

5-11-2010

Garner v. Povey Clerk's Record v. 1 Dckt. 37561

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

* * * * *

DANIEL S. GARNER and SHERRI JO)
GARNER husband and wife; NOLA GARNER,)
a widow and NOLA GARNER as trustee of the)
NOLA GARNER LIVING TRUST, dated 7-29-07,)
)
Plaintiffs-Respondents,)
vs.)
)
BRAD POVEY and LEIZA POVEY,)
husband and wife,)
)
Defendants-Appellants,)
)
and)
)
HAL J. DEAN and MARLENE T. DEAN,)
husband and wife, DOUGLAS K. VIEHWEG and)
SHARON C. VIEHWEG, husband and wife,)
JEFFREY J. NEIGUM and KATHLEEN A.)
NEIGUM as trustees of the JEFFREY J.)
NEIGUM and KATHLEEN A. NEIGUM)
REVOCABLE TRUST, dated 9-17-04; FIRST)
AMERICAN TITLE INSURANCE COMPANY,)
a foreign title insurer with an Idaho certificate)
of authority; and FIRST AMERICAN TITLE)
COMPANY, INC. an Idaho Corporation,)
)
Defendants.)

Supreme Court No. 37561-2010

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Franklin

Honorable STEPHEN S. DUNN
District Judge

APPEARANCES:

Blake S. Atkin
Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Salt Lake City, UT 84101
Attorney for Appellant

Michael W. Brown
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440
Attorney for Respondent

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Date	Code	User	Judge
9/17/2008	NCOC	KJONES	New Case Filed - Other Claims
	SMIS	KJONES	Summons Issued-Hal J. Dean
		KJONES	Filing: U - Fee for opening any other civil case not listed on the schedule Paid by: Bead St. Clair Gaffney Receipt number: 0002957 Dated: 9/17/2008 Amount: \$88.00 (Check) For: Garner, Daniel S (plaintiff)
	APER	HAMPTON	Plaintiff: Garner, Daniel S Appearance Michael D Gaffney
	APER	HAMPTON	Plaintiff: Garner, Daniel S Appearance Jeffrey D. Brunson
	APER	HAMPTON	Plaintiff: Garner, Nola S Appearance Michael D Gaffney
	APER	HAMPTON	Plaintiff: Garner, Nola S Appearance Jeffrey D. Brunson
	SMIS	HAMPTON	Summons Issued-Marlen T. Dean
	SMIS	HAMPTON	Summons Issued-Douglas K. Viehweg
	SMIS	HAMPTON	Summons Issued-Sharon C. Viehweg
	SMIS	HAMPTON	Summons Issued-Jeffery Neigum
	SMIS	HAMPTON	Summons Issued-Kathleen Neigum
	SMIS	HAMPTON	Summons Issued-Brad Povey
	SMIS	HAMPTON	Summons Issued-Lezia Povey
	SMIS	HAMPTON	Summons Issued-1st American Title Co.
10/1/2008	MOTN	HAMPTON	Motion and Affidavit for Service by Publication
	SMIS	HAMPTON	Summons for Publication
10/6/2008	CHJG	HAMPTON	Change Assigned Judge (batch process)
	AFFD	HAMPTON	Affidavit of Service-Sharon Viehweg
	AFFD	HAMPTON	Affidavit of Service-Douglas Vieweg
	AFFD	HAMPTON	AffidavitQuinn Stufflebeam, agent for First American Title Company
	AFFD	HAMPTON	Affidavit of Service-Marlen Dean for Hal Dean
	AFFD	HAMPTON	Affidavit of Service-Marlen Dean
	AFFD	HAMPTON	Affidavit of Service-Brad Posey for Lezia Posey
	AFFD	HAMPTON	Affidavit of Service-Brad Posey
	AFFD	HAMPTON	Affidavit of Service-Kathleen Neigum (for Jeffery Neigum)
10/15/2008	AFFD	HAMPTON	Affidavit of Service-Kathleen Neigum
		HAMPTON	Filing: 17 - All Other Cases Paid by: Eric L. Olsen Receipt number: 0003353 Dated: 10/15/2008 Amount: \$58.00 (Check) For: Dean, Hal J (defendant)

Date: 5/8/2010

Sixth Judicial District Court - Franklin County

User: HAMPTON

Time: 03:22 PM

ROA Report

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Case: CV-2008-0000342 Current Judge: Stephen S. Dunn

Daniel S Garner, etal. vs. Hal J Dean, etal.

Date	Code	User	Judge
10/15/2008	NOAP	HAMPTON	Notice of Appearance of Appearance - Smith: Dean, Viehweg and Neigum husband and wife
10/22/2008	ORDR	HAMPTON	Order of Reference
11/5/2008		KJONES	Filing: I7 - All Other Cases Paid by: First American Title Company (defendant) Receipt number: 0003595 Dated: 11/5/2008 Amount: \$58.00 (Check) For: First American Title Company (defendant)
	ORDR	HAMPTON	Administrative Order of Reference
	CHJG	HAMPTON	Change Assigned Judge
	APER	HAMPTON	Defendant: First American Title Company Appearance Ryan T. McFarland
	APER	HAMPTON	Defendant: First American Title Company Appearance Stephen C. Hardesty
11/10/2008	AFFD	HAMPTON	Affidavit of Publication
11/13/2008		KJONES	Filing: I7 - All Other Cases Paid by: Olsen, Eric L. (attorney for Dean, Hal J) Receipt number: 0003684 Dated: 11/13/2008 Amount: \$58.00 (Check) For: Dean, Hal J (defendant)
	ANSW	HAMPTON	Answer-Olsen/Smith
12/1/2008	HRSC	HAMPTON	Hearing Scheduled (Motion for Preliminary Injunction 12/17/2008 01:30 PM)
12/15/2008	STIP	HAMPTON	Stipulation for Use of Replacement Access Road During Pendency of Action-Gaffney
12/17/2008	NOTC	HAMPTON	Notice Vacating Hearing
12/18/2008	STIP	HAMPTON	Stipulation for Use of Replacement Access Road During Pendency of Action-Gaffney
	ORDR	HAMPTON	Order Re: Use of Replacement Access Road During Pendency of Action
1/29/2009	MOTN	HAMPTON	Motion for Leave to Amend Complaint-Thatcher
	AFFD	HAMPTON	Affidavit of Gordon S. Thatcher in Support of Plaintiffs' Motion for Leave to Amend Complaint-Thatcher
2/2/2009	NOTC	HAMPTON	Notice of Pendency of Action-Thatcher
2/4/2009	HRSC	HAMPTON	Hearing Scheduled (Motion 02/26/2009 02:00 PM)
	APER	KJONES	Defendant: Dean, Hal J Appearance Blake S. Atkin
		KJONES	Filing: I7 - All Other Cases Paid by: Atkin, Blake S. (attorney for Dean, Hal J) Receipt number: 0004502 Dated: 2/4/2009 Amount: \$58.00 (Check) For: Povey, Brad (defendant)
	NOTC	HAMPTON	Notice of Hearing: Plaintiffs' Motion for Leave to Amend Complaint-Thatcher
	NOAP	HAMPTON	Notice Of Appearance-Atkin for Povey

Date	Code	User	Judge
2/4/2009	APER	HAMPTON	Defendant: Povey, Brad Appearance Blake S. Atkin
	APER	HAMPTON	Defendant: Povey, Lezia Appearance Blake S. Atkin
	MEMO	HAMPTON	Memorandum in Support of Brad and Leiza Povey's Motion to Dismiss Amended Complaint-Atkin
	MOTN	HAMPTON	Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint-Atkin
2/6/2009	NOTC	HAMPTON	Notice of Hearing: Defendants Povey's Motion to Dismiss Amended Complaint-Atkin
	HRSC	HAMPTON	Hearing Scheduled (Motion to Dismiss 02/26/2009 02:00 PM) Defendants Povey Motion
2/9/2009	NOTC	HAMPTON	First American Title Insurance Company's Notice of Non-Opposition to Plaintiff's Motion for Leave to Amend Complaint-Hardesty
2/20/2009	RESP	HAMPTON	rResponse to Defendant Poveys' Motion to Dismiss Amended Complaint-Thatcher
2/24/2009	MISC	HAMPTON	First American Title Insurance Company's Notice of Non-Opposition to Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint-Hardesty
	MISC	HAMPTON	Defendants Brad and Leiza Povey's Reply in Support of Motion to Dismiss Amended Complaint-Atkin
2/26/2009	CMIN	ROBERTS	Court Minutes Hearing type: Motions Hearing date: 2/26/2009 Time: 2:10 pm
	DCHH	HAMPTON	Hearing result for Motion to Dismiss held on 02/26/2009 02:00 PM: District Court Hearing Held Court Reporter: Number of Transcript Pages for this hearing estimated: less than 100 pages Defendants Povey Motion
3/6/2009	ORDR	HAMPTON	Order
3/13/2009	DEOP	HAMPTON	Decision and Order on Povey Defendants Motion to Dismiss Amened Complaint
	AMCO	HAMPTON	Amended Complaint Filed-Thatcher
	CERT	HAMPTON	Certificate of Service-Thatcher
3/30/2009	MISC	HAMPTON	Second Amended Complaint-Thatcher
	CERT	HAMPTON	Certificate of Service-Thatcher
4/9/2009		KJONES	Filing: 17 - All Other Cases Paid by: McFarland, Ryan T. (attorney for First American Title Company) Receipt number: 0005244 Dated: 4/9/2009 Amount: \$58.00 (Check) For: First American Title Company (defendant)
	APER	HAMPTON	Defendant: First American Title Company, Inc., Appearance Ryan T. McFarland

Date	Code	User		Judge
4/9/2009	NOAP	HAMPTON	Notice Of Appearance-McFarland	Stephen S. Dunn
	ANSW	HAMPTON	Povey Defendants' Answer to Second Amended Complaint-Atkin	Stephen S. Dunn
4/16/2009	ANSW	HAMPTON	Answer to Second Amended Complaint-Olsen	Stephen S. Dunn
4/27/2009	CERT	HAMPTON	Certificate of Service of Defendants Brad and Leiza Poveys' First Set of Interrogatories and Requests for Production of Documents to Plaintiffs'Atkin	Stephen S. Dunn
5/1/2009	NOTC	HAMPTON	Notice of Deposition of Daniel S. Garner-Atkin	Stephen S. Dunn
	NOTC	HAMPTON	Notice of Deposition of Sherri Jo Garner-Atkin	Stephen S. Dunn
	NOTC	HAMPTON	Notice of Deposition of Nola Garner-Atkin	Stephen S. Dunn
5/28/2009	NOTC	HAMPTON	Notice of Service-Thatcher	Stephen S. Dunn
9/2/2009	ORDR	HAMPTON	Order for Submission of Information	Stephen S. Dunn
9/3/2009	MOTN	HAMPTON	Defendant Brad and Leiza Povey's Motion for Summary Judgment-Atkin	Stephen S. Dunn
	MEMO	HAMPTON	Memorandum in Support of Defendant Brad and Leiza Povey's Motion for Summary Judgment-Atkin	Stephen S. Dunn
	NOTC	HAMPTON	Notice of Hearing-Atkin	Stephen S. Dunn
9/4/2009	HRSC	HAMPTON	Hearing Scheduled (Motion for Summary Judgment 10/06/2009 02:00 PM)	Stephen S. Dunn
9/16/2009	STIP	HAMPTON	Stipulated Statement-Brunson	Stephen S. Dunn
9/23/2009	NOTC	HAMPTON	Notice of Service of Discovery Documents-Brunson	Stephen S. Dunn
	AFFD	HAMPTON	Affidavit of Henry Povey-Brunson	Stephen S. Dunn
	AFFD	HAMPTON	Affidavit of Michael W. Brown-Brunson	Stephen S. Dunn
	AFFD	HAMPTON	Affidavit of Daniel S. Garner-Brunson	Stephen S. Dunn
	MOTN	HAMPTON	Motion for Leave to Amend Second Amended Complaint-Brunson	Stephen S. Dunn
	NOTC	HAMPTON	Notice of Hearing	Stephen S. Dunn
	MOTN	HAMPTON	Motion for Enlargement of Time-Brunson	Stephen S. Dunn
	MOTN	HAMPTON	Plaintiff's Motion to Strike Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips-Brunson	Stephen S. Dunn
	MEMO	HAMPTON	Memorandum in Opposition to Motion for Summary Judgment of Defendants Brad Povey and Leiza Povey	Stephen S. Dunn
9/29/2009	MEMO	HAMPTON	Povey Defendants Memorandum in Opposition to Motion for Enlargement of Time-Atkin	Stephen S. Dunn
	MEMO	HAMPTON	Memorandum in Opposition to Motion for Leave to Amend Second Amended Complaint-Atkin	Stephen S. Dunn
	MEMO	HAMPTON	Memorandum in Opposition to Motion to Strike the Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips-Atkin	Stephen S. Dunn

Date	Code	User	Judge
9/29/2009	MOTN	HAMPTON	Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner-Atkin
	MEMO	HAMPTON	Memorandum in Support of Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner-Atkin
10/2/2009	REPL	HAMPTON	Reply to Poveys' Memorandum in Opposition to Motion for Leave to Amend Second Amended Complaint-Brunson
	AFFD	HAMPTON	Second Affidavit of Michael W. Brown-Brunson
10/5/2009	REPL	HAMPTON	Reply Memorandum in Support of Motion for Summary Judgment-Atkin
	RESP	HAMPTON	Response to Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner-Brunson
10/6/2009	CMIN	HAMPTON	Court Minutes Hearing type: Motions Hearing date: 10/6/2009 Time: 2:05 pm Courtroom: Court reporter: Sheila Fish Minutes Clerk: Linda HAMPTON Tape Number: Blake Atkin-Povey Michael Brown-Plaintiff
	DCHH	HAMPTON	Hearing result for Motion for Summary Judgment held on 10/06/2009 02:00 PM: District Court Hearing Held Court Reporter: Sheila Fish Number of Transcript Pages for this hearing estimated: 100 pages or more
10/8/2009	STIP	HAMPTON	Stipulation for Dismissal with Prejudice-Brunson
10/14/2009	ORDR	HAMPTON	Order for Dismissal with Prejudice
10/22/2009	CERT	HAMPTON	Certificate of Service of Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Povey Defendants-Atkin
	CERT	HAMPTON	Certificate of Service of Povey Defendants Second Set of Requests for Production of Documents to Plaintiffs-Atkin
10/27/2009	MEMO	HAMPTON	Memorandum Decision on Povey Defendants' Motion for Summary Judgment
11/9/2009	MEMO	HAMPTON	Memorandum of Costs Including Attorney Fees-Atkin
11/13/2009	JDMT	HAMPTON	Judgment
11/23/2009	AFFD	HAMPTON	SECOND Affidavit of Daniel S. Garner-Brown
	MOTN	HAMPTON	Motion to Disallow Costs-Brown
	AFFD	HAMPTON	Affidavit of Jeffrey D. Brunson-Brown
12/2/2009	NOTC	HAMPTON	Notice of Hearing-Brunson

Date: 5/8/2010

Sixth Judicial District Court - Franklin County

User: HAMPTON

Time: 03:22 PM

ROA Report

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Case: CV-2008-0000342 Current Judge: Stephen S. Dunn

Daniel S Garner, etal. vs. Hal J Dean, etal.

Date	Code	User	Judge
12/2/2009	HRSC	HAMPTON	Hearing Scheduled (Objection to Costs 01/13/2010 01:00 PM)
12/24/2009	REPL	HAMPTON	Reply Memorandum in Support of Memorandum of Costs Including Attorney Fees-Atkin
12/28/2009	AFFD	HAMPTON	Affidavit of Blake S. Atkin-Atkin
	AFFD	HAMPTON	Supplemental Affidavit of Blake S. Atkin in Support of Memorandum of Costs Including Attorney Fees-Atkin
12/29/2009	MOTN	HAMPTON	Motion to Strike the Affidavit of Jeffrey J. Neigum-Brunson
	NOTC	HAMPTON	Notice of Hearing-Brunson
1/6/2010	MEMO	HAMPTON	Memorandum in Opposition to Motion to Strike the Affidavit of Jeffrey J. Neigum-Atkin
1/11/2010	NOTC	HAMPTON	Notice of Withdrawal from Eric Olsen/Scott Smith
1/12/2010	REPL	HAMPTON	Reply Memorandum Re: Motion to Disallow Costs and Fees-Brunson
1/13/2010	HRVC	HAMPTON	Hearing result for Objection to Costs held on 01/13/2010 01:00 PM: Hearing Vacated
	HRSC	HAMPTON	Hearing Scheduled (Objection to Costs 02/09/2010 01:00 PM)
	NOTC	HAMPTON	Notice Vacating Hearing-Brunson
2/9/2010	CMIN	HAMPTON	Court Minutes Hearing type: Objection to Costs Hearing date: 2/9/2010 Time: 1:00 pm Courtroom: District/Magistrate Court - Top Floor Court reporter: Minutes Clerk: Linda HAMPTON Tape Number:
	CMIN	HAMPTON	Court Minutes Hearing type: Objection to Costs Hearing date: 2/9/2010 Time: 1:00 pm Courtroom: District/Magistrate Court - Top Floor Court reporter: Minutes Clerk: Linda HAMPTON Tape Number: Blake Atkin Michael Gaffney
	HRHD	HAMPTON	Hearing result for Objection to Costs held on 02/09/2010 01:00 PM: Hearing Held
	MEOR	HAMPTON	Minute Entry And Order
3/9/2010	DEOP	HAMPTON	Decision Or Opinion

Date: 5/8/2010

Sixth Judicial District Court - Franklin County

User: HAMPTON

Time: 03:22 PM

ROA Report

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Case: CV-2008-0000342 Current Judge: Stephen S. Dunn

Daniel S Garner, etal. vs. Hal J Dean, etal.

Date	Code	User	Judge
3/26/2010		KJONES	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Atkin, Blake S. (attorney for Povey, Brad) Receipt number: 0000889 Dated: 3/26/2010 Amount: \$101.00 (Check) For: Povey, Brad (defendant) and Povey, Lezia (defendant)
	BNDC	KJONES	Bond Posted - Cash (Receipt 890 Dated 3/26/2010 for 100.00)
	NOTA	HAMPTON	NOTICE OF APPEAL
	APSC	HAMPTON	Appealed To The Supreme Court
	STAT	HAMPTON	Case Status Changed: Inactive
4/2/2010	CLCERT	HAMPTON	Clerk's Certificate of Appeal mailed to Supreme Court
4/5/2010	LETT	HAMPTON	Letter from Blake Atkin regarding appeal
4/12/2010	MOTN	HAMPTON	Motion to Enforce Settlement Agreement-Smith
	AFFD	HAMPTON	Affidavit of Counsel in Support of Motion to Enforce Settlement Agreement-Smith
4/13/2010	CLCERT	HAMPTON	Clerk's Certificate of Appeal mailed to Supreme Court
4/15/2010	NOTC	HAMPTON	Notice of Telephone Status Conference in Bannock County
4/20/2010	CLCERT	HAMPTON	Clerk's Certificate of Appeal mailed to Supreme Court
4/27/2010	MISC	HAMPTON	Notice of Clerk's Certificate filed
5/3/2010	AMEN	HAMPTON	AMENDED Notice of Appeal
5/4/2010	AMEN	HAMPTON	AMENDED Clerk's Certificate of Appeal

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Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

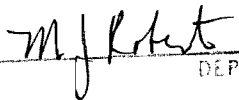
Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as
Trustees of the Jeffery J. Neigum and
Kathleen A. Neigum Revocable Trust,
dated September 17 2004; Jeffery J.
Neigum and Kathleen A. Neigum, husband
and wife; Brad Povey and Leiza Povey,
husband and wife; First American Title
Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
Authority; and First American Title
Company, Inc., an Idaho Corporation,

Defendants.

FILED

09 JAN 29 AM 10: 26

FRANKLIN COUNTY CLERK


DEPUTY

Case No. CV-08-342

MOTION FOR LEAVE TO AMEND
COMPLAINT
(IDAHO R. CIV. P. 15)

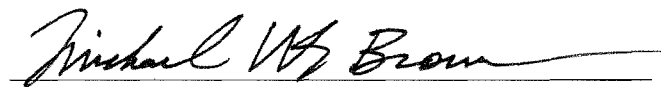
The plaintiffs (collectively the Garners), through counsel of record, Thatcher Beard St. Clair Gaffney *Attorneys*, respectfully move this Court for an order granting leave to amend their complaint pursuant to Rule 15(a) of the Idaho Rules of Civil Procedure. This motion is supported by the affidavit of Gordon S. Thatcher, filed concurrently herewith. The Garners request oral argument on this motion.

Rule 15 of the Idaho Rules of Civil Procedure requires a party to seek leave from the court to amend its complaint after a responsive pleading has been filed.¹ Rule 15 further states that “leave shall be freely given when justice so requires.” Idaho R. Civ. P 15(a)(2008). According to the Idaho Supreme Court, “In the interest of justice, district courts should favor liberal grants of leave to amend a complaint.” *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 871, 993 P.2d, 1197, 1202 (1999)(citation omitted).

In their proposed amended complaint, the Garners seek to add as an additional plaintiff to this action Nola Garner, individually, and as additional defendants to this action Jeffery J. Neigum and Kathleen A. Neigum as Trustees of the JEFFREY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated September 17th 2004. The proposed amended complaint properly identifies First American Title Insurance Company as a foreign title insurer with an Idaho Certificate of Authority. Finally, the Garners’ proposed amended complaint significantly clarifies the Garners’ claims and the issues involved in this action. *See* Aff. Gordon S. Thatcher and exhibits attached thereto. The defendants will not be prejudiced if the Court grants the Garners’ Motion. In the interest of justice, the Court should grant the Garners’ Motion to Amend Complaint.

¹ The defendants, Brad Povey and Leiza Povey, have not answered the Garners’ original complaint, nor have they formally appeared in this action, so leave from the Court is not required to amend the complaint as to the Poveys. Because the other defendants in this action have either filed a responsive pleading or entered an appearance, the Garners bring this Motion.

DATED: January 28, 2009

A handwritten signature in black ink, reading "Michael W. Brown", written over a horizontal line.

Gordon S. Thatcher

Jeffrey D. Brunson

Michael W. Brown

of Thatcher Beard St. Clair Gaffney *Attorneys*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on January 28, 2009 I served a true and correct copy of PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT upon the following by the method of delivery designated:

Eric Olsen
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Brad and Lezia Povey
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Clifton, ID 83228

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Franklin County Courthouse
39 W. Oneida
Preston, ID 83263
Fax: (208) 852-2926

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Gordon S. Thatcher
Jeffrey D. Brunson
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Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as
Trustees of the Jeffery J. Neigum and
Kathleen A. Neigum Revocable Trust,
dated September 17, 2004; Jeffery J.
Neigum and Kathleen A. Neigum, husband
and wife; Brad Povey and Leiza Povey,
husband and wife; First American Title
Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
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Defendants.

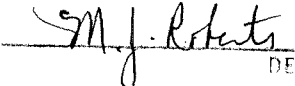
Case No. CV-08-342

AFFIDAVIT OF GORDON S.
THATCHER IN SUPPORT OF
PLAINTIFFS' MOTION FOR LEAVE TO
AMEND COMPLAINT

FILED

09 JAN 29 AM 10:26

FRANKLIN COUNTY CLERK


DEPUTY

STATE OF IDAHO)
S.S.
COUNTY OF MADISON)

I, Gordon S. Thatcher, having been duly sworn on oath, state:

1. I am an attorney with the law firm Thatcher Beard St. Clair Gaffney Attorneys, counsel of record for the plaintiffs in the above captioned action.

2. I am competent to testify and do so from personal knowledge.


3. Attached hereto as Exhibit A is a true and correct copy of the plaintiffs' proposed Amended Complaint.

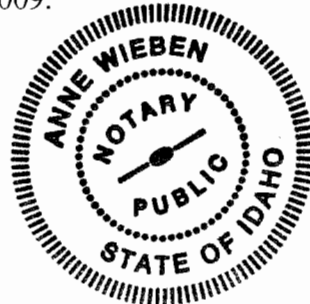
4. Attached hereto as Exhibit B is a true and correct copy of the plaintiffs' Notice of Pendency of Action, which the plaintiffs have filed contemporaneously herewith.

DATED: January 28, 2008


Gordon S. Thatcher
of Thatcher Beard St. Clair Gaffney Attorneys
Attorneys for Plaintiffs

Subscribed to and sworn before me on this 28th day of January, 2009.


 Notary Public for the State of Idaho
 Residing at: R196y
 My commission expires: 7/27/2013
 (SEAL)



CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on January 28, 2009 I served a true and correct copy of AFFIDAVIT OF GORDON S. THATCHER IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT upon the following by the method of delivery designated:

Eric Olsen
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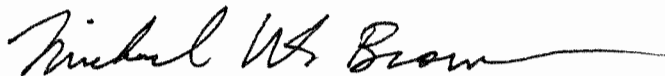
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Michael W. Brown
of Thatcher Beard St. Clair Gaffney, Attorneys
Attorney for Plaintiffs

EXHIBIT A

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Jeffrey D. Brunson, ISB No. 6996
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Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as
Trustees of the Jeffery J. Neigum and
Kathleen A. Neigum Revocable Trust,
dated September 17th 2004; Jeffery J.
Neigum and Kathleen A. Neigum, husband
and wife; Brad Povey and Leiza Povey,
husband and wife; First American Title
Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
Authority; and First American Title
Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

AMENDED COMPLAINT

COPY

**FOUNDATIONAL FACTS
COMMON TO ALL CLAIMS**

1. On May 22, 1987, Plaintiff DANIEL S. GARNER (“Daniel”) as Buyer entered into a written Contract of Sale with Ralph R. McCulloch and Thelma W. McCulloch, husband and wife (“McCullochs”) as Sellers to purchase the following described real property, (“40 Acres”), in Franklin County, Idaho:

NE¼NW¼ of Sec. 34, Twp. 14 S., Rge. 38 E., Boise Mer.

Along with other real property not involved in this action. A copy of the Contract of Sale which was recorded on July 8, 1987, as Instrument # 175876, records of Franklin County, Idaho, is attached hereto as Exhibit “A”.

2. The Contract of Sale (Exhibit “A”) included a right-of-way along an existing roadway that ran from the 40 Acres across McCullochs’ adjacent property to the Westside Highway, also known as Highway D-1. That Contract of Sale also provided for conveyance of an additional parcel from McCullochs to Daniel in Sec. 27 adjacent to the 40 Acres as described in ¶ 9 hereof.

3. At the time of the Contract of Sale the 40 Acres would have been totally landlocked and without any legal access, but for the existing roadway included as a right-of-way in the sale.

4. Attached hereto as Exhibit “B-1” is a Google™ satellite photograph taken in 2004. It illustrates features of the area at the time it was taken. The focal point of the illustration is between the label “Sec. 27” and the label “Sec. 34” and is the common point of the South-Quarter-Corner of Sec. 27 and the North-Quarter-Corner of Sec. 34, Twp. 14 S., Rge. 38 E., Boise Mer., in Franklin County, Idaho. The squares illustrate the approximate location of 40 acre tracts coinciding with the United States official survey of the parts of the area shown. The following additional Exhibits, based on Exhibit “B-1,” are marked to show features at particular

times relevant to this case:

A. Exhibit "B-2" illustrates these features as existing on May 22, 1987:

[1] Westside Highway is marked in orange.

[2] Twin Lakes Canal is marked in blue.

[3] The "First Phase" of the "Original Access Road" is marked in red.

[4] The "40 Acres" in Sec. 34 acquired by Daniel is marked in fuschia.

[5] Additional property in Sec. 27 acquired by Daniel pursuant to the Contract of Sale is also marked in fuschia.

[6] The "Second Phase" of the "Original Access Road" is marked in light blue.

[7] Property retained by McCullochs is marked in yellow.

B. Exhibit "B-3" illustrates the property purported to be acquired by Poveys from McCullochs on May 23, 1990 as alleged in ¶ 10 hereof, marked in yellow.

C. Exhibit "B-4" illustrates the property conveyed by Poveys to Gary T. Garner ("Gary") and Nola S. Garner ("Nola") on June 17, 1992, as alleged in ¶ 11 hereof, marked in blue.

D. Exhibit B-5 illustrates an additional 40 Acres acquired from the Cox Trust, by Gary and Nola on August 20, 1997, as alleged in ¶ 12 hereof, which is marked in green. Also marked in yellow is the revised "Second Phase" of the "Original Access Road" adapted to include the part crossing the Cox property.

E. Exhibit "B-6" illustrates a 30 foot wide access from the Westside Highway acquired from Rices on November 3, 1998, as alleged in ¶ 13 hereof, marked in fuschia, and a 30 foot wide strip exchanged to Rices for that access as alleged in ¶ 13 hereof, marked in green.

F. Exhibit "B-7" illustrates properties conveyed by Defendant Poveys to Deans (August and December 1999), explained in ¶ 16 marked with yellow; to Neigums (April 5, 2001) explained in ¶ 17, marked in blue; and to Viehwegs (November 1, 2005), explained in ¶ 20, marked with red.

5. All of the property over which the original right-of-way existed was at the time of the Contract of Sale (May 22, 1987) owned by McCullochs.

6. At the time of the Contract of Sale (May 22, 1987), attached hereto as Exhibit "A," McCullochs had been farming the 40 Acres and their remaining property over which the right-of-way ran, including pasture for cattle, some irrigated crops, operation of a dairy farm, and some dry-farm hay ground. Some of the McCulloch property over which the right-of-way ran included gravel pits (and potential gravel pits) as the subject of present and future extracting of gravel, and removal of gravel over the right-of-way.

7. The existing roadway constituted the right-of-way after the purchase by Daniel on May 22, 1987 and was used by Daniel continually thereafter; and was also used by McCullochs for their remaining properties so long as they retained those properties.

8. Pursuant to the Contract of Sale, McCullochs conveyed the 40 Acres, with appurtenances, to Daniel by Warranty Deed dated May 22, 1987 and recorded on May 28, 1987 as Instrument # 175555, records of Franklin County, Idaho. A copy is attached hereto as Exhibit "C." The Warranty Deed conveyed the property "with their appurtenances unto the Grantee, his

heirs and assigns, forever.” This means the right-of-way for the existing roadway was included in the conveyance and subject to the covenant of McCullochs “that they will warrant and defend the same from all lawful claims whatsoever.”

9. By Warranty Deed dated May 22, 1987 and recorded on July 8, 1987 as Instrument # 175877, records of Franklin County, Idaho, copy attached hereto as Exhibit “D,” McCullochs conveyed an additional parcel to Daniel, legally described as follows:

Part of NW¼SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., described as follows:

Beginning at the Southwest corner and running thence Northeasterly to the bottom of the gully on the North side of the old gravel pit; thence Southeasterly to the Southeast corner; thence West to the point of beginning.

The wording of the Warranty Deed implied this was in Sec. 34, but from the express description it is clear it was in Sec. 27 as above described. This property was included as paragraph 18 in an addendum on the Contract of Sale, Exhibit “A” hereto. It has continually been used by Daniel as an integral addition to the 40 Acres, and from the date of the Contract of Sale (May 22, 1987) Daniel has accessed it by the right-of-way. The Warranty Deed included “the premises with their appurtenances.” The existing roadway comprising the right-of-way was included in the covenant by McCulloch “to warrant and defend the same from all lawful claims whatsoever.”

10. By Warranty Deed, dated May 23, 1990 and recorded June 4, 1990 as Instrument #181769, records of Franklin County, Idaho, McCullochs purported to convey to Defendants Brad L. Povey and Leiza Povey, and Henry Nels Povey and Melanie Povey (“Poveys”) all of the property of McCulloch, served by the right-of-way, except the 40 Acres of Daniel (and wrongfully included the property conveyed to Daniel by Exhibit “D”, ¶ 9 hereof). A copy of the

Warranty Deed is attached hereto as Exhibit "E." The part of the property included in this suit that was conveyed to Poveys is described as follows:

Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho:

Sec. 27: W $\frac{1}{2}$ SE $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$; ALSO, Commencing at a point 1323.25 feet West and 419.10 feet South 0°06' East of the Northeast corner of SE $\frac{1}{4}$ of Sec. 27, and running thence S0°06' East 900.9 feet; thence East 770.819 feet; thence North 11°11' West 918.53 feet; thence West 594.98 feet to the point of beginning.

The Warranty Deed conveyed appurtenances, so the rights of McCullochs to use the right-of-way to access the property conveyed were transferred to Poveys in the conveyance. Poveys commenced and continued to use the right-of-way to access their acquired property West of the Twin Lakes Canal and were fully aware Daniel continued to use the right-of-way to access his property West of the Twin Lakes Canal.

11. By Warranty Deed recorded on September 16, 1992 as Instrument # 186592, records of Franklin County, Idaho, copy attached as Exhibit "F," Poveys conveyed to Gary T. Garner ("Gary") and Nola S. Garner ("Nola"), husband and wife, a part of the property acquired from McCulloch by Exhibit "E," which part was all of the McCulloch property West of the Twin Lakes Canal, which is described as follows:

Beginning at the SW corner of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running thence East to the Southeast corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27; thence North to the Northeast corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27; thence East to the East side of the Twin Lakes Canal; thence Northwesterly along the East edge of the Twin Lakes Canal to a point on the East-West centerline of Sec. 27; thence West to the centerpoint of Sec. 27; thence South to the Southeast Corner of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27; thence West to the Northwest corner of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27; thence South to the point of beginning. (This legal description is depicted on a Google™ satellite image, attached hereto as Exhibit "B-4".)

The Warranty Deed conveyed appurtenances, so the rights of Poveys to use the right-of-

way to access the property conveyed were transferred to Gary and Nola in the conveyance. Such rights were thereafter used by Gary and Nola. Nola and Gary received a policy of title insurance from Defendant First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority, in connection with the purchase, which policy insured them against loss or damage sustained by him by reason of: "3. lack of a right of access to and from the land." The only access to the Povey property was from the Westside Highway by the Original Access Road extending up to the Povey property. See Exhibit "B-4," attached hereto.

12. By Trustee's Deed, recorded on August 20, 1997, as Instrument #199886, records of Franklin County, Idaho, with the Trustees of the Alvord L. Cox Family Trust ("Cox Trust") as Grantors, and Gary T. Garner and Nola Smart Garner [also known as Nola S. Garner] ("Gary and Nola"), Grantees, the following 40 acre tract in Franklin County, Idaho:

NE¼SW¼ of Sec. 27, Twp. 14 S., Rge. 38 E, Boise Mer.

together with appurtenances was conveyed. A copy of the Trustee's Deed is attached hereto as Exhibit "G., and this 40 acre tract is depicted on a Google™ satellite image, attached hereto as Exhibit "B-5." By oral agreement between Daniel and Gary and Nola the acquired 40 Acres was integrated into the common operation with Gary and Nola's property described in ¶ 11 and with Daniel's property described in ¶ 8 and ¶ 9, hereof; and the Second Phase of the "Original Access Road" was adapted to include a preferred partial route crossing the Cox property. (See Exhibit "B-5"). Nola and Gary received a policy of title insurance from Defendant First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority, in connection with the purchase, which policy insured them against loss or damage sustained by him by reason of: "3. lack of a right of access to and from the land." The only access to the Cox property was from the Westside Highway by the Original Access Road extending up to the Cox property. See

Exhibit "B-5," attached hereto.

13. By Warranty Deed from Edward Rice and Helen S. Rice ("Rices") as Grantors to Gary T. Garner and Nola S. Garner as Grantees ("Gary and Nola"), recorded on November 3, 1998 as Instrument #204036, records of Franklin County, Idaho, the following described property for use as an access road, including as the prime purpose to haul extracted gravel in the non-wintery months (it was not usable in wintry months); was conveyed to Gary and Nola:

Beginning at the Northwest corner of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running thence East along the existing fence line 718 feet more or less to Hwy. D-1; thence South 30 feet; thence West 718 feet, more or less; thence North 30 feet to the point of beginning.

