

11/06/2003

**NOTICE OF ERROR
REPLY**

Please type or print clearly, fill out this form completely and mail.

Return this reply form to IDWR by the deadline date printed below if you want IDWR to change your recommendation or you want to let IDWR know that you agree with its recommendation.

YOUR DEADLINE FOR RETURNING A NOTICE OF ERROR REPLY IS:

Water right number: 23-11213

STEPHEN J MC GRATH

PO BOX 50731

IDAHO FALLS ID 83405-0731

Telephone Number: (208)524-0731

1. Describe the portion of the proposed recommendation with which you disagree (e.g. priority date, period of use, source):

2. Describe the changes you wish to make in the proposed recommendation:

3. Give a brief explanation as to why you disagree with these portions:

X I AGREE with this proposed recommendation: no changes need to be made.

DATE: 3/23/04

SIGNATURE:

Sm. Grath

Please print your name:

Stephen J. Mc Grath

IDWR Regional Office,

RECEIVED

APR 01 2004

Department of Water Resources
Eastern Region

11/06/2003

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

RIGHT NUMBER: 23-11213

NAME AND ADDRESS: STEPHEN J MC GRATH
PO BOX 50731
IDAHO FALLS ID 83405-0731

SOURCE: UNNAMED SLOUGH

TRIBUTARY: RAINEY CREEK

QUANTITY: 0.000 CFS
10.80 AFY

PRIORITY DATE: 06/20/1957

POINT OF DIVERSION:
T01N R44E S8 SESWNW Within BONNEVILLE County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
WILDLIFE STORAGE	01/01 12/31	10.80 AFY

PLACE OF USE: WILDLIFE STORAGE Within BONNEVILLE County
T01N R44E S08 SENE

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

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

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use
SOURCE IS ALSO KNOWN AS MILLERS SLOUGH.

11/06/2003

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

RIGHT NUMBER: 23-11213
NAME AND ADDRESS: STEPHEN J MC GRATH
PO BOX 50731
IDAHO FALLS ID 83405-0731
SOURCE: UNNAMED SLOUGH TRIBUTARY: RAINEY CREEK
QUANTITY: 0.000 CFS
10.800 AFY
PRIORITY DATE: 06/20/1957
POINT OF DIVERSION:
T01N R44E S8 SESWNW Within BONNEVILLE County
PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
WILDLIFE STORAGE	01/01 12/31	10.80 AFY

PLACE OF USE: WILDLIFE STORAGE Within BONNEVILLE County
T01N R44E S08 SENE

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

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

EXPLANATORY MATERIAL: Beneficial Use
SOURCE IS ALSO KNOWN AS MILLERS SLOUGH.

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

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

CIVIL CASE NUMBER: 39576

Ident. Number 23-11213
Date Received: 1/11/01
Receipt No:
Received By:

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

STEPHEN J MCGRATH Phone: (208) 483-2001

PO BOX 50731
IDAHO FALLS ID USA 83405-0731

2. Date of Priority: 06/20/1889

3. Source: RAINEY CREEK Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
01N	44E	8	SW SW NW	BONNEVILLE	

5. Description of diverting works:

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
WILDLIFE STORAGE	01/01	12/31	1	100

7. Total Quantity Appropriated is:
1 C.F.S. and/or 100 A.F.A.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:



Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
01N	44E	8	SW	NE	WILDLIFE STORAGE	
			SE	NE	WILDLIFE STORAGE	

11. Place of use in counties: BONNEVILLE

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

13. Other Water Rights Used:

14. Remarks:

THERE IS AN EXISTING STRUCTURE WHICH WAS REBUILT AFTER THE 1997 FLOOD THAT IS CHECKED TO A HEIGHT OF 20 INCHES TO CONTROL AND MAINTAIN THE STORAGE IN THE SLOUGH. WILDLIFE HABITAT FOR WATER BIRDS. THE ATTACHED COURT DECISION RECOGNIZES THE RIGHT TO MAINTAIN STORAGE IN THE DESCRIBED SLOUGH. THE COURT DID NOT ADDRESS ISSUES OF PRIORITY, USE, AND QUANTITY. THIS CLAIM IS FILED TO CONFIRM THE MISSING PORTIONS OF THIS RIGHT.

15. Basis of Claim: Beneficial Use

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

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

CIVIL CASE NUMBER: 39576

Ident. Number 23-11213
Date Received: 1/11/01
Receipt No:
Received By:

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

1. Name of Claimant(s)

STEPHEN J MCGRATH Phone: (208) 483-2001

PO BOX 50731
IDAHO FALLS ID USA 83405-0731

2. Date of Priority: 06/20/1889

3. Source: RAINEY CREEK Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County
01N	44E	8	SW SW NW	BONNEVILLE

5. Description of diverting works:

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
WILDLIFE STORAGE	01/01	12/31	1	100

7. Total Quantity Appropriated is:
1 C.F.S. and/or 100 A.F.A.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of	1/4 Lot	Use	Acres
01N	44E	8	SW	NE	WILDLIFE STORAGE	
			SE	NE	WILDLIFE STORAGE	

