

5-11-2010

Garner v. Povey Clerk's Record v. 2 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

TABLE OF CONTENTS

Register of Actions	0
Motion for Leave to Amend Complaint filed 1-29-09	1
Affidavit of Gordon S. Thatcher in Support of Plaintiffs' Motion for Leave to Amend filed 1-29-09	5
Notice of Appearance filed 2-4-09	119
Memorandum in Support of Brad and Leiza Povey's Motion to Dismiss Amended Complaint filed 2-4-09 ..	122
Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint filed 2-4-09	131
First American Title Insurance Company's Notice of Non-Opposition to Plaintiff's Motion for Leave to Amend Complaint filed 2-9-09	134
Response to Defendant Poveys' Motion to Dismiss Amended Complaint filed 2-20-10	138
First American Title Insurance Company's Notice of Non-Opposition to Defendant Brad and Leiza Povey's Motion to Dismiss Amended Complaint filed 2-24-09	148
Defendants Brad and Leiza Povey's Reply in Support of Motion to Dismiss Amended Complaint filed 2-24-09	152
Order filed 3-6-09	159
Decision and Order on Povey Defendants Motion to Dismiss Amended Complaint filed 3-13-09	164

VOLUME 2

Amended Complaint filed 3-13-09	176
Second Amended Complaint filed 3-30-09	259
Notice of Appearance filed 4-9-09	293
Povey Defendants' Answer to Second Amended Complaint filed 4-9-09	296
Answer to Second Amended Complaint filed 4-16-09	300
Order for Submission of Information for Scheduling Order filed 9-2-09	313
Defendant Brad and Leiza Povey's Motion for Summary Judgment filed 9-3-09	320

VOLUME 3

Memorandum in Support of Defendant Brad and Leiza Povey's Motion for Summary Judgment filed 9-3-09	323
Stipulated Statement filed 9-16-09	432
Affidavit of Henry Povey filed 9-23-09	437
Affidavit of Michael W. Brown filed 9-23-09	442
Motion for Leave to Amend Second Amended Complaint filed 9-23-09	471
Motion for Enlargement of Time filed 9-23-09	475
Plaintiff's Motion to Strike Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips filed 9-23-09	478

TABLE OF CONTENTS - Continued

VOLUME 4

Memorandum in Opposition to Motion for Summary Judgment of Defendants Brad Povey and Leiza Povey filed 9-23-09	484
Povey Defendants Memorandum in Opposition to Motion for Enlargement of Time filed 9-29-09	506
Memorandum in Opposition to Motion for Leave to Amend Second Amended Complaint filed 9-29-09	518
Memorandum in Opposition to Motion to Strike the Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice and Judy Phillips filed 9-29-09	527
Motions to Strike the Affidavits of Henry Povey and Daniel S. Garner filed 9-29-09	551
Memorandum in Support of Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner filed 9-29-09	554
Reply to Poveys' Memorandum in Opposition to Motion for Leave to Amend Second Amended Complaint filed 10-2-09	565
Second Affidavit of Michael W. Brown filed 10-2-09	572
Reply Memorandum in Support of Motion for Summary Judgment filed 10-5-09	621
Response to Motion to Strike the Affidavits of Henry Povey and Daniel S. Garner filed 10-5-09	650
Stipulation for Dismissal with Prejudice filed 10-8-09	659
Order for Dismissal with Prejudice filed 10-14-09	664
Memorandum Decision on Povey Defendants' Motion for Summary Judgment filed 10-27-09	667
Memorandum of Costs Including Attorney Fees filed 11-09-09	701
Judgment filed 11-13-09	734
Second Affidavit of Daniel S. Garner filed 11-23-09	736

VOLUME 5

Motion to Disallow Costs filed 11-23-09	740
Affidavit of Jeffrey D. Brunson filed 11-23-09	754
Reply Memorandum in Support of Memorandum of Costs Including Attorney Fees filed 12-24-09	761
Affidavit of Blake S. Atkin filed 12-28-09	777
Supplemental Affidavit of Blake S. Atkin in Support of Memorandum of Costs Including Attorney Fees filed 12-28-09	782
Motion to Strike the Affidavit of Jeffrey J. Neigum filed 12-29-09	798
Memorandum in Opposition to Motion to Strike the Affidavit of Jeffrey J. Neigum filed 1-6-10	801
Reply Memorandum Re: Motion to Disallow Costs and Fees filed 1-12-10	805
Minute Entry and Order filed 2-9-10	820
Memorandum Decision on Povey Defendants' Motion for Costs and Fees filed 3-9-10	822

TABLE OF CONTENTS - Continued
VOLUME 5 - Continued

Notice of Appeal filed 3-26-10	841
Clerk's Certificate of Appeal filed 4-2-10	845
Clerk's Certificate of Appeal filed 4-13-10	847
Amended Notice of Appeal filed 5-3-10	849
Amended Clerk's Certificate of Appeal filed 5-4-10	857

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FRANKLIN COUNTY CLERK

K. Jones

DEPUTY

**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

**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:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ 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 NW $\frac{1}{4}$ SE $\frac{1}{4}$ 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 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 replead 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.

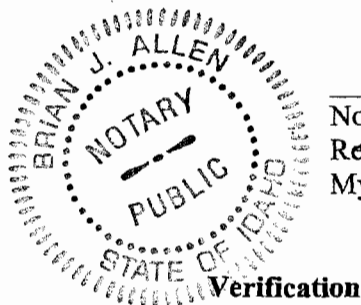
3. In the alternative on the Third Count against Defendants, Hal J. Dean and Marlene T. Dean, husband and wife; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife, individually and as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Living Trust, dated September 17, 2004; and Douglas 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

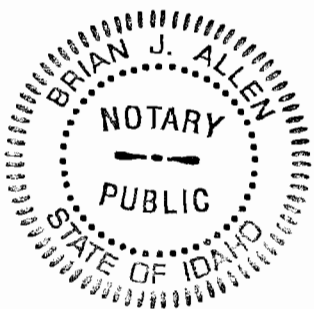
STATE OF IDAHO,)
County of Franklin.) ss.

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

a.m. JUL 8 1987 1:40 p.m.

CORRIG L. KEMER, RECORDER

By *[Signature]* Deputy
FRANKLIN COUNTY, IDAHO

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 C. 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 35, 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.

209

EXHIBIT

A

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 L. Loomis

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 gully 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

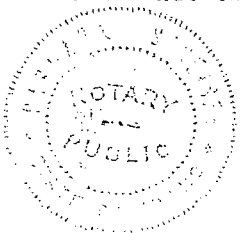
Thelma N. McCulloch
Seller

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.

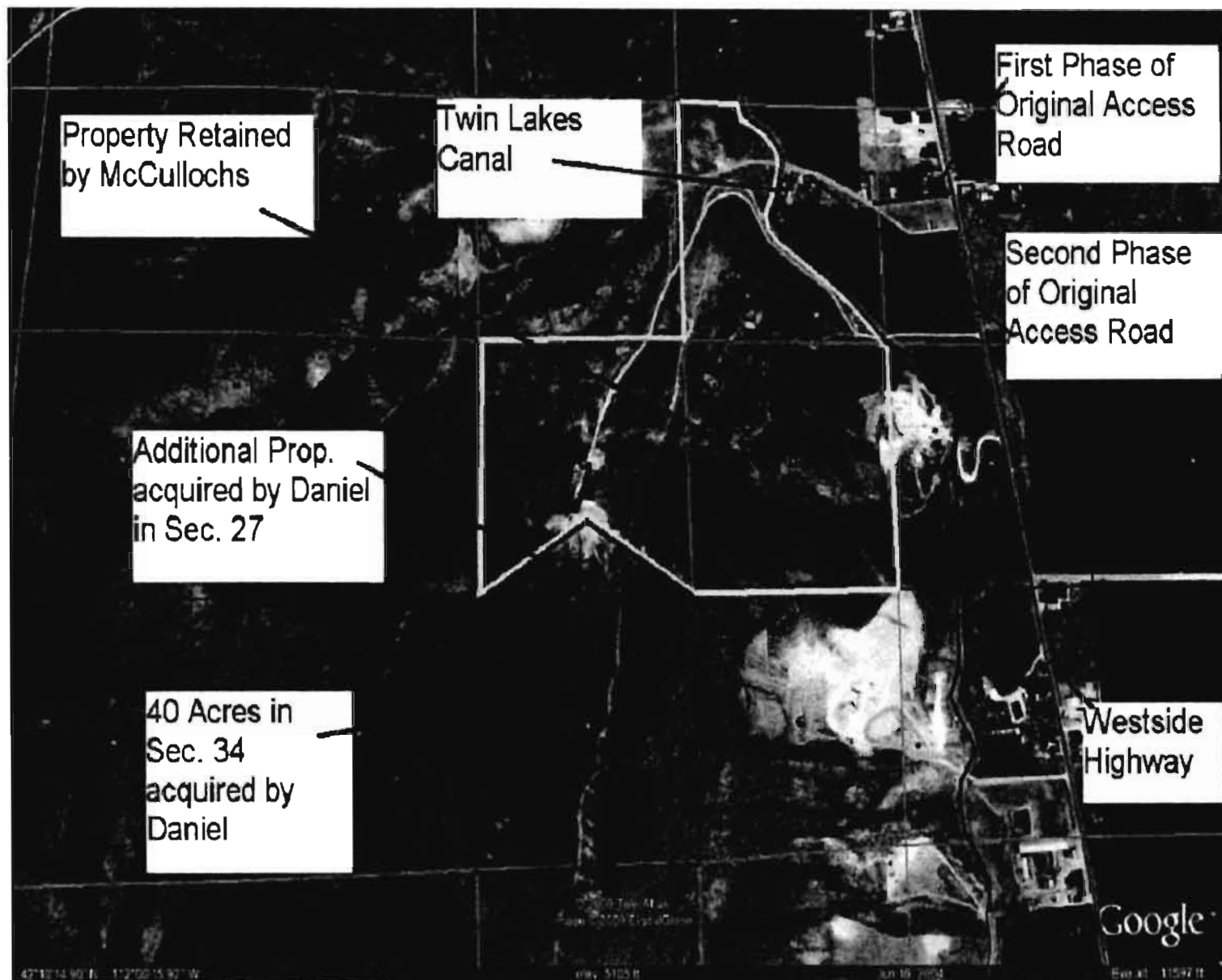
Barbara L. Loomis
Notary Public
Residing at Swan Lake, Idaho
Commission expires May 25, 1988