A copy of the Warranty Deed is attached hereto as Exhibit "H." In exchange by Warranty Deed from Gary and Nola to Rices, recorded on November 3, 1998, as Instrument #204035, the following described property was conveyed by Gary and Nola to Rices:

Beginning at the Northeast Corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and thence South 30 feet to the true point of beginning; thence S 718 feet along the existing fence line; thence West 30 feet; thence North 718 feet, thence East 30 feet to the point of beginning.

A copy of the Warranty Deed is attached hereto as Exhibit "I." See Exhibit "B-6."

By reason of the two Deeds the one 30 foot wide strip for a special limited access road was added to the Gary and Nola property and the other 30 foot wide strip was removed from the Gary and Nola property.

14. Gary died on December 1, 2005. The property of Gary and Nola involved in this case was distributed from the Estate of Gary with an undivided 65% interest distributed to Nola, and Daniel received 35% from the estate distribution and by exchanges with his siblings. Nola has gift deeded 9.796% interest to Daniel so that he now has a 44.796 % interest and Nola has retained a 55.204% interest. Nola had conveyed by Grant Deed her then (July 25, 2007)

60.102% interest to herself as Sole Trustee, or her successors in Trust, under the NOLA GARNER LIVING TRUST, dated July 19, 2007 ("Nola Trust"). A copy of the Registration of Trust is attached hereto as Exhibit "J." Nola has since withdrawn 4.898% interest from the Nola Trust and gifted it to Daniel, leaving the present percentage ownership as 44.796% with Daniel and 55.204% interest in the Nola Trust. The Nola Trust is revocable by Nola. Nola was one of the insured in a policy of title insurance issued in the Povey purchase and in a policy of title insurance issued in the Cox purchase, which policies have been breached by Defendant First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority. So complete relief can be obtained Nola, individually is a party Plaintiff to this suit to pursue the claims on the policies.

15. Each Personal Representative's Deed, each Grant Deed (Furthering Exchange), each Gift Deed, and the Grant Deed to the Nola Trust, conveyed the property described in ¶ 11, ¶ 12 and ¶ 13 (less the 30 foot strip exchanged away), together with all appurtenances pertaining thereto, so the rights of Gary and Nola to use the "Original Access Road" as adapted by acquisition of the Cox property (¶ 12 hereof) are owned by Daniel, with an undivided interest of 44.796%, and by the Nola Trust with a 55.204% interest. Such use of the right-of-way would also be in common with Daniel (and with any applicable rights of Sherri-Jo Garner his wife), as to all interests of Daniel, as to property of Daniel described in ¶ 8 and ¶ 9 hereof.

16. Povey Defendants conveyed to Hal J. Dean and Marlene T. Dean, husband and wife ("Deans") by separate Warranty Deeds recorded respectively on August 30, 1999 as Instrument # 207408 and on December 30, 1999, as Instrument # 208652, records of Franklin County, Idaho, two parcels comprising part of the properties Poveys acquired from McCullochs. Copies of the two Warranty Deeds are attached hereto as Exhibits "K" and "L" respectively. Attached hereto

as Exhibit “M” is an approximate illustration of the descriptions of the two parcels.

In both Deeds Deans were on notice of an “existing right-of-way” along the South boundary, and in the first Deed they expressly took subject to “easements of record and easements visible upon the premises.” Segment “A” of the First Phase of the Original right-of-way was at the time of the Deeds visible upon the premises and the adjoining properties.

17. A Corrected Warranty Deed from Povey Defendants to Jeffrey J. Neigum and Kathleen A. Neigum, husband and wife, (“Neigums”), recorded on April 5, 2001, as Instrument # 212784, records of Franklin County, Idaho, is attached hereto as Exhibit “N.” The complex legal description included all of the McCullochs’ property conveyed to Poveys, Exhibit “E”, explained in ¶ 10 hereof, except:

A. The property previously conveyed to Gary and Nola in 1992, Exhibit “F” hereto, explained in ¶ 11 hereof, and illustrated in Exhibit B-4 hereto.

B. The property previously conveyed to Deans in 1999, Exhibits “K” and “L,” explained in ¶ 16 hereof.

Attached hereto as Exhibit “O” is a Google™ satellite image produced taken on June 16, 2004. The property received by the Neigums is depicted on this image.

18. The Corrected Warranty Deed from Povey Defendants to Neigums on April 5, 2001, Exhibit “N,” described in ¶ 17 hereof, contained a reservation of a roadway for the benefit of Daniel in this language:

“ . . . together with an easement for a roadway 20 feet in width lying adjacent to and along the South and West side of the above-described Courses 1) and 2) to be used by the Grantees, Daniel Garner and the Grantors, their heirs, successors or assigns for general ingress and egress purposes. Said easement shall continue in a westerly direction to a bridge located on

the Twin Lakes Canal **accessing the Daniel Garner premises**” (emphasis added).

The first sentence of the quoted provision describes what is a possible “replacement access road” to what we refer to as Segment “A” of the First Phase of the Original Access Road. The second and last sentence of the quoted provision describes a route identical (except it should be 30-feet not 20-feet in width) as Segment “B” of the First Phase of the “Original Access Road.” It starts at the end of Segment “A” and continues to the bridge over the Twin Lakes Canal.

19. Because Daniel (with his wife) and the Nola Trust, and Nola with rights under the Trust, own all of the property West of the bridge over the Twin Lakes Canal, which has been served by the Original Access Road as adapted with the Cox property (¶ 12 hereof illustrated in Exhibit B-5), the only concerns in this case should be [a] the width of the First Phase (30 feet or 20 feet); [b] and whether the original Segment “A” (see ¶ 21 hereof) or the alternate Segment “A,” such as described in the first sentence of the quoted provision and as further explained in ¶ 22 hereof, should apply.

20. Povey Defendants conveyed the remainder of their property acquired from McCullochs (¶ 10 hereof) to Douglas K. Viehweg and Sharon C. Viehweg, (“Viehwegs”) by Warranty Deed recorded on November 1, 2005, as Instrument # 231836, records of Franklin County, Idaho, a copy of which is attached hereto as Exhibit “P.” The complex deed description of the property conveyed by Poveys to Viehwegs is illustrated by a diagram generated by deed plotting software, a copy of which is attached hereto as Exhibit “Q,” which shows Tract 1 and Tract 2 described in the Warranty Deed.

21. Segment “A” of the First Phase of the Original Access Road generally follows the courses and distances of the Northerly boundary of Tract 2 of the Viehweg property as shown on

Exhibit "Q." It also generally follows the courses and distances of the Southerly boundaries of the Dean properties as illustrated on Exhibit "M," based on the Warranty Deeds attached as Exhibits "K" and "L," and explained in ¶ 16 hereof. Some of Segment "A" of the First Phase of the Original Access Road may be Northerly of the Southerly boundaries of the Dean properties; some or all may be South of the Northerly boundaries of Tract 2 of the Viehweg property; and some may be North of the South boundary of Tract 1 of the Viehweg property.

If the original Segment "A" of the First Phase is confirmed as part of the right-of-way, a survey should be authorized by the Court to determine the correct legal description including the Northerly and Southerly boundaries of Segment "A" in relation to the Dean properties and the Viehweg properties.

22. An alternative Segment "A" of the First Phase of the right-of-way is that alleged in ¶¶ 10, 11, and 12 of ANSWER of Defendants Dean, Viehweg, and Neigum, dated November 11, 2008, herein, with part characterized therein as the "Neigum Driveway", and it may be referred to herein as "Replacement Access Road". The Northerly boundary thereof is the same as the Southerly and Westerly boundary of Tract 2 of the Viehweg properties, Exhibits "P" and "Q" explained in ¶ 20 hereof. This is the same Northerly Boundary of the alternate First Segment of the right-of-way for access to the property of Daniel described in the quotation in ¶ 18 hereof.

23. Defendant First American Title Insurance Company, a foreign corporation that is a Title Insurer as alleged in ¶ 48 hereof ("First American Title Insurance") issued to Plaintiff Daniel S. Garner ("Daniel") a Policy of Title Insurance, ("Policy") on May 28, 1987, a copy of which is attached hereto as Exhibit "R." As applicable to this case, the Policy insured Daniel against loss or damage sustained by him by reason of:

"3. lack of a right of access to and from the land."

The land involved in this suit as to that Policy is: NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 34, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho. It is herein called "40 Acres."

24. From May 22, 1987 the Roadway constituting the right-of-way benefited McCullochs by providing access as to their remaining property west of the Twin Lakes Canal, as well as benefiting Daniel as to his 40 Acres described in ¶ 1 hereof and as to his additional parcel described in ¶ 9 hereof. Thereafter Daniel (and his wife), Nola, and the Nola Trust succeeded to all of the remaining property of McCullochs West of the Twin Lakes Canal and thus succeeded to the use of the right-of-way as to such properties. Such properties benefited by the right-of-way in Franklin County, Idaho are described as follows:

In name of Daniel (100%), ¶ 8 and ¶ 9 hereof:

Tract 1: NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 34, Twp. 14 S. Rge. 38 E., Boise Mer.

Tract 2: Part of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27, Twp., 14 S., Rge. 38 E., Boise Mer., described as follows:

Beginning at the Southwest corner, and running thence Northeasterly to the bottom of the gulley on the North Side of the old gravel pit; thence Southeasterly to the Southeast corner; thence West point of beginning.

In name of Daniel (44.796%), and in name of Nola Trust (55.204%) [with Nola individually having the right to revoke the Nola Trust and be the prime beneficiary thereof]:

Beginning at the SW corner of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running thence East to the Southeast corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27; thence North to the Northeast corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27; thence East to the East side of the Twin Lakes Canal; thence Northwesterly along the East edge of the Twin Lakes Canal to a point on the East-West centerline of Sec. 27; thence West to the centerpoint of Sec. 27; thence South to the Southeast Corner of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27; thence West to the Northwest corner of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 27; thence South to the point of beginning.

Saving and excepting therefrom property exchanged to Rices, ¶ 13 hereof:

Beginning at the Northeast Corner of the SW¼SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and thence South 30 feet to the true point of beginning; thence S 718 feet along the existing fence line; thence West 30 feet; thence North 718 feet, thence East 30 feet to the point of beginning.

Also, less the rights of Daniel to Tract 2 of the property described above.

If approved by the Court also including the 40 Acres acquired from the Cox Trust, Exhibit "G," ¶ 12 hereof, illustrated in Exhibit "B-5," described as follows:

NE¼SW¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer.

25. Defendants First American Title Insurance Company; First American Title Company, Inc. (by its predecessor, Preston Land Title Company, prior to a merger); Poveys, Deans, Neigums, and Viehwegs have been and are in complicity in seeking to deprive Daniel and his wife, the Nola Trust, and Nola, of their rights of access to and from their properties described in ¶ 24 hereof.

The pivotal action was by Viehwegs constructing of a fence across Segment "A" of the First Phase of the Original Access Road, on May 28, 2008, at about the place where the roadway reached the Westerly boundary of the Viehwegs' property.

The actions of those Defendants threatens to permanently deprive Daniel, his wife, Nola and the Nola Trust, and their heirs, successors and assigns, of their long established, effective and critical rights of access across Segment "A" of the First Phase of the Original Access Road as described in ¶ 21 hereof.

26. Defendants Deans, Neigums and Viehwegs have been and are in complicity in depriving Daniel, and his wife, and the Nola Trust of any effective alternate rights of access across those Defendants properties, such as the so called "Replacement Access Road", described

in ¶ 22 hereof, to and from Plaintiffs' properties described in ¶ 24 hereof.

The pivotal action has been the opposition in the "Answer" of Defendants Dean, Viehweg and Neigum, dated November 11, 2008, filed herein, which opposed Daniel, his wife, and the Nola Trust having any access whatsoever across their properties to and from Plaintiffs' properties described on ¶ 24 hereof; and in a Stipulation entered by those Defendants with Plaintiffs on December 15, 2008 wherein those Defendants reserved the right to oppose in this litigation any rights of Plaintiffs for access across their properties.

**FIRST COUNT: POVEYS
Took Title Subject to Right-of-Way
Wrongful Conveyances and Interference
Damages and Attorney Fees**

27. Plaintiffs replead by reference ¶¶ 1 through 26 of the Foundational Facts Common to All Claims.

28. Poveys received from McCullochs a Warranty Deed recorded on June 4, 1990 as Instrument # 181769 (See ¶ 10 hereof, Exhibit "E" and Exhibit "B-3"). This deed described property on both sides of the Twin Lakes Canal.

29. The Warranty Deed did not expressly provide the property conveyed was subject to a road right-of-way in Daniel for access to his 40 Acres acquired from McCullochs on May 22, 1987, nor that it was subject to rights of Daniel in additional property described in ¶ 9 hereof.

30. Poveys were not qualified as bona fide purchasers for value to extinguish the right-of-way of Daniel, by taking the Warranty Deed from McCullochs, because the chain of title to the property purported to be acquired by Poveys contained earlier recorded instruments establishing the right-of-way. These instruments include the Contract of Sale, *see* Exhibit "A",

recorded on July 8, 1987 as Instrument # 175876, which described Daniel's right-of-way on adjacent property of McCullochs (which is the very property acquired by Poveys); and the Warranty Deed, Exhibit "C", conveying the 40 Acres with appurtenances to Daniel recorded on May 28, 1987 as Instrument # 175555.

31. Poveys were also not qualified to be bona fide purchasers of the property included in the Warranty Deed to them on June 4, 1990 because part of the property in Sec. 27 included in the Deed had previously been conveyed by Warranty Deed, with appurtenances, to Daniel by Warranty Deed recorded on July 8, 1987 as Instrument # 175877. See ¶ 9 hereof, Exhibit "10," and Exhibit "B-2," part [5].

32. Poveys were not qualified to be bona fide purchasers for value to extinguish the right-of-way of Daniel, for the further reason they were on notice of the existence of the established road and the continual use of it by Daniel for access to his otherwise landlocked 40 Acres.

33. It was wrongful for Defendant Poveys to purport to convey property to Deans by Warranty Deeds recorded on August 30, 1999 as Instrument # 207408 and on December 30, 1999 as Instrument # 208652 without excepting the right-of-way in Daniel.

34. Plaintiffs are informed and believe that Henry Nels Povey and Melanie Povey, husband and wife, ("Henry and Melanie") have deeded to Defendants Brad L. Povey and Leiza Povey, husband and wife, any interest that Henry and Melanie had in the property conveyed to the four Poveys by McCullochs, less the property conveyed by the four Poveys to Gary and Nola by Warranty Deed recorded on September 16, 1992, as Instrument # 186592; and that Henry and Melanie will acknowledge the four Poveys had acquired the property subject to the right-of-way of Daniel while the Poveys had the right to use the right-of-way to access their property west of

Twin Lakes Canal. Henry and Melanie should acknowledge Daniel, his wife, Gary and Nola, and the Nola Trust have used and have had the right to use of the right-of-way to access their property west of the Twin Lakes Canal as described in ¶ 24 hereof.

Because of expected cooperation of Henry and Melanie for Daniel and his wife and Nola and the Nola Trust to preserve their access rights, Daniel and wife and Nola and the Nola Trust do not include Henry and Melanie as Defendants and do not claim damages against them.

35. The wrongful actions of Brad L. Povey and Leiza Povey, husband and wife, include plowing over Segment "A" of the Original Access Road to facilitate sale of their property; wrongfully conveying property without confirming the right-of-way now held by Daniel, his wife, Nola and the Nola Trust; warranting against the right-of-way; and by actions herein seeking to have Daniel, his wife, Nola and the Nola Trust lose all fully effective access rights. These actions have damaged Daniel and his wife, Nola and the Nola Trust in compelling them to pursue this action to preserve their access rights. This is to their estimated damage of \$100,000.00. Furthermore, if this wrongful conduct proximately contributes to the loss of effective access rights, Daniel and his wife, Nola and the Nola Trust should be awarded an added judgment of damages against Brad L. Povey and Leiza Povey as jointly and severally liable in the amount determined by the Court. The estimated amount of such additional damages is \$500,000.00.

36. Plaintiffs have been required to retain THATCHER BEARD ST. CLAIR GAFFNEY *Attorneys*, to bring and pursue this action to preserve their right-of-way and to recover damages against Defendants Brad Povey and Leiza Povey for their wrongful conduct in seeking to extinguish the right-of-way, and have agreed to pay reasonable attorney fees for those services. The purchase of the real estate by Gary and Nola from Povey Defendants was a commercial transaction under Idaho Code Sec. 12-120 (3) so Plaintiffs, as successors to Gary and Nola,

should be entitled to recover their reasonable attorney fees from Defendants Brad Povey and Lezia Povey.

SECOND COUNT: DEANS, NEIGUMS AND VIEHWEGS
Took Title Subject to Right-of-Way
Quiet Title to Right-of-Way

37. Plaintiffs plead by reference ¶ 1 through ¶ 36 hereof.

38. Deans and Viehwegs each took title from Povey Defendants long after the recording on July 8, 1987 as Instrument # 175876 of the Contract of Sale (Exhibit "A") which conveyed to Daniel the 40 Acres "TOGETHER WITHa right-of-way across Seller's adjacent property along an existing roadway."

39. Deans, Neigums and Viehwegs do not qualify as bona fide purchasers for value because:

A. Each of their chains of title extended back to McCullochs ownership and use of the 40 Acres and ownership and use of all of the adjacent property in Sec. 27 extending to the Westside Highway. An existing roadway ran from the 40 Acres across the adjacent McCulloch property to the Westside Highway.

B. The 40 Acres was then landlocked with no access except across the existing roadway.

C. The roadway extending across the respective properties of Dean, Neigums and Viehwegs was clearly visible upon the premises when they acquired their respective properties.

D. When Deans, Neigums and Viehwegs acquired their respective properties, it was clearly visible upon the adjacent property that the existing roadway ran to a bridge across the Twin Lakes Canal and extended beyond the Canal to the property west of the

Canal.

E. Any reasonable purchaser, at the time Deans, Neigums and Viehwegs acquired their respective property, would have inquired whether someone claimed a right to a right-of-way to access property west of Twin Lakes Canal. Inquiry would have led them to Daniel, as well as his parents, Gary and Nola, who are long-time residents of the area, and they would have found the claims to the right-of-way.

40. Plaintiffs are entitled to a decree, quieting title to the right-of-way, 30-feet in width, extending from Westside Highway to the bridge on the Twin Lakes Canal on a route to be surveyed under direction of the Court.

41. There are alternate legal foundations establishing the rights of Daniel and his wife and the Nola Trust to a decree quieting title to a right-of-way across property of Deans, Viehwegs and Neigums:

A. An express easement founded in the language of the Contract of Sale of May 22, 1987, from McCullochs to Daniel. Daniel continues to be owner as to the original properties benefited by the access roadway. Daniel, his wife, Nola and the Nola Trust have since duly succeeded to the other properties West of the Twin Lakes Canal which benefited in common with Daniel for access to the Westside Highway from the bridge over the Twin Lakes Canal.

B. An implied easement arising from the division by McCullochs of their total properties in Sec. 27 and adjoining Sec. 34, accessed from the Westside Highway, with the access road in regular use to connect the property conveyed to Daniel and the property retained by McCullochs West and East of the Twin Lakes Canal with the Westside Highway. Except for the right-of-way the 40 Acres was land-locked without

access; thus the right-of-way was necessary.

C. A reaffirmation of an implied easement arising from the division by Poveys of McCullochs' property in Sec. 27, acquired by them, between all such property West of the Twin Lakes Canal conveyed to Gary and Nola, with all their retained property East of the Twin Lake Canal; with the property connected by the long-standing regularly used roadway between the Westside Highway and the bridge over the Twin Lakes Canal.

D. Alternatively a right-of-way acquired by Daniel and his wife, Nola and the Nola Trust, and their predecessors by prescription. This begins with Daniel on May 22, 1987, acquiring, if not by express easement at least under color of title, a right-of-way to benefit properties acquired by him from McCullochs by providing access to the Westside Highway; and continues under color of title as a right-of-way to benefit all properties of Poveys West of the Twin Lakes Canal, acquired by Gary and Nola by Warranty Deed dated June 17, 1992, benefiting their properties by providing access to the Westside Highway. The additional elements to establish prescriptive easements are as follows:

[1] Daniel's use of the roadway to access the property acquired by him on May 22, 1987 has been open and notorious; under claim of right; was adverse to any possible claim of any regular owner denying the right; was done with the actual or implied knowledge of all successive owners of the property over which the roadway ran; and was continuous and uninterrupted from May 22, 1987 until May 28, 2008, when the road was blocked. (A period of more than 21 years.) The prescriptive right was established for the required period of five (5) years or more, under Idaho Code § 5-203, (effective until July 1, 2006, when it was changed to twenty (20) years or more). On June 30, 2006 the uninterrupted use

had been for more than nineteen (19) years and the prescriptive right established.

[2] Use of the roadway as to the properties acquired by Gary and Nola and now owned by Daniel and his wife and the Nola Trust, and Nola, acquired by Warranty Deed dated June 18, 1992 from Poveys, has been open and notorious; under claim of right; was adverse to any possible claim of a reputed owner denying the right; was done with the actual or imputed knowledge of all successive owners of the property over which the roadway ran; and was continued and uninterrupted from June 18, 1992 until May 28, 2008, a period of over fifteen (15) years. The prescriptive right was established for the required period of five (5) years or more, under Idaho Code § 5-203, (until July 1, 2006 when it was changed to twenty years). On June 30, 2006 the uninterrupted use had been for more than fourteen (14) years and the prescriptive right established.

42. By Warranty Deed recorded on October 4, 2004, as Instrument # 227649, records of Franklin County, Idaho, copy attached hereto as Exhibit "S", Defendants Jeffery J. Neigum and Kathleen A. Neigum conveyed their properties involved in this action to Defendants Jeffery J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004. All rights alleged or claimed herein against Jeffery J. Neigum and Kathleen A. Neigum, or referring to "Neigums," shall be construed to apply to them individually and as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004.

43. Plaintiffs have been required to retain THATCHER BEARD ST. CLAIR GAFFNEY *Attorneys* to bring and pursue this action to quiet title to their right-of-way or to obtain an adequate replacement access to their properties and have agreed to pay reasonable attorney fees

for those services. Defendants Dean, Neigum and Viehweg have been unreasonable and without proper legal and factual foundation in blocking the right-of-way on May 28, 2008, and in seeking to extinguish any effective year-around right-of-way across their properties and to prevent Daniel, his wife, Nola and the Nola Trust from having effective access to their properties. By reason thereof and Idaho Code § 12-121 and Rule 54(e), I.R.Cv.P., the court should award Plaintiffs Judgment against Defendants Dean, Neigum, and Viehweg for their reasonable attorney fees in obtaining a decree quieting title to the right-of-way or to an adequate replacement right-of-way for access to their properties.

THIRD COUNT: DEANS, NEIGUMS, AND VIEHWEGS
Confirm Adequate Replacement Access
As a Partial Alternative Remedy

44. Plaintiffs replead by reference ¶ 1 through ¶ 43 hereof.

45. Daniel and wife and the Nola Trust, and Nola, are agreeable upon acceptable terms to accept a "Replacement Access Road" for a right-of-way running from the Westside Highway to the bridge over the Twin Lakes Canal, to provide access to their properties described in ¶ 24 hereof, on the following terms and conditions:

A. The right-of-way should be 30 feet in width and should follow the general route described in ¶ 22 hereof, with the actual route to be surveyed as approved by the Court.

B. The use of the right-of-way up to the bridge over the Twin Lakes Canal shall be a private road but shall be used in common by Daniel and his wife and the Nola Trust and Nola, and their successors and assigns; and by Neigums and their successors and assigns. Maintenance shall be allocated according to the respective uses of the owners

and users of the right-of-way.

C. Daniel and his wife and the Nola Trust, and Nola, should be granted a money judgment against Defendants Dean, Neigum and Viehweg for their attorneys fees and costs in responding to the opposition of Defendants Dean, Neigum and Viehweg, to Plaintiffs having any access to their properties, depending on the opposition, as alleged in ¶43 hereof.

D. Upon final Court confirmation of the rights to a “Replacement Access Road” in Daniel his wife and the Nola Trust, and Nola, their heirs, successors and assigns, and their collection of any judgment for attorney fees and costs against Defendants Dean, Neigum and Viehweg, for which they are adjudged responsible, respectively, Daniel, his wife and the Nola Trust, and Nola, shall relinquish and disclaim any rights to the First Segment of the Original Access Road.

46. Daniel and his wife and the Nola Trust, and Nola, their heirs, successors and assigns, shall have complete control over the right-of-way from the bridge over the Twin Lakes Canal extending to the West; and they shall have the duty of maintenance; and the same shall not be a public road nor shall Franklin County have any duty of maintenance thereof.

**FOURTH COUNT: FIRST AMERICAN TITLE INSURANCE
Breach of Contract to Assure Access
Money Judgment for Damages**

47. Plaintiffs replead by reference ¶ 1 through ¶ 46.

48. Defendant First American Title Insurance Company (“First American Title Insurance”) at all times material to this action was a “foreign insurer” under Idaho Code § 41-333, engaged as a title insurer in the State of Idaho under Idaho Code § 41-2704, pursuant to a “certificate of authority” required under Idaho Code § 41-2705 to be issued by the Director of the

Department of Insurance, and amenable to service of process in this action upon the Director as provided in Idaho Code § 41-333.

49. First American Title Insurance has breached its contracts contained in Policy of Title Insurance ("Policy"), issued on May 28, 1987 with Daniel, as insured, described in ¶ 23 hereof, and contained in Exhibit "R" hereof, as to insuring Daniel against loss or damages sustained by him by reason of:

"3. lack of a right of access to and from the land."

The land at issue is "40 Acres" in Franklin County, Idaho, described as follows:

NE¼NW¼ of Sec. 34, Twp. 14 S., Rge. 38 E., Boise Mer.

50. First American Title Insurance had and has an "implied covenant of good faith and fair dealing" in honoring its contractual duties to Daniel.

51. Preston Land Title Company, which co-signed the Policy of Title Insurance, acted as an authorized agent for First American Title, as to all matters at issue in this case, under Idaho Code § 41-2708, under rules and regulations of the Department of Insurance and under other applicable law. On December 26, 2003, Preston Land Title Company merged into what is now First American Title Company, Inc., an Idaho Corporation. Defendant First American Title Insurance is chargeable in this case with information that was known or should have been known by Preston Land Title Company, and its successor corporation, and is bound as principal by all actions of Preston Land Title Company, and its successor corporation, as agent for Defendant First American Title Insurance, as to all matters relevant to this action.

52. On May 28, 1987 when the Policy issued, Daniel had "a right of access to and from the land" over an existing roadway extending from the 40 Acres over adjacent land of Ralph R. McCulloch and Thelma W. McCulloch, husband and wife, ("McCullochs") to the Westside

Highway. McCullochs sold the 40 Acres to Daniel in the title insured transaction, "TOGETHER WITH . . . a right-of-way across Seller's adjacent property along an existing roadway." See Contract of Sale, Exhibit "A," described in ¶¶ 1, 2 and 3 hereof; and Warranty Deed conveying the 40 Acres "with their appurtenances" to Daniel, Exhibit "C," described in ¶8 hereof; and with the right-of-way and land features illustrated in Exhibit "B-2" described in ¶ 4.A hereof. The 40 Acres was then totally "landlocked" without any legal access except for the right-of-way included in the sale.

53. First American Title Insurance had a duty under the Policy to defend Daniel's right-of-way. It constituted the only right of access to an otherwise landlocked 40 Acres. Rather, First American Title Insurance has been complicit with others in seeking to destroy the right-of-way.

54. The pivotal wrongful action by First American Title Insurance is documented by a letter to Daniel from Phil E. De Angeli, State Counsel-Idaho, for First American Title Insurance, dated March 14, 2008, copy attached as Exhibit "T." These facts exist and are revealed or implied in the letter:

A. First American Title Insurance was on March 14, 2008 representing Viehwegs in seeking to invalidate Daniel's right-of-way or have him abandon it for the benefit of its then client, Viehwegs.

B. First American Title Insurance represented Viehwegs as their client for compensation prior to November 1, 2005 when Viehwegs acquired their property from Povey Defendants. See ¶ 20 hereof and Exhibit "P" and Exhibit "Q."

C. First American Title Insurance investigated the state of the property before the property was conveyed and insured good title to the property in Viehwegs.

D. The implication is First American Title Insurance did not except the right-of-

way of Daniel, his wife, and Gary and Nola, in its Policy issued to Viehwegs, and thus would be liable to Viehwegs if the right-of-way is found valid.

E. First American Title Insurance knew prior to November 1, 2005, or would have known had it conducted the investigation it later conducted, that Daniel claimed an ingress and egress easement along the North boundary of the Viehweg property; and that Daniel's claimed easement was described in the Contract of Sale recorded on July 8, 1987 (Exhibit "A," ¶¶ 1, 2, and 3 hereof and Exhibit "B-2").

F. In investigating the "state of the property" First American Title Insurance, or its agent, saw or should have seen the visible roadway extending from the Westside Highway along the edge of the Viehweg property and extended to the bridge over the Twin Lakes Canal and beyond.

55. The March 14, 2008 letter from First American Title Insurance, Exhibit "T", also discloses legal premises underlying the issuance of the Policy to Viehwegs on November 1, 2005, that though represented as controlling to defeat the Plaintiffs' right-of-way were at best questionable in this case and at worst, spurious.

A. First American Title opines that because the Warranty Deed to Daniel did not expressly describe the right-of-way, the Contract of Sale merged into the Deed and the right-of-way was thereby extinguished. This is contrary on two grounds to a decision of the Idaho Supreme Court in *West v. Bowen*, 127 Idaho 128, 898, P.2d 59 (1995) on very similar controlling facts. The Contract of Sale here was a conveyance and because it was recorded prior to the recording of the Warranty Deed to Viehwegs, the title of Viehwegs is subject to the right-of-way. Moreover, the Warranty Deed to Daniel expressly included "appurtenances" and did not need to describe the right-of-way under Idaho Code § 55-

603 and controlling Idaho case law, to prevent it being extinguished by a claimed merger.

B. First American Title Insurance opines that the language purporting to grant the right-of-way had only “an extremely vague reference to an access easement over the property, no particular area of the easement is identified.” To the contrary the grant of the right-of-way was based upon the “existing roadway.” Settled law approves the grant of an easement over an “existing road,” such as done here. An example is *Conley v.*

Whittlesey, 133 Idaho 265, 985 P.2d 1127 (1999). At trial the location of the road, with the width can be determined as the basis for a specific description of the right-of-way. .

C. Implied in the position of First American Title Insurance is that it could and can properly represent Viehwegs, and apparently Poveys, Deans and Neigums in seeking to destroy the right-of-way of Daniel which it had insured. That very representation raises another strong reason why the Court should not permit destruction of Plaintiffs’ right-of-way. Because Defendant First American Title Insurance, directly or through its agent Preston Land Title Company or its successor First American Title Company, Inc., knew or should have known of the recorded right-of-way to Daniel or the existing roadway suggesting a right-of-way, before Poveys, Deans, Neigums, and Viehwegs took title to their properties, each should be bound by the actual or imputed knowledge of their representative, and thus each took title subject to the right-of-way.

56. Daniel responded to the First American Title Insurance letter of March 14, 2008, with his letter of March 24, 2008, copy attached hereto as Exhibit “U.” First American Title Insurance should have taken this as an objection to its seeking to destroy Daniel’s right-of-way, contrary to its policy duties, and should have processed it as a claim for breach of the Policy. Daniel also referred to other policies.

57. The failure of First American Title Insurance to defend Daniel's right of access to and from the land and its conduct seeking to destroy that right is in plain breach of the Policy contract and are in serious breach of the "implied covenant of good faith and fair dealing" in honoring the contract with Daniel.

58. Daniel has been damaged by the breaches of First American Title Insurance far in excess of the Policy limits of \$54,000. Daniel should be awarded a judgment for \$54,000 against First American Title Insurance. It is believed that First American Title Insurance is also in breach of a policy of title insurance issued to Gary and Nola as to the Povey purchase on September 16, 1992, ¶ 11 hereof, and as to the Cox purchase on August 20, 1997, ¶ 13 hereof. First American Title Insurance has by its conduct also breached those policies so Gary and Nola should be awarded damages sustained by them up to the full amount of the policy limits of each policy.

59. Daniel S. Garner has been required to retain THATCHER BEARD ST. CLAIR GAFFNEY *Attorneys* to protect and defend his right of access to his 40 Acres insured in the Policy to Daniel and to recover damages from First American Title Insurance for breach of its duties under the Policy, and is obligated to pay the reasonable attorney fees and costs for their services. By virtue of the Policy of Title Insurance First American Title Insurance is obligated to pay Daniel for those fees and costs in addition to the \$54,000.000 amount of insurance, and judgment should be awarded Daniel against First American Title for such sums. On like grounds judgment should be awarded Daniel, Nola, and Nola Trust, as successors to Gary and Nola, for their attorney fees and costs pursuing damages for breach of the policies of title insurance in the Povey and Cox transactions.

FIFTH COUNT: DEANS, NEIGUMS AND VIEHWEGS
Access During Pendency of Action
Protection Against Transfers

60. Plaintiffs replead by reference ¶ 1 through ¶ 57.

61. On December 15, 2008, Plaintiffs Daniel and Sherri-Jo Garner, husband and wife, and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, by Jeffrey D. Brunson, one of their attorneys; and Defendants Hal J. Dean and Marlene T. Dean, husband and wife, Jeffery J. Neigum and Kathleen A. Neigum, husband and wife, and Douglas V. Viehweg and Sharon C. Viehweg, husband and wife, by Scott Smith, one of their attorneys, entered into a written STIPULATION FOR USE OF REPLACEMENT ACCESS ROAD DURING PENDENCY OF ACTION, a copy of which is attached hereto as Exhibit "V." This, with approval of the Court, should have provided the appropriate interim relief to the parties during the pendency of the action.

62. However, after the Stipulation was entered, and Neigum defendants had knowledge it was entered, they threatened Daniel as he hauled hay on the Replacement Access Road to his many head of cattle being fed on Plaintiffs' property described in ¶ 24 hereof. The nature of the threats were such that Daniel feared for his own life and safety and feared for the life and safety of his cattle. He removed the cattle to other property not involved in this suit. Daniel has been damaged by such misconduct of Neigums in an amount to be established at trial.

63. As further protection against transfers to any purported bona fide purchasers for value, Plaintiffs have filed and recorded a Notice of Pendency of Action, a copy of which is attached hereto as Exhibit "W". This applies as to the original Verified Complaint and shall also apply to this Amended Complaint once it is filed with approval of the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Daniel S. Garner and Sherri-Jo Garner, husband and wife, Nola Garner and Nola Garner, as Trustee of the Nola Garner Living Trust, dated July 19, 2007, pray for Judgment and relief against Defendants as follows:

1. Against Defendants Brad C. Povey and Lezia Povey, husband and wife, for damages for wrongful conveyance and for otherwise acting to seek to extinguish and destroy the “original access road” which is the road right-of-way now owned by Plaintiffs to access their properties in Sec. 34 and in Sec. 27 West of the Twin Lakes Canal over a pre-existing private road in Sec. 27, East of the Twin Lakes Canal, extending to the Westside Highway. The damages would be up to \$100,000.00 for what is required to preserve the right-of-way against the conveyances and other actions of Defendants. If their wrongful conveyance and other actions destroy Plaintiffs’ right-of-way and any adequate replacement right-of-way, then damages are sought against them for up to \$500,000.00 for loss of all adequate access to their property. Plaintiff should also recover against those Defendants their attorney fees and costs.