11. Place of use in counties: BONNEVILLE

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

13. Other Water Rights Used:

14. Remarks:

THERE IS AN EXISTING STRUCTURE WHICH WAS REBUILT AFTER THE 1997 FLOOD THAT IS CHECKED TO A HEIGHT OF 18 INCHES TO CONTROL AND MAINTAIN THE STORAGE IN THE SLOUGH. WILDLIFE HABITAT FOR WATER BIRDS.
THE ATTACHED COURT DECISION RECOGNIZES THE RIGHT TO MAINTAIN STORAGE IN THE DESCRIBED SLOUGH. THE COURT DID NOT ADDRESS ISSUES OF PRIORITY, USE, AND QUANTITY. THIS CLAIM IS FILED TO CONFIRM THE MISSING PORTIONS OF THIS RIGHT.

15. Basis of Claim: Beneficial Use

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

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

CIVIL CASE NUMBER: 39576

Ident. Number 23-11213Date Received Jan. 10, 2001Receipt Number EO26427

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

RECEIVED
JAN 10 2001
Department of Water Resources
Eastern Region

Please type or print clearly

1. Name of Claimant (s) Stephen J. McGrath Phone (208) 483-2001Mailing Address P. O. Box 50731, Idaho Falls, Idaho Zip 83405-07312. Date of Priority (Only one (1) per claim) June 20, 18893. Source of water supply (a) Rainey Creek
which is tributary to (b) _____4. a. Location of existing point of diversion is: Township 1N Range 44E Section 8,
SW 1/4 of SW 1/4 of NW 1/4, Govt. Lot, _____ B.M., County of Bonneville

Additional points of diversion if any: _____

b. If instream flow, beginning point of claimed instream flow is:

Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4,

Govt. Lot _____ B.M., County of _____

ending point is: Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of

_____ 1/4, Govt. Lot _____ B.M., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc),
including the dates of any changes or enlargements in use, the dimensions of the diversion works as
constructed and as enlarged and the depth of each well. There is an existing structure which
was rebuilt after the 1997 flood that is checked to a height of 18 inches to control
and maintain the storage in the slough.

6. Water is claimed for the following purposes:

(both dates are inclusive) (cfs) (acre feet)

For storage wildlife purposes from Jan 1 to Dec 31 amount 10 or 100

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 1.0 (cfs) and/or (b) 100 (acre feet)

8. Total consumptive use claimed is 40 acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.) Wildlife habitat for water birds.

10. Description of place of use:

- If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
- If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RNG	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	
1N	44E	8			W	W													

Total number of acres irrigated _____

11. In which county (ies) are lands listed above as place of use located? Bonneville

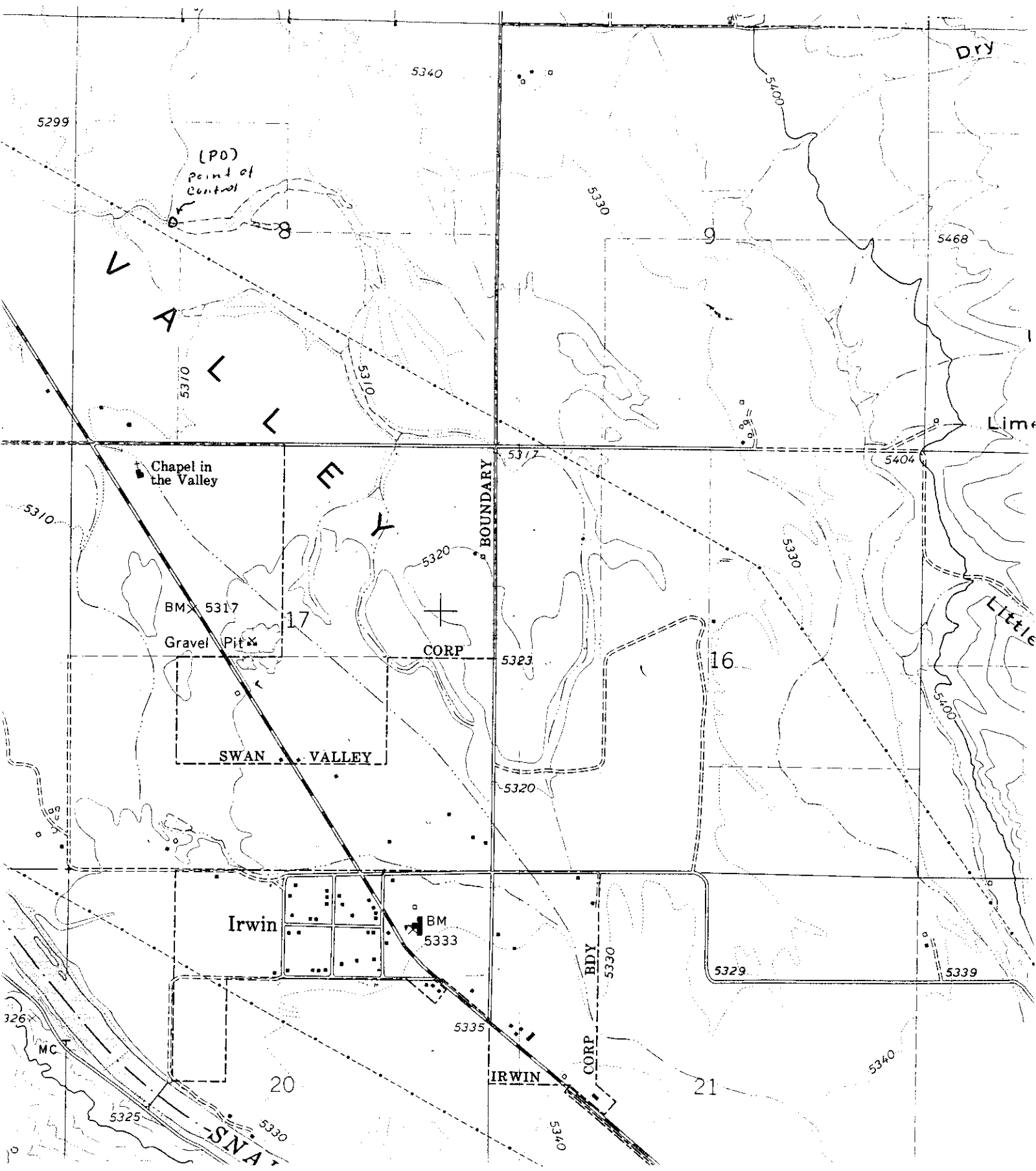
12. Do you own the property listed above as place of use? Yes X No _____
If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above.
_____ or None (X)

