffs
12 shall be responsible for the maintenance of the pipeline from
13 the point where the line leaves the real property owned by the
14 defendant, Lynn Stevenson, and ending at the point where the
15 same connects to the plaintiffs' existing irrigation system.
16 Each party shall be responsible for any and all damages to the
17 pipeline as a result of the negligent or intentional acts of
18 himself, his employees or agents.

19 That plaintiffs and defendants each pay their own
20 costs incurred by them or their attorneys, including all fees
21 and costs incurred as a result of the above entitled action,
22 and that all parties are released from all claims for damages,
23 costs and fees arising from this or any other matter.

24 DATED this 24 day of April, 1978.

25 
26 DISTRICT JUDGE
27
28

IDAHO V. BOARD OF COUNTY COMMISSIONERS

We conclude that the district court committed no error in deciding to award attorney fees to Fox under the Private Attorney General theory.

The judgment of the district court is affirmed. Costs to respondent, Wayne Fox. Because Fox has appeared *pro se* in this appeal, no attorney fees on appeal are allowed. *O'Neil v. Schukardt*, 112 Idaho 472, 733 P.2d 693 (1986); *Curtis v. Campbell*, 105 Idaho 705, 672 P.2d 1035 (1983); *Swanson & Setzke, Chd. v. Henning*, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989); *Christie v. Scott*, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986).

WALTERS, C.J., and SWANSTROM, J., concur.

1. The district court found that the Top Idaho Bar was located twenty-five miles from the contiguous limits of Moyie Springs, was only connected to the city by a one-dimensional line, and was provided no city services. Annexations of such areas have historically been found to be void *ab initio*. See e.g. *Oregon Shortline R.R. Co. v. Village of Chubbuck*, 93 Idaho 815, 474 P.2d 244 (1970); *Potvin v. Village of Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955); and *Hillman v. City of Pocatello*, 74 Idaho 69, 256 P.2d 1072 (1953).

2. The court also concluded that Fox had standing as an aggrieved party. However that is an alternative ground for standing which we need not address in view of our holding that Fox had standing as a taxpayer who challenged the legality of the Commissioners' decision.

3. The Commissioners also argue, relying on *Young v. Board of County Comm'rs*, 67 Idaho 302, 177 P.2d 163 (1947), that there is no right to appeal a decision of the Board of County Commissioners to grant an application for a license to sell liquor. However, the *Young* decision dealt with the licensing of amusement parks rather than taverns, only discussed the issue of liquor licensing in passing, and dealt specifically with an entirely different statutory scheme which has no relevance to this proceeding. Accordingly, we see no reason to further discuss this argument.

4. The amendment simply added the words "or status" in the statute. See 1989 Idaho Sess. Laws, ch. 301, sec. 1, p. 749.

5. The 1989 session of the Idaho Legislature adjourned on March 29, 1989, making the July 1, 1989, date the effective date of all non-emergency legislation adopted during that session.

6. It appears that the County did not take the shoestring annexation of the Top Idaho Bar property into account in drafting its zoning ordinance and drafting the zoning map. The general area containing the bar property was zoned agricultural without any distinction being made for the annexed property.

7. We do not perceive the district court's analysis with regard to the award of fees to be at odds with our holding in *Fox I*. There we held that I.C. § 23-1015 did not provide Fox with an avenue for judicial review of the issuance of the licenses under the Administrative Procedure Act. We were not asked to determine if — once the judicial review properly was initiated under I.C. § 31-1509 — it was appropriate to consider I.C. §§ 23-1015 and 12-117 in determining the attorney fees issue.

Vol. 91, No. 57
IN THE COURT OF APPEALS
OF THE STATE OF IDAHO
No. 18141
Cite as: 91.7 ICAR 487

WILLIAM I. FEUSTEL and A. GERILYN FEUSTEL,
husband and wife,

Plaintiffs-Respondents,

v.

