

10-4-2012

Telford Lands LLC v. Cain Augmentation Record 2 Dckt. 39466

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In the Supreme Court of the State of Idaho

TELFORD LANDS LLC, an Idaho limited
company; MITCHELL D. SORENSEN, an
individual; and PU RANCH, a general
partnership,

Plaintiffs-Respondents,

v.

DONALD WILLIAM CAIN and CAROLYN
RUTH CAIN, husband and wife,

Defendants-Appellants,

and

JOHN DOES 1-20, individuals and JANE
DOES 1-20, individuals,

Defendants.

ORDER GRANTING STIPULATION
TO AUGMENT THE RECORD

Supreme Court Docket No. 39466-2011
Butte County Docket No. 2010-64

LAW CLERK

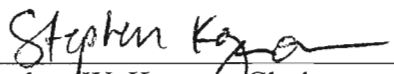
A STIPULATION TO AUGMENT THE RECORD was filed by counsel for Respondents on
September 28, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the STIPULATION TO AUGMENT THE RECORD be,
and hereby is, GRANTED and the augmentation record shall include the document listed below, file
stamped copies of which accompanied this Motion:

1. Memorandum Decision Re: Motion for Reconsideration, file-stamped May 26, 2011.

DATED this 4th day of October, 2012.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

AUGMENTATION RECORD

ORDER GRANTING STIPULATION TO AUGMENT THE RECORD – Docket No. 39466-2011

In the Supreme Court of the State of Idaho

TELFORD LANDS LLC, an Idaho limited
company; MITCHELL D. SORENSEN, an
individual; and PU RANCH, a general
partnership,

Plaintiffs-Respondents,

v.

DONALD WILLIAM CAIN and CAROLYN
RUTH CAIN, husband and wife,

Defendants-Appellants,

and

JOHN DOES 1-20, individuals and JANE
DOES 1-20, individuals,

Defendants.

ORDER GRANTING STIPULATION
TO AUGMENT RECORD

Supreme Court Docket No. 39466-2011
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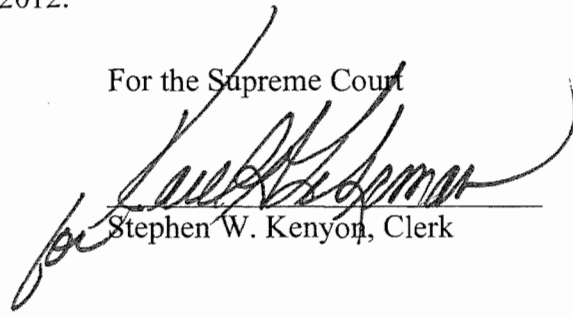
A STIPULATION TO AUGMENT RECORD was filed by counsel for Appellants on
October 16, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's STIPULATION TO AUGMENT RECORD be,
and hereby is, GRANTED and the augmentation record shall include the document listed below,
copies of which accompanied this Motion:

1. Exhibit "D" which was attached to the Affidavit of Donald W. Cain and filed with the
district court on May 18, 2010. (Now designated as Exhibit A.)

DATED this 17th day of October, 2012.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

ORDER GRANTING STIPULATION TO AUGMENT RECORD – Docket No. 39466-2011

BIG LOST RIVER IRRIGATION DISTRICT

P.O. BOX 205 · MACKAY, IDAHO 83251 · (208) 588-2231 · FAX: (208) 588-2863

October 7, 2009

Don Cain
PO Box 927
Moore, Idaho 83255

Dear Don,

This letter is a follow up to our phone conversation on October 6, 2009 where you requested information on delivery of water from ground water right #34-13841 belonging to Mitch Sorenson.

Water can be delivered from that well to the Moore Canal as it has been done in the past. When a well is pumped into a canal belonging to the Big Lost River Irrigation District (BLRID), a Transport Agreement with the BLRID is required. At present, this water right does not have a Transport Agreement and would require one in order to transport this well water to the place of use. It would also require an assessment be paid to the District for the land on which it is used.

