

4-15-2009

# Brown v. City of Pocatello Clerk's Record v. 1 Dckt. 35992

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**IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO**

LINDA BROWN

Plaintiff-Appellant and

vs. **LAW CLERK**

CITY OF POCA TELLO

Defendant-Respondent and

David D. Nye District Judge

Appealed from the District Court of the Sixth  
Judicial District of the State of Idaho, in and for  
Bannock County.

Lowell N. Hawkes

LOWELL N. HAWKES, Chartered

Attorney X For Appellant X

Blake G. Hall

ANDERSON NELSON HALL SMITH, P.A.

Attorney X For Respondent X

Filed this **FILED - COPY** day of \_\_\_\_\_  
2008  
**APR 15 2009**  
Clerk \_\_\_\_\_  
Deputy \_\_\_\_\_  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by: \_\_\_\_\_

**35992**

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN, )  
 )  
 Plaintiff-Appellant, ) Supreme Court No. 35992-2009  
 )  
 vs. )  
 )  
 CITY OF POCA TELLO, A Municipal )  
 Corporation; )  
 Defendant-Respondent, )  
 \_\_\_\_\_ )

**CLERK'S RECORD**

Appeal from the District Court of the Sixth Judicial District of the State of  
Idaho, in and for the County of Bannock.

Before **HONORABLE David D. Nye**, District Judge.

For Appellant:

**Lowell N. Hawkes**  
**Ryan S. Lewis**  
**LOWELL N. HAWKES, Chartered**  
**1322 East Center**  
**Pocatello, Idaho 83201**

For Respondent:

**Blake G. Hall**  
**Sam L. Angell**  
**ANDERSON NELSON HALL SMITH, P.A.**  
**P.O. Box 51630**  
**Idaho Falls, Idaho 83405-1630**

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**VOLUME I**

**VOLUME II**

Linda Brown vs. City of Pocatello

Date	Code	User		Judge
8/3/2007	LOCT	DCANO	SUPREME COURT APPEAL; Clerk's Office	David C Nye
	NCOC	DCANO	New Case Filed-Other Claims	David C Nye
	COMP	DCANO	Complaint Filed	David C Nye
	SMIS	DCANO	Summons Issued	David C Nye
		DCANO	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Lowell N. Hawkes, Chartered Receipt number: 0082937 Dated: 8/3/2007 Amount: \$88.00 (Check) For: [NONE]	David C Nye
	ATTR	DCANO	Plaintiff: Brown, Linda Attorney Retained Lowell N Hawkes	David C Nye
8/6/2007	NOTC	DCANO	Notice of Service of first Discovery to Defendant; First Discovery to Defendant with service of Complaint and Jury Demand, Lowell N. Hawkes, Atty for Plntf.	David C Nye
8/22/2007	ANSW	CAMILLE	Answer and Demand for Jury Trial; aty Blake Hall for city of pocatello;	David C Nye
	DFJT	CAMILLE	Demand For Jury Trial	David C Nye
8/29/2007	NOTC	CAMILLE	Notice of service - 2nd discovery to def; aty L/ Hawkes for plntf	David C Nye
8/31/2007	NOTC	CAMILLE	Notice of service - Defs first set of Interrog and req for production of documents and req for admission; aty Blake Hall for city of pocatello	David C Nye
9/7/2007	NOTC	CAMILLE	Notice of service - Defs Answer to plntfs req. for admission; atyBlake Hall for City of Pocatello	David C Nye
9/26/2007	NOTC	CAMILLE	Notice of service - Defs Answer to Plntfs first set of Interrog and req for production of documents; aty Blake Hall for def	David C Nye
10/2/2007	NOTC	CAMILLE	Notice of service - plntfs resp to defs first req for admission; aty L/ Hawkes	David C Nye
11/27/2007	NOTC	CAMILLE	Notice of Depo - of Linda Brown on 12-13-07 at 9:00 am: aty Blake Hall	David C Nye
1/11/2008	HRSC	CAMILLE	Hearing Scheduled (Scheduling Conference 02/04/2008 10:30 AM)	David C Nye
2/26/2008	ATTR	AMYW	Defendant: City of Pocatello Attorney Retained Sam Angell	David C Nye
	HRSC	CAMILLE	Hearing Scheduled (Jury Trial 09/23/2008 09:00 AM)	David C Nye
	HRSC	CAMILLE	Hearing Scheduled (Pretrial Conference 09/08/2008 10:00 AM)	David C Nye
5/23/2008		CAMILLE	Plaintiffs Fact and Expert Witness Disclosure; aty Lowell Hawkes for plntf	David C Nye
6/9/2008	MOTN	CAMILLE	Motion for summary judgment, aty Blake Hall for City of Pocatello	David C Nye
	MEMO	CAMILLE	Memorandum in support of motionn for summary judgment, aty Blake Hall for City of Pocatello	David C Nye



Linda Brown vs. City of Pocatello

Date	Code	User	Judge
6/9/2008	AFFD	CAMILLE	Affidavit of Lindell Turner; aty Blake Hall for City of Pocatello
	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 07/07/0900 09:00 AM)
6/11/2008	NOTC	CAMILLE	Amended notice of hearing; aty Blake Hall (set for 7-28-08 at 9:00 am)
6/16/2008	CONT	AMYW	Continued (Motion for Summary Judgment 07/07/2008 09:00 AM)
6/17/2008	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 07/28/2008 09:00 AM)
7/1/2008	MOTN	CAMILLE	Plntfs motion for partial summary judgment and notice of hearing; aty Ryan Lewis
	AFFD	CAMILLE	Affidavit of Linda Brown; aty Ryan Lewis for plntf
	AFFD	CAMILLE	Affidavit of counsel; aty Ryan Lewis for plntf
	MEMO	CAMILLE	Memorandum supporting plntfs Motion for partial summary judgment, aty Ryan Lewis for plntf
7/9/2008		CAMILLE	Defendants Fact and Expert Witness Disclosure; aty Blake Hall for City of Pocatello
7/14/2008	RESP	CAMILLE	Plntfs Resp in opposition to defs motion for summary judgment; aty L/ Hawkes for plntf
7/15/2008	MEMO	CAMILLE	Defs Memorandum in opposition to plntfs motion for summary judgment; aty Blake Hall for City of Pocatello
7/22/2008		CAMILLE	Plntfs Reply in support of Her Motion for summary judgment, aty Ryan Lewis for plntf
	BRFS	CAMILLE	Defs Reply Brief; aty Blake Hall for City of Pocatello
9/2/2008	BRFS	CAMILLE	Defs Reply Brief in support of motion for summary judgment, aty Jeffrey Brunson for def
	MEMO	CAMILLE	Defs Memorandum in opposition to motion to strike affidavit of Brett Harris; aty Jeffrey Brunson
9/4/2008	DEOP	CAMILLE	Decision on motions for summary judgment, Court Denies plntfs motion for p artial Summary Judgment and Grants Defs Motion for Summary Judgment: J Nye 9-4-08
9/15/2008	DSBT	CAMILLE	Judgment of Dismissal; plntfs c omplaint is dismissed with prej; with plntf taking nothing thereunder: J Nye 9-15-08
9/26/2008	MOTN	CAMILLE	Motion for reconsideration; aty L/ Hawkes for plntf
9/30/2008	MEMO	CAMILLE	Memorandum supporting plntfs motion for reconsideration ; aty L/ Hawkes for plntf
10/2/2008	NOTC	CAMILLE	Notice of hearing; plntfs motion for reconsideration; aty Ryan Lewis

Linda Brown vs. City of Pocatello

Date	Code	User		Judge
10/2/2008	HRSC	CAMILLE	Hearing Scheduled (Motion 10/20/2008 10:00 AM)	David C Nye
10/14/2008	OBJT	CAMILLE	Defendants Objection to Plntfs Motion for Reconsideration; aty Blake Hall for City of Pocatello	David C Nye
	MEMO	CAMILLE	Defs Memorandum in Opposition to Plntfs Motion for Reconsideration; aty Blake Hall for City of Pocatello	David C Nye
11/7/2008	DPWO	CAMILLE	Decision on Motion for Reconsideration; (Court DENIES plntfs Motion for Reconsideration, Crts Original Decision Regarding immunity. J Nye 11-7-08	David C Nye
	CSTS	CAMILLE	Case Status Changed: closed	David C Nye
12/19/2008		MEGAN	Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: Jerimy Johnson Receipt number: 0047137 Dated: 12/19/2008 Amount: \$15.00 (Check) For: Brown, Linda (plaintiff)	David C Nye
	APSC	DCANO	Appealed To The Supreme Court	David C Nye
	NOTC	DCANO	NOTICE OF APPEAL TO SUPREME COURT; Lowell N. Hawkes, Atty for Plntf.	David C Nye
	MISC	DCANO	Received payment of \$86.00 for Supreme Court check #161 and \$100.00 for Clerk's Record check #160 on 12-19-08. (Check #159 for \$100.00 to Stephanie Morse sent to Stephanie on 12-26-08)	David C Nye
12/26/2008	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL received in Court Records on 12-26-08. Mailed to SC and Counsel on 12-26-08.	David C Nye
		DCANO	Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: Kristi L. Johnson/Lowell Hawkes Receipt number: 0047705 Dated: 12/26/2008 Amount: \$86.00 (Check)	David C Nye
1/7/2009	MISC	DCANO	IDAHO SUPREME COURT: Notice of Appeal received in SC on 12-29-08. Docket # 35992-2009. Clerk's Record and Reporter's Transcript due 3-6-09 (2-2-09 5 weeks prior)	David C Nye
	MISC	DCANO	IDAHO SUPREME COURT; Clerk's Certificated of Appeal received in SC on 12-29-08.	David C Nye
1/8/2009	MISC	DCANO	IDAHO SUPREME COURT: Clerk's Record and Transcript Due Date Reset to 4-10-09.	David C Nye
1/28/2009	MISC	DCANO	REPORTER'S TRANSCRIPT RECEIVED IN COURT RECORDS ON 1-28-09 for Motion for Summary Judgment held 7-28-08 and Motion for Reconsideration held 10-20-08	David C Nye

Date: 3/3/2009

Sixth Judicial District Court - Bannock County

User: DCANO

Time: 08:46 AM

ROA Report

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Case: CV-2007-0003303-OC Current Judge: David C Nye

Linda Brown vs. City of Pocatello

Linda Brown vs. City of Pocatello

Date	Code	User		Judge
3/3/2009	MISC	DCANO	Clerk's Record received in Court Records on 3-3-09.	David C Nye

Lowell N. Hawkes (ISB #1852)  
 Ryan S. Lewis (ISB #6775)  
 LOWELL N. HAWKES, CHARTERED  
 1322 East Center  
 Pocatello, Idaho 83201  
 Telephone: (208) 235-1600  
 FAX: (208) 235-4200  
*Attorneys for Plaintiff*

FILED  
 BANNOCK COUNTY  
 CLERK OF THE COURT  
 2007 AUG -3 PM 4:58  
 BY *[Signature]*  
 DEPUTY CLERK

**IN THE SIXTH JUDICIAL DISTRICT COURT  
 BANNOCK COUNTY, IDAHO**

LINDA BROWN; )  
 )  
*Plaintiff,* )  
 )  
 vs. )  
 )  
 CITY OF POCA TELLO, a Municipal )  
 Corporation; )  
 )  
*Defendant.* )

Case No. CV-2007-3303-OC

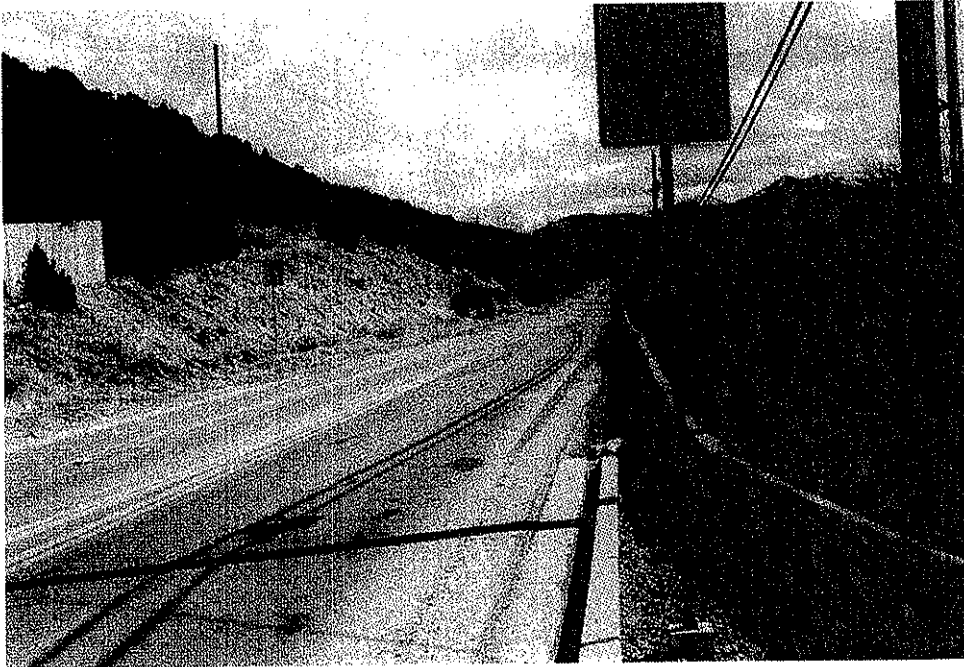
**COMPLAINT  
 AND  
 JURY DEMAND**

*J. Nye*

**District Court Jurisdiction & Parties**

1. The District Court has jurisdiction because the amount in controversy is in excess of \$10,000 and because the issues herein involve real property.
2. Plaintiff Linda Brown is a resident of Pocatello, Bannock County, Idaho residing at 2300 Darrell Loop where she has lived since April of 2001. Her back yard is adjacent to Pocatello Creek Road and is approximately half way between, the KOA

Campgrounds “uphill” south of her home and ...



the Boy Scouts of America offices “downhill” north of her home.



3. Defendant City of Pocatello, is a Municipal Corporation located in Bannock County, incorporated under laws of the State of Idaho and having responsibility for the design and maintenance of the Pocatello Creek Road behind Mrs. Brown's residence.

4. Prior to the summer of 2005, Plaintiff Linda Brown had resided at 2300 Darrell Loop since April of 2001 and had never had any water or water runoff damage to her property from water or rain on Pocatello Creek Road. Nor had the prior home owners.

5. In the summer of 2005, primarily July and August, Defendant City of Pocatello undertook construction on the Pocatello Creek Road behind Plaintiff Linda Brown's home. In so doing the Defendant City of Pocatello negligently altered and reconstructed the Pocatello Creek Road roadway from its prior "water-safe" condition so as to create, among other things, a new roadway depression and water run-off pattern than had previously existed and that did not damage adjacent private properties.

6. The obvious roadway depression and "cupping" is easily seen where the City of Pocatello and Bannock County boundaries meet on Pocatello Creek Road. That difference at the junction was, and should have been, clear and conspicuous to City of Pocatello roadway designers, engineers, and workers with resultant recognition of the

need to deal with roadway water runoff. The completed roadway from the City-County junction line did *not* flow smoothly but created a depression and allowed for pooling of water and water runoff into Plaintiff's yard and home and ultimately, as more fully set forth herein, requiring protection of Plaintiff's home by sandbags.



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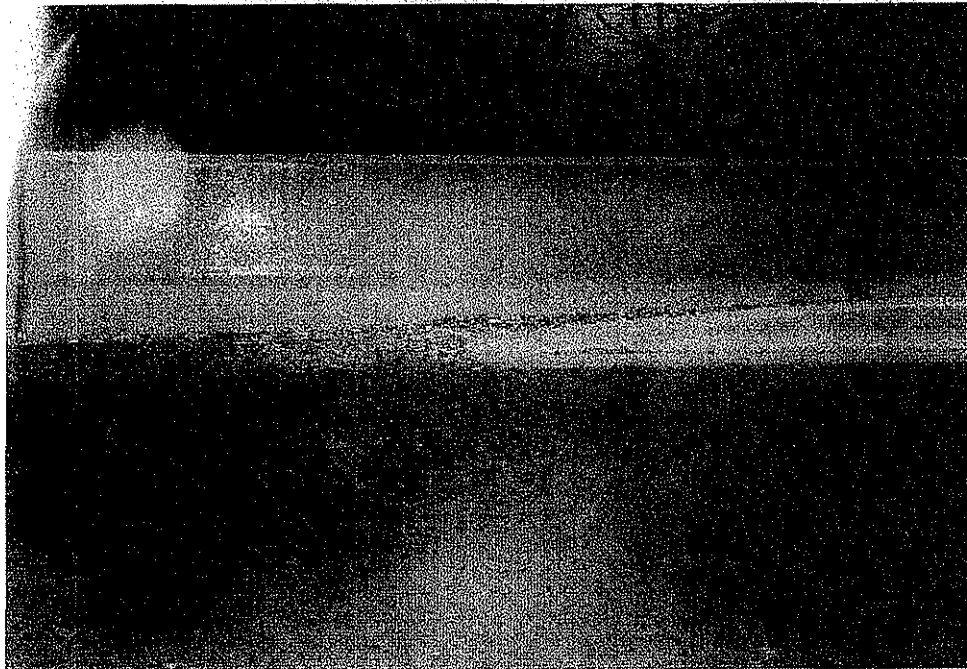
7. In February of 2006 with the water runoff of springtime the roadway as completed would not properly handle water runoff as it had before the summer of 2005 reconstruction and substantial roadway water was diverted onto and into Plaintiff's property and home.

8. Specifically, the roadway as reconstructed in the summer of 2005 allowed roadway water to pool on and adjacent to the roadway as there was no adequate design or means to properly and safely divert water without it passing onto Plaintiff's property; there was not even a drain installed on the west boundary of the property though there was a drain installed in the roadway on the east boundary of the roadway and north of Plaintiff's home.





9. The reconstructed roadway did not even have a full roadway gutter installed in the area behind and north of Plaintiff's home and the work as done and completed was not even sufficient to divert the water into the *partial* curbing that was constructed on part of the roadway north of Plaintiff's property.

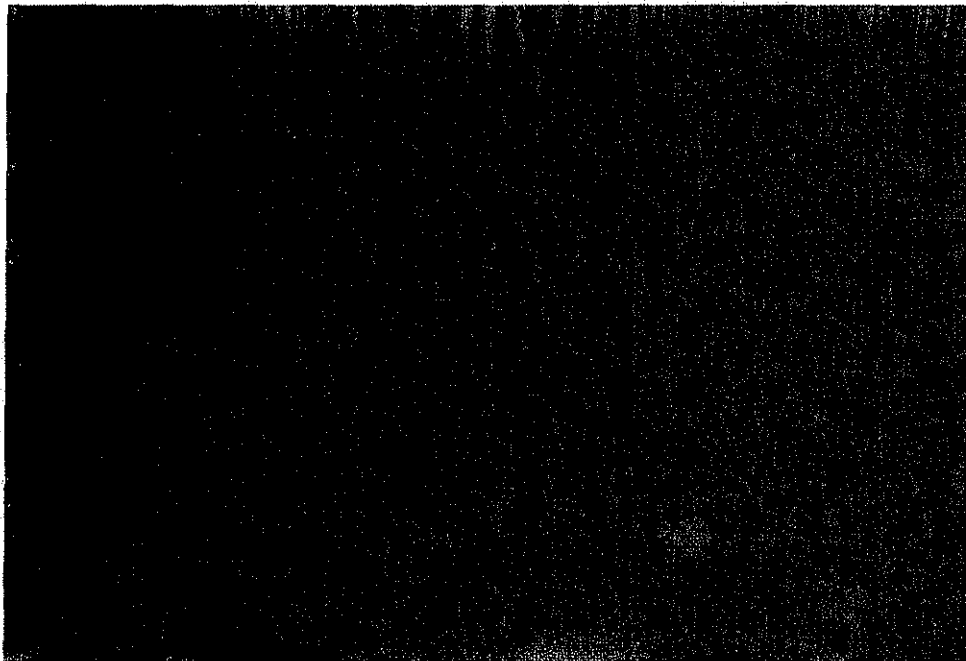




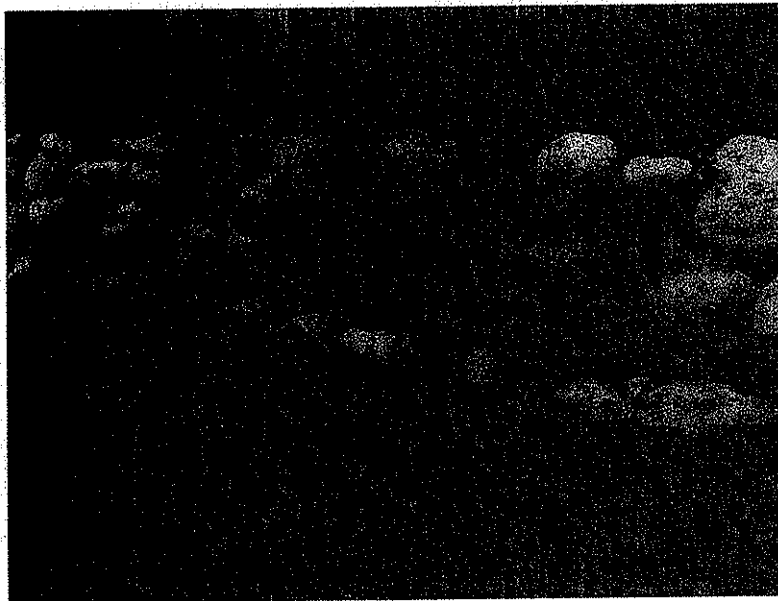
10. Rather than repair the underlying problem and retain and restore the roadway to its prior safe runoff condition, the Defendant City placed sandbags along the west boundary of Pocatello Creek behind Plaintiff's home.

11. Those speaking on behalf of the City of Pocatello have wrongly and obviously claimed that the Pocatello Creek Road construction project "did *not* significantly alter Pocatello Creek Road."

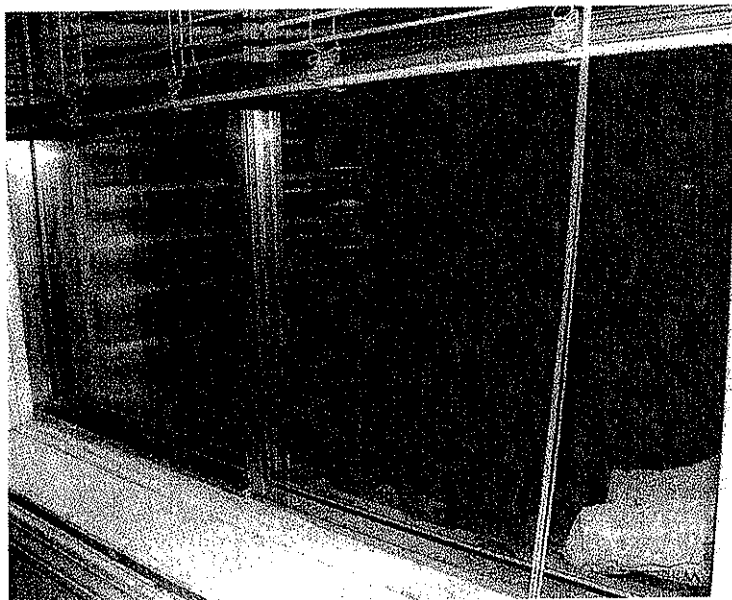
12. As a direct and proximate cause of the negligent Pocatello Creek Road reconstruction, the roadway water flowed off Pocatello Creek Road and under Plaintiff's back yard fence carrying debris and soil and rock with it into the Plaintiff's yard and...



and across the Plaintiff's yard and...

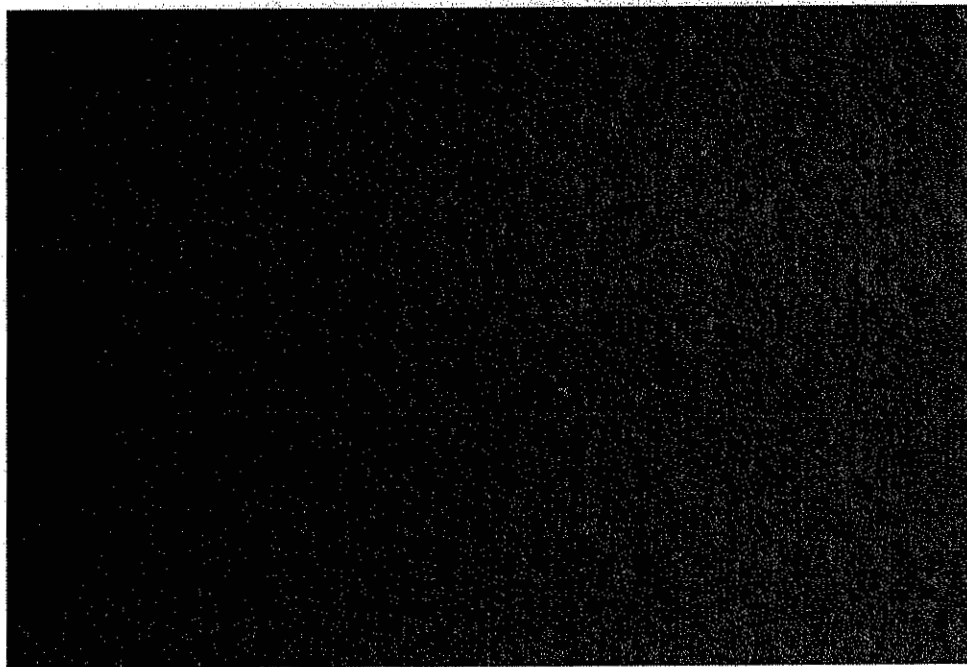
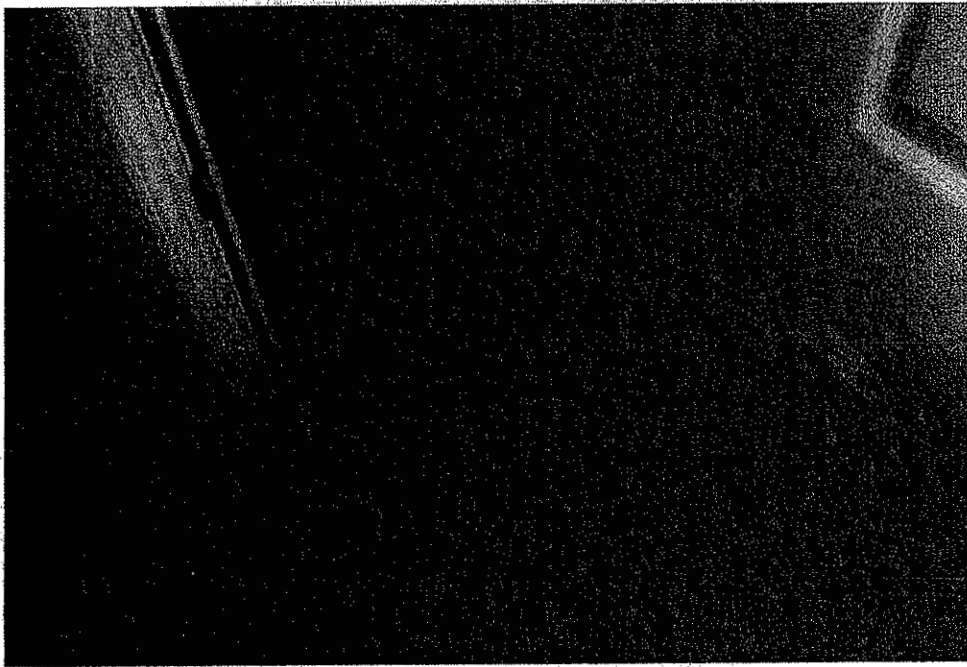


into Plaintiff's home through windows and...



S

and into other rooms and under tile.



S

13. Defendant City of Pocatello previously acknowledged that the necessity of sandbags on the road was not intended to be nor an appropriate permanent remedy of the roadway runoff water condition and assured Plaintiff that the Pocatello Creek Road condition complained of herein would be corrected this summer but to day has not done so though it has done other roadway work in *front of* Plaintiff's home on Darrell Loop where there was no water issue.