LYNN STEVENSON, a single man, and GERALD R.
STEVENSON,

Defendants-Appellants.

Appeal from the District Court of the Fifth Judicial District, State of Idaho; Gooding County. Honorable Phillip M. Becker, District Judge.

Judgment ordering alterations to irrigation pipeline, affirmed in part and reversed in part. Case remanded.

ATTORNEYS:

James L. Kennedy Jr., of Ketchum, Idaho, for appellants.

Hepworth, Nungester & Lezamiz of Twin Falls, Idaho, for respondents. John Hepworth argued.

Filed: April 2, 1991

SWANSTROM, J.

This case involves a dispute between two neighboring landowners over an irrigation pipeline. The issue raised on appeal is whether a judgment of the district court ordering modifications to the pipeline is valid. We affirm the validity of the district court's judgment but remand for an alteration in language.

The background facts, somewhat simplified for the sake of discussion, are as follows. The parties own adjoining rural acreage in Gooding County, Idaho. Natural springs exist on property which now belongs to Lynn and Gerald Stevenson. During the previous century, miners dug a ditch to carry water from the springs to their mining operations. In 1913, landowners along this ditch obtained a decree adjudicating their water rights to the water flowing through the mining company's ditch. *West, et al v. Bell, et al*, May 30, 1913, District Court of Gooding County (hereinafter the "1913 Decree"). By 1958 the mining company ditch no longer existed. The Feustels purchased their property in 1968.

In 1976, a dispute arose between the Feustels and Lynn Stevenson over water and ditch rights. The Feustels brought this action contending that Stevenson had destroyed certain ditches or had otherwise deprived them of water that the Feustels had a right to use upon their property as a result of the 1913 adjudication decree. Just before trial of the action was to commence in August, 1978, the parties apparently reached an oral agreement to settle the dispute. The oral agreement was reduced to writing but never signed by the parties.

Nevertheless, in 1978, the district court issued a memorandum decision holding that an agreement to settle had been reached. Based on the agreement, the district court entered a judgment (hereinafter the "1978 judgment") which

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required Stevenson to build an underground irrigation pipeline across his property, over adjacent state property, and onto the Feustels' property. The pipeline was to be constructed so that it would allow delivery of 12.64 miner's inches of water to Feustels' property from a certain spring located on Stevenson's property, specifically described in the 1913 Decree as "Spring Number eleven." Stevenson built the pipeline, but this failed to end the dispute between the parties. Almost every year since 1978, the Feustels filed motions to require Stevenson to deliver 12.64 miner's inches of water during the irrigation season, contending that Stevenson either was not allowing the required amount of water to enter the system or that the system was not capable of delivering the required amount.

In 1988, the Feustels filed a motion asking the court to order modifications to be made to the irrigation pipeline so that it would provide sufficient water. In reply, Stevenson alleged that the Feustels had wasted the water provided and had not used it beneficially, thus forfeiting their right to most of the 12.64 inches of water decreed to them. See I.C. § 42-222; *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943). Upon a hearing, the district court ordered that modifications be made to the pipeline and declined to change the Feustels' water rights. Stevenson filed this appeal.¹

Stevenson first contends that the district court's judgment requiring modifications to the irrigation system is invalid because it was based on a motion, untimely by more than ten years, to amend the 1978 judgment. We are not persuaded. While it is true that the Feustels' motion before the court was originally entitled a motion to amend judgment, the Feustels recognized the misnomer and the court subsequently determined that it was a motion to enforce the 1978 judgment. Unlike the motions previously filed every year by the Feustels to request the court's assistance in making Stevenson turn the water on, this motion sought a more permanent solution to the problem — modifications to a pipeline system that, for one reason or another, was not working satisfactorily. We do not deem the court's action in requiring those modifications to be an improper amendment to the 1978 judgment, but instead one within the court's inherent power to enforce judgments. See *City of Englewood v. Reffel*, 522 P.2d 1241 (Colo. 1974); *Oatman v. Hampton*, 43 Idaho 675, 156 P.2d (1927); *Martinez v. Martinez*, 157 P.2d 484 (N.M. 1945); 49 C.J.S. *Judgments* § 585 (1947).