2. Against Defendants Hal J. Dean and Marlene T. Dean, husband and wife; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife, individually and as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Living Trust, dated September 17, 2004; and Douglas V. Viehweg and Sharon C. Viehweg, husband and wife, for a decree quieting title in Plaintiffs to the “original access road”, which is a road right-of-way 30 feet in width running from the Westside Highway over property of Defendants to a bridge over the Twin Lakes Canal. This shall enable travel from there to the property of Plaintiffs described in ¶ 24 hereof. The 30-foot wide easement is needed to accommodate vehicles and machinery that frequently must travel the roadway and to enable snowbanks within the easement from snow removal from the traveled portion during the common snow seasons. The “Defining Line” should be the Northerly boundary with the traveled and visible roadway being about equidistant between the Defining Line and the Southern boundary of the 30-foot wide easement. Also against such Defendants for attorney fees and costs.

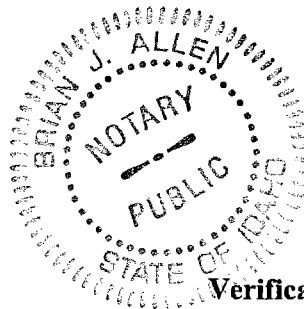
3. In the alternative on the Third Count against Defendants, Hal J. Dean and Marlene T. Dean, husband and wife; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife, individually and as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Living Trust, dated September 17, 2004; and Douglas V. Viehweg and Sharon C. Viehweg, husband and wife, for a decree quieting title in Plaintiffs for the benefit of their property described in ¶ 24 to a Replacement Access Road for Segment "A" of the Original Access Road. It must be a true and full replacement for Segment "A" of the Original Access Road consistent with the prayer for relief as to the Original Access Road. The presently traveled portion of Segment "A" of the Replacement Access Road must be broadened to accommodate a fully usable and travelable portion comparable to Segment "A" of the Original Access Road prior to it being blocked. Also against such Defendants for attorney fees and costs.

4. Against First American Title Insurance Company on the Fourth Count for \$54,000.000 damages for breach of the Policy of Title Insurance policy issued to Daniel and for damages for breach of the policies of title insurance in the Povey and Cox purchases for up to the policy limits on each policy, and for attorney fees and costs.

5. Interim relief should be confirmed for continuous road access by Plaintiffs to and from the properties described in ¶ 24, by the alternate road access, pursuant to "Stipulation for Use of Replacement Access Road During Pendency of action", dated December 15, 2008, during the pendency of this action and until further Order of the Court. Neigum Defendants should be sanctioned for threats against Daniel in violation of the Stipulation and should be assessed damages in an amount to be determined by the Court.

6. For such other and further relief as is deemed proper by the Court.

SUBSCRIBED AND SWORN To before me this 8 day of January, 2009.




Notary Public for Idaho
Residing at CLIFTON ID
My commission expires: 06-19-2014

Verification

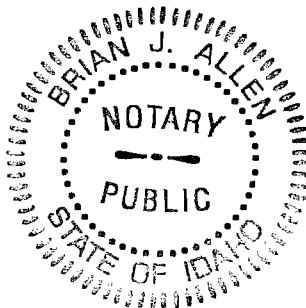
STATE OF IDAHO,)
County of Franklin. ss.
)

DANIEL S. GARNER, being first duly sworn, states under oath:

I have read the foregoing Amended Complaint and know the contents thereof; I am very familiar with the events and actions described therein. As to the facts alleged I verify under oath: (1) As to facts as to my own actions and knowledge, the statements are true; (2) as to the facts or actions by Nola Garner, based upon our close relationship as mother and son and continually working together on business, I believe them to be true; and (3) as to knowledge or actions of others, based on investigation, observation and information supplied by others, I believe the same to be true.


DANIEL S. GARNER

SUBSCRIBED AND SWORN To before me this 8 day of January, 2009.



Notary Public for Idaho
Residing at CLIFTON ID
My commission expires: 06-19-2014

175876

1-3

Recorded at the request of
Daniel S. Garner
 JUL 8 1987 1:40 p.m.
 CORRIE L. KELLER, RECORDER
 By *Daniel S. Garner* Deputy
 FRANKLIN COUNTY, IDAHO
May

CONTRACT OF SALE

1. THIS AGREEMENT, made in duplicate this 22 day of April, 1987, by and between RALPH R. McCULLOCH and THELMA N. McCULLOCH, husband and wife, residing at Clifton, Idaho, hereinafter designated as the Seller, and DANIEL S. GARNER, residing at Clifton, Idaho, hereinafter designated as the Buyer.

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the Buyer, and the Buyer for the consideration herein mentioned agrees to purchase the following described real property, situated in the County of Franklin, State of Idaho. More particularly described as follows:

The Northeast Quarter of the Northwest Quarter of Section 34, Township 14 South, Range 38 East, Boise Meridian.

★ TOGETHER WITH the rights to the water from all existing springs on said property and a right-of-way across Seller's adjacent property along an existing roadway. The right to use said roadway shall be limited to the times and in a manner as to not interfere with the Seller's sprinkler pipe that may from time to time be placed across the roadway. Likewise the Seller shall not place his sprinkler pipes across the roadway in an attempt to unreasonably limit the Buyer's free access to his property.

Also, commencing at NW1/4NE1/4 Section 35, Township 14 South, Range 38 East, Boise Meridian, running thence S. 160 rods; thence E. 38 rods, more or less, to W. line of O. S. L. Railroad right-of-way; thence northerly along W. line of said railroad right-of-way to N. line of said Section 35, thence W. 31 rods, more or less, to place of beginning.

Also, all that part of SE1/4 of Section 33, Township 14 South, Range 38 East, Boise Meridian, lying W. of the O. S. L. Railroad right-of-way.

TOGETHER WITH eighty (80) Share of the capital stock in the Twin Lakes Canal Company and the rights to a 53.6 acre grain base.

3. Said described property shall be conveyed subject to the following restriction and encumbrances, if any: None.

4. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of fifty four thousand dollars (\$54,000.00) payable at the office of Seller, his assigns or order strictly within the following times, to-wit:

- (a) Four thousand dollars (\$4,000) as Earnest Money, the receipt of which is hereby acknowledged; and
- (b) Fifty thousand dollars (\$50,000), in cash, or by cashier's check at the time of closing, which closing shall be on or before May 1, 1987. At the time of closing the Seller shall provide the Buyer with an executed warranty deed and a policy of title insurance.
- (c) In addition to the above, the Buyer agrees to pay the purchaser of a 57 acre parcel that presently shares the above mentioned 53.6 acre grain base one thousand dollars (\$1,000) for the exclusive right to said 53.6 acre grain base.

5. Possession of said premises shall be delivered to Buyer on the day first mentioned above as the date of this agreement.

6. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following: None.



7. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises. The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

8. The Buyer agrees to pay the general taxes for the year 1987 and the 1987 water assessment. The Seller agrees to pay the general taxes for the year 1986 and the 1986 water assessment.

9. The following items of property now on the premises are specifically excluded from the sale: None.

10. The following items of personal property are specifically included in the sale: Mainline irrigation system and pump (25 H.P.), three (3) Thunderbird wheel lines, 16 pieces of three inch hand lines together with valve openers and end plugs.

11. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

12. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract or effect any other remedies of the Seller.

13. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within fifteen (15) days thereafter, the Seller, at his option shall have the following alternative remedies:

(a) The Seller may bring suit and recover judgement for all delinquent installments, including costs and attorneys fees.

(b) The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Idaho, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgement for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

14. It is agreed that time is the essence of this agreement.

15. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto.

16. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Idaho whether such remedy is pursued by filing a suit or otherwise.

17. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of:

Barbara Swanson

Ralph R. McCulloch
Seller

Thelma N. McCulloch
Seller

Daniel S. Garner
Buyer

18. Also in consideration of an additional Five Hundred Dollars (\$ 500.00), the seller agrees to sell and convey to the buyer the following described real property: beginning at the N. W. corner of the N. E. quarter of the N. W. quarter of Sec. 34, Township 14 S., Range 38 E. Boise Meridian, thence Northeasterly to the bottom of the gulley on the North side of the old gravel pit, thence Southeasterly to the N. E. corner of the N. E. quarter of the N. W. quarter of Sec. 34, Township 14 S., thence Westerly to the point of beginning.

The purpose of purchasing this property is to obtain the two springs on the North edge of the old gravel pit, but not the spring presently in use by Ralph McCulloch below this property.

Ralph R. McCulloch
Seller

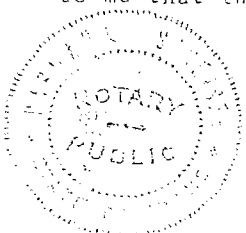
Daniel S. Garner
Buyer

Thelma N. McCulloch
Seller

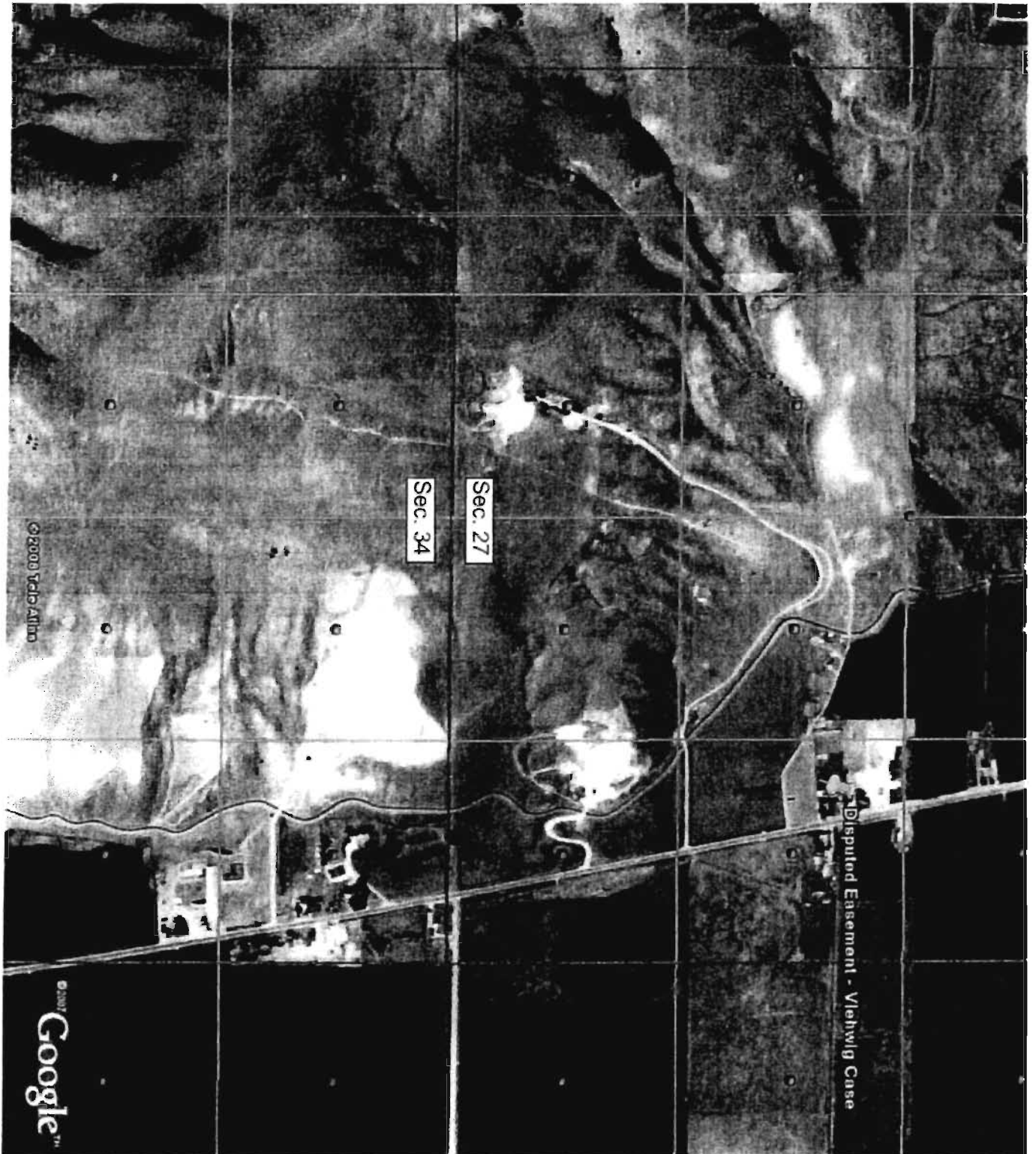
5/22/87
Date

STATE OF IDAHO }
County of Franklin }

On this 22nd day of May, 1987, before me, a notary public in and for said State, personally appeared RALPH R. McCULLOCH and THELMA N. McCULLOCH, husband and wife; and DANIEL S. GARNER, a single man, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.



Barbara Swanson
Notary Public
Residing at Swan Lake, Idaho
Commission expires May 25, 1988



Property Retained
by McCullochs

Twin Lakes
Canal

First Phase of
Original Access
Road

Second Phase
of Original
Access Road

Additional Prop.
acquired by Daniel
in Sec. 27

40 Acres in
Sec. 34
acquired by
Daniel

Westside
Highway

Google

42°10'14" N 112°00'15" W

5105 ft

Jun 16, 2004

East at 11092 ft

tabbles

B-2

EXHIBIT

116

Property Purported to be
acquired by Poveys from
McCullochs West of the
Twin Lakes Canal on May
23, 1990

Sec. 27

Sec. 34

42°10'14.90" N 112°00'15.92" W

© 2005 The Allen
Map Company

May 2005

Jan 12 2004

Google

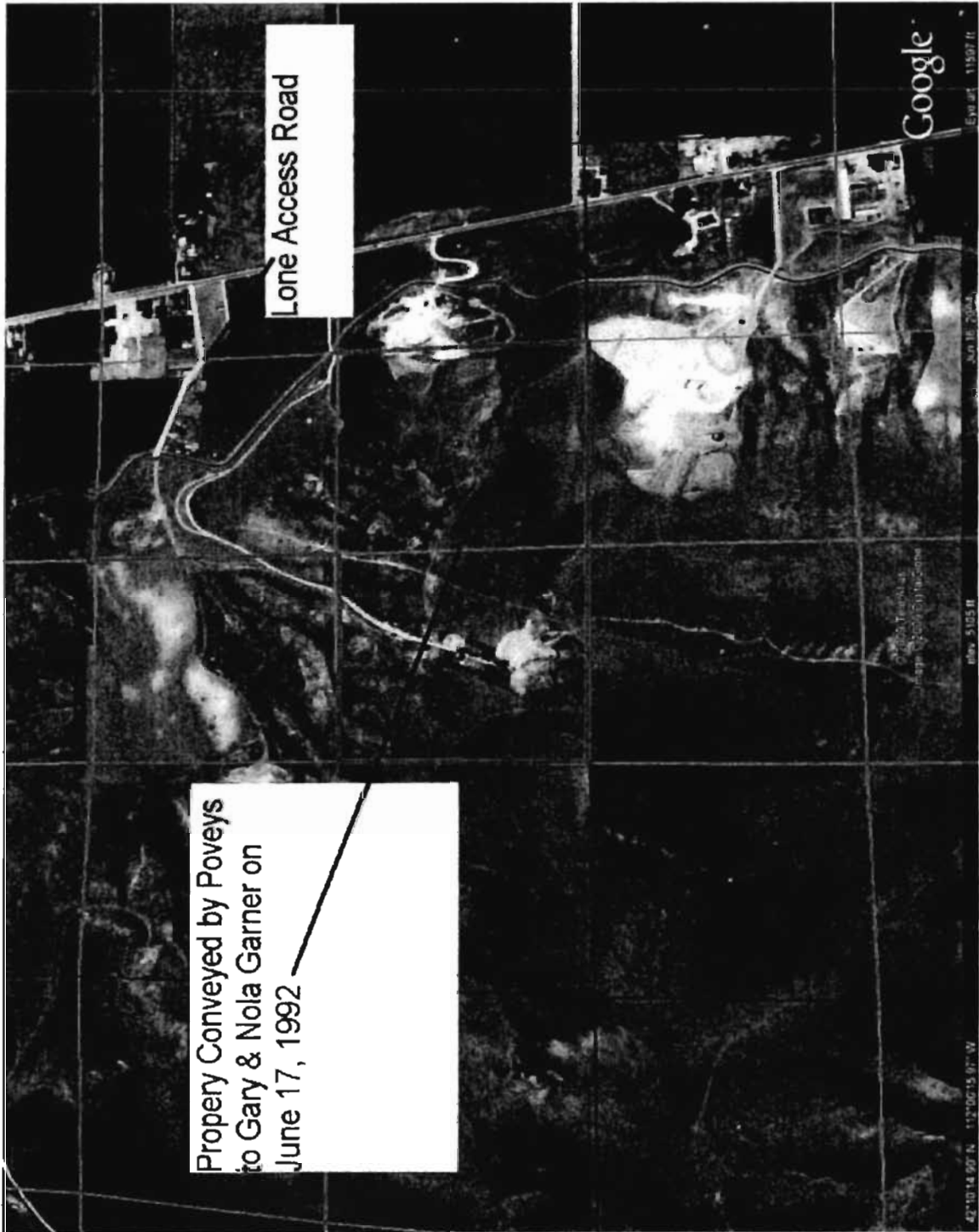
Eye at 11597 ft

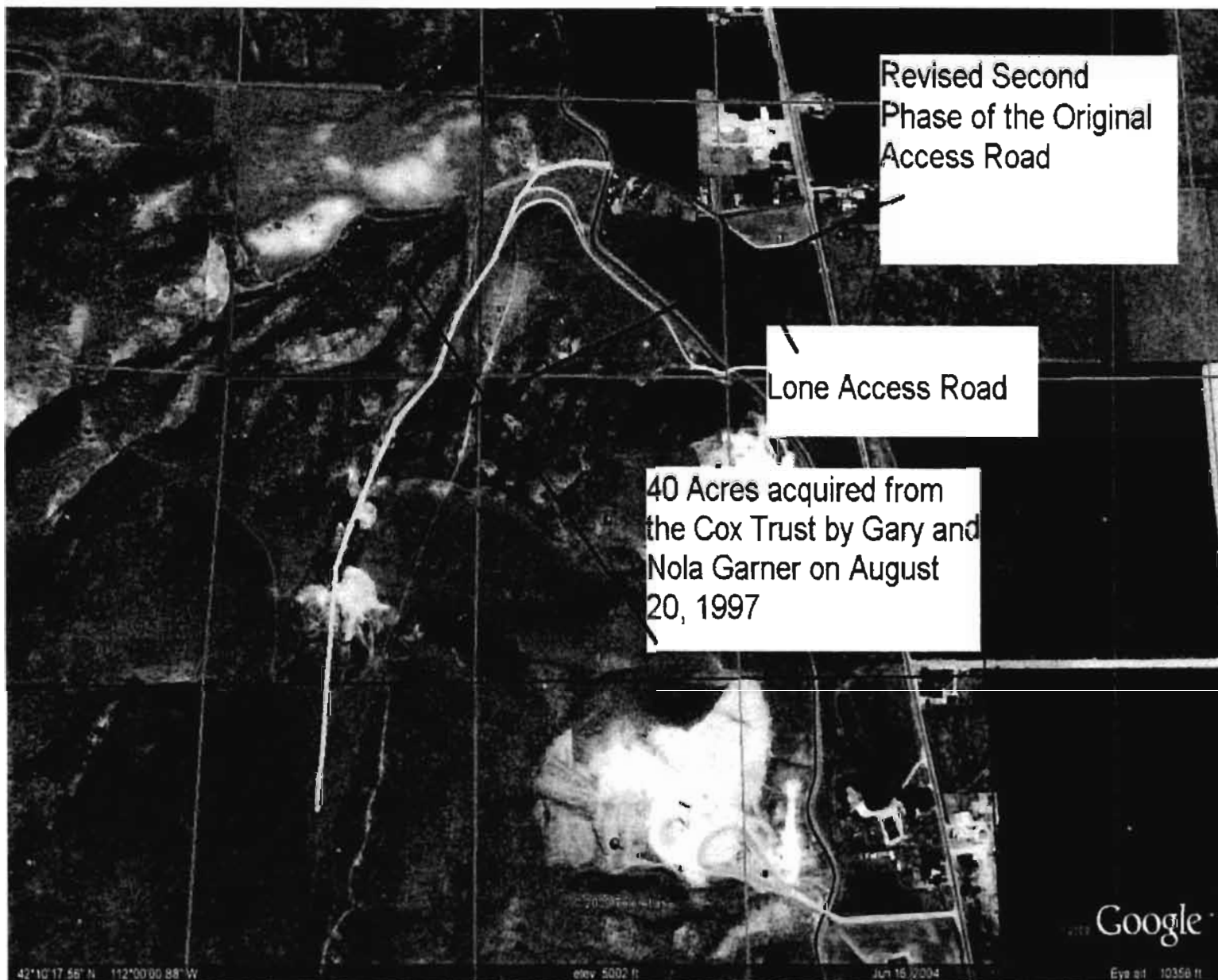
tabbles

EXHIBIT

B-3

47





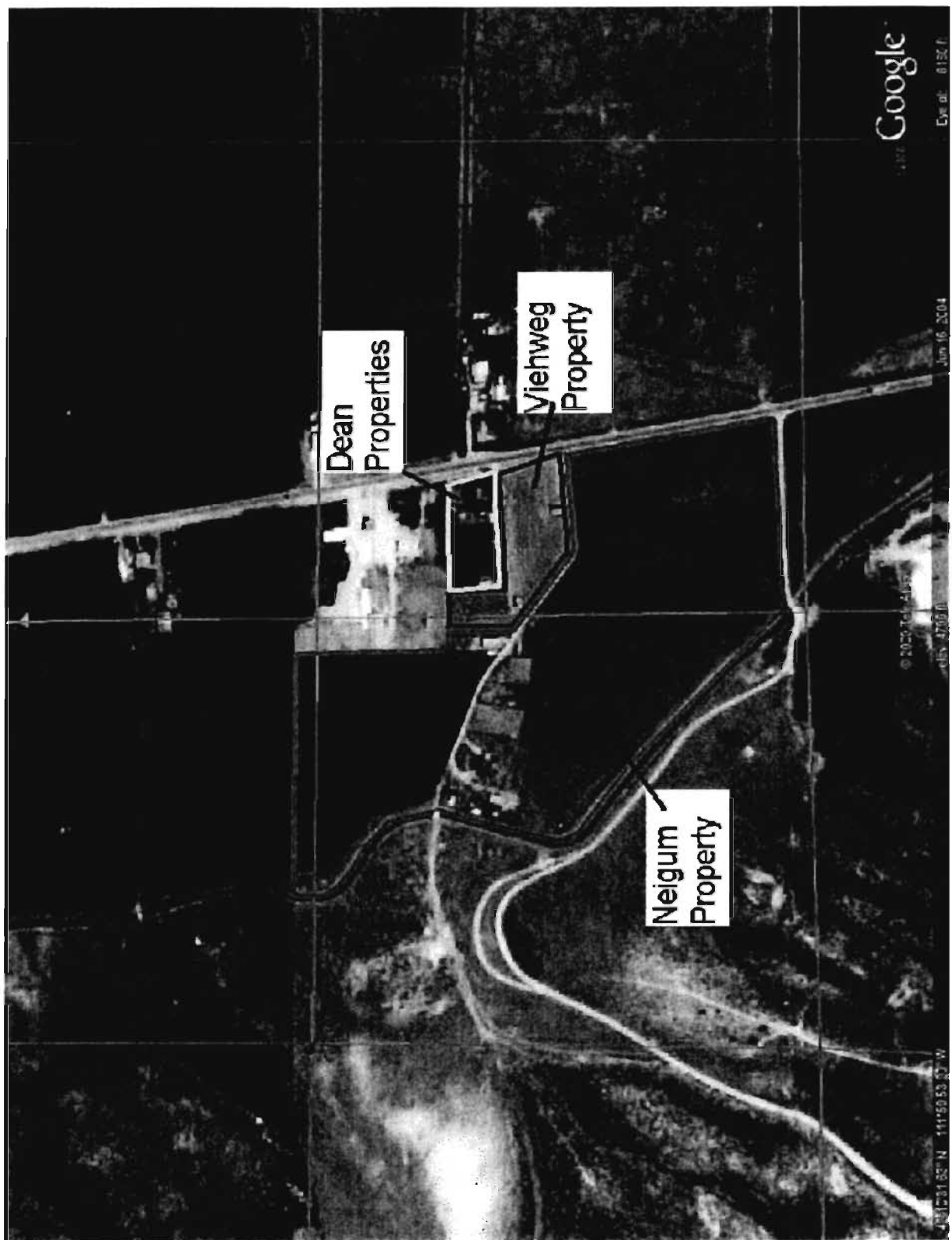
Revised Second
Phase of the Original
Access Road

Lone Access Road

40 Acres acquired from
the Cox Trust by Gary and
Nola Garner on August
20, 1997







4-4153-G

173555

WARRANTY DEED

For Value Received RALPH R. McCULLOCH and THELMA N. McCULLOCH,
Husband and wife,

the grantors, do hereby grant, bargain, sell and convey unto
DANIEL S. GARNER, a single man,

whose current address is: 180 North 213 West
Clifton, Idaho 81228

the grantee, the following described premises, in Franklin County Idaho, to wit:

Township 14 South, Range 38 East of the Boise Meridian
Section 34: NE&NW¼.

Section 35: Commencing at the Northwest corner of the Northeast Quarter of Section 35, and running thence South 160 rods, thence East 38 rods, more or less, to the West line of the Oregon Short line Railroad right-of-way, thence Northerly along the West line of said railroad right-of-way to the North line of said Section 35, thence West 31 rods, more or less, to the place of beginning.

ALSO, all that part of the Southeast Quarter of Section 35, lying West of the Oregon Short line Railroad right-of-way.

TOGETHER WITH 80 shares of the capital stock of the TWIN LAKES CANAL COMPANY.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, his heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantee, that they are the owners in fee simple of said premises; that they are free from all incumbrances.

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: May 21, 1987

Ralph R. McCulloch

Thelma N. McCulloch

STATE OF IDAHO, COUNTY OF FRANKLIN
On this 22nd day of May, 1987,
before me, a notary public in and for said State, personally
appeared

RALPH R. McCULLOCH and
THELMA N. McCULLOCH, husband and
wife,

known to me to be the persons whose names are
subscribed to the within instrument, and acknowledged to
me that they executed the same.

Notary Public
Residing at: Twin Lake, Idaho
Comm. Expires: May 25, 1989

Notary Public

MAY 28 1987

DOUGLAS L. KELLEN, Notary Public
FRANKLIN COUNTY, IDAHO

EXHIBIT

C

WARRANTY DEED

For Value Received

RALPH R. McCULLOCH and THELMA N. McCULLOCH

the grantor ^s do^{es} hereby grant, bargain, sell and convey unto

DANIEL S. GARNER

whose current address is P. O. Box 66, Clifton, Idaho 83228

the grantee, the following described premises, in FRANKLIN County Idaho, to wit:

Beginning at the N.W. corner of the N. E. quarter of the N. W. quarter of Sec. 34, Township 14. S. Range 38 E, Boise Meridian, thence Northeasterly to the bottom of the gully on the North side of the old gravel pit, thence Southeasterly to the N. E. Coanor of the N. E. quarter of the N. W. quarter of Sec. 34, Township 14S., thence Westerly to the point of beginning.

The purpose of purchasing this property is to obtain the two springs on the North edge of the old gravel pit, but not the spring presently in use by Ralph McCulloch below this property.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, their heirs and assigns forever. And the said Grantor^s do^{es} hereby covenant to and with the said Grantee, that they the owners in fee simple of said premises; that they are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated:

May 22, 1987

Ralph R. McCulloch
Thelma N. McCulloch

STATE OF IDAHO, COUNTY OF

On this 22nd day of May, 1987, before me, a notary public in and for said State, personally appeared *Ralph McCulloch & Thelma McCulloch*

known to me to be the person whose name subscribed to the within instrument, and acknowledged to me that they executed the same.

Blanche Henderson
 Notary Public
 Residing at *Clifton, Idaho*, Idaho
 Comm. Expires *March 1993*

Recorded at the request of

Donna S. Garner

JUL 8 1987 1:15 p.m.

CORRIEN KELLER, RECORDER

By *Ann Butler* Deputy
FRANKLIN COUNTY, IDAHO

Furnished by the AMERICAN LAND TITLE CO., Bozeman, Idaho

EXHIBIT

D

WARRANTY DEED

For Value Received RALPH R. McCULLOCH and THELMA N. McCULLOCH, husband and wife,

the grantors, do hereby grant, bargain, sell and convey unto BRAD L POVEY and LEIZA POVEY, HUSBAND AND WIFE and HENRY NELS POVEY and MELANIE POVEY, HUSBAND AND WIFE.

whose current address is 3765 North West Side Highway, Clifton, ID 83228
the grantees, the following described premises, in Franklin County Idaho, to wit:

See Exhibit "A" attached hereto.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises; that they are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: May 23, 1990

Ralph R. McCulloch

Thelma N. McCulloch

STATE OF IDAHO, COUNTY OF

On this 23 day of May, 1990,
before me, a notary public in and for said State, personally
appeared RALPH R. McCULLOCH and
THELMA N. McCULLOCH, husband and
wife,

known to me to be the persons whose names are
subscribed to the within instrument, and acknowledged to
me that they executed the same.

[Signature]

Residing at *[Address]* Notary Public
Idaho

Recorded at the request of

Daniel J. Phillips

JUN 04 1990 1:30 PM

LARAE E. JOHNSON, RECORDER,
Deputy,
FRANKLIN COUNTY, IDAHO

EXHIBIT

E

Township 14 South, Range 38 East of the Boise Meridian

Section 27: W $\frac{1}{2}$ SE $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$. ALSO, Commencing at a point 1323.25 feet West and 419.10 feet South 0°06' East of Northeast corner SE $\frac{1}{4}$ of Section 27, running thence South 0°06' East 900.9 feet; thence East 770.819 feet; thence North 11°11' West 918.53 feet; thence West 594.98 feet to the place of beginning.

Sections 26

and 27: Commencing at point 1320 feet North of the Southwest corner of Section 26, and running thence South 89°44' West 551.161 feet; thence North 11°11' West 675.63 feet; thence South 89°05' East 464.098 feet; thence North 02°48' West 179.47 feet; thence South 89°05' East 1210.6 feet; thence South 2°48' East 809.91 feet; thence South 89°44' West 1023.18 feet to the place of beginning.

EXCEPTING THEREFROM that portion deeded to State of Idaho for highway purposes in Warranty Deed recorded March 23, 1955, in Book 49 of Deeds, page 208, as Instrument No. 95735, records of Franklin County, Idaho.

186592

Recorded at the request of

Nola S. Garner 5

a.m. SEP 16 1992 12:40 p.m.

LARA E. JOHNSON, RECORDER

By G. Shepherd Deputy
FRANKLIN COUNTY, IDAHOReception ☐
Indexed ☐

(DO NOT WRITE ABOVE THIS LINE)

WARRANTY DEED

For Value Received BRAD L. POVEY and LEIZA POVEY, husband and wife,
and HENRY NELS POVEY and MELANIE POVEY, husband and wife,
the grantors, do hereby grant, bargain, sell and convey unto
GARY T GARNER and NOLA S. GARNER, husband and wife,
the grantees, the following described premises, in Franklin County, Idaho, to wit:

BEGINNING at the SW corner of the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of
Section 27, T 14 S, R 38 E, of the Boise Meridian, thence
East to the SE corner of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 27,
thence North to the NE corner of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of
Section 27, thence East to the East side of the Twin Lakes
Canal, thence Northwesterly along the East edge of the
Twin Lakes Canal to a point on the East-West centerline
of Section 27, thence West to the centerpoint of Section
27, thence South to the SE corner of the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$
of Section 27, thence West to the NW corner of the SE $\frac{1}{4}$
of the SW $\frac{1}{4}$ of Section 27, thence South to the point
of beginning. EXCEPT for a 16 foot right of way to
access the irrigation outlet from Twin Lakes Canal
located in the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 27.

TOGETHER with all the water from all springs or wells
originating on the above described property.

TOGETHER with all mineral rights that this property
is presently entitled to.

EXHIBIT

F

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said
Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant
to and with the said Grantee, that they the owners in fee simple of said premises;
that they are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: June 17, 1992

Brad L. Povey
Leiza Povey

(NOTARY SEAL)

Henry Nels Povey
Melanie Povey

State of Idaho
County of Franklin

ss On the 56 day of June A.D. 19 92

199886 1-2

Recorded at the request of

Gary T. Garner

a.m. AUG 20 1997 1:40 p.m.

TRUSTEE'S DEED

V. ELLIOTT LARSEN, RECORDER
By Camille Larsen Deputy
FRANKLIN COUNTY, IDAHO

THIS DEED made this 19th day of August, 1997, between **ALVORD L. COX and LaVENE G. COX**, as Trustees of the **ALVORD L. COX FAMILY TRUST**, hereinafter called "Grantors" and **GARY T. GARNER and NOLA SMART GARNER**, husband and wife, 233 West 1 North, Preston, ID 83263, hereinafter called "Grantees".

WHEREAS, Alvord L. Cox and LaVene G. Cox are the duly appointed and acting Trustees of the Alvord L. Cox Family Trust, dated the 11th day of June, 1986, by and between Alvord L. Cox and LaVene G. Cox as Trustors, and Alvord L. Cox and LaVene G. Cox, as Trustees.

NOW, THEREFORE, WITNESSETH, that the said Grantors, for valuable consideration, and for the purpose of distributing certain real property from the Alvord L. Cox Family Trust, do by these presents hereby distribute, grant, bargain, sell, convey, and confirm unto the said Grantees, and their heirs and assigns forever, all interest in that certain parcel of land, situate, lying and being in Franklin County, State of Idaho, and more particularly described as follows:

Township 14 South, Range 38 East of the Boise Meridian, Franklin County, Idaho

Section 27: NE $\frac{1}{4}$ SW $\frac{1}{4}$

TOGETHER with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders rents, issues and profits thereof;

TO HAVE AND TO HOLD, all and singular the said premises together with the appurtenances unto the Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and



with the said Grantees, that said Trust is the owner in fee simple of said premises; that they are free from all encumbrances and that said Trust will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantors have hereunto set their hands and seals the day and year first above written.

Alvord L. Cox

ALVORD L. COX, Trustee of the
ALVORD L. COX FAMILY TRUST

Lavene G. Cox

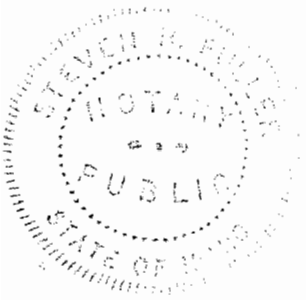
LAVENE G. COX, Trustee of the
ALVORD L. COX FAMILY TRUST

STATE OF IDAHO)
) ss.
County of Franklin)

On this 19th day of August, 1997, before me, the undersigned, a Notary Public in and for said State, personally appeared **ALVORD L. COX and LAVENE G. COX**, known or identified to me to be the persons whose names are subscribed to the within instrument as Trustees of the **ALVORD L. COX FAMILY TRUST** and acknowledged to me that they executed the same as Trustees of the said Trust.

Steven R. Fuller

NOTARY PUBLIC for State of Idaho
Residing at: Preston, ID
Comm. Expires: 2/19/99



204036

WARRANTY DEED

For Value Received

Edward Rice and Helen S. Rice

the grantors do hereby grant, bargain, sell and convey unto

Gary T. Garner and Nola S. Garner

Recorded at the request of

Nola Garner

AM NOV 03 1998 12:30 p.m.

V. ELLIOTT LARSEN, RECORDER
By Shawna Gaddis Deputy
FRANKLIN COUNTY, IDAHO

whose current address is 233 W. 100 N., Clifton, Idaho 83228
the grantees, the following described premises, in Franklin

County Idaho, to wit:

Beginning at the N. W. corner of the S. E. 1/4, of the S. E. 1/4, of
Sec. 27, Township 14 S., Range 38 E., Boise Meridian, thence East
along the existing fence line 718 feet more or less to Hwy 83, thence
South 38 feet, thence West 718 feet more or less, thence North 30 feet
to the point of beginning

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees,
their heirs and assigns forever. And the said Grantors do hereby covenant to and
with the said Grantees, that they are the owners in fee simple of said premises; that they are free
from all incumbrances. None

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: October 30, 1998

Helen S. Rice

Edward S. Rice

STATE OF IDAHO, COUNTY OF

On this 30th day of Oct, 1998,
before me, a notary public in and for said State, personally
appeared

Helen S. & Edward S. Rice

known to me to be the persons whose names
subscribed to the within instrument, and acknowledged to
me that executed the same.