14. As a direct and proximate cause of the Defendant City of Pocatello's negligence and failings as set forth herein, the Plaintiff has been specially and generally damaged in her home and property, cleaning and repair expense, replacement expense, resultant mold and loss of use and benefit of her home and other damages incidental to all of the foregoing.

15. Plaintiff has been required to retain counsel to seek to remedy the foregoing and is entitled to costs and attorney fees that otherwise would not have been incurred.

WHEREFORE, Plaintiff prays for the Court's Orders and Judgment awarding her special and general damages as shown by the evidence, plus interest, costs, attorney fees, repair of the Pocatello Creek Road and such other relief as the Court determines proper.

S

**Jury Demand**

Plaintiff demands trial by jury on all issues.

DATED this 3<sup>rd</sup> day of August, 2007.

LOWELL N. HAWKES, CHARTERED

  
LOWELL N. HAWKES

FILED  
BANNOCK COUNTY  
CLERK OF THE COURT

2007 AUG 22 PM 2:07

BY [Signature]  
DEPUTY CLERK

BLAKE G. HALL (2434)  
SAM L. ANGELL (7012)  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
Telephone (208) 522-3001  
Fax (208) 523-7254

Attorneys for City of Pocatello

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,

Plaintiff,

v.

CITY OF POCA TELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

ANSWER AND DEMAND FOR  
JURY TRIAL

As and for an answer to Plaintiff's complaint, Defendant pleads and alleges as follows:

**FIRST DEFENSE**

Plaintiff's Complaint, and each and every allegation contained therein, fails to state a claim against Defendant upon which relief can be granted.

**SECOND DEFENSE**

1. Defendant denies each and every allegation contained in Plaintiff's Complaint unless expressly and specifically hereinafter admitted.

S



- 2. With regard to paragraph I, Defendant admits the allegations contained therein.
- 3. With regard to paragraphs II and IV, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore, denies said allegations.
- 4. With regard to paragraph III, Defendant admits that it is a municipal corporation under the laws of the State of Idaho responsible for roadways within its roadway system.
- 5. With regard to paragraphs V, VI, VII, VIII, IX, XI, XII, XIV and XV, Defendant denies the allegations contained therein.
- 6. With regard to paragraph X, Defendant admits that it took certain action in response to Plaintiff's complaints.
- 7. With regard to paragraph XIII, Defendant denies the allegations contained therein, specifically allegations asserting a roadway problem.

**THIRD DEFENSE**

Plaintiff's claims are precluded by the requirements and immunities of the Idaho Tort Claims Act.

**FOURTH DEFENSE**

Plaintiff's damages, if any, were caused by the actions of Plaintiff and/or other individuals or entities other than this Defendant.

**FIFTH DEFENSE**

Plaintiff has failed to mitigate her damages, if any.

**SIXTH DEFENSE**

The foregoing defenses are applicable, where appropriate, to any and all of Plaintiff's claims for relief. In asserting these defenses, Defendant does not admit that it has the burden of proving the allegations or denials contained in the defenses, but, to the contrary, asserts that by reasons of the denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or the

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burden of proving the inverse to the allegations contained in many of the defenses is upon the Plaintiff. Defendant does not admit, in asserting any defense, any responsibility or liability, but, to the contrary, specifically deny any and all allegations of responsibility and liability in Plaintiff's Complaint.


#### SEVENTH DEFENSE

Defendant has considered and believes that it may have additional defenses to Plaintiff's Complaint, but cannot at this time, consistent with Rule 11 of the Idaho Rules of Civil Procedure, state with specificity those defenses. Accordingly, Defendant reserves the right to supplement its Answer and add additional defenses as discovery in this case progresses.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice, with Plaintiff taking nothing thereunder;
2. That Defendant be awarded its costs and attorney fees necessarily incurred in defending this action;
3. For such other relief as the Court may deem just and proper.


Dated this 22 day of August, 2007.

  
\_\_\_\_\_  
BLAKE G. HALL

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b), Idaho Rules of Civil Procedure, Defendants request a trial of the issues of fact herein by a jury.

Dated this 22 day of August, 2007.

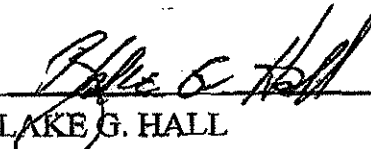
  
\_\_\_\_\_  
BLAKE G. HALL

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing document upon the following this 22 day of August, 2007, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
Ryan S. Lewis  
1322 East Center  
Pocatello, ID 83201

- Mailing
- Hand Delivery
- Fax
- Overnight Mail

  
\_\_\_\_\_  
BLAKE G. HALL

L:\JET\0186.304\Answer.Dem.Jury.Trial.wpd

FILED  
BANNOCK COUNTY  
CLERK OF THE COURT

2008 JAN 11 AM 8:42

BY JW  
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,	)	
	)	Case No.: CV-2007-0003303-OC
Plaintiff,	)	
	)	
vs.	)	
	)	<b>ORDER FOR SCHEDULING</b>
CITY OF POCA TELLO, a	)	<b>CONFERENCE</b>
Municipal Corporation,	)	
	)	
Defendant.	)	
_____	)	

It appearing that the above entitled matter is at issue or is ready for further proceedings,

IT IS HEREBY ORDERED that a **SCHEDULING CONFERENCE** is hereby set in this matter MONDAY, FEBRUARY 4, 2008 AT THE HOUR OF 10:30 A.M. before the undersigned District Judge.

Counsel shall be authorized and prepared to discuss the following matters:

- (1) Service upon unserved parties.
- (2) Status of the case.
- (3) Amendments to the pleadings.

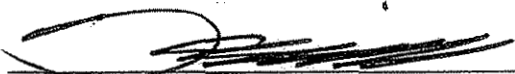
Case No. CV-2007-0003303-OC  
ORDER FOR SCHEDULING CONFERENCE  
Page 1

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- (4) Pending or anticipated pre-trial motions.
- (5) Status of discovery.
- (6) Time required for trial preparations.
- (7) Time required for trial.
- (8) Cut-off dates for discovery & pre-trial motions.
- (9) Settlement.
- (10) Other matters conducive to determination of the action.

A TELEPHONE CONFERENCE CALL MAY BE HELD UPON REQUEST OF COUNSEL. SHOULD THIS BE THE CHOICE OF COUNSEL, A NOTICE SHOULD BE SENT TO THE COURT STATING WHO WILL BE INITIATING THE CALL. SUCH CONFERENCE CALLS SHOULD BE PLACED AT THE TIME AND ON THE DATE HEREIN SET. IT IS THE SPECIFIC REQUEST OF THE COURT THAT LOCAL COUNSEL APPEAR IN PERSON, IF POSSIBLE.

DATED: January 9, 2008.

  
\_\_\_\_\_  
David C. Nye  
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11<sup>th</sup> day of January, 2008, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Lowell N. Hawkes  
Ryan S. Lewis  
Lowell N. Hawkes, Chtd.  
1322 E. Center  
Pocatello, Idaho 83201

U.S. Mail  
 Overnight Delivery  
 Hand Deliver  
 Fax: 235-4200

Blake G. Hall  
Sam L. Angell  
Anderson Nelson Hall Smith, P.A.  
P.O. Box 51630  
Idaho Falls, Idaho 83405-1630

U.S. Mail  
 Overnight Delivery  
 Hand Deliver  
 Fax: 523-7254

  
Deputy Clerk

FILED  
BANNOCK COUNTY  
CLERK OF THE COURT

2008 FEB 28 PM 1:44

BY   
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,	)	
	)	Case No.: CV-2007-0003303-OC
Plaintiff,	)	
	)	
vs.	)	<b>ORDER SETTING PRE-TRIAL AND</b>
	)	<b>ORDER SETTING JURY TRIAL</b>
CITY OF POCATELLO, a	)	
Municipal Corporation,	)	
	)	
Defendant.	)	
_____	)	

Pursuant to a status conference held on the 6<sup>th</sup> day of February, 2008, it is hereby ordered:

(1) JURY TRIAL will commence SEPTEMBER 23, 2008 (2<sup>nd</sup> place setting) AT THE HOUR OF 9:00 A.M. or MARCH 3, 2009 AT THE OUR OF 9:00 A.M. (1<sup>st</sup> place setting).

(2) FORMAL PRE-TRIAL CONFERENCE, pursuant to Rule 16, I.R.C.P. will be held SEPTEMBER 8, 2008 AT THE HOUR OF 10:00 A.M.

(3) Trial counsel for the parties are ordered to meet in person for the purpose of preparing a joint Pre-Trial Memorandum, which shall be submitted to the Court at least one (1) week prior

Register No.: CV2007-0003303-OC  
ORDER SETTING PRE-TRIAL/JURY TRIAL  
Page 1

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to the time of the Pre-Trial Conference. The joint Pre-Trial Memorandum shall contain the following:

(a) An index of all exhibits. The index shall indicate: 1) by whom the exhibit is being offered, 2) a brief description of the exhibit, 3) whether the parties have stipulated to admissibility, and if not, 4) the legal grounds for objection.

(b) An indication of whether depositions, admissions, interrogatory responses, or other discovery responses are to be used in lieu of live testimony, the manner in which such evidence will be presented, and the legal grounds for any objection to such excerpts.

(c) Summary of the documentary evidence supporting the damages sought by the plaintiff shall be appended to the joint Pre-Trial Memorandum. The Memorandum shall include a statement as to whether the parties have stipulated to the admission of the summary under Rule 1006, I.R.E. in lieu of the underlying documents.

(d) A list of the names and addresses of all witnesses which such party may call to testify at trial, including anticipated rebuttal or impeachment witnesses. Expert witnesses shall be identified as such.

(e) A brief non-argumentative summary of the factual nature of the case. The purpose of the summary is to provide an overview of the case for the jury and shall be included in pre-proof instructions to the jury.

(f) A statement that counsel have, in good faith, discussed settlement unsuccessfully.

(g) A statement that all answers or supplemental answers to interrogatories under



Rule 33 reflect facts known to the date of the Memorandum.

(h) A statement of all claims.

(i) Any admissions or stipulations of the parties which can be agreed upon by the parties.

(j) Any issues of law abandoned by any of the parties.

(k) A statement of the issues of fact and law which remain to be litigated at the trial.

(l) A listing of all anticipated motions in limine and any orders which will expedite the trial.

(m) A statement as to whether counsel requires more than 30 minutes per side for opening statement.

At the time of the Pre-Trial Conference, all parties shall be prepared to assist in the formulation of a Pre-Trial Order in the form described in Rule 16(d) I.R.C.P.

(4) At the time of counsel's meeting ordered above, counsel shall complete an Exhibit List on a form to be procured from the Court Clerk. The Exhibit List will be submitted to the Court at the time of the Pre-Trial Conference.

(5) **DISCOVERY CUTOFF will be AUGUST 25, 2008. Counsel are advised that this cutoff means that ALL discovery will be COMPLETE by that deadline.**

(6) Plaintiff shall disclose all fact witnesses to be used

at time of trial no later than MAY 26, 2008; defendants shall disclose their fact witnesses no later than JUNE 25, 2008. Plaintiff shall also disclose all expert witnesses **IN THE MANNER OUTLINED IN RULE 26(b)(4)(A)(i)**, disclosing the person expected to be called as an expert witness, the subject matter on which the expert is expected to testify, the substance of the opinions for which the expert is expected to testify, and the underlying facts and data upon which the expert opinion is based no later than MAY 26, 2008; with defendant given until JUNE 25, 2008 to make a similar disclosure of their expert witnesses. Plaintiffs shall disclose counter witnesses by JULY 25, 2008. Witnesses not disclosed **IN THIS MANNER** will be subject to exclusion at trial.

(7) **MOTION CUTOFF** will be AUGUST 25, 2008 with all motions filed by that date. Motions must be heard within two weeks after that date. This includes all motions concerning any objections to the testimony of experts at trial. This does not include other Motions in Limine the parties may wish to file.

(8) The deadline to amend the pleadings to add a new party or cause of action shall be JUNE 25, 2008.

(9) **SUMMARY JUDGMENT MOTIONS** must be filed at least 60 days prior to the trial date and the requirements of IRCP 56(c) must be met. Any objections to the admissibility of evidence submitted

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for purposes of summary judgment must be submitted in writing. The nonmoving party must submit any such objection with their answering brief. The moving party must submit any such objection at or before the time their reply brief is due. The intent of this requirement is to comply with *Gem State Insurance Co. v. Hutchison*, 07.26 ISCR 1025 (December 24, 2007).

(10) TRIAL BRIEFS AND JURY INSTRUCTIONS shall be filed with the Court at the time of the Pre-Trial Conference.

(11) **MEDIATION** is highly recommended. Any formal mediation must occur at least 60 days before the trial date. If the parties cannot agree on a mediator upon motion by either party, the Court will appoint a mediator.

(12) Unless otherwise specified, all meetings and/or hearings with the Court in this matter shall take place at the Bannock County Courthouse.

(13) All documents submitted in this matter will have Judge David C. Nye listed on the certificate of service with copies of any and all documents submitted mailed to: David C.Nye, P.O. Box 4165, Pocatello, ID 83205.

(14) The Court appreciates time to adequately consider each issue before it, prior to a hearing and/or meeting.

DATED: February 25, 2008.



DAVID C. NYE  
District Judge

CERTIFICATE OF SERVICE

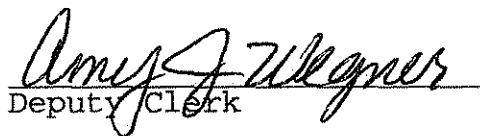
I HEREBY CERTIFY that on the 26<sup>th</sup> day of February, 2008, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Lowell N. Hawkes  
Ryan S. Lewis  
Lowell N. Hawkes, Chtd.  
1322 E. Center  
Pocatello, Idaho 83201

U.S. Mail  
 Overnight Delivery  
 Hand Deliver  
 Fax: 235-4200

Blake G. Hall  
Sam L. Angell  
Anderson Nelson Hall Smith, P.A.  
P.O. Box 51630  
Idaho Falls, Idaho 83405-1630

U.S. Mail  
 Overnight Delivery  
 Hand Deliver  
 Fax: 523-7254



Deputy Clerk

S

BLAKE G. HALL (2434)  
SAM L. ANGELL (7012)  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
Telephone (208) 522-3001  
Fax (208) 523-7254

FILED  
BANNOCK COUNTY  
CLERK  
2008 JUN -9 AM 10:33  
BY  
DEPUTY CLERK

Attorneys for City of Pocatello

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,

Plaintiff,

v.

CITY OF POCATELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

**MOTION FOR SUMMARY  
JUDGMENT**

COMES NOW Defendant, by and through counsel of record, and hereby moves this Court pursuant to Rule 56 of the Idaho Rules of Civil Procedure for an Order granting defendant's motion for summary judgment and dismissing plaintiff's Complaint with prejudice. This motion is based on the grounds that there are no genuine issues of material fact and defendant is entitled to summary judgment as a matter of law.

This motion is based upon the record before the Court and the affidavits and memorandum in support filed concurrently herewith.

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Oral argument is hereby requested.

Dated this 6 day of June, 2008.

  
\_\_\_\_\_  
BLAKE G. HALL

### CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 6 day of June, 2008, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
Ryan S. Lewis  
1322 East Center  
Pocatello, ID 83201

- Mailing
- Hand Delivery
- Fax
- Overnight Mail

  
\_\_\_\_\_  
BLAKE G. HALL

LAJET\0186.304\MSJ.wpd

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FILED WITH  
CLERK OF DISTRICT COURT  
2007 JUN -9 PM 10:33  
BY [Signature] DEPUTY CLERK

BLAKE G. HALL (2434)  
SAM L. ANGELL (7012)  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
Telephone (208) 522-3001  
Fax (208) 523-7254

Attorneys for City of Pocatello

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,

Plaintiff,

v.

CITY OF POCATELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

COMES NOW Defendant City of Pocatello, by and through counsel of record, and  
hereby submits this memorandum in support of its motion for summary judgment filed  
herein.

**STATEMENT OF FACTS**

Plaintiff's basement was flooded on February 28, 2006. Plaintiff's property is  
abutted in the rear by Pocatello Creek Road. The portion of Pocatello Creek Road at issue is  
owned and maintained by the City of Pocatello. Plaintiff's property sits about twenty feet

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below Pocatello Creek Road, and allegedly took on water from the road as a result of the reconstruction project.

The Pocatello Creek Road reconstruction project was identified as a critical transportation need by the Bannock Planning Organization and the City of Pocatello in the late 1990's. The proposed project was placed on the Statewide Transportation Improvement Program (STIP) for development as a Federal Aid project. The process was started to create a design and plan and begin construction. *See, Affidavit Turner, ¶ 3.*

The City of Pocatello allotted funds for an engineering consulting firm to be hired to create the plan and design specifications for the project. The City of Pocatello chose Rocky Mountain Engineering, and a "Consulting Agreement" was executed on October 25, 1999. After the City of Pocatello had received the final plans and specifications from Rocky Mountain Engineering, it authorized the Mayor to move forward with presenting the project to the State of Idaho for bidding. *See, Affidavit Turner, ¶ 7.* The State of Idaho administers all federally funded local road re-construction projects.

Throughout the design process by Rocky Mountain Engineering, periodic reviews were held by the City of Pocatello to ensure the plans and specifications were developed to accepted City, State, and Federal standards. *See, Affidavit Turner, ¶ 4.* When the plan and specifications were completed for the Pocatello Creek Road project, the City of Pocatello, as sponsor, entered an agreement with the State of Idaho Department of Transportation "State/Local Agreement" for administration of the Pocatello Creek project on August 15, 2003. *See, Affidavit Turner, ¶ 5.* The Pocatello City Council passed Resolution No. 2003-13 on August 7, 2003, which gave authority for the Mayor to enter the "State/Local Agreement"



with the State of Idaho. *See, Affidavit Turner*, ¶ 6.- Ultimately, the City of Pocatello, through the State of Idaho Department of Transportation, contracted with Jack B. Parsons Companies to modify and re-pave the section of Pocatello Creek Road that runs along Ms. Brown's property.

Plaintiff claims that as a result of negligent design and/or construction, runoff water pooled alongside the Pocatello Creek Road and eventually drained toward her house, filled her basement window-well, and spilled into her basement. Plaintiff claims damages to her carpet, walls, paint, and mold.

Though the initial damage occurred in February 2006, Plaintiff did not file a notice of tort claim until April 25, 2006. The April 25<sup>th</sup> tort claim only purported to cover damages arising from the February 2006 flooding. Subsequently, Plaintiff alleged that her basement flooded in April 2006, October 2006 and again in the early winter of 2007. Plaintiff did not file a notice of tort claim with the City of Pocatello as to those alleged subsequent occurrences. *See, Affidavit Turner*, ¶ 12.

#### **STANDARD OF REVIEW**

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c).

However, "a mere scintilla of evidence or slight doubt as to the facts" is not sufficient to create a genuine issue for purposes of summary judgment. *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998), *Petriceviich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362 (1969). The non-moving party "must respond to the summary

judgment motion with specific facts showing there is a genuine issue for trial.” *Tuttle v. Sudena Industries, Inc.*, 125 Idaho 145, 150, 868 P.2d 473, 478 (1994). It is well established that merely asserting the existence of a factual dispute will not defeat a motion for summary judgment. There must be a “genuine issue” and it must exist as to a “material fact.” See *Garzee v. Barkley*, 121 Idaho, 771, 774, 828 P.2d 334, 337 (Ct. App. 1992). The nonmoving party’s case “must be anchored in something more solid than speculation. A mere scintilla of evidence is not enough to create a genuine issue.” *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App. 1986).

#### ANALYSIS

The City of Pocatello is entitled to immunity from all of plaintiff’s claims under the discretionary function defense because it is a political subdivision of the State of Idaho and it acted in accordance with official policy. In addition, the City of Pocatello is entitled to immunity under the Idaho Tort Claims Act (ITCA) because plaintiff has failed to timely file a notice of tort claim with regard to each instance of alleged damage.

#### **I. THE CITY IS ENTITLED TO IMMUNITY UNDER THE DISCRETIONARY FUNCTION DEFENSE.**

Idaho Code § 6-904 provides two exceptions to governmental liability under certain circumstances. Sub-paragraph (7) provides an exception to governmental liability for conduct that arises out of the “plan or design for construction of roads.” See, *Lawton v. City of Pocatello*, 126 Idaho 454, 460, 886 P.2d 330, 336 (1994). Sub-paragraph (1) provides an exception commonly known as the “discretionary function” defense. The City of Pocatello qualifies for both exceptions to governmental liability and should be provided immunity for its actions in this matter.



- a. **The City of Pocatello is entitled to immunity from liability because a plan or design for construction improvements made to the Pocatello Creek Road existed with prior approval from the City.**

Idaho Code § 6-904(7) provides a defense “to any claim which arises out of a plan or design for construction or improvement to the highways, roads, [or] streets” of the City in question. *I.C.* § 6-904(7) specifically provides immunity to decisions of governmental entities which:

Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

Thus, to gain immunity the governmental entity must show that (1) a plan or design for construction or improvement existed, and that it was either (2) prepared in substantial conformance with existing engineering or design standards, or (3) approved in advance of the construction by the legislative body exercising discretion to give authority for such approval. *See, Lawton v. City of Pocatello*, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994).

On the first element, the City of Pocatello hired Rocky Mountain Engineering to create a “plan or design” for construction work to be done on the Pocatello Creek Road. In the late 1990's, the Pocatello Creek Road reconstruction project was identified as a critical transportation need by the Bannock Planning Organization and the City of Pocatello. The proposed project was placed on the Statewide Transportation Improvement Program (STIP) for development as a Federal Aid project. The process was started to create a design and

plan and begin construction. *See, Affidavit of Turner*, ¶ 3.

In anticipation of the project, the City of Pocatello entered into a "Professional Agreement" with Rocky Mountain Engineering to provide designs for the project. *See, Affidavit of Turner*, ¶ 4. Pursuant to the professional agreement, Rocky Mountain Engineering provided detailed specifications for the reconstruction project. These plans and specifications were reviewed by engineers for the City of Pocatello. *See, Affidavit of Turner*, ¶ 10. All plans and specifications were completed prior to beginning construction on the Pocatello Creek Road project. In fact, the plans were completed before the project was submitted to the State of Idaho for administration of the contract. It is evident that a plan or design existed, and therefore, the City of Pocatello has established the first element of its defense for purposes of summary judgment.

The City of Pocatello needs to prove only one of the second or third elements. With regard to the second element, the City of Pocatello assured that the plans and specifications were "prepared in substantial conformance with existing engineering or design standards." Rocky Mountain Engineering is a reputable engineering firm and created the design plans and specifications in accordance with American Association of State Highway and Transportation Officials (AASHTO) standards and other generally recognized standards within the industry. *See, Affidavit of Turner*, ¶ 10. The plans were reviewed by licensed engineers for the City of Pocatello, and were found to be in compliance with generally recognized engineering and design standards. *See, Affidavit of Turner*, ¶ 11. These actions on the part of the City of Pocatello ensured that the design and plan for the Pocatello Creek Road project would be carried out in conformance with industry standards. The City of

Pocatello has therefore met its burden on the second element. As a result, the City of Pocatello should be granted immunity on this defense because it has established the first and second elements as required.

Although the City of Pocatello only needs to prove elements (1) and either (2) or (3), in this case the City of Pocatello can easily establish that it met all of the requirements for elements (1), (2) and (3). As for the third element, prior approval for the Pocatello Creek Road project was given by the Pocatello City Council, which is the local legislative body. The procedure for approval was as follows. The City of Pocatello outlined a general plan for reconstruction of a section of road, in this case, Pocatello Creek Road. The City submitted its preliminary plan to the state of Idaho Transportation Department and entered into an agreement – “State/Local Agreement (Construction) STP-7161 (100)”. In so doing, the City turned over supervision of the Pocatello Creek Road project to the State of Idaho Department of Transportation, but retained certain rights and obligations as outlined in the agreement.

The Pocatello City Council passed Resolution No. 2003-13 on August 7, 2003, which gave authority for the Mayor to enter the “State/Local Agreement” with the State of Idaho. *See, Affidavit Turner*, ¶ 6. Prior to the passage of Resolution No. 2003-13, the City of Pocatello had received the final plans and specifications from Rocky Mountain Engineering. Resolution No. 2003-13 authorized the Mayor to move forward with presenting the project to the State of Idaho for bidding. *See, Affidavit Turner*, ¶ 7.

By hiring a reputable engineering firm to create a design and plan, and then reviewing that plan and presenting the Pocatello Creek Road project to the Pocatello City

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Council for approval, the City of Pocatello did everything required for prior approval by the local legislative body. A resolution was passed by the City Council and signed by the Mayor, clearly establishing the third element of this defense. Therefore, the City of Pocatello has established both of the optional elements in that the design or plan both (2) conformed with generally recognized engineering standards and (3) was approved in advance by the local legislative body.

In conclusion, all of the elements which the City of Pocatello is required to establish in order to take advantage of immunity provided in subsection (7) have been conclusively established. The City of Pocatello hired Rocky Mountain Engineering to create a design and plan with specifications that met industry standards. *See, Affidavit of Turner*, ¶ 10. The City of Pocatello then reviewed those plans and passed Resolution No. 2003-13, authorizing the Mayor to move forward with submitting the project to the State of Idaho for administration of the actual construction work. These actions by the City of Pocatello demonstrate that it has met the requirements of *I.C. § 6-904(7)* and is entitled to immunity. Therefore, the Court should dismiss this action as against the City of Pocatello.

**b. The City of Pocatello is entitled to immunity under the “discretionary function” exception to governmental liability.**

Even if this Court were to find that there was not a “design or plan” approved by the City of Pocatello in advance of construction, the City is still entitled to immunity under the discretionary function defense. A governmental entity is entitled to absolute immunity regarding claims arising from the performance of a “discretionary function.” *Id.; citing Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986). “[D]ecisions involving a consideration of the financial, political, economic, and social effects of a particular plan are

likely 'discretionary' and will be accorded immunity." *Lawton*, 126 Idaho at 460, 886 P.2d at 336; citing *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987).

"The discretionary function exception applies to government decisions entailing planning or policy formation." *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 163 P.3d 211, 214 (2007).

There is a two step process for determining the applicability of this exception. The first step is to examine the nature and quality of the challenged actions. 'Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be operational.' Decisions involving a consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and discretionary. . . . The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government.

*Id.*; citing *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987).

In this matter, the City of Pocatello's decision to make improvements to Pocatello Creek Road was a decision involving the "financial, political, economic, and social" aspects of the community. *Dorea*, 144 Idaho 422, 163 P.3d at 214. As such, the decision constituted a "discretionary function" as defined by the foregoing case law. In making this decision, the City of Pocatello had to consider the needs of the citizens in regard to travel on Pocatello Creek Road, the amount of traffic on the road, the cost of reconstructing the road, and the effect the decision to reconstruct the road would have on the community when completed. The decision was approved by the Pocatello City Council and Mayor, which together comprise the local legislative body. *See, Affidavit of Turner*, ¶ 7. There is simply no

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evidence that would create a genuine issue of material fact as to whether or not this decision was “discretionary.” In addition, the second factor weighs in favor of providing immunity to the City of Pocatello in order to further the goal of permitting “those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government.” *Id.* It is imperative that the Pocatello City Council be allowed to analyze the needs of the community and make decisions for road reconstruction when needed, without constant fear of being sued anytime a citizen is dissatisfied with the outcome. It is unfortunate, and certainly unforeseeable, that plaintiff would suffer the damages that she has alleged, however, the Idaho Legislature has intentionally provided immunity to local governments to be free from this type of suit. Therefore, the City of Pocatello should be entitled to immunity under the discretionary function defense, and this matter should be dismissed with prejudice.

