

Attorney: Ray W. Rigby
of RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered
Attorneys at Law
25 North Second East
Rexburg, ID 83440
Telephone: (208) 356-3633

In Re SRBA

Case No. 39576

Subcase Nos. _____

**AFFIDAVIT OF
RAY W. RIGBY**

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

RAY W. RIGBY, being first duly sworn, deposes and says:

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)

22-203

22-204

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.

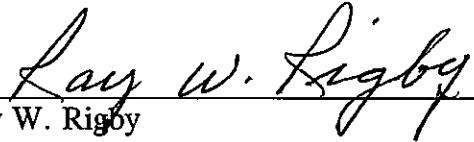
12. The City of Rexburg had works for the diversion of irrigation water throughout and upon a major part of the flat lands within the City limits and many of those diversionary works still exist. However, as the use of surface waters declined within the City and the lands adjoining thereto, the surplus 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.

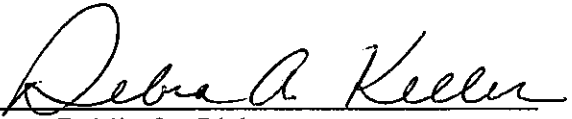
14. The City has acted in good faith, has gathered substantial data documenting its rights and nature of use of water and the ends of justice should entitle said City to file late claims in the SRBA in behalf of itself and the water users who derived their rights from said City.

DATED This 25th day of April, 1997.



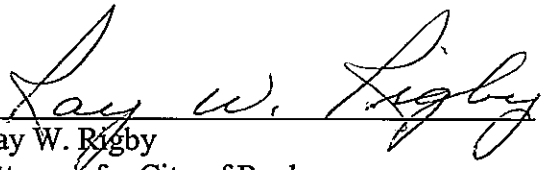
Ray W. Rigby
Attorney for City of Rexburg

SUBSCRIBED AND SWORN to before me a notary public in and for the State
of Idaho this 25th day of April, 1997.



Notary Public for Idaho
Residing at Rexburg, Idaho
My Commission Expires: 11-15-99

DATED This 28th day of April, 1997.


Ray W. Rigby
Attorney for City of Rexburg

SUBSCRIBED AND SWORN to before me a notary public in and for the State of
Idaho this 28th day of April, 1997.


Notary Public for Idaho
Residing at Rexburg, Idaho
My Commission Expires: 11-15-99

Form 42-1409(10)-1
5/89

Date Received

RECEIVED

APR 28 1997

Department of Water Resources

COPY

**State of Idaho
Department of Water Resources
REQUEST FOR EXTENSION OF TIME
TO FILE ADJUDICATION CLAIM(S)**

The Idaho Department of Water Resources will consider this form as a request by the claimant for an additional period of time in which to file claim(s) beyond the 90 days allowed by Section 42-1409(10), Idaho Code.

City of Rexburg 208 356-3633
Name of Claimant Phone Number
c/o Ray Rigby POB 250 Rexburg ID 83440
Mailing Address City State Zip
Madison
County(s) where place of use is located Date claim originally due
See Exhibit A to Ray W. Rigby Affidavit which is attached hereto.
Identify water right(s) for which extension is requested

State why an extension of time is requested explaining how a diligent effort has been made to meet the deadline:
See Affidavit of Ray W. Rigby, with accompanying exhibits,
attached hereto.

Claimant requests an extension to The claims are prepared and can be filed immediately upon department authorization.
Signature Neil L. Boyle Date of request April 25, 19 97
Mayor of City of Rexburg
Title

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

The above request for extension of time is hereby [☒ granted] [☐ denied] for the following reasons:

and if granted the filing deadline is extended to July 1, 19 97
Signed this 28th day of April, 19 97

David R. Tuttle
Director or his designated agent

Mail to: Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706

City of Idaho Falls, 7,000 inches, Apr. 20, 1900, Snake River. (For power and municipal purposes.)
 City of Idaho Falls, 2,400 inches, Oct. 22, 1904, Snake River. (For power and municipal purposes.)
 City of Rexburg, 1,650 inches, Apr. 1, 1898, Teton River. (For municipal and power purposes.)
 City of Rexburg, 1,350 inches, June 10, 1883, Teton River. (For municipal and power purposes.)
 Clark & Edwards Irrigating Company, Limited, 3,500 inches, Feb. 27, 1885, South Fork of Snake River.
 Clark & Houghton, 160 inches, June 1, 1891, Teton River.
 Clark & Houghton, 200 inches, Apr. 1, 1898, Teton River.
 Clark, H. J., 160 inches, May 15, 1898, Teton River.
 Clark, J. P. L., Good Luck Canal Company and Pioneer Ditch Company.
 Clawson, B. W., 500 inches, Jan. 18, 1905, North Leigh or Spring Creek.
 Clawson, Spencer, 150 inches, Jan. 18, 1905, North Leigh or Spring Creek.
 Clawson, Spencer, Adminr. Estate of, 500 inches, Jan. 18, 1905, North Leigh or Spring Creek.
 Clay, S. C., The Sunnyside Irrigation Canal Company.
 Clay, Z. T., The Sunnyside Irrigation Canal Company.
 Clegg, William, The Farmers' Friend Canal Company.
 Cleverly, George F., Enterprise Canal Company.
 Cleverly, Herbert, The Farmers' Friend Canal Company.
 Cleverly, Jesse, and Mary Ann, The Farmers' Friend Canal Company.
 Cleverly, John H., The Farmers' Friend Canal Company.
 Cleverly, William, The Farmers' Friend Canal Company.
 Cluff, Charles, 10 inches, June 1, 1897, Fox Creek.
 Cluff, Charles, 150 inches, June 1, 1898, Fox Creek.
 Cole, Charles, Enterprise Canal Company.
 Coles, Alvin, The Farmers' Friend Canal Company.
 Coles & Dodge, The Farmers' Friend Canal Company.
 Coles, Henry, The Farmers' Friend Canal Company.
 Coles, Reuben, The Farmers' Friend Canal Company.
 Coles, Thomas, The Farmers' Friend Canal Company.
 Collins, J. A., 120 inches, Oct. 15, 1900, Tom Creek.
 Conant Creek Canal Company, 1,000 inches, May 1, 1901, Conant Creek.
 Consolidated Farmers Canal Company, Limited, 4,000 inches, June 1, 1890, North Fork of Snake River.
 Consolidated Farmers Canal Company, Limited, 6,000 inches, June 1, 1892, North Fork of Snake River.
 Consolidated Farmers Canal Company, Limited, 2,750 inches, June 1, 1895, North Fork of Snake River.
 Consolidated Feeder Canal Company, 7,000 inches, Apr. 14, 1902, South Fork of Snake River.
 Cook, T. S., The Farmers' Friend Canal Company.
 Cooper, I. D., Enterprise Canal Company.
 Cooper, I. L., Enterprise Canal Company.
 Cooper, John, Watson Slough Irrigation Company.
 Cooper, Samuel, 320 inches, May 1, 1896, Hulls Springs.
 Cooper, Samuel, 160 inches, May 1, 1896, Bonner Creek proper.
 Corbett, Harlan, 100 inches, July 6, 1892, Rainey Creek.
 Corbett, Ira A., 160 inches, June 1, 1897, Rainey Creek.
 Corbett, J. N., 155 inches, May 7, 1896, Rainey Creek.
 Corbett, V. W., 70 inches, Oct. 24, 1898, Rainey Creek.
 Corbett Slough Ditch Company, 6,000 inches, May 1, 1889, Snake River.
 Corbett Slough Ditch Company, 6,500 inches, May 1, 1892, Snake River.
 Corey, George L., and Lester S., 300 inches, June 1, 1887, South Fork of Snake River.
 Costello, C. A., 120 inches, June 15, 1895, Spring Creek.
 Costello, C. A., 40 inches, June 15, 1895, Pine Creek.

EXHIBIT

"A"

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF IDAHO, IN
AND FOR FREMONT COUNTY.

Rexburg Irrigation Company,
a corporation, et al.,

Plaintiffs.

vs.

Teton Irrigation Canal Com-
pany, et al.,

Defendants.

ANSWER AND CROSS-COMPLAINT OF
THE CITY(FORMERLY VILLAGE)OR REX-
BURG, AND ITS MAYOR AND COUNCIL-
MEN(FORMERLY TRUSTEES).