Myra Magle

Residing in Franklin County, Idaho
Comm. Expires 2-1-99

Notary Public



EXHIBIT

H

2046

WARRANTY DEED

Recorded at the request of

Nola Garner

For Value Received

Gary T. Garner and Nola S. Garner

the grantor^s, do hereby grant, bargain, sell and convey unto

Edward Rice and Helen S. Rice

12:25
a.m. NOV 03 1998 p.m.V. ELLIOTT LARSEN, RECORDER
By Shawn Gaddes Deputy
FRANKLIN COUNTY, IDAHOwhose current address is 570 S. Main Hwy, Clifton, Idaho 83228
the grantees, the following described premises, in Franklin

County Idaho, to wit:

Beginning at the N. W. corner of the S.E. 1/4, of the S. E. 1/4, of Sec. 27
Township 14S., Range 38 E., Bolso Meridian, thence South 30 feet to the
true point of beginning, thence South 718 feet along the existing fence line,
thence West 30 feet, thence North 718 feet, thence East 30 feet to the
point of beginning.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees,
their heirs and assigns forever. And the said Grantors do hereby covenant to and
with the said Grantees, that they are the owners in fee simple of said premises; that they are free
from all incumbrances none

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: October 30, 1998

Gary T. Garner
Nola S. Garner

STATE OF IDAHO, COUNTY OF

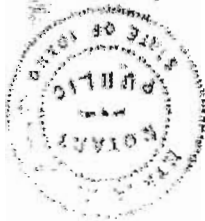
On this 30th day of Oct. 1998
before me, a notary public in and for said State, personally
appeared

Gary & Nola Garner

known to me to be the person whose name
subscribed to the within instrument, and acknowledged to
me that executed the same.

Myra M. Magle
Notary Public
Residing at Franklin County, Idaho
Comm. Expires 2-1-99

FORM COMPLIMENTS OF PRESTON LAND TITLE CO.



EXHIBIT

I

Gordon S. Thatcher (Idaho State Bar #880)
of THATCHER LAW OFFICE, PLLC
Attorneys at Law
116 S. Center
P.O. Box 216
Rexburg, Idaho 83440
Phone: 208 359-5885
FAX: 208 359-5888

FILED
07 JUL 25 PM 1:00
CLERK
DEPUTY

Attorneys for Trustee

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

IN THE MATTER OF A TRUST:) Case No. *CV-07-296*
)
NOLA GARNER LIVING TRUST) **REGISTRATION OF TRUST**
) (Idaho Code Sec. 15-7-102)
) Fee Category: Q.1

NOLA S. GARNER, as Trustee of NOLA GARNER LIVING TRUST, states
and represents:

1. The principal place of administration of the Trust and the place at which the
records of the Trust are kept is:

NOLA S. GARNER
44 North 2nd West
Clifton, Idaho, Idaho 83328

2. The Trust has not been registered elsewhere.

3. The Trust is an inter vivos (living) trust; the Settlor (Trustmaker) of the Trust
is NOLA S. GARNER; the Trust is revocable; the name of the Trust is NOLA
GARNER LIVING TRUST; and the Trust is governed by Articles of Trust dated July
19, 2007.

4. NOLA S. GARNER hereby acknowledges the existence of the Trust and
submits to the jurisdiction of the Court in any proceeding relating to the Trust that may
be instituted by any interested person.



DATE: July 19, 2007

Nola S. Garner
NOLA S. GARNER

PR12748

207408

WARRANTY DEED

Recorded at the request of

First American Title Co.

For Value Received Brad L. Povey and Leiza Povey husband and wife

Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto

Hal J. Dean and Marlene T. Dean husband and wife,

whose address is: 608 South Main St., Clifton, Id 83228

12:15
a.m. AUG 30 1999 p.m.

V. ELLIOTT LARSEN, RECORDER

By Ruth K. Pauling Deputy
FRANKLIN COUNTY, IDAHO

Hereinafter called the Grantee, the following described premises situated in Franklin County, ID, to-wit:

Township 14 South, Range 38 East of the Boise Meridian, Franklin County, Idaho

Section 27: Beginning at a point 946.25 feet West and South 0°06' East 419.10 feet from the Northeast corner of the SE1/4 of said Section 27, and running thence East 185 feet, more or less, to the West line of Highway right of way; thence South 11°11' East along the West right of way line of Highway 150.5 feet, more or less, to the South line of an existing right of way; thence West 195 feet, more or less, to a point 164.5 feet South of the POINT OF BEGINNING; thence North 164.5 feet to the POINT OF BEGINNING.

SUBJECT TO all easements, right of ways, covenants, restrictions, reservations, applicable building and zoning ordinances and use regulations and restrictions of record, and payment of accruing present year taxes and assessments as agreed to by parties above.

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 said premises are free from all encumbrances except current years taxes, levies, and assessments, and except U. S. Patent reservations, restrictions, easements of record, and easements visible upon the premises, and that Grantor will warrant and defend the same from all claims whatsoever.

Dated: August 27, 1999

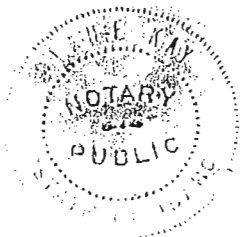
Brad L. Povey
Brad L. Povey

Leiza Povey
Leiza Povey

STATE OF IDAHO)
COUNTY OF FRANKLIN)

On this 27th day of August, 1999, before me, a Notary Public in and for said State, personally appeared BRAD L. POVEY and LEIZA POVEY, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same. In witness whereof I have set my hand and affixed my official seal the day and year in this certificate first above written.

Diana Kay
Notary Public
Residing at: Swan Lake, Id
Comm. expires: 5/25/2000



63



208652

WARRANTY DEED

For Value Received BRAD L. POVEY and LEIZA POVEY, husband and wife

the grantor s, do hereby grant, bargain, sell and convey unto HAL J. DEAN and
MARLENE T. DEAN, husband and wife,

whose current address is 608 South Main St., Clifton, Idaho 83228
the grantee s, the following described premises, in Franklin County Idaho, to wit:

Township 14 South, Range 38 East, of the Boise Meridian,
Franklin County, Idaho

Section 27: Beginning at a point 946.25 feet West, and
South 0 degrees 06' East 419.10 feet from the Northeast corner
of the Southeast quarter of said Section 27, and running thence
South 152.5 feet, more or less, to the North line of an existing
right of way, thence Westerly along this right of way 198.6 feet,
more or less, to a point in line with the West side of an
existing shed, thence North along said line 160 feet, more or
less, to an existing fence, thence East along said fence
198.5 feet, more or less, to the point of beginning.

Recorded at the request of

Brad Povey

8 P.M. DEC 30 1999 1:00 P.M.

V. ELLIOTT LARSEN, RECORDER
By Camille Larsen Deputy
FRANKLIN COUNTY, IDAHO

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee s,
their heirs and assigns forever. And the said Grantor s do hereby covenant to and
with the said Grantee s, that they are the owners in fee simple of said premises; that they are free
from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: December 28, 1999

Brad L. Povey

Leiza Povey

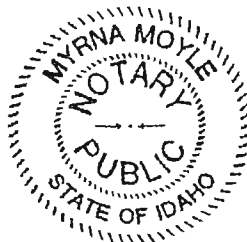
STATE OF IDAHO, COUNTY OF

On this 28th day of Dec. , 1999,
before me, a notary public in and for said State, personally
appeared

Brad L. & Leiza Povey

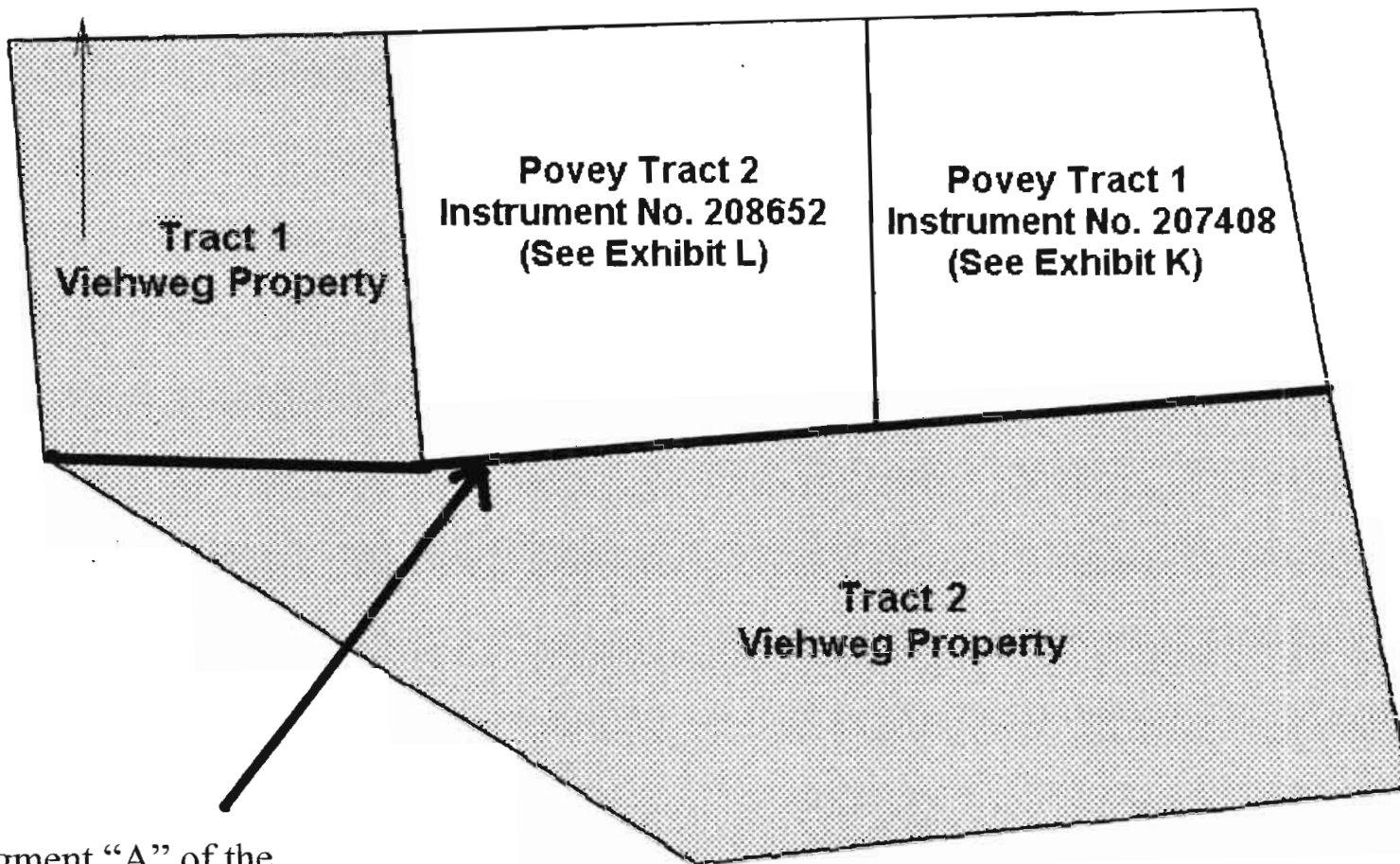
known to me to be the person s whose name s
subscribed to the within instrument, and acknowledged to
me that they executed the same.

Myrna Moyle
Residing at Franklin County, Idaho
Comm. Expires 01-28-05
Notary Public



EXHIBIT

L



65



212784 ¹³

Recorded at the request of
FIRST AMERICAN TITLE

APR 05 2001 3:20 P.M.

CORRECTED WARRANTY DEED ELIOTT L. CORNELIUS, Notary Public
By Camille Spier Deputy
FRANKLIN COUNTY, IDAHO

FOR VALUE RECEIVED

BRAD L. POVEY and LEIZA POVEY, husband and wife,

do hereby grant, bargain, sell and convey unto

JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, husband and wife,

whose current address is: 202 Pony Ct., Pope Valley, CA 94567,
the Grantees, the following described premises in Franklin County,
Idaho to wit:

SEE ATTACHED EXHIBIT "A"

TO HAVE AND TO HOLD the said premises, with their appurtenances
unto the Grantee, his heirs and assigns forever. And the said
Grantors do hereby covenant to and with the said Grantees, that
they are the owners in fee simple of said premises; that they are
free from all encumbrances and that they will warrant and defend
the same from all lawful claims whatsoever.

DATED: March 22, 2001

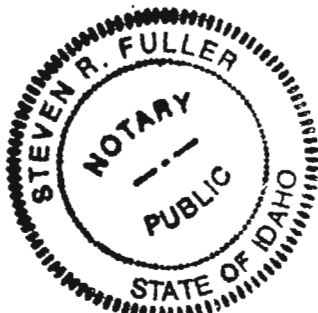
Brad L. Povey
BRAD L. POVEY

Leiza Povey
LEIZA POVEY

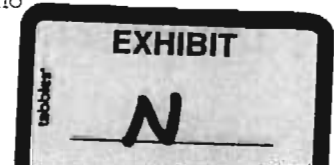
STATE OF IDAHO)

County of Franklin)

On this 22nd day of March, 2001, before me, the undersigned a Notary
Public in and for said State, personally appeared BRAD L. POVEY and LEIZA POVEY,
known to me to be the persons whose names are subscribed to the within instrument and
acknowledged to me that they executed the same.



Steven R. Fuller
NOTARY PUBLIC for State of Idaho
Residing at: Preston, Idaho
Comm. Exp.: 2/19/05



66

Township 14 South, Range 38 East of the Boise Meridian, Franklin County, Idaho

Section 27: NW $\frac{1}{4}$ SE $\frac{1}{4}$. ALSO, Commencing at a point 1323.25 feet West and 419.10 feet South 0 06' East of Northeast corner SE $\frac{1}{4}$ of Section 27, running thence South 0 06' East 900.9 feet; thence East 770.819 feet; thence North 11 11' West 918.53 feet; thence West 594.98 feet to the place of beginning.

(1) EXCEPTING THEREFROM: Beginning at the Southwest corner of the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 27, Township 14 South, Range 38 East of the Boise Meridian, thence East to the Southeast corner of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 27, thence North to the Northeast corner of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 27, thence East to the East side of the Twin Lakes Canal, thence Northwesterly along the East edge of the Twin Lakes Canal to a point on the East-West centerline of Section 27, thence West to the centerpoint of Section 27, thence South to the Southeast corner of the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 27, thence West to the Northwest corner of the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 27, thence South to the POINT OF BEGINNING. EXCEPT for a 16-foot right-of-way to access the irrigation outlet from Twin Lakes Canal located in the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 27.

(2) ALSO EXCEPTING: Commencing at the Northeast corner of said SE $\frac{1}{4}$ of Section 27, as filed for record as Instrument No. 208970 in the Office of the Franklin County Clerk and Recorder; thence West a distance of 1323.25 feet; thence South 00 06'00" East a distance of 419.10 feet; thence East a distance of 33.58 feet to the POINT OF BEGINNING; thence continuing East a distance of 508.20 feet; thence South 11 20'30" East along the Westerly Right-of-way line of the West Side Highway a distance of 317.50 feet; thence along the following three described Courses:

- 1) South 84 11'00" West a distance of 293.84 feet;
- 2) North 57 45'00" West a distance of 312.25 feet;
- 3) North 04 40'00" West a distance of 175.04 feet to the POINT OF BEGINNING; together with an easement for a roadway 20 feet in width lying adjacent to and along the South and West side of the above-described courses 1) and 2) to be

(continued)

→ used by the Grantees, Daniel Garner and the Grantors, their heirs, successors and assigns for general ingress and egress purposes. Said easement shall continue in a westerly direction to a bridge located on the Twin Lakes Canal accessing the Daniel Garner premises.

- (3) Also, Grantors hereby convey to Grantees an easement 10 feet in width to excavate, maintain and repair buried utility lines (water, phone and electrical), said easement being more particularly described as follows: Township 14 South, Range 38 East of the Boise Meridian, Section 27: Commencing at the NE corner of the SE $\frac{1}{4}$ of Section 27, as filed for record at Instrument No. 208970 in the office of the Franklin County Clerk and Recorder; thence West a distance of 1323.25 feet; thence South 00 06'00" East a distance of 419.10 feet; thence East a distance of 33.58 feet; thence South 04 40'00" East a distance of 175.04 feet to the Point of Beginning; thence South 88 02'30" East a distance of 154.44 feet; thence North 85 01'10" East a distance of 370.61 feet to the right-of-way line of the West Side Hwy.
- (4) SUBJECT TO an easement 10 feet in width for the installation, repair, replacement and maintenance of a collection/diversion box and buried irrigation mainline for the use of the Grantors, the Grantees, H. Miles Geddes and Rodney B. Vaterlaus, and Bill Rich, their heirs, successor and assigns located along the South and East boundaries of the premises conveyed hereunder to Grantees. The use of said irrigation system is subject to the terms of an "Agreement" and "Modification to Agreement" recorded as Instrument Nos. 135710 and 201269, respectively, in the records of Franklin County, Idaho.

Together with 16 shares of stock in Twin Lakes Canal company.

THIS DEED IS BEING RECORDED TO CORRECT THE LEGAL DESCRIPTION ON THAT CERTAIN DEED DATED SEPTEMBER 6, 2000, AND RECORDED SEPTEMBER 21, 2000, AS INSTRUMENT NO. 210956 IN THE RECORDS OF FRANKLIN COUNTY, IDAHO.



Recorded at the request of
Steven R. Fuller

____ a.m. NOV 01 2005 p.m. 3:00

WARRANTY DEED

V. ELLIOTT LARSEN, RECORDER
 By Ruth K. Rawling Deputy
 FRANKLIN COUNTY, IDAHO

FOR VALUE RECEIVED

BRAD L. POVEY and **LEIZA POVEY**, Grantors,

do hereby grant, bargain, sell and convey unto

DOUGLAS K. VIEHWEG and **SHARON C. VIEHWEG**, whose current address is:
 5601 West 155th Street, Overland Park, Kansas 66223,

Grantees, their interest in the following described premises in Franklin County, Idaho to wit:

SEE ATTACHED EXHIBIT "A"

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises; that they are free from all encumbrances and that they will warrant and defend the same from all lawful claims whatsoever.

DATED: October 4, 2005.

Brad L. Povey
 Brad L. Povey

Leiza Povey
 Leiza Povey

STATE OF IDAHO)
) ss.
 County of Franklin)

On this 4th day of October, 2005, before me, the undersigned, a Notary Public in and for said State, personally appeared BRAD L. POVEY and LEIZA POVEY known or identified to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

STEVEN R. FULLER
 NOTARY PUBLIC
 STATE OF IDAHO

Steven R. Fuller
 NOTARY PUBLIC for State of Idaho
 Residing at: Preston, Idaho
 Comm. Exp: 1/21/11

EXHIBIT

P

231836 2.2

EXHIBIT "A"

PARCEL 1: A PARCEL OF LAND BEING A PORTION OF THAT LARGER PARCEL OF LAND PREVIOUSLY DESCRIBED AT INSTRUMENT NO. 196512 IN THE OFFICE OF THE FRANKLIN COUNTY CLERK AND RECORDER, LYING ENTIRELY WITHIN THE SOUTHEAST ONE-QUARTER OF SECTION 27, TOWNSHIP 14 SOUTH, RANGE 38 EAST IN THE CITY OF CLIFTON, FRANKLIN COUNTY, IDAHO, AND BEING MORE PARTICULARLY AS FOLLOWS:

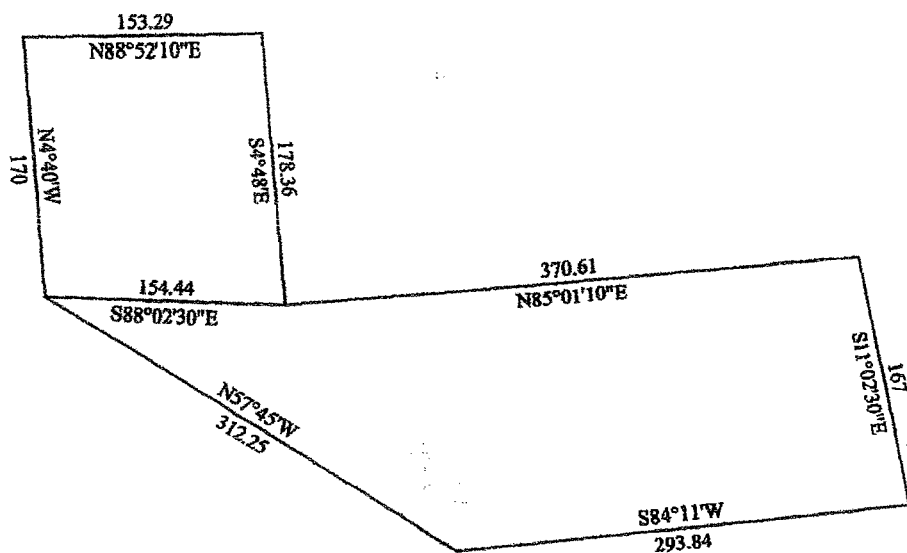
COMMENCING AT THE NE CORNER OF SAID SE 1/4 OF SECTION 27, AS FILED FOR RECORD AT INSTRUMENT NO. 208970 IN THE SAID FRANKLIN COUNTY RECORDS; THENCE WEST A DISTANCE OF 780.74 FEET; THENCE S 00°06'00" E A DISTANCE OF 419.10 FEET TO A POINT ON THE WESTERLY RIGHT-OF-WAY LINE OF THE WESTSIDE HIGHWAY, A PUBLIC ROAD; THENCE S 89°40'38" W A DISTANCE OF 354.54 FEET TO THE POINT OF BEGINNING; THENCE S 04°48'00" E A DISTANCE OF 178.36 FEET; THENCE N 88°02'30" W A DISTANCE OF 154.44 FEET; THENCE N 04°40'00" W A DISTANCE OF 170.00 FEET; THENCE N 88°52'10" E ALONG AN EXISTING FENCE LINE A DISTANCE OF 153.29 FEET TO THE POINT OF BEGINNING; CONTAINING 0.61 ACRE.

PARCEL 2: A PARCEL OF LAND BEING A PORTION OF THAT LARGER PARCEL OF LAND PREVIOUSLY DESCRIBED AT INSTRUMENT NO. 196512 IN THE OFFICE OF THE FRANKLIN COUNTY CLERK AND RECORDER, LYING ENTIRELY WITHIN THE SOUTHEAST ONE-QUARTER OF SECTION 27, TOWNSHIP 14 SOUTH, RANGE 38 EAST IN THE CITY OF CLIFTON, FRANKLIN COUNTY, IDAHO, AND BEING MORE PARTICULARLY AS FOLLOWS:

COMMENCING AT THE NE CORNER OF SAID SE 1/4 OF SECTION 27, AS FILED FOR RECORD AT INSTRUMENT NO. 208970 IN THE SAID FRANKLIN COUNTY RECORDS; THENCE WEST A DISTANCE OF 780.74 FEET; THENCE S 00°06'00" E A DISTANCE OF 419.10 FEET TO A POINT ON THE WESTERLY RIGHT-OF-WAY LINE OF THE WESTSIDE HIGHWAY, A PUBLIC ROAD; THENCE S 11°20'30" E ALONG SAID WESTERLY RIGHT-OF-WAY LINE A DISTANCE OF 150.50 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING S 11°02'30" E ALONG SAID WESTERLY RIGHT-OF-WAY LINE A DISTANCE OF 167.00 FEET; THENCE S 84°11'00" W A DISTANCE OF 293.84 FEET; THENCE N 57°45'00" W A DISTANCE OF 312.25 FEET; THENCE S 88°02'30" E A DISTANCE OF 154.44 FEET; THENCE N 85°01'10" E A DISTANCE OF 370.61 FEET TO THE POINT OF BEGINNING; CONTAINING 1.56 ACRES, AND BEING SUBJECT TO A 10 FOOT UTILITY EASEMENT PARALLEL AND ADJACENT TO THE NORTH BOUNDARY OF SAID DESCRIBED PARCEL.

SUBJECT TO AN EASEMENT 10 FEET IN WIDTH FOR A BURIED IRRIGATION PIPELINE AND A RIGHT OF ACCESS THERETO FOR MAINTENANCE AND REPAIR, BEGINNING ALONG THE EAST BOUNDARY OF THE ABOVE PREMISES AND RUNNING IN A NORTHWESTERLY DIRECTION TO THE PROPERTY LYING NORTH OF THE ABOVE DESCRIBED PREMISES.

TOGETHER WITH 2 SHARES OF THE CAPITAL STOCK OF TWIN LAKES CANAL COMPANY



Title:

Date: 12-07-2005

Scale: 1 inch = 125 feet

File: VIEHWEG D 231836 #3155.des

+Tract 1: 0.613 Acres: 26682 Sq Feet: Closure = s45.2443w 0.01 Feet: Precision = 1/112140: Perimeter = 656 Feet

+Tract 2: 1.565 Acres: 68171 Sq Feet: Closure = n78.5347e 0.88 Feet: Precision = 1/1480: Perimeter = 1298 Feet

Net Area= 2.178 Acres: 94854 Sq Feet

001=/NE,SE,27,14S,38E

008=N88.5210E 153.29

015=S84.11W 293.84

002=/N90W 780.74

009=@0+

016=N57.45W 312.25

003=/S.06E 419.10

010=/NE,SE,27,14S,38E

017=S88.0230E 154.44

004=/S89.4038W 354.54

011=/N90W 780.74

018=N85.0110E 370.61

005=S4.48E 178.36

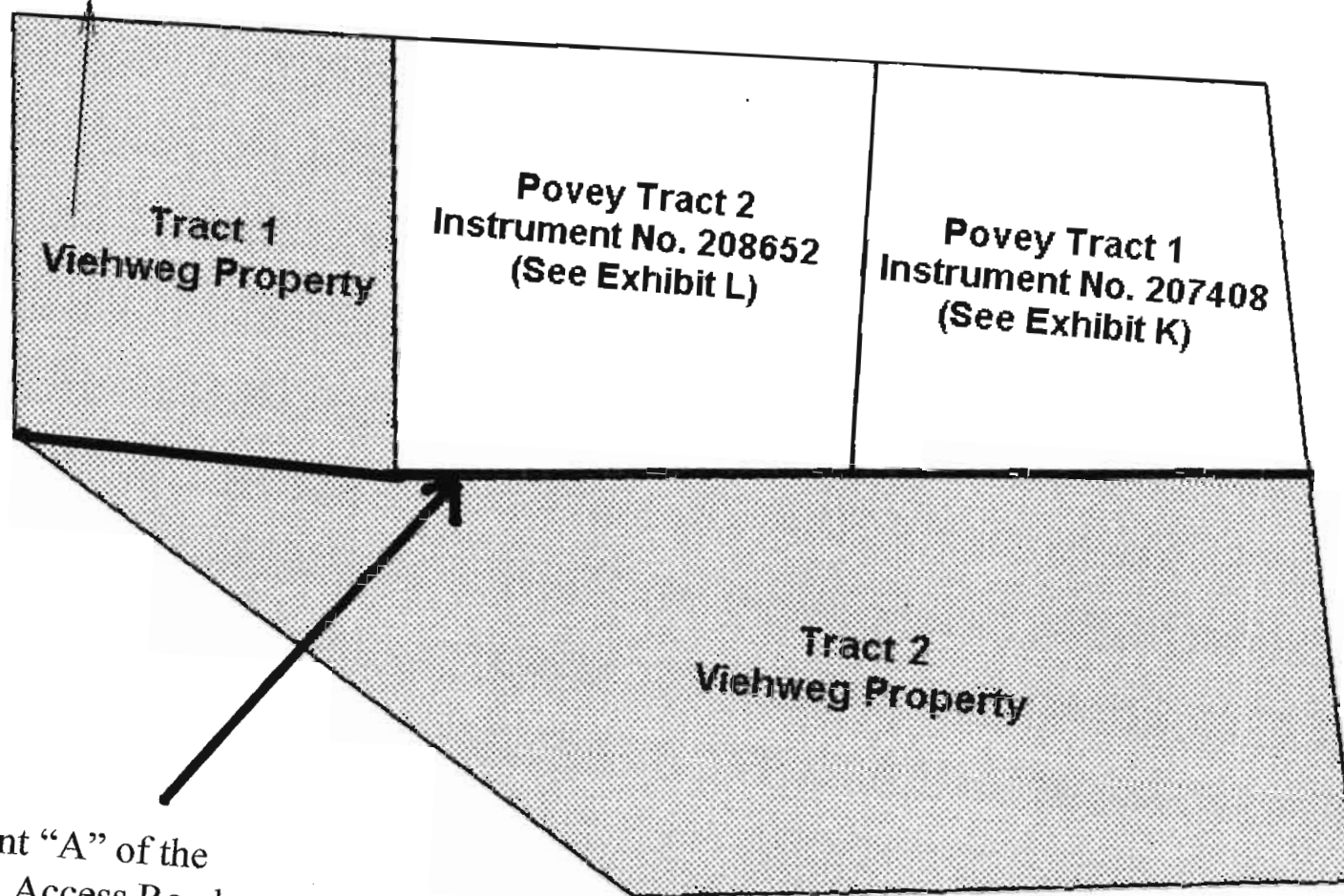
012=/S.06E 419.10

006=**N88.0230W 154.44

013=/S11.2030E 150.50

007=N4.40W 170

014=S11.0230E 167



Segment "A" of the
Original Access Road



Form No. 1402 (1/70)
ALTA Owner's Policy
Form B -- 1970
(Amended 10-17-70)

FIRST AMERICAN

POLICY OF TITLE INSURANCE

ISSUED BY

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. any defect in or lien or encumbrance on such title;
3. lack of a right of access to and from the land; or
4. unmarketability of such title.

IN WITNESS WHEREOF, First American Title Insurance Company has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A.

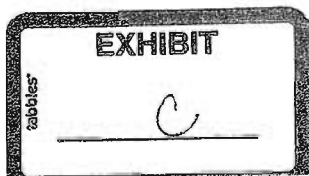
First American Title Insurance Company

BY  PRESIDENT

ATTEST  SECRETARY

PRESTON LAND TITLE COMPANY

By: 



SCHEDULE OF EXCLUSIONS FROM COVERAGE

THE FOLLOWING MATTERS ARE EXPRESSLY EXCLUDED FROM THE COVERAGE OF THIS POLICY:

1. ANY LAW, ORDINANCE OR GOVERNMENTAL REGULATION (INCLUDING BUT NOT LIMITED TO BUILDING AND ZONING ORDINANCES) RESTRICTING OR REGULATING OR PROHIBITING THE OCCUPANCY, USE OR ENJOYMENT OF THE LAND, OR REGULATING THE CHARACTER, DIMENSIONS OR LOCATION OF ANY IMPROVEMENT NOW OR HEREAFTER ERECTED ON THE LAND, OR PROHIBITING A SEPARATION IN OWNERSHIP OR A REDUCTION IN THE DIMENSIONS OR AREA OF THE LAND, OR THE EFFECT OF ANY VIOLATION OF ANY SUCH LAW, ORDINANCE OR GOVERNMENTAL REGULATION.
2. RIGHTS OF EMINENT DOMAIN OR GOVERNMENTAL RIGHTS OF POLICE POWER UNLESS NOTICE OF THE EXERCISE OF SUCH RIGHTS APPEARS IN THE PUBLIC RECORDS AT DATE OF POLICY.
3. DEFECTS, LIENS, ENCUMBRANCES, ADVERSE CLAIMS, OR OTHER MATTERS (a) CREATED, SUFFERED, ASSUMED OR AGREED TO BY THE INSURED CLAIMANT; (b) NOT KNOWN TO THE COMPANY AND NOT SHOWN BY THE PUBLIC RECORDS BUT KNOWN TO THE INSURED CLAIMANT EITHER AT DATE OF POLICY OR AT THE DATE SUCH CLAIMANT ACQUIRED AN ESTATE OR INTEREST INSURED BY THIS POLICY AND NOT DISCLOSED IN WRITING BY THE INSURED CLAIMANT TO THE COMPANY PRIOR TO THE DATE SUCH INSURED CLAIMANT BECAME AN INSURED HEREUNDER; (c) RESULTING IN NO LOSS OR DAMAGE TO THE INSURED CLAIMANT; (d) ATTACHING OR CREATED SUBSEQUENT TO DATE OF POLICY; OR (e) RESULTING IN LOSS OR DAMAGE WHICH WOULD NOT HAVE BEEN SUSTAINED IF THE INSURED CLAIMANT HAD PAID VALUE FOR THE ESTATE OR INTEREST INSURED BY THIS POLICY.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule C, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule C, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law impart constructive notice of matters relating to said land.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

3. DEFENSE AND PROSECUTION OF ACTIONS - NOTICE OF CLAIM TO BE GIVEN BY AN INSURED CLAIMANT

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an

insured in all litigation consisting of actions or proceedings commenced against such insured, or a defense interposed against an insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

(d) Whenever the Company shall have brought any action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

4. NOTICE OF LOSS - LIMITATION OF ACTION

In addition to the notices required under paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

5. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment, by the insured claimant and authorized by the Company.

6. DETERMINATION AND PAYMENT OF LOSS

(a) The liability of the Company under this policy shall in no case exceed the least of:

(i) the actual loss of the insured claimant; or

(ii) the amount of insurance stated in Schedule A.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such insured with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

(Continued on inside back cover)

75

CONDITIONS AND STIPULATIONS

(Continued from inside front cover)

7. LIMITATION OF LIABILITY

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

8. REDUCTION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company.

9. LIABILITY NONCUMULATIVE

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a lien on the estate or interest covered by this policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy. The Company shall have the option to apply to the payment of any such mortgages any amount that otherwise would be payable hereunder to the insured owner of the estate or interest covered by this policy and the amount so paid shall be deemed a payment under this policy to said insured owner.

10. APPORTIONMENT

If the land described in Schedule C consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of said parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each such parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement herein or by an endorsement attached hereto.

11. SUBROGATION UPON PAYMENT OR SETTLEMENT

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

12. LIABILITY LIMITED TO THIS POLICY

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

13. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at its main office at 421 North Main Street, Santa Ana, California, or to the office which issued this policy.

SCHEDULE A

Total Fee for Title Search, Examination
and Title Insurance \$ 301.00

Amount of Insurance: \$ 54,000.00

Policy No. D 265435
4-4133-G

Date of Policy: May 28, 1987, at 11:15 A.M.

1. Name of Insured: DANIEL S. GARNER
2. The estate or interest referred to herein is at Date of Policy vested in:
DANIEL S. GARNER, a single man.
3. The estate or interest in the land described in Schedule C and which is covered by this policy is:
Fee simple.

SCHEDULE B

Policy No. D 265435
4-4133-G

This policy does not insure against loss or damage by reason of the matters shown in parts one and two following:

Part One:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Easements, claims of easement or encumbrances which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.
5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.
6. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.

Part Two:

1. General Taxes for the year 1987 and subsequent years which are an accruing lien not yet due or payable. Liability for additional assessment and subsequent tax billing if any, pursuant to Idaho Code Sections 63-403 and 63-3906.
2. Right, title and interest of the public in and to those portions of above-described premises falling within the bounds of roads or highways.
3. The effect of and conditions contained in PIPELINE EASEMENT AGREEMENT by and between OREGON SHORT LINE RAILROAD COMPANY - UNION PACIFIC RAILROAD COMPANY, and RALPH R. McCULLOCH, recorded September 29, 1976, as Microfilm Instrument No. 140866, records of Franklin County, Idaho. Said Easement being for water pipeline (Construction, operation and maintenance) extending underground across the right-of-way and underneath the road bed and track.
4. Any claim arising from the expanded use of the Oregon Short Line Railroad right-of-way due to the original grant given by the United States of America to the Utah and Northern Railway Company.