At present, there is an existing Transport Agreement for water rights #34-2332 and #34-7079 belonging to PU Ranch LTD which historically has been used in the Moore Canal for transport of water to the place of use. These rights are pertinent to the same well as Sorenson partly owns.

If there are any questions, please give me a call at 390-1447.

Sincerely,



James Rindfleisch, Mgr
Big Lost River Irrigation District



In the Supreme Court of the State of Idaho

TELFORD LANDS LLC, an Idaho limited
company; MITCHELL D. SORESEN, an
individual; and PU RANCH, a general
partnership,

Plaintiffs-Respondents,

v.

DONALD WILLIAM CAIN and CAROLYN
RUTH CAIN, husband and wife,

Defendants-Appellants,

and

JOHN DOES 1-20, individuals and JANE
DOES 1-20, individuals,

Defendants.

ORDER GRANTING STIPULATION TO AUGMENT THE RECORD

Supreme Court Docket No. 39466-2011
Butte County Docket No. 2010-64

A STIPULATION TO AUGMENT THE RECORD was filed by counsel for Respondents on September 28, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the STIPULATION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Memorandum Decision Re: Motion for Reconsideration, file-stamped May 26, 2011.

DATED this 4th day of October, 2012.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

Holder

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

TELFORD LANDS LLC, an Idaho Limited)
Liability Company, MITCHELL D.)
SORENSEN, an individual, and PU)
RANCH, a general partnership,)

Plaintiffs/Counterdefendants,)

vs.)

DONALD WILLIAM CAIN and)
CAROLYN RUTH CAIN, husband and)
wife,)

Defendants/Counterclaimants.)

Case No. CV-2010-64

**MEMORANDUM DECISION RE:
MOTION FOR RECONSIDERATION**

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Judge Watkins
Date May 26, 2011
Time 11:30 am
Deputy Clerk JM

I. FACTUAL AND PROCEDURAL BACKGROUND

Each of the Plaintiffs in this matter is a property owner in Butte County. Plaintiffs each own and/or lease water rights that they use to irrigate their lands. Defendants, Donald and Carolyn Cain (hereafter, "Cains"), also own property in Butte County. Cains' property lies east of Plaintiffs' properties. The Moore Canal, which belongs to the Big Lost River Irrigation District (hereafter, "the District"), runs from east to west across Cains' property and has historically been used to transport some of Plaintiffs' water pursuant to their water rights.

In 2009, Plaintiffs installed an irrigation pipeline (hereafter, "Pipeline") that lies north of and approximately parallel to the Moore Canal. The Pipeline begins as two separate branches, one connected to the PU Well and the other connected the Old Moss Well. The two branches converge east of Cains' property, and the Pipeline then runs west across Cains' property until it ties into the UC Canal. Plaintiffs believe they had Cains' permission to install the Pipeline prior to installing it. Cains deny giving such permission.

Cains objected to the Pipeline after Plaintiffs installed it. At some point, Donald Cain dug up a portion of the Pipeline on his property and damaged it. Plaintiffs initiated this action following unsuccessful attempts to negotiate a settlement with Cains. Plaintiffs' complaint alleged breach of contract, estoppel, civil conspiracy, and condemnation. Cains answered and counterclaimed alleging trespass.

On September 7, 2010, Cains filed a motion to dismiss Telford Lands, LLC (hereafter, "Telford") from this action for lack of standing. On September 17, 2010, Plaintiffs filed a motion for summary judgment on their condemnation claim. On September 29, 2010, Cains filed a cross motion for summary judgment on all four of Plaintiffs' causes of action. On October 8, 2010, Plaintiffs filed a motion to strike portions of the affidavit of James Rindfleish.

On October 20, 2010, the Honorable Joel E. Tingey issued a Memorandum Decision and Order (hereafter, "Decision and Order") that (1) granted Plaintiffs' motion to strike portions of the Rindfleish affidavit, (2) denied Cains' motion to dismiss Telford, (3) granted Plaintiffs' motion for summary judgment on their condemnation claim, and (4) granted Cains' motion for summary judgment on the issues of breach of contract, estoppel, and civil conspiracy.

