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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

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Attorneys for the Povey Defendants

FILED
09 SEP -3 AM 9:31
FRANKLIN COUNTY CLERK
L Hampton
DEPUTY

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

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation. Defendants.	Memorandum in Support of Defendant Brad and Leiza Poveys' Motion for Summary Judgment Case No. CV-08-342 Judge: Brown

Defendants Brad and Leiza Povey, by and through undersigned counsel, hereby submit this Memorandum in Support of their Motion for Summary Judgment.

This lawsuit followed the building of a fence across one of three roads that the Garners have used to access their property on the west side of Twin Lakes canal. Interestingly, the fence was built more than 2 ½ years after the Povey Defendants had sold their last piece of property and had left the area.

In order to determine if Summary Judgment is appropriate in favor of the Povey Defendants, the Court needs to make two determinations:

First is whether the Garners have a right to use the particular portion of the roadway that became blocked by the fence, or whether their right of access could be satisfied by what Garners themselves term "a replacement access road,"[1] that existed long before the fence was built. see Second Amended Complaint at ¶¶ 18, and 22 in Court file,

Second, even if the Court were to determine that the Garners' right of access over the servient estate can only be satisfied by the particular roadway blocked by the fence, the Court would then need to determine whether the Povey Defendants had anything at all to do with the blocking.

The answer to both those inquiries is no.

The Garners who failed to have their right of access recorded do not have the right to claim any particular route of access over the servient estate in this case but only a reasonable access route. The "replacement access road" meets that legal requirement.

The second inquiry is equally no. The Poveys left the area more than two and one half years before the fence was built. During that time the Garners continued to use all three access roads. The Garners have no evidence of the Poveys intentionally trying to obliterate or interfere with the use of the road, and can point to no document recorded by the Poveys that would have

[1] The Garner's right of access over the servient estate in this case was never put into any deed by any of the Garners or their predecessors. If it were not for Brad Povey describing the "replacement access road" in his deed to the Neigums there would exist serious questions whether Garners have any right of access at all.

limited the Garners' use of any of the roads. The most that can be said is that the Poveys enhanced one of the access roads so that it would be easier for the Garners to choose not to use a roadway that no one disputes is undesirable because of the danger it poses to small children. There is nothing in the law that imposes penalties for providing a second access road where only one existed before. What the parties did after the Poveys left is really out of the Poveys hands.

FACTS

1. The Garner property on the west side of Twin Lakes canal, though legal title is held in various proportions by the different Garner Plaintiffs, is and always has been operated as a unit. Gary Garner and Nola Garner along with their son Dan have operated their various holdings on the west side of the canal as a common operation.[2] It is generally understood in the community that the Garners operate the property as a common unit. See, June 2, 2009, Deposition of Nola Garner, pp. 81 – 82, attached hereto as Exhibit B.

2. The transaction by which Dan Garner became owner of the legal title to some of the Garner property on the west side of Twin Lakes canal was negotiated by Gary Garner. In particular, Gary Garner requested that the course of the access to the property be altered so that the roadway did not pass directly in front of the home with small children. See, June 2, 2009, Deposition of Nola Garner, p. 27, attached hereto as Exhibit B; see also, June 3, 2009, Deposition of Daniel S. Garner, pp. 12 - 14, attached hereto as Exhibit C. Unfortunately, that part of the negotiations did not make it into the recorded deed or this controversy would have been obviated.

3. Later, after the Povey Defendants became owners of the servient estate, Gary Garner renewed his request to change the route of the access road away from the home with

[2] Sherri-Jo Garner's interest arises solely from the fact that she is the wife of Daniel Garner. See, June 3, 2009 Deposition of Sherri-Jo Garner, pp. 6, 11 – 15, attached hereto as Exhibit A.

small children to the Povey Defendants when they became owners of the property. See, June 2, 2009, Deposition of Nola Garner, p. 27, attached hereto as Exhibit B. Brad Povey agreed to do so and in fact included a description of the access road in the deed he gave to the Neigums. See, March 22, 2001 Corrected Warranty Deed, attached hereto as Exhibit D.

4. After Gary's passing Brad Povey approached Dan Garner in an attempt to document the change in the course of the roadway that he and Gary Garner had agreed upon. Dan Garner did not inform Brad Povey that he disagreed with changing the course of the roadway. Instead he indicated his consent by stating that the idea was worthy of consideration. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 114 - 117, attached hereto as Exhibit C. Indeed, before filing this lawsuit, Dan Garner never protested anything concerning the course of the roadway to Brad Povey even though the alternative route was well established by the McCullochs and someone cultivated over the old roadway at least twice. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 60 - 65, attached hereto as Exhibit C.

5. When someone cultivated the roadway, which upset Dan Garner, Gary Garner told him not to worry about it. Following his instructions, Dan Garner did not protest. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 61 - 65, attached hereto as Exhibit C. That first cultivation occurred in the late 80's. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 64 - 65, attached hereto as Exhibit C.

6. None of the Plaintiffs understood that the word "appurtenances" in their warranty deeds meant that the Povey Defendants were warranting title to any particular access roadway. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 244 – 246, attached hereto as Exhibit C; see also, June 2, 2009 Deposition of Nola Garner, pp. 223 – 226.

ARGUMENT

The Garners have no right to a particular access route, but only a reasonable access. There is no evidence of the Povey defendants doing anything to stop the Garners from using any access they like. Under these facts, the Poveys should never have been made party to this action.

I. The Povey Defendants have not breached any warranty of title.

In analyzing the issue of whether there is a breach of any warranty made in the warranty deed, it is important to keep in mind two salient facts. First is the fact that the deeds in this case are all silent on the issue of access to the property being conveyed. Second, no one is accusing Brad Povey of trying to deny the Garners access to their property, but only of attempting to change the course of that access across the servient estate. Given those two facts, there cannot be a breach of warranty claim in this case.

A. There was no warranty of title to any particular access road.

The warranty deed from the four Poveys to Gary and Nola Garner is devoid of any mention of an access road, let alone a warranty of title to any particular access roadway to the property. Because there is no access roadway mentioned in any of the Garner deeds, the Plaintiffs fall back on language in the warranty deeds stating that the property is being conveyed with all its "appurtenances." While the conveyance of the property along with its "appurtenances" may be sufficient to allow the Garner's to lay claim to an access, the Court should be cautious in imposing a duty of warranty of any particular access roadway with regard to a right of access so ill defined. In this case it is quite clear that the parties intended no warranty of any particular roadway by use of the word "appurtenances" since none of the Plaintiffs knew the meaning of the word. See, June 2, 2009 Deposition of Nola Garner, pp. 223 -

226, attached hereto as Exhibit B; see also, June 3, 2009 Deposition of Daniel S. Garner, pp. 244 – 246, attached hereto as Exhibit C.

B. If an "appurtenance" includes a right of access, the replacement access road provided by the Povey Defendants meets the requirement of the law to provide a right of access.

When the right of access of the dominant estate "is not bounded in the grant, the law bounds it by the line of reasonable enjoyment. This means that the easement must be a convenient and suitable way and must not unreasonably interfere with the rights of the owner of the servient estate." Bethel v. Van Stone, 120 Idaho 522, 522 P 2d 188 (Id. App. 1991). In such cases, the owner of the servient estate has the right to locate the road, "and, if reasonably suitable for the purpose, a selection of a place cannot be questioned." [citation omitted]. "This procedure is in recognition of the right of the owner of the servient property to make such use of his property as he desires, so long as his use is consistent with the easement granted. The owner may choose the location to minimize the impact of the road and to prevent unreasonable interference with the rights of the owner so long as the chosen easement is a convenient and suitable way." Id at 194. At most, that is what was done in this case. As pointed out above, the Warranty Deed from the four Povey's to Gary and Nola Garner is devoid of mention of a right of access let alone a delineation of that access. Neither does any deed to Dan Garner mention an easement or a right of access. Under those circumstances, Brad Povey had the right to locate the path of the access roadway. That he did in the deed to the Neigums where, for the first time ever, a document was recorded that set out the roadway.

Under the cases cited above, Brad Povey could have unilaterally designated the path of the roadway, and as long as it was a convenient and suitable way, the law would uphold his designation. But in this case Brad Povey did not designate the roadway in a vacuum. Without

exception, all of the parties felt that the roadway passing next to a home with small children was problematic.

Q: Just tell me what you remember in substance of what was said?

A: That Gary wanted to move it to get out of the childrens' way.

Q: To move what?

A: The right-of-way. Get the gravel trucks going down the south – using the Rice easement to eliminate them from going past Marlene's.

See, June 2, 2009, Deposition of Nola Garner, p. 27, attached hereto as Exhibit B.

Q: Okay. And was that okay with you to use that road rather than the northern road?

A: Yes. I'm a mother and I want – I don't want people driving past my children.

See, June 2, 2009, Deposition of Nola Garner, p. 70, attached hereto as Exhibit B.

Q: Were you ever told of any concern that the Poveys had about their young children in vicinity to the northern roadway? Was that ever brought up as an issue to you?

A: Not to me.

Q. Were you ever aware of that concern?

A: I might have been aware, but I was never asked directly, no.

Q: Okay. You say you might have been aware. Were you aware? And if you don't recall, you don't, I'm just asking.

A: Any logical person would assume that's why they asked the gravel trucks to go the other way.

Q: Okay. But you don't recall ever having any discussions with the Poveys about that?

A: Discussions, no, I don't remember ever personally being told.

Q: Okay. How about the Deans, did you ever have any discussions with the Deans about concern over the safety of their children and a request that you – did the Deans ever talk to you about a concern over the safety of their children?

A: Yes.

See, June 3, 2009 Deposition of Daniel S. Garner, pp. 49-50, attached hereto as Exhibit C.

Q: And why did you use that roadway as opposed to the northern roadway, if you had a reason? I'm not saying you had to have a reason, but was there a reason why you used that roadway rather then the northern roadway?

A: It was probably safer to exit the residence, the home.

Q: Why is that?

A: Because of small children.

See, June 3, 2009 Deposition of Sherri-Jo Garner, pp. 22 – 23, attached hereto as Exhibit A. No one was more concerned with this safety of the children factor than Gary Garner. Beginning with the purchase by the Garners of the first, Gary Garner, who negotiated the details of the purchase while his son, Plaintiff Dan Garner, was away at college, requested that the course of the roadway be changed to put it further away from the home with small children. See, June 2, 2009, Deposition of Nola Garner, p. 27, attached hereto as Exhibit B; see also, June 3, 2009 Deposition of Daniel S. Garner, pp. 12 - 14, attached hereto as Exhibit C. Unfortunately, the intended change in the roadway's course did not make it into the deeds to the property which remained silent on the question of access.

Gary Garner renewed his request that the course of the access road be changed when the Povey Defendants became the new owners of the servient estate. Pursuant to that request, and in

keeping with the feeling of all the parties involved that the roadway passing as it did so closely to the home with small children was problematic, Brad Povey located the course of the access roadway in the deed given to the Neigums upon their purchase of a portion of the property. That deed was the first time that the course of the roadway was ever delineated in writing and was the first time that any mention of the Garner access was ever recorded.[3]

So intent was Gary on protecting the children, that he bought, over the protests of his wife and son, an entirely new access roadway to access the property. See, June 2, 2009, Deposition of Nola Garner, pp. 20-21 attached hereto as Exhibit A. The new roadway he purchased required a new crossing of Twin Lakes Canal, but the canal company did not want a new crossing because of the added difficulty each crossing imposes on canal maintenance. So Gary agreed that if the canal company would permit the installation of the new crossing it could remove the existing crossing. See, June 2, 2009, Deposition of Nola Garner, pp. 53 – 55, attached hereto as Exhibit B; see also, April 2, 2009 Affidavit of Ivan Jensen, attached hereto as Exhibit E; see also, March 19, 2009 Affidavit of Judy Phillips, attached hereto as Exhibit F; see also, March 5, 2009 Affidavit of Ron Kendall, attached hereto as Exhibit G. Of course, elimination of the existing crossing would necessarily mean abandonment by the Garners of the access rights that are the subject of this lawsuit. See, June 2, 2009, Deposition of Nola Garner, pp. 174 – 175, attached hereto as Exhibit B. Brad Povey, after Gary Garner's death, even discussed the change in the course of the roadway with Plaintiff Dan Garner who told him that the idea "definitely deserves some consideration". See, June 3, 2009 Deposition of Daniel S. Garner, p. 116, attached hereto as Exhibit C.

[3] Although the deed to the Neigums is the first recording of the " replacement access road" now known as the Neigum driveway, that roadway, or something generally in that vicinity had been the historic roadway used to access the Garner property on the west side of the canal. See, 4/16/09 Affidavit of Ted Rice, attached hereto as Exhibit H; see also, 4/16/09 Affidavit of Lorraine Rice, attached hereto as Exhibit I.

Having the right to designate the exact course of the access roadway so long as the designation was not unreasonable; given the fact that everyone recognized that the existing roadway was problematic because of its course past a home with small children; given Gary Garner's incessant efforts to obtain an alternative access route that would move access away from the home with small children; and given Dan Garner's failure to protest the change in the route, it can hardly be argued that Brad Povey, by providing a reasonable alternative route of access across the property breached any warranty in the warranty deed that is silent on the issue of the access roadway.

C. A breach of warranty cannot be based on facts occurring after conveyance of title.

A warranty is breached if at the time of making the warranty, the seller does not have full title to the property being conveyed. Madden v. Caldwell Land Co., 16 Idaho 59, 100 P. 358, (Idaho 1909). A breach of warranty cannot arise from acts occurring after conveyance unless the grantor takes steps to deny the title granted to his grantee. Garners claim for breach of warranty arises from acts allegedly occurring after conveyance. That is why the Garners did not name the other two Poveys as Defendants. See, Second Amended Complaint, at ¶ 34, in Court file. There is no allegation that the Povey's have done anything except to enhance the Garner's rights to access of the property. The breach of warranty claim fails as a matter of law.

II. The Povey Defendants have never interfered with the Garner's use of any roadway.

The Povey Defendants have never interfered with the Garner's access to the property. Nor have they even tried to force the Garner's to use the "replacement access road" that they recorded on the property. Until May 28, 2008, long after the Poveys had sold their last interest in the servient estate, the Garners continued to use either the original access road or the

alternative access road. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 82 - 87, attached hereto as Exhibit C; See also, June 3, 2009 Deposition of Sherri-Jo Garner, pp. 34 - 39, attached hereto as Exhibit A. There simply is no evidence of any interference by the Povey Defendants with the Garner's use of any roadway to access their property.

III. There is no evidence that the Povey Defendants cultivated the roadway.

In their amended complaint, the Plaintiffs allege that the Povey Defendants "plowed" the roadway. A better way to describe what happened is that portions of the roadway were cultivated along with fields on either side of the roadway, a practice not uncommon with regard to farm roads of this nature. This happened at least twice while the Poveys owned the servient estate. The first time was in the mid eighties. At the behest of Gary Garner, the Garners did not protest the practice, and by usage the roadway was reestablished. See, Deposition of Nola Garner, pp. 106 - 109, attached hereto as Exhibit B. The Poveys nor anyone else complained of the Garners driving over the planted crops. The second time cultivation over the roadway occurred was just prior to the sale by the Poveys of the property. Again, the Garners did not protest the practice and the roadway was reestablished by use. See June 2, 2009 Deposition of Nola Garner, pp. 99 – 101, attached hereto as Exhibit B; see also, June 3, 2009 Deposition of Daniel S. Garner, pp. 89 – 90, attached hereto as Exhibit C.

The Garners do not have any evidence that it was the Povey Defendants who performed this cultivation. On one occasion, Nola Garner saw Brad Povey's nephew doing the cultivation, but she did not know whether he had been instructed to do it. See, Deposition of Nola Garner, pp. 106 - 109, attached hereto as Exhibit B. At first blush, the family relationship might be seen as raising some issue, but when one considers that Plaintiff Sherri Jo Garner is Brad Povey's niece it would be just as reasonable to infer that the Plaintiff instructed her cousin to do the

cultivating as to infer that Brad Povey so instructed his nephew. No inference can be drawn from the family relationship. There simply is no evidence that the Povey Defendants ever cultivated or plowed the roadway.

A. There is no evidence that the Povey Defendants had any intent to interfere with Garner's use of the roadway.

Even if there were evidence of plowing by the Poveys, which there is not, as this court has already ruled: that without more would not be actionable. The Plaintiffs would need to additionally prove that the Poveys plowed the roadway with the intent to interfere with Garners use or to obliterate the roadway to facilitate a sale of the property to an unsuspecting buyer who would take without knowledge of the roadway. The Garners simply have no evidence of any such intent. See, June 3, 2009 Deposition of Daniel S. Garner, pp. 60 - 65, attached hereto as Exhibit C; see also, June 2, 2009 Deposition of Nola Garner, pp. 105 – 107, attached hereto as Exhibit B.

B. The Povey Defendants never filed any documents that denied the existence of the Garner roadway.

The Povey Defendants never filed any documents attempting to refute the Garners right to use any access roadway. Indeed, the Poveys are the only parties who have tried to preserve the Garner access by mentioning it in the deeds to their assigns. That the Garners have included them in this lawsuit is proof of the maxim that no good deed goes unpunished!

Because there is no evidence that Poveys ever interfered in any way with the use by Garners of any roadway, the remaining claims by the Garners cannot stand.

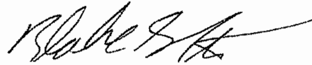
CONCLUSION

Because there is no evidence that the Povey Defendants did anything but attempt to establish and clarify Garners' right to access their property over the servient estate, the claims

against the Poveys should never have been brought. The time has come for the Court to dismiss these ill founded claims and the Court should award the Poveys their costs and attorney fees in defending this action.

DATED THIS 1st day of September, 2009.

ATKIN LAW OFFICS, P.C



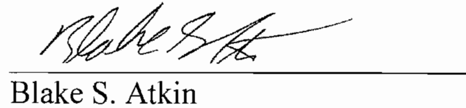
Blake S. Atkin
Attorney for the Povey Defendants

CERTIFICATE OF SERVICE

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

Gordon S. Thatcher Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	_X_ U.S. Mail	___Hand delivery	___ Fax
Eric Olsen Racine, Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, Idaho 83204-1391	_X_ U.S. Mail	___Hand delivery	___ Fax
Ryan McFarland Hawley, Troxell Ennis & Hawley P.O. Box 1617 Boise, Idaho 83701-1617	_X_ U.S. Mail	___Hand delivery	___ Fax
Franklin County Court 39 West Oneida Preston, Idaho 83263	_X_ U.S. Mail	___Hand delivery	___ Fax

DATED THIS 1st day of September, 2009.



Blake S. Atkin

Exhibit A

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.) Case No. CV-08-342
HAL J. DEAN and MARLENE T.)
DEAN, husband and wife;)
(Caption continued.)

DEPOSITION OF SHERRI-JO GARNER

JUNE 3, 2009

REPORTED BY:

RODNEY FELSHAW, C.S.R. No. SRT-99

Notary Public

1 SHERRI-JO GARNER,
2 first duly sworn to tell the truth relating to
3 said cause, testified as follows:
4
5 EXAMINATION
6 BY MR. ATKIN:
7 Q. Will you state your name and spell it
8 for the record.
9 A. Sherry Joe Garner. S-h-e-r-r-i,
10 hyphen, J-o. Garner, G-a-r-n-e-r.
11 Q. Would you like me to call you Mrs.
12 Garner, Sherri-Jo, how would you like me to
13 address you?
14 A. Sherri-Jo is fine.
15 Q. Okay. Sherri-Jo, I understand that
16 you're related to Daniel Garner?
17 A. Yes.
18 Q. You're his wife?
19 A. Yes.
20 Q. Are you familiar with the second
21 amended complaint that's been filed in this
22 matter?
23 A. No, I'm not.
24 Q. You know that we're involved in a
25 lawsuit?

1 Q. Okay. What do you know about the
2 property on the west side of Twin Lakes Canal that
3 is being accessed, or that there are questions
4 about the access road?
5 A. Which property are you referring to?
6 Q. Okay. You're aware that your husband,
7 before you were married to him, purchased a parcel
8 of property on the west side of Twin Lakes Canal
9 from some people named McCulloch? Are you
10 familiar with that piece of property?
11 A. Can you repeat that?
12 Q. Before you were married to Daniel
13 Garner, he purchased a piece of property west of
14 Twin Lakes Canal, about 40 acres, from the
15 McCullochs. Are you familiar with that parcel of
16 property?
17 A. Yes.
18 Q. How are you familiar with it?
19 A. I have moved cattle on it.
20 Q. Okay.
21 A. Rode my horse on it.
22 Q. Fair enough. And then sometime after
23 he purchased that parcel of property his parents,
24 you know Gary and Nola Garner?
25 A. Yes.

1 Q. They purchased a parcel of property
2 from Brad and Leiza and Hank and Melanie Povey.
3 Are you familiar with that piece of property?
4 A. Yes.
5 Q. And how are you familiar with that
6 piece of property?
7 A. It connects to our piece of property
8 that Dan owns.
9 Q. Okay. And then Gary and Nola Garner
10 also purchased a parcel of property from the
11 Coxes. Are you familiar with that piece of
12 property?
13 A. Yes.
14 Q. And it's my understanding that in one
15 way or another those three parcels have been
16 accessed at some point in time in the past over a
17 roadway from Westside Highway. And here's my
18 question, are you familiar with the three roads
19 that at one point or another have been used, or
20 could have been used, to access those parcels of
21 property owned by the Garners on the west side of
22 Twin Lakes Canal?
23 A. You're referring to all three parcels
24 of property?
25 Q. Yeah, I'm referring to all three

1 parcels, but you can answer it however you like.
2 Let me just ask you this, you've been to the
3 property that you and Daniel own on the west side
4 of Twin Lakes Canal that we're talking about that
5 he bought from the McCullochs?
6 A. Yes.
7 Q. You've herded cattle there, have
8 ridden your horse there. Have you ever been there
9 in a vehicle?
10 A. Yes.
11 Q. Okay. How did you get to that
12 property when you went there?
13 A. In a vehicle, a dump truck, farm
14 equipment.
15 Q. Tell me what road --
16 A. Equine.
17 Q. Tell me what roads you've used to get
18 there.
19 A. The furtherest north access road, the
20 middle access road, and the south access road.
21 Q. Okay. And the furtherest north access
22 road, is that the road that now goes very close to
23 what's known as the Dean home?
24 A. Yes.
25 Q. Okay. And the middle access road is

1 the roadway that has sometimes been referred to as
2 the Neigum driveway, does that make sense to you?
3 A. It would be the piece between Neigums
4 and Viehwegs, that roadway property.
5 Q. And that roadway goes off the Westside
6 Highway and then heads north. Then at some point
7 it converges with the northern roadway, right?
8 A. Yes.
9 Q. And then the south roadway is a
10 roadway that was purchased by Gary and Nola Garner
11 from Ted Rice, is that your understanding? Is
12 that the southern roadway that you're talking
13 about?
14 A. Yes.
15 Q. Okay. What knowledge do you have
16 about the -- do you know whether you and Daniel
17 are claiming any right-of-way across the northern
18 roadway?
19 A. Yes.
20 Q. You do know you are claiming a
21 right-of-way across the northern roadway?
22 A. Yes.
23 Q. And what is that based on?
24 A. Usage and hearsay.
25 Q. And hearsay?

1 A. Uh-huh.
2 Q. What's the hearsay?
3 A. What part of hearsay do you want to
4 know about?
5 Q. I want you to tell me the hearsay that
6 you're aware of on which you base a claim to a
7 right-of-way across that roadway.
8 A. That was the only access way to get to
9 the property at the time I was married. That's
10 the only access road. The other roads did not
11 exist.
12 Q. When were you married?
13 A. August 23rd, 1991.
14 Q. And at that time it's your testimony
15 that the only access to the parcel that you and
16 Daniel owned was on the northern roadway?
17 A. Yes.
18 Q. Okay. Is there anything else on which
19 you base a claim of ownership of a right-of-way on
20 the northern roadway?
21 A. Through a legal marriage.
22 Q. Okay. Whatever rights Daniel has you
23 have?
24 A. Right.
25 Q. Are you aware -- is there anything

1 Q. I'm just tying to figure out where it
2 was that it joined the northern roadway. There is
3 along the northern roadway a grain bin that you've
4 stated you know where that is. My question is,
5 did this U-shaped roadway join the northern
6 roadway on the east side of that grain bin,
7 between that grain bin and Westside Highway, or
8 did it join the northern roadway on the west side
9 of that grain bin between the grain bin and Twin
10 Lakes Canal?
11 A. East.
12 Q. How far from the grain bin?
13 A. I can't tell you that.
14 Q. Okay. Did you ever use that roadway?
15 A. Which roadway are you referring to?
16 Q. The U-shaped roadway that you've
17 described.
18 A. Yes.
19 Q. Okay. And when did you use it?
20 A. Exiting and leaving the Povey
21 residence.
22 Q. And why did you use that roadway as
23 opposed to the northern roadway, if you had a
24 reason? I'm not saying you had to have a reason,
25 but was there a reason whv you used that roadway

1 rather than the northern roadway?
2 A. It was probably safer to exit the
3 residence, the home.
4 Q. Why is that?
5 A. Because of small children.
6 Q. Okay. So you used that roadway
7 because it was a safer way to go?
8 A. Not always.
9 Q. It wasn't always safer or you didn't
10 always use it?
11 A. I did not always use it.
12 Q. Okay. Is it true that that -- what's
13 now referred to as the middle road or the Neigum
14 road, does it take up a portion of that U-shaped
15 road that you've described?
16 A. Yes.
17 Q. Okay. But it follows a different path
18 in order to rejoin the northern road; is that
19 correct?
20 A. Restate the question.
21 Q. The middle road, or the Neigum road,
22 always leaves Westside Highway and eventually
23 rejoins the northern road?
24 A. No.
25 Q. It doesn't?