SCHEDULE C

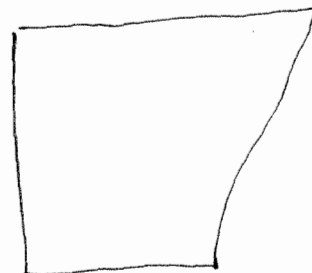
The land referred to in this policy is situated in the State of Idaho
County of Franklin

and is described as follows:

Township 14 South, Range 38 East of the Boise Meridian
Section 34: NE $\frac{1}{4}$ NW $\frac{1}{4}$.

Section 35: Commencing at the Northwest corner of the Northeast Quarter of Section 35, and running thence South 160 rods, thence East 38 rods, more or less, to the West line of the Oregon Short Line Railroad right-of-way, thence Northerly along the West line of said railroad right-of-way to the North line of said Section 35, thence West 31 rods, more or less, to the place of beginning.

ALSO, all that part of the Southeast Quarter of Section 35, lying West of the Oregon Short Line Railroad right-of-way.



AFTER RECORDING PLEASE RETURN TO:
JEFFERY & KATHLEEN NEIGUM
636 S. MAIN HWY.
CLIFTON, IDAHO 83228

227649-3

WARRANTY DEED

JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, Grantors of Clifton, Franklin County, State of Idaho, hereby CONVEY AND WARRANT to JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, or their Successors, as Trustees of the JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST dated September 17th 2004, Grantees of 636 S. Main Hwy., Clifton, Idaho 83228, for the sum of Ten Dollars (\$10.00), and other good and valuable consideration, the following described tract of land in Franklin County, State of Idaho:

SEE ATTACHED EXHIBIT "A"

DATED this 17th day of September, 2004.

Recorded at the request of

Smith Law Offices

AM OCT 04 2004 2:35 PM

V. ELLIOTT LARSEN, RECORDER

By Camille Larsen Deputy

FRANKLIN COUNTY, IDAHO

STATE OF UTAH)

: ss.

County of Cache)

Jeffery J. Neigum
JEFFERY J. NEIGUM

Kathleen A. Neigum
KATHLEEN A. NEIGUM

On the 17th day of September, 2004, personally appeared before me JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, the signers of the within instrument, who duly acknowledged to me that they executed the same.

Jennifer Yarbrough
Notary Public

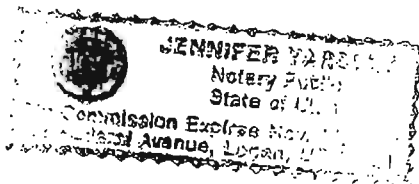


EXHIBIT "A"

2276492-3

Township 14 South, Range 38 East of the Boise Meridian, Franklin County, Idaho

Section 27: NW¼SE¼. ALSO, Commencing at a point 1323.25 feet West and 419.10 feet South 0°06' East of Northeast corner SE¼ of Section 27, running thence South 0°06' East 900.9 feet; thence East 770.819 feet; thence North 11°11' West 918.53 feet; thence West 594.98 feet to the place of beginning.

- (1) EXCEPTING THEREFROM: Beginning at the Southwest corner of the SE¼ of the SW¼ of Section 27, Township 14 South, Range 38 East of the Boise Meridian, thence East to the Southeast corner of the SW¼ of the SE¼ of Section 27, thence North to the Northeast corner of the SW¼ of the SE¼ of Section 27, thence East to the East side of the Twin Lakes Canal, thence Northwesterly along the East edge of the Twin Lakes Canal to a point on the East-West centerline of Section 27, thence West to the centerpoint of Section 27, thence South to the Southeast corner of the NE¼ of the SW¼ of Section 27, thence West to the Northwest corner of the SE¼ of the SW¼ of Section 27, thence South to the POINT OF BEGINNING. EXCEPT for a 16-foot right-of-way to access the irrigation outlet from Twin Lakes Canal located in the NW¼ of the SE¼ of Section 27.
- (2) ALSO EXCEPTING: Commencing at the Northeast corner of said SE¼ of Section 27, as filed for record as Instrument No. 208970 in the Office of the Franklin County Clerk and Recorder; thence West a distance of 1323.25 feet; thence South 00°06'00" East a distance of 419.10 feet; thence East a distance of 33.58 feet to the POINT OF BEGINNING; thence continuing East a distance of 508.20 feet; thence South 11°20'30" East along the Westerly Right-of-way line of the West Side Highway a distance of 317.50 feet; thence along the following three described Courses:
 - 1) South 84°11'00" West a distance of 293.84 feet;
 - 2) North 57°45'00" West a distance of 312.25 feet;
 - 3) North 04°40'00" West a distance of 175.04 feet to the POINT OF BEGINNING; together with an easement for a roadway 20 feet in width lying adjacent to and along the South and West side of the above-described courses 1) and 2) to be used by the Grantees, Daniel Garner and the Grantors, their heirs, successors and assigns for general ingress and egress purposes. Said easement shall continue in a westerly direction to a bridge located on the Twin Lakes Canal accessing the Daniel Garner premises.
- (3) Also, Grantors hereby convey to Grantees an easement 10 feet in width to excavate, maintain and repair buried utility lines (water, phone and electrical), said easement being more particularly described as follows: Township 14 South, Range 38 East of the Boise Meridian, Section 27; Commencing at the NE corner of the SE¼ of Section 27, as filed for record as Instrument No. 208970 in the office of the Franklin County Clerk and Recorder; thence West a distance of 1323.25 feet; thence South 00°06'00" East a distance of 419.10 feet; thence East a distance of 33.58 feet; thence South 04°40'00" East a distance of 175.04 feet to the Point of Beginning; thence South 88°02'30" East a distance of 154.44 feet; thence North 85°01'10" East a distance of 370.61 feet to the right-of-way line of the West Side Hwy.

Exhibit "A" Continued

227649³⁻³

- (4) SUBJECT TO an easement 10 feet in width for the installation, repair, replacement and maintenance of a collection/diversion box and buried irrigation mainline for the use of the Grantors, the Grantees, H. Miles Geddes and Rodney B. Vaterlaus, and Bill Rich, their heirs, successor and assigns located along the South and East boundaries of the premises conveyed hereunder to Grantees. The use of said irrigation system is subject to the terms of an "Agreement" and "Modification to Agreement" recorded as Instrument Nos. 135710 and 201269, respectively, in the records of Franklin County, Idaho.

Together with 16 shares of stock in Twin Lakes Canal company.



*First American
Title Insurance Company*

PHIL E. DE ANGELI
STATE COUNSEL-IDAHO

March 14, 2008

Daniel Garner
3579 N. Westside Hwy.
Clifton, ID 83228

Re: *Douglas K. Viehweg
Our File No. 07-121*

Dear Mr. Garner:

Doug and Shari Viehweg have requested First American's assistance with regard to a matter regarding access on their property in Preston.

First American issued a policy of title insurance to the Viehwegs, at the time they purchased their property. At that time, First American investigated the state of the property. During that investigation, at no time was there discovered an easement on the North side of the property to be used for ingress and egress. This easement is solely to be used for utilities. Enclosed herewith is a copy of that easement.

Mr. and Mrs. Viehweg have made us aware that you claim some interest in an ingress egress easement along the North border of the property. Our research reveals that there was a warranty deed recorded on May 28, 1987 and then a later contract recorded on July 8, 1987. While the contract does contain an extremely vague reference to an access easement over the property, no particular area of the easement is identified. Moreover, the terms of the contract were merged out, once the warranty deed was delivered and recorded.

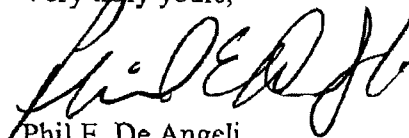
Therefore, based upon the multiple other accesses, particularly the twenty foot access along the South of the Viehweg's property, First American is asking that you no longer use or attempt to use the utility easement for ingress egress purposes. If there is some reason to access the utility easement related to the maintenance or repair of utilities, then that easement is useable. However, continued use of the utility easement for ingress egress will only result in First American filing suit on behalf of the Viehwegs against you to have the state of the property declared by a court. This is the option I least wish to take because it involves everyone's time, emotional output, and expenditure of funds.



Daniel Garner
March 14, 2008
Page Two

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Phil E. De Angeli
Idaho State Counsel

PED/dcd

March 24, 2008

Mr. De Angeli,

I am responding to a letter written by you, on behalf of Douglas K. Viehweg, your file No. 07-121. This property is in Clifton, not Preston.

Let me first start by declaring that Yes, I have a easement that starts on the Dean property to the north of Mr. Viehweg's and then cuts through the middle of his parcel. I have no intentions of giving up this purchased easement or to stop using it.

I would also like to clarify that though this is a utility easement for some, for me and others this is are only access to farm the ground, which we purchased. This is why twenty feet is not adequate, since when in grain the equipment used has been larger than 20 feet. This ground is also used to winter cattle and if fences where put up the 20 feet would dwindle with the removal of snow. These were not problems before, however I can see they are becoming and will be increasingly more so.

It troubles me that First American investigated this purchase and failed to find this easement. There are at least eight implied easements that I know of that use this same road, and at least six for sure used First American as their title insurance choice. If you go back two transactions on one parcel you discover that the road was a BLM easement. My transaction, which bought this easement, was also insured through First American. This now worries me for the twenty plus transaction that my family has counted on First American to do the research and insure.

Back to the matter at hand. You stated that the easement contained in instrument No. 175876 was, "extremely vague". I disagree, it clearly states that the easement is along an existing roadway. Aerial photos taken at the time of the sale clearly show this road, as it was a main road that was built for Mr. McCulloch's dairy, and had to be able to handle milk trucks



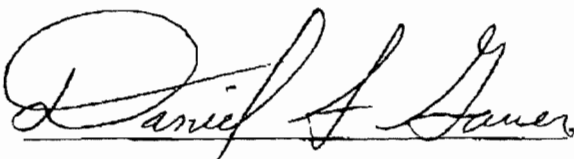
weighing eighty thousand pounds. I would appreciate it if you would advise your client to put the road back in the condition it was in before Mr. Povey plowed up a section of it. I assume, to make this sale. Yes I did complain to Mr. Povey when this was done.

I also informed Mr. Povey that I was not willing to move or relocate my easement to the property south of Mr. Viehweg's, located on Mr. Neigum's, which by the way also was done though First American. This was done before this sale. This I assume, is the other easement that you refer to that you claim "merged" out the old one when the warranty deed was recorded. This, I find hard to believe, considering I did not agree and even objected too moving the easement. I would be shocked if a court would allow an easement to be changed at the whim of a bunch of third parties with out even involving the parties that purchased, or set up the easement to begin with.

As you can see this situation is a mess. I resent that it has come to this when a little bit of research, or, just asking the adjacent property owner would have clarified the situation. As it is, this encroachment of growth on this parcel has limited, and hindered my ability to access my property. The number of people that use the road has grown, as has the number of people's property that the road goes through. This change in the easement would benefit Mr. Viehweg and Mr. Dean. I however only see disadvantages for me.

I have talked to a lawyer concerning these problems, as I know others have, but perhaps a solution can still be worked out instead of litigation. I am willing to meet with others that are involved to talk about options; if they would like. As this is such a big mess involving First American, maybe meeting at the office in Preston would be the best option.

Respectfully,

A handwritten signature in cursive script, reading "Daniel S. Garner". The signature is written in dark ink and is positioned above the printed name.

Daniel S. Garner

Michael D. Gaffney, ISB No. 3558
Jeffrey D. Brunson, ISB No. 6996
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, ID 83404-7495
Tel: (208) 523-5171
Fax: (208) 529-9732
Email: gaffney@beardstclair.com
jeff@beardstclair.com

Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife, and Nola Garner as
Trustee of the Nola Garner Living Trust,

Plaintiffs,

vs.

Hal J. Dean and Marlen T. Dean, husband
and wife, Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife, Jeffery J.
Neigum and Kathleen A. Neigum,
husband and wife, Brad Povey and Lezia
Povey, husband and wife, First American
Title Company, an Idaho Corporation, and
their heirs, personal representatives,
successors and assigns, and John Does and
Jane Does being any and all those who
may claim right in the property described
in the complaint that being Twp. 14 S.,
Rge. 38 E., Boise Mer., Franklin County,
Idaho;

Sec. 27: NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$,
W $\frac{1}{2}$ SW $\frac{1}{4}$, Part of NW $\frac{1}{4}$ SE $\frac{1}{4}$ described as
follows:

Beginning at the Southwest corner of
NW $\frac{1}{4}$ SE $\frac{1}{4}$ and running thence East to the

Case No. CV-08-342

STIPULATION FOR USE OF
REPLACEMENT ACCESS ROAD
DURING PENDENCY OF ACTION



East edge of the Twin Lakes Canal; thence Northwesterly along the East edge of the canal to the North line of NW $\frac{1}{4}$ SE $\frac{1}{4}$; thence West to the Northwest corner of NW $\frac{1}{4}$ SE $\frac{1}{4}$; thence South to the point of beginning.

SW $\frac{1}{4}$ SE $\frac{1}{4}$, saving and excepting therefrom:

Beginning at a point 30 feet South of the Northeast corner of SW $\frac{1}{4}$ SE $\frac{1}{4}$, and running thence South 718 feet along the existing fence line; thence West 30 feet; thence North 718 feet; thence East 30 feet to the point of beginning.

Part of SE $\frac{1}{4}$ SE $\frac{1}{4}$ described as follows: Beginning at the Northwest corner of SE $\frac{1}{4}$ SE $\frac{1}{4}$, and running thence East along the existing fence line 718 feet, more or less, to the west line of the Highway; thence southerly along the west line 30 feet, more or less; thence West 718 feet, more or less; thence North 30 feet, to the point of beginning.

Sec. 34: NE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$

Defendants.

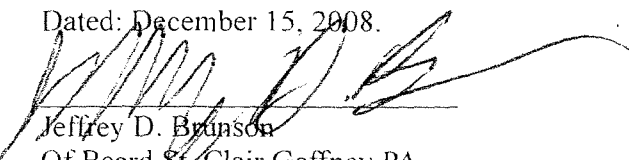
There is currently a preliminary injunction hearing scheduled for December 17, 2008 based on allegations contained in the Verified Complaint. The Verified Complaint identifies an original access road and a replacement access road. A portion of the replacement access road is used as the driveway to the Neigums' home. The Verified Complaint seeks use of the original access road. In an effort to avoid the hearing, by their attorneys of record Plaintiffs and Defendants Deans, Viehwegs, and Neigums, stipulate and agree as follows:

1. The designated Defendants agree that Plaintiffs or any of their agents shall be allowed to use the replacement access road during the pendency of this action for purposes reasonably associated with the use of the Plaintiffs' real property accessed thereby.

2. The designated Defendants or any of their agents shall not take any action to interfere with Plaintiffs' use of the replacement access road in any manner during the pendency of this action, including but not limited to erecting any new or additional fencing on either side of the road during the pendency of this action.

3. This stipulation is not evidence of the reasonableness or legal significance of the original or replacement access roads which are issues that remain to be litigated. This stipulation in no way waives the Plaintiffs' right to seek in this action use of the original access road. This stipulation in no way waives the Defendants' rights to seek in this action to limit or exclude use of either the original or replacement access roads. This stipulation shall not prejudice any of the parties' substantive rights, claims, or defenses in this action.

Dated: December 15, 2008.



Jeffrey D. Brunson
Of Beard St. Clair Gaffney PA
Attorneys for Plaintiffs

Dated: December ____, 2008

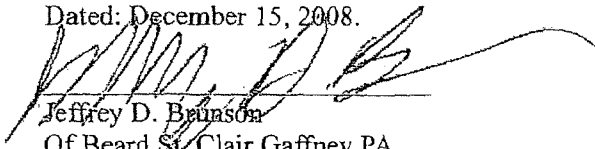
Scott Smith
Of Racine Olsen Nye Budge & Bailey, Chartered
Attorneys for Defendants Deans, Viehwigs, and Neigums

1. The designated Defendants agree that Plaintiffs or any of their agents shall be allowed to use the replacement access road during the pendency of this action for purposes reasonably associated with the use of the Plaintiffs' real property accessed thereby.

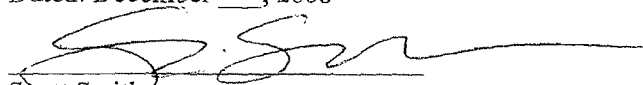
2. The designated Defendants or any of their agents shall not take any action to interfere with Plaintiffs' use of the replacement access road in any manner during the pendency of this action, including but not limited to erecting any new or additional fencing on either side of the road during the pendency of this action.

3. This stipulation is not evidence of the reasonableness or legal significance of the original or replacement access roads which are issues that remain to be litigated. This stipulation in no way waives the Plaintiffs' right to seek in this action use of the original access road. This stipulation in no way waives the Defendants' rights to seek in this action to limit or exclude use of either the original or replacement access roads. This stipulation shall not prejudice any of the parties' substantive rights, claims, or defenses in this action.

Dated: December 15, 2008.


Jeffrey D. Brunson
Of Beard St. Clair Gaffney PA
Attorneys for Plaintiffs

Dated: December 15, 2008


Scott Smith
Of Racine Olsen Nye Budge & Bailey, Chartered
Attorneys for Defendants Deans, Viehwigs, and Neigums

Certificate of Mailing or Hand Delivery

I certify that I am a licensed attorney in the State of Idaho and on December 15, 2008, I served a true and correct copy of the STIPULATION FOR USE OF REPLACEMENT ACCESS ROAD DURING PENDENCY OF ACTION upon the following by the method of delivery designated:

Eric Olsen
Scott Smith
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
Fax: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Ryan McFarland
Hawley Troxell Ennis & Hawley
PO Box 1617
Boise, ID 83701-1617
Fax: (208) 342-3829

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Brad and Lezia Povey
160 E. 200 N.
Clifton, ID 83228

☒ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Franklin County Courthouse
39 W. Oneida
Preston, ID 83263
Fax: (208) 852-2926

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Honorable Stephen Dunn
Bannock County Chambers
624 E. Center
Pocatello, ID 83201
Fax: 9208) 236-7012

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

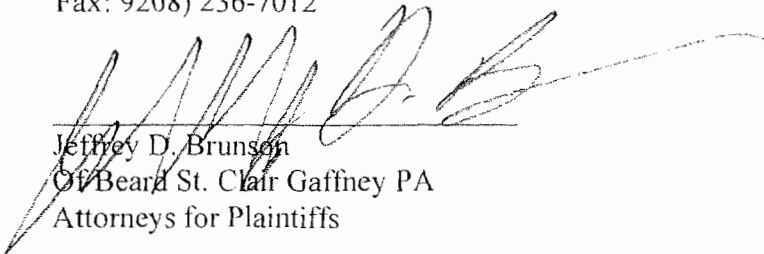

Jeffrey D. Brunson
Of Beard St. Clair Gaffney PA
Attorneys for Plaintiffs

EXHIBIT B

Gordon S. Thatcher, ISB No. 880
Jeffrey D. Brunson, ISB No. 6996
Michael W. Brown, ISB No. 8017
THATCHER BEARD ST. CLAIR GAFFNEY *Attorneys*
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mbrown@beardstclair.com

Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as
Trustees of the Jeffery J. Neigum and
Kathleen A. Neigum Revocable Trust,
dated September 17th 2004; Jeffery J.
Neigum and Kathleen A. Neigum, husband
and wife; Brad Povey and Leiza Povey,
husband and wife; First American Title
Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
Authority; and First American Title
Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

NOTICE OF PENDENCY OF ACTION

COPY

PLEASE TAKE NOTICE THAT Plaintiffs DANIEL S. GARNER and SHERRI-JO GARNER, husband and wife, and NOLA GARNER, as Trustee of the NOLA GARNER LIVING TRUST, dated July 19, 2007, brought this action by Verified Complaint filed on September 17, 2008, seeking among other relief to quiet title to a right-of-way for a roadway to obtain access, for ingress and egress from the Westside Highway, to and for the benefit of property owned by them in Franklin County, Idaho. The Verified Complaint alleges that on May 28, 2008 certain defendants, in concert with other Defendants, wrongfully constructed a barrier across the roadway which had been in use by Plaintiffs since May 22, 1987, preventing use of the roadway.

PLAINTIFFS respectfully submit the following explanation as to this Notice:

1. PLAINTIFFS have this day served upon counsel for Defendants who have appeared, and have mailed to the Court for filing, a MOTION TO FILE AN AMENDED COMPLAINT, and have requested a time for the Motion to be heard by the Court. A verified AMENDED COMPLAINT has been tendered to the Court with the Motion.

2. THERE ARE FOUR CHANGES IN DEFENDANTS and an added PLAINTIFF in the proposed AMENDED COMPLAINT:

A. PLAINTIFFS have learned that by Warranty Deed recorded on October 4, 2004, as Instrument # 227649, records of Franklin County, Idaho, (copy attached hereto as Exhibit 1) Defendants Jeffery J. Neigum and Kathleen A. Neigum, individually conveyed to Jeffery J. Neigum and Kathleen A. Neigum, or their Successors, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004, the property that is involved in this action. Because the Trust is revocable the Neigums individually should remain as parties Defendant; but to afford complete relief Plaintiffs seek to have JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, as TRUSTEES of the JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated September 17, 2004, added as Defendants.

B. The original Verified Complaint named as a Defendant "First American Title Company, an Idaho Corporation," and alleged that it had issued to Daniel Garner the Policy of Title Insurance which is relevant to this case. On November 3, 2008, Ryan T.

McFarland, of HAWLEY TROXELL ENNIS & HAWLEY LLP served a Notice of Appearance herein on behalf of First American Title Company. However the text of the Notice stated the appearance was for Defendant First American Title **Insurance** Company. (Emphasis added.) Plaintiffs have discovered these facts:

[1] The Policy of Title Insurance, Exhibit "S" to the proposed Amended Complaint, was issued by "First American Title Insurance Company" which is not an Idaho Corporation but is a foreign corporation. Plaintiffs believe such foreign corporation must be made a party and served with process upon the Idaho Commissioner of Insurance as provided in Idaho Code § 41-333. Plaintiffs assume such foreign corporation is acting in Idaho as a Title Insurer under Idaho Code § 41-2704 with a "certificate of authority" as required in Idaho Code § 41-2705.

[2] Preston Land Title Company was the co-signer on the Policy of Title Insurance (Exhibit "S") and as alleged in ¶ 51 of the proposed Amended Complaint acted as an authorized agent for First American Title Insurance Company. In a series of complex transactions Preston Land Title Company has been merged into what is now "First American Title Company, **Inc.**", an Idaho Corporation. (Emphasis added.)

[3] Service was made in this case upon Quinn H. Stufflebeam on September 26, 2008, as agent for "First American Title Company". He is shown by applicable annual reports with the Secretary of State as Secretary of and Resident Agent for First American Title Company, **Inc.** (Emphasis added.)

[4] If "First American Title Insurance Company" did issue the Policy of Title Insurance while operating under an applicable "certificate of authority" from the Idaho Commissioner of Insurance; continues to so operate; and would be responsible to pay any judgment herein on the Policy of Title Insurance, then apparently it may not be necessary that First American Title Company, Inc. remain as a party Defendant, but if it should so remain the name should be corrected to "First American Title Company, Inc., an Idaho Corporation."

C. The original Verified Complaint specified after the named Defendants, "their heirs, personal representatives, successors and assigns." Because this Notice of Pendency

of Action will be recorded in Franklin County, Idaho, anyone acquiring an interest in the properties of Defendants Dean, Viehweg, or Neigum, after such recording, will be bound by the judgment herein without being added as a Defendant.

D. The original Verified Complaint added "John Does and Jane Does being any and all those who may claim right in the property described in the complaint...." and added a legal description of properties. Plaintiffs make three comments:

[1] If on discovery it is disclosed that there are any mortgages or liens against the properties of Defendants Dean, Viehweg, or Neigum, as described in ¶ 6 hereof, and any mortgage holder or lien holder opposes the quiet title relief sought by Plaintiffs, then Plaintiffs will move to join any opposing mortgage holder or lien holder as Defendants so that the opposition can be litigated in this case.

[2] Plaintiffs have described in ¶ 4 hereof their properties to which the right-of-way for the access road is appurtenant and do not need to notify by publication any unknown claimants thereto.

[3] Plaintiffs have described in ¶ 6 hereof the properties of Defendants Dean, Viehweg, and Neigum over which the right-of-way, as subsequently determined by the Court will run, and do not need to notify by publication any unknown claimants to those properties.

E. Nola Garner, a widow, is added as an additional Plaintiff. The Nola Trust is a revocable Trust, which could be revoked by Nola Garner, and she is the prime beneficiary thereunder. In addition she was one of the insureds (along with her husband Gary who is now deceased) under the Title Insurance Policies issued by First American Title Insurance Company in the Povey and Cox transactions for which claims may be established against the insurer. For both reasons Nola, personally, needs to be a party Plaintiff.

3. On December 15, 2008 counsel for Plaintiffs, Jeffrey D. Brunson, of BEARD ST. CLAIR GAFFNEY P.A., (who are now handling the case through its Rexburg Office, known as THATCHER BEARD ST. CLAIR GAFFNEY Attorneys); and counsel Scott Smith of RACINE OLSEN NYE BUDGE & BAILEY, *Chartered*, for Defendants Hal J. Dean and Marlene T. Dean, husband and wife, and Douglas K. Viehweg and Sharon C. Viehweg, husband

and wife, and Jeffery J. Neigum and Kathleen A. Neigum, husband and wife, ("Defendants Dean, Viehweg and Neigum") entered into a STIPULATION FOR USE OF REPLACEMENT ACCESS ROAD DURING PENDENCY OF ACTION which should have provided necessary interim relief. However, thereafter as alleged in ¶ 62 of the Amended Complaint Defendants Neigum flagrantly breached the Stipulation and by threats on Daniel caused him to cease using the Replacement Access Road for fear of his own life and safety and of that of his cattle. Therefore appropriate interim and final relief against Defendants Dean, Viehweg and Neigum will be needed.

4. Under the VERIFIED COMPLAINT and the proposed AMENDED COMPLAINT, PLAINTIFFS seek among other relief to either quiet title to the ORIGINAL ACCESS ROAD or quiet title to a REPLACEMENT ACCESS ROAD, to provide necessary access to property of PLAINTIFFS in Franklin County, Idaho, described as follows:

Tw. 14 S., Rge. 38 E., Boise Mer.:

Sec. 27: That part of NW $\frac{1}{4}$ SE $\frac{1}{4}$ West of the Twin Lakes Canal;
NE $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$; SW $\frac{1}{4}$ SE $\frac{1}{4}$, excepting therefrom:

Beginning 30 feet South of the Northeast Corner and running
thence South 718 feet; thence West 30 Feet; thence North 718 feet;
thence East 30 feet to the point of beginning.

Sec. 34: NE $\frac{1}{4}$ NW $\frac{1}{4}$

5. THE ORIGINAL ACCESS ROAD had two parts, the "First Phase" extended from the Westside Highway to a bridge over the Twin Lakes Canal; and the "Second Phase" extended from the bridge to properties West of the Twin Lakes Canal. Plaintiffs now own all property West of the Twin Lakes Canal that was served by the roadway, so the roadway West of the Twin Lakes Canal is not now in controversy, except that Plaintiffs contend they have succeeded to all rights of former owners of property West of the Twin Lakes Canal to utilize the roadway from the Westside Highway to and across the bridge over the Twin Lakes Canal to access their properties above described.

6. PROPERTIES OF DEFENDANTS DEAN, VIEHWEG AND NEIGUM which may be impacted by a quiet title judgment for PLAINTIFFS as to the Original Access Road or the Replacement Access Road:

A. Property of Defendants Dean may be directly impacted by the first 370.61 feet, more or less, of the roadway, measured by the defining Northerly boundary of Segment "A" of the First Phase of the Original Access Road, beginning at the Westside Highway, and running in part across their properties. Their properties would at least be indirectly impacted by that part of the Original Access Road running nearby or adjacent to the Southern boundaries of their properties, which are in Franklin County, Idaho, and are described as follows:

Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer.:

Beginning at a point 946.25 feet West and South 00°06' East 419.10 feet from the Northeast corner of the SE¼ of said Sec. 27, and running thence East 185 feet, more or less, to the West line of Highway right of way; thence South 11°11' East along the West right of way line of Highway 150.5 feet, more or less, to the South line of an existing right of way; thence West 195 feet, more or less, to a point 164.5 feet South of the POINT OF BEGINNING; thence North 164.5 feet to the POINT OF BEGINNING.

ALSO: Beginning at a point 946.25 feet West, and South 00°06' East 419.10 feet from the Northeast corner of the SE¼ of said Sec. 27, and running thence South 152.5 feet, more or less, to the North line of an existing right of way; thence Westerly along this right of way 198.6 feet, more or less, to a point in line with the West side of an existing shed; thence North along said line 160 feet, more or less, to an existing fence; thence East along said fence 198.5 feet, more or less, to the point of beginning.

The Dean properties should not be impacted by the Replacement Access Road.

B. Property of Defendants Viehweg would be impacted as a servient estate as to all or mostly all of the 30-foot wide roadway of Segment "A" of the "First Phase" of the Original Access Road, measured by the defining Northerly boundary of Segment "A", running Westerly from the Westside Highway approximately along the 370.61 feet and 154.44 feet of the Northerly boundary of Tract 2 of the Viehweg properties.

The Viehweg properties could be indirectly impacted by the Replacement Access Road by reason of the defining Northerly boundary of Segment "A" of the "First Phase" of the Replacement Access Road, running Westerly and Northwesterly from the Westside Highway approximately along the 293.84 feet and 312.25 feet of the Southerly and Southwesterly boundary of Tract 2 of the Viehweg property; this is because the roadway would be adjacent or close to the Viehweg property.

Direct impact would come from the defining Northerly boundary of Segment "A" of the Replacement Access Road being determined by the Court to be on Viehweg Tract 2; and impact could be on Viehweg Tract 1, directly if Segment "A" was in part on Tract 1, and indirectly if Segment "A" was adjacent or near to Tract 1.

There could be some indirect impact on the Viehweg properties from Segment "B" which extends from the Westerly end of Segment "A" in both the Original Access Road and in the Replacement Access Road, Northwesterly to the bridge over the Twin Lakes Canal. The indirect impact could come from Segment "B" commencing adjacent or nearby to the Viehweg properties.

The Viehweg properties are in Franklin County, Idaho, and described in two adjacent Tracts which are illustrated in a printout attached to the proposed AMENDED COMPLAINT as Exhibit "Q", and attached hereto as Exhibit 2. Exhibit 2, attached hereto, identifies the approximate route of Segment "A" in the Original Access Road (colored in red) and the approximate route of the Replacement Access Road (colored in green). The two Viehweg Tracts are described as follows:

Tract 1: Commencing at the Northeast corner of SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 89°40'38" W 354.54 feet to the Point of Beginning; and running thence S 04°48'00" E 178.36 feet; thence N 88°02'30" W 154.44 feet; thence N 04°40'00" W 170 feet; thence N 88°52'10" E along an existing fence line 153.29 feet, to the Point of Beginning. Containing 0.61 acre.

Tract 2: Commencing at the Northeast corner of SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 11°20'30" E along said Westerly right-of-way line 150.50 feet, to the Point of Beginning; and thence continuing S 11°02'30" E along said Westerly right-of-way line 167 feet; then S 84°11'00" W 293.84 feet; thence N 57°45'00" W 312.25 feet; thence S 88°02'30" E 154.44 feet; thence N 85°01'10" E 370.61 feet, to the Point of Beginning. Containing 1.56 acres.

C. Property of Defendants Neigum would be directly impacted as a servient estate as to the 30-foot wide roadway in Segment "B" of the Original Access Road and as to the identical Segment "B" of the Replacement Access Road. Segment "B" runs Northwesterly from the identical ends of Segment "A" to the bridge over the Twin Lakes Canal. It runs totally over the property of Defendants Neigum. Property of Defendants

Neigum would also be directly impacted as a servient estate as to most or all of the 30-foot wide roadway in Segment "A" of the Replacement Access Road. This would be by reason of the defining Northerly boundary of Segment "A" of the "First Phase" of the Replacement Access Road, running Westerly and Northwesterly from the Westside Highway approximately along the 293.84 feet and 312.25 feet of the Southerly and Southwesterly boundary of Tract 2 of the Viehweg property. That boundary is identical to the Northerly and Northeasterly boundary of that part of the Neigum property. If the defining Northerly boundary of Segment "B" of the Replacement Access Road is identical to the common boundary between the Viehweg property and Neigum property, then all of the 30-foot width of the roadway in Segment "B" of the Replacement Access Road would come from the Neigum property. If that defining Northerly boundary of Segment "B" is North of the common boundary between the Viehweg property and the Neigum property, then that part of the 30-foot wide roadway North of the common boundary would come from the Viehweg property.

The Neigum property is in Franklin County, Idaho, and is described as follows:

Two parts of N½SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., described as follows:

That part of NW¼SE¼ lying East of the Twin Lakes Canal.

That part of NE¼SE¼ lying West of the Westside Highway and further described as follows:

Beginning at a point 1323.25 feet West and S 0° 06' E 419.10 feet from the Northeast corner of SE¼, and running thence S 0°06' E 900.9 feet along the West line of NE¼SE¼ ; thence East 770.819 feet to the West right-of-way line of the Westside Highway; thence North 11°11' W along the West right-of-way line of the Westside Highway to the Southeast Corner of Tract 2 of the Viehweg property; thence S 84°11'W 293.84 feet; thence N 57°45' W 312.25 feet; thence N 4°40' W 170 feet to the Northwest corner of Tract 1 of the Viehweg property; thence West to the point of beginning.

Containing 25.1 acres, more or less.

7. REQUESTED LEGAL DESCRIPTIONS for Segment "A" and Segment "B" of the Original Access Road. We deal with the Original Access Road from the Westside Highway to and across the bridge over the Twin Lakes Canal. Plaintiffs seek a 30-foot wide easement to

accommodate vehicles and machinery that frequently must travel the roadway and to enable snowbanks within the easement from snow removal from the traveled portion during the common snow seasons. A guide to establishing the bounds of the easement will be the traveled and visible roadway existing on May 27, 1987 and used by Plaintiffs and their predecessors in title to access property served by the roadway until it was blocked by Viehweg Defendants on May 28, 2008. The "defining line" will be the Northerly boundary of the claimed 30-foot wide easement with the traveled and visible roadway being about equidistant between the Defining Line and the Southern boundary of the 30-foot wide easement. The 30-foot wide easement shall be subject to establishment with a specific surveyed description in this case.

A. The Defining Line for Segment "A" of the Original Access Road is as follows:

Commencing at the NE Corner of SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho, and running thence West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 11°20'30" E 150.50 feet along said Westerly right-of-way line to the Point of Beginning of the Defining Line of Segment "A" of the Original Access Road; and running thence S 85°01'10" W 370.61 feet; thence N 88°02'30" W 154.44 feet to the end of Segment "A".

B. The Defining Line for Segment "B" of the Original Access Road is as follows:

Commencing at the end point of the Defining Line of Segment "A" of the Original Access Road; and running thence Northwesterly following the course of the defined and visible roadway located about equidistant between the Defining Line and the Southerly boundary of the 30-foot wide easement, to and across the bridge over the Twin Lakes Canal to that part of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho, lying West of the Twin Lakes Canal.