14. Remarks:
The attached Court decision recognizes the right to maintain storage in the described slough. The Court did not address issues of priority, use, and quantity. This claim is filed to confirm the missing portions of this right

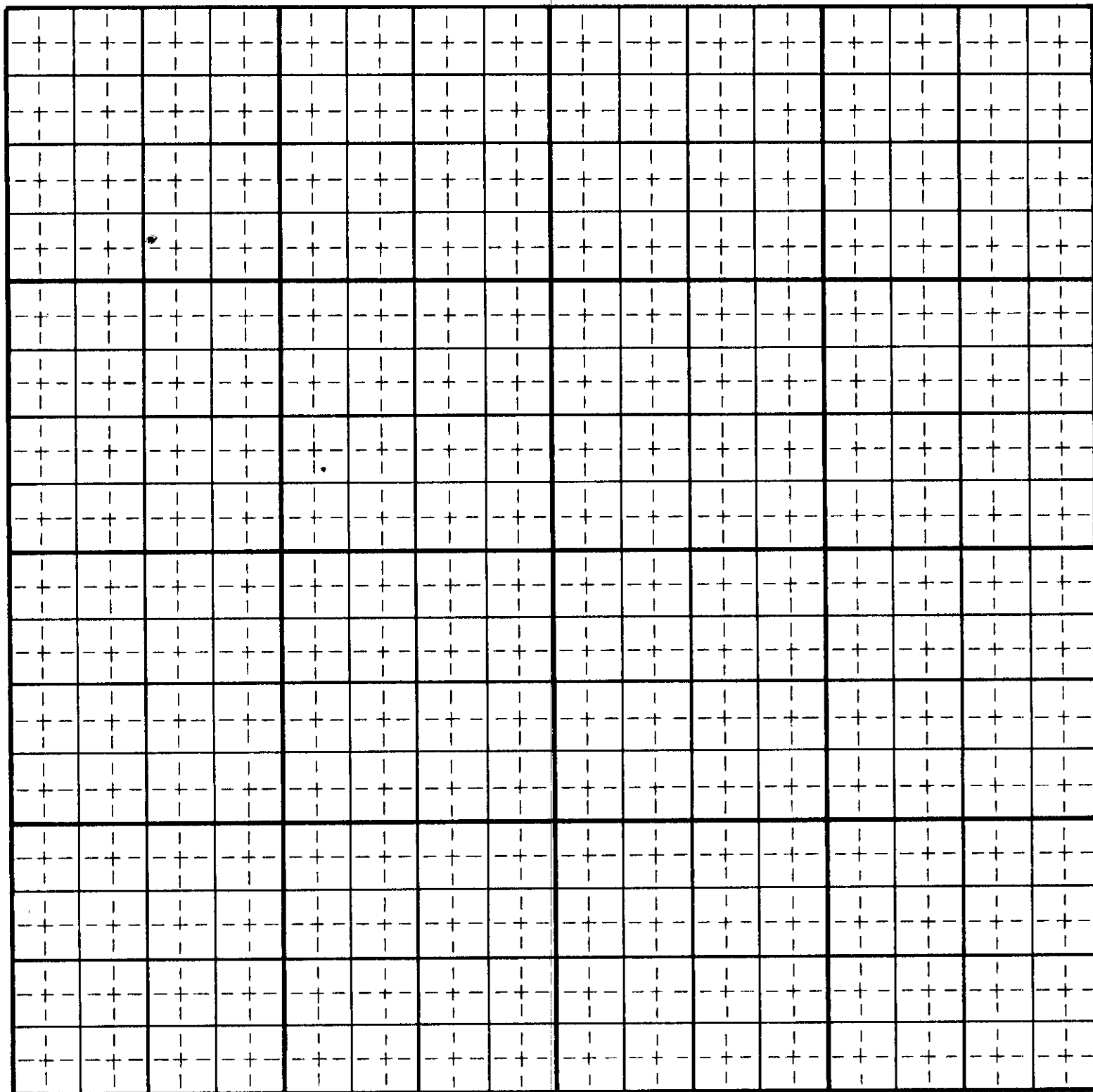
Last Name McGrath Ident No. _____

Copies: White -State, Yellow-Claimant



Map of Project: show clearly the point of diversion, place of use, section number, township, and range number.