212





213

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

Sec. 27

Sec. 34

Google

42°10'14.90" N 112°06'15.97" W

elev. 5165 ft.

Jun 17, 2004

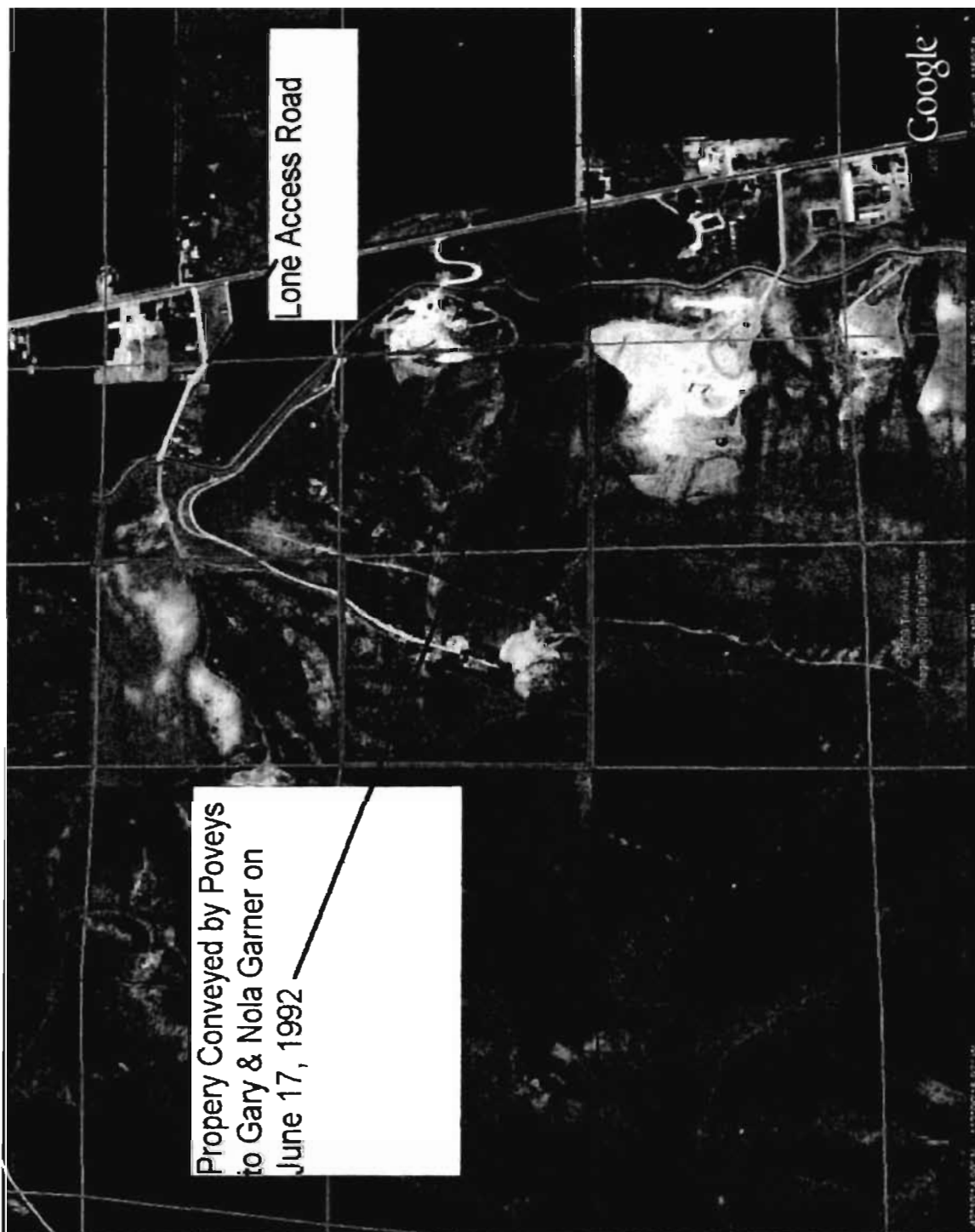
Eye alt. 11597 ft.