1 Q. And you don't know where that other
2 piece of property was?
3 A. Not exactly, no.
4 Q. Did you have an understanding that it
5 was a 30-foot strip of property that went south
6 from where the Rice roadway crossed the Twin Lakes
7 Canal into the Rice gravel pit?
8 A. No.
9 Q. Do you know who built, physically
10 built, the roadway along the Rice roadway?
11 A. No.
12 Q. Okay. And were you aware that before
13 that road -- before Gary Garner did that swap and
14 built that roadway, that there was not a crossing
15 of the Twin Lakes Canal at that point?
16 A. Yes.
17 Q. You knew that Gary put in a crossing
18 at that point, a culvert?
19 A. Yes.
20 Q. And who physically put in the culvert,
21 do you know?
22 A. No.
23 Q. Do you know if your husband was
24 involved in putting in the culvert or in building
25 the roadway now known as the Rice roadway?

1 A. I'm not sure.
2 Q. Do you know whether he was involved in
3 building the gate and the posts on the Rice
4 roadway?
5 A. Yes.
6 Q. And was he involved in that?
7 A. In what?
8 Q. In building the gate and the posts?
9 A. Yes.
10 Q. How do you know that?
11 A. Because I brought them lunch.
12 Q. Okay. Fair enough. Brought them
13 lunch. Who was helping him build the gate and the
14 posts?
15 A. Gary.
16 Q. Okay. And when did that occur? Was
17 that the same year that the roadway was built?
18 A. I can't tell you.
19 Q. Do you know why -- that gate is
20 massive. Do you know why he put in that kind of a
21 gate on the roadway?
22 A. No.
23 Q. You've never had any discussions with
24 your husband about why it was built so massively?
25 A. No.

1 Q. Any other gates on your property
2 anywhere that is built with the same strength as
3 that gateway?
4 A. There's some that are close.
5 Q. Okay. Did you ever overhear any
6 discussions by anyone about a plan to build an
7 access road from the Rice roadway, where it
8 crosses Twin Lakes Canal, south along the 30-foot
9 strip of property that Gary traded to Ted Rice, to
10 build a roadway along there to access Ted Rice's
11 gravel pit?
12 A. Repeat that again.
13 Q. Okay. Are you familiar with Ted
14 Rice's gravel pit?
15 A. Yes.
16 Q. And it's directly south of this Rice
17 roadway, right?
18 A. What is?
19 Q. Ted Rice's gravel pit.
20 A. To the south?
21 Q. Yes.
22 A. Above the canal?
23 Q. Yes.
24 A. Yes.
25 Q. On the west side of the canal?

1 A. Yes.
2 Q. And the 30-foot strip of property that
3 Gary Garner traded to Ted Rice goes from the top
4 of where the Rice roadway crosses the canal down
5 to and into the Ted Rice gravel pit?
6 A. I don't know.
7 Q. I'm just telling you that. Did you
8 ever overhear anybody talking about building a
9 roadway along that 30-foot strip in order to
10 access Ted Rice's gravel pit?
11 A. Did I hear or was I a part of?
12 Q. I think you've already told me you
13 weren't part of that deal, but did you ever hear
14 anybody talking about building such an access road
15 for Ted Rice?
16 A. For Ted Rice?
17 Q. Yeah. In order to access the gravel
18 pit?
19 A. No.
20 Q. Okay. Did you ever hear how it was
21 that Gary Garner convinced the Twin Lakes Canal
22 Company to let him put in the culvert at the Ted
23 Rice roadway that crosses Twin Lakes?
24 A. Physically hear?
25 Q. Yes.

1 A. Be a part of the conversation or
2 hearsay?
3 Q. Hearsay or anything. Did anybody ever
4 tell you how he was able to get Twin Lakes to do
5 that?
6 A. No.
7 Q. Do you have any idea how that came
8 about?
9 A. I'm sure he went to the board and
10 asked if he could build it.
11 Q. But you don't have any knowledge of
12 that?
13 A. No.
14 Q. Hearsay or otherwise?
15 A. No.
16 Q. Now, on the northern roadway, until
17 the point in time, and I think it was May of 2008
18 that the vinyl fence was built across the northern
19 roadway. Does that ring a bell to you? Let me
20 have you -- we've got a photograph that somebody
21 told me you took the picture that is deposition
22 exhibit 3.
23 A. Yes.
24 Q. It's dated 5/28/08?
25 A. Uh-huh.

1 Q. And is that an automatic date that the
2 camera puts on pictures or did you put the date on
3 some other way?
4 A. I put the date on.
5 Q. Okay. What does that date reflect?
6 A. The date I took the picture.
7 Q. Okay. And when did you put -- when
8 did you physically put the date on the picture?
9 A. When I made the copies.
10 Q. Okay. And when did you make the
11 copies?
12 A. I can't tell you an exact date.
13 Q. Was it --
14 A. Within the last month.
15 Q. Okay. And how did you know to put the
16 date of 5/28/08 on it?
17 A. Because it's on my camera.
18 Q. What's on the camera?
19 A. The date.
20 Q. So the camera somehow recorded the
21 date the picture was taken?
22 A. It's just in my camera. It doesn't
23 print it on it because it's not --
24 Q. It doesn't print it, but the camera
25 records the date the picture was taken?

Exhibit B

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.) Case No. CV-08-342
HAL J. DEAN and MARLENE T.)
DEAN, husband and wife;)
(Caption continued.)

DEPOSITION OF NOLA GARNER

JUNE 2, 2009

REPORTED BY:
RODNEY FELSHAW, C.S.R. No. SRT-99
Notary Public

1 A. It's a hill.
2 Q. And it's close to the boundary with
3 your son Danny?
4 A. Yes.
5 Q. Let me ask you, what was Danny's
6 involvement, if any, in the purchase or building
7 of what's now known as the Rice right-of-way? Was
8 he involved in that transaction?
9 A. He was not involved in the
10 transaction.
11 Q. Okay. And if I understand, at least
12 one of the purposes -- let me ask it this way.
13 Was one of the purposes of building that
14 right-of-way to provide a better access for trucks
15 hauling gravel out of the gravel pit that's up the
16 mountain from that right-of-way?
17 A. I don't know how to answer that
18 exactly. I don't know what Gary's purpose was.
19 Q. All right. Then let me ask this.
20 What, if any, was your involvement?
21 A. Anger.
22 Q. Explain that to me, please.
23 A. I could not see why we needed to give
24 away something more valuable for -- the property
25 that we traded for that eas[illegible]t to me was more

1 valuable than the easement.

2 Q. I see.

3 A. We already had a way in and I couldn't

4 understand that.

5 Q. Okay. So you were angry with your

6 husband about doing it?

7 A. Yeah. I thought it was foolish.

8 Q. Did you find out about it before or

9 after he had made that exchange?

10 A. He couldn't make the exchange without

11 me.

12 Q. Duh. That's one of those questions

13 for the joke books.

14 That is your signature on exhibit I to

15 the amend second amended complaint?

16 A. You can fight and still come to a

17 conclusion that you'll do something, but it

18 doesn't mean you think it's wise.

19 Q. I take it from that that initially you

20 did not think it was wise?

21 A. I did not.

22 Q. There came a point in time when you

23 agreed with your husband to go ahead with the

24 transaction?

25 A. Yes.

1 something about your husband -- let me start over.
2 Tell me what Brad Povey told you about what he had
3 discussed with your husband with regard to the
4 Rice right-of-way.
5 A. It was at the city community building
6 in Clifton and you were there.
7 Q. Tell me what you recall. I was there,
8 but we need it on the record.
9 A. Just that he had talked to -- I'm not
10 recalling it very well.
11 Q. Just tell me what you remember in
12 substance of what was said?
13 A. That Gary wanted to move it to get out
14 of the childrens' way.
15 Q. To move what?
16 A. The right-of-way. Get the gravel
17 trucks going down the south -- using the Rice
18 easement to eliminate them from going past
19 Marlene's.
20 Q. Fair enough. Do you recall anything
21 else of that conversation with Brad Povey?
22 A. Not the direct conversation. I
23 couldn't quote -- well, as you can see, I can't
24 quote anything.
25 Q. I understand you can't quote, but

1 A. None. Well, we talked, but not about
2 this.
3 Q. Not about the right-of-way?
4 A. Yes.
5 Q. Okay. You told me earlier about a
6 conversation you had with Lynn where he related to
7 you some conversations he'd had with his father
8 about the use of the Rice roadway for gravel. You
9 told me about what Brad Povey had said in that
10 regard. Did you ever have any conversations with
11 your husband Gary about use of the Rice
12 right-of-way for gravel trucks?
13 A. We never did.
14 Q. Okay. When the Rice right-of-way was
15 put in, it needed -- it goes directly from the
16 Westside Highway up the hill to the Twin Lakes
17 Canal?
18 A. Very steep.
19 Q. And crosses the Twin Lakes Canal?
20 A. (Witness nodded her head.)
21 Q. Onto your property, correct?
22 A. That's correct.
23 Q. And there was not a crossing of the
24 Twin Lakes Canal at that point when you put in --
25 when your husband put -- when the Rice

1 right-of-way was put in there was not a crossing
2 of the Twin Lakes Canal at that time?
3 A. Not when that road was put in, no.
4 Q. A new crossing at the Twin Lakes Canal
5 had to be put in?
6 A. That's correct.
7 Q. Now, the other two roadways, the north
8 and the Neigum driveway, or whatever we call the
9 middle driveway, middle roadway, those two roads,
10 after they converged with each other, they
11 continued on up to Twin Lakes Canal and there is a
12 crossing of the Twin Lakes Canal at that point?
13 A. That's correct.
14 Q. And if there weren't a crossing of the
15 Twin Lakes Canal at that point, would there be any
16 reason for you to use either the north roadway or
17 the Neigum driveway, the middle roadway? If you
18 couldn't cross the Twin Lakes Canal at that point
19 would there be any reason for you to use those
20 roadways?
21 A. Well, you wouldn't be able to get to
22 your property if you didn't.
23 Q. I know that sounds like a foolish
24 lawyer question.
25 A. I keep thinking I must not be

1 understanding.

2 Q. Let me try -- the reason you used the

3 northern roadway or the middle roadway was to get

4 to your property that's on the west side of the

5 canal?

6 A. That's correct.

7 Q. So if there wasn't a crossing there

8 you couldn't get to your property on the west side

9 of the canal and you wouldn't have any reason to

10 use either the northern roadway or the middle

11 roadway, would you?

12 A. If we couldn't -- you can't swim the

13 canal.

14 Q. Right. Okay. I know it seems

15 obvious, but I'm trying to make it clear on the

16 record that the purpose of these roadways was to

17 lead to the canal, to cross the canal to get onto

18 your property. And if you couldn't cross the

19 canal --

20 A. There are other properties that use

21 that.

22 Q. Okay. But I'm talking about the

23 Garners.

24 A. Not the Garners or Nola Garner. We

25 have to be specific here, because I own property

1 A. They asked me to.
2 Q. Okay. Tell me about that. When did
3 they ask you to do that?
4 A. I don't know.
5 Q. Sometime when Brad and Leiza were
6 living in the home that the Deans now live in?
7 A. Yes.
8 Q. And did they tell you why they wanted
9 you to use that road?
10 A. I can't remember specifically why they
11 said.
12 Q. Okay.
13 A. Do you want me to guess?
14 Q. No. But do you think you know why?
15 A. I think it was because they have
16 little children too.
17 Q. Okay. And was that okay with you to
18 use that road rather than the northern road?
19 A. Yes. I'm a mother and I want -- I
20 don't want people driving past my children.
21 Q. Okay. Fair enough. The complaint
22 talks about the two properties that you and Gary
23 bought on the west side of Twin Lakes Canal. And
24 it also talks about the property that Danny
25 bought. I think Danny bought his before you and

1 Q. All right. Was this before the deal
2 had been done to develop the Rice right-of-way?
3 A. I don't remember.
4 Q. Was it before you signed the documents
5 on the Rice right-of-way, exhibit I?
6 A. I don't know if it was before or
7 after.
8 Q. Okay. Let me ask you, if it was
9 before -- if it was after the deal was already
10 done, would there have been any reason for the
11 conversation and the exasperation of your husband?
12 A. Yes. Sometimes we rehash what we've
13 already done.
14 Q. Okay. So as you sit here you don't
15 know, in relationship to the deal, when it was
16 discussed?
17 A. No.
18 Q. In what regard did Danny think that it
19 was an unwise decision to put in the Rice
20 right-of-way?
21 A. I don't remember anything he said
22 about it so I don't really know what -- well, I
23 don't know what he thought.
24 Q. Was it because of the property that
25 was being traded for the Rice right-of-way?

1 A. It was probably the value.
2 Q. All right.
3 A. But I don't know, because I don't
4 remember Danny saying anything specifically.
5 Q. All right. Did there come a point in
6 time when Danny became happy or reconciled to the
7 idea of the Rice right-of-way?
8 A. I don't really know.
9 Q. Other than that do you remember
10 anything else about that conversation about the
11 development of the Rice right-of-way, other than
12 Danny and you not seeing the wisdom in it and your
13 husband being exasperated because you couldn't see
14 how wise it was?
15 A. The only thing I saw was that Danny
16 regrets being what he considers disrespectful to
17 his father.
18 Q. Anything else?
19 A. No.
20 Q. The complaint, as I say, alleges -- we
21 talked about how you run this property as a common
22 operation. That's pretty well known in the
23 community of Clifton, that the Garners and the
24 Smarts run all of their properties in tandem.
25 A. Together. We discuss it and work

1 together, yes.

2 Q. And so the Poveys and Deans and the

3 Neigums, they would have understood that

4 relationship, that the Garners are a group that

5 run their properties together, wouldn't they?

6 MR. MCFARLAND: Objection. Calls for

7 speculation.

8 Q. (BY MR. ATKIN) I mean, it's commonly

9 known that that's how you operate, isn't it?

10 A. I think so.

11 Q. Do you have any reason to believe

12 that -- let's take them one at a time. Do you

13 have any reason to believe that the Poveys knew,

14 with regard to this property on the west side of

15 Twin Lakes Canal, that Gary and Nola Garner and

16 Danny and Sherri Garner ran the property as an

17 integrated common operation?

18 A. I think that the Poveys would know a

19 little bit more than most. And they would also

20 know that Danny is definitely his own individual.

21 Q. All right. And why is it that the

22 Poveys would know a little bit more than most

23 about the way that the Garners ran this as an

24 integrated common operation?

25 A. Brad is Sherri's uncle.

1 we've been talking about goes that way. Then it
2 turns again and goes up through Neigums. This is
3 part of the north road.
4 Q. Okay. This is part of the north
5 roadway looking to the west from the direction of
6 Westside Highway; is that correct?
7 A. Yes.
8 Q. And did you have occasion to look at
9 this roadway in May of 2008?
10 A. I wasn't looking at the roadway, I was
11 looking at the fence.
12 Q. Okay. You had occasion to look at the
13 fence at that time?
14 A. Yes.
15 Q. And that is about when the fence was
16 built?
17 A. Yes.
18 Q. So these photographs would have been
19 taken shortly after the fence was built?
20 A. Shortly after, uh-huh.
21 Q. Now, we were talking -- what brought
22 these pictures up is we were talking about trying
23 to put a date on when you saw someone disturbing
24 the roadway and planting grain on the roadway. Do
25 you recall that?

1 A. I recall that.

2 Q. Do these photos help refresh your

3 recollection of when that occurred?

4 A. Well, it was before this.

5 Q. Okay. How long before this?

6 A. I don't remember when it was. If you

7 want me to guess I can guess.

8 Q. Well, I don't want you to guess, but

9 if you have a reason to estimate when it was, then

10 you can tell me that.

11 A. I think it was when Brad and Leiza

12 lived in the home.

13 Q. And why do you think that?

14 A. Because that just kind of seems like

15 when it was. But I don't know.

16 Q. Does the fact that it was one of Walt

17 Povey's boys doing what you saw happening, is that

18 what causes you to think that Brad and Leiza were

19 still living in the home?

20 A. It wouldn't have to be, because it

21 could have been after they moved, but it was

22 before they sold to the Viehwegs.

23 Q. How do you know that?

24 A. Well, it was before Gary died. That's

25 the thing, I can't find a spot to tie it to a

1 closer date.
2 Q. I'm just wondering whether the fact
3 that it was Walt's boy doing whatever work was
4 being done, if that's what led you to believe it
5 was while the Poveys still lived in the home?
6 A. I don't know.
7 Q. Okay. Let me ask you this. We talked
8 earlier and you said that at the time that the
9 Deans bought the property the roadway was clearly
10 visible. As I look at exhibits 1 through 4, the
11 roadway appears to be clearly visible to me even
12 at this date, 5/28/08. Would you agree with that?
13 A. I agree with that.
14 Q. And while there is some growth across
15 the roadway, that's typical of a farm road, isn't
16 it?
17 A. This road was much better when the
18 milk truck was using it.
19 Q. Okay. It was used more?
20 A. Well, it had a better base.
21 Q. Okay. But the growth you see in
22 exhibits 1 through 4, wouldn't you agree with me
23 that that's just typical of what happens on a farm
24 road?
25 A. It looks just like my driveway.

1 The gravel is real strong down towards the
2 Westside Highway, but then you can see the gravel
3 thinning out as you get further up the road. Do
4 you see that?
5 A. I think it's because it's been farmed
6 that it's thinning out there.
7 Q. Well, and I'm just asking -- didn't
8 you tell me earlier that the gravel was best down
9 by the Westside Highway and then after the grain
10 bin --
11 A. And by the barn where the milk is
12 picked up. It would be the same all the way down.
13 Q. But beyond that point, up past the
14 grain bin --
15 A. But up in this part it would be less.
16 Q. Right. More like a typical two-lane
17 farm road, correct?
18 A. Yeah.
19 Q. Okay. And you have seen, haven't you,
20 where farmers drill ground and they don't shut the
21 grain drill off as they go across the road and
22 actually plant crops in the road?
23 A. I have seen that done.
24 Q. Is there anything that you saw or
25 witnessed or heard that would cause you to believe

1 that if Brad Povey planted grain on this roadway,
2 it was anything other than a typical farmer
3 accidentally, or maybe not caring, and planting
4 grain on the roadway?
5 A. Ask me that question again.
6 Q. I'm just asking, isn't it possible
7 that this was just typical farming going on and
8 not an intentional effort on Brad Povey's part to
9 try to obscure the roadway?
10 A. There's a possibility.
11 Q. And do you have any evidence that
12 would suggest other than that?
13 A. Not -- no.
14 Q. Now, it's true, too, isn't it, that
15 after you -- after a farmer has drilled a country
16 road that way, if you continue to use the road it
17 isn't long before the roadway is completely
18 reestablished?
19 A. No, that is not true.
20 Q. Haven't you seen where driving across
21 the roadway after it's been planted causes the new
22 plants to be killed and the roadway is
23 reestablished?
24 A. But you lose the gravel. You lose
25 your road base.

1 Q. All right. But the roadway itself,
2 being able to see the roadway, is reestablished by
3 driving across it again?
4 A. You would see the trail, yeah.
5 Q. Okay.
6 A. But it doesn't look as much like a
7 road.
8 Q. Let me ask you, after you saw one of
9 Walt Povey's boys doing this, disturbing the
10 ground and then planting grain on the roadway, did
11 you ever drive across that portion of the roadway
12 again?
13 A. Yes.
14 Q. How often?
15 A. Me?
16 Q. Yeah.
17 A. I went through the grain patch once
18 and felt very guilty. I probably went twice. I
19 don't go up there very often.
20 Q. All right. And why did you feel
21 guilty?
22 A. Well, it was a beautiful stand of
23 grain.
24 Q. When you drove through that grain
25 patch, the once or twice that you did, did anyone

1 protest about you driving through the grain patch?
2 A. No.
3 MR. MCFARLAND: This is grain on the road?
4 Q. (BY MR. ATKIN) I assume so. You were
5 driving on what had been the driveway through
6 grain?
7 A. I don't like to get stuck. And I just
8 got a new knee so I haven't liked to walk for
9 quite a while.
10 Q. But you were driving through the part
11 where the road had gone?
12 A. Yes.
13 Q. Okay. And nobody complained about you
14 doing that?
15 A. No, no one.
16 Q. So there was a portion of the road
17 where this disturbance occurred and some grain had
18 been planted. And then was there another portion
19 of the road past that that continued on up to the
20 canal and across the canal?
21 A. Yes.
22 Q. So the portion that you were driving
23 was between where the tillage or the disturbance
24 started and the disturbance ended, is that fair to
25 say?

1 A. Yeah. In between -- in this area.
2 Q. Okay. And the roadway got
3 reestablished shortly after this planting
4 occurred, didn't it?
5 A. I don't know. I went up twice and
6 didn't go up again for a while.
7 Q. Okay. Do you know whether Danny or
8 anybody else went through the roadway during that
9 time period?
10 A. I imagine Danny did. I don't know,
11 but my guess would be he did.
12 Q. But at least by 2008 these pictures,
13 exhibits 1 through 4, and I think we've determined
14 that they occurred after this disturbance that
15 you're talking about, at least by that point in
16 time the roadway has been reestablished, right?
17 A. Uh-huh, it has. It's been disturbed
18 at least twice quite severely.
19 Q. Okay.
20 A. That I recall.
21 Q. Let me back up. You told me about the
22 disturbance that occurred by Walt Povey's boy.
23 Are you saying that there was another time also
24 when the roadway was disturbed?
25 A. Uh-huh.

1 A. To my knowledge, I don't know that.
2 Q. Let me see if I can be more specific.
3 Ted Rice, have you spoken to him at all since this
4 litigation was filed?
5 A. No.
6 Q. Do you recall when the last time you
7 talked to Ted Rice was?
8 A. The last time I talked to Ted was at a
9 funeral, but I don't know when it was.
10 Q. Okay.
11 A. Ted is very hard of hearing and he's
12 an elderly gentleman, like in his nineties.
13 Q. Okay. Are you aware that Ted Rice has
14 offered to provide additional ground on his
15 property to change the Ted Rice access to make it
16 easier to use?
17 A. I am not aware of that.
18 Q. It's my understanding that Brad Povey
19 may have approached Danny about abandoning his
20 rights to the northern road, the northern access
21 route. Do you know anything about that?
22 A. Only hearsay.
23 Q. What have you heard?
24 A. That Brad wanted Danny to give up his
25 right-of-way. Danny told him he would think about

1 it. In fact, I think what he said is that that
2 definitely deserves some consideration.
3 Q. Did you hear him say that?
4 A. No. He said he said that and that's
5 what his father has taught all of the kids to say,
6 so I imagine he did.
7 Q. Do you know when that occurred?
8 A. No, I don't.
9 Q. Other than that, have you heard
10 anything else about this?
11 A. Danny told him no.
12 Q. Do you know if Brad Povey ever gave --
13 I'm going to ask Danny these same questions.
14 A. It would be best to ask Danny because
15 he's the one -- mine is hearsay.
16 Q. Did Danny ever show you a draft
17 contract or a commitment from Brad Povey regarding
18 the access road?
19 A. No, he didn't.
20 Q. I believe you testified earlier that
21 Danny and Lynn may have both helped construct the
22 Neigum driveway; is that correct?
23 A. I think they both did.
24 Q. Do you know how that came about, how
25 is it that they built that?

1 A. Yes. Lynn is always helping every
2 one. He quite often pulls Danny in to helping him
3 help. Jeff was new, just moved there, and needed
4 some help.
5 Q. Did they just do it out of the
6 kindness of their heart?
7 A. I think Jeff paid.
8 Q. Okay.
9 A. I'm not sure, but I would imagine he
10 did. Jeff could tell you or Dave could.
11 Q. After the Neigum driveway was
12 constructed, did either you or Danny ever use the
13 Neigum driveway to access your property?
14 A. I know I have once. I may have done
15 it twice.
16 Q. Okay.
17 A. I don't know what Danny has done.
18 Q. Did you believe that you had a right
19 to use the Neigum driveway to access your
20 property?
21 A. No, I don't feel like I have a right
22 to do so. I do now because the court has ordered
23 it, but up until then I did not feel like I did.
24 Q. Okay. Did you and Danny ever discuss
25 whether you had the right to use the Neigum

1 driveway?

