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In Re SRBA )  
 ) Subcase Nos. \_\_\_\_\_  
 )  
Case No. 39576 )  
 )  
 ) **AFFIDAVIT OF**  
 ) **RAY W. RIGBY**  
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 )

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

1. That he is licensed to practice law in all courts in the State of Idaho.

2. That he is associated with the law firm of Rigby, Thatcher, Andrus, Rigby,

Kam & Moeller, P.A., which maintains its office at 25 N. 2nd E., Rexburg, ID 83440, and which firm receives its mail at P.O. Box 250, Rexburg, ID 83440.

3. That he has been retained as an attorney by the City of Rexburg, Madison County, Idaho, to file and process said City's claims to water rights in the Snake River Basin Adjudication (hereinafter "SRBA").

4. Mary Smith, who is now, for all intents and purposes, retired from the practice of law, and unable to handle said claims, has been the regular retained attorney for said City for approximately 50 years.

5. Mary Smith, within the time allowed by the Court for the filing of claims for the particular basin, prepared and delivered to the Eastern District office of the State of Idaho, claims to the water rights for said City of Rexburg.

6. Mary Smith was told the fee for filing the claims, and when Mary Smith was astounded at the size of the fee, she was told that it was based upon claims for the use of water for "power purposes" because the so-called "Rexburg Decree" has so listed it. A copy of the pertinent provisions of the Rexburg Decree is attached hereto as Exhibit "A" and by reference made a part hereof.

7. Because Mary Smith maintained said City's water rights were irrigation rights and not power rights, neither she nor anyone in behalf of the City paid the filing fee, based on power rights or otherwise; the claims were not filed in the SRBA proceedings and have not been filed at any time thereafter, and Mary Smith has never filed with said Department of Water Administration any documentation supporting her claim that the City's water rights were irrigation rights and not power rights.

8. Thereafter, the City of Rexburg had a change of mayors and Mary Smith has had no further association with the City's water claims.

9. When asked by the City to file and process its water claims, your affiant has gathered the following information:

a. The City of Rexburg acquired its water rights and a canal system from the Rexburg Irrigation Company. One record indicates that the acquisition was made on the 13th day of April, 1896, and another record indicates that the acquisition was made on the 11th day of February, 1897. In an action filed in the Fifth Judicial District Court in and for Fremont County, Idaho, entitled Rexburg Irrigation Company, a corporation, the City of Rexburg, in Fremont County, Idaho, and T. L. Nave v. Teton Irrigation Canal Company, et al. (numerous defendants), the said City of Rexburg alleged that:

The Rexburg Irrigation Canal Company, sold and conveyed to the Plaintiff, the City of Rexburg, a certain canal together with all the laterals connected therewith, theretofore constructed and then owned by it and Four Thousand (4,000) miners inches measured under a Four (4) inch pressure of the waters of Teton River by it appropriated, as heretofore alleged, on the \_\_\_\_ day of April, 1885. That since said date the Plaintiff, the City of Rexburg, has continuously each and every year, diverted the said Four Thousand (4,000) inches of water from said Teton River and distributed the same to the said original stockholders in the Rexburg Irrigation Company, according to the stock and credit held by each, for the purpose of irrigating the lands in the City of Rexburg and adjacent thereto occupied, used and owned by such stockholder, and for culinary [sic] and other useful purposes. And has used said water for City purposes.

The whole of said Four Thousand (4,000) inches of water is necessary for the use of said Plaintiff for City purposes and for distribution to said original stockholders under the agreement and obligation entered into and undertaken by said Plaintiff when said canal and water was conveyed to it.

The Court dismissed the City of Rexburg as a Plaintiff in said case and required it to appear as a party defendant. Consequently, on August 20, 1903, it filed, in said case, the "Answer and Cross-Complaint of The City (Formerly Village) or [sic] Rexburg, and its Mayor and Councilmen (Formerly Trustees)." A copy of same is labeled Exhibit "B" and is attached hereto and by reference made a part hereof.

b. Rexburg Canal Company acquired its water right by diversion and appropriation to a beneficial use pursuant to a notice of claim filed in the County records, which claim stated that it was for agricultural, mining, milling, and mechanical purposes. A copy of said claim is labeled Exhibit "C" and is attached hereto and by reference made a part hereof.

c. The City of Rexburg water right was diverted from the Teton River, a tributary of the North Fork of the Snake River at a point a short distance west of the City of Teton, Idaho, and was delivered through a channel that came to be known as "The City Ditch."

d. The City Ditch was known as the "Upper Ditch" used to distribute water to the farmers entitled to water therefrom for irrigation, domestic and stock watering uses in an area between the point of diversion for said City Ditch and the City of Rexburg, and approximately 425 acres south of said City. The water for the City and for other farmers flowed on down the channel to the City's diversions used to distribute water to the people of the City for irrigation, domestic use, stock watering, and City uses, and then to the farmers entitled to water therefrom south of said City, for irrigation, domestic and stock watering uses, with any surplus water or unused water being emptied into the canal of the Rexburg Irrigation Company, pursuant again to an agreement between the City and said canal company.

e. The Rexburg Irrigation Company also diverted its water from the said Teton River into its canal, known as the lower ditch, which followed a semi-circle course around the northerly and westerly side of the City of Rexburg for delivery of water to its stockholders west and southwest of said City.

f. The Rexburg Milling Company also acquired a water right which it diverted from said Teton River and delivered it through what is now known as the Woodmansee-Johnson

ditch or canal to a "flouring mill . . . situated near the Town of Rexburg, for use in generating power to operate said mill . . . and after using said water for said purpose has permitted the same to flow on down for the use and benefit of other parties to this suit and especially of the Rexburg Irrigation Company." (From the Cross-Complaint of Charles H. Woodmansee, James Johnson, Hugh St. Clair Johnson, and the Rexburg Milling Company, a corporation.)