Come now the City of Rexburg(formerly Village) and Henry Flamm, Mayor, and John M. Woodburn, Edward Paul, John L. Jacobs, N. H. Halstrom, Joseph B. Loyd, and Eli McIntyre, as councilmen of said City, and by leave of Court first had and obtained and in accordance with an order of the Court dismissing the said Village of Rexburg as a party plaintiff and requiring it to appear as a party defendant, said Village(now City), and said Trustees(now Mayor and Councilmen) hereby enter their appearance as defendants and for answer and cross-complaint herein allege as follows, to-wit:-

-I-

That since the commencement of this action, pursuant to the general laws of the State of Idaho, the said Village of Rexburg has, by proceedings duly taken according to law, became, and the same is, a city of the second class and has adopted a city government, and elected the officers of a city pursuant to law.

-II-

Said defendants deny that the parties named in the Fourth paragraph of the complaint or any number of said parties or the plaintiff canal company or any or all of its predecessors in interest on the _____ day of April, 1883, or at any other time appropriated Fifteen thousand(15,000) miner's inches, measured under a four inch pressure, of the waters of Teton River or any other

EXHIBIT

"B"

(Cedar Point Water Company, Continued.)

- Mitchell, Thomas, SW $\frac{1}{4}$ of Sec. 20 and 5 acres in SE $\frac{1}{4}$ of Sec. 20, T. 1 N. R. 37 E. B. M., containing 165 acres.
- Nelson, Gust., NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of Sec. 30, T. 1 S. R. 37 E. B. M., containing 269 acres.
- Peterson, Ebbe, E $\frac{1}{2}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$ and Lot 3 of Sec. 32, T. 1 N. R. 37 E. B. M., E $\frac{1}{2}$ of NW $\frac{1}{4}$ and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 8, T. 1 S. R. 37 E. B. M., containing 320 acres.
- Rider, John M., 52 acres in Sec. 18, T. 1 S. R. 37 E. B. M.
- Robbins, Frank T., part of SW $\frac{1}{4}$ of Sec. 25, T. 1 S. R. 37 E. M. M., containing 10 acres.
- Shelly, John F., S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 29, SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 28, Lots 2 and 3 of Sec. 17, Lot 8 of Sec. 18, SE $\frac{1}{4}$ of NW $\frac{1}{4}$ and Lots 1, 2, 3 and 7 of Sec. 31, Lot 2 of Sec. 31, E $\frac{1}{2}$ of SW $\frac{1}{4}$, and Lots 4 and 5 of Sec. 31, NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 32, Lot 3 of Sec. 29, Lots 1 and 2, W $\frac{1}{2}$ of NE $\frac{1}{4}$, and W $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 32, Lot 1 of Sec. 17, Lot 1 of Sec. 36, T. 1, E. B. M., containing 820 acres.
- Streed, Peter, Lots 5 and 6 and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 7, T. 1 S. R. 37 E. B. M., containing 157 acres.
- Whitmill, Henry R., W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 8, E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 7, T. 1 S. R. 37 E. B. M., containing 160 acres.
- Wilson, Fred, Estate of, S $\frac{1}{2}$ of SE $\frac{1}{4}$, and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 5, NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 8, and SW $\frac{1}{4}$ of Sec. 4, T. 1 S. R. 37 E. B. M., containing 320 acres.
- Central Teton Canal Company, lands of stockholders of said Company, the description of said land and the names of said stockholders not being given in the pleadings of said Company.
- Chaffin, John R., NE $\frac{1}{4}$ of NW $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$, and 50 acres of E. side of NW $\frac{1}{4}$ of Sec. 14, T. 2 N. R. 38 E. B. M., containing 170 acres.
- Chaffin, J. W., NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 16, T. 2 N. R. 38 E. B. M., and 30 acres in NW corner of NW $\frac{1}{4}$ of Sec. 26, T. 2 N. R. 38 E. B. M., containing 70 acres.
- Chelsey, John P., N $\frac{1}{2}$ of N $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 7, N $\frac{1}{2}$ of N $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 8, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 6, S $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 5, T. 3 N. R. 45 E. B. M.
- Cherry, Thomas, Lot 4, and SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 1, T. 3 N. R. 45 E. B. M.
- Chester Canal & Irrigation Company, Limited, lands of stockholders of said Company, the description of said lands and the names of said stockholders not being given in the pleadings of said Company.
- Christensen, B. L., E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 1, T. 1 N. R. 37 E. B. M., containing 80 acres.
- Christensen, Nels C., SE $\frac{1}{4}$ of NW $\frac{1}{4}$ and Lot 4 of Sec. 19, NE $\frac{1}{4}$ of NW $\frac{1}{4}$ and Lot 1 of Sec. 30, T. 4 N. R. 46 E. B. M.
- Chubbuck, Walter E., SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 32, T. 4 N. R. 41 E. B. M., and E $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 5, T. 3 N. R. 41 E. B. M.
- City of Idaho Falls, the lands (public and private) within the city limits of the City of Idaho Falls.
- City of Rexburg, the lands (public and private) within the city limits of the City of Rexburg.
- Clark & Edwards Canal & Irrigating Company, Limited, lands of stockholders of said Company, the description of said lands and the names of said stockholders not being given in the pleadings of said Company.
- Clark & Houghton, N $\frac{1}{2}$ of SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 11, T. 6 N. R. 40 E. B. M.
- Clark, H. J., S $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 36, T. 7 N. R. 40 E. B. M.
- Clark, John, NW $\frac{1}{4}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 36, T. 1 N. R. 37 E. B. M., containing 120 acres.

- Reed, Charles S., NE $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 15 and SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 15, T. 2 N. R. 37 E. B. M., containing 140 acres.
- Reese, A. J., S $\frac{1}{2}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$ and Lot 7 of Sec. 6, T. 3 S. R. 35 E. B. M., containing 160 acres (owned jointly with Daniel King).
- Reid Canal Company, lands of stockholders of said Company, the description of said lands and the names of said stockholders not being given in the pleadings of said Company.
- Rexburg Irrigation Company, lands of stockholders and patrons of said Company, the description of said lands and the names of said stockholders and patrons not being given in the pleadings of said Company.
- Rexburg Milling Company, lands of said Company, the description of said lands not being given in the pleadings of said Company.
- Rice, A. L., S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 31 and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 32, T. 4 N. R. 45 E. B. M., and N $\frac{1}{2}$ of SE $\frac{1}{4}$ and E $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 31, T. 4 N. R. 45 E. B. M., containing 320 acres.
- Rice, Ed., E $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 23, T. 13 N. R. 45 E. B. M., containing 80 acres.
- Rice, George A., SW $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 35, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 34 and SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 35, T. 4 S. R. 32 E. B. M.; also NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 3, NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 2, E $\frac{1}{2}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 3, T. 5 S. R. 32 E. B. M.; also N $\frac{1}{2}$ of SE $\frac{1}{4}$ and NE $\frac{1}{4}$ of Sec. 34, NW $\frac{1}{4}$ of NW $\frac{1}{4}$, E $\frac{1}{2}$ of NW $\frac{1}{4}$ and W $\frac{1}{2}$ of NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 35, T. 4 S. R. 32 E. B. M., containing a total of 1,000 acres.
- Rich, Anna Page, NW $\frac{1}{4}$ of Sec. 25, T. 13 N. R. 43 E. B. M., containing 160 acres.
- Rich, Dora E., E $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 26, T. 4 S. R. 32 E. B. M., containing 80 acres.
- Rich, Landon J., SE $\frac{1}{4}$ of NW $\frac{1}{4}$ and S $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 26, T. 4 S. R. 32 E. B. M., containing 160 acres.
- Richie, Mary C., N $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 23, T. 3 N. R. 38 E. B. M., containing 80 acres.
- Ricks, Effie E., N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 11 and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 12, T. 3 N. R. 45 E. B. M., containing 160 acres.
- Ricks, Ernest, SW $\frac{1}{4}$ of Sec. 23, T. 2 N. R. 38 E. B. M., containing 160 acres.
- Ricks, John, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 11 and E $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 14, T. 3 N. R. 45 E. B. M., containing 160 acres.
- Ricks, Josiah, N $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 35 and S $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 26, T. 6 N. R. 45 E. B. M., containing 160 acres.
- Ricks, Wallace, S $\frac{1}{2}$ of NE $\frac{1}{4}$ and N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 25, T. 6 N., R. 45 E. B. M., containing 160 acres.
- Rigby Canal & Irrigating Company, lands of stockholders of said Company, the description of said lands and the names of said stockholders not being given in the pleadings of said Company.
- Riley, J. H. (Description not given in pleadings.)
- Ritchie, John J., E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 24 and 60 acres from NE corner of NW $\frac{1}{4}$ and 50 acres from SE corner of NW $\frac{1}{4}$ of Sec. 25, T. 3 N. R. 38 E. B. M., containing 190 acres.