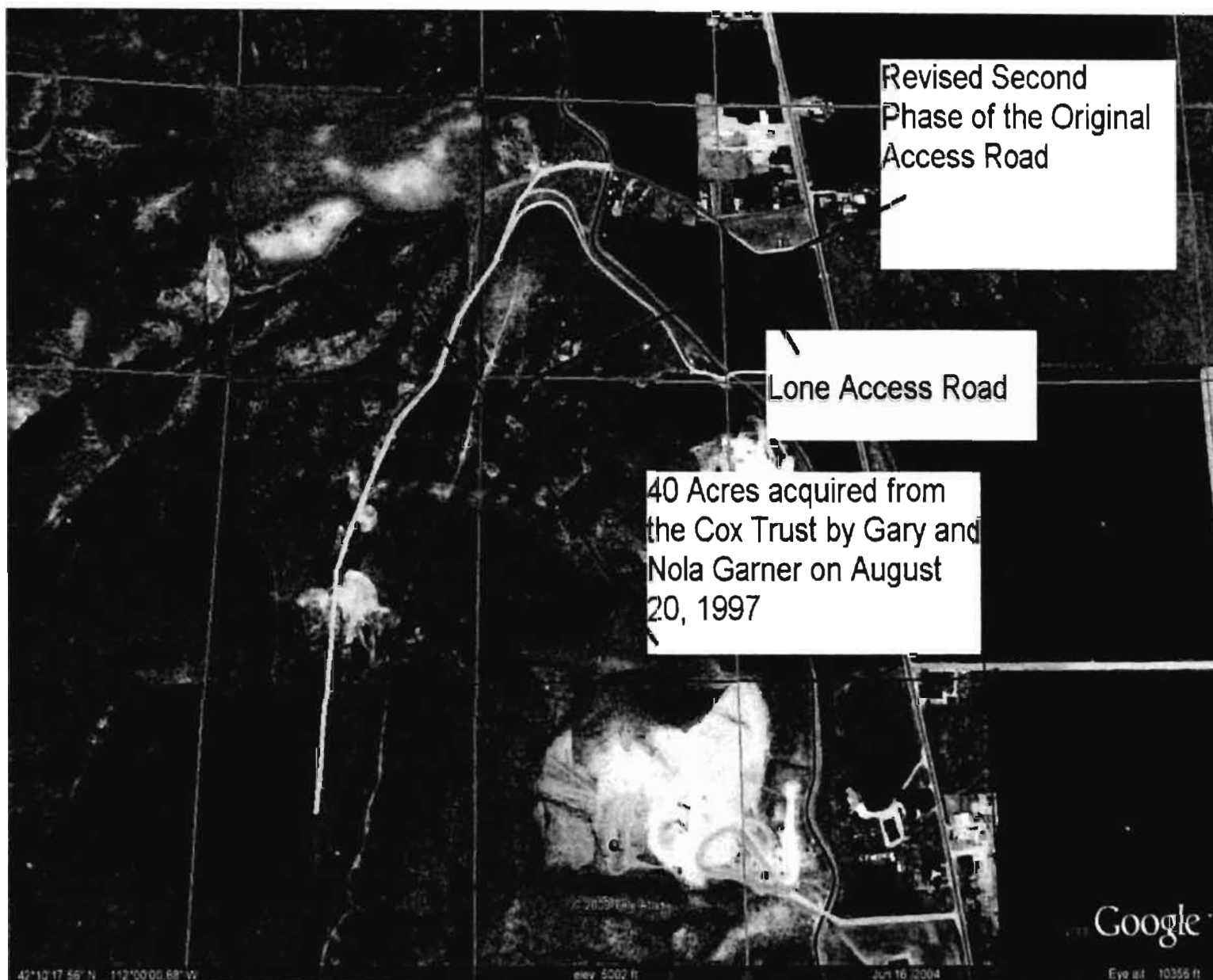
tabbles

EXHIBIT

B-3

214





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

Google

42°10'17.56" N 112°00'00.88" W

elev 5002 ft

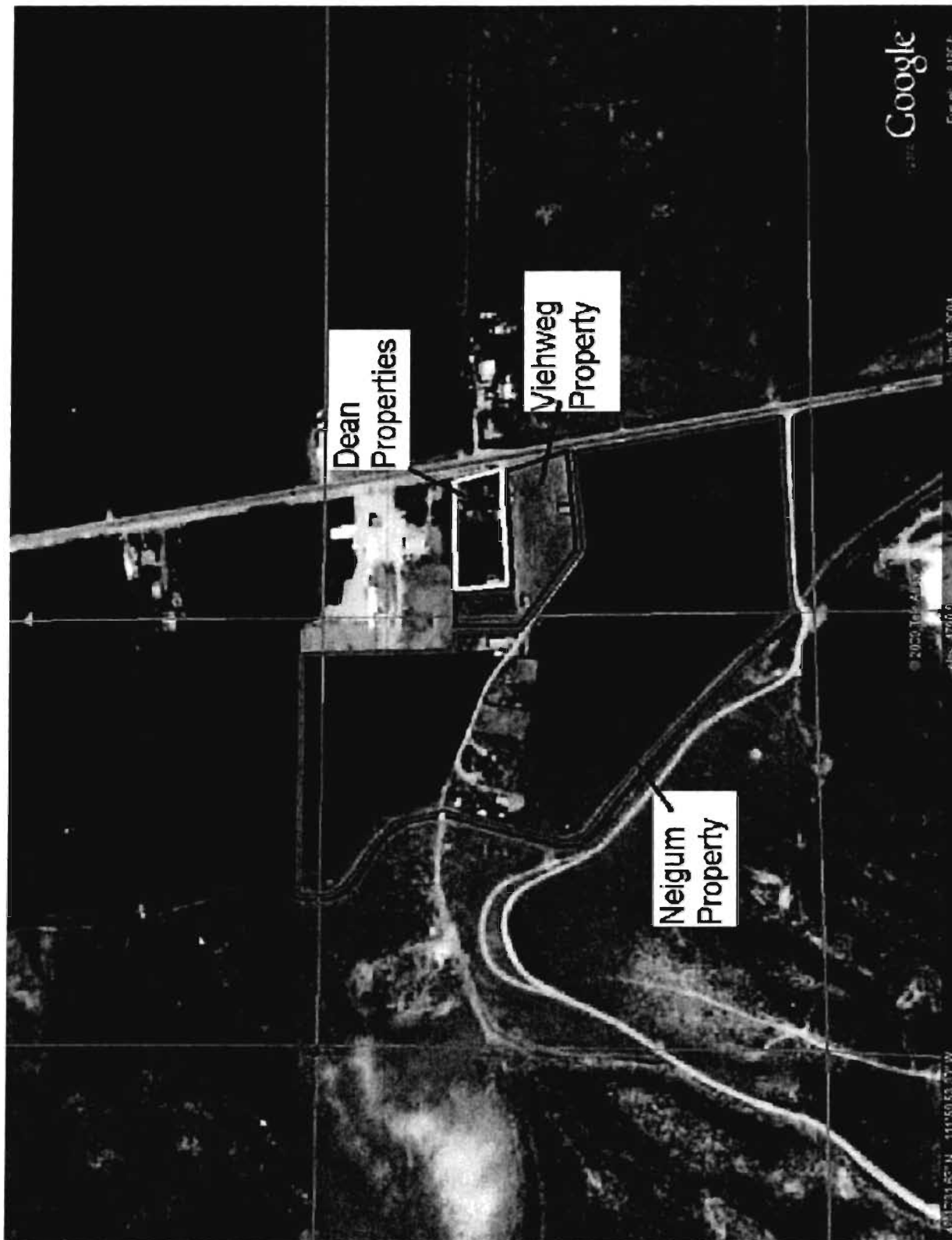
Jun 16, 2004

Eye alt 10356 ft

216







4-4153-G

175555

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 233 West
Clifton, Idaho 83202

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

Township 14 South, Range 38 East of the Boise Meridian
Section 34: NE1/4NW1/4.

Section 35: Commencing at the Northwest corner of the Northeast Quarter of Section 35, and running thence South 160 rods, thence East 32 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, 1988

Recorded in the records of
Franklin County, Idaho

MAY 28 1987

CORRE & KELLEN, REGISTER
By *Corre & Kellen*
FRANKLIN COUNTY, IDAHO

Notary for the State of Idaho, No. 100, Exp. 5/25/88

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. Corner 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 Grantors ^{does} 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

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

Recorded at the request of
Blanche Henderson

a.m. JUL 8 1987 1:15 p.m.

CORRIE L. KELLER, RECORDER
By Amber Deputy
FRANKLIN COUNTY, IDAHO

Furnished by the AMERICAN LAND TITLE CO., Inc., Boise, 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 *Prichard*, Idaho
Notary Public
Expires *2001*

Recorded at the request of

Daniel J. Phillips

JUN 04 1990 1:30 PM

LARAE E JOHNSON, RECORDER,

By *[Signature]* 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 s 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)

State of Idaho
County of Franklin

Henry Nels Povey
Melanie Povey

223

13th day of August A.D. 19 94

199888 12

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 Amille 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.

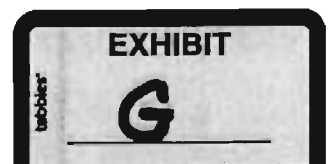
NOW, THEREFORE, WITNESSETH, that the said Grantors, for valuable consideration, and for the purpose of distributing certain real property from the Alvord L. Cox Family Trust, do by these presents hereby distribute, grant, bargain, sell, convey, and confirm unto the said Grantees, and their heirs and 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

224



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

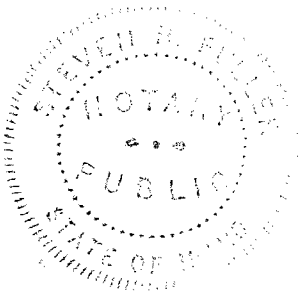
LAVENE G. COX, Trustee of the
ALVORD L. COX FAMILY TRUST

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. Fultz

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

8 a.m. NOV 03 1998 12:30 p.m.

V. ELLIOTT LARSEN, RECORDER
By Sharon 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 87, thence
South 30 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 encumbrances 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 person whose name
subscribed to the within instrument, and acknowledged to
me that executed the same.

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



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 Geddes, Deputy
FRANKLIN COUNTY, IDAHO

whose current address is 579 S. Main Hwy, Clifton, Idaho 83226
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., Boise 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
appears in the within instrument, and acknowledged to
me that executed the same.

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



FORM COMPLEMENTS OF PRESTON LAND TITLE CO.

227



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

FRANKLIN COUNTY 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

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:

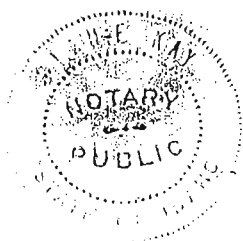
Township 14 South, Range 38 East of the Boise Meridian, Franklin County, Idaho

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. PoveyLeiza Povey
Leiza PoveySTATE 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.Shirley Kay
Notary Public
Residing at: Swan Lake, Id
Comm. expires: 5/25/2000

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 a.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