2 A. No.

3 Q. Do you know how he felt about it?

4 A. No.

5 Q. Today there's been some discussion

6 about what we've called this middle access road.

7 We know it became the Neigum driveway. You

8 mentioned earlier that historically before the

9 driveway existed that it may have followed a

10 slightly different route?

11 A. I would call it a circle driveway into

12 the garage.

13 Q. Okay.

14 A. It wasn't a garage, it was a shed that

15 had been turned into a garage.

16 Q. Okay. I'll call it the circle

17 driveway, a historical circle driveway. In this

18 case are you making a claim for an easement along

19 the circular historical driveway?

20 A. No.

21 Q. Okay. I know I'm kind of jumping

22 around on different topics. This informal oral

23 business relationship that you have with Danny,

24 are you aware of any documents formalizing any

25 part of this business relationship you have with

1 Danny?
2 A. No. If I needed a formal contract
3 with one of my children, I've done a poor job of
4 rearing them.
5 Q. Okay. There are no corporations or
6 LLC's, company names?
7 A. Huh-uh.
8 Q. Okay.
9 A. Oh, there is a company name.
10 Q. What's the name?
11 A. There's several company names. I'm
12 not sure if I can tell you what all of them are.
13 There's Caribou Mountain Farms.
14 Q. Okay. Nola, before you start, are
15 these -- do these have some relationship with the
16 property that we're talking about today?
17 A. Yes.
18 Q. Okay. Then go ahead.
19 A. There's another name, but I'm not sure
20 what it is. We are organic farmers. Caribou is
21 the organic name. And they all sell things under
22 their -- under Caribou.
23 Q. You'll have to remind me because I
24 didn't get it written down. It's Caribou what?
25 A. Mountain Farms. Now, I may not be

1 **Q. Okay. Nola, Mr. Atkin asked you about**
2 **the deed whereby Daniel acquired his interest from**
3 **the McCullochs. He asked you whether the deed**
4 **contained any reference to the right-of-way. Do**
5 **you remember that?**
6 **A. Yes.**
7 **Q. Are you familiar with that deed?**
8 **Would it be helpful to look at it if I were to ask**
9 **you a question about it?**
10 **A. Yes, it would be very helpful.**
11 MR. BROWN: Would you mind, Blake, if I
12 used your exhibits there?
13 MR. ATKIN: Sure.
14 THE WITNESS: I imagine I read that when it
15 was new.
16 **Q. (BY MR. BROWN) Nola, you see there the**
17 **deed and it's obviously a legal description to the**
18 **property that Daniel acquired. I'd like you to**
19 **read this last sentence down here beginning with**
20 **the capitalized words to have and hold. Just read**
21 **the first line there as well as you can. I know**
22 **the print isn't terribly clear.**
23 **A. To have and to hold the said premises**
24 **with, and I don't know what that is.**
25 MR. BROWN: Would counsel object to my

1 coaching her to the correct word that I'm trying
2 to have her read?
3 MR. ATKIN: What word is it that she can't
4 read?
5 MR. BROWN: Their appurtenances.
6 MR. SMITH: Do you understand what that
7 means?
8 THE WITNESS: No, I don't.
9 MR. SMITH: You're going to have her read
10 it even though she doesn't understand it?
11 MR. BROWN: I'll have her read it and if
12 the questioning doesn't result in anything
13 helpful I'll move on.
14 MR. ATKIN: I don't know what good it is to
15 read a document she doesn't understand, but go
16 ahead.
17 THE WITNESS: Appurtenances to the said
18 grantee.
19 **Q. (BY MR. BROWN) You can stop right**
20 **there. I can see that this line of questioning**
21 **probably won't be helpful to us. I'll move on.**
22 **A. That is very difficult to decipher.**
23 **Q. I understand.**
24 MR. SMITH: For the attorneys too.
25 **Q. (BY MR. BROWN) Okay. I want to review**

1 this one issue with respect to the knowledge that
2 the Poveys had about the property they sold to
3 you. There's been -- you earlier testified that
4 the Poveys knew that there was a right-of-way
5 passing through the properties that they
6 ultimately conveyed to the Deans, Neigums and
7 Viehwegs that allowed access to the property west
8 of the Twin Lakes Canal?
9 A. That's right.
10 Q. Okay. And how is it that Brad and
11 Leiza Povey knew there was a right-of-way through
12 that property?
13 A. Maybe I shouldn't say they knew. It
14 had been used for quite a number of years. They
15 bought the property off of their uncle that sold
16 it to us. I think it's her uncle. The McCullochs
17 anyway.
18 Q. Let me ask you this, Nola. There was
19 a period of time when you owned property formerly
20 owned by the Poveys west of the Twin Lakes Canal
21 contemporaneous, or at the same time, when the
22 Poveys still owned property that they subsequently
23 sold to the Deans, Neigums and Viehwegs, right?
24 A. Yes.
25 Q. And during that period of time did you

1 access your property west of the Twin Lakes Canal
2 through the northern roadway?
3 A. Yes.
4 Q. And did the Poveys know that you used
5 that northern roadway?
6 A. They should have.
7 Q. How should they have known?
8 A. Well, driving past their house.
9 Q. It was clearly openly visible to them?
10 A. (Witness nodded her head.)
11 Q. Okay. I want to bring you back to a
12 moment when Mr. Smith, the attorney for the Deans,
13 Neigums and Viehwegs, asked you a question about
14 which parties were responsible for disturbing the
15 ground on the northern roadway. He asked you
16 whether the Deans, Neigums or Viehwegs had
17 anything to do with tilling over the road or
18 planting grain. You answered that they did not
19 have anything to do with that; is that right?
20 A. Yes.
21 Q. Did that answer apply to the party or
22 parties responsible for erecting the fence at the
23 convergence, as we've described it today, of the
24 northern roadway and the middle roadway?
25 A. No.

Exhibit C

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.) Case No. CV-08-342
HAL J. DEAN and MARLENE T.)
DEAN, husband and wife;)
(Caption continued.)

DEPOSITION OF DANIEL S. GARNER

JUNE 3, 2009

REPORTED BY:
RODNEY FELSHAW, C.S.R. No. SRT-99
Notary Public

1 Q. Okay. And at some point you were
2 given a deed by the McCullochs for the property?
3 A. Correct.
4 Q. But in that deed it didn't include
5 this language that we've just read describing the
6 right-of-way?
7 A. The lawyer that did the sale said it
8 wasn't -- that that was perfectly legal and
9 insisted on leaving it in there at closing.
10 Q. Okay.
11 A. So, yes.
12 Q. I'm not arguing. The deed that you
13 received did not have that language in it?
14 A. No.
15 Q. Okay. Do I understand correctly --
16 your mother told us yesterday that when you were
17 buying this property that you had talked with the
18 seller, the McCullochs, and tried to get them to
19 agree to moving the right-of-way to a different
20 location than what we've been --
21 A. Than what is referred to there?
22 Q. Yeah.
23 A. I have no knowledge of that.
24 Q. Did you ever have any discussions with
25 the McCullochs about where the right-of-way would

1 cross?
2 A. No, sir. I was in college at the time
3 and most of it was done on weekends.
4 Q. Okay. Did your father or mother
5 assist you in negotiating the purchase of the
6 property?
7 A. Yes.
8 Q. So what your mother told us you may
9 not have been involved in because they were
10 helping you with it?
11 A. Yes.
12 Q. So the best information we have about
13 those negotiations would be what your mother told
14 us yesterday?
15 A. Correct.
16 Q. All right. Now, did you ever have any
17 discussions with the sellers about this language
18 in exhibit A that we just had you read?
19 A. Yes.
20 Q. What discussions did you have?
21 A. My dad pushed -- my dad approached me
22 that the McCullochs felt like they should get paid
23 extra money because we wanted to extract gravel
24 down the right-of-way. Ralph was there at the
25 time, Ralph McCulloch, at the time that we agreed

1 to pay him that extra money.
2 Q. Okay. And so you did pay him extra
3 money?
4 A. Correct.
5 Q. How much, do you recall?
6 A. 6,000.
7 Q. Any other discussions with the sellers
8 about the meaning of the language in exhibit A?
9 A. Yes.
10 Q. What discussions did you have?
11 A. At the same time we discussed the pipe
12 being across the road and what was meant by that.
13 And what he would do to facilitate access to the
14 property and to help. And if the pipes weren't
15 running he said that we could separate the main
16 line and go up.
17 Q. Now, let me see if I can get a feel
18 for where this pipeline crosses the road. I need
19 to back up a little bit. There are three roads --
20 I just want to identify the roads so we know what
21 road we're talking about. There are three roads
22 that at one point or another could be used to
23 access your property. And when I say your
24 property, unless I say differently, I mean any of
25 the properties, the Povey property, the Cox

1 brother was asked to use with the gravel trucks,
2 or the Neigum driveway? Let's take the first one
3 first. The roadway that was created sometime
4 after the Poveys were living in the house, which
5 they asked your brother to use for the gravel
6 trucks, were you ever asked to use that roadway
7 rather than the northern roadway?
8 A. Not to my knowledge.
9 Q. Okay. Did you ever use that roadway?
10 A. No.
11 Q. Were you ever asked to use the Neigum
12 driveway by the Poveys?
13 A. That was constructed after -- I don't
14 remember. Can you clarify? I mean, what are you
15 getting at?
16 Q. Did the Poveys ever ask you to use
17 that roadway rather than the northern roadway?
18 A. Did they ever ask me to change my
19 right-of-way?
20 Q. No. That's a different question. Did
21 they ever ask you to use the Neigum driveway
22 rather than the northern roadway?
23 A. I don't know.
24 Q. Were you ever told of any concern that
25 the Poveys had about their young children in

1 vicinity to the northern roadway? Was that ever
2 brought up as an issue to you?
3 A. Not to me.
4 Q. Were you ever aware of that concern?
5 A. I might have been aware, but I was
6 never asked directly, no.
7 Q. Okay. You say you might have been
8 aware. Were you aware? And if you don't recall,
9 you don't, I'm just asking.
10 A. Any logical person would assume that
11 that's why they asked the gravel trucks to go the
12 other way.
13 Q. Okay. But you don't recall ever
14 having any discussions with the Poveys about that?
15 A. Discussions, no, I don't remember ever
16 personally being told.
17 Q. Okay. How about the Deans, did you
18 ever have any discussions with the Deans about
19 concern over the safety of their children and a
20 request that you -- did the Deans ever talk to you
21 about a concern over the safety of their children?
22 A. Yes.
23 Q. When did that occur?
24 A. Oh, I'm not sure. It was winter.
25 Q. Okay. Obviously sometime after the

1 A. From the beginning. But it became
2 more belligerent later.
3 Q. At the point where it appeared to you
4 that it wasn't just parking cars, that it was an
5 attempt to block your access, at what point did
6 that occur?
7 A. Shortly after the bow incident when I
8 continued to keep using it.
9 Q. I was trying to get at it from a
10 different direction. That doesn't help you try to
11 pinpoint the time?
12 A. No.
13 Q. All right. Did the Poveys ever park
14 cars on the roadway, the northern roadway?
15 A. Yes.
16 Q. In an obstructive manner?
17 A. No.
18 Q. So did the McCullochs ever park cars
19 on the roadway?
20 A. No.
21 Q. Did you ever talk to the Poveys about
22 them parking cars on the roadway?
23 A. No.
24 Q. It didn't bother you as long as you
25 could get around them?

1 A. Right.
2 Q. Okay. Now, there is an allegation in
3 the complaint in this matter that the Poveys at
4 some point plowed the roadway. You're familiar
5 with that allegation?
6 A. Yes.
7 Q. What do you know about that? Did you
8 see the Poveys plowing the roadway?
9 A. Which time?
10 Q. Well, was there more than one time
11 that the roadway was plowed?
12 A. Plowed, tilled.
13 Q. Well, maybe you can help me out. The
14 allegation in the complaint is that the roadway
15 was plowed. Was the roadway ever plowed?
16 A. Yes, sir.
17 Q. Do you know what a plow is?
18 A. Yes, sir.
19 Q. Okay. What kind of plow was used to
20 plow the road?
21 A. A three bottom.
22 Q. And did you see the roadway being
23 plowed?
24 A. No.
25 Q. How do you know it was plowed by a

1 three bottom plow?
2 A. I know what a plowed field looks like,
3 sir.
4 Q. So you saw the roadway after it had
5 been plowed?
6 A. I got stuck in it, sir.
7 Q. You got stuck in it with what?
8 A. A green GMC pickup.
9 Q. Okay. When did the plowing occur?
10 A. Early nineties, late eighties.
11 Q. Okay. While the Poveys still owned
12 the property?
13 A. Correct.
14 Q. And again, you didn't see the plowing
15 occurring, but you got stuck in it as you tried to
16 drive through it?
17 A. Correct. It was done and I went up to
18 access my property and got stuck.
19 Q. Okay. Do you know who did the
20 plowing?
21 A. No.
22 Q. Did you ever talk to anyone about the
23 plowing on the road?
24 A. Yes.
25 Q. Who did you talk to?

1 A. My father.
2 Q. What did you say to your father?
3 A. He came and pulled me out. He told
4 me -- I wanted to go -- I was quite upset. He
5 calmed me down and told me not to worry about it.
6 Once the field was planted it would be accessible
7 again. That was the end of it.
8 Q. Okay. So did you talk to anyone else
9 about it?
10 A. No.
11 Q. So your father considered it not a big
12 deal, wasn't that big of a deal, you shouldn't get
13 upset about it?
14 A. I don't know what he considered, sir.
15 Q. Okay. Fair enough. He told you don't
16 worry about it, the field will be planted and once
17 it's planted you'll be able to access the property
18 again?
19 A. That's what he told me.
20 Q. Okay. I guess the field was
21 eventually planted?
22 A. Yes.
23 Q. And after that you were able to access
24 your property again?
25 A. Yes.

1 Q. Did you talk to anyone else about that
2 plowing incident?
3 A. No.
4 Q. And the roadway was reestablished
5 after the planting occurred?
6 A. Correct.
7 Q. Now, this plowing didn't occur along
8 the full length of the roadway?
9 A. No.
10 Q. About how much of the roadway was
11 plowed?
12 A. Hmm, from the hay barn up.
13 Q. All the way up to the canal?
14 A. Yes.
15 Q. And as I understand it, at that time
16 the ground on both sides of the roadway was being
17 farmed?
18 A. Correct.
19 Q. And when the field was planted do you
20 know what it was planted with?
21 A. I don't. I went back to college, or
22 wherever I went.
23 Q. So this was while you were still in
24 college?
25 A. Early nineties, late eighties, yes,

1 sir.

2 Q. At that time was your father kind of

3 running the farm while you were at college?

4 A. No, sir.

5 Q. Who was running your farm on the west

6 side of Twin Lakes Canal?

7 A. I would come home on the weekends.

8 Q. All right. Did your father have any

9 involvement in running the farm?

10 A. No.

11 Q. Was this before he and his wife had

12 purchased the property on the west side of Twin

13 Lakes Canal?

14 A. I don't know.

15 Q. At the time this occurred was that

16 your only access road to your property?

17 A. Yes, sir.

18 Q. How long was your property

19 inaccessible as a result of the plowing?

20 A. I don't remember.

21 Q. The next you knew you came back from

22 school and it was accessible?

23 A. I don't know.

24 Q. I take it that day you didn't -- that

25 day you didn't make it up to your property?

1 A. No, I don't remember that.
2 Q. That doesn't jog your memory of any
3 discussion with her about those concerns?
4 A. No.
5 Q. Now, as I understand it, there came a
6 point in time, and we've got a document we can
7 look at if we need to, but in connection with his
8 sale of a parcel of property Brad Povey and Leiza
9 Povey put into one of the deeds a legal
10 description of a right-of-way across the property
11 leading to the bridge we've talked about across
12 the Twin Lakes Canal. That was a right-of-way for
13 your use to access your property on the west side
14 of the Twin Lakes Canal. Are you familiar with
15 that deed?
16 A. There's two deeds that reference it.
17 Which one is it? There's one on the Dean deed and
18 it shows it on the old one.
19 Q. That's true. In the Dean deed it
20 references a right-of-way at the south 20 feet of
21 the Dean deed, I believe?
22 A. Right.
23 Q. And then there's a deed -- in the deed
24 to the Neigums there's an actual description of a
25 right-of-way coming along about the south boundary

1 of the Viehweg property, describing the Neigum
2 driveway or that middle access road. Are you
3 familiar with that?
4 A. Yes.
5 Q. And that one specifically references
6 your use of that right-of-way to access your
7 property on the west side of Twin Lakes Canal?
8 A. Yes.
9 Q. Now, before those two deeds were
10 recorded, the Dean deed and the Neigum deed that
11 described those rights of way, there weren't any
12 deeds recorded that described your access rights
13 across what had been the McCulloch property, is
14 there?
15 A. I believe that's correct.
16 Q. Do you know of anything filed by Brad
17 Povey or Leiza Povey that tries to deny your right
18 of access across the property that had been owned
19 by the McCullochs?
20 A. No, not to my knowledge.
21 Q. Are you aware of anything that Brad
22 Povey or Leiza Povey has ever done that tries to
23 deny or negate the idea that you have a
24 right-of-way across the McCulloch property?
25 A. Just the disturbance on the old

1 right-of-way that we've talked about.
2 Q. Okay. Anything other than that?
3 A. No.
4 Q. And I know I asked you about the
5 plowing. Let me make sure I ask about the later
6 disturbance. Other than that disturbance, is
7 there anything that leads you to believe that that
8 was anything more than planting of the two fields?
9 In other words, is there anything that makes you
10 think that he was trying to -- whoever disturbed
11 that was trying to obliterate the right-of-way and
12 it wasn't just farming?
13 A. Just that it's awful hard to plant
14 around granaries and the structures there with the
15 little bit of oats that you get. It seems that
16 you would have left it.
17 Q. Okay. I'm not sure I understand that.
18 If you'll look at exhibit M again, maybe you can
19 describe it for me. This disturbance occurred
20 between tract 1 of the Viehweg property and tract
21 2 of the Viehweg property, across that area?
22 A. Correct.
23 Q. And where is the granary?
24 A. There's a couple of granaries here.
25 Q. Okay.

1 A. And it seems awful funny to mess with
2 that corner and to plant it.
3 MR. MCFARLAND: Counsel, for the record,
4 Mr. Garner was pointing to the south part of that
5 stretch of that right-of-way between tract 1 and
6 tract 2?
7 MR. ATKIN: Actually, he was pointing on
8 exhibit M to the westerly portion of the
9 right-of-way.
10 MR. SMITH: Let's go off the record.
11 (Discussion off the record.)
12 Q. (BY MR. ATKIN) Let me show you what was
13 marked exhibit 1 -- or let me show you exhibit 2.
14 That may be what we want. Are you familiar with
15 that photograph?
16 A. Yes, sir.
17 Q. And who took the photograph?
18 A. My wife.
19 Q. Okay. And was that photograph taken
20 on or about May 28th, 2008?
21 A. Yes, sir.
22 Q. Because exhibit 3 shows that date, May
23 28th, 2008?
24 A. Yes, sir.
25 Q. All right. What is that photograph --

1 you're familiar with the area where that
2 photograph was taken?
3 A. Yes, sir.
4 Q. And does that photograph accurately
5 depict the area that is photographed?
6 A. Yes, sir.
7 Q. And what does it show?
8 A. It shows the northerly right-of-way
9 that bisects the Viehweg property. I believe he's
10 standing on the Dean property about halfway up.
11 Is that what you want?
12 Q. When you say it bisects the Viehweg
13 property, are we looking at the westerly portion
14 of segment A as shown in exhibit M?
15 A. Correct.
16 Q. Okay. And where on exhibit M would
17 the person taking the photograph be standing?
18 A. In here somewhere.
19 Q. Okay. Somewhere near the convergence
20 of Povey tract 2 and Povey tract 1?
21 A. Probably.
22 Q. All right. On deposition exhibit
23 number 2 can you see the portion of ground that
24 your telling me was disturbed and planted?
25 A. Yes.

1 Q. Show us where that is. In fact, if
2 you'll take my pen and draw a line to show where
3 you think it is.
4 A. I'm allowed to do that?
5 Q. Yes.
6 A. From this post up to here and across
7 the road like that. You can see the change in
8 color.
9 Q. How wide of an area was disturbed?
10 A. I don't know. Whatever it is from --
11 I don't know. I haven't measured it.
12 Q. Okay. And was it also disturbed in
13 the area past the grain bin?
14 A. Below?
15 Q. To the west of the grain bin.
16 A. To the west?
17 Q. Yes.
18 A. Oh, yes.
19 Q. If I understand it correctly, this is
20 a picture looking west?
21 A. No. Oh, yes, this is looking west.
22 Q. Okay. And where you've marked is on
23 the east side of the grain bin, correct?
24 A. No. That's where it goes north to
25 south across the road, across the right-of-way.

1 across the road in the area between tract 1 and
2 tract 2 of the Viehweg property?
3 A. Correct.
4 Q. Missing the grain bin, basically?
5 A. Correct.
6 Q. Okay. I kind of take it that you
7 wouldn't have farmed it that way?
8 A. No.
9 Q. Other than that, is there anything
10 that leads you to believe that that planting --
11 that disturbance and planting was done to
12 obliterate the roadway?
13 A. Just that that was done in close
14 proximity to the selling to Viehweg.
15 Q. Okay. Anything else?
16 A. No.
17 Q. You haven't heard anybody -- nobody
18 has ever told you that that's why it was done?
19 A. No.
20 Q. You never asked anybody why the
21 planting was done there?
22 A. No.
23 Q. You say it was in close proximity to
24 the sale of the property to the Viehwegs?
25 A. I'm not sure, but I believe so.

1 Q. Okay. Do you know when the property
2 was sold to the Viehwegs?
3 A. 2005.
4 Q. How do you know that?
5 A. That's when the deed was recorded.
6 Q. When did you first learn that the
7 property had been sold to the Viehwegs?
8 A. 2008.
9 Q. Okay. So at the time that the
10 property was being sold, you were not aware of it?
11 A. Correct.
12 Q. The Viehwegs don't live there?
13 A. No.
14 Q. And somebody farms the property for
15 the Viehwegs?
16 A. I assume.
17 Q. You don't know who that is?
18 A. I don't.
19 Q. Somebody must because it gets at least
20 pastured?
21 A. Correct.
22 Q. Maybe some hay cut off of it. So you
23 wouldn't have any reference point for knowing when
24 the property was sold to the Viehwegs, other than
25 the deed?

1 the Neigum driveway rather than the north
2 driveway?
3 A. No.
4 Q. Did you ever talk with Brad Povey
5 about putting a description of your right-of-way
6 across that property in writing, across what was
7 the McCulloch property? Did you and Brad ever
8 have a discussion about reducing to writing
9 exactly what that right-of-way was and where it
10 was located?
11 A. No.
12 Q. Do you ever recall any discussions
13 with Brad about him wanting to put in writing a
14 description of the right-of-way?
15 A. Yes.
16 Q. Okay. Tell me about that.
17 A. He said that he would like to move it;
18 and if he did he would put it in writing.
19 Q. All right. And when did that occur?
20 While Brad was still living in the home that's now
21 the Dean home?
22 A. Yes, I think it was before the Deans
23 bought it.
24 Q. All right. Did you have one such
25 discussion or more than one discussion?

1 A. More than one.

2 Q. Okay. And were they in person?

3 A. Yes.

4 Q. Do you know where you were at at the

5 time of these discussions?

6 A. Yes.

7 Q. Where were you?

8 A. The first one he caught me there at

9 the property.

10 Q. On the northern roadway?

11 A. Just on the property somewhere.

12 Q. Okay. How many such discussions were

13 there?

14 A. Four.

15 Q. Are you able to separate them in your

16 mind?

17 A. Yes.

18 Q. Tell me about the first of those four

19 discussions. And that was somewhere on the

20 property, you're not sure when, but Brad was still

21 living in the house; is that correct?

22 A. I don't know if Brad was living in the

23 house or if he was in Pocatello.

24 Q. Okay. But it was before the Deans had

25 bought the house?

1 A. Yes.

2 Q. Okay. Tell me what Brad said during
3 that conversation.

4 A. He said that he would like to move the
5 roadway over to a different position.

6 Q. Did he tell you where?

7 A. Roughly at that time.

8 Q. And where was it? Was that roughly
9 where the Neigum driveway is?

10 A. Yes, where the driveway would go.

11 Q. What else did he say? I think you
12 said that he at one point told you if he did that
13 he would put it in writing?