On February 3, 2011, Cains filed a motion for reconsideration asking this Court to (1) dismiss Telford, (2) consider the stricken portions of the Rindfleish affidavit, and (3) rule in their favor on the condemnation issue. On April 13, 2011, Plaintiffs filed a brief in opposition to Cains' motion for reconsideration.¹ On April 19, 2011, Cains filed a reply brief in support of their motion. On April 20, 2011, this Court heard oral argument regarding the matter.

¹ Plaintiffs' brief in opposition asserts they are entitled to an award of attorney's fees pursuant to Idaho Code § 12-121 for fees incurred in opposing Defendants' motion for reconsideration. This Memorandum Decision does not make a determination regarding attorney fees as the issue is not properly before the Court at this time. See I.R.C.P. 54(d)(5)-(6).

II. STANDARD OF ADJUDICATION

The decision to grant or deny relief pursuant to a motion for reconsideration is within the sound discretion of the trial court and, absent a manifest abuse of discretion, will not ordinarily be disturbed on appeal. *Kirkland v. State*, 143 Idaho 544, 547, 149 P.3d 819, 822 (2006); *Win of Michigan, Inc. v. Yrekd United, Inc.*, 137 Idaho 747, 754, 53 P.3d 330, 337 (2002).

Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure provides, in part, “A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but no later than fourteen (14) days after the entry of the final judgment.”

When considering a motion [for reconsideration], the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. The burden is on the moving party to bring the trial court’s attention to the new facts. We will not require the trial court to search the record to determine if there is any new information that might change the specification of facts deemed to be established.

Coeur d’Alene Mining Co. v. First Nat. Bank of North Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

III. DISCUSSION

A. Motion to Strike Rindfleish Affidavit

Pursuant to the Decision and Order, Paragraph 6 and most of Paragraph 4 of the September 22, 2010 Rindfleish Affidavit were stricken on the basis that those portions of the Affidavit were without foundation.

Rule 56(e) of the Idaho Rules of Civil Procedure sets forth the requirements for supporting and opposing affidavits: “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.”

Paragraph 4 of the Affidavit contains information regarding a response by the Idaho Department of Water Resources (hereafter "IDWR") to a water right transfer request by Plaintiff Sorensen. Paragraph 6 contains statements by Mr. Rindfleish regarding settlement negotiations between the District and Plaintiffs, and the reasons for Plaintiffs' transport agreements being terminated.

Whereas this Court finds the stricken portions of Paragraphs 4 and 6 to be inapposite to the conclusions made below, there is no need to engage in an analysis of the admissibility of the statements. Cains' motion for reconsideration is denied on this issue.

B. Motion to Dismiss Telford

Cains argue Telford lacks standing to assert a condemnation claim and should be dismissed as a plaintiff in this action.

In its Decision and Order, the Court stated the following regarding Telford's standing:

The Court finds that as to Counts One, Two, and Three, Telford was part of a joint enterprise in installing the pipeline and would therefore have an interest in matters pertaining to the pipeline. Defendants' motion to dismiss as to Counts One, Two and Three [is] denied.

Whether Telford has standing to seek an easement through condemnation is a more difficult question. The evidence establishes that Telford's property is west and downstream from Plaintiffs. The evidence also establishes that Telford's wells are also west of the Defendants' property. However, Telford has a lease from the Department of Water Resources' Water Bank whereby Telford may draw water from a well east of Defendants' property, which water would then be conveyed through the pipeline and desired easement.

Telford's participation in the joint venture alone is insufficient to establish standing to seek an easement for the pipeline. Merely having an interest in the pipeline does not establish a beneficial use or necessity for purposes of condemning and easement.