## **II. PLAINTIFF’S CLAIMS ARE PRECLUDED BY THE IDAHO TORT CLAIMS ACT.**

- a. Plaintiff failed to a notice of tort claim with regard to damages which have been alleged in the complaint.**

Idaho Code § 6-906 requires that all claims against a city must be filed with the clerk “within one hundred and eighty (180) days from the date the claim arose or reasonably should have been discovered.” The 180 day period begins to run when a prudent person is aware of sufficient facts to cause further inquiry. Furthermore, even though the full extent of the claimant’s injuries may be unknown for some time, the date from which the 180-day time limit begins to run is the alleged wrongful act, regardless of whether damages are

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ngoing.

The 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time. *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227, 56-0 P.2d 1315, 1317 (1977). "Knowledge of the facts which would put a reasonably prudent person on inquiry," triggers the 180 day period. *McQuillen v. City of Ammon*, [supra]. . . . A claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement. *Mitchell v. Bingham Mem'l Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997).

*Magnuson Properties Partnership v. City of Coeur D'Alene*, 138, Idaho 166, 169-170, 59 P.3d 971, 974-975 (2002).

In this matter, plaintiff filed a notice of tort claim that specifically related back to an incident of flooding which allegedly occurred in February 2006. There was no other reference to any subsequent occurrence of flooding. Plaintiff has alleged in her complaint that there were subsequent incidences of flooding, however, there was never a subsequent notice of tort claim filed. Plaintiff did not provide written notice to the City that there was an ongoing flooding problem, and did not provide the City with notice within 180 days of each subsequent flooding event. Therefore, plaintiff's damages in this matter should be limited to the incident contained in her notice of tort claim, and the amount in her notice of tort claim. This Court should exclude all other evidence of damages not related to the incident described in the notice of tort claim, and which would go beyond the amount stated in the notice of tort claim.

- b. **The City of Pocatello is not liable for the alleged negligent conduct as set forth in the complaint, because it was done by an independent contractor.**

The City of Pocatello is not liable for operational error in constructing the roadway

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which allegedly caused plaintiff's damages, because such operational errors were committed by Jack B. Parsons Companies, which was an independent contractor. The ITCA only allows plaintiff to bring claims against governmental entities or their employees, and "independent contractors" are excluded from the definition of "employees." See, I.C. § 6-902(4).

Pursuant to the "State/Local Agreement" the State of Idaho advertised for bids and awarded a contract to the lowest responsive bidder, Jack B. Parsons Co. ("Parsons"). Parsons was an independent contractor. See, *Affidavit of Turner*, ¶ 8. The State of Idaho oversaw and administered this project – as it was a project which utilized federal funding. The City of Pocatello retained a limited supervisory role, but was not involved in the day-to-day management of the project. See, *Affidavit of Turner*, ¶ 8. Under plaintiff's general negligence theory, the City of Pocatello is entitled to immunity pursuant to the ITCA because Parsons was not an "employee" of the City. Plaintiff has presented no evidence that would create a genuine issue of material fact on this defense, and therefore, plaintiff's complaint should be dismissed with prejudice.

#### CONCLUSION

The City of Pocatello has set forth facts sufficient to establish each element of the immunities provided by the ITCA, as set forth above. The City of Pocatello respectfully requests that this Court dismiss all claims with prejudice.

Dated this 6 day of June, 2008.

  
\_\_\_\_\_  
BLAKE G. HALL

## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 6 day of June, 2008, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
Ryan S. Lewis  
1322 East Center  
Pocatello, ID 83201

- Mailing  
 Hand Delivery  
 Fax  
 Overnight Mail

  
\_\_\_\_\_  
BLAKE G. HALL

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BLAKE G. HALL (2434)  
SAM L. ANGELL (7012)  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
Telephone (208) 522-3001  
Fax (208) 523-7254

Attorneys for City of Pocatello

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,

Plaintiff,

v.

CITY OF POCA TELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

**AFFIDAVIT OF LINDELL  
TURNER**

STATE OF IDAHO )

ss:

County of Bannock )

LINDELL TURNER, being first duly sworn, under oath, deposes and states as follows:

1. I have personal knowledge of the statements made herein.
2. I am City Engineer for the City of Pocatello and a licensed Professional Engineer in the State of Idaho.

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3. The Pocatello Creek Road reconstruction project was identified as a critical transportation need by the Bannock Planning Organization and the City of Pocatello in the late 1990's. The proposed project was placed on the Statewide Transportation Improvement Program (STIP) for development as a Federal Aid project. The process was started to create a design and plan and begin construction.
4. The City of Pocatello allotted funds for an engineering consulting firm to be hired to create the plan and design specifications for the project. The City of Pocatello chose Rocky Mountain Engineering, and a "Consulting Agreement" was executed on October 25, 1999. *See, Exhibit "A" attached hereto.*  
  
Throughout the design process, periodic reviews were held to ensure the plans and specifications were developed to accepted City, State, and Federal standards.
5. When the plan and specifications were completed for the Pocatello Creek Road project, the City of Pocatello, as sponsor, entered an agreement with the State of Idaho Department of Transportation "State/Local Agreement" for administration of the Pocatello Creek project on August 15, 2003. *See, Exhibit "B", attached hereto.*
6. The Pocatello City Council passed Resolution No. 2003-13 on August 7, 2003, which gave authority for the Mayor to enter the "State/Local Agreement" with the State of Idaho. *See, Exhibit "C", attached hereto.*
7. Prior to the passage of Resolution No. 2003-13, the City of Pocatello had

received the final plans and specifications from Rocky Mountain Engineering.

The Pocatello City Council and Mayor were aware of the completion of the plans for the Pocatello Creek Road project, and thereafter authorized the Mayor to move forward with presenting the project to the State of Idaho for bidding.

8. Pursuant to the "State/Local Agreement" the State of Idaho advertised for bids and awarded a contract to the lowest responsive bidder, Jack B. Parsons Co. ("Parsons"). Parsons was an independent contractor. The State of Idaho oversaw and administered this project – as it was a project which utilized federal funding. The City of Pocatello retained a limited supervisory role, but was not involved in the day-to-day management of the project.
9. The State paid Parsons, and the City of Pocatello reimbursed the State the portion of the contract not covered by federal funding.
10. Rocky Mountain Engineering is a reputable engineering firm and created the design plans and specifications in accordance with American Association of State Highway and Transportation Officials (AASHTO) standards and other generally recognized standards within the industry. A complete copy of the plans and specifications has not been attached due to its size, however, the cover page is attached as Exhibit "D".
11. In sum, a design and plan existed for the Pocatello Creek Road project and in my professional opinion it was prepared in substantial conformance with existing engineering standards. The design, plans, and specifications were

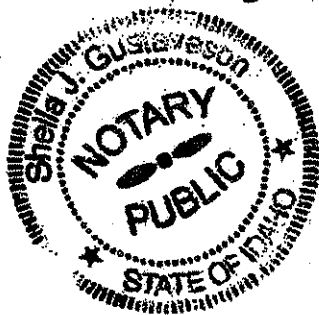
reviewed by City of Pocatello engineers and approved by the Pocatello City Council and Mayor in advance of construction.

- 12. The initial damage to plaintiff's home occurred in February 2006. Plaintiff did not file a notice of tort claim until April 25, 2006. See, Exhibit "E" attached hereto. Subsequently, Plaintiff alleged that her basement flooded in April 2006, October 2006 and again in the early winter of 2007. Plaintiff did not file a notice of tort claim with the City of Pocatello as to those alleged subsequent occurrences.

Dated this 6<sup>th</sup> day of June, 2008.

*Lindell Turner*  
 LINDELL TURNER

SUBSCRIBED AND SWORN TO, before me the undersigned, a Notary Public in and for said State, this 6<sup>th</sup> day of June, 2008.



*Sheila Gustavson*  
 Notary Public for Idaho  
 Residing at Pocatello  
 My commission expires January 11, 2012

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## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 6 day of June, 2008, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
Ryan S. Lewis  
1322 East Center  
Pocatello, ID 83201

- Mailing  
 Hand Delivery  
 Fax  
 Overnight Mail

  
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BLAKE G. HALL

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# Exhibit "A"

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## PROFESSIONAL AGREEMENT

THIS AGREEMENT, is made and entered into this 25<sup>th</sup> day of October, 1999, by and between the **City of Pocatello**, whose address is 911 N. 7<sup>th</sup>, P.O. Box 4169, Pocatello, ID 83205-4169, hereinafter called the "Sponsor," and **Rocky Mountain Engineering, LLC** whose address is 155 South Second Avenue, Pocatello, ID 83201, hereinafter called the "Consultant."

### RATIFICATION

The Idaho Transportation Department, representing the Federal Highway Administration on all local federal-aid highway projects, is authorized to ratify all agreements for engineering services entered into between sponsoring local agencies and their retained consultants. All references to State used hereafter shall denote the Idaho Transportation Department.

**NOW, THEREFORE**, in consideration of the premises and the mutual promises of the parties hereinafter contained, the parties hereto mutually agree as follows:

The work of this Agreement is for the following project:

**PROJECT NAME:** Pocatello Creek Road, Pocatello  
**PROJECT NO:** STP-7161(100)  
**KEY NO:** 5967

### I. SUBCONSULTANTS

The Sponsor approves the Consultant's utilization of the following Subconsultants: Materials Testing & Inspection and Amerigo, Inc.

The Consultant shall have sole responsibility for the management, direction, and control of each Subconsultant and shall be responsible and liable to the Sponsor for the satisfactory performance and quality of work performed by Subconsultants under the terms and conditions of this Agreement. The Consultant shall include all the applicable terms and conditions of this Agreement in each Subconsultant Agreement between the Consultant and Subconsultant, and provide the Sponsor with a copy of each Subconsultant Agreement prior to the Subconsultant beginning work.

No other Subconsultant shall be used by the Consultant without prior written consent by the Sponsor.

### II. AGREEMENT ADMINISTRATION

**This Agreement shall be administered by the Sponsor.** The Agreement Administrator is Laura Lamberty; or an authorized representative. The Agreement Administrator will administer this Agreement for performance and payment and will decide all questions which may arise as to quality and acceptability of the work, rate of progress, definition of work to

FINANCIAL CONTROL

Register # 2000-82UC

o. n. # 4127

be performed, and acceptable fulfillment of this Agreement. The Consultant shall address all correspondence, make all requests, and deliver all documents to the Agreement Administrator.

### III. DUTIES AND RESPONSIBILITIES OF CONSULTANT

#### A. DESCRIPTION OF WORK

The Consultant shall perform the work as outlined in the attachment(s) and as further described herein.

1. The following attachments are made a part of this Agreement:
  - a. Attachment No. 1 is the negotiated Scope of Work with design assumptions, Man Day Estimate, Federal Per Diem Rates for Idaho, and Consultant CADD Specifications.
  - b. Attachment No. 2 consists of the Consultant Agreement Specifications which are generic to all agreements.

In the case of discrepancy, this Agreement shall have precedence over Attachment No. 1, and Attachment No. 1 shall have precedence over Attachment No. 2.

2. The work consists of providing professional services as described in the negotiated scope of work, Consultant specifications, and herein.

### IV. DUTIES AND RESPONSIBILITIES OF SPONSOR AND/OR STATE

The Sponsor and/or State will provide to the Consultant copies of pertinent data on hand. The normal fee that the Sponsor and/or State charges for copies will be waived.

### V. TIME AND NOTICE TO PROCEED

- A. The Consultant shall start performance under this Agreement no later than ten (10) calendar days from the date the written NOTICE TO PROCEED is received. The Consultant shall complete all negotiated work by August 7, 2001.
- B. The Consultant shall remain available to perform additional work for an additional one hundred twenty (120) days or until the Agreement is closed out whichever comes first.

### VI. BASIS OF PAYMENT

- A. The basis of payment for this Agreement is **lump sum** with an Agreement amount of **One Hundred Thirty Nine Thousand Dollars (\$139,000.00)**. The amount is made up of a **\$139,000.00 lump sum** amount for performing all project development services. The Consultant agrees to accept as full compensation for all services rendered to the satisfaction of the Sponsor for the accomplishment of the project development, the **Lump Sum Amount \$139,000.00**.
- B. Fee - the fee is included in the lump sum amount.
- C. Combined Overhead
1. Consultant, Rocky Mountain Engineering. The combined overhead rate is 136.092 percent.
  2. Subconsultant, Materials Testing & Inspection. The combined overhead rate is 97.32 percent.
  3. Subconsultant, Amerigo is a direct expense to the Consultant.
- D. Written Professional Services Authorizations (PSA) will authorize a maximum dollar amount for a specific portion of the work under this Agreement. PSA No. 1 will be issued in the amount of \$25,000.00 to begin the work of this Agreement. The remaining amount of this Agreement, \$114,000.00 is set up to complete the work of this Agreement and will be authorized by consecutive PSAs. When the work of one PSA has progressed to the point where the work of the next PSA is needed to maintain the proper prosecution of the overall work of the Agreement, then the Consultant shall request the issuance of the next PSA. The State will review the Consultant's request and when the next PSA can be issued without detriment to the overall work of the Agreement, the PSA will be issued.

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IN WITNESS WHEREOF, the Parties hereto have set their hands on the day and year in this Agreement first written above.

ROCKY MOUNTAIN ENGINEERING  
Consultant

CITY OF POCA TELLO  
Sponsor

By: J. Mitchell Owen

By: [Signature]  
Mayor

Title: Partner

By: [Signature]  
City Clerk

IDAHO TRANSPORTATION DEPARTMENT

APPROVED BY ITD  
LEGAL COUNSEL  
DAGSMP  
OCTOBER 14, 1998

By: [Signature] FOR SCH  
Assistant Chief Engineer (Development)

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Attachment No. 1  
**CRITERIA 1- DETAILED SCOPE OF WORK**

**1.0 GENERAL**

The City of Pocatello sponsored project will provide for the improvement of Pocatello Creek Road from Olympus Drive to Booth Road. A minimum of three design alternatives will be investigated and a preferred alternate will be identified. The scope of the study will include public involvement, preparation of an environmental document, completion of a preliminary design, and final design of an alternative that best meets the project needs statement.

The scope of work will be divided into two phases. Phase I includes completing the preliminary design and approval. Phase II includes the final design and PS&E work tasks. Rocky Mountain Engineering, L.L.C. will be the lead consultant on all work performed under the scope of work.. We intend to use **Materials Testing And Inspection** for all geotechnical work, **Snake River Surveying** for all boundary and right-of-way issues, **Amerigo, Inc.** will assist with Traffic Control design and planning and **Idaho State University** and **Davidson Consulting** will assist in the preparation of the environmental document. We have assembled a fully local project team that has an extensive amount of ability in projects of this type. Our local team will provide the City of Pocatello a vast amount of local expertise and enthusiasm at an economical value that will not be exceeded by any other project team.

**2.0 WORK PRODUCTS**

**2.A Planning and Engineering Services**

The work provided shall include preliminary design services including project development services, scheduling and conducting agency meetings, identification of alternatives, surveying and mapping, the completion of the location process, materials investigations and reports; development of project concepts; preliminary design activities; identification of utility relocation issues; analysis of traffic data; preparation of preliminary plans and design reports; preparation of cost estimates and schedules; performance of environmental evaluation activities. Final design activities include the preparation of an appropriate environmental document, the preparation of the final plans, reports, specifications right-of-way certificates and construction cost estimates.

**2.B Public Involvement Program**

The work for this item shall consist of developing a public involvement program to identify and address public concerns with the alternate routes and to inform the public of the purpose and the results of the study. This task shall include the preparation of mailings and advertisements, conducting

public information meetings and public hearings, and to the extent possible, gaining a consensus for a single preferred design alternative.

RME will facilitate the formation of an evaluation committee consisting of key city personnel from Engineering, Community Development, Streets, Traffic, and representatives from Bannock Planning Organization (BPO) ITD, City Council Members, Edahow School, and affected property owners along the corridor.

RME will also facilitate an entire community outreach program by utilizing an informational call in show on channel 11 or 12. RME will also establish public information centers at the Pine Ridge Mall and at community events to inform the general public about the project and to receive comments from a city-wide perspective.

### 3.0 TASKS- PRELIMINARY DESIGN

Prior to the start of the preliminary design activities, a pre-operational conference will be scheduled as soon as the contract is approved and a notice to proceed is issued. RME Employees and Key city personnel including Traffic, Engineering and Streets along with Bannock Planning Organization and the Idaho Transportation Department will attend the meeting. Coordination procedures, individual project roles and a project schedule will be developed at the meeting. A site tour will be conducted so that the key personnel can establish a thorough project understanding and identify key project issues, and to classify roles that the various agencies will play in the project. After this initial stage, RME will begin the preliminary design process as detailed below:

#### 3.A Alternate Development

Task A consists of developing concept level designs for a minimum of three different roadway design alternatives. These alternatives will be evaluated; however, additional alternatives will be identified for evaluation in the design process. Each alternative that has been developed to date is identified as follows:

- **Widen to 80' Right of Way-** The design section for this alternative consists of four traffic lanes and two bicycle lanes. On street parking will be restricted along the south side of Pocatello Creek Road. The design plans indicate that all of the widening will occur along the south side and will also require the purchase right of way along the south side of Pocatello Creek Road. The additional right-of-way requirement could result in setback requirement problems with some residents such as at Maria Meadows housing development as shown in Figure 1.



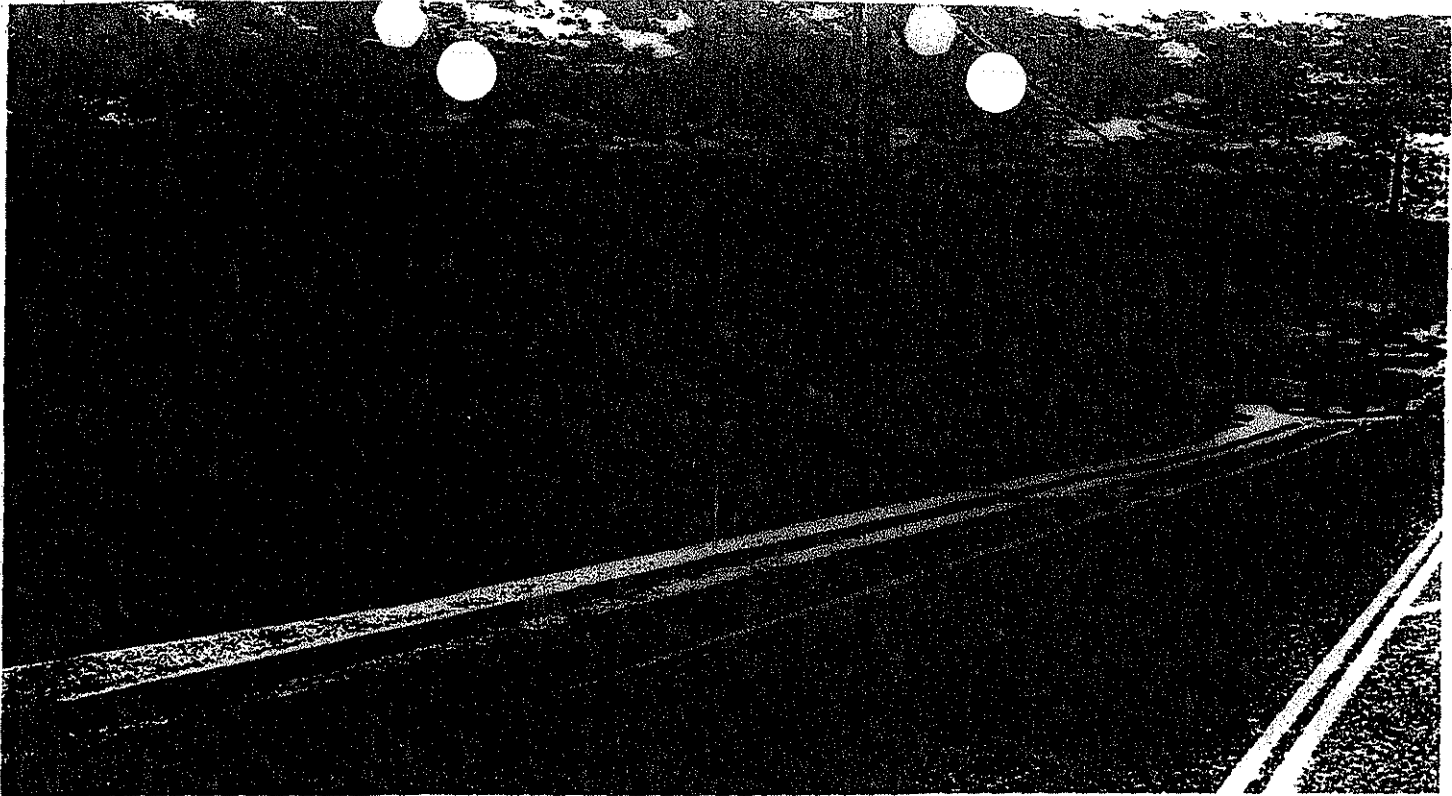


Figure 1. Maria Meadows

Widening to the south could require that property be acquired from the school. A section 4-f environmental process may have to be undertaken. If roadway widening and right-of-way acquisition is required, the south side of the project will be better for this to occur because there is fewer impacted parcels. Some of the parcels that will be impacted are vacant and many of the homes are set back further than the residents are along the north. Widening along the south will require the relocation of overhead power and other utilities that would end up in the traveled way. The traffic merge from four to two lanes will occur at the Booth road intersection which will push the merging traffic movements further away from the congested Olympus Drive intersection. The four lane option will also allow a dedicated lane for the Westbound traffic entering Pocatello Creek Road off of Satterfield Drive as shown in Figure 2.



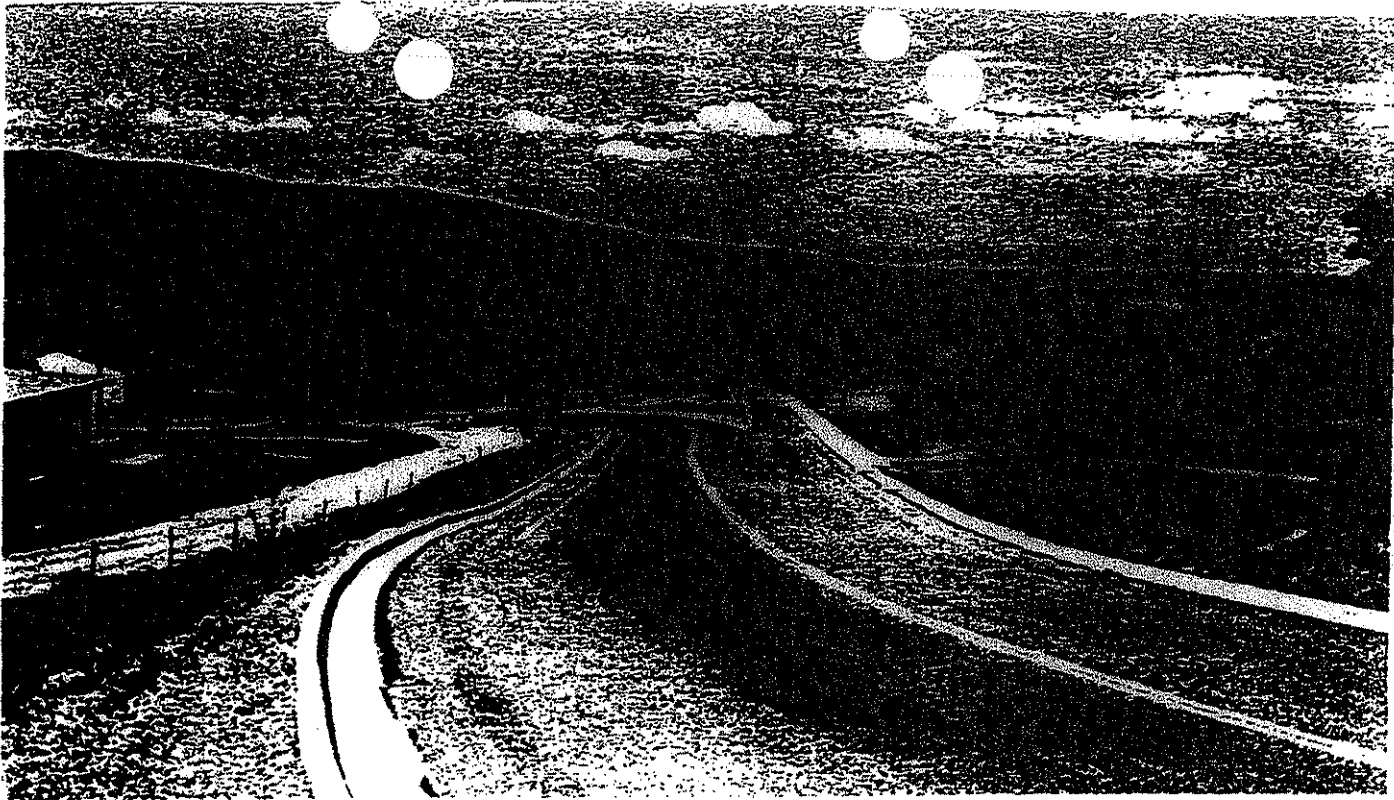


Figure 2. Satterfield Drive merge into Pocatello Creek Road.

- **Reconfigure Traveled Way-** The benefit to this option is that the purchase of right-of-way will not be required. The existing lane configuration will remain about the same; however, a left turn bay will be added along the corridor. Cost savings may be realized by choosing this alternative because much of the existing curb, gutter and sidewalk could remain along the north side of the road. The traffic merge from 4 to 2 lanes will occur at Olympus drive at an area of higher congestion and a merge will be left at the intersection of Satterfield drive and Pocatello Creek Road.
- **Do Nothing** The do nothing alternate must be considered in any corridor study. The "do nothing" alternative will mean the impacts from the project are too high and the Pocatello Creek Road corridor will continue in the condition as it exists today. Specifically:
  - A roadway section that has structural deficiencies
  - Increased delays and congestion along the corridor
  - Poor traffic flow and circulation
  - Inadequate pedestrian facilities

### 3.A.1 Conceptual Plan Layout:

For each of the identified alternatives, RME will develop concept level plan layouts. The preliminary conceptual plans at a minimum will include the following key elements:

- Typical Sections
- Project Overview Plan Sheets
- Drainage Structures
- Intersection and Merge Geometrics
- Concept Level Cost Estimates

The following tasks will be required to complete the conceptual plan layout:

**3.A.1.1 Surveying and Base Mapping-** RME and SRS will perform preliminary surveys as required to supplement and verify the existing topography supplied by the City, and to establish preliminary control.

**3.A.1.2 Preliminary Ownership Maps-** RME and SRS will perform preliminary ownership research at the Bannock County Courthouse. Preliminary ownership lists will be created and the City GIS information will be verified and up-dated.

**3.A.1.3 Preliminary Utility Investigations-** RME will perform research of utility company records and engage Dig Line to perform field locates of the utilities along the corridor. The line locates will be tied to the project control and the location of the existing utilities along the corridor will be added to the base mapping.

**3.A.1.4 Identification of Typical Section-** Develop the roadway alignment parameters for each design alternative. The typical section will detail the location, width, number of lanes and pedestrian facilities on each alternative.

**3.A.1.5 Drainage Requirements-** Existing drainage patterns and facilities will be identified along the corridor.

**3.A.1.6 Review Conformance with Key Criteria-** All necessary information will be compiled and organized in a manner so that each alternative can be evaluated against the following key criteria:

- Merging of traffic from two lanes to one lane at Satterfield Drive Westbound and near Olympus eastbound is negatively affecting traffic and may be a hazardous condition
- Enhanced safety and efficiency at Edahow Elementary School
- On and off street parking requirements
- Edahow Elementary School on-site parking and traffic circulation, particularly with any right-of-way acquisition
- Pedestrian and bicycle improvements
- Street drainage issues
- Condition of existing facilities such as curb, gutter and sidewalk

- Impacts to existing property owners along the urban corridor with regard to right-of-way acquisition
- Enhanced safety and efficiency of the Pocatello Creek and Booth Road intersections

**3.A.1.7 ITD Form 2708- Preliminary Project Concept- Complete ITD Form 2708 for each alternate.**

**3.A.1.8 ITD Form 1150- Project Cost Summary- Complete ITD Form 1150- Project Cost Summary for each design alternative.**

**3.A.2 Traffic Analysis:**

RME will work closely with Mori Byington at BPO to evaluate existing and future situations. Anticipated growth rates along the corridor will be used with Trans-Cad to evaluate each alternative alignment. The model will provide future design traffic models and will be useful in determining the effects of the proposed improvements on the surrounding roadway network.