District Judge Kramer, who took evidence in 1978 concerning the settlement agreement, viewed the parties' agreement as "a contract to deliver water." The parties agreed to split the cost of the pipeline and to divide the maintenance responsibilities. As a result, the Feustels were not given an easement across Stevenson's property. The 1978 judgment made Stevenson responsible for the "maintenance of any fixture or pipeline" on his property. The Feustels were made responsible for the pipeline from the point where it left Stevenson's property to where it connected to the Feustels' "existing irrigation system."

District Judge Becker, who conducted the hearing on the parties' latest annual dispute, could not determine the cause of the failure of the system to deliver 12.64 inches of water to Feustels' property. Each of the parties blamed the other for failing to maintain his part of the system or for violating the terms of the judgment. The court relied heavily on the testimony and on the report of Charles Brockway, a witness both parties readily agreed was a qualified expert on water and water systems. Brockway explained why existing control devices

and gauges, coupled with the parties' divided responsibilities and their mutual mistrust, made it difficult for either party to locate the source of problems in the system so that they could be attributed to the proper party for corrective action. This evidence, and the ten-year history of judicial involvement, clearly demonstrated that the trial court would continue to be frustrated in its efforts to enforce the 1978 judgment unless the court ordered changes to be made in the system.

For example, no fixed control devices existed at the inlet end of the pipeline to accurately maintain the water level at a height where hydraulic pressure would cause 12.64 miner's inches to flow out the other end. Instead, Stevenson would adjust the water's height in the intake channel by putting in or taking out rocks in the channel. No gauges existed at the pipe inlet to show whether the water surface was above or below the prescribed level. Even if the water level was set correctly, a screen protecting the inflow could become blocked with debris so as to reduce the flow. It was Stevenson's responsibility to keep debris from blocking or reducing the inflow. The Feustels were not given any easement or permission to do this. Thus, it could not be readily determined by the Feustels or anyone else whether Stevenson was properly controlling the inlet to the pipeline.

The Feustels were responsible for maintaining the lower end of the pipeline after it left Stevenson's property. The evidence showed that the diameter of the pipe was reduced in this area. Sediment could accumulate in a dip of the line causing a reduction in the flow if the line were not periodically flushed out. The line also had a high point or syphon in this area. It was sometimes necessary to bleed air from this high point because the air also could reduce the flow of water. These were the Feustels' maintenance responsibilities. However, if the Feustels experienced a reduction in the flow of water to their property, they could not readily tell whether the problem was in the upper or the lower end of the line. Distrusting Stevenson, they usually assumed he was responsible. Yet, without access to Stevenson's property, they could not readily determine where the problem was.

Brockway's solution was to have a "sight glass" installed above the pipeline at the point where it left Stevenson's property. This device would show at a glance whether the water level at the inlet of the pipe was at the correct setting to allow a flow of 12.64 miner's inches of water at the outlet. Finally, Brockway recommended that a fixed "Cipolletti weir" be installed at the outlet so that anyone could take a reading and accurately determine the actual flow of water from the pipe, measured in miner's inches. These two devices, used in conjunction, would enable the parties to quickly determine at any given time where a problem existed.

The district court adopted these suggestions, deciding that the parties should equally share the additional cost of their installation. Essentially, the court designated Brockway as a master to accomplish the changes himself or to designate others to do the work under his supervision, to inspect the work, and to certify its completion and cost. We uphold these orders because it is apparent they were reasonably necessary to enable the court to enforce the 1978 judgment fairly and in a manner that will reduce the chances for another decade of litigation.