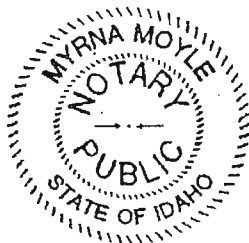
Leiza Povey

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

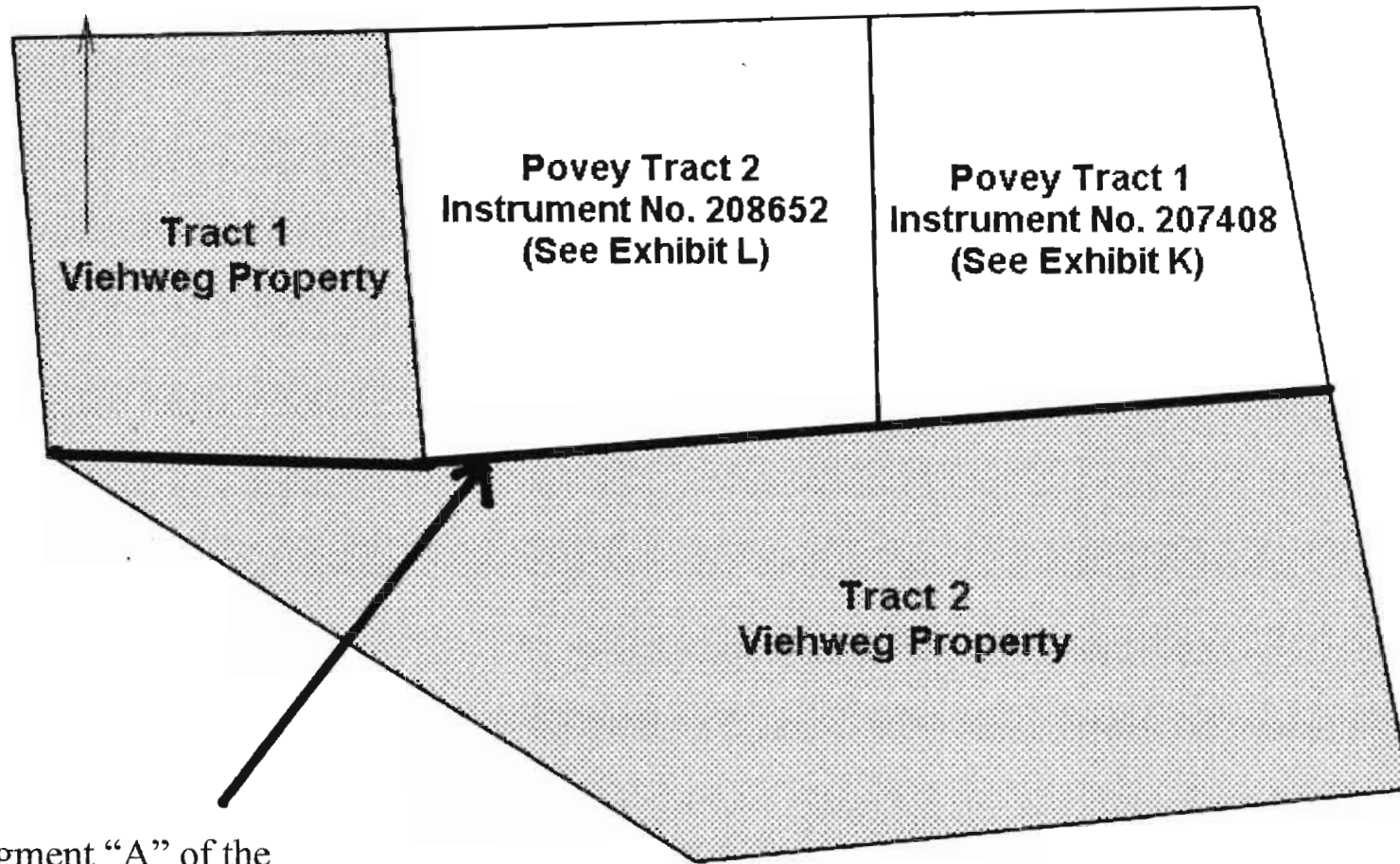
known to me to be the person s whose name s
subscribed to the within instrument, and acknowledged to
me that they executed the same.

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



EXHIBIT

L



Segment "A" of the
Original Access Road

232



212784 ¹³

Recorded at the request of
FIRST AMERICAN TITLE

— E.M. APR 05 2001 3:20 P.M. —

CORRECTED WARRANTY DEED ELLIOTT CORNEAL, REC. 101
By Camille Spivey 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

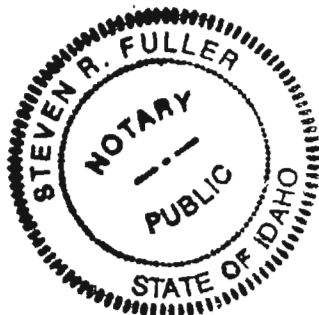
Brad L. Povey
BRAD L. POVEY

Leiza Povey
LEIZA POVEY

STATE OF IDAHO)

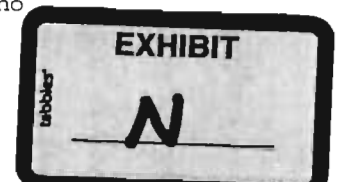
County of Franklin)

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

233



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

(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

FOR VALUE RECEIVED

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

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

EXHIBIT "A"

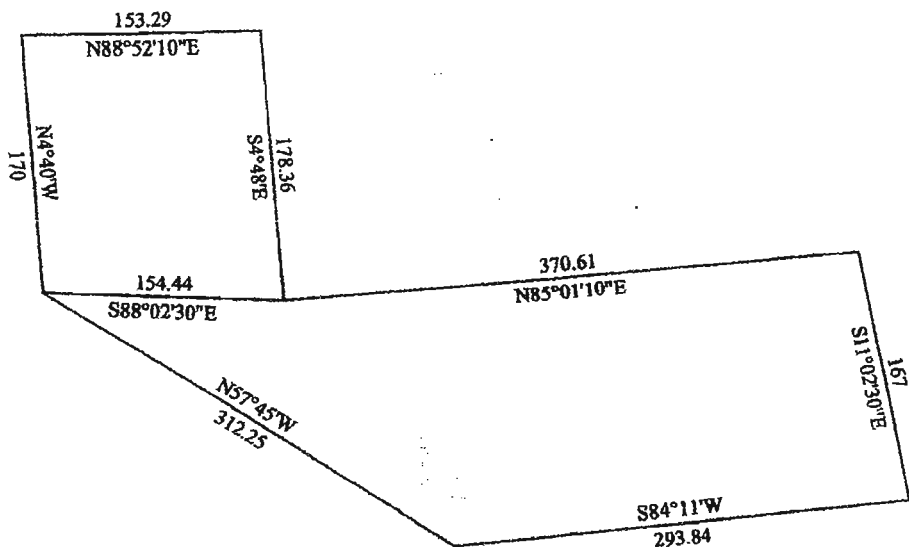
PARCEL 1: A PARCEL OF LAND BEING A PORTION OF THAT LARGER PARCEL OF LAND PREVIOUSLY DESCRIBED AT INSTRUMENT NO. 196512 IN THE OFFICE OF THE FRANKLIN COUNTY CLERK AND RECORDER, LYING ENTIRELY WITHIN THE SOUTHEAST ONE-QUARTER OF SECTION 27, TOWNSHIP 14 SOUTH, RANGE 38 EAST IN THE CITY OF CLIFTON, FRANKLIN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



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

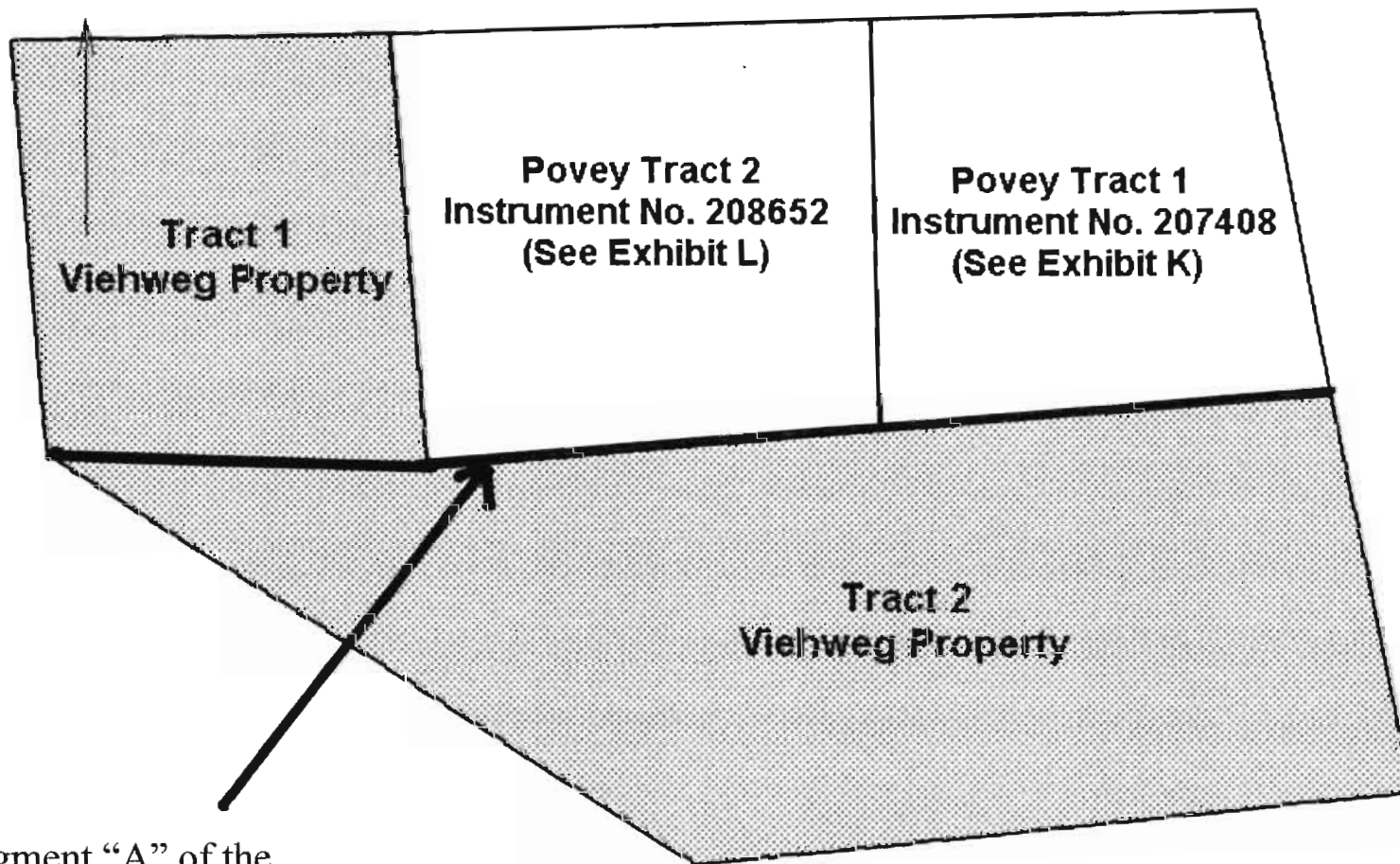
012=S.06E 419.10

006=**N88.0230W 154.44

013=S11.2030E 150.50

007=N4.40W 170

014=S11.0230E 167



240



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.