Riverside Ditch Company.

- Allen, Elihu, NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 32, T. 2 S. R. 33 E. B. M., containing 40 acres.
- Bailey, C. W., commencing at NE corner of W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 22, T. 2 S. R. 35 E. B. M., thence W 50 rods, thence S 160 rods, thence E 50 rods, thence N 160 rods, to beginning, containing 50 acres.
- Baldwin, James, Fred Bergeson and J. J. Peterson, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 26, T. 2 S. R. 35 E. B. M., containing 80 acres.
- Baldwin, James W., commencing at NE corner of Sec. 29, T. 2 S. R. 35 E.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF IDAHO, IN
AND FOR FREEMONT COUNTY.

Rexburg Irrigation Company,
a corporation, et al.,

Plaintiffs.

vs.

Teton Irrigation Canal Com-
pany, et al.,

Defendants.

ANSWER AND CROSS-COMPLAINT OF
THE CITY(FORMERLY VILLAGE)OR REX-
BURG, AND ITS MAYOR AND COUNCIL-
MEN(FORMERLY TRUSTEES).

Come now the City of Rexburg(formerly Village) and Henry Flamm, Mayor, and John M. Woodburn, Edward Paul, John L. Jacobs, N. H. Halstrom, Joseph B. Loyd, and Eli McIntyre, as councilmen of said City, and by leave of Court first had and obtained and in accordance with an order of the Court dismissing the said Village of Rexburg as a party plaintiff and requiring it to appear as a party defendant, said Village(now City), and said Trustees(now Mayor and Councilmen) hereby enter their appearance as defendants and for answer and cross-complaint herein allege as follows, to-wit:-

-I-

That since the commencement of this action, pursuant to the general laws of the State of Idaho, the said Village of Rexburg has, by proceedings duly taken according to law, became, and the same is, a city of the second class and has adopted a city government, and elected the officers of a city pursuant to law.

-II-

Said defendants deny that the parties named in the Fourth paragraph of the complaint or any number of said parties or the plaintiff canal company or any or all of its predecessors in interest on the _____ day of April, 1883, or at any other time appropriated Fifteen thousand(15,000) miner's inches, measured under a four inch pressure, of the waters of Teton River or any other

EXHIBIT

"B"

2.

amount of water in excess of 7750 inches, including the water now owned by these defendants, and deny that said plaintiff canal company or any of its predecessors in interest ever constructed canals of sufficient size or capacity to conduct, or ever did actually conduct or divert, in excess of said 7750 inches, including the water of these defendants, of said water from said Teton River to or upon the lands referred to in the complaint or at all, and deny that said plaintiff canal company or any of its predecessors in interest ever rented or distributed for any purpose at all an amount of water in excess of 7750 inches, including the water of these defendants, or ever diverted in excess of said amount of water, and deny that eleven thousand(11,000) inches of said water or any other amount in excess of six thousand four hundred(6400) inches is necessary for said plaintiff canal company to supply its stockholders and patrons in irrigating their lands and in supplying their domestic and other needs, and deny that the plaintiff canal company now is, or at the time of the commencement of this action was, the owner or in the possession, or entitled to the use or possession, of any of the waters of said Teton River in excess of sixty four hundred(6400)inches, measured under a four inch pressure.

The defendants admit that prior to the commencement of this action, the plaintiff canal company duly conveyed to these defendants and their predecessors in interest what is known as its "Upper Canal" and the water flowing therein, and the water rights appurtenant thereto represented by said plaintiff canal company to amount to four thousand(4,000) inches.

CROSS-COMPLAINT OF THE CITY(FORMERLY VILLAGE)OF REXBURG AND ITS
MAYOR AND COUNCILMEN(FORMERLY TRUSTEES).

And further answering and by way of cross-complaint, said defendants allege as follows, to-wit:-

-I-

That at the time of the commencement of this action, the Village of Rexburg was a public corporation, organized and existing under and by virtue of the laws of the State of Idaho, relating to the creation and government of cities and villages in the State of Idaho; and that since the commencement of this action, pursuant to the general laws of the State of Idaho, the said Village of Rexburg has, by appropriate proceedings duly taken according to law, become and the same now is a city of the second class under the laws of Idaho, and has adopted a city government and elected the officers provided by law for a city of the second class; and that Henry Framm is the duly elected, qualified and acting mayor of the city, and that John M. Woodburn, Edward Paul, John L. Jacobs, N. H. Halstrom, Joseph B. Loyd, and Eli McIntyre are the duly elected, qualified and acting councilmen of said City and the said city and its said mayor and councilmen, these cross-complainants, defend in this action and maintain this cross-complaint upon behalf of and for the benefit of said City of Rexburg and all persons using waters of the Teton River in Fremont County, Idaho, for irrigation, domestic, and other beneficial purposes within said Village of Rexburg, and all other persons rightfully using water from what is known as "Upper Canal", diverting water from said Teton River near said City of Rexburg, said persons being numerous and it being impracticable to bring them all before the Court; these cross-complainants being Trustees for said users of water.

-II-

That on or about the First day of April, 1883, these cross-complainants and their predecessors in interest and said users of water and their predecessors in interest, then residing at and in the vicinity of said City of Rexburg, and being desirous of using water for domestic, stock, and irrigation purposes, appropriated 1350 inches, measured under four inch pressure, of the waters

of said Teton River, and by means of dams and ditches diverted said water from said river and conducted the same through a main ditch or canal known as the "Upper Canal" and measured out and distributed said water to said persons and their predecessors in interest in such amounts as they were severally entitled to; said water thereupon being conducted through lateral ditches belonging to said numerous parties to their several lands and places of residence where the same was used by said persons for the purposes aforesaid, and ever since said date these cross-complainants and said users of water and their predecessors in interest, continuously, during the irrigating season of each and every year, and for domestic and stock purposes during the whole of each and every year, used said 1350 miner's inches of said water.

That the whole of said 1350 inches of water is necessary for the use of said parties for the purposes aforesaid, and that said cross-complainants in the capacity aforesaid are the owners and entitled to the use of said amount of water and said right, dating from the First day of April, 1883.

-III-

That all of the lands irrigated by said water, and said City of Rexburg, and the townsite thereof, are adjacent to said Teton River, and all of said lands are, in their natural state, arid in character and require the artificial applitation of water thereon in order to produce crops thereon in paying quantities, and said City of Rexburg has, approximately, 2000 inhabitants needing water for domestic and stock purposes and for irrigating their lawns and gardens, and said City needs water for sprinkling its streets and for other beneficial uses, and, as before stated, said amount of water, so appropriated and claimed, is necessary to supply said needs and uses, and there is no other water available for said purposes.

That all the other parties to the action claim some in-

5.

terest in and to the waters of said Teton River, and the rights of these cross-complainants, as hereinbefore stated, have, during the last three or four years, been interfered with by other parties to this action; that there is no conflict between the claim of these cross-complainants and the other cross-complainants represented by their counsel, F. S. Dietrich, and Messrs. Ricks & Soule.

WHEREFORE, These cross-complainants pray for the judgment and decree of this Court:-

-I-

To quiet title to all of the waters of said Teton River and its tributaries and determine the rights of all the parties hereto in and to the said stream.

-II-

Adjudging and decreeing to these cross-complainants and their successors the right to use the waters of said Teton River and its tributaries in the amount and from the date as alleged in the foregoing cross-complaint, and further adjudging and decreeing that the right of these cross-complainants to the said amount of water is prior and superior to the right of the other parties hereto appropriating water subsequent to said appropriation of these cross-complainants.

-III-

Perpetually enjoining all other parties from in any manner interfering with the rights of these cross-complainants as the same shall be decreed.

-IV-

Adjudging and decreeing all other relief such as to the Court may in the premises seem just and proper, and for their costs and disbursements herein incurred.

complainants.