14 A. Yes.

15 Q. Okay. Did he tell you that at that
16 first meeting, that he would put it in writing if
17 he did that?

18 A. Yes, I think he did.

19 Q. Okay. And how did you respond? What
20 did you say during that first meeting?

21 A. I told him a phrase that my dad always
22 taught me to say when you're caught off guard. I
23 told him that that definitely deserves some
24 consideration. He had a puzzled look on his face,
25 so I told him that I didn't see a problem with it,

1 but that I wanted to think about it.
2 Q. When was the next discussion?
3 A. Oh, sometime later he showed up at my
4 house with a piece of paper that Steve Fuller had
5 drawn up to sign that would move the right-of-way.
6 I don't have the legal document, but I believe it
7 was -- it didn't have the description of the
8 right-of-way, but I believe it just was an
9 agreement to move it. And I told him that I had
10 not had time to think about it.
11 Q. How much after the first meeting was
12 this?
13 A. I don't know. And then --
14 Q. Let me back up. Anybody else present
15 besides you and Brad?
16 A. Not that I know of.
17 Q. Okay. And he had a document with him?
18 A. Yes.
19 Q. Did you keep a copy of the document?
20 A. Yes. He left it there for me to think
21 about and sign.
22 Q. Do you still have a copy of it?
23 A. I don't.
24 Q. Do you know where it went?
25 A. Yes.

1 your attention again to the second amended
2 complaint, paragraph 15. I'll warn you this time
3 that I do intend to interrupt you at least once.
4 If you would read for the record paragraph 15.
5 A. Each personal representative's deed,
6 each grant deed, furthering exchange, each gift
7 deed, and the grant deed to the Nola Trust
8 conveyed the property described in paragraphs 11,
9 12, and 13.
10 Q. I'll stop you there. It's talking
11 about the property described in paragraphs 11, 12
12 and 13. If you'll flip back to paragraph 13, and
13 you don't need to read it out loud, but the first
14 paragraph I asked you to read, I believe that is
15 referencing the Rice road; is that right?
16 A. Yes.
17 Q. Okay. Paragraph 13 is talking about
18 the Rice road. Back to 15 now. We left off at
19 conveyed the property described in paragraphs 11,
20 12, and 13. If you will take it from there.
21 A. Less the 30-foot strip exchanged away.
22 Q. I'll interrupt you again. That's the
23 gravel area that was given to the Rices?
24 A. Correct.
25 Q. Okay.

1 A. Together with all, and whatever that
2 word is.
3 Q. Appurtenances.
4 A. Pertaining thereto, so the rights of
5 Gary and Nola to use the original access road as
6 adapted by acquisition of the Cox property,
7 paragraph 12 hereof, are owned by Daniel, with an
8 undivided interest of 44.796 percent.
9 Q. Okay. Stop there. As I read that
10 paragraph, that is stating that you have a 44.796
11 percent -- excuse me. A 44.796 percent interest
12 in the property in paragraphs 11, 12 and 13, which
13 includes the Rice road.
14 A. That's how I read it too.
15 Q. So to make it clear, having now read
16 paragraphs 15 and 13 of the second amended
17 complaint, do you understand -- is it your
18 understanding that you have a 44.796 percent
19 interest in the Rice road?
20 A. I hate to get caught up in the
21 percentage, but didn't you say less than five?
22 MR. BROWN: I'll confer with him for a
23 moment.
24 MR. MCFARLAND: Let's see if he can answer
25 the question, then you can confer.

1 THE WITNESS: Having read that, I see the
2 44.796 percent. I don't understand what that --
3 I hope that's correct.
4 MR. BROWN: Before he answers another
5 question, can I just briefly consult with him?
6 MR. MCFARLAND: Sure. We'll go off the
7 record.
8 (Recess.)
9 THE WITNESS: I don't understand that
10 estate thing.
11 Q. (BY MR. MCFARLAND) Perhaps I'm making
12 my questions more complicated than they need to
13 be. My question, to simplify it, having read that
14 paragraph do you understand that you now own
15 more -- a greater than five percent interest in
16 the Rice road?
17 A. Yes.
18 Q. Okay. And that you may own over 44 --
19 over a 44 percent interest in the Rice Road?
20 A. Yes.
21 MR. MCFARLAND: I have nothing further.
22 MR. ATKIN: I have some follow up. Is it
23 my turn? Okay.
24 FURTHER EXAMINATION
25 BY MR. ATKIN:

Exhibit D

212784

Recorded at the request of
FIRST AMERICAN TITLE

a.m. APR 05 2001 3:20 p.m.

ELLIOTT LARSEN, RECORDER
By Camille Lower Deputy
FRANKLIN COUNTY, IDAHO

CORRECTED WARRANTY DEED

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.

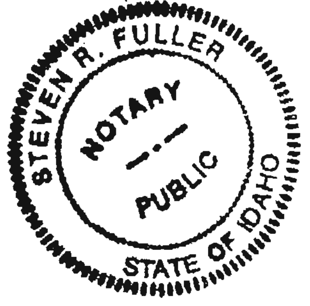
DATED: March 22, 2001

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

EXHIBIT "A"   212784 2-3

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

over

(continued)

212784[3-3]

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.

(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.

Exhibit E

Blake S. Atkin ISB# 6903
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
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Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorneys for Brad and Leiza Povey

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

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority, and First American Title Company, Inc., an Idaho Corporation. Defendants.	AFFIDAVIT OF IVAN JENSEN Case No. CV-08-342 Judge Dunn

STATE OF IDAHO)

:ss

COUNTY OF FRANKLIN)

Ivan Jensen, having been first duly sworn, deposes and says:

1. I am currently employed by Twin Lakes Canal Company and was so employed during the events related in this affidavit.
2. In that capacity I met with Mr. Ted Rice, Mr. Earl Ward, Mr. Ron Kendall, and Mr. Gary Garner. The meeting took place on the canal bank near what is now known as the Rice right of way. The meeting took place just before installation of the Rice right of way in the early part of 1999.
3. At that time we discussed the crossing that has now been installed at that location. Twin Lakes was opposed to the installation of a new crossing because each crossing creates added difficulty for Twin Lakes when it comes to cleaning the canal.
4. Gary Garner told us that if we would install the new crossing on the Rice right of way that he would agree that we could remove what his family had been using as a crossing, the bridge that is now located to the north and west of the Neigum property.
5. We installed the crossing at the Rice right of way.
6. We then proceeded to remove the old bridge as had been agreed to by Gary Garner.
7. After removing the bridge we were confronted by Dan Garner who told us that the bridge served as his right of way and demanded that we replace the bridge. We told him what had been agreed to by his father and he responded that his father could do

what he wanted to, but that his father had given away his own right of way, but that the bridge served also as Dan's right of way and his father could not give away his (Dan's) right of way.

Ivan Jensen

SUBSCRIBED and SWORN to before me this 2 day of ~~March~~ April, 2009.

Notary Public

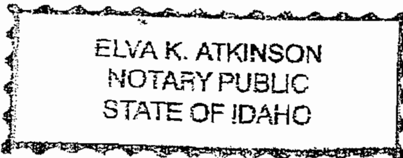
ELVA K. ATKINSON
NOTARY PUBLIC
STATE OF IDAHO

Exhibit F

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Attorneys for Brad and Leiza Povey

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

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation. Defendants.	AFFIDAVIT OF JUDY PHILLIPS Case No. CV-08-342 Judge Dunn

STATE OF IDAHO)

:ss

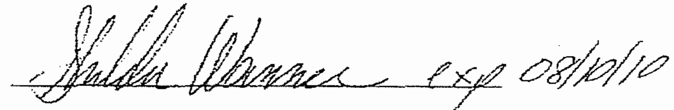
COUNTY OF FRANKLIN)

JUDY PHILLIPS, having been first duly sworn, deposes and says:

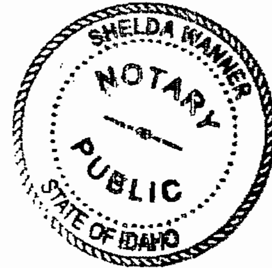
1. I am currently the secretary of Twin Lakes Canal Company.
2. In that capacity I am the custodian of records for Twin Lakes Canal Company.
3. Attached hereto is a true and correct copy of a page from the minutes of the board of directors meeting of the company held on March 25, 1999.
4. These minutes were made at or near the time of the meeting and are kept in the ordinary course of business of Twin Lakes Canal Company.

Judy Phillips

SUBSCRIBED and SWORN to before me this 19 day of March, 2009.



Notary Public



25 March 1994

The Lyle Christensen bridge was discussed. We have agreed to pay one half. Since this was before our new bridge policy, if he comes up with one half the cost, we will participate in the bridge.

A bridge in the Garner property was discussed. He has given permission to take the bridge out so the workers were directed to do so. It was decided to put cattle guards on the system in other areas before putting them through the Garner property.

Earl requested a large meter on the 15" pipe at the head of the headgate #30 system, so he can read the total use by the lateral. The board approved the purchase.

A check for Dell Griffeth was discussed. The new county culvert could have a check frame bolted to it, or we could put one close to his property but it would cost $4000. It was decided to put it on the culvert pipe bridge at 3200 North.

Vehicle costs for company-owned vehicles were reviewed. No final decision was made.

A Motorola representative had met with the workers and made some suggestions. It was agreed to try two new radios from them for Earl's house and vehicle to see if they are better than the radios's we are now using.

Bob reported that he is on the planning committee for the Clifton, Oxford and Treasureton area and they have an April 1st deadline for input. He also has been asked by the county to work with them on a check-off list for building permits that will protect the canal company.

It was agreed to purchase some signs for the dam and around the lakes. We will get 10 each of the two types of signs and try them out.

The Armstrong agreement was discussed. The old agreement has been found and seems to be better than the new proposed one, so no further action on the new one will be taken.

The secretary was directed to send a letter to the stockholders telling them we now estimate the season will allow two acre feet of water per share of stock.

There being no further business the meeting adjourned.

Michael D. Kunz, Secretary

Jeffrey Johnson, President

ABF573

Exhibit G

Blake S. Atkin ISB# 6903
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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation. Defendants.	AFFIDAVIT OF RON KENDALL Case No. CV-08-342 Judge Dunn

STATE OF IDAHO)

:ss

COUNTY OF FRANKLIN)

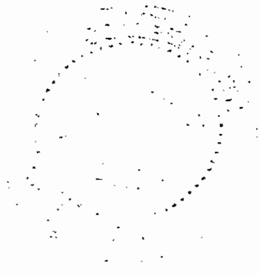
Ron Kendall, having been first duly sworn, deposes and says:

1. While serving as the water master of Twin Lakes Canal Company, I met with Ted Rice, Earl Ward, Ivan Jensen, and Gary Garner. Gary Garner wanted to install a new crossing of the canal in order to access his property that lay west of the canal. He told me that the right of way he was using at that time went past the Povey's home, that the Poveys had little children and that he thought it would be safer if he accessed his property at the new crossing so that the gravel trucks and farm machinery would not be going so close to the Povey's home. Twin Lakes was opposed to the installation of a new crossing because each crossing creates added difficulty for Twin Lakes when it comes to cleaning the canal.
2. Gary Garner told me that if we would allow the installation of the new crossing that he would agree that we could remove what his family had been using as a crossing that is located to the north and west of the Neigum property.
3. We installed the new crossing.
4. Twin Lakes then proceeded to remove the old bridge.
5. Dan Garner protested after the bridge was removed. The bridge was then replaced.

Ron Kendall

Ron Kendall

SUBSCRIBED and SWORN to before me this 5 day of March, 2009.



Colleen Smith

Notary Public exp 06/10/2011

Exhibit H

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

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation. Defendants.	AFFIDAVIT OF TED RICE Case No. CV-08-342 Judge Dunn

STATE OF IDAHO)

:ss

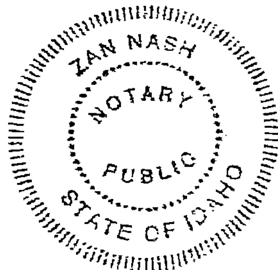
COUNTY OF FRANKLIN)

Ted Rice, having been first duly sworn, deposes and says:

1. I am 92 years old and have lived in my home adjacent to the property and the right of way claimed by the Garners in this case for 82 years.
2. I met with Mr. Earl Ward, Mr. Ron Kendall, and Mr. Gary Garner on the canal bank near what is now known as the Rice right of way as we discussed the installation of that right of way. If the parties talked about Gary Garner's right of way I did not hear any of those discussions.
3. I am familiar with what is now known as the Neigum driveway and I am also familiar with the roadway that goes past the Dean home.
4. The property now owned by the Garners on the west side of Twin Lakes Canal was originally accessed by an existing roadway that ran generally along the course of what is now known as the Neigum driveway.
5. The roadway that goes past the Dean home originally terminated at the outbuildings and did not go all the way through to the bridge that crosses the canal.

Ted Rice
Ted Rice

SUBSCRIBED and SWORN to before me this 16 day of April, 2009.



Notary Public exp Jan 2 2014

Exhibit I

Blake S. Atkin ISB# 6903
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorneys for Brad and Leiza Povey

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

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation. Defendants.	AFFIDAVIT OF LORRAINE RICE Case No. CV-08-342 Judge Dunn

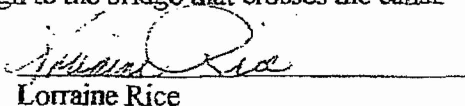
STATE OF IDAHO)

:ss

COUNTY OF FRANKLIN)

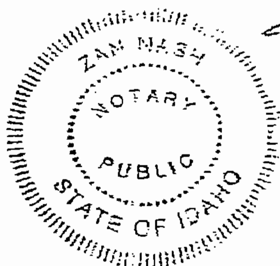
Lorraine Rice, having been first duly sworn, deposes and says:

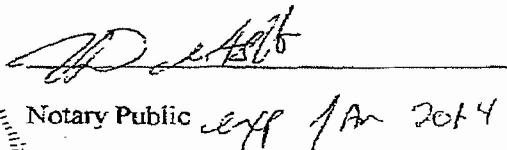
1. I am familiar with what is now known as the Neigum driveway and I am also familiar with the roadway that goes past the Dean home.
2. The property now owned by the Garners on the west side of Twin Lakes Canal was originally accessed by an existing roadway that ran generally along the course of what is now known as the Neigum driveway.
3. The roadway that goes past the Dean home originally terminated at the outbuildings and did not go all the way through to the bridge that crosses the canal.



Lorraine Rice

SUBSCRIBED and SWORN to before me this 16th day of April, 2009.





Notary Public exp 1 Apr 2014

FILED
09 SEP 16 AM 9:17
FRANKLIN COUNTY CLERK
Kjones
DEPUTY

Jeffrey D. Brunson, ISB No. 6996
Michael W. Brown, ISB No. 8017
343 E. 4th N.
P.O. Box 216
Rexburg, ID 83440
Tel: (208) 359-5885
Fax: (208) 359-5888
jeff@beardstclair.com
mbrown@beardstclair.com

Attorneys for Plaintiffs

DISTRICT COURT SIXTH JUDICIAL DISTRICT FRANKLIN COUNTY IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, vs. Hal J. Dean and Marlene T. Dean, husband and wife; Douglas K. Viehweg and Sharon C. Viehweg, husband and wife; Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	Case No. CV-08-342 **STIPULATED STATEMENT**

Pursuant to the court's Order for Submission of Information for Scheduling Order, dated September 1, 2009, the plaintiffs, 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, by and through their counsel of record, hereby submit the following stipulated statement:

(1) Whether this matter is to be tried to the Court or to a Jury: **Jury.**

(2) Whether service is still needed upon any unserved parties: **No.**

(3) Whether motions to add new parties or otherwise amend pleadings are expected: **Yes.** The plaintiffs have reached a settlement agreement in principle with all defendants except Brad Povey and Leiza Povey. As part of this settlement agreement, the defendants Deans, Neigums, and Viehwegs agreed to assign to the plaintiffs causes of action against Brad Povey and Leiza Povey. These causes of action arise out of the same circumstances and events described in the plaintiffs' second amended complaint. The plaintiffs will move the court for leave to amend their complaint so they can assert the assigned claims against Brad Povey and Leiza Povey. The Poveys will vigorously object to this motion.

(4) Whether an unusual amount of time is needed for trial preparation and/or discovery: **No.**

(5) The agreed number of trial days required for trial: 5

(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: As indicated above, settlement with all defendants except Brad Povey and Leiza Povey is imminent. It is expected that the plaintiffs and the settling defendants will soon stipulate to dismissal of all claims unrelated to Brad Povey and Leiza Povey.

(7) Submit **THREE (3) STIPULATED TRIAL DATES, as described below**:

- First Stipulated trial date: The plaintiffs are available to begin trial on **March 2, 2010.**

Mr. Atkin is unavailable for trial at any time in the 6-9 month timeframe requested by the court. Mr. Atkin is, however, available to begin trial the week of **February 1, 2010.**

- Second Stipulated trial date: The plaintiffs are available to begin trial on **June 1, 2010.** Mr. Atkin is unavailable for a trial at any time in the 9-12 month timeframe requested by the court. Mr. Atkin is however, available to begin trial the week of **September 6, 2010.**

- Third Stipulated trial date: The plaintiffs are available to begin trial **September 7, 2010.** Mr. Atkin identified the week of **September 6, 2010** as his second available trial date. However, Mr. Atkin is also available the week of **November 1, 2010** as a third possible trial date.

(8) Mr. Atkin understands the court has ordered the parties to begin the trial on a Tuesday. Mr. Atkin sincerely believes the trial will take five days. If it is acceptable to the court, Mr. Atkin requests that the trial begin on a Monday so that the jury would not be required to return a second week.

(9) Counsel for the plaintiffs was able to confer with counsel for the Poveys only moments before this statement was to be filed with the court. The Poveys' counsel requested that this statement include certain items important to him. The plaintiffs' counsel was unable to obtain approval of this statement from Mr. Smith and Mr. McFarland, the attorneys representing the other parties in this action. However, this fact should not prevent the court from entering its scheduling order because following the plaintiffs' expected settlement with those parties, they will no longer be parties to this lawsuit.

Respectfully submitted this 15th day of September, 2009.

Michael W. Brown
of Thatcher Beard St. Clair Gaffney
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 15, 2009, I served a true and correct copy of *Stipulated Statement re: Scheduling Order* on the following individuals by the method of delivery designated:

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

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

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

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

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

☐ 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

Judge Stephen S. Dunn
Bannock County Courthouse
624 E. Center
P.O. Box 4126
Pocatello, ID 83204
Fax: (208) 236-7012

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

Dated: September 15, 2009

Michael W. Brown
of Thatcher Beard St. Clair Gaffney, *Attorneys*
Attorneys for the Plaintiff

FILED
09 SEP 23 AM 9:00
FRANKLIN COUNTY CLERK
[signature]
DEPUTY

Jeffrey D. Brunson, ISB No. 6996
Michael W. Brown, ISB No. 8017
343 E. 4th N. Ste. 223
P.O. Box 216
Rexburg, ID 83440
Tel: (208) 359-5885
Fax: (208) 359-5888
jeff@beardstclair.com
mbrown@beardstclair.com

Attorneys for Plaintiffs

DISTRICT COURT SIXTH JUDICIAL DISTRICT FRANKLIN COUNTY IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow; and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, vs. Hal J. Dean and Marlene T. Dean, husband and wife; Douglas K. Viehweg and Sharon C. Viehweg, husband and wife; Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A. Neigum Revocable Trust, dated September 17 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	Case No. CV-08-342 AFFIDAVIT OF HENRY POVEY

STATE OF IDAHO
ss.
County of Bonneville

I, Henry Povey, having first been sworn, depose and state:

1. I am over the age of eighteen, am competent to testify and do so from personal knowledge.

2. I participated in a common farming operation in Franklin County, Idaho with my father, Leonard Povey and brother, Brad Povey approximately fifteen (15) years ago.

3. During that time, we would farm the land adjacent to the only access road to the Garner property lying west of the Twin Lakes canal.

4. Attached as Exhibit B is a copy of a photograph wherein I can identify the access roadway as it previously existed.

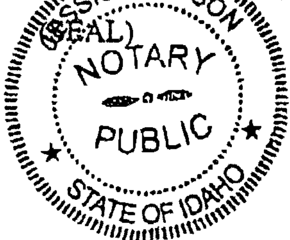
5. Attached as Exhibit D is a copy of a photograph wherein I can identify the area where the access roadway used to be but has clearly been damaged or farmed over in some manner.

Dated: September 22, 2009.

Henry Povey

Subscribed and sworn to before me on September 22, 2009.

Notary Public for State of Idaho
Residing at Idaho Falls, ID
My Commission Expires: 4-11-14
(SEAL)



Certificate of Service

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 22, 2009, I served a true and correct copy of AFFIDAVIT OF HENRY POVEY upon the following by the method of delivery designated:

Eric Olsen Racine Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, ID 83204-1391 Fax: (208) 232-6109	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Ryan McFarland Hawley Troxell Ennis & Hawley P.O. Box 1617 Boise, ID 83701-1617 Fax: (208) 342-3829	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Blake S. Atkin 837 South 500 West Suite 200 Bountiful, UT 84010 Fax: (801) 533-0380	☐ 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
Judge Stephen S. Dunn Bannock County Courthouse 624 E. Center/P.O. Box 4126 Pocatello, ID 83204 Fax: (208) 236-7012	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile

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

EXHIBIT
B

EXHIBIT
D

Jeffrey D. Brunson, ISB No. 6996
Michael W. Brown, ISB No. 8017
343 E. 4th N. Ste. 223
P.O. Box 216
Rexburg, ID 83440
Tel: (208) 359-5885
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jeff@beardstclair.com
mbrown@beardstclair.com

Attorneys for Plaintiffs

FILED
09 SEP 23 AM 10:47
FRANKLIN COUNTY CLERK
Hampton
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.	Case No. CV-08-342
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.	AFFIDAVIT OF MICHAEL W. BROWN

STATE OF IDAHO

ss.

County of Madison

I, Michael W. Brown, having first been sworn, depose and state:

1. I am over the age of eighteen, am competent to testify and do so from personal knowledge.

2. I am an attorney at Thatcher Beard St. Clair Gaffney PA, counsel of record for Plaintiffs, 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.

3. In late April 2009 we began settlement negotiations with many of the defendants in this case. The settlement discussions centered around the major issue in this case, the Garners' obtaining access to their properties lying west of the Twin Lakes Canal.

4. Due to the many parties involved these settlement negotiations have gone on for several months.

5. Counsel for the Poveys noticed up depositions of the Plaintiffs, in May 2009. As the date for the depositions drew near, I understand counsel for one of the other parties asked counsel for the Poveys to postpone the depositions because the parties were attempting to settle. Counsel for the Poveys refused to vacate the depositions.

6. Settlement with the parties owning the servient estates over which the original access road runs would have changed the complexion of the Garners' claims against Poveys and could have perhaps enabled settlement. Thus, the Garners temporarily did not initiate further action in the litigation that would involve the Poveys.

7. The Garners did not conduct discovery (other than preparing for and attending the depositions noticed up by counsel for the Poveys) in an effort to minimize costs. It did not make sense to accrue additional costs if the case was going to settle.

8. After many months of negotiating, the Garners are in a position to settle their claims with all the defendants but the Poveys. In fact, the Garners have reached an agreement in principle. They are just awaiting final signature on the settlement agreement.

9. Part of the settlement with the other defendants includes an assignment of claims they may have against the Poveys. The Plaintiffs intend on amending their claims to assert these assigned claims. The reason they have not done so sooner is because the settlement was not completed.

10. The Plaintiffs have attempted to settle their claims with the Poveys and have been unsuccessful.

11. In order to fully respond to the summary judgment motion filed by the Poveys, the Plaintiffs need to conduct additional discovery. Specifically, the Plaintiffs need to serve written discovery on the Poveys and need to depose the Poveys. Additional depositions may be necessary depending on the discovery responses and depositions of the Poveys.

12. The reason this discovery was not done sooner was that the Plaintiffs did not want to accrue unnecessary legal expenses because the Plaintiffs believed they could settle their claims with all parties including the Poveys.

13. There is no discovery deadline since a trial date has yet to be set by the District Court. No prejudice would be suffered by Poveys by allowing the Plaintiffs the opportunity to conduct discovery.

14. Attached as Exhibit A to this Affidavit is a true and correct copy of Instrument No. 208652, (Deans) recorded in the records of Franklin County, Idaho.

15. Attached as Exhibit B to this Affidavit is a true and correct copy of Instrument No. 212784, (Neigums) recorded in the records of Franklin County, Idaho.

16. Attached as Exhibit C to this Affidavit is a true and correct copy of Instrument No. 231836, (Viehwegs) recorded in the records of Franklin County, Idaho.