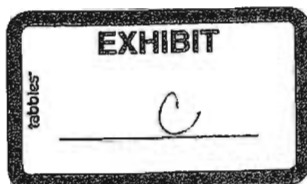
First American Title Insurance Company

BY  PRESIDENT

ATTEST  SECRETARY

PRESTON LAND TITLE COMPANY

By: 



241



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 ability 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.

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)

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

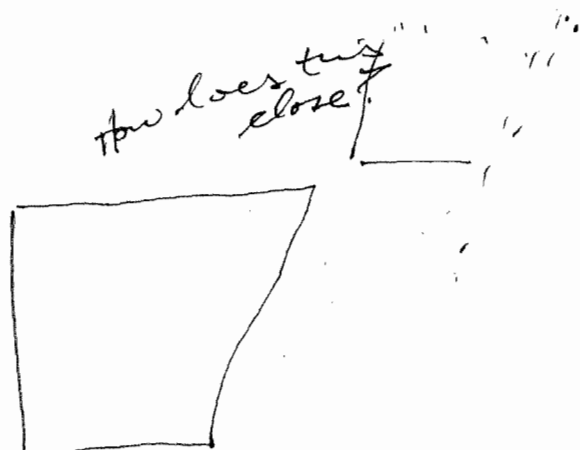
The land referred to in this policy is situated in the State of Idaho
County of Franklin

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 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

AM OCT 04 2004 2:35 PM

V. ELLIOTT LARSEN, RECORDER

By Camille Larso Deputy
FRANKLIN COUNTY, IDAHO

STATE OF UTAH)

: ss.

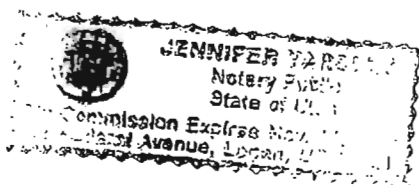
County of Cache)

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 Yare
Notary Public



EXHIBIT

S

247

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 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.

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.

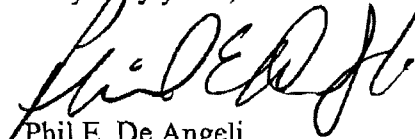
Therefore, based upon the multiple other accesses, particularly the twenty foot access along the South of the Viehweg's property, First American is asking that you no longer use or attempt to use the utility easement for ingress egress purposes. If there is some reason to access the utility easement 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,

A handwritten signature in black ink, appearing to read "Phil E. De Angeli". The signature is fluid and cursive, with the first name "Phil" being the most prominent.

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

252



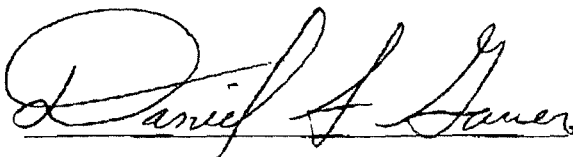
weighing eighty thousand pounds. I would appreciate it if you would advise your client to put the road back in the condition it was in before Mr. Povey plowed up a section of it. I assume, to make this sale. Yes I did complain to Mr. Povey when this was done.

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

Stipulation for Use of Replacement Access Road During Pendency of Action

254



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.

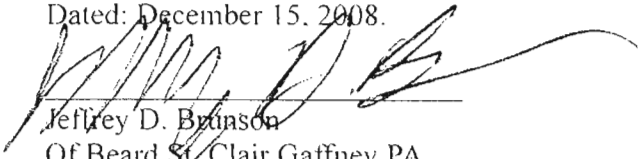
There is currently a preliminary injunction hearing scheduled for December 17, 2008 based on allegations contained in the Verified Complaint. The Verified Complaint identifies an original access road and a replacement access road. A portion of the replacement access road is used as the driveway to the 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. Brinson
Of Beard St. Clair Gaffney PA
Attorneys for Plaintiffs

Dated: December ___, 2008

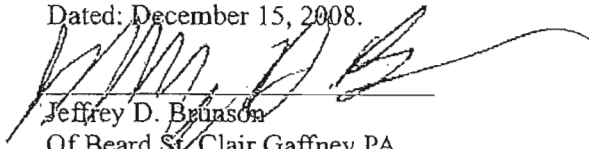
Scott Smith
Of Racine Olsen Nye Budge & Bailey, Chartered
Attorneys for Defendants Deans, Viehwigs, and Neigums

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.

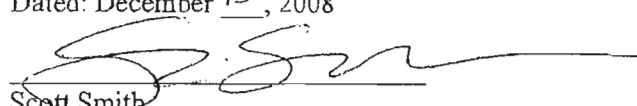
2. The designated Defendants or any of their agents shall not take any action to interfere with Plaintiffs' use of the replacement access road in any manner during the pendency of this action, including but not limited to erecting any new or additional fencing on either side of the road during the pendency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

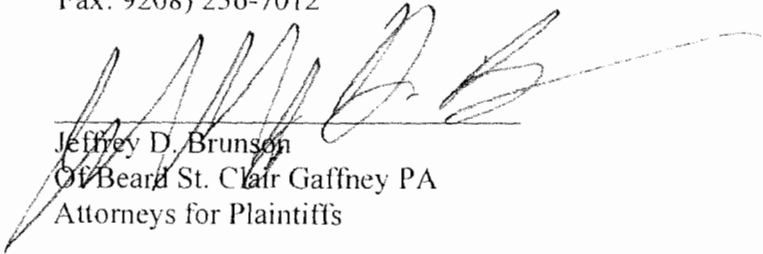
☒ U.S. Mail ☐ Hand-delivered ☐ Facsimile

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

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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P. O. Box 216
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Tel: (208) 359-5881
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jeff@beardstclair.com
mbrown@beardstclair.com

Attorneys for Plaintiffs

FILED
09 MAR 30 PM 12:19
FRANKLIN COUNTY CLERK
K. Jones
DEPUTY

**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

SECOND AMENDED COMPLAINT

**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:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ 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 fuchsia.

[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 gulley 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
Breach of Warranty 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 Poveys' conveyance to Gary Garner and Nola Garner, described above in ¶ 11, was made by Warranty Deed, which warranty deed 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).

36. 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. By performing these wrongful actions, the Poveys breached the warranty contained in the Warranty Deed described in ¶ 11 hereof. 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.

37. 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 Leiza Povey.

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

38. Plaintiffs replead by reference ¶ 1 through ¶ 37 hereof.

39. 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."

40. 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.

41. 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.

42. 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.

43. 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.

44. 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

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

46. 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 ¶44 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.

47. 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

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

49. 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.

50. 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.

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

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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

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

62. 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.

63. 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 was 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.

64. 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, wrongful interference with easement, breach of warranty, 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.

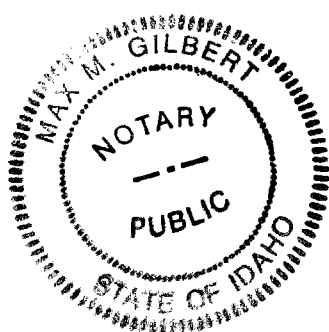
4. Against First American Title Insurance Company on the Fourth Count for \$54,000.000 damages for breach of the Policy of Title Insurance policy issued to Daniel and for damages for breach of the policies of title insurance in the Povey and Cox purchases for up to the policy limits on each policy, and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

5. Interim relief should be confirmed for continuous road access by Plaintiffs to and from

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.

Nola Garner
NOLA GARNER

SUBSCRIBED AND SWORN To before me this 26 day of March, 2009.



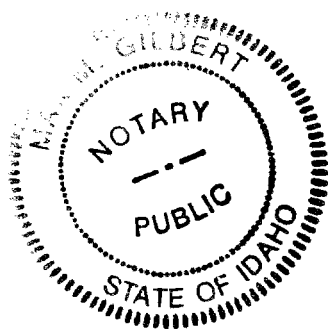
Max M. Gilbert
Notary Public for Idaho
Residing at PRESTON
My commission expires: 3-6-2012

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

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 26 day of March, 2009.