F. S. Dietrich James H. Wallis
Ricks & Soule
 Attorneys for defendants and cross-

State of Idaho,
County of Fremont.

ss.

John E. Pincock, being first duly sworn, deposes and says that he is one of the defendants and cross-complainants above mentioned and makes this affidavit upon the behalf of all of the defendants and cross-complainants; that he has heardread the foregoing answer and cross-complaint and knows the contents thereof and the same are true of his own knowledge, except as to matters therein stated to be upon information or belief, and as to those matters he believes them to be true.

John E. Pincock
Subscribed and sworn to before me, this 2nd day of August, 1903.

John Donaldson
Probate Judge.

WATER LOCATION RECORD.

WATER LOCATION

-OF-

Resburg Irrigating Comp^y.

Yeton River. Resburg Nov 3. 1884

We ~~The Resburg Irrigating Company~~ do hereby give Notice that we claim ~~fourteen thousand cubic inches of water~~ Measured under a four inch pressure for agriculture, Mining, Milling and Mechanical purposes. The same to be taken from the Yeton River, and from thence conveyed to place of use Thru of Two Main Canals described as follows, To wit: The Upper Canal to be taken out of the Yeton River 80 rods North and 30 rods West of North, East Corner of Sec 15 T P 6 N R 140 East and from thence extend nearly South to Moody Creek, thence down Moody Creek to about the center of Section 15, thence extending in a South Westerly direction keeping at base of hills to S E Corner of Section 36 Township 6 North Range 39 East of Boise Meridian thence due west to Texas Slough to end of Canal said Canal being completed 10 feet wide and 3 feet deep at this date to 1/2 mile South of N E Corner of Sec. 30 T P 6 N R 140 East of Boise Meridian, but we claim the right to enlarge said Canal to 20 feet in bottom The Lower Canal commences 140 rods North and 10 rods East of North East corner of Sec. 30 Township 6 North of Range 40 East of Boise Meridian thence in a South Westerly direction to South West corner of Sec. 30 T P 6 N R 140 E, thence due west to North Fork of Snake River to end of Canal, said Canal being completed 10 feet wide in bottom to 160 rods North of S W Cor. of Sec. 30 T P 6 N R 140 E, and we also claim the right to convey said water, and enlarge said Canal to 20 feet wide in bottom of Canal, and we also claim the right to convey said water in lateral ditches wherever the proper distribution of water requires

Recorded December 3^d A.D. 1884
 at Request of A. S. Anderson
 Wm B. Thoms Co. Recorder
 Wm H. Evans, Deputy

EXHIBIT

"C"

HENRY FLAMM, being first duly sworn, upon behalf of the claim of clients of Messrs. Dietrich & Soule, testified as follows:-

DIRECT EXAMINATION BY SOULE.

- Q. Mr. FLAMM state your name and residence?
- A. My name is Henry Flamm.
- Q. Where do you reside? A. Rexburg.
- Q. How long have you resided here?
- A. Ever since its first settlement since 1883.
- Q. What time in 1883 did you come here?
- A. I came to Rexburg on the third day of April, in 1883.
- Q. Were you here before work was begun on the Rexburg City Canal or the Rexburg Irrigation Company canal?
- A. I certainly was.
- Q. What was the first thing done with reference to taking water out of the river Teton River or Moody Creek for the irrigation of lands in the vicinity of Rexburg.
- A. Mr. Anderson surveyed the canal. He surveyed it to a point in the first place in the neighborhood of Hoskinson Brothers--
- Q. What canal are you speaking of now? A. Speaking of the city canal, and we found that point was too low to get the water so we continued it and run up to Moody Creek, and we put it then in Moody Creek, and then went further up the river and put a waste gate into the dam, and from there is the beginning of the diversion of the water to the Rexburg City Canal to start with.
- Q. When was that done?
- A. It was done in the spring of 1883, we put in our crops first. I could not say to the exact date, but I should judge it was done some time in May.
- Q. When did you get water out through this city canal first?
- A. I could not state the exact date as to that either, but any way we worked with might and main early and late on account of our crops beginning to suffer before we could get to the latter end of the canal to the terminus where we wanted to divert it, but I would not be positive as to the date when

EXHIBIT

"D"

we got the water on to the land.

Q. Give the date as near as you can?

A. Some time in the latter end of May, I should judge.

Q. Now how much water at this time, the latter end of May did you have running through this city canal?

A. We put in a pretty good stream at the head but owing to the nature of the ground that it consumed a good big share of our water on account of the distance being such a length, and then we had rock points where the water had to be taken up at the edge of the bluff, through which the water sank, and in order to try to save that water—

Q. Now Mr. Flamm this time you speak of when the water was running through the City Canal what if anything had been done on the Rexburg Irrigation Company canal, the plaintiff in this case?

A. There had been nothing done.

Q. State what was done then towards getting out the Rexburg Irrigation Company canal?

A. I can state as briefly as I can remember correctly—

Dietrich—Just a moment Mr. Flamm—

Soule resuming—Now has water been used through this city canal continuously since that time? A. It has.

Q. And for what purposes? A. For irrigation purposes.

Q. What other purposes?

A. I do not know as to what arrangements was made with the Milling Company.

Q. In connection with the City? A. Used in the city of Rexburg.

Q. What for?

A. Oh, for use in the City of Rexburg, been used for irrigation purposes and for and culinary purposes and general purposes for the public, and drinking purposes.

Q. Now is the amount of this water now used through the City Canal used within the City limits of the City of Rexburg?

A. Yes sir, it is.

Q. What is the population of Rexburg at the present time?

A. It is about 2800 inhabitants.

Q. And these inhabitants use the water for culinary and drinking

purposes and sprinkling their lawns, in addition to irrigating gardens? A. Irrigating their gardens.

Q. What would you say as to the amount of water that was necessary? For this purpose? Would you say that more water was necessary to be used in a city for the same amount of land than on a farm?

A. There certainly is. Always more water used in the garden than on the farm, besides the additional uses which are necessary for the public to exist. Would not use so much on the farms as in a thickly populated place.

Q. How long has Rexburg been a city or village?

Dietrich--When was it started, when was it incorporated?

A. I am just trying to think? I am not positive as to the year. If my memory serves me right it was 1896.

Q. When incorporated as a village? A. Yes sir.

Q. How many inhabitants had they at that time?

A. Probably 1800 at that time.

Q. When was it that the first colony came here?

A. The first colony came here in 1883.

Q. How many people, about, were here at that time?

A. Not to exceed three hundred.

Q. When was the townsite laid off?

A. The townsite was laid off before I came to Rexburg, must have been in March.

Q. 1883? A. 1883. Shortly before I came in here, the latter end of March.

Q. How much water would you say now was necessary per acre in the city limits for the purposes you have mentioned?

A. That is a question that I am hardly able to answer.

I do not actually know how much would be necessary per acre.

Q. Well, how much in your judgment?

A. At least double the amount what is usually required for making crops.

Q. Double the amount you say?

A. At least double the amount.

Q. You are speaking of the City Ditch now, you speak of the ditch as being transferred from the Rexburg Irrigation Company to

the City of Rexburg? A. That was done later.

Q. In the first place these two canals were operated as one,
they were amalgamated, b t afterwards separated?

A. Yes sir.

Q. What was done with the city canal?

A. The City canal still remains of course.

Q. Was there any conveyance of it from the Rexburg Irrigation
Company to the City of Rexburg?

A. I presume there was.

Q. And also the water rights appropriated by said ditch conveyed
to the City? A. I think so.

Dietrich—I desire to make this statement as to the title.

This is one of the ditches or canals constructed by an assoc-
iation, referred to in the testimony for the plaintiff,
which was afterwards organized into the plaintiff corporation,
and was by the corporation transferred together with the water
right to the trustees of the village or City of Rexburg, as
stated in the cross-complaint.

Soule—That is all, gentlemen, unless you have something to
ask the witness.

Court—Any cross examination? Call your next.

Soule—Call Mr. Whitney. His testimony is to the same effect
as Mr. Flamm's and unless the plaintiff company offers rebuttal
we wont incur the record. Call Mr. Jacobs.

J. L. JACOBS, being first duly sworn, upon behalf of the
Rexburg City Canal, testified as follows:—

DIRECT EXAMINATION BY SOULE.