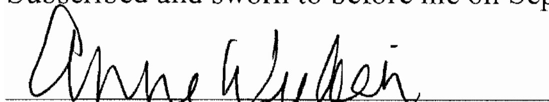
17. Attached as Exhibit D to this Affidavit are true and correct copies of portions of the deposition transcript of Daniel S. Garner.

18. Attached as Exhibit E to this Affidavit is a true and correct copies of portions of the deposition transcripts of Nola Garner.

Dated: September 22, 2009.

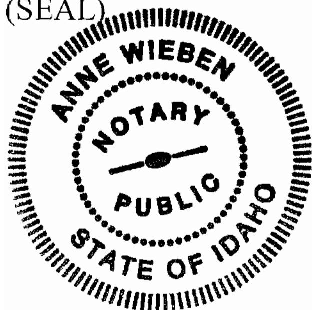
Michael W. Brown
of Thatcher Beard St. Clair Gaffney PA
Attorneys for Plantiffs

Subscribed and sworn to before me on September 22, 2009.



Notary Public for State of Idaho
Residing at Rigby
My Commission Expires: 7-27-2013

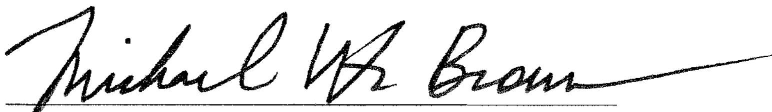
(SEAL)



Certificate of Service

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 22, 2009, I served a true and correct copy of AFFIDAVIT OF MICHAEL W. BROWN upon the following by the method of delivery designated:

Eric Olsen Racine Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, ID 83204-1391 Fax: (208) 232-6109	☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile
Ryan McFarland Hawley Troxell Ennis & Hawley P.O. Box 1617 Boise, ID 83701-1617 Fax: (208) 342-3829	☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile
Blake S. Atkin 837 South 500 West Suite 200 Bountiful, UT 84010 Fax: (801) 533-0380	☐ 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
Judge Stephen S. Dunn Bannock County Courthouse 624 E. Center/P.O. Box 4126 Pocatello, ID 83204 Fax: (208) 236-7012	☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile



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

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
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.

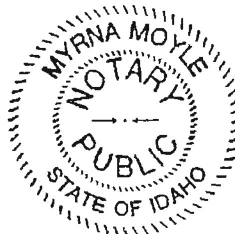
Dated: December 28, 1999

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 persons whose names 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



FORM COMPLIMENTS OF PRESTON LAND TITLE CO.

212784 [1-3]

Recorded at the request of
FIRST AMERICAN TITLE
____ a.m. APR 05 2001 3:20 p.m.
ELLIOTT LARSEN, RECORDER
By Camille Sauer Deputy
FRANKLIN COUNTY, IDAHO

CORRECTED WARRANTY DEED

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.

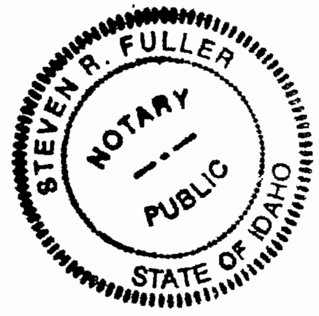
DATED: March 22, 2001

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

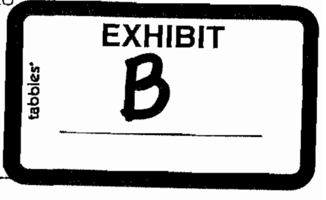


EXHIBIT "A" 212784 23

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

over

(continued)

231836 1-2

Recorded at the request of
Steven R. Fuller

____a.m. NOV 01 2005 p.m. 3:00

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

WARRANTY DEED

FOR VALUE RECEIVED

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

do hereby grant, bargain, sell and convey unto

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

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

SEE ATTACHED EXHIBIT "A"

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

DATED: October 4, 2005.

Brad L. Povey (signature)
Brad L. Povey

(signature)
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

(signature)
NOTARY PUBLIC for State of Idaho
Residing at: Preston, Idaho
Comm. Exp: 1/21/11

EXHIBIT
C

231836 2-2

EXHIBIT "A"

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

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

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

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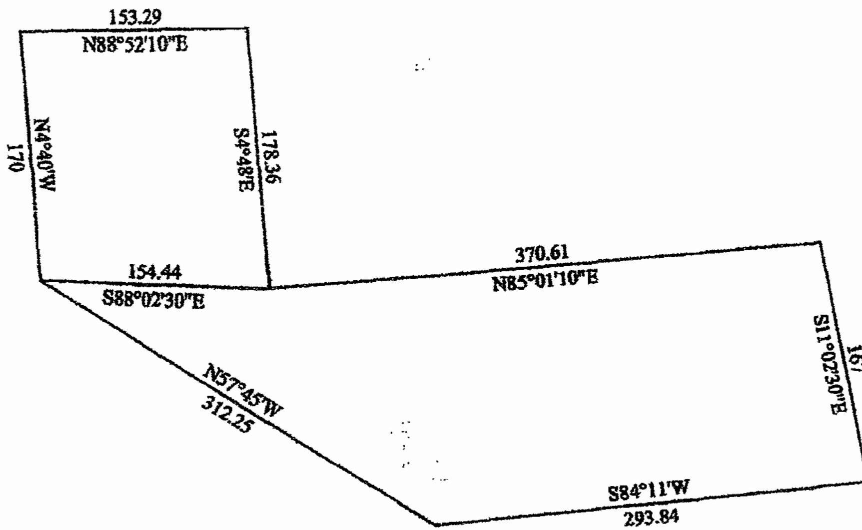
SUBJECT TO AN EASEMENT 10 FEET IN WIDTH FOR A BURIED IRRIGATION PIPELINE AND A RIGHT OF ACCESS THERETO FOR MAINTENANCE AND REPAIR, BEGINNING ALONG THE EAST BOUNDARY OF THE ABOVE PREMISES AND RUNNING IN A NORTHWESTERLY DIRECTION TO THE PROPERTY LYING NORTH OF THE ABOVE DESCRIBED PREMISES.

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



Title:		Date: 12-07-2005
Scale: 1 inch = 125 feet	File: VIEHWEG D 231836 #3155.des	

+Tract 1: 0.613 Acres: 26682 Sq Feet: Closure = s45.2443w 0.01 Feet: Precision =1/112140: Perimeter = 656 Feet
+Tract 2: 1.565 Acres: 68171 Sq Feet: Closure = n78.5347e 0.88 Feet: Precision =1/1480: Perimeter = 1298 Feet
Net Area= 2.178 Acres: 94854 Sq Feet

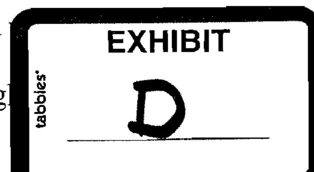
001=/NE,SE,27,14S,38E
002=/N90W 780.74
003=/S.06E 419.10
004=/S89.4038W 354.54
005=S4.48E 178.36
006=**N88.0230W 154.44
007=N4.40W 170
008=N88.5210E 153.29
009=@0+
010=/NE,SE,27,14S,38E
011=/N90W 780.74
012=/S.06E 419.10
013=/S11.2030E 150.50
014=S11.0230E 167
015=S84.11W 293.84
016=N57.45W 312.25
017=S88.0230E 154.44
018=N85.0110E 370.61

1 A. Right.
2 Q. Okay. Now, there is an allegation in
3 the complaint in this matter that the Poveys at
4 some point plowed the roadway. You're familiar
5 with that allegation?
6 A. Yes.
7 Q. What do you know about that? Did you
8 see the Poveys plowing the roadway?
9 A. Which time?
10 Q. Well, was there more than one time
11 that the roadway was plowed?
12 A. Plowed, tilled.
13 Q. Well, maybe you can help me out. The
14 allegation in the complaint is that the roadway
15 was plowed. Was the roadway ever plowed?
16 A. Yes, sir.
17 Q. Do you know what a plow is?
18 A. Yes, sir.
19 Q. Okay. What kind of plow was used to
20 plow the road?
21 A. A three bottom.
22 Q. And did you see the roadway being
23 plowed?
24 A. No.
25 Q. How do you know it was plowed by a

1 three bottom plow?
2 A. I know what a plowed field looks like,
3 sir.
4 Q. So you saw the roadway after it had
5 been plowed?
6 A. I got stuck in it, sir.
7 Q. You got stuck in it with what?
8 A. A green GMC pickup.
9 Q. Okay. When did the plowing occur?
10 A. Early nineties, late eighties.
11 Q. Okay. While the Poveys still owned
12 the property?
13 A. Correct.
14 Q. And again, you didn't see the plowing
15 occurring, but you got stuck in it as you tried to
16 drive through it?
17 A. Correct. It was done and I went up to
18 access my property and got stuck.
19 Q. Okay. Do you know who did the
20 plowing?
21 A. No.
22 Q. Did you ever talk to anyone about the
23 plowing on the road?
24 A. Yes.
25 Q. Who did you talk to?

1 A. My father.
2 Q. What did you say to your father?
3 A. He came and pulled me out. He told
4 me -- I wanted to go -- I was quite upset. He
5 calmed me down and told me not to worry about it.
6 Once the field was planted it would be accessible
7 again. That was the end of it.
8 Q. Okay. So did you talk to anyone else
9 about it?
10 A. No.
11 Q. So your father considered it not a big
12 deal, wasn't that big of a deal, you shouldn't get
13 upset about it?
14 A. I don't know what he considered, sir.
15 Q. Okay. Fair enough. He told you don't
16 worry about it, the field will be planted and once
17 it's planted you'll be able to access the property
18 again?
19 A. That's what he told me.
20 Q. Okay. I guess the field was
21 eventually planted?
22 A. Yes.
23 Q. And after that you were able to access
24 your property again?
25 A. Yes.

1 Q. Did you talk to anyone else about that
2 plowing incident?
3 A. No.
4 Q. And the roadway was reestablished
5 after the planting occurred?
6 A. Correct.
7 Q. Now, this plowing didn't occur along
8 the full length of the roadway?
9 A. No.
10 Q. About how much of the roadway was
11 plowed?
12 A. Hmm, from the hay barn up.
13 Q. All the way up to the canal?
14 A. Yes.
15 Q. And as I understand it, at that time
16 the ground on both sides of the roadway was being
17 farmed?
18 A. Correct.
19 Q. And when the field was planted do you
20 know what it was planted with?
21 A. I don't. I went back to college, or
22 wherever I went.
23 Q. So this was while you
24 college?
25 A. Early nineties, late eig



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1 Q. Okay. Again, do you have any evidence
2 to suggest that in plowing the road at that time
3 that they were trying to obliterate the road?
4 A. I don't see why you plow a road.
5 Q. I understand you don't see why. I'm
6 saying do you have any evidence to suggest that
7 they were doing it in order to try to eliminate
8 the road?
9 A. Evidence. Define evidence. A letter
10 from them saying I'm going to plow the road so you
11 can't get up there?
12 Q. Anything that would lead you to
13 believe that they were trying to prevent you using
14 the road by plowing it rather than just being a
15 farmer trying to plant the two fields?
16 A. I don't see why you plow through a
17 road.
18 Q. Okay. I understand that.
19 A. I don't know what you're asking, I
20 guess.
21 Q. At that time did anything lead you to
22 believe that the person who plowed this road was
23 trying to prevent your ability to use the road
24 rather than just farming the two fields?
25 A. I don't know.

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1 Q. Okay. At a later time it wasn't
2 plowed, but you're saying there was something
3 done. What was that?
4 A. It was disturbed enough that the
5 gravel base was gone and I got stuck twice with
6 the backhoe and had to lift myself out.
7 Q. Let me ask you this. That plowing
8 that occurred would have disturbed the gravel base
9 more than anything else, wouldn't it? Did that
10 disturb the gravel base?
11 A. Two different sections of the road.
12 Q. Okay.
13 A. This was a different spot.
14 Q. Okay. Fair enough. Did the plowing
15 disturb any gravel base or there just wasn't any
16 gravel base?
17 A. It totally obliterated it.
18 Q. There had been a gravel base before
19 the plowing, and then after the plowing --
20 A. A small one, yes. I had to redo it.
21 Q. Did you actually put some new gravel
22 on the roadway after the plowing incident
23 occurred?
24 A. Throughout the years afterwards, yes.
25 Q. We'll get to that in a minute. Let me

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1 talk to you about other disturbances of the road.
2 Let me make sure the record is clear. The plowing
3 that you just told us about went from the barn to
4 the canal, basically?
5 A. Correct.
6 Q. All right. The second disturbance of
7 the roadway, and we'll talk about what you mean by
8 a disturbance in a minute, but what portion of the
9 roadway did that occur on?
10 A. Between the granaries and the hay
11 barn.
12 Q. Between the granaries and the hay
13 barn?
14 A. The section -- this section here.
15 Q. Okay. Show me on exhibit M where the
16 first plowing occurred.
17 A. Off the exhibit.
18 Q. Past the hay barn and up towards the
19 canal?
20 A. Correct.
21 Q. And then the second time we're talking
22 about a disturbance, that occurred between tract 1
23 of the Viehweg property and tract 2 of the Viehweg
24 property?
25 A. Correct.

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1 Q. And tell me what the disturbance was?
2 Did it go beyond and up the hill to where the
3 plowing had occurred the first time?
4 A. No. It was just right there.
5 Q. Just that little section there?
6 A. Correct.
7 Q. Okay. Tell me what the disturbance
8 was at that time.
9 A. I don't know, but it was enough that I
10 sank with the backhoe and got stuck twice.
11 Q. You don't know what kind of implement
12 was used to do that?
13 A. I do not.
14 Q. You got stuck twice?
15 A. Correct.
16 Q. Two different times?
17 A. Correct.
18 Q. How far apart -- both times in the
19 backhoe?
20 A. Correct. I was feeding cattle.
21 Q. You were feeding cattle with your
22 backhoe?
23 A. Correct.
24 Q. Was it in the winter time or in the
25 summer time?

1 A. Spring.
2 Q. And I asked this, but I didn't hear
3 the answer. How far apart were the two incidents?
4 A. Within a three day period.
5 Q. Okay. Did you talk to anyone about
6 those two incidents?
7 A. Mr. Neigum was there.
8 Q. So this was after the Neigums had
9 built their house?
10 A. Correct.
11 Q. After the Neigum driveway was
12 established?
13 A. Correct.
14 Q. And Mr. Neigum saw you stuck and came
15 out and talked to you or how was he there?
16 A. He might have been feeding his horses
17 and saw me.
18 Q. Was he there on both instances?
19 A. I think just the one.
20 Q. Okay. And did you talk to him
21 about -- did you talk to him?
22 A. Yes.
23 Q. What did you say to him?
24 A. I told him I was sorry I'd made the
25 ruts, but they messed up the road and planted oats

1 across it that summer and I'd have to deal with
2 it.
3 Q. And you're saying this was in the
4 spring of the year?
5 A. Correct.
6 Q. So when had the oats been planted?
7 Was it before --
8 A. I don't know.
9 Q. Let me back up a little bit. You
10 didn't see anyone doing the actual disturbance of
11 the ground?
12 A. No.
13 Q. You saw the results of somebody doing
14 that?
15 A. Correct.
16 Q. Do you know who did it?
17 A. No.
18 Q. Did Mr. Neigum know who did it?
19 A. I didn't ask him.
20 Q. Okay. How did he respond to what you
21 said to him? You said you were sorry about the
22 ruts, but they messed up the road. Did he say
23 anything in response?
24 A. I don't remember.
25 Q. Did he at that point suggest that you

1 use the Neigum driveway rather than that roadway?
2 A. I don't remember, but I did use the
3 Neigum driveway until it dried up after that.
4 Q. Okay.
5 A. I don't know if he suggested it. I
6 can't remember. He might have. I just don't
7 remember.
8 Q. All right. Now, do I understand
9 correctly that you were involved in building the
10 Neigum driveway?
11 A. No, I was not. I sold the gravel for
12 it is all.
13 Q. You sold the gravel for it, but you
14 weren't involved in building it?
15 A. No.
16 Q. You didn't spread any of the gravel?
17 A. I didn't spread the gravel, I didn't
18 do the ground prep, no.
19 Q. Who did, do you know?
20 A. My brother.
21 Q. Lynn?
22 A. Yes.
23 Q. Okay. The Rice roadway, you have used
24 that roadway to access your gravel pit; is that
25 correct?

1 A. Lately, yes, I had a big argument with
2 my dad and told him I wouldn't use it. After a
3 few years that softened and I did use it.
4 Q. Okay. Tell me about that. You had an
5 argument with your dad and told him you wouldn't
6 use the Rice roadway?
7 A. Correct.
8 Q. When did that occur?
9 A. When he purchased it, or when I found
10 out that he'd purchased it.
11 Q. So you found out about it after he
12 purchased it?
13 A. Correct.
14 Q. Did you find out about it after he had
15 developed it and installed the culvert across the
16 canal?
17 A. No. He asked me to help with that and
18 I told him I didn't want anything to do with it.
19 He tried to repair the damage, but we continued to
20 argue.
21 Q. Okay. Why did you argue with him
22 about that? What was your position?
23 A. It was an economically bad decision in
24 my mind.
25 Q. Why?

1 A. And it seems awful funny to mess with
2 that corner and to plant it.
3 MR. MCFARLAND: Counsel, for the record,
4 Mr. Garnèr was pointing to the south part of that
5 stretch of that right-of-way between tract 1 and
6 tract 2?
7 MR. ATKIN: Actually, he was pointing on
8 exhibit M to the westerly portion of the
9 right-of-way.
10 MR. SMITH: Let's go off the record.
11 (Discussion off the record.)
12 Q. (BY MR. ATKIN) Let me show you what was
13 marked exhibit 1 -- or let me show you exhibit 2.
14 That may be what we want. Are you familiar with
15 that photograph?
16 A. Yes, sir.
17 Q. And who took the photograph?
18 A. My wife.
19 Q. Okay. And was that photograph taken
20 on or about May 28th, 2008?
21 A. Yes, sir.
22 Q. Because exhibit 3 shows that date, May
23 28th, 2008?
24 A. Yes, sir.
25 Q. All right. What is that photograph --

1 you're familiar with the area where that
2 photograph was taken?
3 A. Yes, sir.
4 Q. And does that photograph accurately
5 depict the area that is photographed?
6 A. Yes, sir.
7 Q. And what does it show?
8 A. It shows the northerly right-of-way
9 that bisects the Viehweg property. I believe he's
10 standing on the Dean property about halfway up.
11 Is that what you want?
12 Q. When you say it bisects the Viehweg
13 property, are we looking at the westerly portion
14 of segment A as shown in exhibit M?
15 A. Correct.
16 Q. Okay. And where on exhibit M would
17 the person taking the photograph be standing?
18 A. In here somewhere.
19 Q. Okay. Somewhere near the convergence
20 of Povey tract 2 and Povey tract 1?
21 A. Probably.
22 Q. All right. On deposition exhibit
23 number 2 can you see the portion of ground that
24 your telling me was disturbed and planted?
25 A. Yes.

1 Q. Show us where that is. In fact, if
2 you'll take my pen and draw a line to show where
3 you think it is.
4 A. I'm allowed to do that?
5 Q. Yes.
6 A. From this post up to here and across
7 the road like that. You can see the change in
8 color.
9 Q. How wide of an area was disturbed?
10 A. I don't know. Whatever it is from --
11 I don't know. I haven't measured it.
12 Q. Okay. And was it also disturbed in
13 the area past the grain bin?
14 A. Below?
15 Q. To the west of the grain bin.
16 A. To the west?
17 Q. Yes.
18 A. Oh, yes.
19 Q. If I understand it correctly, this is
20 a picture looking west?
21 A. No. Oh, yes, this is looking west.
22 Q. Okay. And where you've marked is on
23 the east side of the grain bin, correct?
24 A. No. That's where it goes north to
25 south across the road, across the right-of-way.

1 Q. I understand that, but where you put
2 the markings -- the disturbance went north and
3 south across the roadway, correct?
4 A. Correct.
5 Q. But we're on the east side of the
6 grain bin?
7 A. Yes. It was both on the east and west
8 sides of the grain bin.
9 Q. So both sides of the grain bin?
10 A. Yes.
11 Q. Okay. And the field to the north of
12 the roadway, was it also planted in oats?
13 A. Above the pole.
14 Q. Beyond this pole it was planted in
15 oats?
16 A. Yeah. Up in here.
17 Q. Okay. The north --
18 A. I know -- this tract was planted, yes.
19 Q. Tract 1 of the Viehweg property on
20 exhibit M was planted?
21 A. Yes.
22 Q. Was tract 2 of the Viehweg property
23 also planted in oats?
24 A. Correct.
25 Q. And so the disturbance would have gone

1 across the road in the area between tract 1 and
2 tract 2 of the Viehweg property?
3 A. Correct.
4 Q. Missing the grain bin, basically?
5 A. Correct.
6 Q. Okay. I kind of take it that you
7 wouldn't have farmed it that way?
8 A. No.
9 Q. Other than that, is there anything
10 that leads you to believe that that planting --
11 that disturbance and planting was done to
12 obliterate the roadway?
13 A. Just that that was done in close
14 proximity to the selling to Viehweg.
15 Q. Okay. Anything else?
16 A. No.
17 Q. You haven't heard anybody -- nobody
18 has ever told you that that's why it was done?
19 A. No.
20 Q. You never asked anybody why the
21 planting was done there?
22 A. No.
23 Q. You say it was in close proximity to
24 the sale of the property to the Viehwegs?
25 A. I'm not sure, but I believe so.

1 Q. Okay. Do you know when the property
2 was sold to the Viehwegs?
3 A. 2005.
4 Q. How do you know that?
5 A. That's when the deed was recorded.
6 Q. When did you first learn that the
7 property had been sold to the Viehwegs?
8 A. 2008.
9 Q. Okay. So at the time that the
10 property was being sold, you were not aware of it?
11 A. Correct.
12 Q. The Viehwegs don't live there?
13 A. No.
14 Q. And somebody farms the property for
15 the Viehwegs?
16 A. I assume.
17 Q. You don't know who that is?
18 A. I don't.
19 Q. Somebody must because it gets at least
20 pastured?
21 A. Correct.
22 Q. Maybe some hay cut off of it. So you
23 wouldn't have any reference point for knowing when
24 the property was sold to the Viehwegs, other than
25 the deed?

1 A. Correct.
2 Q. And your memory of when this property
3 was disturbed and the oats were planted, you know
4 it was in the spring of the year sometime?
5 A. Yes. That's when you usually plant.
6 Q. Well, you got stuck sometime in the
7 spring of the year with your backhoe?
8 A. That would have been the year after it
9 was planted.
10 Q. Oh, the year after?
11 A. Yes.
12 Q: Not the same year it was planted?
13 A. No.
14 Q. Do you know what year you got stuck?
15 A. No.
16 Q. Any way that you could refresh your
17 recollection and try to find out what year?
18 A. Maybe, but I'll have to think about
19 it.
20 Q. No documents that you can refer to?
21 Are there documents that you could refer to that
22 would refresh your recollection as to when you got
23 stuck with your backhoe?
24 A. Maybe.
25 Q. What would they be?

1 A. Calving records.
2 Q. Okay. How would the calving records
3 help you remember?
4 A. If I happened to write it in there.
5 Q. Describe your calving records for me.
6 A. I usually have the cow number, calf
7 number, problems that the cow had having the calf,
8 whether the calf was delivered live or dead.
9 Q. And you're --
10 A. Feed ratios.
11 Q. And you keep accurate records that way
12 of your calfs?
13 A. Yes.
14 Q. And why would those records show when
15 you got stuck?
16 A. Only if I was upset enough that I
17 wrote it down when I got home, which I don't
18 believe I was. I don't know.
19 Q. You still have those calving records?
20 A. Yes.
21 Q. Going back how far?
22 A. Since we went organic.
23 Q. Which would have been?
24 A. '87, '88.
25 Q. Okay. So going basically back to --

1 A. Correct.
2 Q. All right. And it talks about a
3 right-of-way?
4 A. Correct.
5 Q. Did you ever think that you had more
6 than one right-of-way across the McCulloch
7 property?
8 A. No.
9 Q. We've talked about the Neigum driveway
10 and that because of the turn there might be some
11 difficulty in getting certain equipment up the
12 Neigum driveway. Are there any other reasons why
13 the Neigum driveway wouldn't be a sufficient
14 replacement to the northern roadway?
15 A. The slope is steeper.
16 Q. Okay. Anything else?
17 A. No.
18 Q. So the slope on the Neigum driveway is
19 steeper than the north?
20 A. It climbs sharper.
21 Q. I thought it was the other way around,
22 but you're telling me the Neigum driveway is
23 steeper than the north driveway?
24 A. Correct.
25 Q. Are there any advantages to you to use

1 the Neigum driveway rather than the north
2 driveway?
3 A. No.
4 Q. Did you ever talk with Brad Povey
5 about putting a description of your right-of-way
6 across that property in writing, across what was
7 the McCulloch property? Did you and Brad ever
8 have a discussion about reducing to writing
9 exactly what that right-of-way was and where it
10 was located?
11 A. No.
12 Q. Do you ever recall any discussions
13 with Brad about him wanting to put in writing a
14 description of the right-of-way?
15 A. Yes.
16 Q. Okay. Tell me about that.
17 A. He said that he would like to move it;
18 and if he did he would put it in writing.
19 Q. All right. And when did that occur?
20 While Brad was still living in the home that's now
21 the Dean home?
22 A. Yes, I think it was before the Deans
23 bought it.
24 Q. All right. Did you have one such
25 discussion or more than one discussion?