Mary M Gilbert
Notary Public for Idaho
Residing at PRESTON
My commission expires: 3-6-2012

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FRANKLIN COUNTY CLERK

K. Jones

DEPUTY

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Attorneys for Defendants First American Title Insurance
Company and First American Title Company, Inc.

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)
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; JEFFREY)
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)

Case No. CV-08-342

NOTICE OF APPEARANCE

Idaho Corporation,)
)
Defendants.)
)
_____)


TO: DANIEL S. GARNER, SHERRI-JO GARNER, NOLA GARNER, and NOLA GARNER
AS TRUSTEE OF THE NOLA GARNER LIVING TRUST, DATED JULY 19, 2007,
PLAINTIFFS ABOVE NAMED, AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that Stephen C. Hardesty and Ryan T. McFarland, members of
the firm of Hawley Troxell Ennis & Hawley LLP, Post Office Box 1617, Boise, Idaho, 83701,
hereby enter an appearance as Attorneys of Record for Defendants First American Title
Insurance Company and First American Title Company, Inc.

DATED THIS 7th day of April, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Ryan T. McFarland, ISB No. 7347
Attorneys for Defendants First American Title
Insurance Company and First American Title
Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2009, I caused to be served a true copy of the foregoing NOTICE OF APPEARANCE by the method indicated below, and addressed to each of the following:

Gordon S. Thatcher
Jeffrey D. Brunson
Michael W. Brown
THATCHER BEARD ST. CLAIR GAFFNEY
116 South Center Street
P.O. Box 216
Rexburg, Idaho 83440
[Attorneys for Plaintiffs]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Telecopy (208) 529-9732

Eric L. Olsen
Scott J. Smith
RACINE OLSON NYE BUDGE & BAILEY CHTD.
201 East Center
P.O. Box 1391
Pocatello, ID 83204-1391
[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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☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Telecopy (208) 232-6109

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[Attorneys for Brad Povey and Leiza Povey]

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☐ Overnight Mail
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Ryan T. McFarland

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ATKIN LAW OFFICES, P.C.
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Fax: (801) 533-0380

Attorneys for the Povey defendants

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FRANKLIN COUNTY CLERK

R. Jones

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,

Povey defendants' answer to second
Amended Complaint

Case No. CV-08-342

Judge Dunn

Brad and Leiza Povey, the "Povey defendants," through undersigned counsel, answer
plaintiff's Second Amended Complaint as follows:

The Povey defendants admit paragraphs 1 of the Second Amended Complaint.

The Povey defendants deny paragraphs 19, 25, 27, 33, 36, 37 of the Second Amended Complaint.

The Povey defendants are without sufficient information to form a belief as to the truth or falsity of paragraphs 3, 5, 6, 7, 14, 15, 23, 24, 26, 34 of the Second Amended Complaint and therefore deny the same.

The Povey defendants answer paragraphs 2, 4, 8, 9, 10, 11, 12, 13, 16, 17, 18, 20, 21, 22, 28, 29, 30, 31, 35 of the Second Amended Complaint by affirmatively alleging that the documents speak for themselves. Except as admitted herein, the Povey defendants deny each and every allegation of the above referenced paragraphs.

In answering paragraph 32 of the second amended complaint, the Povey defendants admit that they were on notice of the existence of the established road and that it was used by the plaintiffs and deny the remaining allegations of paragraph 32 of the Second Amended Complaint.

The Povey defendants are not named in Counts 2 through 5 and therefore do not respond to paragraphs 38 through 64 of the Second Amended Complaint. Except as admitted herein, the Povey defendants deny all allegations of the Second Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

The wrongs complained of by plaintiffs and the damages alleged by plaintiffs, if any were not proximately caused by any action of the Povey defendants, but were the proximate result of the actions of the plaintiffs and/or Gary Garner or of other third parties.

SECOND AFFIRMATIVE DEFENSE

The actions of plaintiffs and/or Gary Garner led the Povey defendants to believe that the plaintiffs and/or Gary Garner had abandoned the right of way. Therefore, plaintiffs are estopped from making any claims against the Povey defendants.

THIRD AFFIRMATIVE DEFENSE

Through the actions, statements, and conduct of plaintiffs and/or Gary Garner, the claims of the plaintiffs have been waived.

FOURTH AFFIRMATIVE DEFENSE

The easement across the Povey defendant's previously owned property was never described in any deed until described in deeds filed by the Povey defendants. The easements described by the Povey defendants substantially meet the terms of any warranty that might have been given to the plaintiffs and/or Gary Garner.

FIFTH AFFIRMATIVE DEFENSE

The claims of the plaintiffs are extinguished by agreement of the plaintiffs and/or Gary Garner.

SIXTH AFFIRMATIVE DEFENSE

The claims of the Second Amended Complaint are barred against these defendants by failure to join an indispensable party or parties.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of waiver, estoppel, and laches.

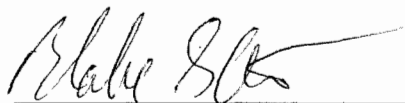
EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs claims are barred by the applicable statutes of limitations.

Wherefore, having fully answered plaintiff's complaint, the Povey defendants pray that the Second Amended Complaint be dismissed, no cause of action and that the Povey defendants be awarded their costs and reasonable attorney fees.

Dated this 6 day of April, 2009

Atkin Law Offices, P.C.



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
**ANSWER TO SECOND AMENDED COMPLAINT OF DEFENDANT BRAD AND
LEIZA POVEY** upon the following by the method of delivery designated:

Gordon S. Thatcher
Thatcher, Beard, St. Clair, Gaffney
116 S. Center
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Rexburg, Idaho 83440

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Eric Olsen
Racine, Olson Nye Budge & Bailey
P.O. Box 1391
Pocatello, Idaho 83204-1391

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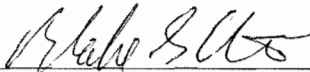
Ryan McFarland
Hawley, Troxell Ennis & Hawley
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Boise, Idaho 83701-1617

☒ U.S. Mail ☐ Hand delivery ☐ Fax

Franklin County Court
39 West Oneida
Preston, Idaho 83263

☒ U.S. Mail ☐ Hand delivery ☐ Fax

Dated this 20 day of April, 2009



Eric L. Olsen (ISB# 4811)
Scott J. Smith (ISB# 6014)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
P. O. Box 1391/Center Plaza
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Attorneys for Defendants Dean, Viehweg, and Neigum

FILED

09 APR 16 AM 9:49

FRANKLIN COUNTY CLERK

K. Jones
DEPUTY

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 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; JEFFERY 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 LEZIA 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-2008-342

**ANSWER TO
SECOND AMENDED
COMPLAINT**

Defendants Hal J. Dean and Marlene 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; and Jeffery J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17, 2004 (collectively "Defendants"), by and through counsel of record, admit, deny and allege in answer to the Plaintiffs' Second Amended Complaint, as follows:

FIRST DEFENSE

Plaintiffs' Second Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendants deny each and every allegation of Plaintiffs' Second Amended Complaint except as is expressly admitted herein.

1. In answer to paragraphs 40, 41, 42, and 44 of Plaintiffs' Second Amended Complaint, Defendants deny the allegations contained therein.

2. In answer to paragraphs 3, 5, 6, 7, 15, 23, 24, and 64 of Plaintiffs' Second Amended Complaint, Defendants are without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and therefore deny the same.

3. Paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60 of Plaintiffs' Second Amended Complaint concern parties to this lawsuit other than the Defendants and therefore do not necessitate an answer from Defendants. In the event that an answer is deemed necessary by the Court, the Defendants state that they are without sufficient information to form a belief as to the truth or falsity of the allegations and therefore deny the same.

4. In answer to paragraphs 38, 45, and 61 of Plaintiffs' Second Amended Complaint, Defendants fully incorporate herein their corresponding answers as set forth in this Answer to each respective paragraph that Plaintiff incorporates by reference.

5. In answer to paragraphs 1 and 2 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached as Exhibit "A" to the Second Amended Complaint is a copy of a "Contract of Sale" recorded on July 8, 1987, in the Franklin County recorder's office as Instrument No. 175876. Defendants admit that the "Contract of Sale" speaks for itself. Defendants deny any and all allegations contained in paragraphs 1 and 2 of the Second Amended Complaint which do not fully and completely conform to the language contained in the aforementioned "Contract of Sale."

6. In answer to paragraph 4 of the Plaintiffs' Second Amended Complaint, Defendants state that they are without sufficient information to form a belief as to origin, creation, author, date, accuracy or correctness of the referenced aerial maps and the markings contained thereon as attached to the Plaintiffs' Second Amended Complaint as Exhibits B-1, B-2, B-3, B-4, B-5, B-6, and B-7; therefore, Defendants deny the same. It is noted that certain subparts of paragraph 4 reference other paragraphs contained in the Second Amended Complaint. Defendants will answer those other paragraphs separately herein.