8. REQUESTED LEGAL DESCRIPTION for Segment "A" of the Replacement Access Road. The Replacement Access Road runs from the Westside Highway to and across the bridge over the Twin Lakes Canal. However, Segment "B" is identical to Segment "B" of the Original Access Road. Therefore here we only describe Segment "A" of the Replacement Access Road. To be a true replacement this must involve a 30-foot wide easement to accommodate vehicles and machinery that frequently must travel the roadway and to enable snowbanks within the easement from snow removal from the traveled portion during the common snow seasons. A guide to establishing the bounds of the easement will be the traveled and visible roadway

existing after May 28, 2008 when Viehweg Defendants blocked access to Segment "A" of the Original Access Road Easement, but the specifically traveled portion must be broadened to accommodate a full and usable traveled portion by Plaintiffs equivalent to their full usable and traveled portion of Segment "A" of the Original Access Road prior to it being blocked by Viehweg Defendants on May 28, 2008. The "defining line" will be the Northerly boundary of the claimed 30-foot wide easement with the traveled and usable roadway being about equidistant between the Defining Line and the Southern boundary of the 30-foot wide easement. The 30-foot wide easement shall be subject to establishment with a specific surveyed description in this case.

A. The Defining Line for Segment "A" of the Replacement Access Road is as follows:

Commencing at the NE Corner of SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho and running West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 11°20'30" E 150.50 feet along said Westerly right-of-way line; thence S 11°02'30" E 167 feet, along said Westerly right-of-way line to the Point of Beginning of the defining line of Segment "A" of the Replacement Access Road; thence S 84°11' W 293.84 feet; thence N 57°45' W 325.25 feet to the end of Segment "A" (which is identical to the end of Segment "A" of the Original Access Road.

B. The Defining Line for Segment "B" of the Replacement Access Road is identical to the Defining Line for Segment "B" of the Original Access Road, and is as follows:

Commencing at the end point of the Defining Line of Segment "A" of the Replacement Access Road (which is the same end point of the Defining Line of Segment "A" of the Original Access Road); and running thence Northwesterly following the course of the defined and visible roadway located about equidistant between the Defining Line and the Southerly boundary of the 30-foot wide easement, to and across the bridge over the Twin Lakes Canal, to that part of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho, lying West of the Twin Lakes Canal.

REFERENCE IS MADE To the VERIFIED COMPLAINT, filed herein on September 17, 2008, and to the proposed AMENDED COMPLAINT, dated and verified this 28th of January, 2009, and mailed to and tendered to the Court this day with MOTION TO FILE AN AMENDED COMPLAINT, of this same date.

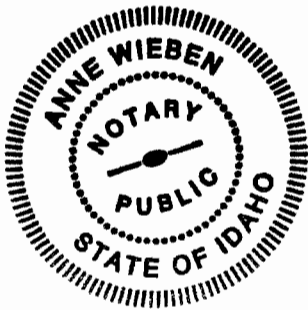
DATED THIS 28th day of January, 2009.

Gordon S. Thatcher

Gordon S. Thatcher
of THATCHER BEARD ST. CLAIR GAFFNEY
Attorneys for Plaintiffs

STATE OF IDAHO)
 ss.
County of Madison.)

On this 28th day of January, 2009, before me, the undersigned, a Notary Public in and for said State, personally appeared GORDON S. THATCHER, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.



Anne Wieben

Notary Public for Idaho
Residing at Rigby, Idaho
My commission expires: 7/27/2013

AFTER RECORDING PLEASE RETURN TO:
JEFFERY & KATHLEEN NEIGUM
636 S. MAIN HWY.
CLIFTON, IDAHO 83228

227649 1-3

WARRANTY DEED

JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, Grantors of Clifton, Franklin County, State of Idaho, hereby CONVEY AND WARRANT to JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, or their Successors, as Trustees of the JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST dated September 17th 2004, Grantees of 636 S. Main Hwy., Clifton, Idaho 83228, for the sum of Ten Dollars (\$10.00), and other good and valuable consideration, the following described tract of land in Franklin County, State of Idaho:

SEE ATTACHED EXHIBIT "A"

DATED this 17th day of September, 2004.

Recorded at the request of

Smith Law Offices

2:35
AM OCT 04 2004 PM

V. ELLIOTT LARSEN, RECORDER
By Camille Larsen Deputy
FRANKLIN COUNTY, IDAHO

STATE OF UTAH)

: ss.

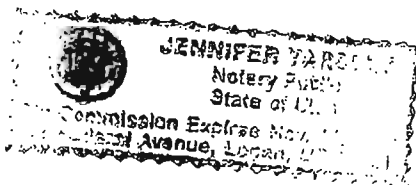
County of Cache)

On the 17th day of September, 2004, personally appeared before me JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, the signers of the within instrument, who duly acknowledged to me that they executed the same.

Jeffery J. Neigum
JEFFERY J. NEIGUM

Kathleen A. Neigum
KATHLEEN A. NEIGUM

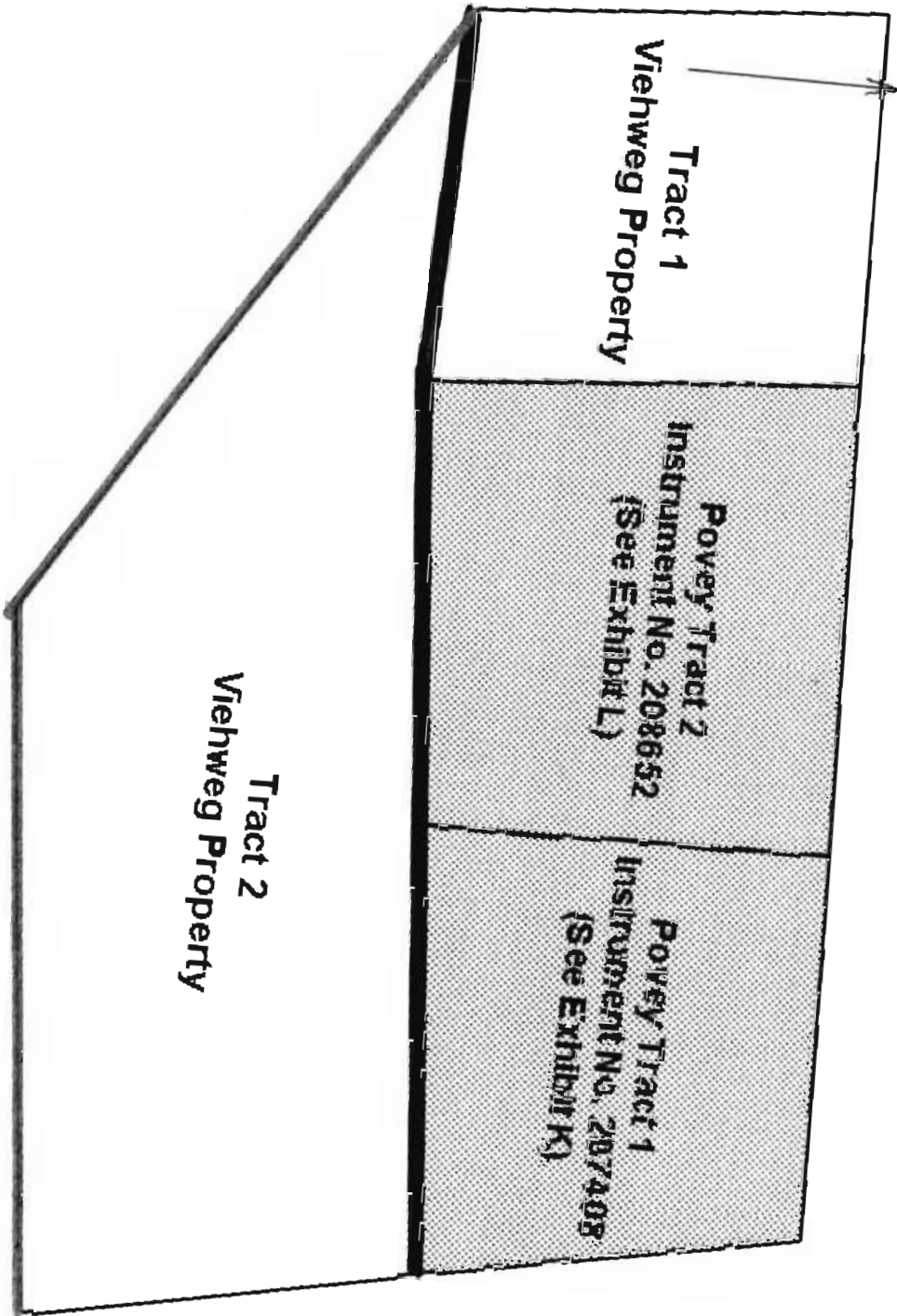
Jennifer Y. [Signature]
Notary Public



EXHIBIT

1

104



244093 1-17

Gordon S. Thatcher, ISB No. 880
Jeffrey D. Brunson, ISB No. 6996
Michael W. Brown, ISB No. 8017
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Fax: (208) 359-5888
gthatcher@beardstclair.com
jeff@beardstclair.com
mbrown@beardstclair.com

Recorded at the request of

Beard, St. Clair, Gaffney

___ a.m. JAN 29 2009 p.m. 2:19

V. ELLIOTT LARSEN, RECORDER
By C. Larsen Deputy
FRANKLIN COUNTY IDAHO

Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**



Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

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vs.

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Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
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Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

NOTICE OF PENDENCY OF ACTION

PLEASE TAKE NOTICE THAT Plaintiffs DANIEL S. GARNER and SHERRI-JO GARNER, husband and wife, and NOLA GARNER, as Trustee of the NOLA GARNER LIVING TRUST, dated July 19, 2007, brought this action by Verified Complaint filed on September 17, 2008, seeking among other relief to quiet title to a right-of-way for a roadway to obtain access, for ingress and egress from the Westside Highway, to and for the benefit of property owned by them in Franklin County, Idaho. The Verified Complaint alleges that on May 28, 2008 certain defendants, in concert with other Defendants, wrongfully constructed a barrier across the roadway which had been in use by Plaintiffs since May 22, 1987, preventing use of the roadway.

PLAINTIFFS respectfully submit the following explanation as to this Notice:

1. PLAINTIFFS have this day served upon counsel for Defendants who have appeared, and have mailed to the Court for filing, a MOTION TO FILE AN AMENDED COMPLAINT, and have requested a time for the Motion to be heard by the Court. A verified AMENDED COMPLAINT has been tendered to the Court with the Motion.

2. THERE ARE FOUR CHANGES IN DEFENDANTS and an added PLAINTIFF in the proposed AMENDED COMPLAINT:

A. PLAINTIFFS have learned that by Warranty Deed recorded on October 4, 2004, as Instrument # 227649, records of Franklin County, Idaho, (copy attached hereto as Exhibit 1) Defendants Jeffery J. Neigum and Kathleen A. Neigum, individually conveyed to Jeffery J. Neigum and Kathleen A. Neigum, or their Successors, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004, the property that is involved in this action. Because the Trust is revocable the Neigums individually should remain as parties Defendant; but to afford complete relief Plaintiffs seek to have JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, as TRUSTEES of the JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST, dated September 17, 2004, added as Defendants.

B. The original Verified Complaint named as a Defendant "First American Title Company, an Idaho Corporation," and alleged that it had issued to Daniel Garner the Policy of Title Insurance which is relevant to this case. On November 3, 2008, Ryan T.

McFarland, of HAWLEY TROXELL ENNIS & HAWLEY LLP served a Notice of Appearance herein on behalf of First American Title Company. However the text of the Notice stated the appearance was for Defendant First American Title **Insurance** Company. (Emphasis added.) Plaintiffs have discovered these facts:

[1] The Policy of Title Insurance, Exhibit "S" to the proposed Amended Complaint, was issued by "First American Title Insurance Company" which is not an Idaho Corporation but is a foreign corporation. Plaintiffs believe such foreign corporation must be made a party and served with process upon the Idaho Commissioner of Insurance as provided in Idaho Code § 41-333. Plaintiffs assume such foreign corporation is acting in Idaho as a Title Insurer under Idaho Code § 41-2704 with a "certificate of authority" as required in Idaho Code § 41-2705.

[2] Preston Land Title Company was the co-signer on the Policy of Title Insurance (Exhibit "S") and as alleged in ¶ 51 of the proposed Amended Complaint acted as an authorized agent for First American Title Insurance Company. In a series of complex transactions Preston Land Title Company has been merged into what is now "First American Title Company, **Inc.**", an Idaho Corporation. (Emphasis added.)

[3] Service was made in this case upon Quinn H. Stufflebeam on September 26, 2008, as agent for "First American Title Company". He is shown by applicable annual reports with the Secretary of State as Secretary of and Resident Agent for First American Title Company, **Inc.** (Emphasis added.)

[4] If "First American Title Insurance Company" did issue the Policy of Title Insurance while operating under an applicable "certificate of authority" from the Idaho Commissioner of Insurance; continues to so operate; and would be responsible to pay any judgment herein on the Policy of Title Insurance, then apparently it may not be necessary that First American Title Company, Inc. remain as a party Defendant, but if it should so remain the name should be corrected to "First American Title Company, Inc., an Idaho Corporation."

C. The original Verified Complaint specified after the named Defendants, "their heirs, personal representatives, successors and assigns." Because this Notice of Pendency

of Action will be recorded in Franklin County, Idaho, anyone acquiring an interest in the properties of Defendants Dean, Viehweg, or Neigum, after such recording, will be bound by the judgment herein without being added as a Defendant.

D. The original Verified Complaint added "John Does and Jane Does being any and all those who may claim right in the property described in the complaint...." and added a legal description of properties. Plaintiffs make three comments:

[1] If on discovery it is disclosed that there are any mortgages or liens against the properties of Defendants Dean, Viehweg, or Neigum, as described in ¶ 6 hereof, and any mortgage holder or lien holder opposes the quiet title relief sought by Plaintiffs, then Plaintiffs will move to join any opposing mortgage holder or lien holder as Defendants so that the opposition can be litigated in this case.

[2] Plaintiffs have described in ¶ 4 hereof their properties to which the right-of-way for the access road is appurtenant and do not need to notify by publication any unknown claimants thereto.

[3] Plaintiffs have described in ¶ 6 hereof the properties of Defendants Dean, Viehweg, and Neigum over which the right-of-way, as subsequently determined by the Court will run, and do not need to notify by publication any unknown claimants to those properties.

E. Nola Garner, a widow, is added as an additional Plaintiff. The Nola Trust is a revocable Trust, which could be revoked by Nola Garner, and she is the prime beneficiary thereunder. In addition she was one of the insureds (along with her husband Gary who is now deceased) under the Title Insurance Policies issued by First American Title Insurance Company in the Povey and Cox transactions for which claims may be established against the insurer. For both reasons Nola, personally, needs to be a party Plaintiff.

3. On December 15, 2008 counsel for Plaintiffs, Jeffrey D. Brunson, of BEARD ST. CLAIR GAFFNEY P.A., (who are now handling the case through its Rexburg Office, known as THATCHER BEARD ST. CLAIR GAFFNEY Attorneys); and counsel Scott Smith of RACINE OLSEN NYE BUDGE & BAILEY, *Chartered*, for Defendants Hal J. Dean and Marlene T. Dean, husband and wife, and Douglas K. Viehweg and Sharon C. Viehweg, husband

and wife, and Jeffery J. Neigum and Kathleen A. Neigum, husband and wife, ("Defendants Dean, Viehweg and Neigum") entered into a STIPULATION FOR USE OF REPLACEMENT ACCESS ROAD DURING PENDENCY OF ACTION which should have provided necessary interim relief. However, thereafter as alleged in ¶ 62 of the Amended Complaint Defendants Neigum flagrantly breached the Stipulation and by threats on Daniel caused him to cease using the Replacement Access Road for fear of his own life and safety and of that of his cattle. Therefore appropriate interim and final relief against Defendants Dean, Viehweg and Neigum will be needed.

4. Under the VERIFIED COMPLAINT and the proposed AMENDED COMPLAINT, PLAINTIFFS seek among other relief to either quiet title to the ORIGINAL ACCESS ROAD or quiet title to a REPLACEMENT ACCESS ROAD, to provide necessary access to property of PLAINTIFFS in Franklin County, Idaho, described as follows:

Twp. 14 S., Rge. 38 E., Boise Mer.:

Sec. 27: That part of NW $\frac{1}{4}$ SE $\frac{1}{4}$ West of the Twin Lakes Canal;
NE $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$; SW $\frac{1}{4}$ SE $\frac{1}{4}$, excepting therefrom:

Beginning 30 feet South of the Northeast Corner and running
thence South 718 feet; thence West 30 Feet; thence North 718 feet;
thence East 30 feet to the point of beginning.

Sec. 34: NE $\frac{1}{4}$ NW $\frac{1}{4}$

5. THE ORIGINAL ACCESS ROAD had two parts, the "First Phase" extended from the Westside Highway to a bridge over the Twin Lakes Canal; and the "Second Phase" extended from the bridge to properties West of the Twin Lakes Canal. Plaintiffs now own all property West of the Twin Lakes Canal that was served by the roadway, so the roadway West of the Twin Lakes Canal is not now in controversy, except that Plaintiffs contend they have succeeded to all rights of former owners of property West of the Twin Lakes Canal to utilize the roadway from the Westside Highway to and across the bridge over the Twin Lakes Canal to access their properties above described.

6. PROPERTIES OF DEFENDANTS DEAN, VIEHWEG AND NEIGUM which may be impacted by a quiet title judgment for PLAINTIFFS as to the Original Access Road or the Replacement Access Road:

A. Property of Defendants Dean may be directly impacted by the first 370.61 feet, more or less, of the roadway, measured by the defining Northerly boundary of Segment "A" of the First Phase of the Original Access Road, beginning at the Westside Highway, and running in part across their properties. Their properties would at least be indirectly impacted by that part of the Original Access Road running nearby or adjacent to the Southern boundaries of their properties, which are in Franklin County, Idaho, and are described as follows:

Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer.:

Beginning at a point 946.25 feet West and South 00°06' East 419.10 feet from the Northeast corner of the SE¼ of said Sec. 27, and running thence East 185 feet, more or less, to the West line of Highway right of way; thence South 11°11' East along the West right of way line of Highway 150.5 feet, more or less, to the South line of an existing right of way; thence West 195 feet, more or less, to a point 164.5 feet South of the POINT OF BEGINNING; thence North 164.5 feet to the POINT OF BEGINNING.

ALSO: Beginning at a point 946.25 feet West, and South 00°06' East 419.10 feet from the Northeast corner of the SE¼ of said Sec. 27, and running thence South 152.5 feet, more or less, to the North line of an existing right of way; thence Westerly along this right of way 198.6 feet, more or less, to a point in line with the West side of an existing shed; thence North along said line 160 feet, more or less, to an existing fence; thence East along said fence 198.5 feet, more or less, to the point of beginning.

The Dean properties should not be impacted by the Replacement Access Road.

B. Property of Defendants Viehweg would be impacted as a servient estate as to all or mostly all of the 30-foot wide roadway of Segment "A" of the "First Phase" of the Original Access Road, measured by the defining Northerly boundary of Segment "A", running Westerly from the Westside Highway approximately along the 370.61 feet and 154.44 feet of the Northerly boundary of Tract 2 of the Viehweg properties.

The Viehweg properties could be indirectly impacted by the Replacement Access Road by reason of the defining Northerly boundary of Segment "A" of the "First Phase" of the Replacement Access Road, running Westerly and Northwesterly from the Westside Highway approximately along the 293.84 feet and 312.25 feet of the Southerly and Southwesterly boundary of Tract 2 of the Viehweg property; this is because the roadway would be adjacent or close to the Viehweg property.

Direct impact would come from the defining Northerly boundary of Segment "A" of the Replacement Access Road being determined by the Court to be on Viehweg Tract 2; and impact could be on Viehweg Tract 1, directly if Segment "A" was in part on Tract 1, and indirectly if Segment "A" was adjacent or near to Tract 1.

There could be some indirect impact on the Viehweg properties from Segment "B" which extends from the Westerly end of Segment "A" in both the Original Access Road and in the Replacement Access Road, Northwesterly to the bridge over the Twin Lakes Canal. The indirect impact could come from Segment "B" commencing adjacent or nearby to the Viehweg properties.

The Viehweg properties are in Franklin County, Idaho, and described in two adjacent Tracts which are illustrated in a printout attached to the proposed AMENDED COMPLAINT as Exhibit "Q", and attached hereto as Exhibit 2. Exhibit 2, attached hereto, identifies the approximate route of Segment "A" in the Original Access Road (colored in red) and the approximate route of the Replacement Access Road (colored in green). The two Viehweg Tracts are described as follows:

Tract 1: Commencing at the Northeast corner of SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 89°40'38" W 354.54 feet to the Point of Beginning; and running thence S 04°48'00" E 178.36 feet; thence N 88°02'30" W 154.44 feet; thence N 04°40'00" W 170 feet; thence N 88°52'10" E along an existing fence line 153.29 feet, to the Point of Beginning. Containing 0.61 acre.

Tract 2: Commencing at the Northeast corner of SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., and running West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 11°20'30" E along said Westerly right-of-way line 150.50 feet, to the Point of Beginning; and thence continuing S 11°02'30" E along said Westerly right-of-way line 167 feet; then S 84°11'00" W 293.84 feet; thence N 57°45'00" W 312.25 feet; thence S 88°02'30" E 154.44 feet; thence N 85°01'10" E 370.61 feet, to the Point of Beginning. Containing 1.56 acres.

C. Property of Defendants Neigum would be directly impacted as a servient estate as to the 30-foot wide roadway in Segment "B" of the Original Access Road and as to the identical Segment "B" of the Replacement Access Road. Segment "B" runs Northwesterly from the identical ends of Segment "A" to the bridge over the Twin Lakes Canal. It runs totally over the property of Defendants Neigum. Property of Defendants

Neigum would also be directly impacted as a servient estate as to most or all of the 30-foot wide roadway in Segment "A" of the Replacement Access Road. This would be by reason of the defining Northerly boundary of Segment "A" of the "First Phase" of the Replacement Access Road, running Westerly and Northwesterly from the Westside Highway approximately along the 293.84 feet and 312.25 feet of the Southerly and Southwesterly boundary of Tract 2 of the Viehweg property. That boundary is identical to the Northerly and Northeasterly boundary of that part of the Neigum property. If the defining Northerly boundary of Segment "B" of the Replacement Access Road is identical to the common boundary between the Viehweg property and Neigum property, then all of the 30-foot width of the roadway in Segment "B" of the Replacement Access Road would come from the Neigum property. If that defining Northerly boundary of Segment "B" is North of the common boundary between the Viehweg property and the Neigum property, then that part of the 30-foot wide roadway North of the common boundary would come from the Viehweg property.

The Neigum property is in Franklin County, Idaho, and is described as follows:

Two parts of N $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., described as follows:

That part of NW $\frac{1}{4}$ SE $\frac{1}{4}$ lying East of the Twin Lakes Canal.

That part of NE $\frac{1}{4}$ SE $\frac{1}{4}$ lying West of the Westside Highway and further described as follows:

Beginning at a point 1323.25 feet West and S 0° 06' E 419.10 feet from the Northeast corner of SE $\frac{1}{4}$, and running thence S 0° 06' E 900.9 feet along the West line of NE $\frac{1}{4}$ SE $\frac{1}{4}$; thence East 770.819 feet to the West right-of-way line of the Westside Highway; thence North 11° 11' W along the West right-of-way line of the Westside Highway to the Southeast Corner of Tract 2 of the Viehweg property; thence S 84° 11' W 293.84 feet; thence N 57° 45' W 312.25 feet; thence N 4° 40' W 170 feet to the Northwest corner of Tract 1 of the Viehweg property; thence West to the point of beginning.

Containing 25.1 acres, more or less.

7. REQUESTED LEGAL DESCRIPTIONS for Segment "A" and Segment "B" of the Original Access Road. We deal with the Original Access Road from the Westside Highway to and across the bridge over the Twin Lakes Canal. Plaintiffs seek a 30-foot wide easement to

accommodate vehicles and machinery that frequently must travel the roadway and to enable snowbanks within the easement from snow removal from the traveled portion during the common snow seasons. A guide to establishing the bounds of the easement will be the traveled and visible roadway existing on May 27, 1987 and used by Plaintiffs and their predecessors in title to access property served by the roadway until it was blocked by Viehweg Defendants on May 28, 2008. The "defining line" will be the Northerly boundary of the claimed 30-foot wide easement with the traveled and visible roadway being about equidistant between the Defining Line and the Southern boundary of the 30-foot wide easement. The 30-foot wide easement shall be subject to establishment with a specific surveyed description in this case.

A. The Defining Line for Segment "A" of the Original Access Road is as follows:

Commencing at the NE Corner of SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho, and running thence West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 11°20'30" E 150.50 feet along said Westerly right-of-way line to the Point of Beginning of the Defining Line of Segment "A" of the Original Access Road; and running thence S 85°01'10" W 370.61 feet; thence N 88°02'30" W 154.44 feet to the end of Segment "A".

B. The Defining Line for Segment "B" of the Original Access Road is as follows:

Commencing at the end point of the Defining Line of Segment "A" of the Original Access Road; and running thence Northwesterly following the course of the defined and visible roadway located about equidistant between the Defining Line and the Southerly boundary of the 30-foot wide easement, to and across the bridge over the Twin Lakes Canal to that part of the NW¼SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho, lying West of the Twin Lakes Canal.

8. REQUESTED LEGAL DESCRIPTION for Segment "A" of the Replacement Access Road. The Replacement Access Road runs from the Westside Highway to and across the bridge over the Twin Lakes Canal. However, Segment "B" is identical to Segment "B" of the Original Access Road. Therefore here we only describe Segment "A" of the Replacement Access Road. To be a true replacement this must involve a 30-foot wide easement to accommodate vehicles and machinery that frequently must travel the roadway and to enable snowbanks within the easement from snow removal from the traveled portion during the common snow seasons. A guide to establishing the bounds of the easement will be the traveled and visible roadway

existing after May 28, 2008 when Viehweg Defendants blocked access to Segment "A" of the Original Access Road Easement, but the specifically traveled portion must be broadened to accommodate a full and usable traveled portion by Plaintiffs equivalent to their full usable and traveled portion of Segment "A" of the Original Access Road prior to it being blocked by Viehweg Defendants on May 28, 2008. The "defining line" will be the Northerly boundary of the claimed 30-foot wide easement with the traveled and usable roadway being about equidistant between the Defining Line and the Southern boundary of the 30-foot wide easement. The 30-foot wide easement shall be subject to establishment with a specific surveyed description in this case.

A. The Defining Line for Segment "A" of the Replacement Access Road is as follows:

Commencing at the NE Corner of SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho and running West 780.74 feet; thence S 00°06'00" E 419.10 feet to a point on the Westerly right-of-way line of the Westside Highway; thence S 11°20'30" E 150.50 feet along said Westerly right-of-way line; thence S 11°02'30" E 167 feet, along said Westerly right-of-way line to the Point of Beginning of the defining line of Segment "A" of the Replacement Access Road; thence S 84°11' W 293.84 feet; thence N 57°45' W 325.25 feet to the end of Segment "A" (which is identical to the end of Segment "A" of the Original Access Road).

B. The Defining Line for Segment "B" of the Replacement Access Road is identical to the Defining Line for Segment "B" of the Original Access Road, and is as follows:

Commencing at the end point of the Defining Line of Segment "A" of the Replacement Access Road (which is the same end point of the Defining Line of Segment "A" of the Original Access Road); and running thence Northwesterly following the course of the defined and visible roadway located about equidistant between the Defining Line and the Southerly boundary of the 30-foot wide easement, to and across the bridge over the Twin Lakes Canal, to that part of the NW¼SE¼ of Sec. 27, Twp. 14 S., Rge. 38 E., Boise Mer., Franklin County, Idaho, lying West of the Twin Lakes Canal.

REFERENCE IS MADE To the VERIFIED COMPLAINT, filed herein on September 17, 2008, and to the proposed AMENDED COMPLAINT, dated and verified this 28th of January, 2009, and mailed to and tendered to the Court this day with MOTION TO FILE AN AMENDED COMPLAINT, of this same date.

244093 12-13

AFTER RECORDING PLEASE RETURN TO:
JEFFERY & KATHLEEN NEIGUM
636 S. MAIN HWY.
CLIFTON, IDAHO 83228

227649 1-3

WARRANTY DEED

JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, Grantors of Clifton, Franklin County, State of Idaho, hereby CONVEY AND WARRANT to JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, or their Successors, as Trustees of the JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM REVOCABLE TRUST dated September 17th 2004, Grantees of 636 S. Main Hwy., Clifton, Idaho 83228, for the sum of Ten Dollars (\$10.00), and other good and valuable consideration, the following described tract of land in Franklin County, State of Idaho:

SEE ATTACHED EXHIBIT "A"

DATED this 17th day of September, 2004.

Recorded at the request of

Smith Law OfficesAM OCT 04 2004

2:35

PM

V. ELLIOTT LARSEN, RECORDER

By Camille Larsen Deputy

FRANKLIN COUNTY, IDAHO

STATE OF UTAH)

: ss.

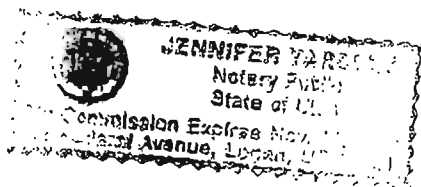
County of Cache)

Jeffery J. Neigum
JEFFERY J. NEIGUM

Kathleen A. Neigum
KATHLEEN A. NEIGUM

On the 17th day of September, 2004, personally appeared before me JEFFERY J. NEIGUM and KATHLEEN A. NEIGUM, the signers of the within instrument, who duly acknowledged to me that they executed the same.

Jennifer Y. Larsen
Notary Public

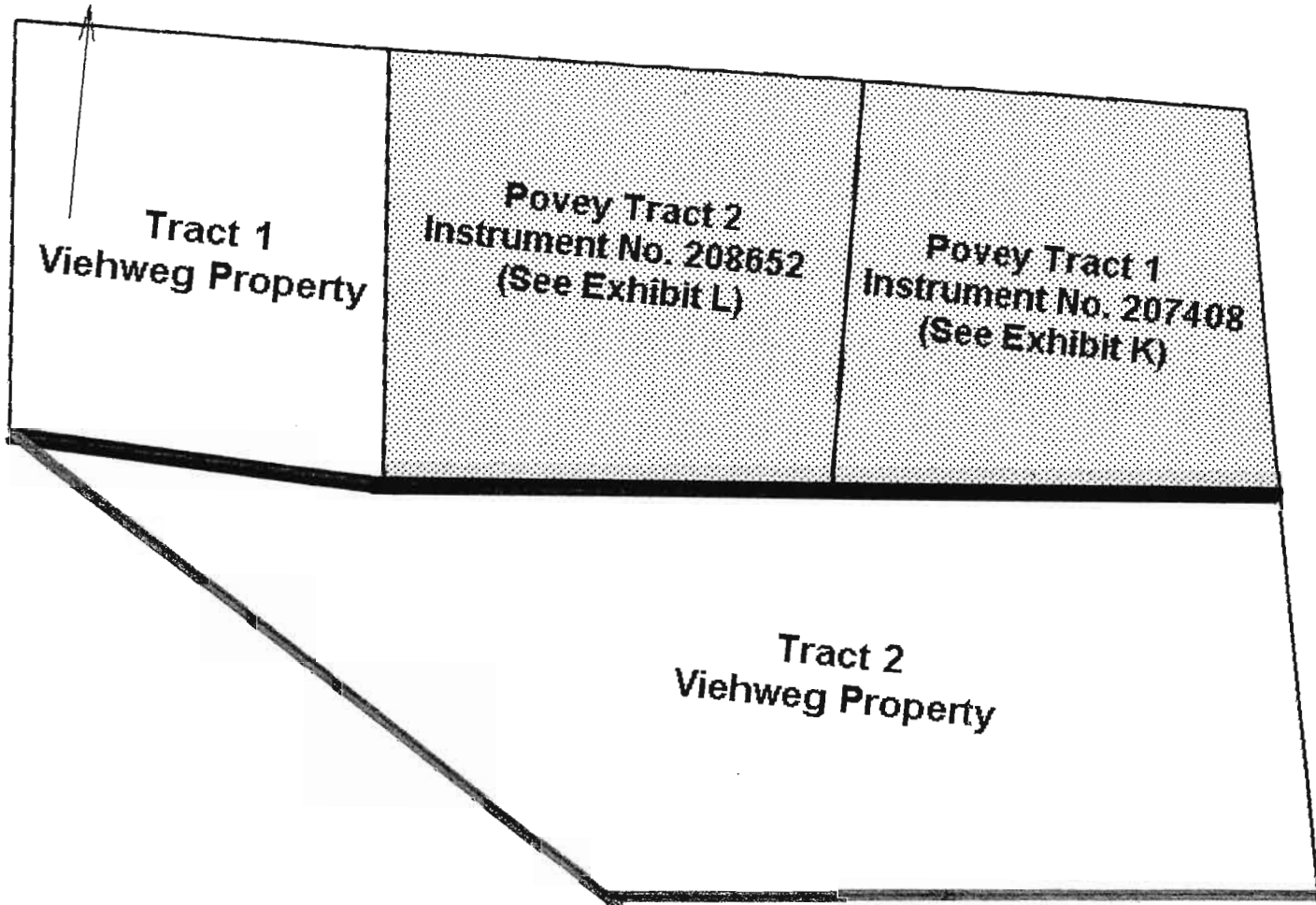


EXHIBIT

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Blake S. Atkin ISB# 6903
7579 North WestSide highway
Clifton, Idaho 83228
(208) 747-3414

ATKIN LAW OFFICES, P.C.
136 South Main Street, Suite 401A
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Fax: (801) 533-0380

Attorneys for the Povey defendants

FILED

09 FEB -4 PM 3:17

FRANKLIN COUNTY CLERK

Klones

DEPUTY

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow and
Nola Garner as Trustee of the Nola Garner
Living Trust, dated July 19, 2007,

Plaintiffs

Hal J. Dean and Marlene T. Dean, husband
and wife, Douglas K. Viehweg and Sharon C.
Viehweg, husband and wife, Jeffrey J.
Neigum and Kathleen A. Neigum, as Trustees
of the Jeffery J. Neigum and Kathleen A.
Neigum Revocable Trust, dated September
17, 2004; Jeffery J. Neigum and Kathleen A.
Neigum, husband and wife; Brad Povey and
Leiza Povey, husband and wife; First
American Title Insurance Company, a
Foreign Title Insurer with an Idaho
Certificate of Authority; and First American
Title Company, Inc., an Idaho Corporation.

Defendants,

Notice of Appearance

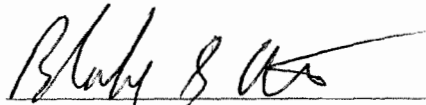
Case No. CV-08-342

Judge Brown

Blake S. Atkin, of the law firm, Atkin Law Offices, hereby enters his appearance as
counsel for Defendants, Brad and Leiza Povey.

Dated this 4 day of February, 2009

Atkin Law Offices, P.C.

A handwritten signature in black ink, appearing to read "Blake S. Atkin", written over a horizontal line.