Scale: 2 inches equals 1 mile



Last Name McGrath Ident No. _____

Copies: White-State, Yellow-Claimant

15. Basis of Claim (check one) Beneficial Use _____ Posted Notice _____ License _____ Permit _____
Decree _____
If applicable provide IDWR Water Right Number _____
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

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

Number of attachments _____

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true
and correct.

Signature of Claimant (s) Eric Shaw Date 1/09/01

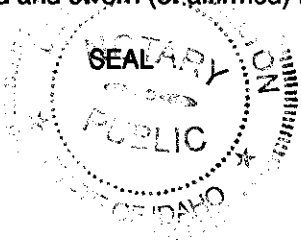
Date _____

For Organizations: I do solemnly swear or affirm that I am _____
Title _____
of _____, that I have signed the foregoing
Organization _____
document in the space below as _____ of _____
Title _____ Organization _____
and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____
Title and Organization _____ Date _____

State of Idaho/or _____)
County of Bonneville) SS.

Subscribed and sworn (or affirmed) before me this 9th day of January 19 2001



Notary Public _____

Residing at Idaho Falls, Idaho

My Commission Expires 04/11/05

Please Print Name

17. Notice of Appearance:
Notice is hereby given that I, _____ will be acting as attorney at law on behalf
of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above
should be mailed to me at the address listed below.

Signature _____

Address _____

Date _____

Last Name _____ Ident. Number _____

Copies White-State, Yellow-Claimant

Contacts Data Entry Form

Water Right No. 23-11213

Owner Type	Full Name	Address	City	State	Zip	Phone
Current Owner	STEPHEN J McGRATH					
Name connector: and _____, or _____, and/or _____						
Current Owner						
Current Owner						
Representing Attorney:			Phone Number:			
Accompanied By:			Phone Number:			
Relationship to Claimant:						
Date of Field Exam:			Time:			

Directions to Property (if different from above) and/or update owner information:

BILL CLAIM - SUBMITTALS w/ CLAIM AND EXCERPT OF A
Supreme Court CASE: T.M. Woods, et al vs Archie
McKay (No. 9229), June 12, 1963.
Source: 382 PACIFIC REPORTER, 2d SERIES.

Reviewer: _____

Date: _____

Priority Date Data Entry Form

Claim Number: _____

Water Right Priority Date: _____ Water Right Basis: _____

Claimed Priority Date: 6/20/1889 Claimed Basis: BURecommended Priority Date: 6/20/1957 Recommended Basis: BU☐ Use Claimed Priority Date and Basis as Recommended Priority Date and Basis

Document the evidence submitted/reviewed for the priority date claimed, include your analysis of the evidence:

EVIDENCE DOES NOT DETAIL OR SUPPORT THE CLAIMED
PRIORITY DATE OF 1889.

PRIORITY DATE NOT ADDRESSED BY SUPREME COURT DECISION
WEEKS vs MCKAY (1963) ALTHOUGH REFERENCED IS MADE TO 1957
EXCAVATION AND CONSTRUCTION OF A HEROGATE OR DAM IN BELOW
THE OUTLET FROM THE LAKE. RECOMMEND 1957.

Reviewer: _____

Date: _____

Point of Diversion and Source Data Entry Form

Claim Number: _____

Water Right Point of Diversion: T____, R____, Sec.____,____,____,____, County: _____

Source: _____ Tributary: _____

Claimed Point of Diversion: T 1N, R 44E, Sec. 8, SW, SW, NW, County: BONNSource: RAINB CK Tributary: SNAGO RIVER, S. FR.

Recommended Point of Diversion: T____, R____, Sec.____,____,____,____, County: _____

Source: _____ Tributary: _____

____ Use Claimed POD and Source as Recommended POD and Source

Twp	Rge	Sec	Gov Lot	QQQ of QQ of Q	County	Source
<u>1N</u>	<u>44E</u>	<u>8</u>		<u>SBSWNN</u>	<u>BONN</u>	<u>SLOUGH</u>
GPS Coordinates: _____						

GPS Coordinates: _____						

GPS Coordinates: _____						

GPS Coordinates: _____						

GPS Coordinates: _____						

GPS Coordinates: _____						

TRANS TO:
RAINB CKOther rights from this POD? GPS POD - TAG # NONE

Document how the POD and Source were verified and/or Pump and Motor data:

Slough 'AKA' Millon's Slough

Remark
B01

Transfers Changing POD _____

Reviewer: _____

Date: _____

Place Of Use Data Entry Form

Claim Number: _____

_____ Use Claimed POU as Recommended POU

Claimed Place of Use

Twp	Rge	Sec	QQ	Q	County	Lot Num	Acres	Purpose of Use
1N	44E	8	SWNE		BONNI.			WILDLIFE STORAGE
			SENE					" "

Total Acres _____

Recommended Place of Use

Twp	Rge	Sec	QQ	Q	County	Lot Num	Acres	Purpose of Use
1N	44E	8	SWNW					
			SENW					

Total Acres _____

Document how the POU was verified:

SEE #14. Remarks: OF CLAIM; "... Priority, USE & QUANTITY."