However, where Telford would clearly derive a benefit from conveying water from the P.U. Ranch Well, such confers standing upon Telford. Telford's standing should not be affected by whether he owns the water right by which water is diverted from the Well or whether he leases the right from the Water

Bank. Each would result in the irrigation of Telford's property consistent with a recognized public purpose. Section 42-1102 allows "owners of land" to seek rights of way for the watering of such lands.

Where Telford would be directly benefited from an easement by which he could convey water from the P.U. Ranch Well to his property, Telford has standing and is a real party in interest.

Decision and Order at 4-5.

Cains argue, "the fact that Telford may currently have a year or less remaining on a water bank lease with the State of Idaho does not confer standing on Telford to institute eminent domain proceedings relative to the Cains' property." Cains assert that only *water right owners* can proceed under the law of eminent domain. Cains rely on the following language from *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 619 P.2d 122 (1980) in support of their argument:

In order to assist owners of water rights whose lands are remote from the water source, the state has partially delegated its powers of eminent domain to private individuals. I.C. §§ 42-1102 and-1106. *See White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975). These statutes permit landlocked individuals to condemn a right of way through the lands of others for purposes of irrigation.

To condemn such a right-of-way, the water right owner must proceed under Idaho's law of eminent domain, found in I.C. §§ 7-701 *et seq.*

Id. at 607, 619 P.2d at 125.

In *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), the Idaho Supreme Court stated the following regarding the condemnation of irrigation easements:

Chapter 11 of Title 42, Idaho Code, deals with ditch rights of way for the irrigation of land. I.C. § 42-1102 gives to *landowners* a right to an easement or right of way across the lands of others to supply irrigation water. If the landowner of an adjacent parcel refuses to allow such access for irrigation water, *the owner of land* may condemn a right-of-way under the law of eminent domain. I.C. § 42-1106.

Id. at 272-73 (emphasis added). Idaho Code § 42-1102 provides as follows:

When any such *owners or claimants to land* have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such *owners or claimants* are entitled to a right-of-way through the lands of others, for the purposes of irrigation.

I.C. § 42-1102 (emphasis added). Idaho Code § 42-1106 provides as follows:

In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the *person or persons desiring the right of way* may proceed as in the law of eminent domain.

I.C. § 42-1106 (emphasis added).

The plain language of §§ 42-1102 and 1106 gives *landowners* the right to proceed under the law of eminent domain if certain conditions exist. There is, however, no requirement in the statutes that the landowner also be a water right owner. The *White* decision reaffirms the statutory language of §§ 42-1102 and 1106. Furthermore, *Canyon View* did not overturn *White* or alter the construction of §§ 42-1102 and 1106. In this Court's view, the language in *Canyon View* regarding "water right owners" was unessential to the court's holding, was an ambiguous recitation of the law, and is not controlling on the issue before this Court.

With regard to easement condemnation claims, this Court concludes it is irrelevant whether a person *owns* a water right. Undoubtedly, *landowners* will need a water right in order to obtain water from a remote source, but the means whereby the landowner obtains that right (i.e., by purchase, lease, or some other way) is unrelated to the landowner's right to condemn an easement by eminent domain. See *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 606, 130 P.3d 1138, 1144 (2006) ("Although a ditch easement typically concerns the conveyance of water, it is 'a property right apart from and independent of questions of water rights.'").

This Court reaffirms its prior conclusion that Telford, being a landowner seeking water from a remote source, has standing and is a real party in interest regarding the condemnation action.

C. Motion for Summary Judgment on Condemnation

Cains disagree with the Decision and Order regarding Plaintiffs' condemnation claim. In their motion for reconsideration, Cains argue (1) Plaintiffs' land is not "arid," (2) Plaintiffs' water rights require them to use the Moore Canal, and (3) Plaintiffs have attempted to create their necessity.

1. Arid Lands

Cains argue Plaintiffs' land is not arid because it has been irrigated for decades.

Plaintiffs argue their land is arid because irrigation water continues to be necessary to grow crops.