g. In the case of Rexburg Irrigation Company, et al. vs. Teton Irrigation Canal Company, et al., filed on or about July 30, 1901, many claimants to the use of the waters of the Snake River and its tributaries filed cross-claims to put in issue their claims to water rights. The City of Rexburg filed its Cross-Complaint as stated above, and a copy of said Cross-Complaint labeled "Exhibit "B" is attached hereto and by reference made a part hereof.

h. Henry Flamm, Mayor of the City of Rexburg at the time, and J. L. Jacobs, a Rexburg City Councilman, testified in said case in behalf of the claims of the City of Rexburg. A copy of the pertinent parts of their recorded testimony is labeled "Exhibit "D" and is attached hereto and by reference made a part hereof. The following points were made by them:

- i. The City's water rights were for irrigation, stock watering and domestic purposes for lands within the City and farmers' lands on the east side of the City and on the south side of the City.
- ii. The City irrigated approximately two-thirds (2/3) or 432-440 acres of the approximate 640 acres within the townsite and subdivisions thereto. The farmers outside of the City limits irrigated approximately 425 acres.
- iii. Other witnesses testified substantially, as Mayor Flamm did, and supported the City's claims to the use of its water rights for irrigation purposes principally.

10. The City of Rexburg is the owner of the following water rights:

- 1,650 inches, Apr. 1, 1898, Teton River (from Rexburg Decree)
- 1,350 inches, June 10, 1883, Teton River (from Rexburg Decree)

11. Those rights were for irrigation, stock watering and domestic purposes for lands within the City and farmers' lands on the east side of the City and on the south side of the City. The City Ditch is situate upon a course that has very porous soils and therefore the transportation losses are great, necessitating the diversion of substantially greater quantities of water than are actually used for irrigation and City purposes. However, the course of the canal parallels generally the course of the Teton River at a higher elevation and the water lost in transportation from the diversion point to the places of use is, to a great extent, a part of the recharge of said river.

12. The City of Rexburg had works for the diversion of irrigation water throughout and upon a major part of the flat lands within the City limits and many of those diversionary works still exist. However, as the use of surface waters declined within the City and the lands adjoining thereto, the surplus water of the City was emptied into the channel of the Rexburg Irrigation Canal Company canal to supplement the waters of that canal company for use on its stockholders' lands. However, a portion of its surplus water has been leased to the Canyon Creek Canal Company as supplemental water for irrigation of its stockholders' lands. All of the water claimed by the City has been held and shall be held as a municipal provider to meet reasonably anticipated present and future needs and therefore the entire water right claimed constitutes beneficial uses, and such rights have not and should not be lost or forfeited for nonuse and all of the same, as granted by "The Rexburg Decree" is still fully needed to meet the reasonably anticipated present and future needs of the said City of Rexburg. (Idaho Code Sec. 42-222(2)). Therefore, none of the City's water rights have been forfeited or abandoned, and

continue to be used for beneficial purposes, since decreed to it in 1910 by "The Rexburg Decree."

13. The Decree in the said Rexburg case erred in listing "power use" as the purpose for which the City water was decreed and said water rights have never been used by the City of Rexburg for power purposes and it is reasonable to assume that the error was made by the scriveners in assembling the rights of the parties and used the Rexburg Milling Company power use rights right as the purpose of the Rexburg City water rights.

14. The City has acted in good faith, has gathered substantial data documenting its rights and nature of use of water and the ends of justice should entitle said City to file late claims in the SRBA in behalf of itself and the water users who derived their rights from said City.

15. Your affiant, in behalf of the City of Rexburg, has reviewed all portions of the proceedings in the Rexburg Decree, as well as minutes of the Rexburg City Council, including the early minutes, dealing with the City's water rights, hiring of water masters, installing of diversionary works, and the irrigation of the lands of the City and its relationship with the Rexburg Milling Company and the Rexburg Irrigation Company, and your Affiant has also interviewed many people, including, but not limited to, former Mayor John Porter, who is over 80 years of age, and who has lived in the City of Rexburg all of his life; Robert Erikson, who is over 90 years of age, served on the City Council for several years, and has lived in Rexburg all of his life; Gene Palmer, whose father and grandparents have been on the so-called Upper Ditch and know its history and how the water was used for all of the flat lands of the City of Rexburg; and particularly the conversations with former water masters to the effect that both

of the water rights of the City from the Rexburg Decree (4-1-1898 and 6-10-1883) were fully used over the years.

16. Your affiant has also lived in and near the City of Rexburg throughout his lifetime, and knows of his own knowledge that the site and diversionary works of the Rexburg Milling Company, the diversions of the Rexburg Irrigation Company and the City Ditch, and has observed the irrigation of portions of the City of Rexburg in earlier years, and has observed the location of the canals and ditches running through the City, including diversionary works that still exist on the corner of your affiant's law office; that by your own affiant's knowledge and from the information obtained from the records and the witnesses the City historically watered through its system yards, gardens and even farm land within the City limits, took a great portion of its decreed water from the canals and ditches into tanker trucks to suppress fires, to water lawns, trees and shrubs and flush streets and sewers as well as irrigating several additional acres of farm land, both on the easterly side of the City and on the Southwesterly side of the City that are now used as home sites; that water distributed to the Rexburg Milling Company was emptied into the City Ditch and the City waste water went into the Rexburg Irrigation Company Canal, and exact records were not kept as to which decree any particular water came from, but the consensus of the records and the opinions of the witnesses that the water from the City's junior decree, being more or less a "high water" right, was not only measured, but was nevertheless delivered to the citizens of the City of Rexburg for irrigation of their lands, domestic purposes, and city purposes as described above, as was the waters from the City's early decree.