POU is w/ SE SW Soc. 8 T1N, R44E - Superior Court Decision

DISCUSSED A DAM HEIGHT OF 20" (1.67')

SEE Photo in 23-11160

Transfers Changing POU _____

Reviewer: _____

Date: _____

Period of Use and Quantity Data Entry Form

Claim Number: _____

☐ Use Claimed Period of Use and Quantity as Recommended Period of Use and Quantity

Water Right Period of Use and Diversion Rate

Water Use	Start	End	Rate	Volume
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Overall Diversion Rate _____ Overall Diversion Volume _____

Claimed Period of Use and Diversion Rate

Water Use	Start	End	Rate	Volume
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Overall Diversion Rate _____ Overall Diversion Volume _____

Recommended Period of Use and Diversion Rate

Water Use	Start	End	Rate	Volume
WINDYER SLough	1/1	12/31		108
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Overall Diversion Rate _____ Overall Diversion Volume _____

Document how the Period of Use and/or Diversion Rate were verified:

SLough ON CLAIMANTS LANDS 6⁵AC

DAM HEIGHT OF 20" (1.67')

$\therefore 6^{5}AC \times 1.67' = 108 AF$

GRATE NOT CONSIDERED

COMBINED USE REMARKS w/ 23-11160

Remark

Reviewer: _____

Date: _____



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A, Idaho Falls, Idaho 83402-1718 - (208) 525-7161- Fax (208) 525-7177

EASTERN REGION

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

February 5, 2001

STEPHEN J MCGRATH
PO BOX 50731
IDAHO FALLS ID 83405-0731

RE: NOTICE OF CLAIM TO A WATER RIGHT #A23-11213

Dear Mr. McGrath:

I have corrected your claim to show 20 inches of water as per your letter.

I have enclosed a new copy of this claim for your records.

I apologize for any inconvenience this may have caused. If you have any other questions or concerns feel free to contact this office.

Respectfully submitted,

Cheri Vandermeulen
Records Clerk

RECEIVED

JAN 29 2001

LAW OFFICES OF
McGRATH, MEACHAM, DECKER & SMITH, PLLC

STEPHEN J. McGRATH
GREGORY P. MEACHAM
KARL R. DECKER
BRYAN D. SMITH*

*ALSO ADMITTED IN CALIFORNIA

414 SHOUP
POST OFFICE BOX 50731
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 524-0731

FAX (208) 529-4166

e-mail: info@eidaholaw.com

January 25, 2001

Department of Water Resources
Eastern Region
SWAN VALLEY OFFICE
980 RAINEY CREEK ROAD
SWAN VALLEY, IDAHO 83449
TEL (208) 483-2002
FAX (208) 483-2004

Ernie Carlson
Department of Water Resources
900 N. Skyline Drive
Idaho Falls, Idaho 83402-1718

Re: Water Rights

Dear Ernie:

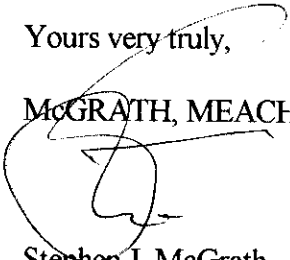
In reviewing the Notice of Claim to a Water Right Acquired Under State Law, I noted that we had inadvertently committed a typographical error in the original claim which refers to a right to maintain a structure 18 inches in height in Rainey Creek to store water in lower Rainey Creek. The Supreme Court decision which was attached to our claim actually established a right to maintain a 20 inch structure and I had failed to note the mistake in submitting the claim.

Would you please advise as to what if anything needs to be done to correct this error.

Thank you for your time and attention.

Yours very truly,

McGRATH, MEACHAM, DECKER & SMITH, PLLC



Stephen J. McGrath

SJM/dh

LAW OFFICES OF
McGRATH, MEACHAM, DECKER & SMITH, PLLC

STEPHEN J. McGRATH
GREGORY P. MEACHAM
KARL R. DECKER
BRYAN D. SMITH*

*ALSO ADMITTED IN CALIFORNIA

414 SHOUP
POST OFFICE BOX 50731
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 524-0731

FAX (208) 529-4166

e-mail: info@aidaholaw.com

January 8, 2001

SWAN VALLEY OFFICE
980 RAINEY CREEK ROAD
SWAN VALLEY, IDAHO 83449
TEL (208) 483-2002
FAX (208) 483-2004

RECEIVED

JAN 10 2001

**Department of Water Resources
Eastern Region**

Ernie Carlson
Department of Water Resources
900 N. Skyline Drive
Idaho Falls, Idaho 83402-1718