1 A. More than one.
2 Q. Okay. And were they in person?
3 A. Yes.
4 Q. Do you know where you were at at the
5 time of these discussions?
6 A. Yes.
7 Q. Where were you?
8 A. The first one he caught me there at
9 the property.
10 Q. On the northern roadway?
11 A. Just on the property somewhere.
12 Q. Okay. How many such discussions were
13 there?
14 A. Four.
15 Q. Are you able to separate them in your
16 mind?
17 A. Yes.
18 Q. Tell me about the first of those four
19 discussions. And that was somewhere on the
20 property, you're not sure when, but Brad was still
21 living in the house; is that correct?
22 A. I don't know if Brad was living in the
23 house or if he was in Pocatello.
24 Q. Okay. But it was before the Deans had
25 bought the house?

1 A. Yes.
2 Q. Okay. Tell me what Brad said during
3 that conversation.
4 A. He said that he would like to move the
5 roadway over to a different position.
6 Q. Did he tell you where?
7 A. Roughly at that time.
8 Q. And where was it? Was that roughly
9 where the Neigum driveway is?
10 A. Yes, where the driveway would go.
11 Q. What else did he say? I think you
12 said that he at one point told you if he did that
13 he would put it in writing?
14 A. Yes.
15 Q. Okay. Did he tell you that at that
16 first meeting, that he would put it in writing if
17 he did that?
18 A. Yes, I think he did.
19 Q. Okay. And how did you respond? What
20 did you say during that first meeting?
21 A. I told him a phrase that my dad always
22 taught me to say when you're caught off guard. I
23 told him that that definitely deserves some
24 consideration. He had a puzzled look on his face,
25 so I told him that I didn't see a problem with it,

1 but that I wanted to think about it.
2 Q. When was the next discussion?
3 A. Oh, sometime later he showed up at my
4 house with a piece of paper that Steve Fuller had
5 drawn up to sign that would move the right-of-way.
6 I don't have the legal document, but I believe it
7 was -- it didn't have the description of the
8 right-of-way, but I believe it just was an
9 agreement to move it. And I told him that I had
10 not had time to think about it.
11 Q. How much after the first meeting was
12 this?
13 A. I don't know. And then --
14 Q. Let me back up. Anybody else present
15 besides you and Brad?
16 A. Not that I know of.
17 Q. Okay. And he had a document with him?
18 A. Yes.
19 Q. Did you keep a copy of the document?
20 A. Yes. He left it there for me to think
21 about and sign.
22 Q. Do you still have a copy of it?
23 A. I don't.
24 Q. Do you know where it went?
25 A. Yes.

1 Q. Where?
2 A. I gave it back to him at the next
3 meeting.
4 Q. Okay. What else was said during --
5 what was said during this second meeting at your
6 home?
7 A. Just that I hadn't had enough time to
8 have thought about it and I would continue to do
9 so.
10 Q. Okay. Tell me about the third
11 meeting.
12 A. Okay. The third meeting he called at
13 the house again. I gave it back to him and told
14 him I'd thought about it and decided not to sign
15 it. I didn't want to move it. I liked it where
16 it was, it was fine, I didn't want to mess with
17 it.
18 Q. And did he say anything?
19 A. He asked me why.
20 Q. Did you respond?
21 A. I did not.
22 Q. How did that conversation or meeting
23 end?
24 A. It just ended.
25 Q. Okay.

1 A. He left. The next thing, the next
2 meeting -- I thought that had resolved it. I
3 thought it was a moot issue, was done.
4 Q. Let me ask you this first. The
5 document that he had, did it describe where the
6 easement, or the right-of-way, whatever it was,
7 did it describe where the right-of-way would go?
8 A. I don't believe it did. Like I said,
9 I don't remember, I don't have the document, but I
10 believe at that point it was just an agreement to
11 move it.
12 Q. Okay. But no description of the --
13 where it would be?
14 A. I don't think so.
15 Q. Was there going to be a description of
16 the course of the right-of-way? I mean --
17 A. I assume there would be if I signed it
18 and we would have moved it.
19 Q. But there wasn't any discussion about
20 we need to have a description of exactly where
21 this right-of-way is going to go? Did that ever
22 come up in your conversations with Brad about
23 putting in place a description of where the
24 right-of-way was?
25 A. He said that he would do that if we

1 moved it.
2 Q. Okay. Now, have you told me
3 everything about the third meeting?
4 A. Yes.
5 Q. Tell me about the fourth one.
6 A. The next time he came to the house he
7 had the paper again.
8 Q. The same paper?
9 A. Same paper. Well, a copy of the same
10 paper maybe. And he had a deed.
11 Q. How carefully did you read the paper
12 that he had prepared?
13 A. I didn't read it at all.
14 Q. Okay. So it may have been the same
15 paper, may have been something completely
16 different?
17 A. Correct. I just thought about whether
18 or not I wanted to move it.
19 Q. All right. And he also had a deed at
20 the fourth meeting?
21 A. Yes, a deed that showed -- it was a
22 copy of the Neigum deed that showed the
23 right-of-way on it. I was a little agitated
24 because, like I said, I thought it was solved. I
25 had told him I didn't want to move it. And I

1 didn't sign it.
2 Q. Was there a place for you to sign that
3 deed?
4 A. Not on the deed, I don't believe. But
5 on the other paper there was.
6 Q. How do you know it was the Neigum
7 deed? Did you read the Neigum deed at that point?
8 A. Yes.
9 Q. So he showed you what -- was this
10 before or after the deed had been executed?
11 A. Now that I don't know.
12 Q. Had it been signed by Brad at that
13 point?
14 A. I don't know. I didn't look.
15 Q. All right. How do you know it was the
16 Neigum deed?
17 A. The first part of it, of the deed,
18 said --
19 Q. Named the Neigums?
20 A. Correct.
21 Q. Did you know the Neigums at that point
22 in time?
23 A. No. And then shortly after that Steve
24 Fuller called and told me that the paper was ready
25 to sign. I informed him I wasn't going to sign

1 it. Well, his secretary called, I should say,
2 from his office.
3 Q. Okay. Any other conversations on the
4 subject of putting together in writing a
5 description of the right-of-way across what was
6 then the Povey property?
7 A. Not that I recall.
8 Q. Okay. While the Poveys owned the
9 property was there ever a time when they tried to
10 interfere with your use of any of the roadways
11 going to your property?
12 A. Other than the ones we've discussed?
13 Q. The plowing and the planting?
14 A. Uh-huh.
15 Q. Other than those two instances,
16 there's nothing else?
17 A. Correct.
18 Q. And even on those two events, nobody
19 ever told you that that was done to try to prevent
20 you from using the roadway, correct?
21 A. Correct.
22 MR. ATKIN: Let's take a few minutes. I
23 might be finished.
24 (Recess.)
25 MR. BROWN: For the record, previously in

1 the deposition both my client and I represented
2 it was our belief that Daniel Garner does not
3 own -- does not have an ownership interest in the
4 Rice road. I've since had the opportunity to
5 review some deeds which caused me to need to
6 correct the statement that we earlier made. It
7 does appear, based on the deeds, that Daniel does
8 have a small, less than five percent, fractional
9 interest in the Rice roadway as the result of
10 gift deeds that were given to him by the Nola
11 trust.
12 MR. ATKIN: Why don't we mark those deeds,
13 if you have copies.
14 MR. BROWN: That's fine. And these were
15 provided to counsel as part of the supplement to
16 our discovery response.
17 MR. ATKIN: Are you okay with marking the
18 copy that you have there?
19 MR. BROWN: That's fine, yes.
20 MR. SMITH: For the record, can you read
21 the instrument number as well?
22 MR. BROWN: Yes. The first instrument
23 number is 238036. And that relates to the
24 comments I just made, it conveys a 2.449 percent
25 interest in what's identified as parcel eight in

1 the deed, which is the Rice roadway.
2 The second instrument is number
3 243758, likewise conveying a 2.449 percent
4 interest in parcel eight, which is the Rice
5 roadway.
6 MR. ATKIN: Let's mark those as exhibits 7
7 and 8.
8 (Exhibits 7 and 8 marked.)
9 Q. (BY MR. ATKIN) So, Daniel now knowing
10 that you own an undivided interest in the Rice
11 roadway, does that change your view as to whether
12 you have the legal right to use the Rice roadway?
13 A. It makes me feel a lot better.
14 Q. You understand that being an undivided
15 owner of a portion of that property, that you have
16 the right to use that roadway?
17 A. Yes.
18 MR. ATKIN: Okay. That's all I have.
19 MR. SMITH: Is anyone interested in having
20 lunch before we go on?
21 MR. MCFARLAND: I'm happy to work through
22 if we're going to go with Mrs. Garner still.
23 MR. ATKIN: Maybe we'll take a lunch break
24 as we trade witnesses while she's coming.
25

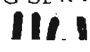
1 looked to see who owned that property at the end
2 of that road and across that canal, right?
3 A. Yes.
4 Q. They could have gone down there and
5 Aden Wade would have given them the deed who
6 showed who own it?
7 A. Probably not the deed, but he would
8 have shown them what was there.
9 MR. MCFARLAND: Who was that?
10 MR. ATKIN: He's the -- what is he?
11 THE WITNESS: He makes the plats.
12 MR. ATKIN: You ask him who owns a piece of
13 property and he tells you.
14 MR. MCFARLAND: Thank you.
15 Q. (BY MR. ATKIN) The same is true when
16 the Neigums bought their property, that northern
17 road was clearly visible on the ground and went
18 all the way to Twin Lakes Canal and across the
19 canal?
20 A. I don't know if it did then.
21 Q. Why not?
22 A. Well, because at different times the
23 ground had been disturbed and planted.
24 Q. Okay. Well, how about when the
25 Viehwegs bought their property, was that northern

1 road visible on the ground at that time?
2 A. Not as much because, again, it had
3 been disturbed.
4 Q. Let's talk about that. There is an
5 allegation in the second amended complaint that
6 the road had been plowed?
7 A. Maybe the word plowed was wrong.
8 Q. What would be a more accurate word?
9 A. Disturbed, tilled.
10 Q. A harrow run across it?
11 A. Harrow would be the same as plowed.
12 You have to know which piece of equipment did it
13 before you name it.
14 Q. Did you see anybody plowing the road
15 or a portion of the road?
16 A. I saw someone disturbing the road so
17 that it could be planted.
18 Q. Okay. Who did you see doing that?
19 A. One of Walt's boys.
20 Q. Who is Walt? Now you've come up with
21 a name I don't know.
22 A. I think Brad's oldest brother.
23 Q. Brad's oldest brother?
24 A. (Witness nodded her head.)
25 Q. Brad has a brother named Walt?

1 A. (Witness nodded her head.)
2 Q. And this is different from Hank or
3 Brad?
4 A. He has another brother too.
5 Q. Okay. So you saw who you thought was
6 one of Walt's children disturbing the ground on
7 the road?
8 A. Uh-huh.
9 Q. All right. Let's get some time frames
10 here. When did that occur?
11 A. I can't tell you what year because I
12 can't come up with anything to fit around it.
13 Q. Was it before the fence was built
14 across the road?
15 A. Yes, before the fence was built.
16 Q. So before 2008?
17 A. Yes.
18 Q. Was it before you had -- was it while
19 the Deans were living in the home or was it while
20 the Poveys were in the home?
21 A. I'll have to say I don't know.
22 Q. All right. And how did -- was this
23 using a tractor pulling an implement?
24 A. Yes.
25 Q. You don't know what kind of implement

1 it was?
2 A. In my mind it stands to be a plow, but
3 I'm not sure.
4 Q. Okay. When you say it stands to be a
5 plow, do you not know what a plow is?
6 A. I know what a plow is, but I'm not
7 positive -- I'm not sure that I paid close enough
8 attention to say that it was a plow.
9 Q. Okay. Did it concern you that
10 somebody was disturbing the roadway?
11 A. A little.
12 Q. Why?
13 A. Because you get stuck when you get it
14 tilled up.
15 Q. Okay. And whoever was doing this
16 disking of the roadway, did they do it the whole
17 length of the roadway or was it just across a
18 certain portion of the roadway?
19 A. It was not the whole length of the
20 roadway. I can't tell you the exact amount of it.
21 I can't tell you where it begins. It was a grain
22 that was planted.
23 Q. So the roadway was disturbed and then
24 some planting took place on the road[illegible]
25 what you just said?

EXHIBIT E



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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.	Case No. CV-08-342
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.	AFFIDAVIT OF DANIEL S. GARNER

STATE OF IDAHO

ss.

County of Madison

I, DANIEL S. GARNER, having first been sworn, depose and state:

1. I am over the age of eighteen, am competent to testify and do so from personal knowledge.

2. I am familiar with the properties involved in this litigation based on my ownership interest in properties lying west of the Twin Lakes Canal. I am also familiar with these properties because I have visited them frequently over the course of over two decades. I have also operated business activities on my property.

3. I acquired an interest in an easement over what has been referred to in this case as the original access road in 1987 when I purchased a forty-acre parcel of real property from Mr. and Mrs. McCulloch. I subsequently paid Mr. and Mrs. McCulloch consideration in the amount of $6,000 for the right to operate gravel trucks on the original access road. I regularly used the original access road for the purposes of hauling gravel and transporting equipment related to agricultural practices from 1987 until the commencement of this lawsuit.

4. From 1990 until the commencement of this action, the Poveys have known of my interest in the original access road. The Poveys have known that I regularly use the original access road throughout my ownership of property lying west of the Twin Lakes Canal.

5. For a period of time between 1990 and 1992, the Poveys accessed property they owned lying west of the Twin Lakes Canal via the original access road.

6. I am familiar with the dimensions and location of the original access road due to my frequent use of it for many years. The original access road is thirty feet wide, and this width was necessary for me to maneuver my vehicles and equipment over the original access road

leading to my property west of the Twin Lakes Canal. The first phase of the original access road runs between what are today the two Dean properties and the Viehweg properties.

7. In the early nineties the original access road was plowed over by a three bottom plow. This plowing occurred while the Poveys owned the servient estate properties through which the original access road passes. The plowing destroyed the original access road's base and caused me to get stuck while driving my pickup over it.

8. In or about 2001, Mr. Povey approached me and asked me to relocate my easement from the original access road to the so-called "replacement road." He brought with him a legal instrument I understood would accomplish such relocation. After considering his proposal, I informed Mr. Povey that I would not agree to move my easement. Mr. Povey returned to my home with the instrument again. This time he brought a deed that purported to convey property to the Neigums. The deed apparently described a "replacement road" that would be reserved for me. I once again told Mr. Povey that I would not agree to relinquish my right to use the original access road, and I objected to his seeking to move my easement.

9. The easement the Poveys purported to reserve for me in their deed to the Neigums is inadequate because it is only twenty feet wide, a width too narrow to support my established practices of accessing my property west of the Twin Lakes Canal with large gravel trucks and farming equipment.

10. In or about the spring of 2005, I observed that the original access road had been disturbed and that oats had been planted on it. This disturbance and planting occurred while the Poveys owned the servient estate properties on either side of the original access road where the disturbance occurred. The disturbance again compromised the original access road's base, and I got stuck twice in a backhoe while attempting to access my property.

11. I never agreed to acquire or use what has been referred to in this litigation as the "Rice road" at the time it was negotiated and acquired.

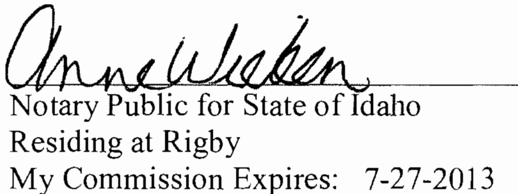
11. The Rice road does not provide adequate, safe access to the Garners' property in the winter months.

12. I contacted the USDA to obtain aerial photos. Attached as Exhibit A is a copy of a letter from the USDA certifying aerial photos they provided to me. Attached as Exhibit B is a portion of Enlargement #NAPP-365-B, dated June 24, 1987; attached as Exhibit C is a portion of Enlargement #NAPP-4926-275C, dated July 20, 1992; and attached as Exhibit D is a portion of Enlargement #NAPP-10671-209C, dated June 28, 1998.

Dated: September 22, 2009.

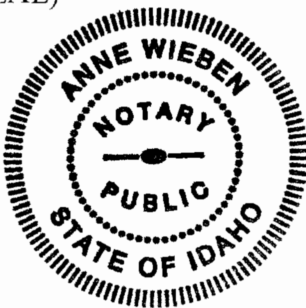
DANIEL S. GARNER

Subscribed and sworn to before me on September 22, 2009.



Notary Public for State of Idaho
Residing at Rigby
My Commission Expires: 7-27-2013

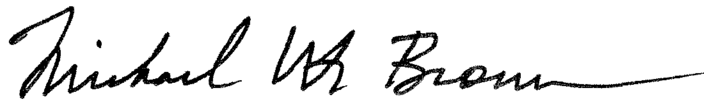
(SEAL)



CERTRIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 22, 2009, I served a true and correct copy of AFFIDAVIT OF DANIEL S. GARNER upon the following by the method of delivery designated:

Eric Olsen Racine Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, ID 83204-1391 Fax: (208) 232-6109	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Ryan McFarland Hawley Troxell Ennis & Hawley P.O. Box 1617 Boise, ID 83701-1617 Fax: (208) 342-3829	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Blake S. Atkin 837 South 500 West Suite 200 Bountiful, UT 84010 Fax: (801) 533-0380	☐ 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
Judge Stephen S. Dunn Bannock County Courthouse 624 E. Center/P.O. Box 4126 Pocatello, ID 83204 Fax: (208) 236-7012	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile



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

United States
Department of
Agriculture

Farm
Service
Agency

Aerial
Photography
Field Office

2222 W 2300 S
Salt Lake City UT
84119-2020
801-844-2922
801-956-3653 fax

June 17, 2009

RE: 9900-1011926

Nola Garner
200 W 50 N
Clifton, ID 83228

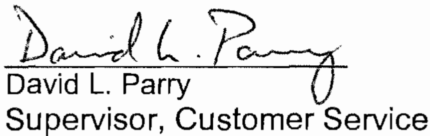
Dear Ms. Garner

This letter is to certify that the following exposures were secured while photographing.

Franklin County, Idaho

The film is on file in the USDA, Farm Service Agency, Aerial Photography Field Office, located in Salt Lake City, Utah.

ENLARGEMENT	DATE
NAPP-365-B	June 24, 1987
NAPP-4926-275C	July 20, 1992
NAPP-10671-209C	June 28, 1998



David L. Parry
Supervisor, Customer Service

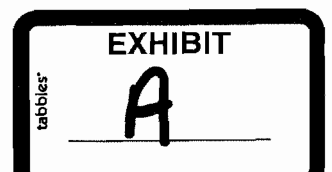


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EXHIBIT
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EXHIBIT C

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EXHIBIT
D
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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 17 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	Case No. CV-08-342 MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT (IDAHO R. CIV. P. 15)

The plaintiffs (collectively the Garners), through counsel of record, Thatcher Beard St. Clair Gaffney *Attorneys*, respectfully move this Court for an order granting leave to amend their second amended complaint pursuant to Rule 15(a) of the Idaho Rules of Civil Procedure. This

motion is supported by the affidavit of Michael W. Brown, filed concurrently herewith. The Garners request oral argument on this motion.

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

The Garners are awaiting final signature on a stipulated settlement agreement between themselves and all of the Defendants except the Poveys. Pursuant to this agreement, for valuable consideration, the defendants Deans, Neigums, and Viehwegs will assign to the Garners causes of action against the Poveys.[2]

It will be necessary to amend the Second Amended Complaint in order to include these additional causes of action against Povey defendants. The Garners are filing the present motion on the understanding that they have an agreement with the other Defendants to obtain the assigned claims. There is no undue delay in asserting these claims as the Garners are still in the process of acquiring them. In the interest of judicial economy, the Garners would like additional time to investigate the claims and then file an amended complaint pertaining to the assigned claims.

As the Garners presently understand the facts, they may bring at least two causes of action received by assignment against the Poveys. The claims and the bases therefor are as follows:

---

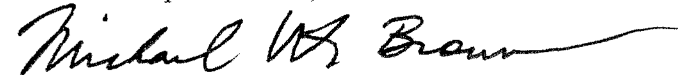
[2] The settlement agreement and stipulation will be filed with the Court as soon as it is signed by all parties. However, because there is a pending motion for summary judgment the Garners are filing this motion to preserve the assigned claims.

(1) Breach of Warranty. The Poveys had knowledge of the Garners' easement interest in the original access road. The Poveys conveyed various parcels of real property encumbered by the original access road easement to third parties. To varying degrees in each conveyance, the Poveys breached their warranty to these grantees by warranting title without disclosing the existence of the original access road despite their knowledge of it.

(2) Fraud. This claim may apply with respect to the conveyances the Poveys made to the Deans, Neigums, and Viehwegs, but most likely in the case of the Viehwegs. The Poveys knew of the existence of the original access road. They knew that the prospective purchasers of their property did not know of the easement. They represented in the conveying deeds that they were the owners in fee simple and that the property being conveyed was not subject to any encumbrances. This representation was false. The Poveys sought to induce reliance on this statement. The buyers of the property did in fact rely on this representation. The buyers were damaged by their reliance. Once the Garners have formally acquired these claims, they will be in a position to plead with particularity the elements of fraud in their third amended complaint.

The Poveys will not be prejudiced if the Court grants the Garners' Motion. In the interest of justice, the Court should grant the Garners' Motion to Amend Complaint.

DATED: September 22, 2009



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

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 22, 2009 I served a true and correct copy of PLAINTIFFS' MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT upon the following by the method of delivery designated:

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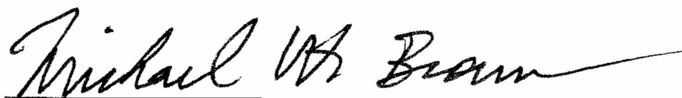

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DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO

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.	Case No. CV-08-342
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.	MOTION FOR ELARGMENT OF TIME (IRCvP Rule 56(f))

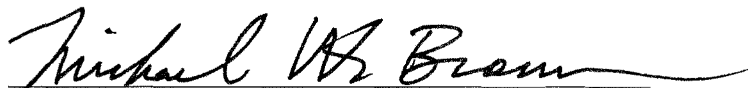
The Plaintiffs (collectively the Garners), through counsel of record, Thatcher Beard St. Clair Gaffney *Attorneys*, pursuant to IRCvP 56(f), respectfully move this Court to enlarge the

time in which to file affidavits in support of its Memorandum in Opposition to Motion for Summary Judgment. The Garners respectfully move for a continuance to of the summary judgment proceedings to allow depositions to be taken and discovery to be had. This motion is supported by the Affidavit of Michael Brown filed concurrently herewith. Oral argument is requested.

As set forth in the affidavit of Michael Brown, the Garners were attempting to settle this case in good faith. As a result, the Plaintiffs held off on serving discovery on the Poveys and deposing the Poveys. There is no trial date and a discovery cutoff has not even been set by the trial court. It would not prejudice the Poveys if the Garners were given an opportunity to conduct discovery.

Additionally, the Garners are in the process of acquiring assigned claims against the Poveys. The Garners need additional time to investigate the assigned claims. Based on the foregoing, the Garners respectfully request that the summary judgment proceedings be continued.

DATED: September 22, 2009



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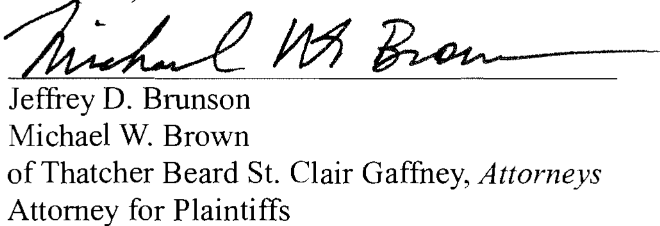

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DISTRICT COURT SIXTH JUDICIAL DISTRICT
FRANKLIN COUNTY IDAHO

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 PLAINTIFF'S MOTION TO STRIKE AFFIDAVITS OF RON KENDALL, IVAN JENSEN, TED RICE, LORRAINE RICE, AND JUDY PHILLIPS

The plaintiffs, through counsel of record, object and move to strike the affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips submitted by

Poveys in support of their motion for summary judgment. This basis for this motion is set forth below. Oral argument is requested.