Article 1, § 14, of the Idaho Constitution permits the power of eminent domain to be exercised only in furtherance of a 'public use.' The irrigation and reclamation of arid lands is a well recognized public use, Idaho Const. art. 1, § 14, and art. 15, § 1; I.C. § 7-701(3), even if the irrigation project is ostensibly intended to benefit only private individuals. *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676 (1905), *affirming* 75 P. 371 (Utah 1904). '[Article 1, § 14, of the Idaho Constitution] confers the right to condemn for individual use on the theory that the development of individual property tends to the complete development of the entire state.' *Codd v. McGoldrick Lumber Co.*, 48 Idaho 1, 10, 279 P. 298, 300 (1929).

Canyon View, 101 Idaho at 607, 619 P.2d at 125.

Although not essential to the court's holding, the Idaho Court of Appeals stated in *Merrill v. Penrod*, 109 Idaho 46, 704 P.2d 950 (Ct. App. 1985) that dry and arid climates are those "where irrigation is necessary in order to cultivate the soil." Thus, whether a parcel of land has been irrigated in the past is irrelevant in determining whether the land is arid. The important question, rather, is whether irrigation is required to cultivate the soil now and in the future.

In this case, there is no dispute Plaintiffs need irrigation water to cultivate their land. This Court concludes Plaintiffs' land is arid, and irrigation of that land is a public use for which the law of eminent domain may be evoked.

2. Water Right Conditions of Approval

Cains disagree with the Decision and Order wherein the Court stated, "The Court . . . finds that identification of a delivery system in a permit, license, transfer application or other similar document is for descriptive purposes only and has no binding effect for purposes of the pending motions." Decision and Order at 7.

Cains argue the Idaho Supreme Court, in *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992), "clearly affirmed the statutory authority of the IDWR to impose conditions on a water right permit or upon a transfer application." Brief in Support at 14. Thus, Cains argue Plaintiffs are required to use the Moore Canal because their water rights specify the Moore Canal as the delivery system to be used in connection with the right.

Whether Plaintiffs' water rights require, as a condition of use, that Plaintiffs transport their water via the Moore Canal is a question unrelated to the issue before this Court. As previously noted, a ditch easement is a property right and the condemnation of such easement is a matter apart from and independent of questions regarding water rights. See *Beach Lateral*, 142 Idaho at 606, 130 P.3d at 1144. Accordingly, Cains may or may not be correct when they assert Plaintiffs must petition the IDWR if they seek to change or eliminate conditions regarding the delivery of their water. However, the conditions of approval listed on Plaintiffs' water rights have no bearing on Plaintiffs' ability to condemn an easement for the irrigation and reclamation of their arid lands. As Cains correctly point out, "[t]he relevant issue is one of necessity." Brief in Support at 12.

3. Necessity

Cains maintain their argument that “the owners of the PU Ranch at all times had a legally viable means of having their water delivered through the Moore Canal, and did not have a legitimate basis to assert necessity in order to invoke eminent domain.” Brief in Support at 9. Cains believe the evidence shows Plaintiffs selectively terminated transport agreements, attempting “to create their own necessity.” Brief in Support at 10.

In its Decision and Order, this Court justified granting Plaintiffs’ motion for summary judgment on the condemnation claim by stating the following regarding necessity:

While use of the Moore Canal has occurred historically, the record reflects a number of potential problems with continued use of the Canal. There is no dispute that Plaintiffs have suffered and would continue to suffer a significant amount of water loss through use of the Canal. While some loss would arise from typical shrinkage, more troubling is the evidence that Plaintiffs also would bear the brunt of stolen water as well as unmeasured or improperly measured water diversions. The evidence is undisputed that there have been large fluctuations in delivered water and the Plaintiffs, when using the Moore Canal, have not consistently received their proportionate share of water when considering the volume of water put into the Canal. The evidence establishes that use of the Canal has been very inefficient in delivering water to Plaintiffs such that they have been unable to irrigate the full amount of acreage authorized by the water rights.