7. In answer to paragraph 8 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "C" is a copy of the "Warranty Deed" recorded on May 28, 1987, in the Franklin County recorder's office as Instrument No. 175555. Defendants admit that this Warranty Deed speaks for itself and purports to have conveyed from McCullochs to Daniel Garner the same "40 Acres" identified in the Contract of Sale attached as Exhibit "A" to the Second Amended Complaint. With regard to paragraph 8 of Plaintiffs'

Second Amended Complaint, Defendants also admit the aforementioned "Warranty Deed" contains language purporting to convey the property "with their appurtenances." Defendants deny the last sentence of paragraph 8.

8. In answer to paragraph 9 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "D" is a copy of the "Warranty Deed" recorded on July 8, 1987, in the Franklin County recorder's office as Instrument No. 175877. Defendants admit that this Warranty Deed speaks for itself. Defendants admit that the legal description as set forth in the Warranty Deed mirrors the legal description contained in paragraph 18 of the Contract of Sale attached to the Second Amended Complaint as Exhibit "A". Defendants admit that the Warranty Deed contains language stating: "the premises with their appurtenances." Defendants are without sufficient information to form a belief as to whether the legal description contained in the Warranty Deed describes the same property as identified in paragraph 9 of Plaintiffs' Second Amended Complaint and therefore deny the same. Defendants are without sufficient information to form a belief as to truth or falsity of the allegations contained in the fourth and sixth sentences of paragraph 9 of the Second Amended Complaint and therefore deny the same.

9. In answer to paragraph 10 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "E" is a copy of the "Warranty Deed" recorded on June 4, 1990, in the Franklin County recorder's office as Instrument No. 181769. Defendants admit that the Warranty Deed speaks for itself and purports to have conveyed certain real property from the McCullochs to the Poveys. Defendants are without sufficient information to form a belief as to whether the conveyed property was served by a right-of-way as alleged and therefore deny the same. Defendants are without sufficient information to form a belief as to the

truth or falsity of the allegations contained in the last three sentences of paragraph 10 of the Second Amended Complaint and therefore denies the same.

10. In answer to paragraph 11 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "F" is a copy of a "Warranty Deed" recorded on September 16, 1992, in the Franklin County recorder's office as Instrument No. 186592. Defendants admit that the Warranty Deed" purports to have conveyed certain real property as described therein from the Poveys to Gary and Nola Garner. Defendants are without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in the last four sentences of paragraph 11 of the Second Amended Complaint and therefore deny the same.

11. In answer to paragraph 12 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "G" is a copy of a "Trustee's Deed" recorded on August 20, 1997, in the Franklin County recorder's office as Instrument No. 199886. Defendants admit that the Trustee's Deed speaks for itself and purports to have conveyed certain real property as described therein from the Alvord L. Cox Family Trust to Gary and Nola Garner. Defendants are without sufficient information to form a belief as to the truth or falsity of the allegations contained in the last half of paragraph 12 of Plaintiffs' Second Amended Complaint which begins with the term "By oral agreement" and therefore deny the same.

12. In answer to paragraph 13 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "H" is a copy of the "Warranty Deed" recorded on November 3, 1998, in the Franklin County recorder's office as Instrument No. 204036. Defendants admit that the Warranty Deed purports to have conveyed certain real property identified therein from Edward and Helen Rice to Gary and Nola Garner. Defendants are without sufficient information to form a belief as to whether the transferred property was

intended to be used as a "special limited access road" or an "access road, including as the prime purpose to haul extracted gravel in the non-wintery months" or whether "it was not usable in wintery months" and therefore deny the same.

Defendants further admit that the document attached to the Second Amended Complaint as Exhibit "I" is a copy of the "Warranty Deed" recorded on November 3, 1998, in the Franklin County recorder's office as Instrument No. 204035. Defendants admit that the aforementioned Warranty Deed purports to have conveyed certain real property identified therein from Gary and Nola Rice to Edward and Helen Rice. Defendants are without sufficient information to form a belief as to whether Exhibit "I" was provided "in exchange" for Exhibit "H" and therefore deny the same.

13. In answer to paragraph 14 of the Plaintiffs' Second Amended Complaint, Defendants admit the first sentence thereof. Defendants are without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in this paragraph and therefore deny the same.

14. In answer to paragraph 16 of the Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "K" is a copy of a "Warranty Deed" recorded August 30, 1999, in the Franklin County recorder's office as Instrument No. 207408 and that the document attached to the Second Amended Complaint as Exhibit "L" is a copy of a "Warranty Deed" recorded December 30, 1999, in the Franklin County recorder's office as Instrument No. 208652. Defendants admit that these two Warranty Deeds purport to have conveyed certain real property identified therein from Brad and Leiza Povey to Hal and Marlene Dean. Defendants admit for illustrative purposes only that Exhibit "M" attached to the Second Amended Complaint approximately illustrates the location of the Deans' real property

with respect to the Viehweg's real property. Defendants admit that the Warranty Deed recorded as Instrument No. 207408 provides that the property was transferred "free from all encumbrances except ... easements of record, and easements visible upon the premises." All remaining allegations contained in paragraph 16 of the Second Amended Complaint are denied.

15. In answer to paragraph 17 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "N" is a copy of the "Corrected Warranty Deed" recorded April 5, 2001, in the Franklin County recorder's office as Instrument No. 212784. Defendants admit that the Corrected Warranty Deed speaks for itself. Defendants admit that this Corrected Warranty Deed purports to have conveyed certain real property identified therein from the Poveys to Jeffrey and Kathleen Niegum. Defendants deny any and all allegations contained in paragraph 17 of the Second Amended Complaint which do not fully and completely conform to the language contained in the Corrected Warranty Deed. Defendants admit for illustrative purposes only that the aerial map attached to the Second Amended Complaint as Exhibit "O" identifies the approximate location of the property received by the Neigums under the Corrected Warranty Deed.

16. In answer to paragraph 18 of Plaintiffs' Second Amended Complaint, Defendants admit the aforementioned Corrected Warranty Deed contained the quoted language sans any emphasis or bolding. Defendants admit that the Corrected Warranty Deed speaks for itself. Defendants deny any and all allegations contained in paragraph 17 of the Second Amended Complaint which do not fully and completely conform to the language contained in the Corrected Warranty Deed. Defendants deny that Plaintiffs are entitled to an access road across the Defendants' properties and further deny that any access road claimed by the Plaintiffs "should be 30-feet not 20-feet in width."

17. In answer to paragraph 19 of Plaintiffs' Second Amended Complaint, Defendants admit that Daniel Garner owned real property located to the west or southwest of the bridge over the Twin Lakes Canal near the Niegums' residence. Defendants are without sufficient information to form a belief as to whether the Nola Trust is the actual owner of real property to the west of the bridge over the Twin Lakes Canal near the Neigums' residence and therefore deny the same. Defendants deny the remaining allegations contained in paragraph 19 of the Second Amended Complaint.

18. In answer to paragraph 20 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "P" is a copy of a "Warranty Deed" recorded on November 1, 2005, in the Franklin County recorder's office as Instrument No. 231836. Defendants admit that the Warranty Deed purports to have conveyed certain real property identified therein from the Poveys to Douglas and Sharon Viehweg. Defendants admit for illustrative purposes only that Exhibit "Q" attached to the Second Amended Complaint illustrates the approximately layout of Tract 1 and Tract 2 identified in the Warranty Deed.

19. In answer to paragraphs 21 and 22 of Plaintiffs' Second Amended Complaint, Defendants deny that Plaintiffs are entitled to an access road along the route alleged therein. Defendants therefore deny the allegations contained in paragraphs 21 and 22 of the Second Amended Complaint.

20. In answer to paragraph 25 of Plaintiffs' Second Amended Complaint, Defendants admit that on or about May 28, 2008, Doug Viehweg constructed a fence along a portion of the western boundary of his property which crossed the real property identified by Plaintiffs as the so-called Segment "A". Defendants deny all remaining allegations in paragraph 25 of the Second Amended Complaint.

21. In answer to paragraph 26 of Plaintiffs' Second Amended Complaint, Defendants admit that they previously filed an Answer dated November 11, 2008 in which they denied that Plaintiffs were entitled to a right-of-way across their respective properties. Defendants further admit that they previously filed a Stipulation reserving the right to oppose in this litigation any claim by Plaintiffs to a right-of-way across their respective properties. Defendants deny all remaining allegations in paragraph 26 of the Second Amended Complaint.

22. In answer to paragraph 39 of Plaintiffs' Second Amended Complaint, Defendants admit that the Deans and Viehwegs received deeds from Povey (as described above) after July 8, 1987. Defendants deny all other allegations if any in paragraph 39 of the Second Amended Complaint.

23. In answer to paragraph 43 of Plaintiffs' Second Amended Complaint, Defendants admit that the document attached thereto as Exhibit "S" is a copy of the "Warranty Deed" recorded on October 4, 2004, in the Franklin County recorder's office as Instrument No. 227649. Defendants admit that the Warranty Deed purports to have conveyed certain real property identified therein from Jeffery and Kathleen Neigum 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." Any other allegations in paragraph 43 of the Second Amended Complaint, if any, are denied.