**3.A.2.1 BPO Traffic Models-** RME will work closely with Mori Byington at BPO and Dennis Ray, P.E. with the City Traffic Department to obtain traffic modeling information.

**3.A.2.2 Current and Projected Volumes-** BPO population projections and traffic counts will be used to determine current and projected traffic volumes.

**3.A.2.3 Evaluate Level of Service (Current and Future)-** Existing and Future levels of service will be determined for each of the alternatives based on the traffic projections obtained from the BPO model. The level of service will also be evaluated at key intersections including Booth/Satterfield Drive and Olympus Drive.

**3.A.2.4 Identify Safety and Access Issues-** Traffic patterns around Edahow School will be evaluated and particular attention will be paid to the effects on the surrounding roadway network. Pedestrian traffic will also need detailed consideration during the traffic modeling. Preliminary analysis will be performed on each access and how it will be affected by the proposed alternatives.

**3.A.2.4 Review Conformance with Key Criteria-** The results of the traffic investigation for each alternative will be reviewed for conformance with the key criteria.



### **3.A.3 Environmental Scan:**

The purpose of the environmental-scan is to gather enough information about the corridor to identify environmental issues that could impact the design of the roadway facility. The environmental scan shall include a thorough investigation of several resources to determine the impact that the project could have on proposed land uses, cultural and historic resources, natural resources and the socioeconomic characteristics of Pocatello. RME will utilize several resources will be used to perform the environmental scan including:

**3.A.3.1 Site Reconnaissance-** The RME team and interested agencies including the City of Pocatello will perform a site investigation. Key environmental issues will be identified and documented

**3.A.3.2- Preliminary Agency Contacts-** Preliminary letters will be sent to agencies detailing the project and requesting their comments. The following agencies will be contacted: Department of fish and game, Department of Labor, Idaho Historical Society, State Historic Preservation Office, Natural Resource Conservation Service, and the United States Fish and Wildlife Service.

**3.A.3.3- Archeological Reconnaissance-** Idaho State University will perform the archeological survey for this project and complete ITD form 1500 detailing the results of the survey.

**3.A.3.4- ITD 654-A-** After the completion of the site reconnaissance, the ITD form 654-A will be completed detailing the results of the preliminary environmental surveys.

### **3.B Public Information Meetings**

The key to the success in the Pocatello Creek corridor improvement plan will be the result of a carefully organized public involvement plan. RME project managers intend to handle all of the public involvement locally. We will create and "open door" policy at our office so that people can visit at any time to address concerns or questions relating to the project. All of the public involvement will be handled locally by the RME team actually performing the project work. A flashy public relations consultant will not be brought in to gloss all of the alternatives and give residents and public a feeling of an outsider coming in to tell them what is best for them. The RME team will handle the public coordination by creating a team effort between the design team and the public throughout the design process. Hopefully this approach will foster a feeling of cooperation between the public, design team and the City of Pocatello working together on an important project for the betterment of the community.

The RME design process will focus on early and continued public involvement throughout the project:

The goals of the public outreach program will include:

1. Building an understanding of the project with the public. This will insure the public is capable of making informed decisions related to the project.
2. Insuring the community leaders are involved in the program so that they are "informed" of public opinion and about the goals of the project so that they can also made informed decisions relating to the project.
3. Get affected groups involved in the process early to reduce the possibility of organized opposition groups gaining momentum against the project.
4. Foster a feeling with the public that we are addressing their concerns in the designs of the facilities.
5. Insure the design team, city staff and other personnel involved in the project keep an "open mind" to suggestions that the public presents.

Based on the five-step approach outlined in the ITD Design Manual, the public involvement program will include:

- Setting goals and objectives for the public involvement process
- Identify the people to be reached- Contact with the City of Pocatello, community leaders and civic organizations
- Develop a set of strategies keyed to the goals and objectives
- Determine the specific techniques to be used such as focus groups and advisory committees to explore specific elements such as alignments
- Continually evaluate and make corrections to insure that the proposed strategies and techniques are getting the desired results.

The first public information meeting will be critical to the overall success of the project. The following tasks will be completed to insure a successful public involvement program:

**3.B.1 Organize/ Outline Hearing and Assign Tasks-** Define the roles of all key personnel in the public hearing and outreach process. Develop a detailed outline of the outreach program.

**3.B.2 Prepare Alternate Presentation-** Organize and prepare all drawings, displays, handouts and matrix questionnaires for use in the public information process.



**3.B.3 Publicity and Advertisements-** RME will prepare all necessary legal advertisements for the public hearing and will coordinate with the local media to generate publicity for the project.

**3.B.4. Notify Impacted Property Owners-** RME will make personal contact with all of the affected property owners and invite them to the public hearing, to a meeting on-site, or to visit in our office to discuss the project impacts.

**3.B.5 Contact Local Officials and Determine Concerns-** RME will provide written notification to local officials requesting comments and notification of any concerns regarding the project.

**3.B.6 Public Television Session-** We will organize and coordinate a public television session to discuss project issues and inform the general public about the project. We would anticipate that City Engineering, ITD and the Mayor would play a role in the television session.

**3.B.7 Hold Public Information Meeting-** Schedule a formal meeting in the Council Chambers at the City of Pocatello or at Edahow School. Displays and packets detailing all aspects of the project will be made available to the public at this meeting.

### **3.C Additional Alternative Development:**

Additional alternate design alignments and alternatives identified throughout the public process or from comments received from the public will be included in the concept plans. A supporting documentation package will be prepared for screening and evaluation against the established criteria.

**3.C.1 Review Public Input-** RME will review and compile all the public input received on the project.

**3.C.2. Prepare Additional Alternate Options-** Based on the results of the public comment, RME will develop any additional alternates that warrant consideration.

### **3.D Evaluation and Screening:**

RME will facilitate the alternative screening process. A screening packet will be prepared for each viable alternative that is identified. The screening packet will include:

- Concept Layouts and supporting information
- Traffic and Environmental information as available

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- An evaluation matrix that is tied to the evaluation criteria and to the comments received from the public.

**3.D.1. Presentation to Evaluation Committee-** Key city personnel from Engineering, Streets, Traffic and Planning will be supplied evaluation packets. Also, Community Development Commission members and City Council members will be given the evaluation packets. Packets will be provided to ITD, BPO and interested citizens for completion. A meeting will be scheduled to discuss the project in detail with the evaluation committee. Documentation of the evaluation process will be kept and a final report summarizing the screening process will be prepared.

It is anticipated that the advisory committee will be formed to evaluate the design alternatives under consideration. RME will assist the city in forming the advisory committee. Based on our experience, the advisory committee should be composed of the at least one Landowner from the north, one Landowner from the South, the Principal from Edahow School, all the member of the City Council, and a representative from Community Development, Engineering, Traffic, Streets, BPO, and ITD.

**3.D.2. Committee Review and Direction Decision-** After the meeting, the committee will review the evaluation packets and complete the evaluation matrix for each alternative. RME will collect this information, if required, schedule a second meeting to determine a consensus on the direction that the project will proceed.

### **3.E Location Hearing and Location Study Report:**

This task will occur in concurrence with the public hearing and design study report after the preliminary design review.

### **3.F Concept Approval:**

RME will prepare a Concept Design Report in accordance with the requirements and procedures of Section 4.5 of the ITD Design Manual. ITD 783- Concept Approval, 783-A- Design Standards, and 783-B- Alternate Solutions and Costs will also be completed. The concept report submittal package will help to identify the alternative or combination of alternatives that will be advanced through the preliminary design process. A public consensus and most feasible alternative will be selected for the concept report.

The concept report will include the following items:

**3.F.1 Project Narrative and Vicinity Map-** RME will complete the Project Narrative which is a written detail of the proposed project. A Vicinity Map showing project location will also be prepared.

**3.F.2 ITD 783- Concept Approval-** Complete ITD form and obtain sponsor approval and signature per the Design Manual.

**3.F.3 ITD 783-A- Design Standards-** Prepare written documentation detailing all design standards including grades, widths, pavement sections, design speeds, access control and character of proposed work.

**3.F.4. ITD 783-B- Alternate Solutions and Costs-** Compare a variety of construction options and costs to determine the most economical construction and design life expectancy.

**3.F.5 Traffic Data-** Summarize all level of service models, capacity analysis, accident reports and volume projections.

**3.F.6 Proposed Design Exceptions-** We do not anticipate any design exceptions; however, if they should be required, the design exceptions will be requested.

**3.F.7 Concept level cost estimates-** Cost estimates will be prepared for the proposed design.

**3.F.8 Materials Phase I Report with life cycle cost analysis-** MTI will prepare the report in accordance with ITD guidelines and will include a pavement life cycle cost analysis and geologic map. The phase I report will be prepared for the preferred alternate as follows:

- Available information will be obtained, reviewed, including previous ITD materials reports, geologic maps, soil survey maps and other information that may be available.
- A site geologic reconnaissance visit will be conducted.
- The final report will be prepared and submitted for review.

**3.F.9 City/ ITD Reviews-** Submit the preliminary draft concept report to ITD and the City of Pocatello for Review.

**3.F.10 Consultant Revisions-** Analyze the review information and make the necessary revisions to the concept report.

**3.F.11 Concept Approval-** Re-submit the concept report for ITD and Pocatello City review and approval.



### **3.G Preliminary Design and Environmental Evaluation:**

As soon as the Concept Report is approved, RME will begin the tasks of surveying including verification of GIS information and topographic information, and the determination of property lines and ownership. During this phase, RME will develop preliminary design plans and conduct a preliminary environmental evaluation according to Section 3.4.1 of the ITD Design Manual, complete a cultural resource survey, schedule and conduct a design hearing and prepare a draft Design Study Report. The following tasks will be completed during the preliminary design and evaluation:

#### **3.G.1 Surveying**

RME and SRS will perform additional surveys as required to supplement and verify the existing topography supplied by the City.

**3.G.1.1 Preliminary Owner Contacts-** SRS and RME will research county records and utilize title companies as required to determine the property owners impacted by the project. As a project team, we will contact each affected property owner and obtain written permission to survey where required.

**3.G.1.2 Obtain Existing Topography including buildings and all improvements-** The City of Pocatello will provide all GIS information related to the project and RME and SRS will field verify all topographic information supplied by the city. All utilities, landscaping and other improvements will be checked and up-dated wherever necessary.

**3.G.1.3 Establish Project Bench Marks-** Project benchmarks and horizontal control will be established to tie the project to the City of Pocatello datum. A control network will be established along the corridor and monuments will be fixed to use throughout the design and construction process.

**3.G.1.4 Land Survey to define property lines-** SRS will perform proper legal research at the Bannock County courthouse and with Rick Green, the City of Pocatello surveyor to obtain information related to the location of property lines, USGS section corners and other monuments that can be used to establish the horizontal and vertical control for the project. The field crew will locate all existing property corners and monuments and they will be incorporated into the project mapping files. Using a combination of the legal research and field data obtained, the property lines and right-of-way lines will be established by SRS and also incorporated into the project mapping. All corner of perpetuation and record of survey information will be recorded by SRS at the Bannock County Courthouse.

### **3.G.2 Utility Plans**

**3.G.2.1 Preliminary Utility Plans-** The RME team will obtain utility information and detail all existing utilities. A set of preliminary utility plans will be created incorporating all of the field data, topography, design data and information gathered from the utility companies. The plans will clearly show *all of the utilities, detail the necessary relocations, adjustments and removals.* The utility plans will be prepared in accordance with ITD design manual Section 4.16.

**3.G.2.2 Utility Owner Contacts-** Coordination with the affected utility companies will be made. Each utility company will receive a letter outlining the proposed project, including the specific location of the utility and be provided two copies of the proposed project plans. A field inspection will be scheduled with each utility company representative to insure each utility company has a thorough understanding of the project.

**3.G.2.3 Final Utility Plans-** Final utility plans will be created incorporating all of the utility company reviews, the proposed relocation and the responsible parties for each relocation. The final utility plans will be color coded and submitted to the utility agreement coordinator.

### **3.G.3 Right-of-Way Plans**

**3.G.3.1 Right-of-way plats and right-of-way plans-** SRS will prepare the right-of-way plats as defined by I.C. 40-209 for use during the right-of-way acquisition and recordation with Bannock County.

**3.G.3.2 Total ownership map-** Preliminary owner contacts will be made in concurrence with the field surveys and field data acquisition. All of the property ownership data will be incorporated into a preliminary ownership map detailing the property lines and all relevant ownership data.

**3.G.3.3 Supporting documentation for transfer of fee title and legal descriptions-** SRS will prepare all legal descriptions and supporting graphics for use by the City of Pocatello in acquiring the right-of-way and easements to construct the project.

### **3.G.4 Preliminary Plans**

**3.G.4.1 Base Mapping-** All field survey information, research, and GIS information will be merged into one project base map. The base map shall be constructed using AutoCad 14 and Eagle Point Design Software. All of the

mapping will be done in metric units and in conformance with ITD "Standard Conventional Construction Plan Symbols." Electronic base map data files will be transferred to the City of Pocatello and ITD in compatible formats with their systems.

**3.G.4.2 Establish Preliminary Line and Grade and Earthwork-** Establish preliminary roadway profiles and location of all roadway facilities.

**3.G.4.3 Preliminary Drainage Studies-** Existing and proposed drainage patterns will be evaluated and the roadway alignment will be adjusted to insure adequate drainage will exist along the corridor. Studies to determine feasible and methods consistent with BMP practices for stormwater disposal will be conducted. Preliminary stormwater disposal plans will be created.

**3.G.4.4 Access Control and Parking Determination-** Form ITD 606 will be completed utilizing city, ITD and BPO policies. Appropriate access control will be depicted on the plans. Parking requirements will be reviewed and designs established. Interior traffic flow around Edahow School will be reviewed and analyzed.

**3.G.4.5 Pedestrian and Bike Lane Consideration-** RME will analyze pedestrian and bicycle requirements paying particular attention to pedestrian crossings and bicycle circulation around Edahow School.

**3.G.4.6 Prepare ITD-783 C Field Inventory-** This form will be completed in accordance with the ITD design manual. The form will be included with the preliminary design review submittal.

**3.G.4.7 Preliminary Roadway Plans-** Preliminary construction plans will be prepared for the project in accordance with standard engineering principles and in accordance with the ITD Design Manual. At a minimum, the plan set will include the following plan sheets:

- Cover Sheet With Vicinity Map
- Standard Drawing List
- Project Clearance Summary
- Typical Sections
- Roadway Summaries
- Drainage Details
- Plan and Profile Sheets

**3.G.4.8 Preliminary Traffic Group Plans-** RME in consultation with Amerigo, Inc. will determine all of the requirements for striping and signage along the corridor along with any illumination and signal requirements.

**3.G.4.9 Preliminary Traffic Control Plans-** American Traffic Control, Inc. will assist RME with the creation of the preliminary traffic control plans. The traffic control plan will detail the traffic control through the work zone throughout the duration of the construction project. All construction signing, barricades, etc... will be detailed according to the Manual of Uniform Traffic Control Devices and ITD standards.

**3.G.4.10 Preliminary Landscaping Plans-** RME will prepare landscape plans as required for the project. Plans will address disturbance to existing properties and will detail any new landscaping along the corridor.

### **3.G.5 Cost Estimate**

At the completion of the preliminary design tasks, the cost estimate will be updated and a new ITD 1150 will be submitted.

### **3.G.6 Draft Materials Report- Phase II, III, IV**

MTI will be responsible for all geotechnical engineering on this project.

**3.G.6.1 Phase II Soils investigation Report-** Information on soil and rock that will be encountered over the length of the proposed corridor will be evaluated by MTI. Geotechnical recommendations regarding slopes, embankments, and drainage required to construct the project to current State and Federal standards will be fashioned. Details on sources and descriptions of borrow material required for the project will be created. A pavement condition survey will be conducted and recommendations will be made regarding pavement thickness requirements.

**3.G.6.2 Pavement Design Report-** MTI will conduct a preliminary Phase III pavement design report to provide the pavement type, typical sections, materials and data necessary to complete plan quantities and cost estimates. Typical sections will be detailed showing materials, dimensions and locations. All appropriate laboratory information will be provided to validate all of the recommendations. Any special construction requirements will be identified including geotextiles or special compaction requirements.

**3.G.6.3 Foundation Investigation-** It is not anticipated that a foundation investigation will be required on this project.

## **H. Final Environmental Evaluation**

Existing information relevant to possible adverse environmental impact upon the project site and the surrounding area will be collected. Due to the fact that this project deals with the improvement of an already urbanized corridor, we would

anticipate that the environmental requirements should not be as extensive as might be encountered on other highway projects, and the project may qualify for a categorical exclusion. Unless unusual circumstances arise, a categorical exclusion will be requested and if required, RME will perform the environmental analysis on this project and community resources at Idaho State University and Davidson Consulting will be subcontracted for specific areas of the environmental evaluation.

**3.H.1.** It is anticipated that a large amount of coordination will be required with applicable local, state and federal resource and regulatory agencies. This consultation will be ongoing throughout the design, project concepts, and environmental evaluations. The resources of several agencies will be required throughout the environmental process: BLM, NRCS, US Fish and Wildlife Service, USEPA, DEQ, IDWR, SHIPO, Idaho Fish and Game, and Corp of Engineers. The following environmental issues will be evaluated through the above agencies and a draft environmental report will be prepared:

- **Cultural Resource Inventory-** A cultural resource inventory survey and report utilizing ITD's standard practice in compliance with Section 106 will be conducted. It is anticipated that Idaho State University will be utilized to perform this inventory and to complete the ITD form 1500A. RME will coordinate the results of the study closely with ITD's staff archeologist
- **Existing and Proposed Land Use and Farmland Determination-** An investigation of the Land uses in and around the project will be investigated using City ordinances and through Community Development at the City of Pocatello. The impact to prime farmland is not anticipated as both sides of the corridor have been developed; however a determination as to the impact to prime and unique farmland will be made.
- **Pedestrian and Bicycle Facilities Safety-** An analysis of the project designs with respect to pedestrian safety will be performed. Due to the fact that Edahow school is located along the corridor, it will be critical to insure the pedestrian facilities are appropriately designed.
- **Noise Abatement-** Noise monitoring and modeling will be conducted for sensitive areas such as residences and the school. Project noise levels will be estimated using FHWA approved modeling. The results of the noise modeling will be compared to standards established by ITD and FHWA to determine if noise abatement is required for the project.
- **Water Quality-** It is unlikely that the project will result in the disturbance of more than five acres. If the project does impact more than five acres or, if the requirements are tightened throughout the design process, a NPDES stormwater permit will be required. Regardless of the impacts, a stormwater



pollution prevention plan and sediment and erosion control plan will be created and detailed in the project plans.

- **Floodplain Effects-** It is unlikely that the project will impact the floodplain of Pocatello Creek; however, a detailed evaluation of the impacts will be considered in the environmental document.
- **Wetlands-** A preliminary wetlands investigation has been performed and it is unlikely that the project will result in impact to wetlands. If, as the project evolves, it becomes apparent that wetlands will be impacted or wetland mitigation will be required, Davidson Consulting will be utilized to determine and mitigate the impacts to wetlands.
- **Social, Community and Economic Effects-** The direct impacts to the community will be evaluated for each design alternative throughout the process to determine these impacts. These impacts can be difficult to quantify and will be evaluated throughout the project and during the public meetings.
- **Displacements or Relocation-** It is unlikely that any displacements or relocations will be required as a result of this project.
- **Vegetation, Wildlife, Fisheries, and Threatened and Endangered Species-** RME will coordinate with the United State Fish and Wildlife service to determine if there will be an impact to threatened or endangered species. If it is deemed necessary, RME will consult with Davidson Consulting to perform a Biological assessment.
- **Hazardous Waste Sites-** ITD Form 654-A Hazardous Wastes/ Preliminary Site Assessment Checklist will be completed through a search of Public Records including title reports, city directories, Federal environmental records and aerial photos. Interviews with city officials, property owners and other community residents will be conducted along with physical site investigations will be conducted to establish evidence of detrimental facilities to air or water qualities.
- **Section 4(f) Evaluation-** A Section 4 (f) evaluation will be conducted if any project alternative under consideration has a use of historic lands, recreational lands or lands composing wildlife refuges. It is not anticipated that a 4 (f) evaluation will be required unless right-of-way is acquired from Edahow School.

**3.H.2 ITD Form 654-** RME will complete the environmental evaluation for the project.

**3.H.3. Agency Approvals-** The project will be submitted to all of the agencies detailed above for approval. For impacts that cannot be avoided, mitigation of the impacts will be identified in order to minimize the negative impacts as much as possible.

**3.H.4 City, ITD, FHWA Reviews and Comments-** Impacts will be identified and a draft environmental document will be submitted to the City of Pocatello, ITD and the FHWA for review.

**3.H.5 Consultant Revisions-** The environmental document will be revised according to comments received from the reviewing agencies. The final environmental document will be based on comments received from ITD, Pocatello City and the FHWA, and from comments received during the public process on the draft environmental document. All public comment and review received at the design hearing will be incorporated into the environmental document

**3.H.6 Environmental Approvals-** RME will provide interface with ITD, FHWA and the City of Pocatello to determine the supporting documentation and draft the FONSI if required.

### **3.I Public Hearing Process/ Design Study Report**

The public hearing process will be conducted to obtain formal public input on the project design concept. The hearing process will be conducted in accordance with the ITD Design manual. After the completion of the hearing and analysis of the testimony, the design study report will be completed. The report will document the conceptual design and project issues as they will be addressed during the design process. This is detailed in section 4.18 of the Design Manual. The design study report will detail the conclusions of the preliminary design and public meeting phase. The design study report will also include a summary of ITD's consideration of the environmental impacts of the project and will detail significant design considerations and changes.

**3.I.1 Organize / Outline Hearing Assign Tasks –** RME will define the roles of all key personnel in the public hearing and identify the hearing location. A request will be made to the hearing officer from ITD to administer the hearing. A detailed outline of the key issues and presentation stations will be created.

**3.I.2 Submit Hearing Plans / Documentation -** The hearing packet information will be organized and submitted to the hearing officer for approval and eventual publication. The information packet will include the right of way impacts, environmental issues, key geometric and traffic concerns and the presentation materials for each of these areas.



**3.1.3. Notify Impacted Property Owners-** RME will make personal contact with all of the affected property owners and invite them to the public hearing, to meet with us on-site, or to visit in our office to discuss the project impacts.

**3.1.4. Draft Script and Video-** RME will prepare the script and video portion of the hearing process. This video will be presented in a separate area of the hearing to allow individuals to review all the project issues in preparation for the actual hearing.

**3.1.5. Notice Letter from District to Owners-** In accordance with the requirements of the Design Manual, a formal letter will be prepared and submitted to District 5 officials. This letter will be directly sent to all impacted property owners to inform and invite them to the hearing.

**3.1.6. Public Announcements Start-** RME will facilitate the official publication of the hearing in connection with the ITD hearing officer.

**3.1.7. Dress Rehearsal-** In preparation for the hearing, a 'dress rehearsal' will be performed to allow practice setup of the facilities. The hearing officer will give direction on the responsibility of each of the key participants in the hearing.

**3.1.8. Press Releases / Interview-** Just prior to the actual hearing, press releases will be issued through television, news papers and radio to inform the general public about the project. A formal interview with the Mayor will be presented on the local news programs.

**3.1.9. Hold Public Hearing-** The hearing will be held in the Council Chambers at the City of Pocatello or at Edahow School. Displays and packets detailing all aspects of the project will be made available to the public at this meeting.

**3.1.10. Review Public Input-** The testimony received at the hearing will be evaluated to determine concerns and support for the proposed project. The testimony will be categorized and reviewed to ensure the public need is being fulfilled.

**3.1.11. Prepare Design Study Report-** In accordance with the requirements of the Design Manual, the Design Study Report will be prepared. The report will contain all required information to clarify and support the project decision process. Any revision of updates to the project concept will be addressed and the Design Study Checklist will be completed.

**3.1.12. City / ITD / FHWA Reviews-** The report will be submitted to the City of Pocatello, and the evaluation committee prior to submittal to ITD for review and



approval. Upon acceptance of the council and committee the report will be forwarded to ITD and FHWA for review.

**3.I.13. Consultant Revisions-** RME will make all necessary revisions to the Design Study Report to meet the requirements of ITD and FHWA allowing them to support the project design.

**3.I.14. Design Approval-** Upon the revised report, design approval will be granted and the final design process will be started. The approval of this report will define the exact project scope and intent.

#### **4.0 TASKS- FINAL DESIGN**

RME will prepare the final design, including all necessary drawings and documents, submit for review and approval, make revisions as needed, and submit for PS&E review. The tasks associated with the final design will, at a minimum, include the following tasks:

##### **4.A Material Reports**

This task will include the preparation of Final Material Reports

**4.A.1 Phase II Soils Investigation Report-** MTI and RME will prepare and submit the final soils investigation report. The report will include a description of the project, type of project, length, width and grades. The report will detail the type of existing and proposed structures (if any) and approximate earthwork requirements. The alignment will be characterized along with a description of the geology, soils and vegetation. A vicinity sketch showing the project limits, location of all sources, stockpile sites and waste sites will be submitted. The report will be prepared in accordance with ITD guidelines.

**4.A.2 Pavement Design Report-** MTI will complete the pavement design report in close consultation with local District Materials personnel to incorporate local experience and preference. The report will detail the pavement type, typical sections, materials, quantities and cost estimates.

**4.A.3 Phase IV Foundation Investigation-** It is not anticipated that that a foundation investigation will be required; however, MTI will complete the report according to ITD requirements if it is deemed necessary for the project.

**4.A.4 Identify new material sources-** It is not anticipated that new material sources will be required for this local project. If it becomes



apparent through the design process that new material sources will be required, MTI and RME will work closely with ITD and the City of Pocatello to identify new material sources.

#### **4.B Develop Construction Plans**

The construction plans will be finalized and will include the following plan sheets and concepts:

**4.B.1 Final Roadway Plans-** All requirements for final roadway plan and profile construction sheets. Plan items will include final alignment, profile data, earthwork, fencing, approaches, landscaping, drainage, utilities, demolition, etc... A standard drawing index sheet will be prepared. Typical sections, including data from the materials report will be completed in accordance with Section 9.12 of the materials report.

**4.B.2 Final Traffic Control Plan-** RME in consultation with Amerigo, Inc. will complete the traffic control plan. The traffic control plan will be completed using MUTCD and ITD standards.

**4.B.3 Final Pavement Marking Plans-** Final pavement marking plans for the project will be prepared by RME and Amerigo, Inc. in accordance with ITD Traffic and Design Manuals. Plans will detail the edge lines, transition, stop bars, turning lanes, turn bays, channelization, center lane striping, type of material, color and width of lines.

**4.B.4 Final Signing Plans-** RME and Amerigo, Inc. will prepare final signage plans in accordance with MUTCD and ITD Traffic Manuals. Plans will include legends, location and construction details. Any required delineation will also be included in this task.

**4.B.5 Final Drainage Design-** Irrigation component adjustment (if required) and all other drainage disposal facilities and any required sediment and erosion control will be detailed.

#### **4.C Right of Way Plans and Certificate**

**4.C.1 Title Reports-** It is anticipated that additional right-of-way could be required for the completion of the project. If additional right-of-way is required, title reports will be obtained for all of the property owners within the impact area of the project.

**4.C.2 Final Total Ownership Map-** SRS will prepare the ownership map in accordance with the design manual. The map will show adjacent property owners, parcel numbers, total ownership, rights-of-way, remainders, easements and rights of entry.

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**4.C.3 Write Descriptions for Right-Of-Way and Easements-** SRS will prepare a legal description and supporting mapping for each right-of-way and easement needed to construct the project.