We have more difficulty, however, in the wording used by the district court in upholding the Feustels' water right. In its 1989 judgment ordering modifications to the existing pipeline, the district court stated that the Feustels were entitled "to receive through the pipeline ... a continuous flow of water of

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not more or less than 12.64 miner's inches." (Emphasis added.) We believe this language is a material change from the following language of the 1978 judgment:

That the defendant, Lynn Stevenson, shall provide and deliver a quantity of water not to exceed 12.64 miner's inches of water through the said pipeline for the beneficial use of the plaintiffs.

That the plaintiffs shall demand no greater quantity of water than can be beneficially used, either for irrigation or otherwise, so as to make any excess supply of water available for the beneficial use of the defendants. However, plaintiffs shall determine the amount of water that may be put to beneficial use at any point in time, not to exceed 12.64 miner's inches. The plaintiffs shall notify either the defendant, Lynn Stevenson, his agents, or employees that an amount of water in excess of that required, is being furnished when the situation so justifies in order that defendant, Lynn Stevenson, his agents, or successors can use said water beneficially at such times as plaintiffs are not so beneficially using the same.

-These provisions were amended by a subsequent stipulation of the parties in 1978. The stipulation recites that "the plaintiffs' water use outside the irrigation season shall be limited to a maximum of four inches for stock water and fire protection." Clearly, the Feustels are not given an absolute right to receive a "continuous" flow of "not less than" 12.64 inches of water even during the irrigation season. The judgment unequivocally prohibits the Feustels from demanding a greater quantity of water "than can be used beneficially, either for irrigation or otherwise, so as to make any excess supply of water available for the beneficial use of the defendants."

The 1978 judgment gives the Feustels the right to "determine the amount of water that may be put to beneficial use at any point in time, not to exceed 12.64 miner's inches," but this language must be read in context and not in a manner that will nullify the rights given to Stevenson in the same paragraph. The question whether the Feustels are actually using the water beneficially is subject to review as a mixed question of fact and law. We see nothing in the 1978 judgment which adjudicates this question or forecloses an inquiry into it.

The memorandum decision which the district judge issued following the January, 1989, hearing indicates that the judge believed that the necessity of using the full 12.64 inches of water for irrigation and other beneficial purposes on the Feustels' property was somehow established by the 1978 judgment. We disagree. Nothing in the 1978 judgment suggests such a determination. Neither does the memorandum decision of the court which preceded the judgment. At most, the judgment can be interpreted to mean that, based on the settlement agreement of the parties, Stevenson had a duty to provide the amount of water the Feustels requested, within the separate limits set for the irrigation season and for the non-irrigation season, with the burden falling on Stevenson to show that Feustel was not using all of the requested water beneficially. While the judgment placed the burden of persuasion on this issue upon Stevenson, the judgment did not create any presumptions that the court had found it was "necessary" for the Feustels to employ a greater amount of

water per acre than allowed by I.C. § 42-220.

Because we believe the district judge misconstrued Stevenson's burden on this issue, and because the language used in the 1989 judgment purporting to grant a perpetual right in the Feustels to thereafter receive "a continuous flow of water of not more or less than 12.64 miners inches," is at odds with the language and intent of the 1978 judgment, we vacate paragraphs "1" and "2" on page two of the 1989 judgment. We affirm the other provisions which we hold are necessary to carry out and enforce the 1978 judgment.

Given the uncertainty of the evidence showing the actual amount of water delivered to the Feustels prior to the 1989 irrigation season, we leave it to the district court to determine whether anything can be gained by relitigating the question whether they have beneficially used the available water. The court may justifiably avoid this determination until the system is shown to perform as intended. The court may decide that this issue can best be decided in the forum of the Snake River Adjudication proceedings now under way. We remand the case for further proceedings consistent with this opinion. Because we determine that neither party has clearly prevailed in this appeal, we decline to award costs or fees on appeal to either party.

Walters, C.J., and Schilling, J., pro tem., concur.

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1. The order from which this appeal was taken is designated a "judgment." Although it might more properly be termed an order, we will hereinafter refer to it as the "1989 judgment."
-

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