Q. State your name and residence? A. My name is J. L. Jacobs,
I live in Rexburg.

Q. Are you a member of the City Council of Rexburg? A. Yes sir.

Q. You are acquainted with the City canal, and also the
Rexburg Irrigation Company are you? A. Yes sir.

Q. Do you know how much land there is within the corporate limits
of the village of Rexburg?

A. Why there is 640 acres in the townsite proper, and then there
is two additions, that is the Parker and Klinger Addition.

Q. How much land in these additions? A. Eighty acres, I think, in each.

Q. Is all this land irrigated from the City Canal, from the City ditch? A. No sir, these additions, there is a part of it, the greater part of it does not come under the canal.

Q. All of the townsite proper all the 640 acres does come under it? A. Yes sir, nearly all except a little corner at the upper end?

Q. How much lands are there outside of the City owned by farmers watered from the City canal?

A. As near as I could find out about 425 acres.

Q. How do they get water from this City canal, by what method?

A. They help to keep the canal in repair the same as the City does.

Q. The City Canal then is under the supervision of the town council?

A. Yes sir.

Q. The town council levies the assessments?

A. Yes sir.

Q. And those farmers who draw water from the city canal are subject to the same conditions as the inhabitants of the town, with reference to getting water and paying for it?

A. Yes sir, according to their lands and the work that is done or the work that was assessed the same as the residents of the town.

Q. And some of them hold certificates of shares just the same as the inhabitants of the town in the stock of the canal?

A. Yes sir.

Q. How much water would you say is necessary to irrigate the land that is irrigated under this City Canal, how much per acre? A. I should think not less than two inches per acre. Not less than two inches.

Q. Now where—would you say that that amount of water was necessary or not?

A. Yes sir, high water would not affect us much. We use about the same amount of water the year around, and there is water that we have to have run through the City that comes right direct through the City from our canal into the Rexburg Irrigat-

ing canal, into the lower canal, that is not used for irrigating land, only the trees that are standing along the ditch. It is used in case of fire, the two ditches that run right in front of this building run nearly through town town from one end to the other, and no land is watered to speak of out of these ditches as they are all lower than the land is. Simply runs through the land, and used for building purposes, such as they need for around buildings, and for fire protection, and the like of that.

Q. Is that a necessary use?

A. Yes sir, we have to have that. It runs the year around, that is from in the spring to fall until it freezes up.

Q. How much of the farm land that you spoke of is under cultivation that is watered from the City Canal?

A. Farm land? Q. Yes.

A. I should judge two thirds or probably three fourths.

Q. Now as to lands in the City limits, townsite property, how much of that needs irrigation and is irrigated?

A. Well, there is parties that have used it for several years that are not using it now, and then there is others again that is using it now that have not used it in the beginning.

Q. How much of the townsite has been brought under cultivation and is inhabited I mean?

A. Practically all of it, all needs irrigation, yes sir.

Q. And it is practically all cultivated and inhabited is it?

A. Yes sir.

Q. Very little of it lying uncultivated and has not been plowed and water on it? A. Yes sir.

Q. Are there any uses that you put the water to in the city besides those mentioned?

A. Well, there is—we use it, the water in town is used like any other city for sprinkling purposes and for building.

Where water is not run just upon, right on to the land it is run by it, but one thing there is not a drop of water that runs through town but what runs right unto the other canal.

Our main ditch terminates there.

Jones—This canal furnishes the City of Rexburg, the only source of supply is it not?

Court—Any further examination of this witness? Stand aside witness. Call your next, gentlemen.

Soule—We here offer in evidence report of the State Engineer number 55, together with the maps used in connection therewith.

Merriman—I would like to have it understood that this objection goes to all of these maps, so that we will not have to raise this objection every time.

Court—They may be introduced.

Dietrich—Call Mr. Jacobs for one question.

Court—Come forward Mr. Jacobs.

J. L. JACOBS, having been here afore duly sworn and examined, and being recalled, on behalf of the Rexburg City Canal testified as follows:—

DIRECT EXAMINATION BY SOULE.

Q. Are you positive as to the amount of land included within the townsite?

A. No, I have not looked over it—positively. I just merely sized the map up. That is, I have not made a positive count—The map is there.

Q. How did you arrive at the amount of land outside of the city that is irrigated from this canal?

A. I was appointed as one of the committee to have the farmers that were using the water to meet us here in town and they gave me the number of acres, each one of them. They were all there except one or two.

Q. And it totaled up to how much?

A. I think it was 432 acres, between thirty and thirty-five acres.

Q. About three-fourths of which you say is actually under cultivation? A. Three-fourths of it actually under cultivation, yes sir.

A. Now there is two or three parties that use the water above east and west of the canal, and if the surveyor has just taken the west and north side he would miss that part that was watered east of the canal. That is up at the head, above the waters

of the canal. Maybe that would make a discrepancy.

Dietrich--And you say that substantially all of the townsite has been inhabited and irrigated from this canal?

A. Yes sir.

Court--Any questions. Stand aside, Mr. Jacobs. Any further testimony--do you want an evening session gentlemen?

I think, gentlemen, the Court will take a recess until morning, nothing further to be put on at this time. Ten o'clock tomorrow morning.

Adjournment until tomorrow morning at ten o'clock.

Dietrich--There are two or three things to be proved yet in connection with the Rexburg City Canal. Apparently the witnesses are not here, and we will proceed to another canal, with the permission of the Court, and will put in this other proof later, and take up what is known as the Salem Canal.

Call Mr. Harris.

GEORGE H. B. HARRIS, being first duly sworn, on behalf of the Salem Canal, testified as follows:-

DIRECT EXAMINATION BY DIETRICH.

Q. What is your name? A. George H. B. Harris.

Q. Where do you reside? A. Salem.

Q. How long have you lived there?

A. Twenty-one years last October.

Q. And what has been your business? A. Farming, mostly.

Q. Do you know what is referred to as the Salem Canal?

A. Yes sir.

Q. Is that what is known as the Salem Canal or in the village of Salem? A. Yes sir.

Q. In Fremont County? A. Yes sir.

Q. It diverts water from what stream? A. From the North Teton.

Q. North Teton River? A. Yes sir.

Q. That is one branch of what is known as the Teton River is it?

A. Yes sir.

5.

terest in and to the waters of said Teton River, and the rights of these cross-complainants, as hereinbefore stated, have, during the last three or four years, been interfered with by other parties to this action; that there is no conflict between the claim of these cross-complainants and the other cross-complainants represented by their counsel, F. S. Dietrich, and Messrs. Ricks & Soule.

WHEREFORE, These cross-complainants pray for the judgment and decree of this Court:-

-I-

To quiet title to all of the waters of said Teton River and its tributaries and determine the rights of all the parties hereto in and to the said stream.

-II-

Adjudging and decreeing to these cross-complainants and their successors the right to use the waters of said Teton River and its tributaries in the amount and from the date as alleged in the foregoing cross-complaint, and further adjudging and decreeing that the right of these cross-complainants to the said amount of water is prior and superior to the right of the other parties hereto appropriating water subsequent to said appropriation of these cross-complainants.

-III-

Perpetually enjoining all other parties from in any manner interfering with the rights of these cross-complainants as the same shall be decreed.

-IV-

Adjudging and decreeing all other relief such as to the Court may in the premises seem just and proper, and for their costs and disbursements herein incurred.

complainants.

F. S. Dietrich James H. Wallis
Ricks & Soule
 Attorneys for defendants and cross-

COMBUSTION.

VERIFICATION OF COMBUSTION AND CLOSURE

Vermin & Pests Complaint
I have received your letter of the 14th inst. and in reply to inform you that I have accepted this
24th day of August 1903
-IA- Douglas
Very truly yours
Douglas

RECEIVED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE

10. Description of place of use:

10. Description of place of use:

a. If water is for irrigation, indicate () page in each subdivision in the tabulation of water.

b. If water is used for other purposes, place a symbol of use (example: D for drink).

[illegible]

Total number of acres irrigated

1634
~~1548~~
1634

MEMORANDUM

DATE: 3 December 1996
FROM: Ernie Carlsen

RE: CITY OF REXBURG

Below are my conclusions on how the City of Rexburg could approach filing its claims on 22-00204 and possibly 22-00203 along with some other findings concerning claims by the City. These findings are based on documentation compiled by this office over the years concerning the City of Rexburg, the records for WD01 and the two notices of claim prepared by Ray Rigby.