**4.C.4 Prepare and Submit Right-of-Way Plat-** SRS will prepare right-of-way plats as defined by I.C. 40-209 for use during the project.

- **Record Right-Of-Way Plat-** After the project is complete, SRS will record the plat(s) at the Bannock County courthouse.

#### **4.D NPDES and SWPP Plans**

Although it may not be required on this project, RME will prepare an NPDES/SWPP plan to control the stormwater runoff throughout the construction and after the project has been completed. The plan will be in compliance with ITD and Division of Environmental Quality Best Management Practices (BMP's).

#### **4.E Final Traffic Control Plans**

RME in collaboration with Amerigo, Inc. will develop all traffic control plans. The construction traffic control plans will reflect the anticipated construction access and provide for though traffic during the construction. The construction sequencing will be reviewed to insure that traffic is maintained through the project at all times. All sign details, traffic control devices and pavement markings for temporary traffic control plans will be included in the final plans. RME in collaboration with Amerigo, Inc. will also complete all permanent traffic control plans. The plans will detail location and construction of all permanent striping and signage. The installation of traffic control devices is not anticipated with this project.

#### **4.F Final Design Submittals**

RME will complete all final design submittals including:

**4.F.1 Contract Proposal Including Special Provisions-** The RME team will prepare all Special Provisions to supersede or augment ITD's standard specifications in accordance with the ITD Design Manual. All special provisions will be written for the required items that do not have a standard specification, supplemental specification, or standard special provision.

**4.F.2 Final Design Review-** RME will submit final plans, specifications and estimates to ITD District 5 and the City of Pocatello for review and distribution. A design review meeting will be held after the reviews are complete. The purpose of the meeting is to identify any changes that are

necessary to the plans. RME will prepare and distribute a written record of all comments and agreed-upon actions.

**4.F.3 Plan and Specification Revision-** All plans and specifications will be revised according to comments received in the final design review meeting.

**4.F.4 Final Project Cost Estimate-** RME transfer quantities from the project plans to roadway summary sheets. Using this information, RME will prepare an estimate of probable construction costs by researching recent local bid prices for similar work, and on ITD current unit price report for projects of similar type and size. Cost estimates will be generated by applying those prices to the estimated quantities for each item. The "Average Unit Price Report" will be used as a guide to prepare the cost estimate.

#### **4.G PS&E Preparation and Submittal**

**4.G.1 Compile and Submit PS&E Plans-** The consultant team will submit the project and respond to questions/concerns of the ITD Roadway Design Section. After ITD review, RME will make all changes to the plans, specifications and cost estimates.

**4.G.2 Submit Final PS&E Package-** After all of the revisions have been made, RME will submit all of the revised plans, specifications, and cost estimates to ITD. All plans in the package will be stamped by the appropriate licensed professional. Plan sheets will be submitted on high quality, reproducible 11" x 17" sheets in metric dimensions. An electronic version of the package will also be submitted. Figure 10-2 of the Design manual will be used as a guide to insure that the package is complete.

**4.G.3 Prepare Resident Engineer's File-** RME will submit the Resident Engineer package to ITD. The package will include all of the original survey notes, special construction notes and any information accumulated during the design that will assist in the construction. The information below will be submitted in an organized file:

Horizontal and Vertical Control Documentation, Cross Sections, Field Notes, Quantity Calculations and Property Owner and Utility Contact Names and Phone Numbers

#### **4.H Standards**

All work performed on this project will be completed in accordance with City of Pocatello standards, ITD standards, the ITD Design Manual, the Highway Capacity Manual and AASHTO standards. RME will prepare all drawings using



the latest versions of AutoCad and Eagle Point design software. All drawings will be prepared using ITD "Standard Conventional Plan Symbols". Drawing files will be prepared in metric units and will be supplied in compatible formats with AutoCad and Intergraph.

#### **4.1 Services by Others**

It is anticipated that several departments within the City of Pocatello will perform important roles in the development of the project. One important role the city will play is to provide important background information related to the project. Some of the essential information the city will supply is digital mapping, survey information, planimetrics, contour and property ownership data related to the Pocatello Creek project. It is also anticipated that the city will provide aerial photographs and other mapping that might be required to facilitate the design.

RME would also anticipate that the City will take an active role in the public outreach program along with key departments performing roles on the evaluation committee. The engineering department will take an active role in the review and design of the roadway facility.

Bannock Planning organization will provide the consultant with relevant traffic counts and accident data. Bannock Planning organization will also provide existing traffic model information, land use zoning constraints and other growth analysis tools for the purpose of traffic analysis. A representative from Bannock Planning Organization will also serve on the evaluation committee.

#### **Items to be provided by the City**

1. Aerial Photographs
2. Digital Mapping (GIS)
3. Evaluation Committee Formation (Engineering, Community Development, Traffic, Streets, City Council representatives)
4. Evaluation Committee Attendance at public meetings
5. A Project Liaison Within the Engineering Department
6. Project Reviews

#### **Items to be provided by Bannock Planning**

1. Traffic Counts
2. Traffic Modeling
3. Land Use
4. Growth Analysis
5. Traffic Analysis Assistance
6. Evaluation Committee Member
7. Attendance at Public Meetings
8. Project Reviews



**BLANK MAN DAY ESTIMATE**

Description	Total Man Hours	Project Manager	Design Engineer	Engineer Technician	Drafting	clerical	Survey Crew	Land Surveyor
Prepare Additional Alternate Options	32	4	8	8	8	2	0	2
<b>Evaluation and Screening</b>								
Presentation to Committee	20	2	6	6	4	2	0	0
Committee Review and Direction Decision	20	4	8	4	0	4	0	0
<b>Concept Approval</b>								
Project Narrative / Vicinity Maps	14	2	4	2	4	2	0	0
ITD 783 - Concept Approval	14	2	8	2	0	2	0	0
ITD Form 783-A - Design Standards	20	4	8	4	2	2	0	0
ITD Form 783-B Alternate Solutions and Costs	24	4	8	8	0	4	0	0
Traffic Data	24	4	8	8	0	4	0	0
Proposed Design Exceptions	12	2	4	4	0	2	0	0
Concept Level Cost Estimate	16	4	8	2	2	0	0	0
Materials Phase I Report - Life Cycle Costs	84	12	24	40	0	8	0	0
City / ITD Reviews	18	2	8	4	0	4	0	0
Consultant Revisions	32	4	12	8	4	4	0	0
Concept Approval	24	4	8	8	0	4	0	0
<b>Preliminary Design and Environmental Evaluation</b>								
<b>Surveying</b>								
Preliminary Owner Contacts	20	4	8	0	0	4	0	4
Obtain Existing Topography	45	1	4	8	0	0	24	8
Establish Project Bench Marks	19	1	2	4	0	0	8	4
Land Survey / Define Property Lines	108	2	2	8	32	8	24	32
<b>Utility Plans</b>								
Preliminary Utility Plans	50	2	8	8	24	4	0	4
Utility Owner Contacts	22	8	8	2	0	4	0	0
Final Utility Plans	44	4	8	8	16	4	0	4
<b>Right of Way Plans</b>								
Right of Way Plats and Plans	68	4	8	4	32	4	0	16
Total Ownership Map	24	2	4	4	8	2	0	4
Supporting Documentation	36	4	8	4	4	8	0	8
<b>Preliminary Plans</b>								
Base Mapping	24	0	4	4	12	0	0	4
Preliminary Line and Grade and Earthwork	18	2	4	4	8	0	0	0

**BLANK MAN DAY ESTIMATE**

Description	Total Man Hours	Project Manager	Professional Engineer	Professional Architect	Professional Designer	Professional Geotechnical	Survey Crew	Land Surveyor
Preliminary Drainage Studies	14	2	8	4	0	0	0	0
Access Control / Parking Determination	14	4	8	2	0	0	0	0
Pedestrian / Bike Lane Consideration	16	4	8	2	2	0	0	0
ITD Form 783-C Field Inventory	44	4	4	24	4	8	0	0
Preliminary Roadway Plans	82	4	8	16	48	6	0	0
Preliminary Traffic Group Plans	32	4	8	4	12	4	0	0
Preliminary Traffic Control Plans	32	4	8	4	12	4	0	0
Preliminary Landscaping Plans	20	4	4	4	8	0	0	0
<b>Cost Estimates</b>	20	4	4	8	0	4	0	0
<b>Draft Materials Reports II, III, IV</b>								
Phase II Materials Report	84	12	12	56	0	4	0	0
Phase III Materials Report	16	4	8	0	0	4	0	0
<b>Preliminary Design Review</b>								
City / ITD Submittals and Comments	28	4	8	8	4	4	0	0
Hold Preliminary Design Review Meeting	12	4	4	4	0	0	0	0
<b>Final Environmental Evaluation</b>								
Prepare Environmental Report	30	4	16	4	4	2	0	0
ITD Form 654 - Environmental Evaluation	18	4	8	4	0	2	0	0
Agency Approvals	10	2	4	2	0	2	0	0
City / ITD / FHWA Reviews and Comments	16	2	8	4	0	2	0	0
Consultant Revisions	18	4	8	2	2	2	0	0
Environmental Approvals	14	2	6	2	0	4	0	0
<b>Public Hearing Process / Design Study Report</b>								
Organize / Outline Hearing - Assign Tasks	16	2	8	4	0	2	0	0
Submit Hearing Plans / Documentation	52	4	6	6	24	4	0	8
Notify Impacted Property Owners	20	4	8	4	0	4	0	0
Draft Script and Video	20	4	8	4	0	4	0	0
Notice Letter From District to Owners	8	2	4	0	0	2	0	0
Public Advertisements Start	10	2	4	0	0	4	0	0
Dress Rehearsal	12	4	4	4	0	0	0	0
Press Releases / Interview	12	2	4	4	0	2	0	0
Hold Public Hearing	28	8	8	8	0	4	0	0
Review Public Input	24	4	8	8	0	4	0	0

**BLANK MAN DAY ESTIMATE**

Description	Total Man Hours	Project Manager	Designer	Engineer	Technician	Drafting	Checker	Survey Crew	Land Surveyor
Prepare Design Study Report	36	4	12	8	4	8	0	0	
City / ITD / FHWA Reviews	14	4	4	4	0	2	0	0	
Consultant Revisions	22	4	8	4	2	4	0	0	
Design Approval	16	4	4	4	0	4	0	0	
<b>FINAL DESIGN</b>									
<b>Materials Reports</b>									
Phase II Soils Investigation Report	44	8	16	12	0	8	0	0	
Pavement Design Report	44	4	24	8	0	8	0	0	
Phase IV Foundation Investigation	0	0	0	0	0	0	0	0	
Identify Material Sources	0	0	0	0	0	0	0	0	
<b>Construction Plans</b>									
Final Roadway Plans	116	8	16	16	68	8	0	0	
Final Traffic Control Plan	36	2	4	4	24	2	0	0	
Final Pavement Marking Plans	24	2	4	4	12	2	0	0	
Final Signing Plans	20	2	4	4	8	2	0	0	
Final Drainage Plan	24	4	8	4	8	0	0	0	
<b>Right of Way Plans and Certificate</b>									
Title Reports	18	2	4	4	0	4	0	4	
Final Total Ownership Map	16	2	4	4	6	0	0	0	
Descriptions and Easements	40	4	4	8	0	8	0	16	
Prepare and Submit Right of Way Plat	74	2	4	8	32	4	0	24	
<b>NPDES and SWPP Plans / Approvals</b>									
Final Traffic Control Plans	38	2	8	8	16	4	0	0	
<b>Final Design Submittals</b>									
Contract Proposal including Special Provision	52	4	16	8	0	24	0	0	
Final Design Review	16	4	4	4	0	4	0	0	
Plan / Specification Revisions	60	4	4	8	32	12	0	0	
Final Project Cost Estimates	22	2	8	4	0	8	0	0	
<b>P.S.E. Preparation and Submittal</b>									
Compile and Submit P.S.E. Plans	56	8	8	8	24	8	0	0	
Submit Final P.S.E. Package	20	4	8	4	0	4	0	0	
Prepare Resident Engineers File	24	4	8	8	0	4	0	0	



**BLANK MAN DAY ESTIMATE**

4

Description	Total Man Hours	Project Manager	Design Engineer	Engineer Technician	Drafting	Clerical	Survey Crew	Land Surveyor
Prepare Design Study Report	36	4	12	8	4	8	0	0
City / ITD / FHWA Reviews	14	4	4	4	0	2	0	0
Consultant Revisions	22	4	8	4	2	4	0	0
Design Approval	16	4	4	4	0	4	0	0
<b>FINAL DESIGN</b>								
<b>Materials Reports</b>								
Phase II Soils Investigation Report	44	8	16	12	0	8	0	0
Pavement Design Report	44	4	24	8	0	8	0	0
Phase IV Foundation Investigation	0	0	0	0	0	0	0	0
Identify Material Sources	0	0	0	0	0	0	0	0
<b>Construction Plans</b>								
Final Roadway Plans	116	8	16	16	68	8	0	0
Final Traffic Control Plan	36	2	4	4	24	2	0	0
Final Pavement Marking Plans	24	2	4	4	12	2	0	0
Final Signing Plans	20	2	4	4	8	2	0	0
Final Drainage Plan	24	4	8	4	8	0	0	0
<b>Right of Way Plans and Certificate</b>								
Title Reports	18	2	4	4	0	4	0	4
Final Total Ownership Map	16	2	4	4	6	0	0	0
Descriptions and Easements	40	4	4	8	0	8	0	16
Prepare and Submit Right of Way Plat	74	2	4	8	32	4	0	24
<b>MPDES and SWPP Plans / Approvals</b>								
Final Traffic Control Plans	38	2	8	8	16	4	0	0
<b>Final Design Submittals</b>								
Contract Proposal including Special Provision	52	4	16	8	0	24	0	0
Final Design Review	16	4	4	4	0	4	0	0
Plan / Specification Revisions	60	4	4	8	32	12	0	0
Final Project Cost Estimates	22	2	8	4	0	8	0	0
<b>P.S.E. Preparation and Submittal</b>								
Compile and Submit P.S.E. Plans	56	8	8	8	24	8	0	0
Submit Final P.S.E. Package	20	4	8	4	0	4	0	0
Prepare Resident Engineers File	24	4	8	8	0	4	0	0

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**BLANK MAN DAY ESTIMATE**

Description	Total Man Hours	Project Manager	Design Engineer	Engineering Technician	Drafting	Clerical	Survey Crew	Land Surveyor
<b>TOTAL MAN HOURS</b>	2579	339	670	496	548	302	64	160
Project Manager	339	\$63.15		\$21,408				
Design Engineer	670	\$63.15		\$42,311				
Engineering Technician	496	\$29.05		\$14,409				
Drafting	548	\$27.79		\$15,229				
Clerical	302	\$21.47		\$6,484				
Survey Crew	64	\$89.68		\$5,740				
Land Surveyor	160	\$50.52		\$8,083				
<b>RME Totals</b>				\$113,663				
Project Manager - MTI	40	\$45		\$1,800				
Design Engineer - MTI	84	\$65		\$5,460				
Engineering Technician - MTI	116	\$40		\$4,640				
Clerical - MTI	32	\$35		\$1,120				
<b>MTI Totals</b>				\$13,020				
<b>Amerigo Inc Total</b>				\$5,000				
<b>REIMBURSABLE</b>								
- Video Productions				\$1,100				
- Title Reports (46)				\$4,600				
- MTI Equipment (Test Pits)				\$1,450				
<b>TOTAL PROJECT FEE</b>				\$138,833				

Rocky Mountain Engineering L.L.C.

Pocatello Creek, Olympus Drive to Booth Road

Project Number: STP-7161(100)

Key Number: 5967

**A. Summary Estimated Man - Hour Costs**

	Man-Hours		Hourly Rate		Raw Labor Cost
1 Project Manager	339	x	\$ 25.00	=	\$ 8,475.00
2 Design Engineer	670	x	\$ 25.00	=	\$ 16,750.00
3 Engineering Technician	496	x	\$ 11.50	=	\$ 5,704.00
4 Drafting	548	x	\$ 11.00	=	\$ 6,028.00
5 Clerical	302	x	\$ 8.50	=	\$ 2,567.00
6 Survey Crew	64	x	\$ 35.50	=	\$ 2,272.00
7 Land Surveyor	160	x	\$ 20.00	=	\$ 3,200.00
<b>Total Raw Labor Costs</b>					<b>\$ 44,996.00</b>

**B. Payroll, Fringe Benefit Cost and Overhead**

Total Raw Labor Cost			Approved Rate		
\$ 44,996.00	x		1.36092	=	\$ 61,235.96

**C. Net Fee**

Total Raw Labor & Overhead			Approved Rate		
\$ 106,231.96	x		7.0%	=	\$ 7,436.24

**D. Out-of-Pocket Expense**

	Estimated Expense
1 Hearing Video	\$ 1,100.00
2 Title Reports	\$ 4,600.00
3 Drill Rig / Test Pits (MTI)	\$ 1,450.00
<b>Total Out-of-Pocket Expense</b>	<b>\$ 7,150.00</b>

**E. Subconsultants**

1 Materials Testing & Inspection	\$ 13,020.00
2 Amerigo Inc.	\$ 5,000.00

**Total Project Costs \$ 138,838.19**

## Federal Per Diem rates for IDAHO

Effective January 1, 1999

(Revised July 29, 1999)

(\*Maximum lodging amount (a)) + (\*\*M&IE rate (b)) = (Maximum per diem rate (c))

(a) + (b) = (c)

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<u>Key city</u>	<u>Per Diem locality County and/or other</u>	<u>(a)</u>	<u>(b)</u>	<u>(c)</u>
Boise	Ada	55	38	93
Coeur d'Alene	Kootenai			
(Jun 1-September 30)		56	34	90
(October 1-May 30)		50	34	84
Ketchum	Blaine	58	42	100
Sun Valley	Blaine (City Limits)			
(June - September 30)		164	42	206
(April 1 - May 31)		124	42	166
(October 1- March 31)		89	42	131
McCall	Valley	59	38	97
Stanley	Custer	50	38	88

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For locations not listed above, the rate is as follows:

Maximum Lodging	+	Maximum M&IE	Maximum Per Diem Rate
<u>Amount</u>		<u>=</u>	<u>Per Diem Rate</u>
\$50.00		\$30.00	\$80.00

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### MILEAGE

Passenger Vehicle mileage reimbursable @ 31 cents per mile.

\*Maximum Lodging - room rates only and does not include taxes

\*\*M&IE = Meals & Incidental Expenses

**Federal Per Diem rates for IDAHO**

Effective January 1, 1999  
(Revised July 29, 1999)

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**Meals and Incidentals Breakdown**

<u>M&amp;IE</u>	<u>\$30</u>	<u>\$34</u>	<u>\$38</u>	<u>\$42</u>
Breakfast	6	7	8	9
Lunch	6	7	8	9
Dinner	16	18	20	22
Incidentals	2	2	2	2

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CONSULTANT CADD SPECIFICATIONSSection A - Drawing Data

## 1. FILE FORMAT AND DELIVERY

Two copies of all drawings shall be furnished to the Department upon completion of the contract. One copy shall be a durable reproducible of the drawing stamped and signed by the Engineer. An electronic stamp is acceptable, provided it is registered and approved with the Board of Professional Engineers and Land Surveyors. Roadway plans shall be furnished on 279 mm x 432mm (11" x 17") sheets. Structure plans shall be furnished on 559mm x 864mm (22" x 34") sheets. The other copy shall be an electronic drawing file in an Intergraph/MicroStation .DGN file format. Electronic files shall be delivered on one of the following:

- a. 3.5" floppy disk, no backup files;
- b. 8mm magnetic tape cartridge in Windows NT backup format;
- c. Standard CD-ROM format;
- d. Zip Drive Cassette.

Files submitted on magnetic tape shall be accompanied by an explanation of the method used to create the tape and the file format contained on the tape.

Files shall be developed on MicroStation software, MDL Version 5.5 or higher or converted to the Intergraph/MicroStation .DGN file format with all conversion errors corrected prior to delivery. If the consultant elects to convert files from other CADD software to the .DGN format, the consultant may be required at various times during the contract period to provide proof that all conversion errors can be corrected.

## 2. FILE NAMING

Electronic files shall be named using only an eight character file name with a three character extension. Only lowercase alpha or numeric characters with no spaces or special characters shall be used. The three character suffix defines the file type to the computer software. This suffix must remain a part of the file name but will not generally be used for naming purposes.

Project file names are composed of four parts; the key number (first four fields), sheet designator (next two fields), sheet number (last two fields), and the file extension. The four digit key number of the project is assigned by the Department. The sheet designator identifies the type of drawing that the file represents. The sheet number is a consecutive listing of the sheets for each individual drawing type. The extension is generally used to identify the type of file.

A further explanation of standard naming conventions, sheet designators and file extensions used by the Department is contained in Exhibit "A" attached.

## 3. LEVEL ASSIGNMENTS AND SYMBOLOGY

Elements used to construct CADD drawings shall be placed on the appropriate design file levels as assigned in Figure 9-1 of the Idaho Transportation Department Design Manual. Standard plan sheet symbols are illustrated on ITD Standard Drawing Nos. K-10, S-1a, S1b and S-1c. Line weights, styles and text height shall conform with Section 9-5 of the ITD Design Manual and ITD Standard Drawings S-1a, S-1b and S-1c. Use of MicroStation user-defined line styles is preferred. Use of standard MicroStation linear patterning is acceptable. Symbols which are needed to complete project plans that are not covered in the ITD Design Manual and Standard Drawings may be created by the consultant with the approval of the Agreement Administrator or Engineer.

Actual symbols for use with MicroStation software, including standard line patterning symbols, are contained in ITD's standard cell library and are available in the Intergraph/MicroStation .CEL file format. Electronic copies of all standard ITD borders, sheets and standard drawings are available in the .DGN file format. The standard cell libraries and drawings are available in Metric units. A standard color table, standard Metric line style resource library with ITD line styles and font resource library with ITD fonts for use with MicroStation are available. This data should be requested through the Agreement Administrator or Engineer.

# CADD SYSTEM FILE NAMING CONVENTION

## IDAHO TRANSPORTATION DEPARTMENT CONSULTANT CADD SPECIFICATIONS EXHIBIT A

### INTRODUCTION

A standard electronic file naming convention is necessary for the Department to coordinate, retain and archive information designed and collected on the CADD system. To accommodate P.C. files only an **eight** character file name with a three character extension will be used by the Idaho Transportation Department for each computer file. It is suggested that only lowercase alpha and numeric characters be used. No spaces or special characters should be used in a file name. The three character suffix defines the file type to the computer software. This suffix must remain a part of the file name but will not generally be used for naming purposes. There are files other than drawing files which are included in this convention. It is highly recommended that individual users adhere to this naming convention and not deviate from it without first contacting system support.

### PROJECT RELATED FILES

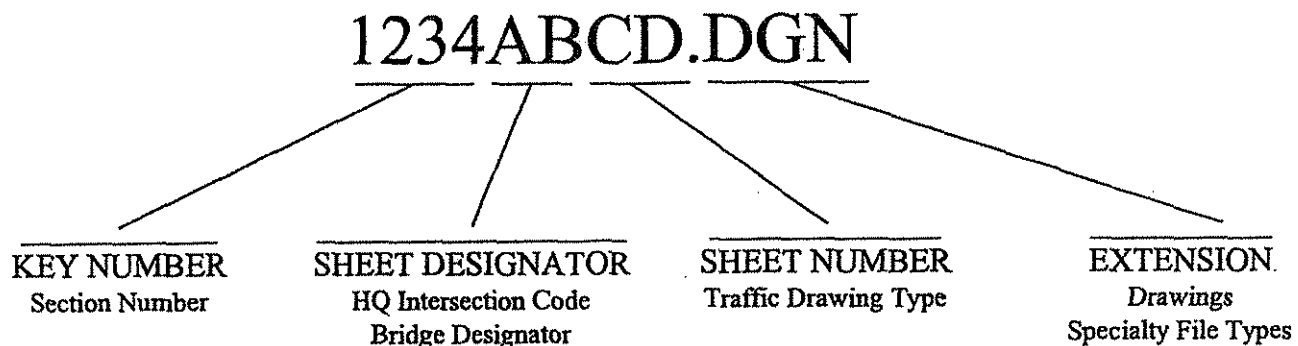
Any project related file name must begin with the four digit key number of the project as assigned by the Program Control Section of the Department. This includes drawing and non drawing files, such as those used by InRoads, InSite, Cogoworks, Fieldworks, Iras.

### NON-PROJECT RELATED FILES

Non-project related files on the CADD system must begin with the letter S and the section number (i.e. S49, S03). The characters 5 through 8 designated by ABCD below, would be considered open for any use except special characters.

### DESCRIPTION

The following is the description of a complete file name which is composed of four parts; the key number, sheet designator, sheet number, and the extension.





# FILE NAME FORMAT DESCRIPTION

## KEY NUMBER - 1234

Use the key number assigned by Program Control.

## SHEET DESIGNATOR - AB

### TITLE SHEET

STANDARD DRAWING INDEX

1234TITL.DGN (ABCD, no numbers )

1234SDIA.DGN (ABCD, no numbers )

### MAPS

VICINITY MAP

TOTAL OWNERSHIP

SPECIAL MAP

1234VM01.DGN

VM

TO

MP

### SUMMARIES (miscellaneous)

PROJECT CLEARANCE SUMMARY

PIPE CULVERT SUMMARY

PIPE SIPHON SUMMARY

IRRIGATION SUMMARY

SEWER PIPE SUMMARY

PIPE UNDERDRAIN SUMMARY

1234PSUM.SHT

*(within PSUM)*

*(within PSUM)*

*(within PSUM)*

*(within PSUM)*

*(within PSUM)*

*(within PSUM)*

1234RSUM.SHT

ROADWAY SUMMARY & CONTINUED

*(within RSUM)*

1234BSUM.SHT

BRIDGE SUMMARY

*(within BSUM)*

### TYPICAL SECTIONS

1234TY01.DGN

### DESIGN PLANS

PLANSHEETS

PROFILE SHEETS

PLAN/PROFILE COMBINATION SHEETS

DETAIL SHEETS

SPECIAL DRAWINGS

EROSION CONTROL

1234PL01.DGN

PL

PR

PP

DE

SD

EC

### TRAFFIC PLANS

SIGNING

PAVEMENT MARKINGS

ILLUMINATION

TRAFFIC CONTROL PLANS

SIGN ERECTION SPECIFICATIONS

MATERIALS QUANTITIES

TRAFFIC DETAIL

DISTRICT TRAFFIC SIGNAL

HQ SIGNAL *(see special name formats)*

1234TR01.DGN

SN

PM

IL

TC

SE

MQ

TD

TS

3 digit intersection code

STRUCTURE DRAWINGS

1234AB01.DGN

The AB sheet designator is used as a structure identifier. These structure identifier is assigned by the Bridge Section.

SOURCE PLATS

(See special naming formats.)

1234S123.DGN

RECORD OF SURVEY

1234RS01.DGN

RIGHT OF WAY

1234RW01.DGN

UTILITY

1234UT01.DGN

STATE MAINTENANCE GROUP

1234SM01.DGN

ST plans should follow regular naming convention.

**SHEET NUMBER - CD**

1234XX01.XXX

This a sheet number to differentiate between the different plan sheets with the same designator. Typically each type of sheet would start with the number 01 and increment up by one. Some types would never have more than one sheet and would always use 01 in this space. This was done to create consistency. If a particular type of sheet needs more than 99 numbers a different designator can be used to identify those extra sheets. Please contact Engineering Support for additional information.

The HQ Traffic Section uses columns 7 and 8 as the intersection drawing type. They are as follows:

Detection Field Wiring

1234XXDT.XXX

Phase Sequence

PH

Conduit Detail

CD

Signal Head Field Wiring

HD

**EXTENSION - DGN**

The department uses the DGN extension for all drawing plans in a project. Special extensions are assigned by CADD system software to identify special file types such as raster files and those used by InRoads to save design information.

