

7-12

DEPARTMENT OF
WATER RESOURCES

Attorneys for the Claimant, City of Driggs

In Re SRBA

Case 39576

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

JERRY R. RIGBY, being first duly sworn, deposes and says:

- 1) My name is Jerry R. Rigby, of the firm Rigby, Andrus and Rigby Chartered of 25 North 2nd East, Rexburg, ID 83440.
- 2) For the past several years and most particularly in the past 2 years, I have been extensively involved in Basin 21 and 22, which includes most of what is known as the Recovered Water Claims (hereinafter "RecRec"), involving well over 100 different rights for individual water users, municipalities and irrigation entities.
- 3) Some time in May of 2011, I was approached by Roger Warner of Rocky Mountain Environmental, a water engineering firm (hereinafter "RME"), and asked if I would

represent his client, the City of Driggs (hereinafter “the City”) in doing what was necessary to secure certain Wyoming water rights held by the City and used within the service area of the City.

- 4) As I began investigating the rights, I was delivered certain Notices of Claims to three particular water rights which had been prepared by RME for the City. All three of the claims were based upon Wyoming diversions (two of which were based upon diversions from a spring in Wyoming and the third was based upon a diversion of Teton Creek in Wyoming). In fact, the two which were based upon the spring in Wyoming are actually diverted in Wyoming, treated for potable water in Wyoming and then put into a pipe in Wyoming to cross the State line into the City. The two spring-based claims had been permitted by the State of Wyoming. Although from the same location, the first permit was granted a diversion rate of 1.0 cfs with a priority date of June 28, 1912 and the second permit was granted a diversion rate of 1.5 cfs with a priority date of June 8, 1999, which was intended to recognize extensive work done by the City in order to increase the discharge from the spring at the original point of diversion which otherwise does not discharge into the creek and therefore would not flow into Idaho. The third claim was based upon the Roxanna Decree (entered by the United States District Court on February 4, 1941) with the diversion rate of 3.2 cfs and a priority date of January 22, 1916 and diverted from the Teton Creek in Wyoming.

- 5) Based upon the claims as written, and in May of 2011, I prepared drafts of a Motion to File Late Notice of Claims on the Standard Form 4 as is the appropriate method prescribed by the above entitled Court.
- 6) However, the initial question posed to this counsel was whether the claims should necessarily be claimed in the Idaho Adjudication at all, especially the two spring-based claims, as from a practical matter, there was no diversion in Idaho due to the spring being fully enhanced in flow and diverted in Wyoming, treated for potable water in Wyoming and placed in a pipe in Wyoming. Furthermore, the 2nd permit of the spring (with a 1999 priority date) was clearly post-adjudication as far as Idaho was concerned and therefore, would necessarily be required to proceed under IDWR's administrative procedures assuming it was deemed to be required of Idaho in the first place.
- 7) Although the above questions were discussed for a month or two and numerous conversations were held with IDWR personnel as well as Wyoming State Board of Control personnel together with meetings held with the representatives of the Grand Teton Canal Company (the primary and priority right holder of water rights within Teton Creek), it was finally decided to proceed to file the Motions to preserve any right in the Idaho SRBA.
- 8) From those decisions, I believed that I specifically requested my staff to have the previously executed motions and claims filed with the Court sometime in late summer of 2011. However, I do not have specific recall as to this fact other than in my mind from that time forward, I fully believed and had no doubt that the Motions

and Claims had been filed. Because of the numerous filings I was involved with the Court and Special Master as to the other Basin 21 and Basin 22 claims and late filings, it did not register that there was no hearing on the Motions for the present late claims.