* Recommend filing a separate claim for the 6.5 cfs of 22-00204 that has been leased to Teton Pipeline. A narrative explaining historical use of water by Teton Pipeline should accompany claim.

* For remainder of 22-00204 file a claim that details the historical beneficial use in and around Rexburg. If for irrigation, the irrigated acres in each 1/41/4 needs to be specified. The second page of the place of use on the enclosed forms lists some acres twice. This duplication should be resolved before returning the forms. For other uses, if any, identify the 1/41/4s where use occurred. Water used within Rexburg's service area can be claimed as municipal use. However, there is more expense for a municipal use and the extent of beneficial use must be annotated.

* It should be noted that Rexburg Irrigation has filed on 7.0 cfs of right 22-00204 under claim A22-11027. This is likely the 7.0 cfs that is the subject of transfer application #3071 filed in 1984 by the City of Rexburg. This application is being held at the regional office in Idaho Falls.

* There is some question about the degree of beneficial use for 22-00203. If it had been used, it would likely have been delivered only through the city ditch. The same criteria applies to this right for the nature of use and place of use as described for 22-00204.

* The City of Rexburg has several other water rights that are subject to the SRBA. Notices of Claim for these rights were originally delivered to this office without the filing fee. Our review of these notices revealed many of them lack sufficient information. After several years of repeated telephone calls and failed requests for additional information, in January, 1995, I met with the Mayor, J. D. Hancock, and an employee familiar with the City's water system. We examined each of the claims previously submitted by the city. The deficiencies, if any, and the amount of the filing fee were annotated and attached to the claim. Since no fees had been paid all the notices were left in the City's possession. Subsequently, to reduce the cost, the City was granted

a second extension of time to waive the late fee. This extension lapsed in March 1995. These claims still have not been filed.

FEATURE ARTICLE

NEW IDAHO STATUTE GIVES GROWING MUNICIPALITIES FORFEITURE EXEMPTION IN ACQUIRING WATER RIGHTS FOR FUTURE NEEDS

By Christopher H. Meyer, Esq.

The Line between Beneficial Use and Speculation

All water users, from the family farmer to the industrial giant, have plans for the future, it seems. Water is often a part of those plans. The Prior Appropriation Doctrine is well suited to the task of assisting the entrepreneur in expanding his or her panoply of water rights to serve a growing enterprise. It must be said, however, that these new uses are not accommodated under the Prior Appropriation Doctrine without some tension.

The reason is this: While the Prior Appropriation Doctrine has long been an engine of growth in the West, it has just as long been the enemy of speculation.

To the economist, this is an odd and artificial distinction. The economist sees speculation as the healthy core of capitalism. But economists did not settle the West. Miners and farmers did, and to them, the difference between growth and speculation was as plain as the difference between God and the devil. The men and women who, with little but their own hands, spirit and determination, somehow scratched out a livelihood in this strange dry place, should be rewarded for their backbreaking labor, it was thought. In contrast, the fellow stepping off the stagecoach with a scheme to lay claim to all the unappropriated water (so that he might sell it to the hard-working immigrants who would arrive later), earned himself no favor and much scorn in these parts.

Hence, from the start, the Prior Appropriation Doctrine has recognized the lawful rights of those who apply water to beneficial use, and has denied any legal protection to those who would hold water for speculative purposes. This distinction between need and speculation has remained viable over time, and rules have developed to define which is which.

In the early days, before permit systems were established in Idaho and virtually every Western state, a water right did not come into existence until actual diversion to beneficial use occurred. The statutory permit system provided some critical leeway to the developer of a new right. Rather than engage in a risky race to develop a water supply, the user could obtain—in advance—a water right permit which secured the quantity and priority of the water right sought. With permit in hand, the user then could obtain financing and proceed to construction of the diversion and delivery system with some confidence that water would be available. Once the project was completed and in use, a license would be awarded, serving as prima facie evidence of the actual diversion and application to beneficial use.

In Idaho, the user might spend five years getting from permit to license, with another five year extension upon showing of need; in specified circumstances, further extensions might be obtained. Idaho Code §§ 42-204, 42-218, 42-128(a). In most cases, that has proven sufficient time to design, fund and construct a water project, at least for the typical Idaho irrigation project. The system has not been entirely satisfactory, however, for municipal suppliers.

The opinions expressed in attributed articles in *Western Water Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *Western Water Law & Policy Reporter*.

Municipal suppliers have argued that they shoulder an obligation unlike that of other water users. The municipal supplier (whether that be a city or a corporation supplying a city), is bound to serve all those customers who find it desirable to locate within the municipality. Cities point out that they cannot wait for the future to unfold. Although uncertainty is inherent in growth projections, practical necessity demands that cities lay the foundation today to meet the water needs of the coming decades. Surface and underground supplies must be identified and acquired. Diversion and storage systems must be put in place. Delivery systems must be expanded and treatment plants constructed.

The bottom line is that the planning horizon for these endeavors may be longer than five or ten years. It is economically, if not physically, impossible for most cities simply to add on additional supply as needed in five or ten year increments. When pipe is laid, wells are drilled, and treatment systems are engineered, cities contend, these systems sensibly must be sized for many years of future growth. But if that need is more than ten years out, what becomes of the water right?

The courts of Idaho and other Western states long ago have addressed this question. Their answer has been consistent. They have recognized the unique obligations of municipalities and have treated them differently than other water users. The seminal statement comes from the Colorado Supreme Court, writing in 1939:

The concern of the city is to assure an adequate supply to the public which it serves. In establishing a beneficial use of water under such circumstances the factors are not as simple and are more numerous than the application of water to 160 acres of land for agricultural purposes. A specified tract of land does not increase in size, but populations do, and in short periods of time. With that flexibility in mind, it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.

City and County of Denver v. Sheriff, 96 P.2d 836, 841 (Colo. 1939) (emphasis supplied).

This quotation demonstrates that the core of the debate over the right of municipalities to hold water for future growth is whether or not this practice constitutes "beneficial use" on the one hand or "speculation" on the other. That is, does the acquisition of water rights beyond the usual five- or ten-year time frame constitute prudence or hoarding? The Growing Communities Doctrine (or Great and Growing Cities Doctrine, as it is known in Colorado) recognizes that long-term planning by municipalities, under proper circumstances, may be prudent, necessary and lawful.

In a sense, the Growing Communities Doctrine is not that much of a departure from the norm. Indeed, one might argue that the idea of a city designing a delivery system sized to accommodate future growth is similar in concept to the idea of storing water in a reservoir for use during a future drought. That drought may not come for many years, but no one would deny the benefit derived *today* simply from knowing that water will be available in the event of drought. Thus, it is undisputed that the storage of water for use in time of future shortage constitutes a current "beneficial use." The Growing Communities Doctrine is simply a recognition of the fact that Idaho's cities derive a substantial and tangible benefit *today* from securing a water supply sufficient to satisfy reasonably foreseeable needs. Without such ability, cities argue, they would be hard pressed to attract desirable new industries and manage sensibly for growth.

Judicial Recognition of the Growing Communities Doctrine in Idaho

Two Idaho cases and one federal case applying Idaho law have addressed the question of whether cities may obtain water rights of sufficient quantity to meet future population growth. In each case, the court squarely ruled that such water rights may be obtained.

The first case was *City of Pocatello v. Murray*, 206 F. 72, 80 (D. Idaho 1913), *aff'd*, *Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914). In this case, the City of Pocatello granted a franchise to Murray and his associates to provide water to the city. The city complained that while Murray had delivered some water from Mink Creek, he had not obtained the entire supply physically available in the creek. The federal court (applying Idaho law) found that Murray

had indeed failed to fulfil his obligation under the contract. The court rejected Murray's argument that it was against public policy for the city to appropriate more water than was then needed. The court declared that the leeway afforded to agricultural users "should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality." *Id.*, 206 F. at 80.

In *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940), the court upheld the right of the City of Soda Springs to purchase water rights from agricultural users and hold them for future municipal needs. The court went on to hold that such water need not be applied to irrigation in the meantime in order to avoid forfeiture. "To require that would amount to nullifying the power granted to a municipality to acquire and hold water for future needs—an absolute necessity of life and existence for a municipality." *Beus*, 62 Idaho at 7, 107 P.2d at 154.