24. In answer to paragraph 46 of Plaintiffs' Second Amended Complaint, Defendants deny that Plaintiffs are entitled to a "Replacement Access Road" across their respective properties. In so far as paragraph 46 of the Second Amended Complaint is simply an offer of settlement, no response is necessary. If a response is found to be necessary, Defendants deny the same.

25. In answer to paragraph 47 of Plaintiffs' Second Amended Complaint, Defendants state that they have not made a claim in this case to any interest in real property located west of the referenced bridge over the Twin Lakes Canal. No response is therefore necessary. Defendants further state that any claims concerning whether the alleged roadway west of the referenced bridge over the Twin Lakes Canal is or is not a "public roadway" is improper in this lawsuit and must be dismissed, particularly given that an indispensable party, namely Franklin County, is not a party to this lawsuit.

26. In answer to paragraph 62 of Plaintiffs' Second Amended Complaint, Defendants admit the entirety except the last sentence thereof. With respect to the last sentence thereof, Defendants admit that the Stipulation was accepted by the Court but deny the remaining allegations in the last sentence in so far as those allegations contradict the terms and conditions of the Stipulation.

27. In answer to paragraph 63 of Plaintiffs' Second Amended Complaint, Defendants admit that the Neigums had knowledge of the filing of the Stipulation. Defendants deny all remaining allegations in paragraph 63 of the Second Amended Complaint.

THIRD DEFENSE

The Plaintiffs are not entitled to an express easement along the easement claimed in their complaint. Plaintiffs claim to an express easement is based solely upon the Contract of Sale referenced in paragraph 51. However, Plaintiff Nola Garner as Trustee of the Nola Garner Living Trust is not a party to said Contract of Sale and therefore has no claim to an express easement thereunder. Moreover, the Contract of Sale does not contain language conveying an express easement to any of the Plaintiffs. Additionally, the Contract of Sale was merged into a subsequent Deed which also does not contain language conveying an express easement.

FOURTH DEFENSE

Plaintiffs have failed to mitigate their damages and therefore cannot recover the same against Defendants.

FIFTH DEFENSE

Plaintiffs' claims are barred by waiver, estoppel and/or laches and therefore Plaintiffs cannot recover the same against Defendants.

SIXTH DEFENSE

Plaintiffs' have abandoned any and all easements claimed in their complaint.

SEVENTH DEFENSE

Any alleged use by Plaintiffs of the easement claimed in Plaintiffs' complaint was by permission which permission has been affirmatively revoked by Defendants.

REQUEST FOR ATTORNEYS FEES

Defendants are entitled to an award of attorneys fees under the facts and circumstances of this case, pursuant to Idaho Code §§ 12-120, 12-121 and other applicable statute or provision.

RESERVATION OF RIGHT TO FILE COUNTERCLAIM, THIRD-PARTY COMPLAINT OR CROSS-CLAIMS

Defendants have not had an opportunity to investigate or conduct discovery to determine whether or not counterclaims, third-party complaints or cross-claims are appropriate under the facts and circumstances in this case and reserves the right to file such further pleadings until such time as the Court may determine or impose a deadline, and until sometime after each Defendant has been identified as a party who will participate as a Defendant in the trial of the above-captioned action.

REQUEST FOR JURY TRIAL

Pursuant to Rule 38 of the Idaho Rules of Civil Procedure, Defendants request a jury trial on all issues triable by a jury.

REQUESTED RELIEF

WHEREFORE, Defendants pray judgment that Plaintiffs take nothing by their Complaint, and that these answering Defendants have and recover their costs and disbursements herein, including attorney fees, together with such other relief as the Court deems just and equitable.

DATED this 15th day of April, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

BY: 

ERIC L. OLSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of April, 2009, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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

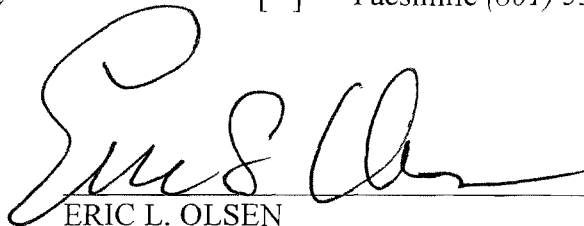
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ERIC L. OLSEN

FILED

09 SEP 2 PM 3:54

FRANKLIN COUNTY CLERK

M. Robert
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF IDAHO

STATE OF IDAHO, IN AND FOR THE COUNTY OF FRANKLIN

Register#CV-2008-342

DANIEL S. GARNER, et al.,

Plaintiffs,

-vs-

HAL J. DEAN, et al.,

Defendants.

ORDER FOR SUBMISSION
OF INFORMATION FOR
SCHEDULING ORDER

A Complaint was filed in this matter on the 17th day of September, 2008. The Defendants have now appeared and/or answered and the case is at issue.

IT IS HEREBY ORDERED, pursuant to I.R.C.P. 16, that the parties shall, through their counsel (or the parties themselves if self-represented), CONFER and PLAINTIFF shall submit to the Court, within fourteen (14) days of the date of this Order, a STIPULATED STATEMENT containing responses to the following issues [PLAINTIFF SHALL SUBMIT ONE AGREED RESPONSE TO EACH ISSUE LISTED BELOW]:

- (1) Whether this matter is to be tried to the Court or to a jury.
- (2) Whether service is still needed upon any unserved parties.
- (3) Whether motions to add new parties or otherwise amend the pleadings are expected.
- (4) Whether an unusual amount of time is needed for trial preparation and/or discovery.
- (5) The agreed number of trial days required for trial.
- (6) Any other matters the parties agree would be helpful to a determination of the case that should be brought to the attention of the Court prior to entering a Scheduling Order.
- (7) Submit THREE (3) STIPULATED TRIAL DATES, as described below.

- The beginning date of the trial must be a TUESDAY. [If the number of trial days is 3 or less and the Monday of the week submitted for trial is a holiday, the beginning day of the trial should be a WEDNESDAY].
- Do not submit trial dates for the third week of any month as that is the Court's criminal trial week.
- The first stipulated trial date must be a specific Tuesday *no less* than six (6) months and *no more* than nine (9) months from the date of this Order.
- The second stipulated trial date must be a specific Tuesday *no less* than nine (9) months and *no more* than twelve (12) months from the date of this Order.
- The third stipulated trial date must be a specific Tuesday *no less* than twelve (12) months and *no more* than fifteen (15) months from the date of this Order.
- **PLEASE COMPLY WITH THIS DIRECTIVE EXPLICITLY. DO NOT SUMBIT LESS THAN THREE STIPULATED AND SPECIFIC TRIAL DATES UNLESS APPROVED IN ADVANCE BY THE COURT. THE SUBMITTED TRIAL DATES MUST BE THE ACTUAL DATES THE TRIAL WILL BEGIN.**

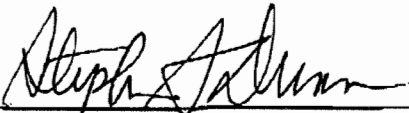
(8) The Plaintiff shall be responsible to submit the STIPULATED STATEMENT.

Upon receipt of this STIPULATED STATEMENT the Court will issue a Scheduling Order setting the matter for trial with dates for discovery, disclosure of witnesses, etc.

IT IS FURTHER ORDERED that if the parties do not file the STIPULATED STATEMENT required herein, within the fourteen (14) days of the date of this ORDER, the Court will set this matter for trial on dates available to the Court and will not approve stipulations to modify the trial dates set.

IT IS SO ORDERED.

DATED: September 1, 2009


STEPHEN S. DUNN
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of September, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

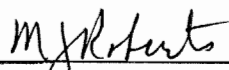
Gordon Thatcher (x) Facsimile: (208) 359-5888
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ATKIN LAW OFFICE

Ryan McFarland (x) Facsimile: (208) 342-3829
HAWLEY TROXEL ENNIS & HAWLEY

Eric Olsen (x) Facsimile: (208) 232-6109
RACINE LAW FIRM

DATED this 1st day of September, 2009.


Linda Hampton, Deputy Clerk

TRANSACTION REPORT

P.01/01

SEP/02/2009/WED 03:12 PM

FAX (TX)

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P.01/01

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P.01/01

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P.01/01

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Attorneys for the Povey Defendants

FILED

09 SEP -3 AM 9: 31

FRANKLIN COUNTY CLERK

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,

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
for Summary Judgment

Case No. CV-08-342

Judge Brown

Defendants Brad and Leiza Povey, by and through undersigned counsel, hereby
respectfully move this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure for

Summary Judgment. This motion should be granted as there are no genuine issues of material fact, as set forth in the memorandum filed in support herewith.

DATED THIS 1st day of September, 2009.

ATKIN LAW OFFICES, P.C



Blake S. Atkin

Attorney for the Povey Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that he caused to be served a true and correct copy of the foregoing **DEFENDANT BRAD AND LEIZA POVEYS' MOTION FOR SUMMARY JUDGMENT** upon the following by the method of delivery designated:


Gordon S. Thatcher _X_ U.S. Mail ____ Hand delivery ___ Fax
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Franklin County Court X U.S. Mail Hand delivery Fax
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DATED THIS 1st day of September, 2009.


Blake S. Atkin