SPECIAL DRAWINGS Certain special drawings use different extensions to keep them from being mistaken for typical drawing or design files. A list of these extensions are listed below.

blank summary sheets

1234XXXX.SHT

blank drawing sheets

SHT

standard drawings

STD

design manual examples

DMX

master signal controller cabinet schematics

LCP

As-Constructed Plans

ACP



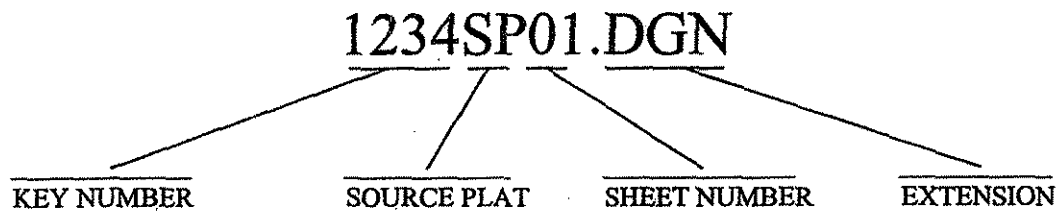
REVIEW DRAWINGS Certain Reference drawings use different extensions to keep them separate from other reference files. The Electronic Review Software uses the same drawing number but assigns one of the following extensions to mark it as a review drawing.

Redline - Master/Design	1234XXXX.RDL
Redline - Traffic	RDT
Redline - Materials	RDM
Redline - Right of Way	RDR
Redline - Bridge	RDB

## SPECIAL NAME FORMATS

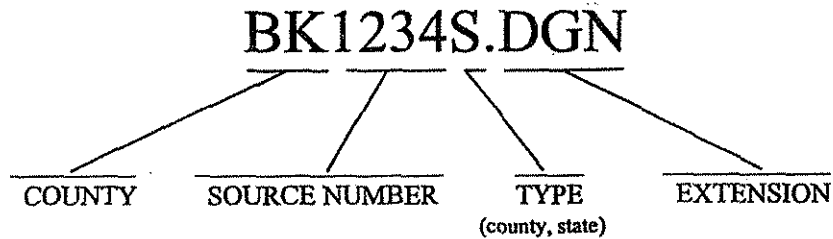
### SOURCE PLATS

Source plats used in a project would use the Key Number and the 4 digit source number.



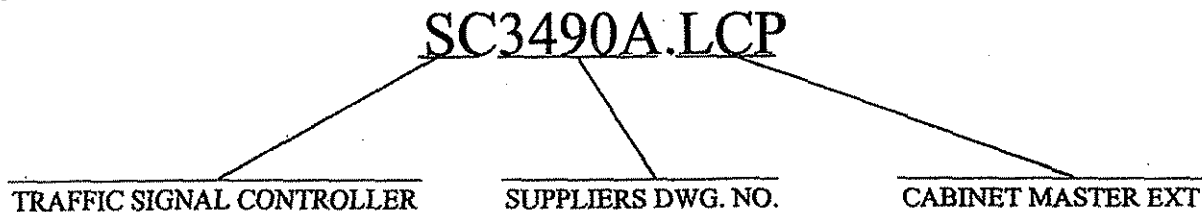
### MASTER SOURCE PLATS

Non-project related source plats would be placed in a separate directory for sources only. (The source number uses a 2 character county designator and a 3 digit source number. See section 19-018.103 of the Materials manuals for source site reference numbers.)



### SIGNAL CONTROLLER MASTER SCHEMATICS

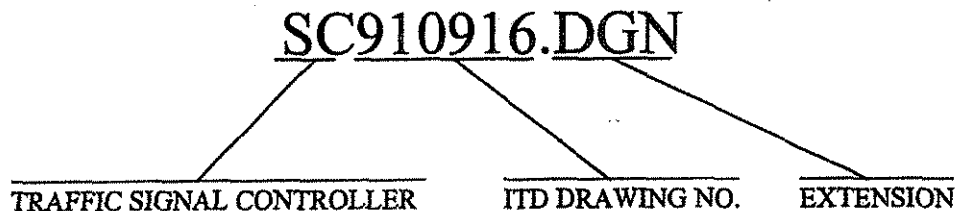
The following naming convention is used for master signal controller cabinet schematics in the HQ Traffic Section.



*S*

## INTERSECTION CONTROLLER SCHEMATICS

The following naming convention is used for individual intersection controller cabinet schematics in the HQ Traffic Section.

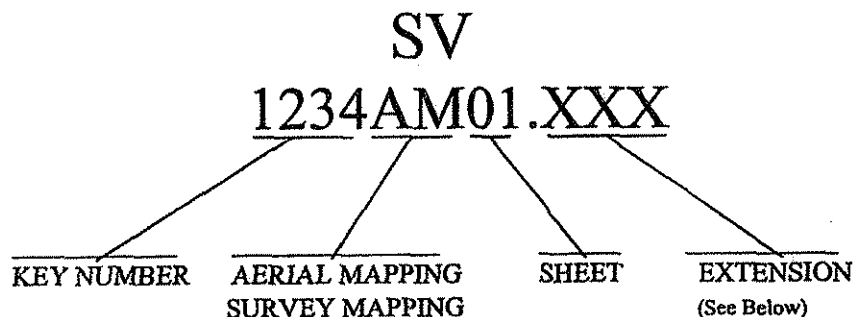


**ITD Drawing Number:** This number consists of three parts based on the day the signal controller cabinet was configured.

Configuration Year	91
Configuration Month	09
Configuration Day	16

## MAPPING FILES

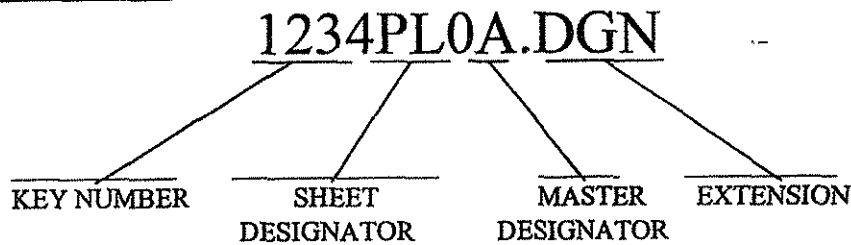
Aerial mapping files should be numbered sequentially through the project in order from one end to the other.



**Extensions:** The extensions for the different types of mapping files allows the information to be separated by type.

DGN	Topography(Graphics)
BRK	Break Line File
PNT	Spot point File

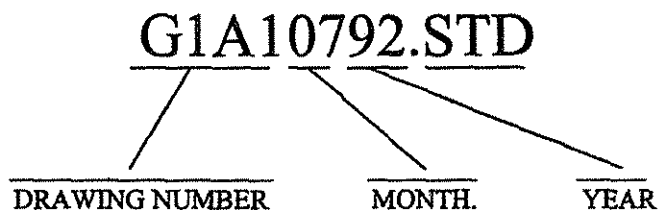
## MASTER DESIGN FILES



S

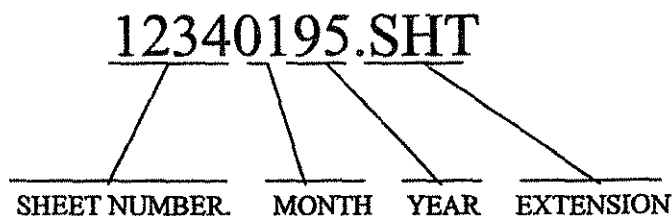
### STANDARD DRAWINGS

The following naming convention is used for master Standard Drawing Numbers in the Standards Directory.

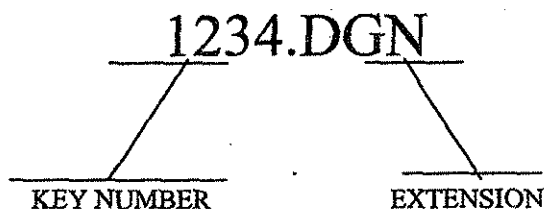


### STANDARD SHEETS

This naming convention shall be used in the standards directory for the naming of standard sheets used in preparing plans and other documents needing drawings. The year is provided only for verifying the most up to date sheet. Only the most current sheet will be available in the standards directory.



### INROADS FILES



- |          |                               |
|----------|-------------------------------|
| 1234.DGN | SCRATCH FILE FOR INROADS WORK |
| 1234.RWK | INROADS PROJECT FILES         |
| 1234.ALG | INROADS ALIGNMENTS            |
| 1234.TML | INROADS TEMPLATE LIBRARY      |
| 1234.RWL | INROADS ROADWAY LIBRARY       |

S

## ATTACHMENT NO 2

### CONSULTANT AGREEMENT SPECIFICATIONS

These specifications supplement all Professional and Term agreements and shall be attached to said agreements.

#### I. STANDARD OF PERFORMANCE

The Consultant agrees that all work performed under agreement will be performed professionally in accordance with the ITD Design Manual and other appropriate standards. When the work is of a nature that requires checking, the checking shall be performed by a qualified person other than the one who performed the work.

#### II. PROFESSIONAL SERVICES AUTHORIZATION

1. A written PROFESSIONAL SERVICES AUTHORIZATION (PSA) will be issued by the State to authorize the Consultant to proceed with a specific portion of the work under this Agreement. The number of PSAs required to accomplish all the work under this Agreement is one to several. Each PSA will authorize a maximum dollar amount and specify the milestone(s) for which the PSA represents. The State assumes no obligation of any kind for expenses incurred by the Consultant prior to the issuance of the PSA; for any expenses incurred by the Consultant for services performed outside the work authorized by the PSA; and for any dollar amount greater than authorized by the PSA.
2. The work of this Agreement will be divided into milestones, each governed by a separate PSA. It is not necessary for a PSA to be completed prior to the issuance of the next PSA. The Consultant shall not perform work which has not been authorized by a PSA. When the money authorized by a PSA is nearly exhausted, the Consultant shall inform the Administrator of the need for the next PSA. The Administrator must concur with the Consultant prior to the issuance of the next PSA.
3. The Agreement amount is lump sum, unit cost, or cost plus fixed fee amount for the negotiated services and an additional services amount is set up for possible extra work not contemplated in original scope of work. For the Consultant to receive payment for any work under the additional services amount of this Agreement, said work must be performed under a PSA issued by the State. Should the State request that the Consultant perform additional services, then the scope of work and method of payment will be negotiated. The basis of payment for additional work will be set up either as a Lump Sum or Cost Plus Fixed Fee.

### III. DEFINITIONS

All cost accounting procedures, definitions of terms, payroll cost, payroll additives, general administrative overhead, direct cost, and fixed fee shall comply with Federal Acquisition Regulations, 48 CFR, Part 31 and be supported by audit accepted by the State.

1. Payroll Costs (Direct Labor Cost)

The actual salaries paid to personnel for the time worked directly on the project. Payroll costs are referred to as direct labor cost.

2. Payroll Additives

All payroll additives allocable to payroll costs such as FICA, State Unemployment Compensation, Federal Unemployment Compensation, Group Insurance, Workmen's Compensation, Holiday, Vacation, and Sick Leave. The payroll additive is expressed as a percent of the direct labor cost.

3. General Administrative Overhead (Indirect Expenses)

The allowable overhead (indirect expenses) expressed as a percent of the direct labor cost.

4. Combined Overhead

The sum of the payroll additives and general administrative overhead expressed as a percent of the direct labor cost.

5. Other Direct Costs

The out-of-pocket costs and expenses directly related to the project that are not a part of the normal company overhead expense.

6. Unit Prices

The allowable charge out rate for units or items directly related to the project that are not a part of the normal overhead expense.

7. Fixed Fee

A dollar amount established to cover the Consultant's profit and business expenses not allocable to overhead. The fixed fee is a negotiated percent of direct labor cost and combined overhead and shall take into account the size, complexity, duration, and degree of risk involved in the work. The fee is "fixed,"



i.e. it does not change. If extra work is authorized, an additional fixed fee can be negotiated, if appropriate.

8. Hourly Charge Out Rate

The negotiated hourly rate to be paid to the Consultant which includes all overhead for time worked directly on the project.

9. Cost Plus Fixed Fee

Cost Plus Fixed Fee is the sum of the payroll costs, combined overhead, and other direct costs, plus the fixed fee.

10. Cost

Cost is the sum of the hourly charge out rate and other direct costs.

11. Lump Sum

An agreed upon total amount, that will constitute full payment for all work described in the Agreement.

12. Not-To-Exceed Amount

The Agreement amount is considered to be a Not-to-Exceed amount, which amount shall be the maximum amount payable and shall not be exceeded unless adjusted by a Supplemental Agreement.

13. CPM

Critical Path Scheduling. The CPM will list all work tasks, their durations, negotiated milestones and their dates, and all State/Local review periods.

14. Incentive/Disincentive Clause

Allows for the increase or decrease of total agreement amount paid based on factors established in the agreement. Normally, these factors will be completion time and completion under budget.

15. State

Normally "State" refers to the Idaho Transportation Department. However, in the case of Local Sponsor projects, "State" may be interchangeable with "Agreement Administrator" or just "Administrator".



16. Administrator

Person directly responsible for administering a consultant agreement on behalf of the State or a Local Public Agency.

17. Milestones

Negotiated portions of projects to be completed within the negotiated time frame. Normally the time frame will be negotiated as a calendar date, but it could also be "working" or "calendar" days. As many milestones as the Consultant and the State believe necessary for the satisfactory completion of the agreement will be negotiated.

IV. PROJECT SCHEDULING

All negotiated agreements shall be accompanied by a critical path method schedule (CPM Scheduling). The CPM will list all work tasks, their duration, negotiated milestones and their completion dates, including all State/Local review periods. The format of this schedule shall be agreed on prior to signing the agreement.

Along with the monthly progress report, the Consultant shall provide monthly CPM Schedule updates to the Agreement Administrator showing the project percent completed on each task.

V. MONTHLY PROGRESS REPORT

The Consultant shall submit to the State a monthly progress report on Form ITD-771, as furnished by the State.

The Consultant shall provide monthly progress schedule (CPM ) updates to the Agreement Administrator.

The monthly progress report and schedule update will be submitted by the tenth of each month following the month being reported or as agreed upon in the scope of work.

The Agreement Administrator will review the progress report and submit approved billings for payment within two weeks of receiving monthly report.

Each progress report shall list billings by PSA number and reference milestones.

VI. PROGRESS AND FINAL PAYMENTS

1. Progress payments will be made once a month for services performed which qualify for payment under the terms and conditions of the Agreement. Such payment will be made based on invoices submitted by the Consultant in the

*format required by the State. The monthly invoice shall be submitted by the tenth of each month following the month being invoiced.*

**Lump Sum**

*Progress payments will be made, based on a percentage of the work satisfactorily completed. No Fee will be paid except after satisfactory completion of each milestone.*

**Cost Plus Fixed Fee**

*The Consultant shall submit a breakdown of costs by each item of work on the monthly invoice, and shall show the percent complete of each item of work, each milestone and percent complete of the entire Agreement. Progress payments will be made based on the invoiced cost less the fixed fee for the work satisfactorily completed for each billing period. Said payment shall not exceed the percent complete of the entire Agreement. Upon satisfactory completion of each milestone, full payment for all approved work performed for that milestone will be made including Fixed Fee.*

**Cost**

*The Consultant shall submit a breakdown of costs by each item of work on the monthly invoice, and shall show the percent complete of each item of work and percent complete of the entire Agreement. Progress payments will be made based on the invoiced cost for the work satisfactorily completed for each item of work. Said payment shall not exceed the percent complete of the entire Agreement.*

2. *The State will make full payment for the value of the services performed which qualify for payment. This full payment will apply until 95 percent of the work under each Project Agreement or Work Task has been completed. No further progress payments will be made until all work under the individual agreement has been satisfactorily accomplished.*

*If at any time, the State determines that the work is not progressing in a satisfactory manner, the State may refuse to make full progress payments and may withhold from any progress payment(s) such sums that are deemed appropriate for unsatisfactory services.*

3. *Final payment of all amounts retained shall be due 90 days after all work under the Agreement has been completed by the Consultant and accepted by the State. Such final payment will not be made until satisfactory evidence by affidavit is submitted to the State that all indebtedness incurred by the Consultant on this project has been fully satisfied.*

4. Agreements which include an incentive/disincentive clause will normally have the clause applied only to the completion of the BID OPENING milestone. If the project is deemed by the State to be ready for advertisement, but advertisement is postponed at no fault of the consultant, any incentive earned will be paid.

## VII. MISCELLANEOUS PROVISIONS

### A. COVENANT AGAINST CONTINGENT FEES

1. The Consultant warrants that they have not:

Employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person to solicit or secure this contract, other than a bona fide employee of the firm;

agreed, as an expressed or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the contract, or;

paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee of the firm) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the contract.

2. The State warrants that the above consulting firm, or firm representative, has not been required, directly or indirectly as an expressed or implied condition in connection with obtaining or carrying out this contract to:

Employ or retain, or agree to employ or retain, any firm or person, or; pay, or agree to pay to any firm, person or organization, any fee, contribution, donation or consideration of any kind.

### B. PROHIBITION AGAINST HIRING PERSONNEL AND WORKING FOR CONTRACTOR

In compliance with the Code of Federal Regulations, (23 CFR, Section 1.33, Conflict of Interest), the Consultant agrees that no one in their employ will work on a part time basis under this Agreement while also in the full-time employ of any Federal Agency or the State, without the written consent of the public employer of such person. The Consultant agrees that no one in their employ under any circumstances shall perform any services for the contractor on the construction of this project. This includes employees who leave the Consultant's employment.



### C. CHANGES IN WORK

All changes in work shall conform to one or more of the following conditions and in no instance shall such change in work be undertaken without written order or written approval of the State.

1. Increase in the work required by the State due to unforeseen circumstances.
2. Revision in the work required by the State subsequent to acceptance of such work at the appropriate conference or after revision of such work as outlined at said conference.
3. Items of work which are beyond the scope of intent of this Agreement and pre-approved by the State.
4. Reduction in the work required by the State due to unforeseen circumstances.

An increase in compensation shall not result from underestimating the complexity of the work.

Adjustment in compensation for either an increase or reduction in work shall be on a negotiated basis arrived at by mutual agreement between the State and the Consultant. During such negotiations the State may examine the documented payrolls, transportation and subsistence costs paid employees actively engaged in the performance of a similar item or items of work on the project, and by estimated overhead and profit from such similar items or items of work.

Said mutual agreement for a negotiated increase or reduction in compensation shall be determined prior to commencement of operations for an increase in a specific item or items of work. In the case of State order for nonperformance a reduction in the specific item or items of work will be made as soon as circumstances permit. In the event that a mutual agreement is not reached in negotiations for an increase in work, the State will use other methods to perform such item or items of work.

The mutually agreed amount shall be covered by a Supplemental Agreement and shall be added to or subtracted from the total amount of the original Agreement.

Adjustment of time to complete the work as may pertain to an increase or a reduction in the work shall be arrived at by mutual agreement of the State and the Consultant after study of the change in scope of the work.

**D. DELAYS AND EXTENSIONS**

1. Extensions of time may be granted for the following reasons:
  - a. Delays in major portions of the work caused by excessive time used in processing of submittals, delays caused by the State, or other similar items which are beyond the control of the Consultant.
  - b. Additional work ordered in writing by the State.
2. Extensions of time will not be granted for the following reasons:
  - a. Underestimating complexity of work.
  - b. Redoing work rejected by the State.

**E. TERMINATION**

The State may terminate or abandon this Agreement at any time upon giving notice of termination hereof as hereinafter provided, for any of the following reasons:

1. Evidence that progress is being delayed consistently below the progress indicated in a schedule of operations given to the State at meetings and conferences herein provided for.
2. Continued submission of sub-standard work.
3. Violation of any of the terms of conditions set forth in the Agreement, other than for the reasons set forth in 1 and 2 above.
4. At the convenience of the State.

Prior to giving notice of termination for the reasons set forth in 1 and 2 above, the State shall notify the Consultant in writing of any deficiencies or default in the performance of the terms of this Agreement, and said Consultant shall have ten (10) days thereafter in which to correct or remedy any such default or deficiency, and upon their failure to do so within said ten (10) days, or for the reasons set forth in 3 above, such notice of termination in writing shall be given by the State. Upon receipt of said notice the Consultant shall immediately discontinue all work and service unless directed otherwise, and shall transfer all documents pertaining to the work and services covered under this Agreement, to the State. Upon receipt by the State of said documents, payment shall be made to the Consultant as provided herein for all acceptable work and services.

F. DISPUTES

Should any dispute arise as to performance or abnormal conditions affecting the work, such dispute shall be referred to the Director of the Idaho Transportation Department or his duly authorized representative(s) for determination.

Such determination shall be final and conclusive unless, within thirty (30) days, said Consultant appeals to the Idaho Transportation Board as provided in Section 105.17, Claims for Adjustment and Disputes, Idaho Transportation Department Standard Specifications for Highway Construction, latest edition, which is hereby incorporated herein.

G. ACCEPTANCE OF WORK

1. The Consultant warrants that all work submitted shall be in accordance with good professional practices and shall meet tolerances of accuracy required by State practices and procedures.
2. Acceptance of the work shall not constitute a waiver of any of the State's rights under this agreement or in any way relieve the consultant of any liability under their warranty or otherwise.
3. Acceptance of work will occur at phases appropriate to the terms of the agreement and level of detail required by the State in its project development procedures.
4. The Consultant is responsible for necessary design and plans corrections as a result of errors and omissions caused by the Consultant or their agents or employees. This responsibility will exist throughout the preconstruction and construction phases of the project based on the individual endorsement and signature on the final plans (Item K. below) and required under Title 54 Idaho Code. No additional compensation will result from such changes.

H. OWNERSHIP OF DOCUMENTS

All material acquired or produced by the Consultant in conjunction with the preparation of the plans, study, or report, shall become the property of, and be delivered to, the State without restrictions or limitations of their further use. However, in any case, the Consultant has the right to make and retain copies of all data and documents for project files.



I. INDEMNITY

Concerning claims of third parties, the Consultant and the State to the extent the State may do so will indemnify, save harmless and defend each other from the damages of and against any and all suits, actions, claims or losses of every kind, nature and description, including costs, expenses and reasonable attorney fees that may be incurred by reason of any negligent act, error or omission of the Consultant or the State in the prosecution of the work which is the subject of this Agreement. Concerning claims of the State, the Consultant shall assume the liability and responsibility for negligent acts, errors or omissions caused by the Consultant or their agents or employees to the design, preparation of plans and/or specifications, or other assignments completed under this Agreement, to the standards accepted at the time of the Final Design Review, other established review periods, and until one (1) year after the project construction has been completed. The State shall have until that time to bring a claim for loss against the Consultant.

Notwithstanding any other provision of this Agreement, the Consultant shall not be responsible for claims arising from the willful misconduct or negligent acts, errors, or omissions of the State for contamination of the project site which pre-exist the date of this Agreement or subsequent Task Authorizations. Pre-existing contamination shall include but not be limited to any contamination or the potential for contamination, or any risk to impairment of health related to the presence of hazardous materials or substances. The State agrees to indemnify, defend, and hold harmless the Consultant from and against any claim, liability or defense cost related to any such pre-existing contamination except for claims caused by the negligence, or willful misconduct of the Consultant.

J. INSURANCE

The Consultant, certifying it is an independent contractor licensed in the State of Idaho, shall acquire and maintain comprehensive general liability insurance in the amount of \$500,000.00 per occurrence, and worker compensation insurance in accordance with Idaho Law. The Consultant shall provide the State with certificates of insurance.

K. ENDORSEMENT BY ENGINEER, ARCHITECT, LAND SURVEYOR, AND GEOLOGIST

The Professional Engineer, Architect, Land Surveyor, or Geologist in direct charge of the work or portion of work shall endorse the same. All plans, specifications, cost summaries, and reports shall be endorsed with the registration seal, signature, and date of the Idaho professional in direct charge of the work. In addition, the firm's legal name and address shall be clearly stamped or lettered on the tracing of each sheet of the plans. This endorsement certifies design responsibility in conformance with Idaho Code and acceptance of responsibility for

correction of any errors or omissions in the project plans, specifications and reports relative to the project at no additional cost to the State.

L. LEGAL COMPLIANCE

The Consultant at all times shall observe and comply with all Federal, State and local laws, by-laws, safety laws, and any and all codes, ordinances and regulations affecting the work in any manner. The Consultant agrees that any recourse to legal action pursuant to this agreement shall be brought in the District Court of the State of Idaho, situated in Ada County, Idaho.

M. SUBLETTING

The services to be performed under this Agreement shall not be assigned, sublet, or transferred except by written consent of the State. Written consent to sublet, transfer or assign any portions of the work shall not be construed to relieve the Consultant of any responsibility for the fulfillment of this Agreement or any portion thereof.

N. PERMITS AND LICENSES

The Consultant shall procure all permits and licenses, pay all charges, fees, and taxes and give all notices necessary and incidental to the due and lawful prosecution of the work.

O. PATENTS

The Consultant shall hold and save the State and its agents harmless from any and all claims for infringement by reason of the use of any patented design, device, material process, trademark, or copyright.

P. CIVIL RIGHTS ACT

During the performance of work covered by this Agreement, the Consultant for themselves, their assignees and successors in interest agree as follows:

1. Compliance With Regulations.

The Consultant shall comply with all regulations of the United States Department of Transportation relative to Civil Rights, with specific reference to Title 49 CFR Part 21, and Title VI of the Civil Rights Act of 1964 as amended.



2. **Nondiscrimination.**

The Consultant, with regard to the work performed by them during the term of this Agreement, shall not in any way discriminate against any employee or applicant for employment; subcontractor or solicitations for subcontract including procurement of materials and equipment; or any other individual or firm providing or proposing services based on race, color, sex, national origin, age or non-job related handicap.

3. **Solicitations for Subcontracts, Including Procurement of Materials and Equipment.**

In all solicitations, either by bidding or negotiation, made by the Consultant for work or services performed under subcontract, including procurement of materials and equipment, each potential subcontractor or supplier shall be made aware by the Consultant of the obligations of this Agreement and to the Civil Rights requirements based on race, color, sex, national origin, age or non-job related handicap.

4. **Information and Reports.**

The Consultant shall provide all information and reports required by regulations and/or directives and sources of information, and their facilities as may be determined by the State or the appropriate Federal Agency. The Consultant will be required to retain all records for a period of three (3) years after the final payment is made under the agreement.

5. **Sanctions for Noncompliance.**

In the event the Consultant is in noncompliance with the Civil Rights provisions of this Agreement, the State shall impose such sanctions as it or the appropriate Federal Agency may determine to be appropriate, including, but not limited to:

Withholding of payments to the Consultant until they have achieved compliance, and/or;

cancellation, termination or suspension of the Agreement, in whole or in part.

6. **Incorporation of Provisions.**

The Consultant shall include the provisions of paragraphs 1 through 5 in every subcontract of \$25,000 or more, to include procurement of materials

and leases of equipment unless exempt by regulations, orders, or directives pursuant thereto. The Consultant shall take such action with respect to any subcontract or procurement as the State or the appropriate Federal Agency may direct as a means of enforcing such provisions, including sanctions for noncompliance. In the event the Consultant becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Consultant may request the State to enter into such litigation to protect the interest of the State, and in addition, the Consultant may request the United States to enter into such litigation to protect the interest of the United States.

**Q. INSPECTION OF COST RECORDS**

The Consultant shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred on the project. They shall make such data available for inspection, and audit, by duly authorized personnel, at reasonable times during the life of this Agreement, and for a period of three (3) years subsequent to date of final payment under this Agreement, unless an audit has been announced or is underway; in that instance, records must be maintained until the audit is completed and any findings have been resolved. Failure to provide access to records may affect payment and may constitute a breach of contract.

**R. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS**

By signing this document the Consultant certifies to the best of his knowledge and belief that except as noted on an attached Exception, the company or its subcontractors, material suppliers, vendors or other lower tier participants on this project:

1. Are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from covered transactions by any Federal department or agency;
2. have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records making false statements, or receiving stolen property;

3. are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (2) of this certification; and
4. have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

**NOTE:** Exceptions will not necessarily result in denial of award, but will be considered in determining Consultant responsibility. For any exception noted, indicate to whom it applies, initiating agency and dates of action. Providing false information may result in criminal prosecution or administrative sanctions.