In the more recent case of *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969), the court upheld the right of the village to obtain an unquantified water right for "all the flow" from a particular source. Whether the water was needed for current or future needs is somewhat unclear from the decision. However, the court noted in a footnote that:

[A]lthough the Village of Peck became a municipality only after the events giving rise to this litigation, we would have found it difficult not to allow the appropriation of some excess water (had there been any in fact) under I.C. § 50-323 and its predecessors and *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940); see *Hutchins*, op. cit. at p. 44 (municipal use of water).

Village of Peck v. Denison, 92 Idaho at 751, n.4, 450 P.2d at 314, n.4.

The court in *Village of Peck v. Denison* cites an article published a year earlier by the distinguished water law scholar, Wells A. Hutchins. Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1 (1968). Mr. Hutchins concluded that Idaho law does recognize water rights for future municipal growth:

[A] city is not limited in the amount of its appropriation to the needs of its citizens at the

time of adjudication of its water right, but may dispose of and apply the surplus water to beneficial use up to the amount of its application.

Hutchins at 44, n. 211.

In sum, Idaho case law consistently has recognized and accommodated the special burdens on municipal providers of water. This body of law is consistent with that of cases and statutes throughout the West.

Idaho's 1996 Codification of the Doctrine

In 1996 the Idaho Legislature codified the Growing Communities Doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for long term growth. S.B. 1535 (Idaho 1996), codified at Idaho Code §§ 42-202, 42-202B, 42-217, 42-219, 42-222. In short, the legislature affirmed the doctrine's role in Idaho water law, but placed clear sideboards on how it is to be applied.

The legislature recognized that it was not writing on a blank slate:

The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled. The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes. The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights. Municipalities would be required to provide information to describe their service area, to establish a reasonable planning horizon, and to show

that the water rights are necessary for reasonably anticipated future needs.

Statement of Purpose, S.B. 1535 (Idaho 1996).

The 1996 Act contains several new concepts.

They are reflected in the terms of art contained in the following summary of the law: "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" within a described "service area" during a specified "planning horizon."

"Municipal providers" include (1) cities, counties and state institutions, (2) corporations and associations holding a franchise to supply water for municipal purposes, and (3) corporations and associations supplying water for municipal purposes through a water supply system regulated as a "public water supply" under Idaho Code § 39-103(15). Idaho Code §§ 42-202B(1), 42-202B(2).

The term "municipal purposes" is broadly defined to include "residential, commercial, industrial, irrigation of parks and open space, and related purposes," but expressly excludes "water from geothermal sources for heating." Idaho Code § 42-202B(3). Thus, water rights for geothermal heating systems (which are common in Idaho) may be obtained only to meet current need. However, geothermal water used for non-heat purposes (such as drinking) does fall within the Act.

The "reasonably anticipated future needs" must be documented with "population and other planning data" by the municipal provider to the satisfaction of the Idaho Department of Water Resources (IDWR). Idaho Code § 42-202B(3). Moreover, they must "not be inconsistent with comprehensive land use plans approved by each municipality" within the service area, and may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(3). This last requirement is a Draconian measure designed to provide a stern incentive to municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop fundamentally conflicting planning scenarios, no one may obtain a "future needs" water right for that overlapped area. Of course, water rights may continue to be acquired to serve existing needs in such areas.

The Act contains no limit on the duration of the "planning horizon," but simply requires the IDWR to establish a reasonable period to fit the needs of the particular user. Idaho Code § 42-202B(4). The Act also provides for substantial flexibility in the establishment of a "service area." Idaho Code § 42-202B(4). The area need not be limited to a city's corporate limits, and corresponds instead to the actual area served. This eliminates the requirement under prior law to describe the area outside of a city's corporate limits by metes and bounds. More significantly, the service area is not fixed, but includes "changes therein after the permit or license is issued." Idaho Code § 42-202B(4). This eliminates the need to initiate a formal change proceeding with the IDWR each time the area served by a municipality is expanded.

It bears emphasis that the Act does not create any automatic entitlement on the part of municipal providers to obtain water rights for future needs. Rather, the Act imposes on the Director of the IDWR the responsibility to determine the reasonableness of the applicant's asserted future requirements. No doubt, a body of administrative and judicial law will emerge over time establishing how much need an applicant must have and how well the applicant must demonstrate it.

The Act applies at both the permit and license stage, as well as to transfers of water rights to municipal use. The initial determination of the scope of the future needs and the duration of the planning horizon may be adjusted by the IDWR at the license stage where the user "proves up" the right. Transfers in Idaho do not entail a two-stage process (as for permits and licenses). Consequently, the scope of the water right is established just once, at the time of transfer.

The Act contains several strong anti-speculation provisions. The prohibition against "future need" rights for areas with overlapped growth plans already has been mentioned. In addition, the Act expressly prohibits the transfer of "future need" water rights by a municipal provider to a place of use outside the service area or to a new nature of use. Idaho Code §§ 42-219(1), 42-222(1). In other words, the statute recognizes that while a municipality is accorded extra leeway in holding water rights to meet long term future needs, the quid pro quo is that the municipal provider may not later decide to accept a "better offer" and trade away its water rights for cash or other

consideration. In a sense, the legislature had determined to take away one stick from the property owner's bundle of rights (free transferability) in recognition of the fact that municipal suppliers hold a stick which other water right holders do not (the right to hold water rights "unused" for long term future needs).

Finally, a license for a "future need" water right may be issued "for an amount up to the full capacity of the system constructed or used in accordance with the original permit . . ." Idaho Code § 42-219(1). In other words, at the time of license, the water right claimant actually must have constructed some "system" for diversion, storage and/or delivery of the water which is physically sized to meet the claimed future needs. Presumably a municipal provider need not have constructed the entire system. Indeed, parts of it may be constructed in years to come as the municipality grows into its right. However, the statute appears to require that there be some tangible evidence of the provider's commitment to meet the claimed future needs. The idea is that the willingness of the provider to invest today's capital in infrastructure to meet future needs is a further guard against the purely speculative acquisition of water rights.

While the legislature laid out extensive procedures for the acquisition of "future need" water rights henceforth, it has not codified or altered the common law Growing Communities Doctrine with respect to

pre-Act rights held by municipal providers. Instead, the legislature recognized the existence of the doctrine and provided "no change in the common law." Presumably, then, such rights will continue to be governed by the general principles enunciated in *Beus v. City of Soda Springs*, *City of Pocatello v. Murray*, and *Village of Peck v. Denison*. One would expect, as well, that as the Growing Communities Doctrine continues to evolve in the context of pre-1996 municipal rights, Idaho courts may be influenced to some extent by what the legislature has done for post-1996 rights.

Conclusion

It is unclear exactly how municipal providers holding water rights for quantities exceeding their current needs will respond to the new law. Some may let a sleeping dog lie and see how their rights fair under the common law when they come up for review under the Snake River Basin Adjudication (SRBA) or in other contexts. Others may affirmatively seek to convert these rights to "future need" rights under S.B. 1535. Inevitably, there is some risk in either approach. Left intact, the rights are subject to the court's evolving view of the common law. If a transfer is initiated, the end product will have the security of the statute's protection, but the water right must first have passed muster before the IDWR.

Christopher H. Meyer is a partner in the law firm of Givens, Pursley & Huntley, LLP in Boise, Idaho. His practice emphasizes natural resources, environmental, water, constitutional and administrative law. Before joining the firm in 1991, Mr. Meyer served for ten years as counsel to the National Wildlife Federation, first in Washington D.C. and later in Boulder, Colorado. While in Colorado, he also held the position of adjunct professor at the University of Colorado Law School, where he taught advanced water law. Mr. Meyer is a frequent speaker at natural resources forums throughout the country.

municipalities to acquire water rights for long-term growth. The new law codifies the "Growing Communities Doctrine" which courts of Idaho and other western states have developed to allow municipalities to acquire water rights to provide for future growth. The doctrine constitutes an exemption from the "beneficial use" requirement and the prohibition against speculation in prior appropriation law.

The growing communities doctrine was first recognized in Idaho in the 1913 case *City of Pocatello v. Murray*, in which the federal court applied state law to find that public policy supported the need of growing municipalities, as well as agricultural users, to obtain more water than was immediately needed. The doctrine has since been upheld in a number of state court cases allowing appropriation of excess water to municipalities.