Re: Water Rights

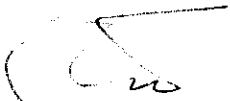
Dear Ernie:

Enclosed please find my Notice of Claim to A Water Right together with my check in the sum of \$100.00 as and for the application fee. Please understand that we only acquired the subject properties a few years ago and only recently became aware of the Idaho Supreme Court's decision in *Weeks v. McKay*, 382 P.2d 783 (1963) which is the Supreme Court's decision upon which our claim of right is based. It was only upon our discovery of the Supreme Court decision that we realized that this water right may not have previously been filed upon. We are obviously therefore late in filing this claim under existing deadlines. Given the unusual nature of our discovery of this problem, I would hope that you would waive the late filing fee. If not, please advise at once.

Thank you for considering this claim and I look forward to hearing from you.

Yours very truly,

McGRATH, MEACHAM, DECKER & SMITH, PLLC



Stephen J. McGrath

SJM/dh
Enclosures

tion in granting to appellant two weeks visitation with the children, away from the home of respondent, provided that she does not remove the children from the State of Idaho and the jurisdiction of the district court. We find no merit in such assignment.

[10] Appellant assigns error of the trial court in not allowing her extended rights of visitation with the children away from respondent's home; she contends that a period of two weeks is of insufficient duration to serve the welfare and best interests of the children. Appellant also asserts insufficiency of the evidence to show that removal from the State of Idaho and jurisdiction of the trial court would be contrary to the best interests and welfare of the children. We deem this subject matter to have been adequately dealt with in the previous discussion contained herein. In regard to the right decreed to appellant of the two weeks period of visitation with the children during summer vacations, away from respondent's home, suffice it to say that under the existing circumstances of the parties, we hold that the trial court did not abuse its discretion in the premises. Such assignments are not meritorious.

[11] Lastly, appellant assigns error of the trial court in allowing her only \$250.00 for travel expenses for the period of child visitation during each summer vacation; and assigns further error in that the trial court made no award to her for maintenance of the children while they are away from respondent's home. Again, we are constrained to the view that under the evidence and all the facts and circumstances shown in this proceeding, that the trial court did not abuse its discretion, and that therefore such assignments are lacking in merit.

Judgment and decree affirmed. No costs allowed.

KNUDSON, C. J., and McQUADE,
McFADDEN and TAYLOR, JJ., concur.

Thomas M. WEEKS, Arvey A. Weeks, and
Ivan R. Weeks, Plaintiffs-Respondents,
v.

Archle McKAY, Defendant-Appellant.

No. 9229.

Supreme Court of Idaho.

June 12, 1963.

Suit by downstream owners to enjoin upstream owner from maintaining dam. The District Court of the Ninth Judicial District, Bonneville County, Faber F. Tway, J., enjoined maintenance of dam more than 20 inches above concrete base, and upstream owner appealed. The Supreme Court, Knudson, C. J., held that if upstream owner maintained dam at height which would permit same amount of water to escape from lake and proceed down creek to downstream owners' diversion point as would have escaped if channel had remained undisturbed, upstream owner would not be responsible for water flowing in quantity less than that to which downstream owners were entitled during any period of the year.

Remanded with instructions to amend findings, conclusions, and judgment in accordance with opinion.

1. Waters and Water Courses ⇨63

Evidence supported finding that upstream owner sued by downstream owners for injunction against maintenance of dam had employed construction company to clean out outlet and that as a result, mouth of lake was lowered 8 inches, as claimed by company's owner.

2. Waters and Water Courses ⇨63

Finding was not erroneous that dam constructed by upstream owner sued by downstream owners for injunction against maintenance of water dam was 44 to 48 inches in height above concrete footing of dam, as testified to by deputy water master.

3. Waters and Water Courses ⇨63

Evidence supported findings that downstream owners suing upstream owner to en-

A77#5

join maintenance of water dam did not get natural flow of water or storage water and that conduct or actions of upstream owner who had dam built interfered with natural flow of the water.

Waters and Water Courses ⇨51

Downstream owners had no right to more water than normally and naturally flowed from lake in its natural state unaffected by artificial changes in depth and width of channel and outlet of lake.

Waters and Water Courses ⇨79

One who undertakes to change natural channel of stream or increases or diminishes flow of stream must exercise care and take such precautions as to prevent injury to others.

Waters and Water Courses ⇨53

If upstream owner maintained dam at height which would permit same amount of water to escape from lake and proceed down creek to downstream owners' diversion point as would have escaped if channel had remained undisturbed by construction of dam, upstream owner would not be responsible for water flowing in quantity greater than that to which downstream owners were entitled during any period of the year.

Waters and Water Courses ⇨63

Downstream owners who sued upstream owner to enjoin maintenance of dam only to preserve their water rights were entitled only to judgment which would enjoin interference with and would protect their rights, and downstream owners were not entitled to enjoin maintenance of dam at height lower than that which would interfere with their rights or privileges relating to water.