Blake S. Atkin

Attorneys for the Povey defendants

CERTIFICATE OF SERVICE

The undersigned certifies that he caused to be served a true and correct copy of **NOTICE OF APPEARANCE OF BLAKE S. ATKIN AS COUNSEL FOR DEFENDANT BRAD AND LEIZA POVEY** upon the following by the method of delivery designated:

Gordon S. Thatcher ☒ U.S. Mail ☐ Hand delivery ☐ Fax
Thatcher, Beard, St. Clair, Gaffney
116 S. Center
P.O. Box 216
Rexburg, Idaho 83440

Eric Olsen ☒ U.S. Mail ☐ Hand delivery ☐ Fax
Racine, Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, Idaho 83204-1391

Ryan McFarland ☒ U.S. Mail ☐ Hand delivery ☐ Fax
Hawley, Troxell Ennis & Hawley
P.O. Box 1617
Boise, Idaho 83701-1617

Franklin County Court ☐ U.S. Mail ☒ Hand delivery ☐ Fax
39 West Oneida
Preston, Idaho 83263

Dated this 4 day of February, 2009

Blake S. Atkin

FILED

09 FEB -4 PM 3:17

FRANKLIN COUNTY CLERK

K/oner

DEPUTY

Blake S. Atkin ISB# 6903
7579 North WestSide highway
Clifton, Idaho 83228
(208) 747-3414
ATKIN LAW OFFICES, P.C.
136 South Main Street, Suite 401A
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Fax: (801) 533-0380
Attorneys for the Povey defendants

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow and
Nola Garner as Trustee of the Nola Garner
Living Trust, dated July 19, 2007,

Plaintiffs

Hal J. Dean and Marlene T. Dean, husband
and wife, Douglas K. Viehweg and Sharon C.
Viehweg, husband and wife, Jeffrey J. Neigum
and Kathleen A. Neigum, as Trustees of the
Jeffery J. Neigum and Kathleen A Neigum
Revocable Trust, dated September 17, 2004;
Jeffery J. Neigum and Kathleen A. Neigum,
husband and wife; Brad Povey and Leiza
Povey, husband and wife; First American Title
Insurance Company, a Foreign Title Insurer
with an Idaho Certificate of Authority; and
First American Title Company, Inc., an Idaho
Corporation.

Defendants,

Memorandum in support of Brad and Leiza
Povey's Motion to dismiss Amended
Complaint

Case No. CV-08-342

Judge Brown

The Amended Complaint should be dismissed as to Brad and Leiza Povey because the allegations of the Amended Complaint preclude a cause of action against them.

STANDARD OF REVIEW

A motion to dismiss, under rule 12(b)(6), for failure to state a claim can be granted only where it appears from the well pleaded facts of the complaint, taken as true, that the plaintiff can not recover on his or her claim. However, the Court should not speculate about facts that are not pleaded in order to try to save an otherwise defective complaint. The Supreme Court of the United States recently clarified the standard for granting dismissal under rule 12(b)(6) in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 , 127 S. Ct. 1955 (2007): to withstand a motion to dismiss, a complaint must contain enough allegations of fact “to state a claim to relief that is plausible on its face.” 127 S. Ct. at 1974 (emphasis added). Under this standard, “the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.” Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir.2007). (emphasis in original). The burden is on the plaintiff to frame a “complaint with enough factual matter (taken as true) to suggest” that he or she is entitled to relief. Twombly, 127 S.Ct. at 1965. “Factual allegations must be enough to raise a right to relief above the speculative level.” Id. The Idaho Supreme Court has added an additional clarification: Where a defense to the claims asserted appears on the face of the

complaint, then dismissal under 12(b)(6) is called for. Gardner v. Hollifield, 533 P 2d 730, 732 (Id. 1975). The Amended Complaint, while making the conclusory allegation that the Poveys have conspired to extinguish the Garner's rights of access, actually pleads specific facts that preclude such a finding. In this case, when all the well pleaded facts of the complaint are considered, it is clear that the Poveys have never done anything but reaffirm and enhance the Garner rights of access over the property in question. Since the crux of the Plaintiff's claim is that the Poveys have conspired to extinguish the access rights of the Garners, under Gardner v. Hollifield, the complaint must fail from its own allegations.

ARGUMENT

The Poveys are named in the first count of a multi-count complaint seeking to resolve a dispute between the plaintiffs and the other defendants over the existence of a right of way used to access the plaintiffs' property. When viewing all the well pleaded facts of the Amended Complaint, it is clear that the Poveys have not "conspired to extinguish" the Garner right of access to their property. Thus the complaint cannot survive factually. In addition, there simply is no well pleaded duty that Poveys owed to the Garners that they have breached. Therefore the Complaint fails legally to state a claim. For both reasons the Complaint must be dismissed as to these defendants.

I. THE WELL PLEADED FACTS OF THE AMENDED COMPLAINT PRECLUDE RECOVERY FROM THE POVEYS.

As alleged in the Amended Complaint, the Poveys no longer own any of the property in question and are not claiming any property rights in this litigation. Amended Complaint at paragraph 20. During the time the Poveys owned the property in question, and in their conveyances of the property, the Amended Complaint alleges that the Poveys took active steps to put the purchasers on notice of the Garners' access rights and to preserve those rights. Amended Complaint at paragraphs 16; 39(D). Indeed, in addition to preserving the original access route, Poveys provided Garners with an additional access to their property. Amended Complaint at paragraph 18. Poveys are truly mystified by the count of the Amended Complaint in which the Garners complain against them.

That count of the complaint alleges that the Poveys could not be bona fide purchasers of the property with respect to the right of way of Daniel Garner, which allegations the Poveys do not deny. The complaint then goes on to set out the supposed cause of action: "It was wrongful for Defendant Poveys to purport to convey property to Deans by Warranty Deeds . . . without excepting the right-of-way in Daniel." Amended Complaint paragraph 33.

The problem with this cause of action is that the allegation is not true as set forth in the Amended Complaint itself:

"In both Deeds Deans were on notice of an "existing right-of-way" along the South boundary, and in the first Deed they expressly took subject to "easements of record and easements

visible upon the premises.” Segment “A” of the First Phase of the Original right-of-way was at the time of the Deeds visible upon the premises and the adjoining properties.” Amended Complaint at paragraph 16.

The amended complaint makes the additional allegation that the Poveys plowed over a portion of segment “A” of “the original Access Road.” Amended Complaint at paragraph 35. While the relevance of this supposed action is not readily apparent, it is also not true as is also alleged in the Amended Complaint. “Segment “A” of the First Phase of the Original right-of-way was at the time of the Deeds visible upon the premises and the adjoining properties.” Amended Complaint at paragraph 16. “When Deans, Neigums and Viehwegs acquired their respective properties, it was clearly visible upon the adjacent property that the existing roadway ran to a bridge across the Twin Lakes Canal and extended beyond the Canal to the property west of the Canal.” Amended Complaint at paragraph 39(D). Exhibit “O” attached to the Amended Complaint shows the “original Access Road” in its entirety, not having been obliterated by any alleged “plowing.” Indeed the “original Access Road” is clearly visible to this day.

There simply is no way, given the allegations of the Amended Complaint, that a jury could find that the Poveys have taken any action to extinguish the Garner’s access to their property. Ironically, as also alleged in the Amended Complaint, in addition to preserving the “original Access Road,” the Poveys created, expressly for the use and benefit of the Garners, an alternative access road. Paragraph 18 of the Amended Complaint correctly alleges that in conveying a

portion of their property to the Neigums, the Poveys reserved an easement in this language:
“together with an easement for a roadway 20 feet in width lying adjacent to and along the South and West side of the above-described Courses 1) and 2) to be used by the Grantees, Daniel Garner, and the Grantors, their heirs, successors or assigns for general ingress and egress purposes. Said easement shall continue in a westerly direction to a bridge located on the Twin Lakes Canal accessing the Daniel Garner premises.” (emphasis in the original). ¹

It is well settled in the law that when a Court is examining a complaint to determine whether a cause of action is stated, the Court takes all of the well pleaded facts into account, and if there are facts pleaded in the complaint that preclude recovery, the court must dismiss the complaint. Gardner v. Hollifield, 533 P 2d 730, 732 (Id. 1975). In this case the complaint alleges that when conveying the property, the Poveys did in fact reference and reserve the easement over which the other parties are now fighting, and in addition reserved an additional route of access. The complaint against these defendants must be dismissed.

II. THE AMENDED COMPLAINT DOES NOT PLEAD A RECOGNIZABLE DUTY POVEYS OWED TO GARNER, NOR A BREACH OF ANY RECOGNIZABLE DUTY.

In addition to being factually flawed, the count alleged against the Poveys is legally flawed. Plaintiffs style their claim as one for “wrongful conveyance.” These defendants have not been able to find such a cause of action discussed in the jurisprudence of this state. Even if the

¹ As the Amended Complaint alleges, this is the only deed reference to the Garners’ having any right of access over the property in question. See, Amended Complaint at paragraph 29. This complaint by the Garners against the Poveys

Poveys had conveyed property without trying to preserve the Garner's access rights (which they have not done as set out above) that would not create a cause of action in the Garners. In order for there to be a cause of action, there must first be a duty and that duty must be breached. Akers v. Mortenson, __ P. 3d __, 2009 WL 198272 (2009). The Amended Complaint fails to identify any duty that the Poveys owed to the Garners or how that duty was breached. Daniel Garner and the Poveys obtained their respective properties from the same Grantor—the McCullochs.² Daniel Garner owned his property before the Poveys bought the property from McCullochs. Indeed, the Amended Complaint alleges that the deed by which Poveys became owners of the property over which Daniel's easement crosses "did not expressly provide the property conveyed was subject to a road right-of-way in Daniel . . ." Amended Complaint at paragraph 29. The Amended Complaint goes on to assert various methods by which Daniel's right to the access was preserved, i.e., through recordings in the chain of title, through implication, and even through prescriptive use. While these defendants do not dispute any of these claims, it is difficult to see how plaintiffs can complain about Poveys not including a metes and bounds description of the Garner access when none existed in their deed. Poveys have done nothing to diminish from any of the legal theories Garners are pursuing to preserve their rights in the easement. Indeed, the Poveys are the only parties in the chain of title, including the Garners, who put express language in any deeds

well illustrates the adage that "no good deed goes unpunished!"

² While the Amended Complaint alleges that Nola Garner and her husband obtained a parcel of property from the Povey defendants and Brad Povey's brother and sister-in-law they have expressly denounced any notion that any duties were breached in connection with that transaction. See, amended complaint at paragraph 34.

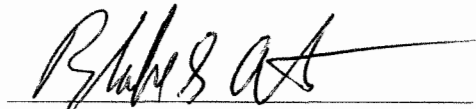
attempting to preserve the Garner access rights. There simply is no such cause of action as "wrongful conveyance" as alleged in the Amended Complaint and certainly there can be no cause of action for failure to insert an easement reservation into a deed when none existed before in the chain of title.

CONCLUSION

For the foregoing reasons the complaint as to Brad and Leiza Povey should be dismissed, no cause of action.

Dated this 4 day of February, 2009

Atkin Law Offices, P.C.

A handwritten signature in black ink, appearing to read "Blake S. Atkin", written over a horizontal line.

Blake S. Atkin

Attorneys for the Povey Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that he caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF BRAD AND LEIZA POVEY'S MOTION TO DISMISS** upon the following by the method of delivery designated:

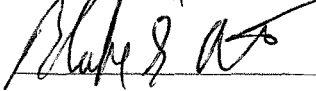
Gordon S. Thatcher ☒ U.S. Mail ☐ Hand delivery ☐ Fax
Thatcher, Beard, St. Clair, Gaffney
116 S. Center
P.O. Box 216
Rexburg, Idaho 83440

Eric Olsen ☒ U.S. Mail ☐ Hand delivery ☐ Fax
Racine, Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, Idaho 83204-1391

Ryan McFarland ☒ U.S. Mail ☐ Hand delivery ☐ Fax
Hawley, Troxell Ennis & Hawley
P.O. Box 1617
Boise, Idaho 83701-1617

Franklin County Court ☐ U.S. Mail ☒ Hand delivery ☐ Fax
39 West Oneida
Preston, Idaho 83263

Dated, this 4 day of February, 2009

 _____

Blake S. Atkin ISB# 6903
7579 North WestSide highway
Clifton, Idaho 83228
(208) 747-3414

ATKIN LAW OFFICES, P.C.
136 South Main Street, Suite 401A
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Fax: (801) 533-0380

Attorneys for the Povey defendants

FILED

09 FEB -4 PM 3:17

FRANKLIN COUNTY CLERK

Klonez
DEPUTY

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow and
Nola Garner as Trustee of the Nola Garner
Living Trust, dated July 19, 2007,

Plaintiffs

Hal J. Dean and Marlene T. Dean, husband
and wife, Douglas K. Viehweg and Sharon C.
Viehweg, husband and wife, Jeffrey J.
Neigum and Kathleen A. Neigum, as Trustees
of the Jeffery J. Neigum and Kathleen A.
Neigum Revocable Trust, dated September
17, 2004; Jeffery J. Neigum and Kathleen A.
Neigum, husband and wife; Brad Povey and
Leiza Povey, husband and wife; First
American Title Insurance Company, a
Foreign Title Insurer with an Idaho
Certificate of Authority; and First American
Title Company, Inc., an Idaho Corporation.

Defendants,

Defendant Brad and Leiza Povey's Motion to
dismiss Amended Complaint

Case No. CV-08-342

Judge Brown

Defendants, Brad and Leiza Povey respectfully move the Court to dismiss the claims
alleged against them in the Amended Complaint on the ground that given all the well pleaded

facts of the Amended Complaint, the Amended Complaint does not state a cause of action against these defendants on which any relief can be granted. This motion is supported by the memorandum filed in support hereof.

Dated this 4 day of February, 2009

Atkin Law Offices, P.C.

A handwritten signature in black ink, appearing to read "Blake S. Atkin", is written over a horizontal line.

Blake S. Atkin

Attorneys for the Povey defendants

CERTIFICATE OF SERVICE

The undersigned certifies that he caused to be served a true and correct copy of **DEFENDANT BRAD AND LEIZA POVEY'S MOTION TO DISMISS** upon the following by the method of delivery designated:


Gordon S. Thatcher ☒ U.S. Mail ☐ Hand delivery ☐ Fax
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Eric Olsen ☒ U.S. Mail ☐ Hand delivery ☐ Fax
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Ryan McFarland ☒ U.S. Mail ☐ Hand delivery ☐ Fax
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Franklin County Court ☐ U.S. Mail ☒ Hand delivery ☐ Fax
39 West Oneida
Preston, Idaho 83263

Dated this 4 day of February, 2009



ORIGINAL

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FRANKLIN COUNTY CLERK

K/ones

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Email: sch@hteh.com
rmcf@hteh.com

Attorneys for Defendant First American Title Insurance
Company

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

Daniel S. Garner and Sherri-Jo Garner,)
husband and wife; and Nola Garner as Trustee)
of the Nola Garner Living Trust,)

Plaintiffs,)

vs.)

Hal J. Dean and Marlen T. Dean, husband and)
wife; Douglas K. Viehweg and Sharon C.)
Viehweg, husband and wife; Jeffery J. Neigum)
and Kathleen A. Neigum, husband and wife;)
Brad Povey and Lezia Povey, husband and)
wife; First American Title Company, an Idaho)
corporation, and their heirs, personal)
representatives, successors and assigns; and)
John Does and Jane Does being any and all)
those who may claim right in the property)
described in the complaint that being)
Twp. 14 S., Rge. 38 E., Boise Mer., Franklin)
County, Idaho;)

Sec. 27: NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$,)
Part of NW $\frac{1}{4}$ SE $\frac{1}{4}$ described as follows:)

Beginning at the Southwest corner of)

FIRST AMERICAN TITLE INSURANCE COMPANY'S NOTICE OF NON-
OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND
COMPLAINT - 1

Case No. CV-08-342

FIRST AMERICAN TITLE INSURANCE
COMPANY'S NOTICE OF NON-
OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
COMPLAINT

134

NW $\frac{1}{4}$ SE $\frac{1}{4}$ and running thence East to the East)
edge of the Twin Lakes Canal; thence)
Northwesterly along the East edge of the canal)
to the North line of NW $\frac{1}{4}$ SE $\frac{1}{4}$; thence West to)
the Northwest corner of NW $\frac{1}{4}$ SE $\frac{1}{4}$; thence)
South to the point of beginning.)

SW $\frac{1}{4}$ SE $\frac{1}{4}$, saving and excepting therefrom:)

Beginning at a point 30 feet South of the)
Northeast corner of SW $\frac{1}{4}$ SE $\frac{1}{4}$, and running)
thence South 718 feet along the existing fence)
line; thence West 30 feet; thence North 718)
feet; thence East 30 feet to the point of)
beginning.)

Part of SE $\frac{1}{4}$ SE $\frac{1}{4}$ described as follows:)
Beginning at the Northwest corner of)
SE $\frac{1}{4}$ SE $\frac{1}{4}$, and running thence East along the)
existing fence line 718 feet, more or less, to)
the west line of the Highway; thence southerly)
along the west line 30 feet, more or less;)
thence West 718 feet, more or less; thence)
North 30 feet, to the point of beginning.)

Sec. 34: NE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$,)

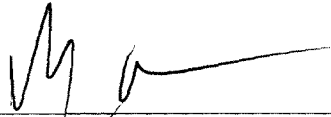
Defendants.)

First American Title Insurance Company ("First American"), named as a Defendant in the above-captioned matter as First American Title Company, by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP, hereby advises the Court that it will not oppose Plaintiff's Motion For Leave To Amend Complaint (Plaintiff's "Motion to Amend"), filed by the law firm of Thatcher Beard St. Clair Gaffney, attorneys for Plaintiffs Daniel S. Garner, Sherri-Jo Garner, and Nola Garner as Trustee of the Nola Garner Living Trust, on or about January 28, 2009.

DATED THIS 6th day of February, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Ryan T. McFarland, ISB No. 7347
Attorneys for Defendant First American
Title Insurance Company

CERTIFICATE OF SERVICE

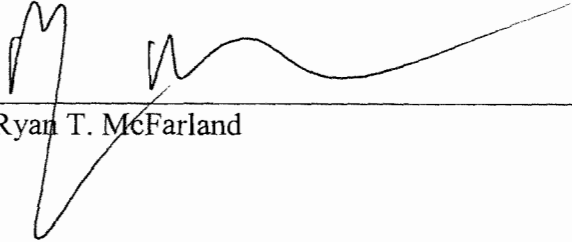
I HEREBY CERTIFY that on this 6th day of February, 2009, I caused to be served a true copy of the foregoing FIRST AMERICAN TITLE INSURANCE COMPANY'S NOTICE OF NON-OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT by the method indicated below, and addressed to each of the following:

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Jeffrey D. Brunson
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[Attorneys for Plaintiffs]

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[Attorneys for Defendants Hal J. Dean, Marlene T.
Dean, Douglas K. Viehweg, Sharon C. Viehweg, Jeffery
J. Neigum and Kathleen A. Neigum]

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☐ Overnight Mail
☐ Telecopy: (208) 232-6109



Ryan T. McFarland

FILED

09 FEB 20 AM 9:10

CLERK

Hampton
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jeff@beardstclair.com
mbrown@beardstclair.com

Attorneys for Plaintiffs

**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as
Trustees of the Jeffery J. Neigum and
Kathleen A. Neigum Revocable Trust,
dated September 17 2004; Jeffery J.
Neigum and Kathleen A. Neigum, husband
and wife; Brad Povey and Leiza Povey,
husband and wife; First American Title
Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
Authority; and First American Title
Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

RESPONSE TO DEFENDANT POVEYS'
MOTION TO DISMISS AMENDED
COMPLAINT

The plaintiffs, Daniel S. Garner, Sherri-Jo Garner and Nola Garner (collectively the

Garners), through counsel of record, Thatcher Beard St. Clair Gaffney *Attorneys*, respectfully respond to the defendants, Brad and Leiza Poveys' (Poveys), Motion to Dismiss Amended Complaint.

INTRODUCTION

The Garners initiated this action by filing a Verified Complaint on September 17, 2008. Before all the defendants had answered the Garners' complaint, the Garners, Deans, Viehwegs, and Neigums entered a stipulation authorizing the Garners to use a replacement road during the pendency of this action. Meanwhile, the Garners informed the defendants of their (Garners') intention to amend their complaint. The Garners filed their Motion for Leave to Amend Complaint on January 29, 2009. Counsel for the defendants, First American Title Insurance Company, the Deans, the Neigums, and the Viehwegs, have indicated they will not oppose the Garners' Motion. Although the Court has not yet granted the Garners leave to file their proposed amended complaint, the Poveys have filed a Motion to Dismiss Amended Complaint to which the Garners now respond.

STANDARD OF REVIEW

The Court may grant a Motion to Dismiss brought under Rule 12(b)(6) of the Idaho Rules of Civil Procedure only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 785 (1960). Even if the court believes the plaintiff will ultimately be unsuccessful in proving the allegations of his complaint, "the complaint should not be dismissed so long as there is *any possibility* that the plaintiff will ultimately prevail." *Id.* at 404, 784 (citation omitted)(emphasis added). Moreover, "[i]t need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be

granted.” *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (1992).

A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be applied in conjunction with Rule 8(a), and “every reasonable intendment will be made to sustain a complaint against a Rule 12(b)(6) motion to dismiss.” *Idaho Comm’n on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973)(internal citation omitted). Finally, “the non-moving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated.” *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

ARGUMENT

The Garners must meet an extremely low threshold in order to withstand the Poveys’ Motion to Dismiss Amended Complaint. The allegations set forth in the Garners’ proposed amended complaint, analyzed below, create not only a possibility the Garners will ultimately prevail, they create a *likelihood* the Garners will prevail against the Poveys. The Poveys’ Motion must therefore be dismissed.

I. THE DEFENDANT POVEYS’ MOTION IS PREMATURE.

The Poveys move to dismiss the Garners’ proposed amended complaint, despite the fact that this Court has not yet ruled on the Garners’ Motion to Amend Complaint. At this stage of the litigation, the Garners’ proposed amended complaint is merely an exhibit to an affidavit supporting the Garners’ Motion for Leave to Amend Complaint, not a filed pleading. Because the proposed amended complaint has not yet been filed, the Poveys’ motion to dismiss the same is not yet ripe for review. Nevertheless, the Garners presume the Poveys would properly bring a Motion to Dismiss upon the Court’s granting the Garners leave to amend their complaint. The Garners therefore respond to the Poveys’ Motion.

II. THE GARNERS' PROPOSED AMENDED COMPLAINT PLAINLY STATES CAUSES OF ACTION UPON WHICH RELIEF MAY BE GRANTED.

Even if this Court is inclined to consider the merits of the Poveys' Motion to Dismiss, its prematurity notwithstanding, the Motion must be denied, for the Garners have plainly alleged conceivably provable facts entitling them to relief under multiple legal theories. In the count directed against the Poveys of the Garners' proposed amended complaint, the Garners clearly allege interference with their easement, a cause of action recognized by the Idaho Supreme Court. *Nampa & Meridian Irrigation Dist. v. Washington Federal Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001). Moreover, although not explicitly stated as such, the facts pled by the Garners support causes of action for breach of covenants of title, slander of title, and nuisance.

A. The Poveys Wrongfully Interfered with, Obstructed, and Diminished the Value of the Garner Right-of-Way by Plowing over it.

The Poveys acknowledge the Garners have alleged that the Poveys wrongfully plowed over a portion of segment "A" of the original Access Road. Defs.' Mot. Dismiss Am. Compl. at 5. Then, perplexingly, the Poveys comment, "the relevance of this supposed action is not readily apparent..." *Id.* This destructive and illegal action could not be more relevant to the Garners' well pled claim that the Poveys wrongfully and unlawfully interfered with the Garners' access to and enjoyment of their right-of-way. The Idaho Supreme Court has recognized that a servient estate owner's interference with or obstruction of a dominant estate's easement is actionable. *Nampa & Meridian Irrigation Dist. v. Washington Federal Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001); *see also Nampa & Meridian Irrigation Dist. v. Mussell*, 139 Idaho 28, 72 P.3d 868 (2003).

As set forth in the Garners' proposed amended complaint, the Poveys plowed over part of the original access road "to facilitate sale of their property." Aff. Gordon Thatcher, Ex. 1, ¶ 35. The sale referred to in this allegation was the sale from the Poveys to the Viehwegs, which sale

took place in November of 2005. Prior to the completion of the sale between the Poveys and Viehwegs, the Poveys owned a servient estate (now the Viehweg property) burdened by the Garner right-of-way. Idaho law is clear on the restraints servient estates much exercise with respect to the rights of dominant estate owners in easement situations. "The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate." *Nampa & Meridian Irrigation Dist. v. Washington Federal Savings*, 135 Idaho at 522, 20 P.3d at 706. When a servient estate owner interferes with or obstructs an easement owner's privileges or rights in an easement, the easement owner is entitled to relief. *Id.*

Here, the Poveys' material interference with and obstruction of the Garners' right-of-way diminished the value of the easement and physically damaged the easement such that it became less suitable for the purposes the Garners had customarily used it. Because this easement constitutes the only legal access to the Garner property, the Poveys' interference with the easement significantly and adversely affected the economic value of the entire Garner property. Without physical and legal access to their property, the Garners lose marketable title. Under Idaho law, the defendant Poveys' are liable to the Garners for the damages caused by their wrongful actions. In any event, by alleging provable facts evincing the Poveys' destruction or attempted destruction of the Garners' right-of-way, the Garners have met the very low threshold required to withstand the Poveys' Motion to Dismiss Amended Complaint.

B. The Poveys' Failure to Disclose the Garner Easement Constitutes a Breach of the Covenants of Title, Slander of the Garners' Title, and Nuisance.

The Poveys repeatedly insist that the cause of action "wrongful conveyance" does not exist or is not recognized in Idaho. Defs.' Mot. Dismiss Am. Compl. at 6. Nevertheless, the Garners' proposed amended complaint clearly alleges wrongful conduct by the Poveys resulting

in damages to the Garners, and these allegations should be construed liberally¹ as causes of action for breach of warranty, slander of title, and nuisance.

i. The Poveys breached the warranty they provided to Nola Garner and Gary Garner by Warranty Deed on June 17, 1992.

The Poveys adamantly, but incorrectly insist the Garners have failed "to identify any duty that the Poveys owed to the Garners or how that duty was breached." Defs.' Mot. Dismiss Am. Compl. at 7. In fact, the Poveys covenanted to warrant title to the property they conveyed to the Garners, and the Poveys are in breach of that covenant. The Poveys conveyed real property, visually depicted in Exhibit B-4 and legally described in Exhibit F, both attached to the proposed amended complaint², to Nola Garner and Gary Garner on June 17, 1992. Following the legal description, the warranty deed to the property contains the following language:

TO HAVE AND TO HOLD the said premises, *with their appurtenances* unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees that they [are] the owners in fee simple of said premises; that they are free from all incumbrances and that *they will warrant and defend the same from all lawful claims whatsoever* (emphasis added).

The foregoing language clearly indicates the Poveys made a covenant of seisen, *see Simpson v. Johnson*, 100 Idaho 357, 361, 597 P.2d 600, 604 (1979), meaning they were lawfully seized of the property and its appurtenances (including the right-of-way used by the Poveys to access the property), and that they were entitled to convey the same. In the Warranty Deed, attached to the proposed amended complaint as Exhibit "F," the Poveys clearly made a covenant of warranty to the Garners. "The general effect of a covenant of warranty is that the grantor agrees to compensate the grantee for any loss which the grantee may sustain by reason of a failure of the title which the deed purports to convey." Powell on Real Property §

¹ See *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241 (Idaho 2008) (A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case).

² The proposed amended complaint is itself Exhibit A to the Affidavit of Gordon S. Thatcher.

81A.06[2][d][i]. This covenant of warranty applies with equal effect to the real property conveyed and any appurtenances, including easements, thereto. *See Walter Ethen v. Reed Masonry, Inc.*, 313 N.W.2d 19, 20 (Minnesota 1981)(defining an appurtenance subject to the covenant of warranty as “everything necessary to the beneficial use of property”). Thus, the Poveys warranted title to the property they conveyed to the Garners and access to the right-of-way constituting the only legal access to the property.

The Poveys are in breach of their covenant of warranty because the Garners have sustained loss and damages “by reason of a failure of the title (which includes appurtenances) which the Povey deed purported to convey.” *See Powell on Real Property* § 81A.06[2][d][i]. Not only has title to the property the Poveys conveyed to the Garners failed (due to the other defendants’ now challenging the validity of the Garner easement), but the Poveys themselves directly and proximately caused that failure when they deeded property to the Deans, Neigums, and Viehwegs without disclosing the existence of the very right-of-way they promised to “warrant and defend from all lawful claims whatsoever.” Further exacerbating circumstances, the Poveys affirmatively sought to destroy the easement by plowing over it. Am. Compl. ¶ 35, attached as Exhibit A to the Affidavit of Gordon S. Thatcher. Based on the standards applied to Rule 12(b)(6) motions, the Poveys’ Motion must be denied because the Garners have clearly shown at least a *possibility* of prevailing on the claims contained in their proposed amended complaint. *See Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 785 (1960).

ii. The Poveys slandered the Garners’ title.

By purporting to convey property free of the Garner right-of-way when they clearly knew of its existence, the Poveys caused damages to the Garners by slandering their title. The elements of a slander of title claim are: (1) publication of a slanderous statement; (2) its falsity;

(3) malice; and (4) resulting special damages. *Hogg v. Wolske*, 142 Idaho 549, 556, 130 P.3d 1087, 1094 (2006). Malice is defined as a reckless disregard for the truth or falsity of a statement. *Id.* at 557, 130 P.3d at 1088. Attorney fees are an appropriate measure of special damages. *Rayl v. Shull Enterprises, Inc.*, 108 Idaho 524, 530, 700 P.2d 567, 573 (1984). Punitive damages may be appropriate based on a claim for slander of title. *Id.*

Here, the Poveys caused deeds (to the Deans, Neigums, and Vei hwegs) negatively affecting title and legal access to the Garners' property to be publicly recorded and thus published. These deeds falsely represented that the properties they purported to convey were not subject to the Garner right-of-way. The Poveys showed reckless disregard for the truth or falsity of the representations made in these deeds because they indisputably knew of the Garner right-of-way and the Garners' habitual use of it. Finally, the Garners have sustained substantial special damages in legal expenses in order to protect their rights.

iii. The Poveys' wrongful actions constitute a nuisance.

The Poveys interfered with the comfortable enjoyment of the Garners' property by damaging and obstructing the Garner right-of-way, an appurtenance to the Garner property necessary for its enjoyment. Such interference constitutes a nuisance. *See* Idaho Code § 52-101. The Idaho Supreme Court has held that if nuisance is shown, the Plaintiff can avail himself of various remedies, including abatement, injunction, and damages. *Benninger v. Derifield*, 142 Idaho 486, 491, 129 P.3d 1235, 1240 (2006). Because the Garners allege provable facts supporting a nuisance claim for which relief can be granted, the Poveys' Motion to Dismiss must be denied.

iv. The Garners should be allowed to revise their proposed amended complaint.

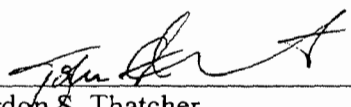
The Garners recognize that although their proposed amended complaint does provide a basis for alleging multiple causes of action, the causes of action of breach of the covenants of

title, slander of title, and nuisance are not specifically identified in the proposed amended complaint's heading. Therefore, the Garners request leave from the Court to revise their proposed amended complaint to comport with the characterization of the Garners' claims against the Poveys discussed herein.

CONCLUSION

Based on the foregoing, the Court should deny the Poveys' Motion to Dismiss Amended Complaint and grant the Garners' Motion for Leave to Amend Complaint.

DATED: February 19, 2008.



Gordon S. Thatcher
Jeffrey D. Brunson
Michael W. Brown
of Thatcher Beard St. Clair Gaffney Attorneys
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on February 19, 2009 I served a true and correct copy of PLAINTIFFS' RESPONSE TO DEFENDANT POVEYS' MOTION TO DISMISS AMENDED COMPLAINT upon the following by the method of delivery designated:

Eric Olsen
Racine Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, ID 83204-1391
Fax: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Ryan McFarland
Hawley Troxell Ennis & Hawley
P.O. Box 1617
Boise, ID 83701-1617
Fax: (208) 342-3829

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Blake S. Atkin
Atkin Law Office
837 S 500 W, Suite 200
Bountiful, UT 84010
Fax: (801) 533-0380


☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Civil Court Clerk
Franklin County Courthouse
39 W. Oneida
Preston, ID 83263
Fax: (208) 852-2926

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Honorable Stephen Dunn Chambers
Bannock County Courthouse
624 East Center
Pocatello, Idaho 83201
Fax: (208) 236-7208

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile


Gordon S. Thatcher
Jeffrey D. Brunson
Michael W. Brown
of Thatcher Beard St. Clair Gaffney Attorneys
Attorneys for Plaintiffs

FILED

09 FEB 24 PM 1:07

FRANKLIN COUNTY CLERK

K Jones

DEPUTY

Stephen C. Hardesty, ISB No 4214
 Ryan T. McFarland, ISB No 7347
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P.O. Box 1617
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 Telephone: (208) 344-6000
 Facsimile: (208) 342-3829
 Email: shardesty@hawleytroxell.com
 rmcfarland@hawleytroxell.com

Attorneys for Defendant First American Title Insurance
 Company

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

Daniel S. Garner and Sherri-Jo Garner,
 husband and wife; and Nola Garner as Trustee
 of the Nola Garner Living Trust,

Plaintiffs,

vs.

Hal J. Dean and Marlen T. Dean, husband and
 wife; Douglas K. Viehweg and Sharon C.
 Viehweg, husband and wife; Jeffery J. Neigum
 and Kathleen A. Neigum, husband and wife;
 Brad Povey and Lezia Povey, husband and
 wife; First American Title Company, an Idaho
 corporation, and their heirs, personal
 representatives, successors and assigns; and
 John Does and Jane Does being any and all
 those who may claim right in the property
 described in the complaint that being
 Twp 14 S, Rge. 38 E, Boise Mer., Franklin
 County, Idaho;

Sec 27: NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$,
 Part of NW $\frac{1}{4}$ SE $\frac{1}{4}$ described as follows:

Beginning at the Southwest corner of

FIRST AMERICAN TITLE INSURANCE COMPANY'S NOTICE OF NON-
 OPPOSITION TO DEFENDANT BRAD AND LEIZA POVEY'S MOTION TO
 DISMISS AMENDED COMPLAINT - 1

Case No. CV-08-342

FIRST AMERICAN TITLE INSURANCE
 COMPANY'S NOTICE OF NON-
 OPPOSITION TO DEFENDANT BRAD
 AND LEIZA POVEY'S MOTION TO
 DISMISS AMENDED COMPLAINT

NW $\frac{1}{4}$ SE $\frac{1}{4}$ and running thence East to the East)
 edge of the Twin Lakes Canal; thence)
 Northwesterly along the East edge of the canal)
 to the North line of NW $\frac{1}{4}$ SE $\frac{1}{4}$; thence West to)
 the Northwest corner of NW $\frac{1}{4}$ SE $\frac{1}{4}$; thence)
 South to the point of beginning.)

SW $\frac{1}{4}$ SE $\frac{1}{4}$, saving and excepting therefrom:)

Beginning at a point 30 feet South of the)
 Northeast corner of SW $\frac{1}{4}$ SE $\frac{1}{4}$, and running)
 thence South 718 feet along the existing fence)
 line; thence West 30 feet; thence North 718)
 feet; thence East 30 feet to the point of)
 beginning.)

Part of SE $\frac{1}{4}$ SE $\frac{1}{4}$ described as follows:)
 Beginning at the Northwest corner of)
 SE $\frac{1}{4}$ SE $\frac{1}{4}$, and running thence East along the)
 existing fence line 718 feet, more or less, to)
 the west line of the Highway; thence southerly)
 along the west line 30 feet, more or less;)
 thence West 718 feet, more or less; thence)
 North 30 feet, to the point of beginning)

Sec 34: NE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$,)


Defendants.)

First American Title Insurance Company ("First American"), named as a Defendant in the above-captioned matter as First American Title Company, by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP, hereby advises the Court that it will not oppose Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint (the "Motion to Dismiss"), filed by the law firm of Atkin Law Offices, P.C., attorneys for the Povey Defendants, on or about February 4, 2009.