Additionally, use of the Canal as a delivery system would be permissive only. While the evidence establishes that it is likely the District would agree to transport water to Plaintiffs, there would be no assurance or certainty that the District would continuously transport via the Canal. The record also reflects that certain conditions imposed by the District in its transport agreements would be undesirable if not unconscionable. Anyone intending to expend significant resources in reclaiming arid lands would certainly have to question the wisdom in doing so if the only way to irrigate the land was through the District’s Moore Canal.

Decision and Order at 7-9.

Regarding the “necessity” requirement inherent in an easement condemnation claim, the Idaho Court of Appeals stated,

Before condemning property, however, a plaintiff must show that "the taking is necessary to such use." I.C. § 7-704. It is well established that the required showing is one of "reasonable" necessity. *Erickson I, supra*; *McKenney v. Anselmo*, 91 Idaho 118, 416 P.2d 509 (1966); *Eisenbarth v. Delp*, 70 Idaho 266, 215 P.2d 812 (1950).

Erickson v. Amoth, 112 Idaho 1122, 739 P.2d 421 (Ct. App. 1987).

Cains argue there can be no necessity where an alternative means of transport exists. In support of their argument, Cains cite *Erickson v. Amoth*, 99 Idaho 907, 591 P.2d 1074 (1978)

[hereinafter *Erickson I*]. In that case, the Idaho Supreme Court stated,

The Ericksons further argue that the trial court erred in not finding that the license agreement providing access over the Lederhos' land was a limited license. The fact that the Ericksons' existing access was by way of a license, rather than an easement across the Lederhos' land, does not destroy either the evidence or the finding of the court that alternative access routes existed nor the trial court's holding based thereon that necessity for condemnation did not exist.

Id. at 910, 591 P.2d at 1077.

This Court agrees that an alternative delivery system *may* negate a claim of necessity. However, one seeking to prove reasonable necessity "need not show that a legally available route is *absolutely* impossible to use." *MacCaskill v. Ebbert*, 112 Idaho 1115, 1120, 739 P.2d 414, 419 (1987). As the court noted in *MacCaskill*, "[t]here are few natural obstacles that could not be surmounted by modern engineering if unlimited resources were committed to the task." *Id.* Thus, reasonable necessity exists where "the difficulty or expense of using the legally available route is so great that it renders the parcel unfit for its reasonably anticipated use." *Id.* On the other hand, mere inconvenience does not constitute reasonable necessity. *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 681 P.2d 1010 (Ct. App. 1984)

The conclusion reached by the Court in its Decision and Order focused heavily on the hardships Plaintiffs would bear if forced to transport their water through the Moore Canal. In

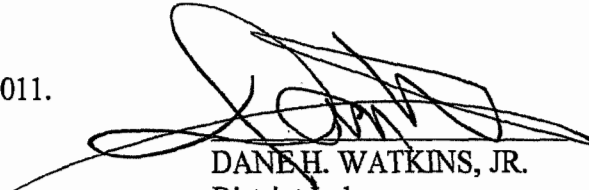
their motion for reconsideration, Cains have not presented any new evidence to alter or contradict the evidence the Court relied upon in making its decision.

This Court reaffirms the conclusion in the Decision and Order that a new delivery system was reasonably necessary, and Plaintiffs are entitled to an easement across Cains' land.

IV. CONCLUSION

Based upon the foregoing law and analysis, Cains' motion for reconsideration is denied.

DATED this 26 day of May 2011.



DANE H. WATKINS, JR.
District Judge

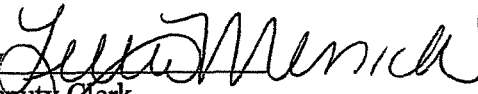
CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of May 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83402
P.O. Box 50130

Gary D. Slette
ROBERTSON & SLETTE, P.L.L.C
P.O. Box 1906
Twin Falls, Idaho 83303-1906

Trilby McAfee
Clerk of the District Court
Butte County, Idaho

By 
Deputy Clerk