- 9) Because the claims involve a limited supply of water from the Teton Creek, most of which would be subject to Grand Teton Canal Company's priority, the mediation has continuously been on-going between the Grand Teton Canal Company and the City, including face to face meetings held at my office. At no time did the City, the Grand Teton Canal Company board, RME or I ever believe that the claims weren't filed and pending a settlement between the parties.
- 10) Finally, the notice of the closing of Basin 22 came from the court. As counsel for the vast majority of the outstanding water claimants in basin 21 and 22, I attempted to contact and investigate all of the pending rights to determine if additional claims were necessary all along assuming that the City's rights had been filed and never knowing otherwise.
- 11) The City owns shares of stock in Grand Teton Canal Company and therefore, the rights claimed herein were always subject to those priority rights except for additional water which is now extracted from the spring as a result of the multi thousand dollar project to enhance the flows of the spring for the purpose of the permits granted by the State of Wyoming.
- 12) Clearly, the error was one of excusable mistake and based upon unique set of circumstances, including but not limited to the Wyoming permits which caused the

issue of untimely filing in the first place; contacting the Department and obtaining the necessary claim numbers long before the Basin's closure; the numerous caseload of counsel in the Basin which caused me to believe that these motions had been filed along with others filed by this firm, all of which were grouped together as recrec claims; and actions by the Claimant and the impacted parties which evidenced that all believed the claims had been filed.

13) An additional equitable reason for granting Claimant's late claims is that Basin 22 is one of the very last basins to be reported and administrated. Whereas other basins have been open and administrated for literally decades, because basin 22 was one of the last basins to be reported and was at the tail end of the adjudication, it was administered far shorter than the other basins not included within its group. Therefore, it is reasonable to grant a reasonable period of time after it is closed for claims which have legitimate reasons for not having been filed before the closing.

14) Finally, because it is incumbent upon the City which is seeking the relief from the order closing Basin 22, to not only meet the requirements of IRCP 60(b), but also to show and present evidence of facts which, if established, would constitute meritorious claims to the water rights, themselves, your affiant has investigated the claims and can represent to the Court as follows:

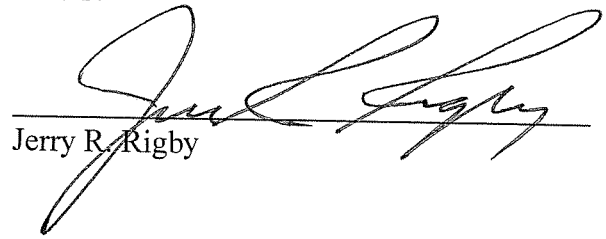
(A) There is no dispute among the impacted parties which divert from Teton Creek, that since 1916, the City has continuously diverted the 3.2 cfs of water from Teton Creek for a beneficial use within the City's authorized territory as set forth in claim number 22-626, which was decreed in the Roxanna

Decree in 1941. The Department also recognizes that Claim number 22-626 is part of the Roxanna Decree and decreed to the City.

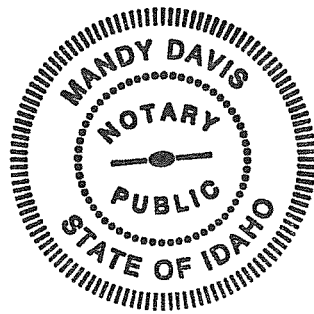
(B) There is also no dispute among the impacted parties which divert from Teton Creek that the City was granted a permit from the State of Wyoming authorizing the diversion of 1.0 cfs of water from the said spring for the City's water supply with a priority date of June 28, 1912 and that since said date, the City has continuously diverted the 1.0 cfs of water from the spring for a beneficial use within the City's authorized territory as set forth in claim number 22-14003, including its use as a potable water supply. The Department also recognizes that Claim number 22-14003 is a valid permit granted to the City by the State of Wyoming (see permit attached to said claim).

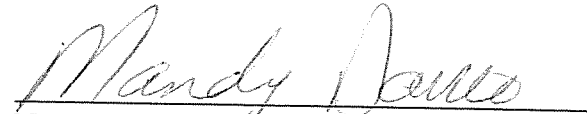
(C) Finally, the City is prepared to present such additional testimony by those who have personal knowledge of the history and use of the water rights as required by the Court at the hearing upon its Motion to File Late Claims in order to further establish the legitimacy of the said claims.

FURTHER YOUR AFFIANT SAITH NOT.


Jerry R. Rigby

SUBSCRIBED AND SWORN To before me this 10th day of July 2012.




Notary Public for Idaho
Residing at: St. Anthony
My Commission Expires: 6/24/17