ARGUMENT

The affidavits fail to comply with Idaho Rule of Civil Procedure 56(e), which establishes standards for admissibility of supporting affidavits. The rule states in relevant part, "Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." IDAHO R. CIV. P. 56(e)(2009)(emphasis added). The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge. *State v. Shama Resources Ltd.*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995).

An affidavit stating no more than mere denials, assertions or beliefs of what might have been are legally insufficient to avoid judgment and create a genuine issue of material fact. *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 1024, 712 P.2d 721, 725 (Ct. App. 1985).

The question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inference rules of summary judgment. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992).

The affidavits must be stricken from the record for their failure to adhere to the standards required for admissibility of supporting affidavits. The affidavits' deficiencies are addressed below.

KENDALL AFFIDAVIT

1. Paragraph 1 is hearsay and lacks foundation. Gary Garner is deceased and unable to authenticate the legitimacy of these statements. Also, Gary Garner is not a party to this lawsuit.

2. Paragraph 2 is hearsay and lacks foundation. Gary Garner is deceased and unable to authenticate the legitimacy of these statements. Also, Gary Garner is not a party to this lawsuit.

JENSEN AFFIDAVIT

1. Paragraph 2 is irrelevant, vague, and lacks foundation. There is no foundation for the statement "what is now known as the Rice right of way". What constitutes the Rice right of way is vague. It does not provide a foundation of fact that the easement was not discussed. The discussion is hearsay and is irrelevant.

2. Paragraph 3 lacks foundation, is vague, and is not relevant.

3. Paragraph 4 is hearsay and is not relevant. Gary Garner is deceased and unable to authenticate the legitimacy of these statements. Also, Gary Garner is not a party to this lawsuit.

4. Paragraph 5 lacks foundation as to what constitutes the "Rice right of way."

5. Paragraph 6 contains hearsay, lacks foundation and is vague.

6. Paragraph 7 is hearsay. Gary Garner is deceased and unable to authenticate the legitimacy of these statements. Also, Gary Garner is not a party to this lawsuit.

TED RICE AFFIDAVIT

1. Paragraph 2 is irrelevant, vague, and lacks foundation. Mr. Rice does not establish a date nor a time when he met with Earl Ward, Ron Kendall and Gary Garner. There is no foundation for the statement "what is now known as the Rice right of way".

What constitutes the Rice right of way is vague. Whether Mr. Rice was able to hear what was being discussed is irrelevant. It does not provide a foundation of fact that the easement was not discussed. The discussion is hearsay and is irrelevant as the parties could have met at any other time without Mr. Rice present to discuss the Garner Easement.

2. Paragraph 3 lacks foundation, is vague, and is conclusory. Mr. Rice's affidavit fails to establish necessary foundation for testifying as to how he is familiar with the Neigum driveway and the roadway that goes past the Dean home. This paragraph is a vague and generalized statement.

3. Paragraph 4 lacks foundation, is conclusory, is vague, and is speculative in nature. Mr. Rice's affidavit fails to establish necessary foundation for testifying as to how he has knowledge that the Garners' property was originally accessed by an existing roadway that ran generally along the course of what is now known as the Neigum driveway. This paragraph is a vague and generalized statement.

4. Paragraph 5 lacks foundation, is conclusory, is vague, and is speculative in nature. Mr. Rice's affidavit fails to establish necessary foundation for testifying as to how he has knowledge that the roadway that goes past the Dean home originally terminated at the outbuildings and did not go all the way through to the bridge that crosses the canal. This paragraph is a vague and generalized statement.

LORRAINE RICE AFFIDAVIT

1. Paragraph 1 lacks foundation, is vague, and is conclusory. Mrs. Rice's affidavit fails to establish necessary foundation for testifying as to how she is familiar with the Neigum driveway and the roadway that goes past the Dean home. This paragraph is a vague and generalized statement.

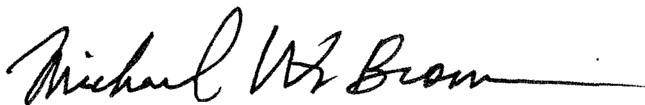
2. Paragraph 2 lacks foundation, is conclusory, is vague, and is speculative in nature. Mrs. Rice's affidavit fails to establish necessary foundation for testifying as to how she has knowledge that the Garners property was originally accessed by an existing roadway that ran generally along the course of what is now known as the Neigum driveway. This paragraph is a vague and generalized statement.

3. Paragraph 3 lacks foundation, is conclusory, is vague, and is speculative in nature. Mrs. Rice's affidavit fails to establish necessary foundation for testifying as to how she has knowledge that the roadway that goes past the Dean home originally terminated at the outbuildings and did not go all the way through to the bridge that crosses the canal. This paragraph is a vague and generalized statement.

PHILLIPS AFFIDAVIT

1. The attachment appears to be an incomplete copy of the entire minutes, is hearsay, lacks foundation, is vague, and is not relevant. No indication is given as to who is discussing the bridge issue. The bridge issue is not relevant to this issue. It is unclear what is being discussed and who is discussing based on the affidavit and the document provided.

Date: September 22, 2009



Michael W. Brown
for Jeffrey D. Brunson
Of Thatcher Beard St. Clair Gaffney PA
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 22, 2009, I served a true and correct copy of the *Motion to Strike Affidavits of Ron Kendall, Ivan Jensen, Ted Rice, Lorraine Rice, and Judy Phillips* upon the following by the method of delivery designated:

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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

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BRAD POVEY AND LEIZA POVEY

The plaintiffs, 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 (collectively "Garners"), through counsel of record, respectfully submit the following memorandum in opposition to the motion for summary judgment filed by the defendants, Brad Povey and Leiza Povey (collectively "Poveys").

INTRODUCTION

The claims in this lawsuit arise from controversies surrounding the Garners' right-of-way over a roadway that has been described in this litigation variously as "the original access road" and "the northern road." Most of the Garners' claims stem or originate from the Povey defendants' actions that impaired, obstructed, interfered with, and threatened to cause the extinguishment of the Garners' easement over the original access road. These actions further threatened the Garners with loss of adequate, year-round access to their property. In their motion for summary judgment, the Poveys' fail to meet their burden of establishing a lack of a genuine issue of material fact, so their motion fails as a matter of law. Based on numerous disputed issues of fact and the law applicable to this case, the Court should deny the Poveys' motion.

FACTS

1. In their verified second amended complaint the Garners allege numerous facts relevant to this response to the Poveys' motion for summary judgment. The Garners hereby incorporate by reference all facts alleged in their second amended complaint.

2. In the early nineties the two fields on either side of the original access road were plowed. The original access road itself had also been plowed by a three bottom plow. This plowing caused Daniel to get stuck in his pickup while attempting to access his property via the original access road. Depo. Daniel Garner pp. 61:2-62:17.

3. In or about 2005 the original access road "was disturbed enough that the gravel base was

gone, and [Daniel] got stuck twice and had to pull [himself] out." Depo. Daniel Garner at 70:4-73:4. This disturbance of the original access road happened due to planting of oats on the roadway. Depo. Daniel Garner at 73:24-74:2. The Poveys owned the servient estate through which the original access road passed at this time. Aff. Daniel Garner ¶ 10.

4. Nola Garner observed one of the Poveys' nephews "disturbing the road so that it could be planted." Depo. Nola Garner at 94:4-94:19.

5. The disturbance of the road happened in close proximity to the Poveys' sale of property to the Viehwegs. Depo. Daniel Garner at 89:13-14.

6. For many years Daniel Garner accessed his property west of the Twin Lakes Canal via the original access road. In accessing his property, Daniel drove farm machinery, gravel trucks, and other machinery that necessitated a roadway thirty feet in width. The original access road provided this necessary width. The Poveys themselves regularly used the original access road during the period of time when they owned property west of the Twin Lakes Canal. The Poveys had actual knowledge of Daniel's use of the original access road during and after this period of time. Aff. Daniel Garner ¶ 4.

7. In 1999, the Poveys conveyed a parcel to the Deans. This parcel was subject to the Garners' interest in the original access road, but the conveying deed did not identify the Garners' interest.

8. Brad Povey approached Daniel and asked him to relinquish his interest in the original access road and to accept instead the replacement roadway (also known as the "middle roadway" and the "Neigum Driveway"). Povey produced a legal instrument that purported to relocate Daniel's easement interest. After considering Mr. Povey's proposal, Daniel refused to agree to relocation of the easement. Mr. Povey approached Daniel again with a request that Daniel

relocate the easement. Again, Mr. Povey produced a legal instrument purporting to relocate Daniel's easement interest for Daniel to sign. Daniel again refused to execute the document and indicated to Mr. Povey that he (Daniel) would not agree to relocate the easement. Depo. Daniel Garner at 114:4-122:7.

9. After Mr. Povey's repeated attempts to persuade Daniel to agree to relinquish his rights in the original access road and to accept the replacement road, the Poveys conveyed by warranty deed a parcel of real property to the Neigums. Aff. Michael W. Brown ¶ 15. The warranty deed the Poveys gave the Neigums indicates the property is subject to a 20-foot-wide easement generally following the course of the middle roadway, the very "replacement road" Daniel twice refused to accept as a substitute for his easement over the original access road. Aff. Daniel S. Garner ¶ 8.

10. The Poveys later conveyed a parcel of property to the Viehwegs. The warranty deed given in connection with this conveyance neither identifies nor acknowledges the original access road easement or the replacement road easement despite the fact that the original access road runs through the property and the replacement road runs along the southern boundary of the property. *See* Aff. Michael W. Brown ¶16.

LEGAL STANDARD

In considering the Poveys' motion for summary judgment, this court should apply the familiar standard of review applicable when Idaho district courts review motions for summary judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56 (2009); *See Grover v. Wadsworth* 205 P.3d 1196, 1999, 2009 Ida. Lexis 45, 6

(2009).

"The moving party bears the burden of establishing the lack of a genuine issue of material fact." *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The non-moving party is entitled to show a genuine issue of material fact regarding the elements challenged by the moving party's motion. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990)(citing *Celotex v. Catrett*, 477 U.S. 317 (1986)); see also *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

"Standards applicable to summary judgment require the district court...upon review, to liberally construe facts in the existing record in favor of the nonmoving party, and to draw all reasonable inferences from the record in favor of the nonmoving party." *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). "[M]otions for summary judgment should be granted with caution." *Id.* If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Id.*

ARGUMENT

The Poveys' actions in this case impaired, obstructed, interfered with, and threatened to cause the extinguishment of the Garners' easement over the original access road. These actions further threatened the Garners' with loss of adequate, year-round access to their property. The Poveys have moved for summary judgment on the Garners' claims. However, the Poveys cannot meet their burden of establishing a lack of a genuine issue of material fact with respect to the Garners' claims. Thus, the Poveys' motion for summary judgment must be denied. In the alternative, the Poveys' motion should be denied because the Garners have not had an adequate opportunity to conduct discovery, the fruits of which would serve to further substantiate the factual basis for the claims the Garners assert against the Poveys.

I. THE GARNERS ESTABLISHED AN EASEMENT RIGHT IN THE ORIGINAL ACCESS ROAD SPECIFICALLY, NOT JUST ANY SUITABLE ACCESS.

As set forth in the second amended complaint, the Garners acquired their easement rights in the original access road based on 1) the McCullochs' conveyance of a 40-acre parcel to Daniel in 1987, which included the right to access this parcel via the original access road, *see* ¶¶ 1-8 of the second amended complaint; and 2) the Poveys' conveyance of their property west of the Twin Lakes Canal to Gary and Nola Garner, which included the right to access this property via the original access road, *see* ¶ 11 of the second amended complaint. Alternatively, the Garners acquired an easement interest over the original access road based on theories of easement by implication, express easement, and easement by prescription.

Regardless of how the Garners obtained their easement interest in the original access road, the question raised by the Poveys in their motion for summary judgment is not whether the Garners may validly claim an easement interest over the original access road. Instead, the Poveys assert that while the Garners may have a right to *an access* to their properties, they do not have a right to a *particular access* to their property and that the Poveys could "unilaterally designate[] the path of the roadway." Defs.' Memo. Supp. Mot. Summ. J. at 6. It is apparently based on this argument that the Poveys seek to avoid liability for impairing and interfering with the Garners' original access road easement by taking affirmative steps to extinguish, obstruct, and create doubt about its existence when the Poveys undeniably knew of its existence.

The Poveys argue the Garners "do not have the right to claim any particular route of access over the servient estate in this case but only a reasonable access route." Defs.' Mem. Supp. Mot. Summ. J. at 2. In support of this argument, the Poveys rely on *Bethel v. Van Stone*, 120 Idaho 522, 817 P.2d 188 (Idaho 1991) for the proposition that in cases of an easement not bounded in the grant, the servient estate owner has the right to locate the road, "and, if

reasonably suitable for the purpose, a selection of a place cannot be questioned." Defs. Mem. Supp. Mot. Summ. J. at 6. This argument fails for at least three reasons.

First, the original access road is not an unbounded easement subject to the analysis urged by the Poveys. In *Bethel*, an easement was purportedly created in 1974 in an instrument referring to "an existing road." The trial court found evidence that "no developed road existed through the meadow [servient estate] in 1974." *Bethel*, 120 Idaho at 527, 817 P.2d at 193. In fact, the plaintiffs' "infrequent travel [over the servient estate] left barely discernable tracks." *Id.* Because there was no existing road at the time the easement was created in *Bethel*, it was appropriate for the court to analyze it as an unbounded easement.

In contrast to the uncertain and unbounded location of the easement in *Bethel*, the location of the right-of-way in the present case has always been certain. The original access was first described in the contract of sale from McCullochs to Daniel Garner. The contract of sale qualifies as a conveyance. Idaho Code § 55-813 (2009). The contract of sale expressly identifies the easement as "a right-of-way across Seller's adjacent property *along an existing roadway*." *See* Exhibit A, second amended complaint (emphasis added). A 1999 Idaho Supreme Court ruling indicates that reference to an existing road is an accepted method of identifying an easement. *See Conley v. Whittlesey*, 133 Idaho 265, 270, 985 P.2d 1127, 1132 (Idaho 1999) (An easement is "particularized to the extent the existing road [is] readily located….").

Here, the original access road cannot be an unbounded easement because there is not and never has been uncertainty about its precise location. Even if there were disputes about its location or dimensions, those would be questions for the trier of fact to resolve. The facts attending the existence and use of the original access road, however, leave little doubt about its location. After granting it to Daniel, the McCullochs continued to use it as long as they owned

property west of the Twin Lakes Canal, and Daniel used it continuously to access his property from the time he acquired his property from the McCullochs to the filing of this lawsuit. The Poveys themselves acquired an interest in the original access road easement when they bought the McCullochs' remaining property. The Poveys used it to access their property west of the Twin Lakes Canal, and Nola and Gary continued to use it after they succeeded to ownership of the Poveys' property west of the Twin Lakes Canal. The record is replete with facts showing certainty regarding the precise location of the original access road. Because the location of the original access road is fixed with certainty, the Poveys could not, as they suggest, assert the easement was not bounded and unilaterally designate the path of the roadway.

Second, even if the original access road were an unbounded easement, the servient estate owners' acquiescence to the Garners' frequent and consistent use of the original access road caused the original access road to become the fixed location of the Garners' right-of-way. A closer reading of *Bethel* shows that even if it were applied to the facts of this case, it would not justify the Poveys' attempted relocation of the Garners' right-of-way. After describing the servient estate owner's right to locate a dominant estate owner's unbounded right-of-way, the Bethel court further explains, "If the grantor omits to exercise this right, the grantee may make the selection and his selection will be upheld unless he has abused the right." *Id.* As early as 1987 and as late as 1990, the servient estate owners of the original access road began acquiescing in the Garners' use of it as a right-of-way.

It seems obvious why the McCullochs acquiesced in Daniel's use of the right-of-way beginning in 1987 – use of the original access road was an intended benefit of the bargain Daniel made with the McCullochs. From 1990 until Brad Povey approached Daniel with a proposal to relocate the easement shortly before the Poveys' sale to the Neigums, the Poveys acquiesced in

the Garners' use of the original access road. When the servient estate owners, including the Poveys as successors to McCullochs and in their own right, acquiesced to the Garners' use of the original access road for at least fourteen years, its location became fixed, and its location could not be changed without the Garners' consent. *See* 25 AmJur.2d § 67 (2008); *see also* *Carrollsburg v. Anderson*, 791 A.2d 54, 61 (D.C. 2002)[1]. The Poveys' actions to force a change in the Garners' easement, as more fully discussed below, was wrongful. At the very least, whether the servient estate owners acquiesced to the Garners' use of the original access road is a question of fact for the jury.

Third, even if the Poveys could claim a right to relocate the Garners' right-of-way, their attempt at relocation was unlawful. According to the *Bethel* court, a servient estate owner's relocation of a dominant estate owner's easement cannot be questioned only "if *reasonably suitable* for the purpose." *Bethel*, 120 Idaho at 528, 817 P.2d at 194. Suitability for a particular purpose is a question of fact the trier of fact must resolve. Here, the Poveys were on notice of the Garners' use of the original access road, which is thirty feet wide, for the purposes of hauling gravel in large trucks and moving large farming equipment to and from the Garner properties. The Poveys' attempt to replace the Garners' original access road with the 20-foot-wide right-of-way identified in the deed to the Neigums, Exhibit N to the second amended complaint, was not suitable for the Garners' long practiced purposes and needs. Thus, even if the Poveys could have relocated the right-of-way, they failed to do so lawfully in this case. In any event, the Garners have at least raised a genuine issue of material fact regarding whether relocation of the Garner easement was reasonably suitable for the Garners' purposes.

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[1]"It is a familiar rule that, when a right of way is granted without defined limits, the practical location and use of such way by the grantee under his deed acquiesced in for a long time by the grantor will operate to fix the location. The location thus determined will have the same legal effect as though it had been fully described by the terms of the grant."

The Poveys make much ado about the supposed desire of Gary Garner to protect children by securing an alternate access for Daniel. First, Gary Garner is not a party to this lawsuit, and his desires could not and do not impact the legal rights of Daniel Garner, whose claim to the original access road is independent of Gary's and Nola's. Second, While the Garners are not insensitive to concerns about the safety of children, none of these issues the Poveys raise is relevant to whether the Garners had a right in the original access road and whether the Poveys had the right to relocate it. Moreover, Daniel never consented to or acquiesced in acquiring the Rice Roadway. Aff. Daniel S. Garner ¶ 11. Daniel also never agreed to use the Rice roadway at the time it was acquired by Gary Garner. Aff. Daniel S. Garger ¶ 11. The analysis above shows clearly the Poveys did not have a right to relocate the easement without the Garners' consent.

II. THERE ARE TRIABLE ISSUES OF FACT REGARDING THE POVEYS' IMPAIRMENT OF AND INTERFERENCE WITH THE ORIGINAL ACCESS ROAD.

The Poveys assert "there is no evidence of the Povey defendants doing anything to stop the Garners from using any access they like." Defs.' Memo. Supp. Mot. Summ. J. at 5. This assertion is undermined by the record. There are genuine issues of fact concerning the actions taken by the Poveys to interfere with the Garners' use the original access road. Idaho law is clear regarding the duties of servient estate owners with respect to easements. "Where a servient landowner takes...land subject to the easement..., he must refrain from interfering with the use of the easement. *Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 377, 723 P.2d 914, 921 (1986). "An easement owner is entitled to relief upon a showing that he is obstructed from exercising privileges granted by an easement. *Id.* (citing *Connecticut Light and Power Co. v. Holson Co.*, 185 Conn. 436, 440 A.2d 935 (1981)).

A. There are triable issues of fact relating to the Poveys' efforts to eliminate the Garners' easement and the Poveys' wrongful conveyance to third parties.

In this case, the servient estate owner Poveys interfered with the Garners' right-of-way over the original access road by seeking to terminate it, apparently to facilitate the sale of one or more of their properties lying east of the Twin Lakes Canal. On this point, there is clearly a genuine issue of material fact.

The Poveys completely misrepresent the deposition testimony of Daniel Garner by stating as fact that "Dan Garner did not inform Brad Povey that he disagreed with changing the course of the roadway. Instead he indicated his consent by stating that the idea was worthy of consideration." Defs.' Memo. Supp. Mot. Summ. J. at 4. The deposition of Daniel Garner, tells quite a different story.

Q. Did you ever talk with Brad Povey about putting a description of your right-of-way across that property in writing, across what was the McCulloch property? Did you and Brad ever have a discussion about reducing to writing exactly what that right-of-way was and wehre it was located?
A. No.
Q. Do you ever recall any discussions with Brad about him wanting to put in writing a description of the right-of-way?
A. Yes.
Q. Okay. Tell me about that.
A. He said that he would like to move it; and if he did he would put it in writing.
Q. All right. And when did that occur? While Brad was still living in the home that's now the Dean home?
A. Yes, I think it was before the Deans bought it.
Q. All right. Did you have one such discussion or more than one discussion?
A. More than one.
Q. Okay. And were they in person?
A. Yes.
Q. Do you know where you were at the time of the discussions?
A. Yes.
Q. Where were you?
A. The first one he caught me there at the property.
Q. On the northern roadway?
A. Just on the property somewhere.
Q. Okay. How many such discussions were there?
A. Four.
Q. Are you able to separate them in your mind?
A. Yes.

Q. Tell me about the first of those four discussions. And that was somewhere on the property, you're not sure when, but Brad was still living in the house; is that correct?

A. I don't know if Brad was living in the house or if he was in Pocatello.

Q. Okay. But it was before the Deans had bought the house?

A. Yes.

Q. Okay. Tell me what Brad said during that conversation.

A. He said that he would like to move the roadway over to a different position.

Q. Did he tell you where?

A. Roughly at that time.

Q. And where was it? Was that roughly where the Neigum driveway is?

A. Yes, where the driveway would go.

Q. What else did he say? I think you said that he at one point told you if he did that he would put it in writing?

A. Yes, I think he did.

Q. Okay. And how did you respond? What did you say during that first meeting?

A. I told him a phrase that my dad always taught me to say when you're caught off guard. I told him that that definitely deserves some consideration. He had a puzzled look on his face, so I told him that I didn't see a problem with it but that I wanted to think about it.

Q. When was the next discussion?

A. Oh, sometime later he showed up at my house with a piece of paper that Steve Fuller had drawn up to sign that would move the right-of-way. I don't have the legal document, but I believe it was – it didn't have the description of the right-of-way, but I believe it was just an agreement to move it. And I told him that I had not had time to think about it.

Q. How much after the first meeting was this?

A. I don't know. And then –

Q. Let me back up. Anybody else present besides you and Brad?

A. Not that I know of.

Q. Okay. And he had a document with him?

A. Yes.

Q. Did you keep a copy of the document?

A. Yes. He left it in there for me to think about and sign.

Q. Do you still have a copy of it?

A. I don't.

Q. Do you know where it went?

A. Yes.

Q. Where?

A. I gave it back to him at the next meeting.

Q. Okay. What else was said during – what was said during this second meeting at your home?

A. Just that I hadn't had enough time to have thought about it and I would continue to do so.

Q. Okay. Tell me about the third meeting.

A. Okay. The third meeting he called at the house again. I gave it back to him and told him I'd thought about it and decided not to sign it. I didn't want to move it. I liked it where it was, it was fine, I didn't want to mess with it.

Q. And did he say anything?

A. He asked me why.

Q. Did you respond?

A. I did not.

Q. How did that conversation or meeting end?

A. It just ended.

Q. Okay.

A. He left. The next thin, then next meeting – I thought that had resolved it. I thought it was a moot issue, was done.

Q. Let me ask you this first. The document that he had, did it describe where the easement, or the right-of-way, whatever it was, did it describe where the right-of-way would go?

A. I don't believe it did. Like I said, I don't remember, I don't have the document, but I believe at that point it was just an agreement to move it.

Q. Okay. But no description of where it would be?

A. I don't think so.

Q. Was there going to be a description of the course of the right-of-way? I mean –

A. I assume there would be if I signed it and we would have moved it.

Q. But there wasn't any discussion about we need to have a description of exactly where this right-of-way is going to go? Did that ever come up in your conversations with Bard about putting in place a description of where the right-of-way was?

A. He said that he would do that if we moved it.

Q. Okay. Now, have you told me everything about the third meeting?

A. Yes.

Q. Tell me about the fourth one.

A. The next time he came to the house he had the paper again.

Q. The same paper?

A. Same paper. Well, a copy of the same paper maybe. And he had a deed.

Q. How carefully did you read the paper that he prepared?

A. I didn't read it at all.

Q. Okay. So it may have been the same paper, may have been something completely different?

A. Correct. I just thought about whether or not I wanted to move it.

Q. All right. And he also had a deed at the fourth meeting?

A. Yes, a deed that showed – it was a copy of the Neigum deed that showed the right-of-way on it. I was a little agitated because, like I said, I thought it was solved. I had told him I didn't want to move it. And I didn't sign it.