DATED THIS 24th day of February, 2009

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Ryan T. McFarland, ISB No. 7347
Attorneys for Defendant First American
Title Insurance Company

FIRST AMERICAN TITLE INSURANCE COMPANY'S NOTICE OF NON-
OPPOSITION TO DEFENDANT BRAD AND LEIZA POVEY'S MOTION TO
DISMISS AMENDED COMPLAINT - 3

150

CERTIFICATE OF SERVICE

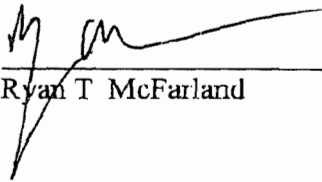
I HEREBY CERTIFY that on this 24th day of February, 2009, I caused to be served a true copy of the foregoing FIRST AMERICAN TITLE INSURANCE COMPANY'S NOTICE OF NON-OPPOSITION TO DEFENDANT BRAD AND LEIZA POVEY'S MOTION TO DISMISS AMENDED COMPLAINT by the method indicated below, and addressed to each of the following:

Michael D. Gaffney
Jeffrey D. Brunson
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, ID 83404-7495
[Attorneys for Plaintiffs]

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☐ Hand Delivered
☐ Overnight Mail
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Eric L. Olsen
Scott J. Smith
RACINE OLSON NYE BUDGE & BAILEY CHTD.
201 E. Center
P.O. Box 1391
Pocatello, ID 83204-1391
[Attorneys for Defendants Hal J. Dean, Marlene I.
Dean, Douglas K. Viehweg, Sharon C. Viehweg, Jeffery
J. Neigum and Kathleen A. Neigum]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy: (208) 232-6109



Ryan T. McFarland

Blake S. Atkin ISB# 6903
7579 North Westside Highway
Clifton, Idaho 83228
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ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorneys for Brad and Leiza Povey

FILED

09 FEB 24 PM 3:52

FRANKLIN COUNTY CLERK
L Hampton
DEPUTY

**IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
FRANKLIN COUNTY, STATE OF IDAHO**

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow and
Nola Garner as Trustee of the Nola Garner
Living Trust, dated July 19, 2007,

Plaintiffs,

v.

Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon C.
Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as Trustees
of the Jeffery J. Neigum and Kathleen A.
Neigum Revocable Trust, dated September
17, 2004; Jeffery J. Neigum and Kathleen A.
Neigum, husband and wife; Brad Povey and
Leiza Povey, husband and wife; First
American Title Insurance Company, a
Foreign Title Insurer with an Idaho
Certificate of Authority; and First American
Title Company, Inc., an Idaho Corporation.

Defendants.

**DEFENDANTS BRAD AND LEIZA
POVEY'S REPLY IN SUPPORT OF
MOTION TO DISMISS AMENDED
COMPLAINT**

Case No. CV-08-342

Judge Dunn

Defendant's Brad and Leiza Povey, by and through undersigned counsel, hereby file this reply in support of their Motion to Dismiss Amended Complaint.

While it is true that the threshold showing necessary to defend against a motion to dismiss is low, in trying to make out a cause of action the Plaintiffs' lawyers cannot free themselves from the sworn to factual statements of the Verified Amended Complaint. The motion to dismiss is not to be denied in cases where the facts pleaded by the plaintiff in a verified amended complaint demonstrate that the plaintiff cannot recover.

I. THE POVEY MOTION IS NOT PREMATURE

As pointed out in Defendants' motion to dismiss, Brad and Leiza Povey ("Povey Defendants" or "Poveys") did not answer the original complaint, therefore leave of Court was not necessary for Plaintiffs to amend as to these Defendants. Motion to Amend Complaint, at n. 1. As to the Povey Defendants, the Complaint has been amended and there is no need to waste any more of the Court's or the parties' resources.

II. IF THE GARNERS NOW WISH TO PURSUE THE CLAIMS OF NOLA GARNER UNDER A BREACH OF WARRANTY CLAIM, THEY HAVE FAILED TO JOIN TWO INDESPENSABLE PARTIES.

The Amended Complaint does not assert a claim for breach of warranty. Indeed, the Amended Complaint expresses the Plaintiff's desire to not widen this controversy by asserting such a claim. Nola and Gary Garner were the only parties in privity of contract with the Povey Defendants. Daniel Garner received his property rights from the same grantor from whom the Poveys obtained the property they once owned.

In discussing the conveyance by the Poveys to Nola and Gary Garner, the Amended Complaint correctly alleges that it was not these Povey Defendants alone who conveyed the

property to Nola and Gary Garner, but these Povey Defendants and Henry and Melanie Povey, who all four owned the property at the time of the conveyance to Nola and Gary Garner. Amended Complaint at 11, 34. The Amended Complaint then alleges that because the Plaintiffs expect

that Henry and Melanie will acknowledge the four Poveys had acquired the property subject to the right-of-way of Daniel while the Poveys had the right to use the right-of-way to access their property west of Twin Lakes Canal. Henry and Melanie should acknowledge Daniel, his wife, Gary and Nola, and the Nola Trust have used and have had the right to use of the right-of-way to access their property west of the Twin Lakes Canal Because of expected cooperation of Henry and Melanie for Daniel and his wife and Nola and the Nola Trust to preserve their access rights, Daniel and wife and Nola and the Nola Trust do not include Henry and Melanie as Defendants

Amended Complaint at paragraph 34.¹ In filing their motion to dismiss, these Povey Defendants understood that allegation to mean that there was no claim being asserted based on the conveyance from the four Poveys to Nola and Gary Garner. Indeed, such a claim could not be made under the allegations of the amended complaint because Henry and Melanie Povey are necessary and indispensable parties to any such claim. Idaho Rule of Civil Procedure 19(a)(1) states, in relevant part, regarding indispensable parties:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to

¹ The court should note that the very same circumstances that led the Plaintiffs to not include Henry and Melanie Povey in the amended complaint would appear to apply with equal force to the Povey Defendants. The Amended Complaint does not allege that Brad and Leiza Povey will not acknowledge the four Poveys had acquired the property subject to the right-of-way of Daniel while the Poveys had the right to use the right-of-way to access their property west of Twin Lakes Canal. Nor does the Amended Complaint allege that Brad and Leiza Povey would fail to acknowledge Daniel, his wife, Gary and Nola, and the Nola Trust have used and have had the right to use of the right-of-way to access their property west of the Twin Lakes Canal. There is no reason to believe that Brad Povey will be any less solicitous of the Garners' interests than his brother. Indeed, as pointed out in the motion to dismiss, Brad Povey is the only person who put any provision in any deed to memorialize the access rights of the Garners.

protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

I.R.C.P. 19(a)(1). “[W]here a suit is brought on a deed all the grantors and the grantees are indispensable parties.” Chapman v. L&N Grove, Inc., 265 So.2d 725, 729 (Fla. App. 1972).

This defect in the complaint cannot be cured by mere argument in the response to the motion to dismiss. New parties obviously cannot be added by the lawyers’ arguments. Nor would such a course be prudent for the Court. If the new cause of action for breach of warranty is allowed to go forward it will necessarily increase the litigation costs exponentially. Such a drastic widening of the controversy to include claims expressly declined in the amended complaint because it would embroil additional parties in this already extended controversy should not be allowed by mere argument.

III. THERE IS NO SLANDER OF TITLE CLAIM PLEADED IN THE AMENDED COMPLAINT

As pointed out in Plaintiffs’ response, a slander of title claim requires first and foremost publication of a slanderous statement. Plaintiffs cannot point to any such slanderous statement concerning the Garners’ access rights across the property. Nowhere is there a recorded document that purports to deny that any of the Garners had a right of access over the property. Indeed, as pointed out in their motion to dismiss, these Povey defendants are the only people on planet earth that included in any deeds filed with the county recorder any mention of the Garner access rights. Whatever the supposed claims might be there certainly is not a cause of action for slander of title.

IV. THE AMENDED COMPLAINT DOES NOT ALLEGE DAMAGE TO THE EASEMENT OR NUISANCE.

The cases cited by the Plaintiffs show that the servient estate can use the property "in any manner which does not materially interfere with the use of the easement by the owner of the dominant estate." Plaintiffs then posit that "when a servient estate owner interferes with or obstructs an easement owner's privileges or rights in an easement, the easement owner is entitled to relief." Response to Defendant Poveys' motion to dismiss amended complaint at p. 5. Similarly, it is argued that Poveys committed a nuisance "by damaging and obstructing" the Garner right of way. *Id.* at p. 8. The problem is that the Amended Complaint does not allege that these defendants obstructed the easement.²

The only allegation of the Amended Complaint that damage was done to the easement is that the Defendants "plowed" the easement. It is not alleged that the plowing made the easement impassable or that it interfered in any way with the use of the easement. Indeed, the allegations of the verified amended complaint and the attachments thereto make it clear that whatever plowing occurred did not obliterate the easement or interfere with its use. For instance, the Verified Amended Complaint alleges that Daniel Garner has used the easement openly and notoriously and continuously and "uninterrupted from May 22, 1987 until May 28, 2008, when the road was blocked." Amended Complaint at paragraph 41(D)([1]). The event that interfered with the use of the easement was "Viehwegs constructing of a fence across segment "A" of the First Phase of the Original Access Road, on May 28, 2008." Amended complaint at paragraph 25. By the time this fence was constructed, the Poveys had long since left the scene. Amended

² This roadway is not a paved or even a graveled road. It is and always has been a two track dirt road. That is why the relevance to plowing seemed irrelevant when these defendants were filing their motion to dismiss. In the response, Plaintiffs assert as argument, that somehow this plowing "obstructed" the easement. This argument flies in the face of the allegations of the Verified Amended Complaint.

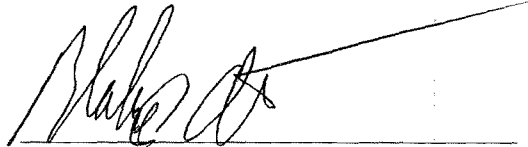
Complaint at paragraph 20.

CONCLUSION

The Complaint in this matter and also the Amended Complaint are verified. That means that the plaintiffs have testified under oath that the facts contained in it are true. All of the arguments made by Plaintiffs' lawyers to try to save this complaint are precluded by the verified facts. Under these circumstances, the Amended Complaint cannot stand.

Dated this 24 day of February, 2009.

ATKIN LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read 'Blake S. Atkin', is written over a horizontal line.

Blake S. Atkin

Attorneys for the Brad and Leiza Povey

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of February, 2009, I caused to be served a true and correct copy of **DEFENDANT'S BRAD AND LEIZA POVEY'S REPLY IN SUPPORT OF MOTION TO DISMISS** upon the following by the method of delivery designated:

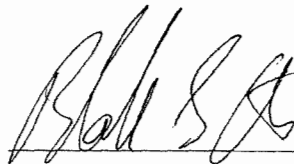
Gordon S. Thatcher ____ U.S. Mail ____ Hand delivery ☒ Fax
Thatcher, Beard, St. Clair, Gaffney
116 S. Center
P.O. Box 216
Rexburg, Idaho 83440

Eric Olsen ☒ U.S. Mail ____ Hand delivery ____ Fax
Racine, Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, Idaho 83204-1391

Ryan McFarland ☒ U.S. Mail ____ Hand delivery ____ Fax
Hawley, Troxell Ennis & Hawley
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Boise, Idaho 83701-1617

Franklin County Court ____ U.S. Mail ☒ Hand delivery ____ Fax
39 West Oneida
Preston, Idaho 83263

Dated this 23 day of February, 2009.



FILED

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**DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO**

FRANKLIN COUNTY CLERK

K. Jones

DEPUTY

Daniel S. Garner and Sherri-Jo Garner,
husband and wife; Nola Garner, a widow;
and Nola Garner as Trustee of the Nola
Garner Living Trust, dated July 19, 2007,

Plaintiffs,

vs.

Hal J. Dean and Marlene T. Dean, husband
and wife; Douglas K. Viehweg and Sharon
C. Viehweg, husband and wife; Jeffrey J.
Neigum and Kathleen A. Neigum, as
Trustees of the Jeffery J. Neigum and
Kathleen A. Neigum Revocable Trust,
dated September 17 2004; Jeffery J.
Neigum and Kathleen A. Neigum, husband
and wife; Brad Povey and Leiza Povey,
husband and wife; First American Title
Insurance Company, a Foreign Title
Insurer with an Idaho Certificate of
Authority; and First American Title
Company, Inc., an Idaho Corporation,

Defendants.

Case No. CV-08-342

ORDER

The Court having considered the Plaintiffs' Motion for Leave to Amend Complaint, and
no opposition having been raised thereto, and good cause appearing therefor, it is hereby
ordered, adjudged, and decreed that Plaintiffs' Motion for Leave to Amend Complaint is
GRANTED.

Stephen S. Dunn

The Honorable Stephen S. Dunn

CERTIFICATE OF SERVICE

I certify that on this 6 day of ~~February~~ ^{March}, I served a true and correct copy of the foregoing ORDER upon the following by the method of delivery designated:

Eric Olsen
Racine Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, ID 83204-1391
Fax: (208) 232-6109

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Atkin Law Offices, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84101
Fax: (801) 533-0380

☒ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Clerk of the District Court
Franklin County, Idaho

By: Klond

Minutes Report

Case: CV-2008-0000342

Daniel S Garner, etal. vs. Hal J Dean, etal.

All Items

Hearing type:	Motions	Minutes date:	02/26/2009
Hearing judge:	Stephen S. Dunn	Start time:	02:10 PM
Court reporter:		End time:	02:10 PM
Minutes clerk:	Mary Jo ROBERTS	Audio tape number:	

Parties: Michael Brown - Garner
Jeff Brunson - Garner
Blake Atkin - Defendants

Tape Counter: 233 Court
Judge - law clerk there is not a physical court reporter - all agreed

Tape Counter: 234 Plaintiff and Defendants agree

Tape Counter: 234 Plaintiff lawyer - Motion for Leave to Amend Complaint
Atkin - stip to amended complaint
Defendant - no oppositions
MOTION GRANTED - Appropriate Motion to be filed

Tape Counter: 235 Motion to Dismiss filed by Poveys - Blake Atkin
Court has reviewed all pleadings filed with this
First issue to resolve - is the motion timely

Tape Counter: 237 Mr. Brown - position - waiving any timeliness

Tape Counter: 237 Court - Mr. Atkins motions - two briefs in support have been read by the Court

Tape Counter: 238 Mr. Atkin - argue anything not in the briefs
Court ask questions
Dealing with easement not in the deeds, unrecorded
Created a replacement easement
Road at issue from Exhibit B4 - this road was visible when the Poveys got the property
Court questions with the exhibits
Issue on the whole case is a small section of road

Tape Counter: 247 Mr. Atkin to argue motion to dismiss

Tape Counter: 248 Court notes Issues- Plowed over part of the road - interferred with the easement
Deal with this issue.

Tape Counter: 249 Mr. Atkin
Court questions

Tape Counter: 255 Court - second issue - the convenance to the properties deficent to impare this easement

Tape Counter: 256 Mr. Atkin - the deed did not specifically describe this easement

Tape Counter: 256 Court - summarized the history of the easement from the McCullochs. The Poveys described the easement in the properties they sold.
Mr. Atkin - chain of the easement

Minutes Report

Case: CV-2008-0000342

Daniel S Garner, etal. vs. Hal J Dean, etal.

All Items

Tape Counter: 259	Court - Poveys conveyed property to others accepting the right of way in Garners.
Tape Counter: 301	Mr. Atkin discuss amended complaint Reference to Exhibit L. Reference to Paragraph 16 of Amended Complaint
Tape Counter: 303	Mr. Atkin Deed from McCullochs to Poveys did not describe the easement Poveys to the Deans did describe the easement Refer to L - in the description it mentions the existing right of way
Tape Counter: 308	Court - what is really meant by these descriptions Motion to Dismiss - is this so clear
Tape Counter: 308	Mr. Atkin
Tape Counter: 310	Court to Clerk - look up what the Deans claim Deans say there isn't an easement they are bound by
Tape Counter: 311	Mr. Atkins Why do the Garners have any claims against the Poveys? Allegations in Paragraph 16 say Poveys breached a duty The Poveys never got a deed to describe their easement There is an easement on the ground, the Poveys did not effect this There is no deed where the easement is described The Poveys have assisted the Garners
Tape Counter: 316	Mr. Brown for the Plaintiffs - the Garners Court responds to questions by Mr. Brown Mr. Brown to address claims Court talks about theories Breach of Warranty claim - allegation of Garners Court asks questions - impertanances, contract of sale, two different documents. Mr. Brown responds - needs to be a writing in the contract Court - contract creates an impertanance Mr. Brown says there is a duty Court says no cases to cite there is a duty
Tape Counter: 326	Mr. Brown - interference of an easement Court asks questions about plowing over the easement Mr. Brown only have to say the easement was impaired Court takes about the easement Mr. Brown - Garners can plead an alternative theory Court says it does not appear to be alternative but opposed Mr. Brown Court reads from the complaint paragraph 41 Mr. Brown missed Count 2 Mr. Brown summary - their easement has been interfered with the Poveys - not the time to display the degree or extent

Minutes Report

Case: CV-2008-0000342

Daniel S Garner, etal. vs. Hal J Dean, etal.

All Items

Tape Counter: 334 Conveyance Argument by Mr. Brown
Bridge of Warranty
Warranty to the Garners
Conveyance of Property - why is it a greater reponsibiltiy of the Poveys than the McCullochs

Tape Counter: 337 Mr. Brown - procedural motion
Mr. Atkins - no objections
The other attorney for the Garners - Ask for a leave to amend the complaint -oral motion for leave to amend complaint pursuant to what has been briefed - rule 15A - leave to assert facts

Tape Counter: 339 Court - willing to entertain the motion
Mr. Atkins - you can file a response

Tape Counter: 340 Mr. Atkins - believes there is sufficient facts before the Court
The Court responds
Mr. Atkins - paragraph 34
Court asks factual question
Mr. Atkins needs to be cauious of expansion of claim
Asks court to grant motion to dismiss

Tape Counter: 350 Court - take under advisement
Comments:
Verified notion of the Complaint
Allegations against Poveys is thin
Usually don't dismiss
Parties using tremendous resources in not resolving this issue
Will rule on the motion to amend
Slander of title - not right
Issue a decision in 30 days

Tape Counter: 353 Mr. Brown - Would like to file memo. in support of motion
Court - grant the motion to file the motion

09 MAR 13 AM 10:18

TRAINING MY CLERK

Klinez

DEFINITION

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

Register No.CV-2008-342

DANIEL S. GARNER, et al.,

Plaintiffs,

-VS-

HAL J. DEAN, et al.

Defendants.

DECISION AND ORDER ON
POVEY DEFENDANTS
MOTION TO DISMISS
AMENDED COMPLAINT

Defendants Brad and Leiza Povey (“Poveys”) seek to dismiss the Amended Complaint¹ pursuant to Rule 12(b)(6) for failure to state a claim against these defendants. Having reviewed the Amended Complaint, Poveys’ Motion to Dismiss Amended Complaint and Memoranda in Support, and Plaintiffs’ Response to Poveys’ Motion to Dismiss and having heard oral argument on the matter, the Court DENIES Defendants’ Motion to Dismiss.

BACKGROUND²

In 1987 Plaintiffs (collectively referred to as “Garners”) acquired real property from McCullochs. Contemporaneously, a Contract of Sale³ was entered into where McCullochs conveyed to Garners “a right-of-way across Seller’s adjacent property along an existing

¹ The Motion to Dismiss was actually filed prior to the Court granting the Plaintiffs' Motion to Amend the Complaint. However, any objection to the timeliness of the Motion to Dismiss was withdrawn by the Plaintiffs. The Motion to Amend was granted without objection so the Motion to Dismiss is properly before the Court.

² Since this is a Motion to Dismiss a verified Amended Complaint, Poveys agree that all the allegations of the Complaint are taken to be true. Thus all facts listed herein are taken from the Amended Complaint.

roadway.” The road Garners were using began at the Westside Highway and ran across the property they acquired and then across property McCullochs retained. Without the use of this road the Garners would not have had access to the property they acquired. In May 1990 Poveys acquired property from McCullochs adjacent to the Garners’ property. Thus Poveys’ property was encumbered by the right-of-way at issue in this case. In 1992 Poveys conveyed a part of the property they owned to Garners, but retained that part of the property adjacent to the Westside Highway over which part of the access road passed. Poveys conveyed portions of their remaining property to Hal Dean (“Dean”) in 1999, to Jeffery Neigum (“Neigum”) in 2001, and to Douglas Viehweg (“Viehweg”)⁴ in 2005, ultimately divesting themselves of all property in the area. The original access road crosses or abuts these last conveyed parcels but the warranty deeds conveying such property do not explicitly reserve or describe the Garners’ right-of-way.⁵ In 2008 Viehweg constructed a fence across part of the access road, allegedly depriving Garners of their right of access, thus precipitating this lawsuit.

As to Poveys, the Amended Complaint alleges that Poveys wrongfully conveyed property to Dean, Neigum and Viehweg without protecting Garners right-of-way which requires Garners to file this action to protect it.⁶ It is also alleged that Poveys impaired the right-of-way by plowing over part of it to facilitate the sale to Dean, Neigum and Viehweg.⁷ As to all Defendants Garners assert that their original right-of-way is being obstructed or damaged and that Defendants are “forcing an inadequate replacement access road” on them.

³ Amended Complaint, Exhibit A.

⁴ The properties were also conveyed to the spouse of each named party.

⁵ The portion of the original access road at issue is a very small segment of the original right-of-way.

⁶ Amended Complaint, ¶¶ 28-33; see also, Prayer for Relief, p. 30.

STANDARD OF REVIEW

A Motion to Dismiss is governed by I.R.C.P.12(b)(6), which provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion... (6) failure to state a claim upon which relief can be granted....

Further, I.R.C.P. 12(c) provides that: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

A motion to dismiss may be granted where "the plaintiff can prove no set of facts upon which the court could grant relief," and in such a case "the complaint should be dismissed."

Johnson v. Boundary School Dist. No. 101, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003)(citing *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). See also *Ernst v.*

Hemenway and Moser Co., Inc., 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct.App. 1991)("For a complaint to be dismissed under Rule 12(b)(6) on the ground that the complaint fails to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.") *Accord, Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 174, 923 P.2d 416, 420 (When faced with an IRCP 12(b)(6) motion to dismiss, after drawing all inferences in favor of the non-moving party, a court must ask "whether a claim for relief has been stated.") In addition, "the nonmoving party is entitled to have all inferences from the record viewed in its favor." *Johnson*, 138 Idaho at 334, 63 P.3d at 460; *Ernst*, 120 Idaho at 946, 821 P.2d at 1001. "[A]s a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct.App. 1992).

⁷ *Id.* ¶ 35.

This standard was reaffirmed in *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005) where the Court stated that “[a] motion to dismiss for failure to state a claim should not be granted ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.’” (Citing *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). Indeed, “upon a rule 12(b)(6) motion to dismiss for failure to state a claim, the complaint must be viewed in the light most favorable to the plaintiff, it must be given the benefit of every reasonable intendment, and every doubt must be resolved in its favor.” *Gardner*, at 610-611, 731-732; *see also Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

ANALYSIS AND HOLDING

I. The Complaint Alleges Sufficient Facts to Satisfy I.R.C.P. 8(a)(1).

The Idaho pleading standard is found in I.R.C.P. 8(a)(1) which requires only a “short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled.”

Poveys assert that a recent United States Supreme Court case “clarified the standard for granting dismissal under rule 12(b)(6)” such that the complaint must contain enough allegations of fact “to state a claim for relief that is plausible on its face” or “must be enough to raise a right to relief above the speculative level.”⁸ However, this Court’s review of *Twombly*, and other cases that have discussed it, leads to the conclusion that if the *Twombly* standard is different than the Idaho standard,⁹ it more narrowly applies in complex litigation, such as Sherman Act or

⁸ Memorandum in Support, p. 2, citing, *Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007).

⁹ And it is not clear that it is.

RICO cases, where massive and expensive discovery is necessary and parties may be forced to conduct that discovery just to show that a sparsely pled allegation is without merit.¹⁰

Therefore, this Court considers Poveys' Motion using the Idaho standard set forth above. After drawing all inferences in favor of the Garners, the Court determines whether a claim for relief has been stated.

Here, the Amended Complaint first alleges that the Poveys plowed up part of the access road to facilitate the sale of the property. Poveys contend that they took no action to obstruct the easement and even if they did, language in the verified complaint counters that assertion because the Amended Complaint also states that "[Garner's] use of the roadway to access the property acquired by him on May 22, 1987 ... was continuous and uninterrupted from May 22, 1987 until May 28, 2008 when the road was blocked [by Viehwegs]."¹¹ Poveys argue that there can be no claim against them for interfering with the access road when Garners also allege that they have used the road openly and continuously for the entire 21 years. Povey's assert that in order to state a claim for interference with an easement the claimant must show that the use of the easement was completely obstructed, citing *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 523, 20 P.3d 702, 706 (2001).¹²

As an initial observation the Court notes that I.R.C.P. 8(a)(1) provides that "[r]elief in the alternative or of several different types may be demanded" and the Idaho Supreme Court has

¹⁰ See, e.g., *Twombly*, 127 S.Ct. at 1967; *Limestone v. Village of Lemont*, 520 F.3d 797, RICO Bus.Disp.Guide 11,453, (7th Cir. 2007); *Phillips v. County of Allegheny*, 515 F.3d 224, 231-32 (3d Cir.2008); *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007).

¹¹ Amended Complaint, ¶41.D.[1].

¹² "The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate. See *Boydston Beach Ass'n. v. Allen*, 111 Idaho 370, 377, 723 P.2d 914, 921 (1986). In other words, the servient estate owner is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement. See *Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct.App.1986). Thus, an easement owner is entitled to relief upon a showing that he is obstructed from exercising privileges granted in the easement. See *Boydston Beach*, 111 Idaho at 377, 723 P.2d at 921."

held: “Under modern pleading rules parties may seek alternative or different types of relief regardless of consistency or whether based on legal or equitable grounds or both. Modern pleading practice no longer prohibits parties from seeking alternative forms of relief even if the remedies sought are inconsistent.” *M.K. Transport, Inc. v. Grover*, 101 Idaho 345, 350, 612 P.2d 1192, 1197 (1980)¹³

The Court reads the allegations in the Complaint, drawing all inferences in favor of Garners, to state that the Poveys took some action that obstructed or interfered with the access road. Poveys assert this is a valid claim only if the obstruction prevented Garners from using the road at all. However, the word “obstruct” has a range of reasonable meanings.¹⁴ It would be possible for Poveys to block, hinder, or obscure the access road without permanently depriving Garners of its use, and the level of the alleged obstruction, and any resulting damage, would remain an issue for the jury to determine. Thus, the fact that Garners used the road continuously for over 20 years does not preclude the possibility that obstruction or interference existed during some portion of that time.

Rather than construe the alleged facts in favor of Garners, Poveys ask the Court to ignore the allegation that the road was plowed over and accept only the allegation of open and continuous use. This the Court cannot do. While not compelling on their face, the Court finds that the allegations that Poveys plowed over a section of the access road to facilitate the sale of their property states a possible claim for damage, and although even less likely, may also state a claim for interference with the existing right-of-way.

The second allegation against Poveys is that the conveyance to Dean, Neigum, and

¹³ See also I.R.C.P. 8(a)(1) and 8(e)(2)(fn. 6).

¹⁴ Including “to block or close up with an obstacle; make difficult to pass; to interrupt, hinder or oppose the passage; and to block from sight, be in the way of (a view, passage, etc.).” *Dictionary.com Unabridged (v. 1.1)*, Random

Viehweg failed to except the right-of-way in Garners, that such failure was “wrongful” and caused Garners damage, including the cost of filing this lawsuit to protect that right-of-way.

The Court pauses at this point to note that during the hearing on the Motion to Dismiss, the Garners made an oral motion, under I.R.C.P. 7(b)(1), to further amend the Amended Complaint (“2nd Amendment”) to assert claims against Poveys sounding in Breach of Warranty, Slander of Title and Nuisance.¹⁵ Garners stated that no amendment to the alleged facts was necessary, that this was just an amendment asserting alternative legal theories based on the facts already alleged in the Amended Complaint. Poveys were given an opportunity to object to the making of the Motion at the hearing, and were further given an opportunity to submit written authority and argument in opposition to the Motion, but Poveys declined both offers and agreed that the Court may consider the 2nd Amendment. Poveys then argued against the 2nd Amendment, asserting that the same arguments proffered in support of the Motion to Dismiss were applicable.

The Court remarks again that as a threshold consideration on a motion to dismiss, “[i]t need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted.” *Harper, supra*, at 536, 1347.

The Amended Complaint does allege that Poveys wrongfully conveyed property to the Deans, Viehwegs, and Neigums because such conveyances are being used to extinguish the Garners’ right-of-way. Although the warranty deeds to Dean, Viehweg, and Neigum contain

House, Inc., 05 Mar. 2009.

¹⁵ See Response to Defendant Poveys’ Motion to Dismiss Amended Complaint (“Response”), pp. 5-8, which asserts the basis for these theories. As to the Breach of Warranty theory in particular, Garners state that “Poveys covenanted to warrant title to the property they conveyed to Garners, and the Poveys are in breach of that covenant.” Response, p. 7. Garners then further state that “Poveys themselves directly and proximately caused that failure [failure of title] when they deeded the property to the Deans, Neigums, and Viehwegs without disclosing the existence of the very right-of-way they promised to ‘warrant and defend from all lawful claims whatsoever.’” Response, p.7. [Referencing language from the deed which conveyed property from Poveys to Garners, attached to the Amended Complaint as Exhibit F].

references to “an existing right of way,” the location and extent of the right-of-way are not specifically set forth. The breadth of the duty Poveys owed to Garners in protecting the right-of-way remains a mixed question of law and fact. But Garners have made a colorable claim as to the breach of a duty Poveys may have to Garners, arising out of both the deed from Poveys to Garners and the deeds from Poveys to Dean, Viehweg and Neigum, that Poveys’ acts or omissions may have had the effect of attempting to extinguish Garners right-of-way. Further Garners’ 2nd Amendment adding Breach of Warranty as a legal theory to support Garners’ claim is supported within the allegations of the Amended Complaint because it may arise out of the same deeds.

Finally, the Poveys raise several factual defenses to the claims, taken from the Amended Complaint itself, including that they took affirmative action to include reference to the easement in the deeds they conveyed to the various buyers and that they did not plow part of the access road because it is alleged that the original access road is still visible to this day.¹⁶ These factual arguments do parry the allegations in the Amended Complaint, but must be developed further in discovery and possibly considered in a motion for summary judgment. As set forth above, the Court must take the allegations in the Complaint as true and draw all inferences in favor of Garners. If it appears that Garners may prove some set of facts that entitle them to relief, the Court may not dismiss the Complaint. Drawing all inferences in favor of the Garners, the Court finds that dismissal of the Amended Complaint as to Poveys is not appropriate at this time. The Motion to Dismiss is DENIED.

II. The 2nd Amendment Is Supported in Part.

The determination of a motion to amend a complaint is within the sound discretion of the trial court. *Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 43, 122 P.3d 300, 302 (2005).

In considering a proposed amendment to a Complaint, the Court may consider “whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim.” *Id.* at 44, 122 P.3d at 303. As a general rule, requests to amend are to be “freely given” absent undue delay, bad faith, undue prejudice, or the futility of the amendment. *Carl Christensen Family Trust v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999); *Suitts v. First Security Bank of Idaho*, 110 Idaho 15, 24-25, 713 P.2d 1374, 1383-84 (1985). On the other hand, the proposed amendment must adequately state a cause of action. If it does not, a denial of the request to amend is not an abuse of discretion. *See Black Canyon Racquetball Club, Inc. v. Idaho First Nat’l Bank*, 119 Idaho 160, 804 P.2d 900 (1991); *Wells v. United States Life Ins. Co.*, 119 Idaho 160, 804 P.2d 333 (Ct.App. 1991).

As noted above, Garners made a second motion to amend the Complaint at the hearing on the Motion to Dismiss. The Court has considered the arguments of counsel on the 2nd Amendment. The Court concluded above that the Breach of Warranty theory was supported by the allegations of the Amended Complaint. Therefore, the 2nd Amendment is GRANTED as to that theory.

The second legal basis asserted is slander of title. Garners acknowledge that the elements of a claim for slander of title are: 1) publication of a slanderous statement; 2) its falsity; 3) malice; and 4) resulting special damages, citing *Hogg v. Wolske*, 142 Idaho 549, 556, 130 P.3d 1087, 1094 (2006). In *Hogg* a quitclaim deed was recorded with full knowledge that it was false and with the intent to convey a false impression to others who may have had interest in the property in question. That is certainly not the case here. The Idaho Supreme Court noted that malice does not exist when an erroneous statement relating to title is made in good faith with

¹⁶ Memorandum in Support of [Poveys’] Motion to Dismiss, p. 5; Amended Complaint ¶¶16, 39.D, Exhibit O.
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probable cause to believe it. *Id.* While the deeds by which Poveys conveyed property to Dean, Viehweg and Neigum were recorded and would support the claim that they were “published,” there is no assertion in the Amended Complaint that Poveys conveyed these deeds “with reckless disregard for the truth or falsity of any statement” contained therein. In fact, the Amended Complaint shows that there was a reference to a right-of-way in these deeds. Therefore, on its face, there is inadequate allegation to support a claim for slander of title and the 2nd Amendment is DENIED as to that legal theory.

The third legal basis is that Poveys action constituted a nuisance. Although a nuisance is generally considered a condition which is offensive or injurious to health, it can also include an obstruction to the free use of one’s property.¹⁷ In *Benninger v. Derifield*, 142 Idaho 486, 129 P.3d 1235 (2006), Benningers had an easement to use the driveway of Derifield to access to their property. Derifield obstructed the driveway so it could not be used. The Idaho Supreme Court noted that when the driveway was obstructed it was a nuisance, but once the driveway was no longer obstructed the nuisance ceased and held that no general damages could be awarded if the nuisance had abated. *Id.* 142 Idaho at 491, 129 P.3d at 1240.

This Court has held above that the possible plowing of the road by Poveys may have been an actionable obstruction to the extent that it interfered with Garners claim to the right-of-way at all. However, the allegations of the Amended Complaint clearly show that the obstruction is not currently present due to any act of Poveys. It appears from the record that when the parties vacated the hearing on the Preliminary Injunction request, the parties temporarily resolved access by Garners to their property pending the conclusion of this action, and reserving to Garners the right to continue their attempt to preserve their original right-of-way. There is no assertion in the Amended Complaint that a current nuisance exists. Thus, there is no current basis for a nuisance

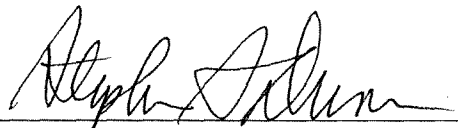
action. Based on the record at this time, the Court concludes that the 2nd Amendment is not warranted as to the nuisance theory and is DENIED.

CONCLUSION

The Amended Complaint sufficiently states a claim by Garners against Poveys and identifies a demand for relief so as to comply with I.R.C.P. 8(a)(1). The allegations therein present a basis from which Garners may be able to prove a set of facts that will entitle them to some type of relief against the Poveys as to plowing the road and, thereby interfering with Garners' claim to the right-of-way, and in conveying property to Garners, Dean, Veihweg and Neigum without adequately protecting Garners right-of-way. The Amended Complaint properly asserts a claim for Breach of Warranty but not for Slander of Title or Nuisance. Therefore, Poveys' Motion to Dismiss Amended Complaint is DENIED and Garners' 2nd Motion to Amend the Complaint is GRANTED as to the Breach of Warranty theory but DENIED as to the Slander of Title and Nuisance theories. Plaintiffs are ORDERED to prepare and serve a copy of the 2nd Amended Complaint, reflecting the oral amendment granted above, to all parties.

IT IS SO ORDERED.

DATED March 9, 2009.


STEPHEN S. DUNN
District Judge

¹⁷ I.C. §§52-101, 52-111.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of March, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Gordon Thatcher
Thatcher, Beard, St. Clair, Gaffney
PO Box 216
Rexburg, ID 83440

☐ U.S. Mail
☐ Overnight Delivery
☐ Hand Deliver
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DATED this 16 day of March, 2009.

K. Jones
Deputy Clerk