#### S. CERTIFICATION CONCERNING LOBBYING ACTIVITIES

By signing this document, the Consultant certifies to the best of their knowledge and belief that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress in connection with this Federal contract, grant, loan or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

The Consultant also agrees that he or she shall require that the language of this certification shall be included in all lower tier subcontracts, which exceed \$100,000, and that all such sub-recipients shall certify and disclose accordingly.

hm:attachment no 2.doc

# Exhibit “B”

S

STATE/LOCAL AGREEMENT  
(CONSTRUCTION)  
STP-7161(100)  
POCATELLO CREEK ROAD  
BANNOCK COUNTY  
KEY NO. 5967

PARTIES

THIS AGREEMENT is made and entered into this 15<sup>th</sup> day of August, 2003, by and between the IDAHO TRANSPORTATION DEPARTMENT, hereafter called the STATE, and the CITY OF POCATELLO, acting by and through its Mayor and Council, hereafter called the SPONSOR.

PURPOSE

The SPONSOR has requested the STATE to program a project for federal participation in the costs of constructing Pocatello Creek Road, to consist of reconstruction of the roadway, including curb and gutter, sidewalks, and drainage, which has been designated as Project No. STP-7161(100). This agreement sets out the responsibilities of the parties in the construction and maintenance of the project.

Authority for this agreement is established by Section 40-317 of the Idaho Code.

The Parties agree as follows:

SECTION I.

1. This Agreement is entered into for the purpose of complying with certain provisions of the Federal-Aid Highway Act in obtaining federal participation in the construction of the project.
2. Federal participation in the costs of the project will be governed by the applicable sections of Title 23, U.S. Code (Highways) and rules and regulations prescribed or promulgated by the Federal Highway Administration.

**SECTION II.** That the **STATE** will:

1. Not guarantee that federal funds herein sought are available or will be made available. In the event federal funds are unavailable, this Agreement is void.
2. Enter into an Agreement with the Federal Highway Administration covering the federal government's pro rata share of construction costs.
3. Advertise, open bids, prepare a contract estimate of cost based on the successful low bid and notify the **SPONSOR** thereof.
4. Award a contract for construction of the project, based on the successful low bid, if it does not exceed the **STATE'S** estimate of cost of construction by more than ten (10) percent.
5. Obtain concurrence of the **SPONSOR** before awarding the contract if the **SPONSOR'S** share of the low bid amount exceeds the amount set forth in Section III, Paragraph 1 by more than ten (10) percent.
6. Provide to the **SPONSOR** sufficient copies of the Contract Proposal, Notice to Contractors, and approved construction plans.
7. Designate a resident engineer and other personnel, as the **STATE** deems necessary, to supervise and inspect construction of the project in accordance with the plans and specifications in the manner required by applicable state and federal regulations. This engineer, or his authorized representatives, will prepare all monthly and final contract estimates and change orders, and submit all change orders to the **SPONSOR** for their concurrence. If the **SPONSOR'S** share of any change order exceeds \$1,000.00, the **STATE** will submit a statement to the **SPONSOR** indicating the amount owed by the **SPONSOR**.
8. Notify the **SPONSOR** when construction engineering and inspection (CE&I) costs have reached approximately 85% of the estimated cost for CE&I.

9. Maintain complete accounts of all project funds received and disbursed, which accounting will determine the final project costs.
10. Upon completion of the project, after all costs have been accumulated and the final voucher paid by the Federal Highway Administration, provide a statement to the **SPONSOR** summarizing the estimated and actual costs, indicating an adjustment for or against the **SPONSOR**. Any excess funds transmitted by the **SPONSOR** and not required for the project will be returned.

**SECTION III.** That the **SPONSOR** will:

1. Be responsible for its share of preliminary engineering costs, construction costs, and construction engineering & inspection (CE&I) by the **STATE**. At the time of execution of this agreement, the **SPONSOR** owes no funds. At completion of the project, the actual cost to the **SPONSOR** will be determined from the total quantities obtained by measurement plus the actual cost of engineering and contingencies required to complete the work. CE&I will be approximately 15% of the total construction cost.
2. Upon approval of the lowest qualified bid received, if the **SPONSOR'S** share exceeds the amount set forth in Section III, Paragraph 1, transmit to the **STATE** the **SPONSOR'S** portion of such excess cost.
3. Authorize the **STATE** to administer the project and make any necessary changes and decisions within the general scope of the plans and specifications. Prior approval of the **SPONSOR** will be obtained if it is necessary, during the life of the construction contract, to deviate from the plans and specifications to such a degree that the costs will be increased or the nature of the completed work will be significantly changed.
4. The **SPONSOR** will designate an authorized representative to act on the **SPONSOR'S** behalf regarding action on change orders. That authorized representative's name is Cac Turner P.E. or Greg Lanning P.E.,  
Phone No. 234 6217.

5. When change orders are submitted by the **STATE** for approval pursuant to Section II, Paragraph 7, the **SPONSOR** or its authorized representative shall give approval of same as soon as possible, but no later than ten (10) calendar days after receipt of the change order. If approval is delayed, any claims due to that delay shall be the responsibility of the **SPONSOR**.
6. Upon receipt of either of the statements referred to in Section II, Paragraphs 7 and 10, indicating an adjustment in cost against the **SPONSOR**, promptly remit to the **STATE** a check or warrant in that amount.
7. Maintain the project upon completion to the satisfaction of the **STATE**. Such maintenance includes, but is not limited to, preservation of the entire roadway surface, shoulders, roadside cut and fill slopes, drainage structures, and such traffic control devices as are necessary for its safe and efficient utilization. Failure to maintain the project in a satisfactory manner will jeopardize the future allotment of federal-aid highway funds for projects within the **SPONSOR'S** jurisdiction.
8. Comply with Appendix A, Title 49 CFR, Part 21, attached hereto and made a part hereof.

#### SECTION IV.

1. Checks for funds owed by the **SPONSOR** shall be made payable to the "Idaho Transportation Department", and mailed to the District Five Office at PO Box 4700, Pocatello, ID 83205-4700.
2. All information, regulatory and warning signs, pavement or other markings, traffic signals required, the cost of which is not provided for in the plans and estimates, must be erected at the sole expense of the **SPONSOR** upon the completion of the project.
3. The location, form and character of all signs, markings and signals installed on the project, initially or in the future, shall be in conformity with the Manual of Uniform Traffic Control Devices as adopted by the **STATE**.



4. During construction, the latest edition of the **STATE's Guide for Utility Management** will be followed in all matters relating to utilities.

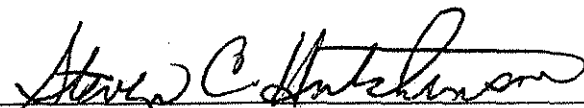
**SECTION V.**

1. That this State/Local Agreement (Construction) upon its execution by both Parties, supplements the State/Local Agreement (Project Development) by and between the same parties, dated March 16, 1995.

**EXECUTION**

This Agreement is executed for the **STATE** by its Assistant Chief Engineer (Development), and executed for the **SPONSOR** by the Mayor, attested to by the City Clerk, with the imprinted corporate seal of the **CITY OF POCATELLO**.

**IDAHO TRANSPORTATION DEPARTMENT**  
APPROVED BY:

  
Assistant Chief Engineer  
(Development)

Approved *As To Form*:

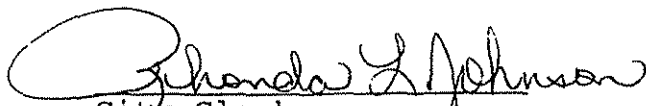
  
Deputy Attorney General


RECOMMENDED BY:

  
Roadway Design Engineer

ATTEST:

**CITY OF POCATELLO**

  
City Clerk

  
Mayor

(SEAL)

By regular special meeting  
on August 7, 2003.

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## APPENDIX A

### EXCERPTS FROM TITLE 49 CFR PART 21

During the performance of work covered by this Agreement, the City of Pocatello for itself, its assignees and successors in interest (hereafter referred to as the SPONSOR), agrees as follows:

1. **Compliance with Regulations:** The SPONSOR during the performance of work covered by this Agreement shall comply with all regulations of the United States Department of Transportation relative to Civil Rights with specific reference to Title 49 CFR Part 21, Title 41 CFR Part 60, Civil Rights Act of 1964 as amended and Executive Order 11246.

2. **Non-Discrimination:** The SPONSOR, with regard to the work performed during the term of this Agreement, shall not in any way discriminate: against any employee or applicant for employment; subcontractor or solicitations for subcontract including procurement of materials and equipment; or any other individual or firm providing or proposing services based on race, color, religion, sex, national origin, age or non-job-related handicap.

3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by bidding or negotiation, made by the SPONSOR for work or services performed under subcontract, including procurement of materials and equipment, each potential subcontractor or supplier shall be made aware, by the SPONSOR, of the obligations of this Agreement and to the Civil Rights Requirements based on race, color, religion, sex, national origin, age or non-job-related handicap.

4. **Information and Reports:** The SPONSOR shall provide all information and reports required by Regulations and/or Directives and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Idaho Transportation Department or the Federal Highway Administration. The SPONSOR will be required to retain all records for a period of three years.

5. **Sanctions for Non-Compliance:** In the event the SPONSOR is in non-compliance with the Civil Rights Provisions of this Agreement, the Idaho Transportation Department shall impose such sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:

- (a) Withholding of payments to the SPONSOR until it has achieved compliance and/or
- (b) Cancellation, termination or suspension of the contract, in whole or in part.

6. **Incorporation of the Provisions:** The SPONSOR shall physically include this Appendix in every subcontract of \$10,000 or more to include procurement of materials and leases of equipment unless exempt by Regulations, Orders, or Directives pursuant thereto. The SPONSOR shall take such action with respect to subcontractor or procurement as the Idaho Transportation Department or the Federal Highway Administration may direct as a means of enforcing the provisions, including sanctions for noncompliance, provided in event the SPONSOR becomes involved in, or is threatened with litigation with the subcontractors or suppliers as a result of such direction, the SPONSOR may request the STATE to enter into such litigation to protect the interest of the STATE, and in addition the SPONSOR may request the United States to enter into such litigation to protect the interest of the United States.

# Exhibit "C"

RESOLUTION NO. 2003-13

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF POCATELLO, A MUNICIPAL CORPORATION OF IDAHO, AUTHORIZING A "STATE/LOCAL AGREEMENT (CONSTRUCTION)" BETWEEN THE STATE OF IDAHO TRANSPORTATION DEPARTMENT AND THE CITY OF POCATELLO FOR CONSTRUCTION OF ROADWAY, INCLUDING CURB AND GUTTER, SIDEWALKS, AND DRAINAGE FOR POCATELLO CREEK ROAD, POCATELLO, IDAHO; PROVIDING THAT A COPY OF THIS RESOLUTION SHALL BE ATTACHED TO THE SAID AGREEMENT; PROVIDING THAT AN EXECUTED COPY OF THIS AGREEMENT AND RESOLUTION SHALL BE FURNISHED TO THE IDAHO TRANSPORTATION DEPARTMENT.

WHEREAS, the Idaho Transportation Department, hereafter called the State, has submitted an Agreement stating obligations of the State and the City of Pocatello, Idaho, for the Pocatello Creek Road construction project; and

WHEREAS, certain functions to be performed by the State involve the expenditure of funds as set forth in the Agreement; and

WHEREAS, the State can only pay for work associated with the State Highway System; and

WHEREAS, the City is fully responsible for its share of project costs;

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF POCATELLO AS FOLLOWS:

1. That the City hereby approves the execution of the agreement entitled STATE /LOCAL AGREEMENT (CONSTRUCTION) STP-7161 (100) for the Pocatello Creed Road roadway construction project.

2. That the City Clerk is hereby directed to verify that the Agreement is fully executed by the City of Pocatello and to ensure that the originals are returned to the State for execution.

3. That this Resolution be attached to the above Agreement and made a part thereof.

RESOLVED this 7<sup>th</sup> day of August, 2003.

CITY OF POCA TELLO, a municipal  
corporation of Idaho

  
\_\_\_\_\_  
ROGER W. CHASE, Mayor

ATTEST:

  
\_\_\_\_\_  
RHONDA L. JOHNSON, City Clerk

# EXHIBIT “D”

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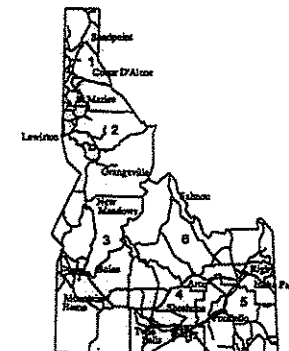
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INDEX OF SHEETS	
SHEET NO.	DESCRIPTION
	TITLE
	STANDARD DRAWING LIST
	TOTAL OWNERSHIP
	PROJECT CLEARANCE SUMMARY
	TYPICAL SECTIONS
12 - 15	ROADWAY PROFILE SUMMARY
16 - 31	PLANS & PROFILES
	BRIDGE STRUCTURES
32 - 38	DRAINAGE PLAN & PROFILE
39	SIGN PRECISION SHEET
40 - 43	SIGNING & PAVEMENT MARKING
44 - 53	TRAFFIC CONTROL PLAN
54 - 65	DETAIL SHEETS
66 - 70	PRIVATE PROPERTY DETAILS

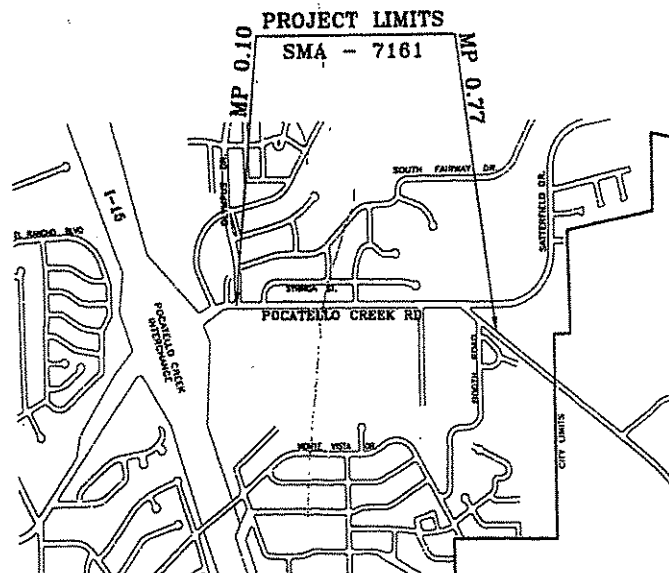
# IDAHO TRANSPORTATION DEPARTMENT

## POCATELLO CREEK ROAD, POCATELLO

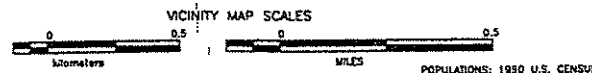
FEDERAL AID PROJECT NO. STP-7161(100)  
KEY NO. 5967  
BANNOCK COUNTY  
AUGUST 2004



STP-7161(100)  
POCATELLO CREEK ROAD, POCATELLO  
SEGMENT CODE 003180



SECTION 13, TOWNSHIP 6 SOUTH, RANGE 34 EAST B.M.



### DESIGN DESIGNATION

ADT	2200	2000
ADT	15800	2022
DHV	1160	2000
DHV	1820	2022
B		
V		60 km/h
TRUCKS:		
ADT	2%	2000
ADT	2%	2022
DHV	2%	2000
DHV	2%	2022

REVISIONS			
NO.	DATE	BY	DESCRIPTION

THE DIMENSIONS SHOWN ON THE PLANS SHALL BE ATTAINED WITHIN LIMITS OF PRECISION THAT GOOD CONSTRUCTION PRACTICES WILL PERMIT

SCALES SHOWN ARE FOR 279 x 432 mm PRINTS ONLY  
CADD FILE NAME  
5967/TITLE  
DRAWING DATE:  
7/03

**IDAHO  
TRANSPORTATION  
DEPARTMENT**

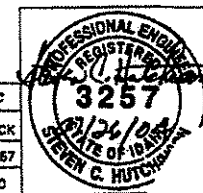


**DISTRICT FIVE**

FEDERAL AID PROJECT NO.  
STP-7161(100)

TITLE SHEET  
**POCATELLO CREEK ROAD  
POCATELLO**

**metric**  
COUNTY **BANNOCK**  
KEY NUMBER **5967**  
SHEET **1** OF **70**



110

# EXHIBIT "E"

3



APR 25 2006

DATE RECEIVED: \_\_\_\_\_  
RECEIVED BY: MM

# CLAIM FOR DAMAGE OR INJURY

(NOTE: It is a requirement that this form, if used, be presented to and filed with RHONDA L. JOHNSON, CITY CLERK, 911 N. 7TH, PO BOX 4169, POCATELLO ID 83205-4169. This form is being provided as a courtesy to assist you in filing your claim. Providing this form to you is not an admission nor shall it be construed to be an admission of liability or an acknowledgement of the validity of a claim by the City of Pocatello. Legal requirements for filing claims can be found in Title 6, Chapter 9, Idaho Code. All claims must be filed in writing within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered!)

Name: <u>Linda Brown</u>	Phone Number: (Home) <u>235-5226</u> (Work) <u>239-1380</u>
Current Address: <u>2300 Darrell Loop Pocatello, Idaho 83201</u>	
Address for the Six Months Immediately Prior to the Date the Damage or Injury Occurred: <u>same</u>	
Date Damage or Injury Occurred: <u>2/28/2006</u> Time: <u>1:00</u> A.M. or <u>(P.M.)</u>	
Location of Occurrence: <u>2300 Darrell Loop</u>	
Any Property Damage? If so, what type? <u>Flooding to basement &amp; backyard</u>	
Any Injuries? <u>no</u> If so, what type?	
Describe How Damage or Injury Occurred: <u>Since the repaving of Pocatello Creek Road, the drainage has been altered, and great amounts of water is now flowing into my backyard, which faces Pocatello Creek Road. A heavy rain on February 28, 2006 washed landscaping out and flowed into my basement</u>	
Witnesses: Name:	Address:
Phone:	
<u>see attached list</u>	

I hereby certify that I have read the above information and it is true and correct to the best of my knowledge.

I hereby make a claim against the City of Pocatello a public entity, for damage (damage or injury) in the amount of (if known) \$ 4962.62.

DATE: 4/25/06 SIGNATURE: Linda L. Brown

Lowell N. Hawkes (ISB #1852)  
 Ryan S. Lewis (ISB #6775)  
 LOWELL N. HAWKES, CHARTERED  
 1322 East Center  
 Pocatello, Idaho 83201  
 Telephone: (208) 235-1600  
 FAX: (208) 235-4200  
*Attorneys for Plaintiff*

FILED  
 BANNOCK COUNTY  
 CLERK OF DISTRICT COURT  
 2008 JUL -1 AM 11:29  
 BY *[Signature]*  
 DEPUTY CLERK

**IN THE SIXTH JUDICIAL DISTRICT COURT**  
**BANNOCK COUNTY, IDAHO**  
 The Honorable David C. Nye

LINDA BROWN; )  
 )  
                   *Plaintiff,* )  
 )  
 vs. )  
 )  
 CITY OF POCATELLO, a Municipal )  
 Corporation; )  
                   *Defendant.* )

Case No. CV-2007-3303-OC

**PLAINTIFF'S**  
**MOTION FOR PARTIAL**  
**SUMMARY JUDGMENT**  
 and  
**NOTICE OF HEARING**

Pursuant to Rule 56, *Idaho Rules of Civil Procedure*, Plaintiff Linda Brown moves this Court for its partial summary judgment against the Defendant City of Pocatello. This Motion is made on the grounds that there is no genuine issue of material fact that the acts and omissions of the City of Pocatello constitute a nuisance within the meaning of *Idaho Code* 52-101 et. seq. and constitutes an uncompensated taking in violation of the Idaho and United States Constitutions and 42 U.S.C. § 1983 and that Plaintiff is entitled to judgment against Defendant City as a matter of law.

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This Motion is supported by the record, and *Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment*, the *Affidavit of Counsel*, and *Affidavit of Linda Brown* filed contemporaneously with this Motion.

**NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT Plaintiff will call up for hearing Plaintiff's *Motion for Partial Summary Judgment* before The Honorable David C. Nye in his courtroom in the Bannock County Courthouse on July 28, 2008 at 9:00 a.m.

DATED this 30<sup>th</sup> day of June, 2008

LOWELL N. HAWKES, CHARTERED

  
\_\_\_\_\_  
RYAN S. LEWIS

**CERTIFICATE OF SERVICE**

I certify that on this 30<sup>th</sup> day of June, 2008 I faxed a copy of the foregoing to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490 Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254.

  
\_\_\_\_\_  
RYAN S. LEWIS

Lowell N. Hawkes (ISB #1852)  
 Ryan S. Lewis (ISB #6775)  
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**IN THE SIXTH JUDICIAL DISTRICT COURT  
 BANNOCK COUNTY, IDAHO**  
 The Honorable David C. Nye

LINDA BROWN; )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CITY OF POCATELLO, a Municipal )  
 Corporation; )  
 )  
 Defendant. )

Case No. CV-2007-3303-OC

**MEMORANDUM  
 SUPPORTING PLAINTIFF'S  
 MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

Plaintiff moves this Court for its Order granting partial summary judgment to the Plaintiff on the basis that there are no genuine issues of material fact regarding the nuisance and uncompensated taking in violation of the Idaho and United States Constitutions and 42 U.S.C. § 1983 of Defendant City of Pocatello as relates to Plaintiff's home located at 2300 Darryl Loop and abutted in the rear by Pocatello Creek Road.

*S*

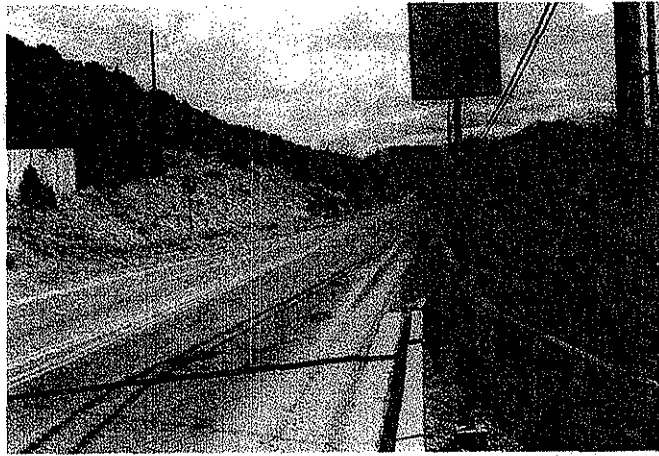
## **STATEMENT OF UNDISPUTED FACTS**

### **Plaintiff's Home Abutting Pocatello Creek Road**

Plaintiff has lived at 2300 Darrell Loop, Pocatello, Idaho, since April 15,

2001. **Linda Brown Deposition 4:25-5:7 (See Affidavit of Counsel, Exhibit A).**

Her back yard is adjacent to Pocatello Creek Road and is approximately half way between, the KOA Campgrounds “uphill” south of my home and ...



the Boy Scouts of America offices “downhill” north of my home.



**Affidavit of Linda Brown, ¶3.**

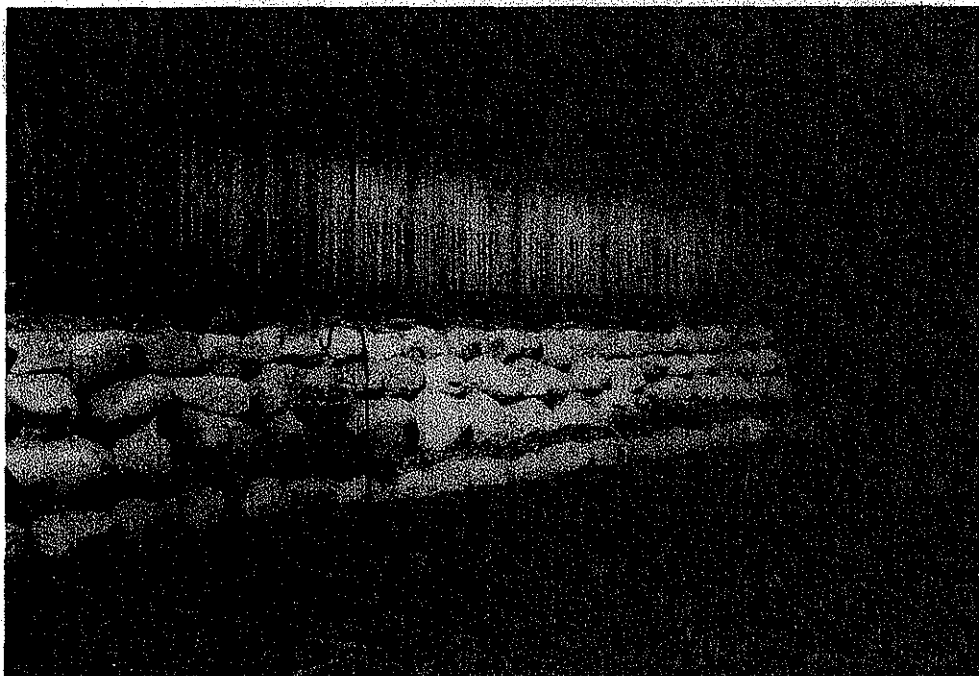
From June 2005 through August 2005 work on the Pocatello Creek Road was done which ended directly behind Plaintiff's home. **Linda Brown Deposition 62:21-63:9.**

The Defendant City of Pocatello negligently altered and reconstructed the Pocatello Creek Road roadway from its prior "water-safe" condition so as to create, among other things, a new roadway depression and water run-off pattern that had *not* previously existed was created and that did not damage adjacent private properties.