O. R. Baum, Ben Peterson, Ruby Y. Brown, Robert W. Bennett, Pocatello, for appellant.

Albaugh, Bloem, Smith & Pike, Idaho Falls, for respondents.

KNUDSON, Chief Justice.

Rainey Creek, in the spring of the year and during other high water periods, is a continuous stream flowing across appellant's land, but during the summer season is usually divided into two streams, viz.: Upper Rainey Creek and Lower Rainey Creek. The water of Upper Rainey Creek usually sinks and disappears before getting to the 9½ acre lake which is fed by springs and constitutes the headwaters of Lower Rainey Creek. Said lake is also fed by a slough with a surface area of about 2.8 acres which is a short distance upstream.

A substantial part of the 9½ acre lake is situated on appellant's land and the 2.8 acre slough is on land owned by persons who are not parties to this action.

Respondents are property owners downstream from appellant's land and they are the owners of a decreed water right of 160 inches (3.2 C.F.S.) in the waters of Lower Rainey Creek with a priority of June 1, 1893 which is appurtenant to their land as described in paragraph 1 of respondents' complaint. The point of diversion of such water is a little over a quarter of a mile downstream from the 9½ acre lake. Respondents also have certain rights to water stored in Palisades Reservoir which is at times delivered to them via Rainey Creek.

During the fall of 1957 appellant employed one Lloyd Rush to do excavation work in Rainey Creek. Appellant admits that he employed Mr. Rush of the Rush Construction Company to perform excavation work in Upper Rainey Creek, but denies that such employment included excavation at the lake outlet or in Lower Rainey Creek.

After the excavation had been completed appellant constructed a headgate or dam approximately 12 feet long across the channel of Lower Rainey Creek just below the outlet from the lake. Said dam has a concrete base with a center pier and ends approximately 64 inches high and is so constructed that the elevation of water behind the dam may be regulated by planks which may be inserted in or removed from

slots made in the center pier and ends of the dam.

This action was commenced by respondents seeking an injunction against appellant and all persons acting for or in aid of him, restraining them from maintaining and using said dam. From a judgment in favor of respondents this appeal has been taken.

[1] Appellant contends that the court erred in finding that appellant employed the Rush Construction Company to clean out the outlet of the lake and that by reason thereof the mouth of the lake was lowered 8 inches. Although appellant denied that he employed said company to clean out the outlet, Mr. Rush testified that he was given specific instructions by appellant to do so and that he removed such amount of material from the outlet as lowered it 8 inches to a foot in depth and widened it six or eight feet. The finding complained of is supported by competent evidence.

[2] Under assignment of error No. III it is claimed that the court erred in finding that the dam constructed by appellant was 44 to 48 inches in height above the concrete footing of the dam. In this connection David Peterson, a deputy watermaster, testified as follows:

"Q. What did you find about the height of that dam; that is to say, the number of planks in it?

"A. Well, the first time I went over there there was three 12-inch planks, one-foot planks, and three two by fours in the spillway.

"Q. There was three two by fours and three 12-inch?

"A. That's right.

"Q. And was the water backed up to the top of those planks?

"A. Yes.

"Q. That would be four feet? That dam, then, was four feet high, is that right? That would look about the right height to you there? I mean, that's about what it was?

"A. That's exactly what it was."

The court did not err in making the finding complained of.

[3] Appellant's contention that "there is no evidence in the record that the conduct or actions of the appellant interfered with the natural flow of the water" in Lower Rainey Creek is clearly without merit. The contention that the court erred in finding that during 1961 respondents failed to get their natural flow water or storage water is also without merit.

Considerable of appellant's brief is devoted to discussing statements or findings of the court relative to the claimed rights of appellant to the waters in the lake. In this regard the court found that the waters in said lake are public waters of the State of Idaho and any right which appellant has as a riparian owner or proprietor therein or thereto is subject and inferior to the rights and claims of respondents. Appellant concedes that any right which he has to the water of said lake are inferior to the decreed rights of respondents to 160 inches of said water, plus such storage rights as they may have acquired. Consequently it is unnecessary to a determination of the issue in this case to define what rights, if any, appellant has to such water.

[4] Appellant further argues that respondents do not have a right to any more water than normally and naturally flows from said lake in its natural state unaffected by artificial changes in the depth and width of the channel and outlet of the lake. There is merit to such contention. However, artificial changes in the channel and outlet of the lake have been made in this case and such changes have brought about this suit.