The 1996 law, while acknowledging the Growing Communities Doctrine, also limits its application in certain respects. It defines "municipal providers" as (1) cities, counties and state institutions; (2) corporations or associations holding a franchise to supply water for municipal purposes; and (3) corporations and associations supplying water through a regulated "public water supply" system as defined under state law. It defines "municipal purposes" as including "residential, commercial, industrial, irrigation of parks and open space, and related purposes." "Municipal purposes" expressly excludes geothermal heating systems.

In addition, the municipal provider must document "reasonably anticipated future needs" with "population and other planning data" to the satisfaction of the Idaho Department of Water Resources. Such projections must not be inconsistent with any comprehensive land use plans approved by the municipality. They also may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." This provision is intended to encourage municipalities to cooperate in planning efforts. No "future needs" water rights will be awarded where two or more municipalities assert conflicting planning authority over the same area.

The law contains some anti-speculation provisions. It prohibits a municipality with future need water rights from transferring the water rights for use outside the service area or to a new kind of use. The statutory language also suggests that some tangible development of infrastructure is needed as proof of commitment to provide for future needs, although it also indicates that the system need not be fully constructed at the time the water right is obtained.

WATER RIGHTS Idaho/Forefeiture Exemption

The 1996 Idaho Legislature has passed a new law establishing specific procedures and limitations for

The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of member states - Arizona, California, Colorado, Hawaii, Idaho, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Wyoming - and associate member states Alaska, Montana and Washington.

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.

Archie 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-

join
natu
that
who
flow

4. W
more
flowe
fecte
width

5. W
chan
ishes
take
to oil

6. W
I
height
water
down
sion
nel ha

tion o
respor
less th
were
year.

7. W

D
stream

only t
entitle

join i
their r
not en

that heig
terfere
ative to

O. I
Brown

appella
Alba

Falls, f

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 situate 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-

ings
evid

[5
natu
dam:
the f
so d
prev
Joe l
92, 3
River
P.2d

stated
as fo

"It
ord
can
ben
son:
ingl
a st
not
the
eith
site

It is
Water:

" *

the
soil,
flow
wont
with

a rea

lows

flow

risk c

him

With

prietc

opera

right

tard t

the i

* *

Appel

finding c

"That
footin

ings are adequately supported by competent evidence.

[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, *vs.*
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-

If water is used for other purposes, place a symbol of use (example) in the corresponding place of use below. See instructions for standard symbols.

Total number of acres irrigated 2,067.4

10. Description of place of use:

Exhibit "B"

- a. If water is for irrigation, indicate page in each subdivision in the tabulation below.
b. 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		
7N	44E	29									40 ⁴⁰	40 ⁴⁰	40 ³⁸	40 ³⁹	40 ²⁵	40 ⁴⁰	40 ³⁹	40 ³⁶	320	29
		30	40 ³⁵	40 ³⁵	40 ³⁵	40 ³⁵	40 ⁴⁰	40 ³⁹	40 ³⁹	40 ⁴⁰	40 ⁴⁰	40 ³⁹	40 ³⁸	40 ³⁹	40 ³⁵	40 ³⁵	40 ³⁵	40 ³⁵	640	59
		31	40 ³⁹	40 ³⁵	40 ³⁷	40 ³⁵	40 ³⁹	40 ³⁹	40 ³⁹	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴¹	40 ⁴⁰	40 ³⁹	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	640	60
		28										6 ¹⁰	30 ²⁵						35	36
		32		40 ³⁹	40 ³⁹		40 ³⁹	40 ³⁹	40 ³⁹	40 ⁴⁰	40 ⁴⁰	40 ³⁸	40 ³⁷	40 ³⁹		40 ³⁹	40 ³⁸		480	46
6N	44E	6	40			40	40 ³⁷	40 ³⁵	40 ³⁴	40 ³³									240	
7N	43E	25									40 ³³	40 ⁴⁰	40 ⁴⁰	40 ³³					160	46
		26	40 ³³	40 ³³	40 ⁴⁰	40 ⁴⁰			30 ⁴⁰	30 ³⁶	30 ⁴⁰	30 ⁴⁰	30 ³⁸	30 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ³⁹	500	5
		27											40	40					80	
		33	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰									40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	320	36
		34	40 ³³	40 ³³	40 ³³	40 ³³	40 ³³	40 ⁴⁰	40 ⁴⁰	40 ³³	40 ³⁹	40 ⁴⁰	40 ⁴⁰	40 ³⁹	40	40 ³⁹	40 ³⁹	40 ³⁹	640	53
		35	40 ³³	40 ³³	40 ⁴⁰	40 ⁴⁰	40 ³⁷	40 ³⁵	40 ³⁹	40 ³⁵					40 ⁴⁰	35 ³⁵	35 ³³	40 ³⁹	470	43
		36					40 ³³	40 ³³	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	15 ⁴⁰	15 ⁴⁰	40 ³⁶	40 ³⁹	40 ⁴⁰	40 ⁴⁰	40 ³⁹	430	46
6N	43E	1	15 ⁴⁴	30 ¹⁶	40 ⁰	25 ²⁰	40 ²³	40 ¹⁶	40 ⁰	40 ⁰	10 ⁰	10 ⁰			10 ⁰	10 ⁰			310	
		2	40 ⁴	40 ¹³	40 ³	40 ⁰	40 ²⁸	40 ³³	40 ³⁸	40 ³²	30 ⁰	40 ¹⁸	10 ⁴⁰		10 ⁰	10 ⁰			420	
		3	40 ³³	40 ³²	40 ²⁹	40 ³⁷	40 ³²	40 ³¹	40 ³⁵	40 ³⁴	40 ³⁸	40 ¹³	40 ⁴⁰	40 ⁴⁰	40 ³³	40 ⁴⁰	35 ³⁸	25 ⁵	620	
6N	44E	3		25 ⁵	40 ³⁵	15 ⁰			40 ⁴⁰	40 ⁴⁰	10 ³⁸	10 ³⁹			5 ⁰	15 ⁴⁴			200	
		4		40 ²⁸	40 ⁴⁰	40 ⁴⁰	40 ²⁰				40 ³⁸	40 ³⁴			40 ⁴⁰	40 ³⁸	40 ³⁸	40 ⁴⁰	440	
		5						40 ³⁷	40 ⁴⁰			40 ⁴⁰	40 ³⁴						160	
		8			40 ³⁸	40 ⁴⁰		30 ⁹	40 ²⁵	40 ¹³	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ²⁵	40 ²³	40 ²⁷	510	
		9	35 ⁴⁰	35 ⁴⁰	35 ⁴⁰	35 ⁴⁰	35 ⁴⁰				35 ⁴⁰	35 ⁴⁰			35 ⁴⁰	35 ⁴⁰	35 ⁴⁰	35 ⁴⁰	385	
		10	20 ⁴⁰	40 ³⁰	35 ³⁶											35 ³⁹	10 ⁴⁰		140	
		7	40 ⁹	40 ³⁵	40 ³¹	40 ¹⁸	40 ³⁸	35 ¹⁵	20 ⁰	5 ²⁹	5 ²¹			5 ¹⁹	40 ¹³	40 ³⁶	40 ⁴⁰	40 ¹⁶	400	
		18									5 ⁰			5 ⁰	40 ⁴⁰	40 ³⁸	40 ³⁸	40 ³⁰	170	
		17	40 ²⁰	40 ⁴⁰	40 ³²	40 ²⁸					40 ⁴⁰	40 ³⁵	40 ³⁶	40 ⁴⁰	40 ³⁶	40 ²²	40 ⁴⁰	40 ⁴⁰	480	
		16				40 ⁴⁰									40 ⁴⁰				80	
		15							20 ⁴⁰	35 ⁰						25 ⁰	40 ⁴⁰	10 ⁰	130	
		22					40 ³⁰	40 ⁰	40 ⁰	40 ⁰									160	
		21	30 ⁴⁰	30 ⁴⁰			30 ⁴⁰	30 ²⁰	15 ¹⁰		15 ⁰								150	
		20	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	40 ⁴⁰	640	
		19				40 ⁴⁰									40 ⁰				80	

Total number of acres irrigated 10,130 (this page)

If water is for irrigation, indicate ☐ 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.

Total number of acres irrigated 2,067.4

Total number of acres irrigated 2,067.4