Q. Was there a place for you to sign that deed?

A. Not on the deed, I don't believe. But on the paper there was.

Q. How did you know it was the Neigum deed? Did you read the Neigum deed at that point?

A. Yes.

Q. So he showed you what – was this before or after the deed had been executed?

A. Now that I don't know.

Q. Had it been signed by Brad at that point?

A. I don't know. I didn't look.

Q. All right. How do you know it was the Neigum deed?

A. The first part of it, of the deed, said –

Q. Named the Neigums?

A. Correct.

Q. Did you know the Neigums at that point in time?

A. No. And then shortly after that Steve Fuller called and told me that the paper was ready to sign. I informed him I wasn't going to sign it. Well, his secretary called, I should say, from his office.

Depo. Daniel Garner at 114:4-122:7.

Mr. Povey's attempt to persuade Daniel to relinquish his easement is significant for a number of reasons. First, it indicates Mr. Povey acknowledged Daniel's interest in the easement. Second, it put Mr. Povey on notice that Daniel affirmatively opposed any altering of his easement. Third, it demonstrates that Mr. Povey knew the location of the easement. With this knowledge, Mr. Povey nevertheless sold property to the Neigums and identified in the Neigum deed the replacement road Daniel rejected while failing to reference the Garners' easement over the original access road, which Mr. Povey knew to exist. The Poveys then conveyed a parcel to the Viehwegs. In the Viehweg deed, the Poveys represented that they were the owners in fee simple and that the property being conveyed was free from all encumbrances. These representations, of course, were not true, but they likely induced the Viehwegs to purchase the property and subsequently seek to deny Daniel's easement over the original access road both physically (placing a barricade in the road) and legally (by retaining legal counsel to pressure Daniel to abandon his easement).[2] The Poveys also failed to expressly identify the original access road in one of the deeds to the Deans in 1999. *See* Aff. Michael W. Brown ¶ 14.

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[2] The same analysis applies to the effect the Poveys' actions had on the easement interest in the original access road Gary and Nola acquired from the Poveys by purchasing their property west of the Twin Lakes Canal.

Throughout the course of this litigation, and most recently in Section III B of their brief, Poveys suggest that they have done nothing but enhance the Garners' easement. The Poveys' self-portrayal as earnest preservers of the Garners' easement is shattered by their actual conduct in this case. The most recently recorded deed regarding this property executed by the Poveys affirmatively, but falsely, represents that they were the owners in fee simple and that the property being conveyed was free from all encumbrances. *See* Aff. Michael W. Brown ¶ 16. The recording of this deed had the effect of denying the Garners' interest in both the original access road and the replacement access road. The Poveys' wrongful conduct is the genesis for this entire lawsuit.

As a result of the Poveys' actions, the Garners were obstructed from exercising their privileges in their easement, entitling them to relief. As this court already found, the Garners have made "a colorable claim as to the breach of a duty the Poveys may have to Garners, arising out of...the deeds from Poveys to Dean, Viehweg, and Neigum, that the Poveys' acts or omissions may have had the effect of attempting to extinguish Garners' right-of-way." (Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 8.) The Garners have at least raised issues of triable fact as to whether the Poveys' knowingly interfered with their easement by wrongfully conveying properties to third parties without disclosing the existence of the Garners' easement interest in the original access road.

B. There are triable issues of fact relating to the Poveys' physical interference with the original access road.

The record raises genuine issues of fact as to whether and to what extent the Poveys physically interfered with the original access road. In its Decision and Order on the Povey Defendants' Motion to Dismiss Amended Complaint, this Court held, "It would be possible for Poveys to block, hinder, or obscure the access road without permanently depriving Garners of its

use, and *the level of the alleged obstruction, and any resulting damage, would remain an issue for the jury to determine*." (Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 8 (emphasis added).)

On at least two occasions, the original access road was damaged by either plowing or cultivating. The circumstances surrounding the damage support an inference that the Poveys damaged, obstructed, or interfered with the Garners' easement interest in the original access road. Moreover, if the court will allow the Garners to conduct discovery as requested in the Garners' Rule 56(f) motion filed concurrently, the Garners are likely to refine the presentation of their factual basis for claiming physical interference with their easement.

Even relying only on the evidence in the record, there are genuine issues of fact that cannot be resolved that the summary judgment stage. For example, the Poveys seek to explain away the Garners' allegation that the Poveys plowed over the original access road by stating, "A better way to describe what happened is that portions of the roadway were cultivated along with fields on either side of the roadway, a practice not uncommon with regard to farm roads of this nature." Defs.' Memo. Supp. Mot. Summ. J. at 11. While the Poveys' conjecture is interesting, it cannot eliminate genuine issues of fact where evidence in the record offers a competing and plausible explanation. Nola Garner observed a nephew of Brad Povey "disturbing the road so that it could be planted." Depo. Nola Garner at 94. This observation combined with the fact that the Poveys owned the servient estate properties on either side of the original access road gives rise to the reasonable inference that the Poveys were complicit in this disturbance of the road. The Poveys seek to dismiss any possible inference that this nephew could have been "disturbing" the road at the behest of his uncle by positing, "No inference can be drawn from family relationship." Defs.' Mem. Supp. Mot. Summ. J. at 12. Nevertheless, as the nonmoving party,

the Garners are entitled to have the court liberally construe facts in the existing record in their favor. *Bonz v. Sudweeks*, 119 Idaho at 541, 808 P.2d at 878.

Daniel Garner discovered another instance of interference with the original access road sometime in the spring of [2005.]

> Q: All right. The second disturbance of the roadway, and we'll talk about what you mean by a disturbance in a minute, but what portion of the roadway did that occur on?
> A: Between the granaries and the hay barn.
> Q: Between the granaries and the hay barn?
> A: The section – this section here.
> A: Okay. Show me on exhibit M where the first plowing occurred.
> A: Off the exhibit.
> Q: Past the hay barn and up towards the canal?
> A: Correct.
> Q: And then the second time we're talking about a disturbance, that occurred between tract 1 of the Viehweg property and tract 2 of the Viehweg property?
> A: Correct.
> Q: And tell me what the disturbance was? Did it go beyond and up the hill to where the plowing had occurred the first time?
> A: No. It was just right there.
> Q: Just that little section there?
> A: Correct.
> Q: Okay. Tell me what the disturbance was at that time.
> A: I don't know, but it was enough that I sank with the backhoe and got stuck twice.
> Q: You don't know what kind of implement was used to do that?
> A: I do not.
> Q: You got stuck twice?
> A: Correct.

Depo. Daniel Garner pp. 71:6-72:15.

This incident in which the road was disturbed happened in the spring of [2005?]. At this time the Poveys owned the servient estate property now owned by the Viehwegs.

> Q: And so the disturbance would have gone across the road in the area between tract 1 and tract 2 of the Viehweg property?
> A: Correct.
> Q: Missing the grain bin, basically?
> A: Correct.
> Q: Okay. I kind of take it that you wouldn't have farmed it that way?
> A: No.
> Q: Other than that, is there anything that leads you to believe that that planting –

that disturbance and planting was done to obliterate the roadway?

A: Just that it was done in close proximity to the selling to Viehweg.

Depo. Daniel Garner pp. 88:25-89:14.

The totality of circumstances surrounding the planting and disturbance of the original access road in 2005 gives rise to a reasonable inference that the Poveys were responsible for it, especially given the fact that the Poveys had sought to eliminate the Garners' original access road easement once before in connection with the sale to the Neigums. In any event, the Garners have raised genuine issues of material fact in regard to their claims that the Poveys physically interfered with the original access road. A determination of the magnitude of this interference and any resulting damages is within the province of the jury. (*See* Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 8.)

The Poveys seek to undermine the Garners' claim of interference by asserting that the Garners must prove that the Poveys plowed the roadway with the intent to interfere with Garners' use or to obliterate the roadway to facilitate a sale of the property to an unsuspecting buyer who would take without knowledge of the roadway." Defs.' Memo. Supp. Mot. Summ. J. at 12. The Poveys cite no authority for this proposition, so the court should not consider it. Even if the Garners were required to show that the Poveys had intent to interfere with the Garners' easement, intent would be a question for the jury, further precluding summary judgment.

III. THE POVEYS BREACHED THEIR WARRANTY OF TITLE TO THE GARNERS.

The Garners' breach of warranty claim arises from many of the same facts and circumstances described above in II.A. It also arises from the fact that the Poveys failed to warrant and defend title to the parcel, with its appurtenant original access road easement, Nola and Gary bought from the Poveys in 1992.

The Poveys assert that breach of warranty occurs only when "at the time of making the

warranty, the seller does not have full title to the property being conveyed." While the Garners do not disagree that a cause of action for breach of warranty exists under those circumstances, the Garners' breach of warranty claim "is supported within the allegations of the Amended Complaint because it may arise out of the...deeds [given by the Poveys to the Deans, Neigums, and Viehwegs]." (*See* Decision and Order on Povey Defendants' Motion to Dismiss Amended Complaint at 8.)

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

The Garners acquired by warranty deed property west of the Twin Lakes Canal from the Poveys in 1992. Aff. Michael W. Brown ¶ In the warranty deed, the Poveys covenanted to warrant title to the property and its appurtenances they conveyed to the Garners, and the Poveys are in breach of that covenant. Following the legal description, the warranty deed to the property contains the following language:

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

The foregoing language clearly indicates the Poveys made a covenant of seisen, *see Simpson v. Johnson*, 100 Idaho 357, 361, 597 P.2d 600, 604 (1979), meaning they were lawfully seized of the property and its appurtenances (including the right-of-way used by the Poveys to access the property), and that they were entitled to convey the same. In the Warranty Deed, attached to the proposed amended complaint as Exhibit "F", the Poveys clearly made a covenant of warranty to the Garners. As established above, the Poveys covenanted and warranted to defend the Garners' access to their property via the original access road. This obligation arose out of the fact that the original access road easement passed with the property conveyed to Nola

and Gary, *see* Idaho Code § 55-603, and out of the fact that the Poveys themselves accessed the property conveyed property via the original access road. Aff. Daniel S. Garner ¶ 5.

"The general effect of a covenant of warranty is that the grantor agrees to compensate the grantee for any loss which the grantee may sustain by reason of a failure of the title which the deed purports to convey." Powell on Real Property § 81A.06[2][d][i]. This covenant of warranty applies with equal effect to the real property conveyed and any appurtenances, including easements, thereto. *See Walter Ethen v. Reed Masonry, Inc.*, 313 N.W.2d 19, 20 (Minnesota 1981)(defining and appurtenance subject to the covenant of warranty as "everything necessary to the beneficial use of property"). Thus, the Poveys warranted title to the property they conveyed to the Garners and access to the right-of-way constituting the only legal access to the property.

The Poveys are in breach of their covenant of warranty because the Garners have sustained loss and damages "by reason of failure of the title (which includes appurtenances) which the Povey deed purported to convey." *See* Powell on Real Property § 81A.06[2][d][i]. Not only has title to the property the Poveys conveyed to the Garners failed (due to the other defendants' now challenging the validity of the Garner easement), but the Poveys themselves directly and proximately caused that failure when they deeded property to the Deans, Neigums, and Viehwegs without disclosing the existence of the very right-of-way they promised to "warrant and defend from all lawful claims whatsoever." Further exacerbating circumstances, the Poveys affirmatively sought to impair and interfere with the easement as described above. The Poveys breached their warranty to the Garners, so their motion for summary judgment should be denied as a matter of law. The Garners have at least identified issues of genuine fact regarding the Poveys' conduct causing the breach.

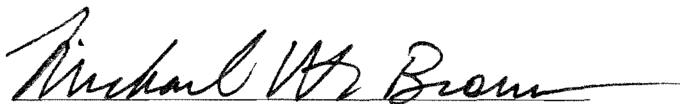
IV. THE POVEYS ARE NOT ENTITLED TO AN AWARD OF ATTORNEY FEES

Even if the court were to grant the Poveys' motion for summary judgment, the Poveys are not entitled to an award of attorney's fees. In the conclusion of their brief, Poveys argue that they are entitled to attorney fees. The Poveys have not cited a statute or otherwise stated a basis for recovery of attorney fees. Neither attorney fees statute applies here. In *Brown v. Miller*, 140 Idaho 439, 95 P.3d 57 the Supreme Court of Idaho declined to award attorney fees under Idaho Code § 12-120, holding, "Because this case involves an easement, there is no [commercial transaction] basis for an award of fees under this statute." *Id.* at 445, 63. This court already denied the Poveys' motion to dismiss, so the Poveys are not entitled to attorney fees under Idaho Code § 12-121 on the basis of prosecuting an action frivolously, unreasonably, or without foundation.

CONCLUSION

Based on the foregoing, the Poveys' motion for summary judgment should be denied.

Date: September 22, 2009



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CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho, I have my office in Rexburg, Idaho, and on September 22, 2009, I served a true and correct copy of *Memorandum in Opposition to Motion for Summary Judgment* upon the following by the method of delivery designated:

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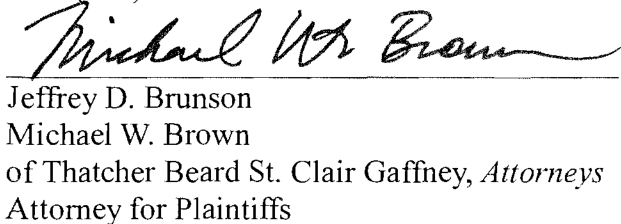

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR FRANKLIN COUNTY, STATE OF IDAHO

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	**POVEY DEFENDANTS MEMORANDUM IN OPPOSITION TO MOTION FOR ENLARGEMENT OF TIME** Case No. CV-08-342 Judge Dunn

The Plaintiffs filed a motion, pursuant to rule 56(f), Idaho Rules of Civil Procedure, for enlargement of time to respond to Defendant Brad and Leiza Poveys' Motion for Summary Judgment. However, the Rule 56(f) Affidavit of Michael Brown fails to meet either of the requirements of a 56(f) affidavit in that it fails to set forth any legitimate reason why the discovery Plaintiffs seek could not have been done earlier in this case that is now 12 months old. More importantly, the 56(f) affidavit fails to identify what, if any, admissible evidence Plaintiffs seek in the discovery they propose. Rule 56(f) is not an excuse for a fishing expedition. Therefore the motion for enlargement of time should be denied.

I. THE 56(f) AFFIDAVIT OF MICHAEL BROWN FAILS TO ARTICULATE A LEGITIMATE REASON FOR PLAINTIFFS' DELAY IN PURSUING THE DISCOVERY IT NOW SEEKS.

In order to obtain a continuance pursuant to Rule 56(f), the party opposing summary judgment bears a dual burden. First, the 56(f) affidavit must show a legitimate reason for the failure of the party to have made discovery in the case. And second, the 56(f) affidavit must set out what specific discovery the party proposes to pursue and what the party expects the proposed discovery to produce. The Michael Brown affidavit does neither.

Plaintiffs' excuse for not pursuing the discovery earlier in this case is "the Garners were attempting to settle this case in good faith." See, Plaintiffs Motion for Enlargement of Time, p. 2. This statement is false. There has been no good faith effort on the part of the Garners to settle with the Poveys. The Affidavit of Michael Brown states that "The Plaintiffs have attempted to settle their claims with the Poveys and have been unsuccessful." What this misleading sentence leaves out is that the first settlement offer made by the Plaintiffs to the Poveys was on September 3, 2009, after the Poveys had already moved the Court for summary judgment.

On the subject of settlement, the Plaintiffs also fail to point out to the Court that the Poveys made several attempts in the fall and winter of 2008 to settle the matter, but their offers fell on deaf ears. They got absolutely no response to their offers. Finally, on April 2, 2009, the Povey Defendants made another settlement offer. In that offer, they explained to the Garners that if settlement were not reached by April 15, 2009, the Poveys would move forward to protect their interests and bring this matter to a close. Again, no response from the Garners. When the Poveys noticed the depositions of the Garners, there was no settlement discussion initiated by the Garners.[1] In short, the Poveys were left in the dark about any attempt at settlement until September 3, 2009, when they were informed by the Garners that the Garners were attempting to obtain assignments of the claims of the other defendants and that when obtained, intended to widen this litigation through an attempted amendment. See, Affidavit of Blake S. Atkin in Opposition to Motion for Enlargement of Time, attached hereto as Exhibit A. It is preposterous for the Garners to claim good faith attempts to settle their claims with the Poveys.

Apparently sensing that their "good faith settlement" assertions have no merit in light of the absolute failure of the Garners to make any settlement offer to the Poveys until after the summary judgment motion was filed, Michael Brown asserts in his affidavit that settlement with the other Defendants, "would have changed the complexion of the Garners' claims against the Poveys." If that were the case, the Garners would have done well to refrain from bringing action against the Poveys until that complexion had changed. Rule 11 counsels that a claim should not be filed until it has matured. In fact, however, Mr. Brown knows that attempting settlement with

[1] It is not true that one of the other parties told the Poveys that they were attempting settlement. On the eve of the depositions, counsel for the Poveys was contacted by one of the other Defendants who merely stated that the date of the depositions was not convenient. Because the depositions had been noticed for several weeks and it would be an inconvenience for the witnesses and court reporter to reschedule at that late date, the Poveys politely refused the request. No settlement was mentioned.

the other parties did not put the litigation with the Poveys on ice. The Poveys had negotiated a stand still with the Garners shortly after the complaint was filed in this matter, in order to "stop churning fees." That agreement provided that the Poveys would have 20 days after notification to respond to the Complaint. In January, the Poveys were informed that the Garners demanded an answer to be filed so that the litigation could move forward. Poveys' attorney entered an appearance in February in response to that demand. See, Affidavit of Blake S. Atkin in Opposition to Motion for Enlargement of Time, attached hereto as Exhibit A. Having sued the Poveys for over half a million dollars, having demanded that the Poveys move forward with the litigation, and not having informed the Poveys about any settlement discussions, it is ludicrous for the Garners to try to use their secret settlement discussions with the other defendants as an excuse to now burden the Poveys, with whom they refused to initiate settlement discussions, with further delay and expense.

II. MICHAEL BROWN'S 56(f) AFFIDAVIT DOES NOT SET OUT THE FACTS ESSENTIAL TO JUSTIFY THEIR OPPOSITION THAT THEY HOPE THE PROPOSED DISCOVERY WILL PRODUCE.

Rule 56(f) specifically requires the affidavit to point out "the facts essential to justify the party's opposition" that they expect the discovery they propose to uncover. Nowhere in the Michael Brown affidavit does he even attempt to state what facts the Plaintiffs expect they could uncover in discovery or depositions that could have any effect on the motion for summary judgment. Without such specific delineation, a rule 56(f) continuance should be denied. Jenkins v. Boise Cascade Corp., 141 Idaho 233, 237, 108 P.3d 380, 384 (2005)(It was not an abuse of discretion for the trial court to deny a motion to vacate based upon the failure to set forth in a Rule 56(f) affidavit what additional relevant discovery would be necessary to respond to the

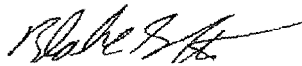
issues raised in the summary judgment motion). Rule 56(f) is not an excuse for a fishing expedition. Duffy v. Wolle, 123 F.3d 1026, 1041 (8th Cir. 1997).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Enlargement of Time should be denied.

DATED this 29th day of September, 2009.

ATKIN LAW OFFICS, P.C

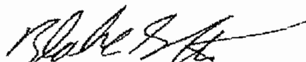


Blake S. Atkin
Attorney for the Povey Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2009, I caused to be served a true and correct copy of **POVEY DEFENDANTS MEMORANDUM IN OPPOSITION TO MOTION FOR ENLARGEMENT OF TIME** upon the following by the method of delivery designated:

Gordon S. Thatcher Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	_X_ U.S. Mail ___Hand delivery _X__ Fax
Eric Olsen Racine, Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, Idaho 83204-1391	_X_ U.S. Mail ___Hand delivery _X__ Fax
Ryan McFarland Hawley, Troxell Ennis & Hawley P.O. Box 1617 Boise, Idaho 83701-1617	_X_ U.S. Mail ___Hand delivery __X_ Fax
Franklin County Court 39 West Oneida Preston, Idaho 83263	__ U.S. Mail _X__Hand delivery ___ Fax



Blake S. Atkin

Exhibit A

Blake S. Atkin ISB# 6903
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Facsimile: (801) 533-0380

Attorneys for the Povey Defendants

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

Daniel S. Garner and Sherri-Jo Garner, husband and wife; Nola Garner, a widow and Nola Garner as Trustee of the Nola Garner Living Trust, dated July 19, 2007, Plaintiffs, v. Hal J. Dean and Marlene T. Dean, husband and wife, Douglas K. Viehweg and Sharon C. Viehweg, husband and wife, Jeffrey J. Neigum and Kathleen A. Neigum, as Trustees of the Jeffery J. Neigum and Kathleen A Neigum Revocable Trust, dated September 17, 2004; Jeffery J. Neigum and Kathleen A. Neigum, husband and wife; Brad Povey and Leiza Povey, husband and wife; First American Title Insurance Company, a Foreign Title Insurer with an Idaho Certificate of Authority; and First American Title Company, Inc., an Idaho Corporation, Defendants.	**AFFIDAVIT OF BLAKE S. ATKIN IN OPPOSITION TO MOTION FOR ENLARGEMENT OF TIME** Case No. CV-08-342 Judge Dunn

STATE OF IDAHO)
SS:
COUNTY OF FRANKLIN)

Blake S. Atkin, having been first duly sworn deposes and says:

1. I am attorney of record for the Povey Defendants in the above entitled matter.
2. I have personal knowledge of the matters set forth herein.
3. My clients have not owned property in the vicinity of this dispute since October 4, 2005.
4. In early November I made a settlement offer to the Garners on behalf of the Poveys. I got no response to that settlement offer.
5. Sometime later that year, I orally renewed my settlement proposal. Again I got no response.
6. In November 2008, I urged Plaintiffs' counsel to agree to a stand still between his clients and mine so that his clients could attempt to resolve the dispute with people who did own the servient estate without running up unnecessary fees between two parties who could not settle the dispute over the right of way.
7. Plaintiffs' counsel agreed with the proviso that when notified, the Poveys would answer the complaint within 20 days.
8. In January, I was informed that the Garners insisted on an answer to the Complaint by the Poveys.
9. I again made a settlement offer for which I got no response. I suggested that settlement needed to be accomplished with dispatch because of the growing attorney fees bill being faced by both the Garners and the Poveys.

10. On April 2, 2009 I made a written settlement offer to the Garners and stated that if settlement had not occurred by April 15, 2009, the Poveys would have no choice but to move forward to protect their interests. I got no response.

11. On April 29, 2009, I noticed the depositions of Nola Garner, Daniel Garner, and Sherri-Jo Garner.

12. I received no communication from the Garners about settlement or otherwise.

13. On the eve of the depositions, I received a phone call from counsel for one of the other Defendants.

14. He told me that the dates of the depositions was not convenient and asked if I would reschedule them.

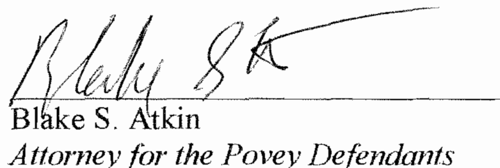
15. I normally like to accommodate such requests, but this one coming so soon before the deposition, I did not feel it was fair to the witnesses, the court reporter, or to my client to reschedule the deposition so I refused.

16. Based on the results of my discovery, I filed a motion for summary judgment on September 1, 2009.

17. Two days later I received the first settlement offer the Plaintiffs ever made in this case.

18. We countered that offer, but the parties have not been able to settle the matter.

DATED this 29 day of September, 2009.



Blake S. Atkin
Attorney for the Povey Defendants

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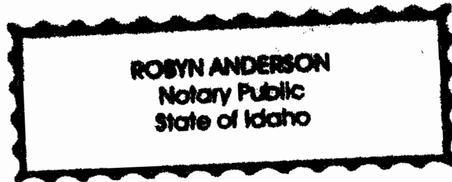
SUBSCRIBED and SWORN before me this 29 day of September, 2009.

Notary Public
My Commission expires: 10-16-12



CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of September, 2009, I caused to be served a true and correct copy of **AFFIDAVIT OF BLAKE S. ATKIN IN OPPOSITION TO MOTION FOR ENLARGEMENT OF TIME** upon the following by the method of delivery designated:

Gordon S. Thatcher Thatcher, Beard, St. Clair, Gaffney 116 S. Center P.O. Box 216 Rexburg, Idaho 83440	__ U.S. Mail	___Hand delivery	___ Fax
Eric Olsen Racine, Olson Nye Budge & Bailey P.O. Box 1391 Pocatello, Idaho 83204-1391	__ U.S. Mail	___Hand delivery	___ Fax
Ryan McFarland Hawley, Troxell Ennis & Hawley P.O. Box 1617 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

____