The trial court found that by reason of the installation of the dam by appellant the respondents were unable to obtain for the irrigation of their lands, a large portion of the natural flow water to which they were entitled under their decreed right, and were unable to obtain or use the exchange water from the Palisades Reservoir. Such find-

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[5] One who undertakes to change the natural channel of a stream or by means of dams or otherwise increases or diminishes the flow of a stream must exercise care in so doing and take such precautions as to prevent injury to others. *Mashburn v. St. Joe Improvement Co.*, 19 Idaho 30, 113 P. 92, 35 L.R.A.N.S., 824; *Smith v. Big Lost River Irrigation District*, 83 Idaho 374, 364 P.2d 146. The generally accepted rule is stated in 56 Am.Jur., 505, Waters, § 14, as follows:

"It is established, however, that the ordinary or natural course of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Accordingly, one who changes the course of a stream must do so in such manner as not to injure, or unduly interfere with the rights of, the adjoining proprietor, either above or below, or on the opposite side of the stream. * * *

It is further stated in 56 Am.Jur. 510, Waters, § 18, that:

"* * * a riparian proprietor has the right, inseparably annexed to the soil, to have the water of a stream flow to and from his land as it has been wont to flow, so far as is consistent with the right of other owners to make a reasonable use of such water. It follows that the obstruction of the natural flow of a stream is always done at the risk of being answerable in damages to him who sustains a loss thereby. Without the consent of the other proprietors who may be affected by his operations, an upper proprietor has no right unreasonably to interrupt or retard the natural flow of the water, to the injury of the lower owners, * * *

Appellant complains of the following finding of fact:

"That the top of the concrete base or footings of the said dam is twelve (12)

inches below the level of the existing channel of Lower Rainey Creek; that the present level of the channel of Lower Rainey Creek at said dam is eight (8) inches lower than it was before same was dredged and deepened by defendant and his agents; * * *

Appellant argues that the court's conclusion that the channel at the dam is only 8 inches lower than it was before it was dredged and deepened by appellant and his agents, is but an arbitrary conclusion of the court. It is true appellant and some witnesses testified that the bed had been lowered more than 8 inches, however, among others, the man who did the work testified that he lowered the outlet of the lake between 8 and 12 inches, and the court was justified in accepting his estimate.

Appellant strenuously complains concerning the language used in the last portion of said finding No. XV, which is substantially the same as is used in a portion of the last paragraph of the judgment. The language referred to is as follows:

"* * * that planks or boards may be installed and maintained in said dam on top of said concrete base or footing to a height of twenty (20) inches, and no more."

Appellant argues that this language, in effect, increased respondents' rights, whereas, the court should not have restricted appellant from maintaining the lake at a higher level so long as it does not interfere with respondents' rights. We do not agree with appellant's claimed effect of the judgment, however there is some justification for complaint regarding the language used:

[6] This action was commenced seeking an order enjoining and restraining appellant from interfering with the natural flow of Lower Rainey Creek to respondents' damage; its objective is to preserve respondents' water rights. The trial court found that if the dam in controversy is maintained at a height of 20 inches above the concrete base or footing of the dam, it will permit the same amount of water to

escape from the lake and proceed down Lower Rainey Creek to respondent's diversion point as would occur if its channel had remained undisturbed. Under such condition it will not be appellant's responsibility, if, during any period of the year, the amount of water flowing from the lake is less than the quantity to which respondents are entitled.

[7] Appellant acknowledges that he has in the past received benefits resulting from the percolation of water from the lake sub-irrigating approximately 70 acres of his land and also that the level of the lake affects the amount of sub-irrigation his land receives. Appellant further acknowledges that he has no decreed right to the water in the lake here involved and from the record before us it appears that appellant enjoys only the rights or privileges of a riparian owner. However, since the issue here presented, and the relief hereby sought, involves only the preservation of respondents' rights, we are of the view that so long as the provisions of the judgment properly enjoin appellant from in any manner interfering with, and adequately protects, respondents' rights such judgment would be proper. We conclude that the last paragraph of the judgment should be amended to read:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, his agents, servants, employees and all others acting in aid or assistance of him be hereby perpetually enjoined during the irrigation season of each year from maintaining said dam at a height more than twenty (20) inches above the concrete base or footing of said dam if and when any additional height would interfere in any respect with plaintiffs' rights or privileges relative to the water of Rainey Creek or the Palisades Reservoir or the prior rights of others. In the event of a violation of the foregoing order by defendant or any person acting in aid or assistance of him, he may thereafter be perpetually enjoined

from, at any time, maintaining said dam at a height in excess of 20 inches above the concrete base thereof. Plaintiffs shall have judgment for their costs in the amount of _____ DOLLARS."

We have examined the remaining assignments of error and find no error that would justify a reversal of the judgment in this case.

The cause is remanded with instructions to the trial court to amend its findings of fact, conclusions of law and judgment in accordance with the views herein expressed. Costs to respondents.

McQUADE, McFADDEN, TAYLOR
and SMITH, JJ., concur.



Dearold FOSTER, Plaintiff-Appellant,
v.
Frank H. THOMAS, Defendant-Respondent.
No. 9289.

Supreme Court of Idaho.
June 7, 1963.

Action for personal injuries and property damage resulting from intersectional collision between defendant's westbound automobile which was coming from a stop sign and plaintiff's motorbike which was proceeding south on a highway to the right of a southbound automobile as they approached the intersection. The District Court, Ninth Judicial District, Bonneville County, Henry S. Martin, J., after jury verdict and entry of judgment for plaintiff, granted defendant's motion for an order setting aside the verdict and directing entry of judgment in favor of the defendant. The plaintiff appealed. The Supreme Court, Knudson, C. J., held that questions as to defendant's neg-