**Affidavit of Linda Brown, ¶4.**

Prior to this 2005 road construction, neither Plaintiff's home nor yard had been flooded from roadway water. **Linda Brown Deposition 12:12-19; 64:20-65:6.**

Her backyard had never flooded:



**Affidavit of Linda Brown, ¶5.**

**MEMORANDUM SUPPORTING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT — Page 3**

*Brown v. City of Pocatello*

### City Owns the Road At Issue

It is undisputed that the “portion of Pocatello Creek Road at issue is owned and maintained by the City of Pocatello.” **Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 1; Answer to Request for Admission No. 1 (See Affidavit of Counsel, Exhibit B, p. 2).**

### Flooding Until Post-Complaint Repair

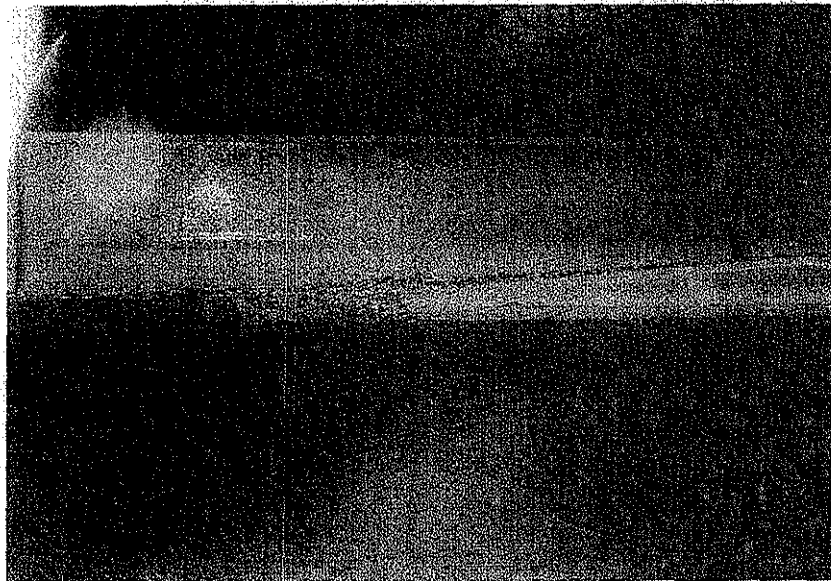
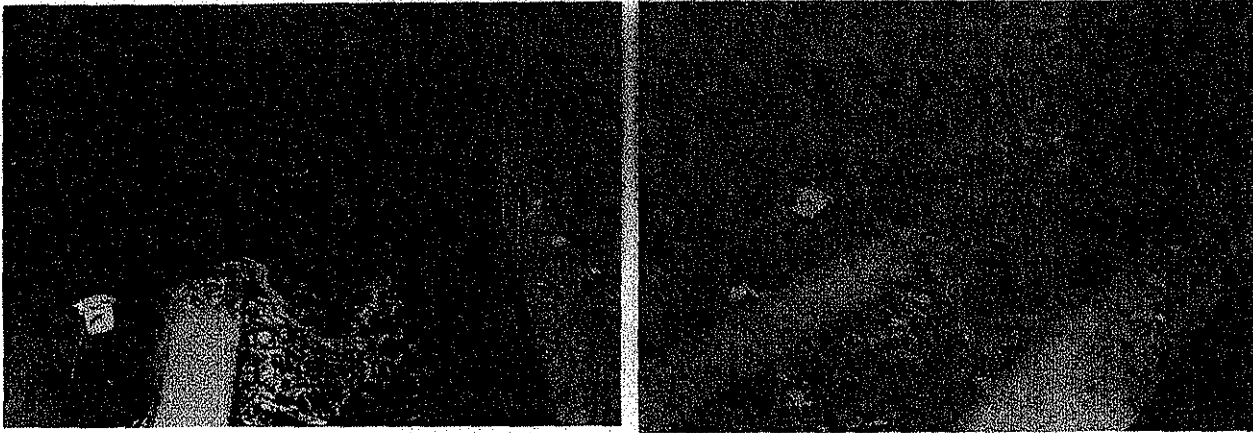
Following the 2005 Pocatello Creek Road construction, Plaintiff’s yard and home has been subjected to numerous, frequent and inevitable flooding occasions of flooding by water coming off of Pocatello Creek Road. **Affidavit of Linda Brown, ¶6.**

Ultimately — but only after this lawsuit was filed — did the City add an asphalt-to-cement barrier to keep roadway water on the road shoulders and stop the flooding from runoff into Mrs. Brown’s yard and home. **Affidavit of Linda Brown, ¶7.**

It is unknown how long this *make-do temporary* “fix” will last before eroding or wearing away (like prior attempted fixes) with the flooding repeated. **Affidavit of Linda Brown, ¶8.**

The project has a *partial* curb and gutter, but “The water will not run to that curb and gutter” it pools or stalls before it gets there. **Linda Brown Deposition 80:18-25.**

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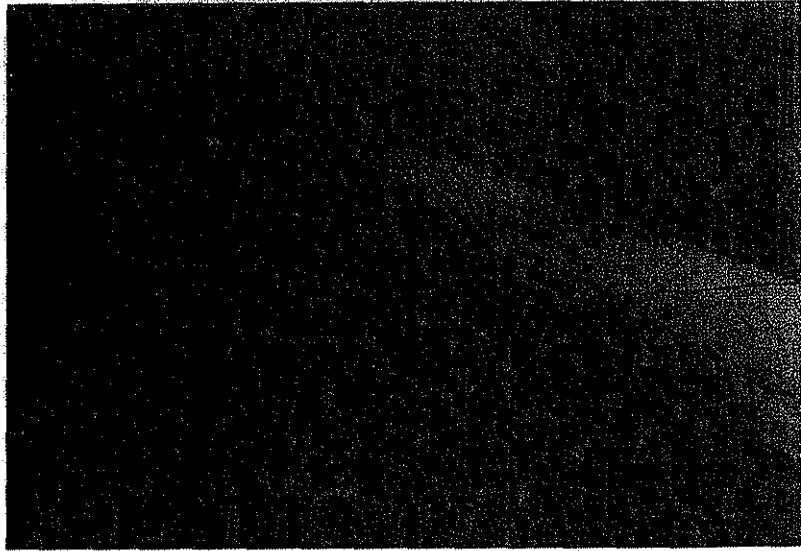
**Affidavit of Linda Brown, ¶9.**

The roadway as reconstructed in the summer of 2005 allowed roadway water to pool on and adjacent to the roadway as there was no adequate design or means to properly and safely divert water without it passing onto Plaintiff's property. **Linda**

**Brown Deposition 108:25-109:7:**

37





a gutter drain has been installed on the *east-uphill* side of the road but *not* on the west-downhill side of the road adjacent to her home *where it is needed*. **Linda Brown**

**Deposition 108:25-109:7; Affidavit of Linda Brown, ¶10.**

**Flood: February 28, 2006**

Plaintiff's home initially flooded February 28, 2006; when she came home from work at the PMC to find her "basement was entirely covered in water" from "three inches deep" to "a half inch deep." **Linda Brown Deposition 8:11-24; Affidavit of Linda Brown, ¶11.**

Plaintiff went in the back yard and saw that the "landscaping in the backyard had been eroded away and there was a lot of silt and dirt" washed from the upper garden area onto the lawn, and "the water had come across the lawn and into the house." **Linda Brown Deposition 10:9-15; Affidavit of Linda Brown, ¶11.**

It was evident that the "flooding on that February 28, 2006, flood" was caused by "the water" and "had come off from Pocatello Creek Road" based upon "the

way that the backyard was eroded.” **Linda Brown Deposition 12:12-16; Affidavit of Linda Brown, ¶11.** This flooding had never happened before (Linda Brown Deposition 12:17-19) and Plaintiff had lived there for nearly five years — since April 15, 2001. **Linda Brown Deposition 4:25-5:7.**

There was a debris-water line on the window which showed where the water level had been inside the window well and where “the water had come in through the back yard into the house.” **Linda Brown Deposition 9:12-16; Affidavit of Linda Brown, ¶11.**

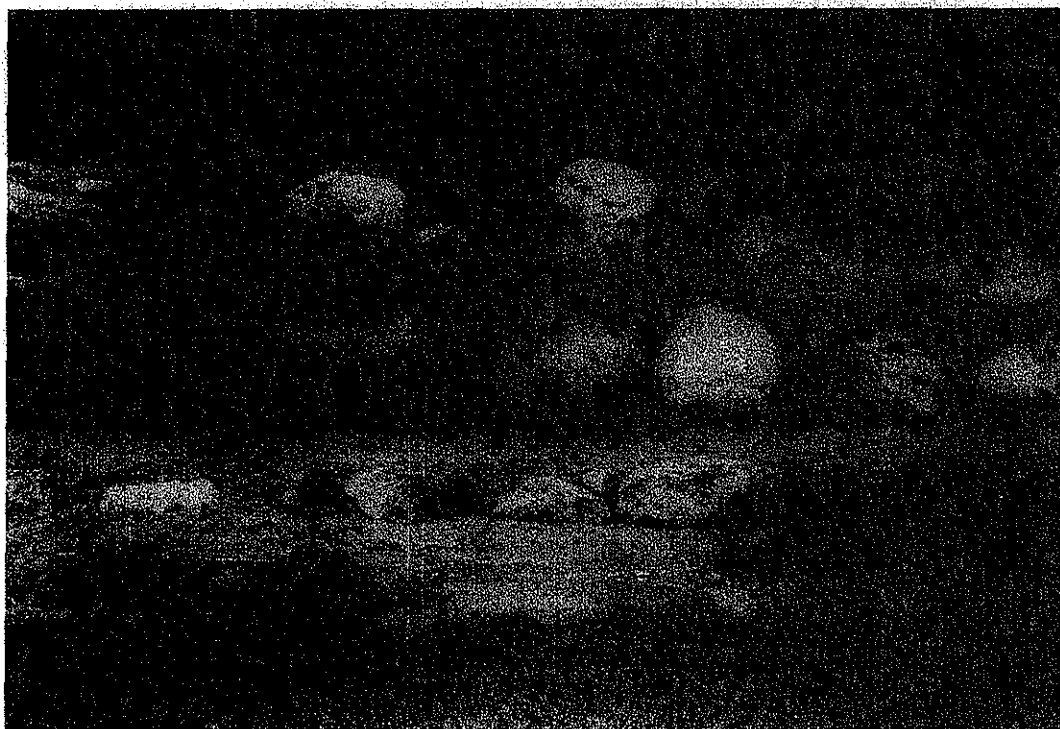
The roadway water flowed off Pocatello Creek Road and under Plaintiff’s back yard fence as seen by the hole in this photo:



carrying debris and soil and rock with it into Plaintiff's yard and across her yard ...



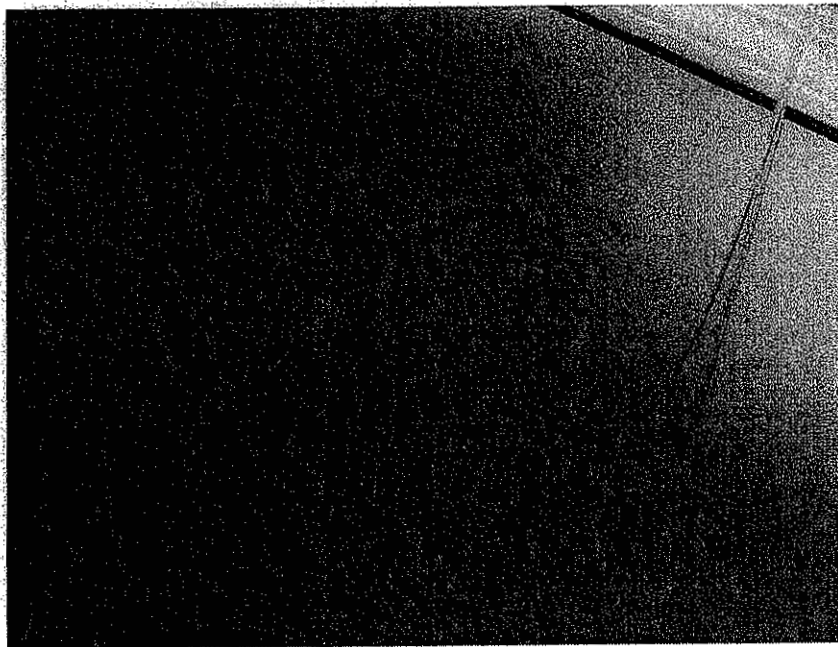
With water pouring under the fence as seen in this photo,



into her home through windows and...

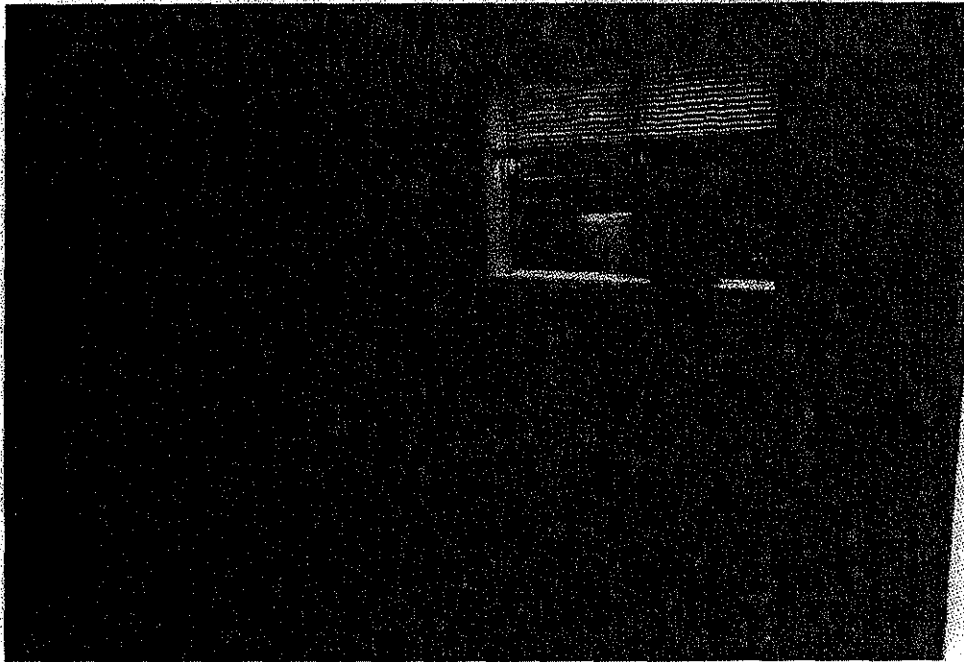


into and down my walls and...



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onto floors and under carpeting...



and into other rooms and under tile.



**Affidavit of Linda Brown, ¶13.**

**MEMORANDUM SUPPORTING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT — Page 10**

*Brown v. City of Pocatello*

This February 28, 2006 flood caused “water damage” in the “whole basement.” **Linda Brown Deposition 45:21-46:8.** The “water on the sheetrock” also evidenced the area and depth of flooding. **Linda Brown Deposition 9:12-14; Affidavit of Linda Brown, ¶12.**

Plaintiff contacted Service Master and

“They sent a team in with high-powered vacuums to suck up the water. All of the furniture, everything that was in the basement was moved up to the family room. All the carpets were pulled, the padding was destroyed, and the carpets were re-laid back down on the floor to dry to see if they could be salvaged. They brought in big fans and heating units to dry out the entire basement.” **Linda Brown Deposition 11:5-13.**



**Affidavit of Linda Brown, ¶15.**

Plaintiff had other contractors come in to respond to the damage. The “carpet was not salvageable in the bedroom so it was replaced by Rug Rat Floor

Covering.” **Linda Brown Deposition 11:16-21; Affidavit of Linda Brown, ¶15.** Plaintiff also “did a lot of repairs with the help of” her son at that time, including sheet rock replacement, “taking up the carpet” and some of the baseboards and some of the trim around the window.” **Linda Brown Deposition 12:1-6; Affidavit of Linda Brown, ¶15.** Plaintiff’s friend, Rod Silcock, “came in and helped with some of the trim work and some of the Perfataping and other items that needed to be repaired.” **Linda Brown Deposition 12:6-9; Affidavit of Linda Brown, ¶15.**

### Subsequent Frequent and Inevitable Flooding

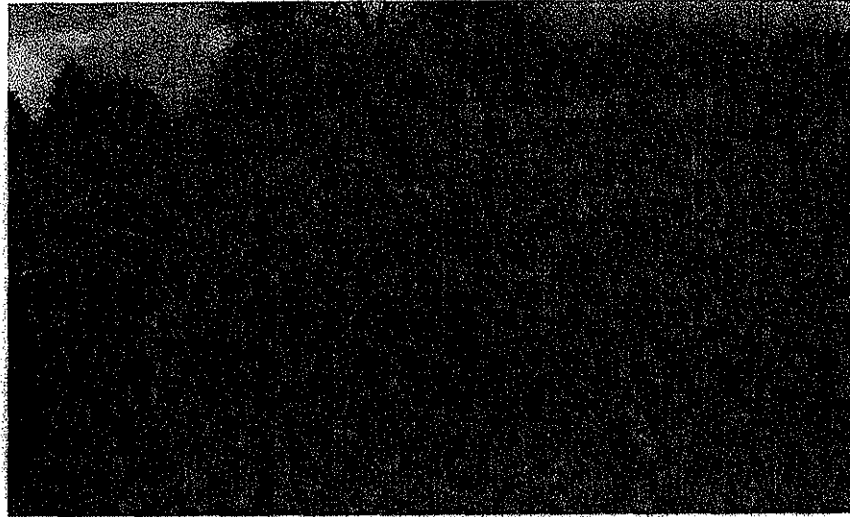
Since that first flood, I have experienced the frequent and inevitable flooding as set forth herein. **Affidavit of Linda Brown, ¶16.**

### Flood: April 16, 2006

On April 16, 2006, Plaintiff was at home during a storm when water off Pocatello Creek Road again began flooding her backyard and she “was able to observe where the water was coming from, which was off from Pocatello Creek Road.” **Linda Brown Deposition 12:20-13:1; Affidavit of Linda Brown, ¶17.**

Plaintiff “dug a trench” in her “lawn to divert the water away from” the “house” and was able to divert the water to protect against further damage. **Linda Brown Deposition 13:18; Affidavit of Linda Brown, ¶17.**

That trench is seen in this photo:



**Affidavit of Linda Brown, ¶17.**

Plaintiff contacted the City of Pocatello offices and was referred to “Cac Turner” and she told him that she “had been experiencing flooding from Pocatello Creek Road and that it was entering my yard and also my home.” **Linda Brown Deposition**

**13:19-14:14; Affidavit of Linda Brown, ¶18.**

**Drainage Problem Admitted**

Mr. Turner “said that he would go up and take a look at it” and contacted the Plaintiff and admitted “I can see that there is a problem and he sent a crew up and they put a small amount of gravel up on the road where it had initially come through the barrier.” **Linda Brown Deposition 14:5-14; Affidavit of Linda Brown, ¶18.**

**City on Notice**

Defendant admits that “April 17, 2006 was the first date that Defendant became aware of Plaintiff’s claim of water run off damages.” **Answer to Interrogatory**



**No. 6 (See Affidavit of Counsel, Exhibit C, p. 3).**

Plaintiff filed a “Claim for Damages or Injury” dated April 25, 2006 with the City of Pocatello, and reported the “Flooding to basement & backyard” and included photos and described the flooding since the Pocatello Creek Road work alterations.

**Affidavit of Linda Brown, ¶20, Exhibit A; (See also Affidavit of Lindell Turner, Exhibit E, evidencing receipt by Defendant).**

**Flood: October 4, 2006**

On October 4, 2006, during a rainstorm, Plaintiff was at home and “went upon the road and took photos and she “could see exactly why the water was entering my property” because the “new portion of the road was built too high and would not allow the proper drainage of water coming down Pocatello Creek Road into the city. *It stopped [pooled] right at my home.*”<sup>1</sup> **Linda Brown Deposition 15:18-16:1; Affidavit of Linda Brown, ¶21.**

While this caused additional “erosion” to Plaintiff’s “landscaping,” Plaintiff still had the “diversion ditch” in her yard and the flooding did not reach to her home. **Linda Brown Deposition 16:5-12; Affidavit of Linda Brown, ¶21.**

**Flood: December 27, 2006**

On December 27, 2006, there was another “rainstorm” and “The water flowed down Pocatello Creek Road into” Plaintiff’s “yard, across the lawn” and the trenches “filled in with dirt, silt, water, ice, and the water again came into the house.”

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<sup>1</sup> All *italics* and **bold** herein are added unless stated otherwise

**Linda Brown Deposition 16:24-17:4; Affidavit of Linda Brown, ¶22.**

Plaintiff again suffered damage to her home and again reported this to the City. **Linda Brown Deposition 17:5-9; Affidavit of Linda Brown, ¶22.**

Plaintiff's son met with City personnel at her home on February 2, 2007.

**Linda Brown Deposition 17:10-14; 20:21-23; Affidavit of Linda Brown, ¶23.**

Mr. Turner agreed "that there was a problem with the road" and Plaintiff was "asked to resubmit a new list of expenses at that time and resubmit the claim that had been previously denied" which she did. **Linda Brown Deposition 17:20-18:1; Affidavit of Linda Brown, ¶23.**

Plaintiff's "second round" of damages were "to the walls, specifically this time you could see the rust marks from the water near the mop boards. The carpet was again damaged. The tile in the bathroom had been damaged at this point in time." Soon after Plaintiff "began to see mold growing" around the window." **Linda Brown Deposition 18:2-11; Affidavit of Linda Brown, ¶24.**

The prior so-called fix was inadequate; Plaintiff continued to see water running down her "landscaping towards" her house "every time it rained." **Linda Brown Deposition 23:11-13; Affidavit of Linda Brown, ¶25.**

#### Sandbags Are Not a Solution

On February 5, 2007, The City of Pocatello placed sandbags on Pocatello Creek Road. **Answer to Interrogatory No. 7 (See Affidavit of Counsel, Exhibit C, p. 4, 9).**

After being placed on notice of the water run-off, the City of Pocatello “admits that sandbags were placed as a *temporary* remedy to water run-off.” **Answer to Request for Admission No. 6 (See Affidavit of Counsel, Exhibit B, p. 3).**

The City of Pocatello admits that “Defendant through its agents has previously acknowledged that the placement of sandbags on Pocatello Creek Road *was not intended to be nor is it an appropriate permanent remedy of the runoff water problem for the Pocatello Creek Road modification.*” **Answer to Request for Admission No. 9 (See Affidavit of Counsel, Exhibit B, p. 3).**

Rather than contain the water, the sandbags actually “spread the water out so” it dispersed throughout my yard.” **Linda Brown Deposition 25:9-12.**



The second picture shows the collection of silt and rocks on the sandbags evidencing the pooling of water. **Affidavit of Linda Brown, ¶28.**

**August 27, 2007 — Asphalt barrier prevents Flooding**

In August 2007, the City put “asphalt up against the [concrete] barrier along Pocatello Creek Road.” Plaintiff has not had “flooding since then,” or “water

getting into” her “landscaping,” or water getting into” her “basement.” **Linda Brown Deposition 24:2-11; Affidavit of Linda Brown, ¶29.**

Based upon Defendant’s records, this occurred August 20, 2007, or two weeks after service of the Complaint and First Discovery on August 6, 2007. **Answer to Interrogatory No. 9 (See Affidavit of Counsel, Exhibit B, p. 4, 10); Affidavit of Counsel, ¶3.**

It took the filing of this lawsuit to get the City to take proper action to contain its roadway run-off water. **Affidavit of Linda Brown, ¶30.**

#### **Permanent Fix???**

It is unknown if the asphalt placement is a “permanent” fix. Plaintiff continues to worry about flooding on her property and the City’s indifference to the problem it created. **Affidavit of Linda Brown, ¶31.**

#### **Plaintiff Suffers Damages From the Flooding**

Plaintiff has experienced significant damages and expenses to repair and remediate the City’s improper draining of run-off water onto my property. Among other repair and damages, I have had to repair and replace wall trim, window trim, sheetrock, taping, texturing, painting, insulation, floor molding, window molding, carpet, and tile. **Affidavit of Linda Brown, ¶32; Linda Brown Deposition 27:4-5; 28:4-6.**

#### **Clean-up Expense**

Initially, Plaintiff hired Service Master Cleaning and Restoration and their bill was \$2,940.10 and has incurred at least an additional \$283.70 in finances charges.

**Affidavit of Linda Brown, ¶33 and Exhibit B; Linda Brown Deposition 53:20-24.**

**Flooring Damages**

Plaintiff has incurred damages for expense to Rug Rat Floor Covering to repair carpet in the amounts of \$548.44 and \$1,830.19. Plaintiff has also incurred expense in the to-date amount of \$1,066.68 to repair damaged tile — a job not yet completed. **Affidavit of Linda Brown, ¶34 and Exhibit C; Linda Brown Deposition 55:23-24.**

**Basement Damage**

Plaintiff has incurred additional repair expenses for sheetrock, taping and texturing, insulation, painting, trim, and expenses for work done by Shawn Brown, in the amount of \$1,903.13, plus \$172.84. **Affidavit of Linda Brown, ¶35 and Exhibit D; Linda Brown Deposition 27:4-5; 28:4-6.** Plaintiff has also incurred \$224.08 in additional paint and supplies and items damaged from waters and moving. **Affidavit of Linda Brown, ¶35 and Exhibit A, pp. 5, 9-11.**

**Mold Abatement**

Plaintiff hired “John McCasland, Best Clean Care” a specialist in “mold abatement” who “determined that there was mold in the house, then came back and took care of the mold abatement.” **Affidavit of Linda Brown, ¶36 and Exhibit E; Linda Brown Deposition 42:4-9.** The bills for Best Clean Care are \$250 and \$6,633.25 which is less than the initial estimate of \$250 plus \$13,590.44.” **Affidavit of Linda Brown, ¶36 and Exhibit E; Linda Brown Deposition 50:20-23.**

### Mold Remediation Expert

Plaintiff was required to hire mold remediation experts including Bradley Harr and Mike Larango who prepared a pre- and post-remediation mold report which cost \$3,322.58. **Affidavit of Linda Brown, ¶37 and Exhibit F.**

### Molded Window

Plaintiff incurred \$654.04 in damages to replace the bedroom window which had molded after the flooding. **Affidavit of Linda Brown, ¶38 and Exhibit G.**

### Remaining Landscaping Damage

The damage to Plaintiff's yard has not been repaired, but a bid for \$5,457.00 was provided by from "Edged in Stone" to make the landscaping repairs necessary to repair the damage. The initial landscaping damage is significantly higher than originally because of the City's failure to repair the improper water discharge after Plaintiff's first notice and continued damage. **Affidavit of Linda Brown, ¶39 and Exhibit H.**

Plaintiff has suffered additional damages including the damage to the value of her home caused by the flooding and mold, and loss of use of the lower portion of her home for the three months of February into May 2006, and eleven months from December 2006 through November 2007. **Affidavit of Linda Brown, ¶40.** The value of this will be a jury question.

## **STANDARD OF REVIEW**

Summary judgment shall be rendered “if the pleadings , depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” **Rule 56(c), Idaho Rules of Civil Procedure.** If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. ***Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).***

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. ***Tingley, 125 Idaho at 90, 867 P.2d at 964.*** Summary judgment is proper in favor of the moving party when the non-moving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. ***Badell v. Beeks, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).***

The Pocatello Creek Road changes resulted in a “nuisance” by definition:

Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to *interfere with the comfortable enjoyment of life or property, is a nuisance* and the subject of an action. In the case of a moral nuisance, the action may be brought by any resident citizen of the county; in all other cases the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

— ***Idaho Code § 52-111.***

## **ARGUMENT**

### **POINT ONE**

#### **POCATELLO CREEK ROAD CONSTITUTES A NUISANCE**

Defendant City has denied that it breached a duty to Plaintiff by this Pocatello Creek Road nuisance. **Answer to Request for Admission No. 14 (See Affidavit of Counsel, Exhibit B, p. 5).**

However, it is undisputed that the “portion of Pocatello Creek Road at issue is owned and maintained by the City of Pocatello.” **Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 1; Answer to Request for Admission No. 1 (See Affidavit of Counsel, Exhibit B, p. 2).**

#### **The Pocatello Creek Road Water Run-off Is a Nuisance**

A nuisance is:

Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an *obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property*, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

— **Idaho Code § 52-101**

The Supreme Court has set forth the law that the City is not allowed to expand and improve, draining water where it did not drain previously:

This court adheres to the civil law rule (as opposed to the common enemy rule. Annot. 59 A.L.R.2d 421 [1958]) which recognizes HN1a natural servitude of natural drainage

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between adjoining lands so that the lower owner must accept the "surface" water which naturally drains onto his land. *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945). However, in *Teeter v. Nampa and Meridian Irrigation Dist.*, 19 Idaho 355, 114 P. 8 (1911), it was held that waters could not be artificially accumulated and then cast upon lower lands in unnatural concentrations.

Before the expansion of the City of Burley into the area where it constructed the system of curbs and gutters and storm drains, the surface waters from rain and melting snow percolated into this ground and there was no flow of this water. Upon the expansion of the city into this new area the ability of the land to absorb this surface water was lost; and the city to remove the surface water constructed the curbs, gutters and storm drain sewers, [\*104] [\*\*1076] effectively concentrating into a small area the accumulated surface water. In *Levene v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951), the Supreme Court of Oregon held [\*\*\*7] that a city has no right to artificially collect drain water from a drain system and cast them upon the lands of another in unnatural volumes even though they were turning the waters so collected into a watercourse. This same principal was discussed by this court in *Teeter v. Nampa and Meridian Irrigation Dist.*, supra.

— *Dayley v. Burley*, 96 Idaho 101, 103-104, 524 P.2d 1073 (1974).

It cannot be disputed by the Defendant that the flooding of Mrs. Brown's home from the Pocatello Creek Road water run-off has obstructed Plaintiff's "free use of property, so as to interfere with the comfortable enjoyment of life or property." *Idaho Code § 52-101*. Nor that these road "improvements" caused *new* waters in unnatural volumes onto Plaintiff's property.

It is uncontroverted that water that flooded Plaintiff's property was from Pocatello Creek Road. City Engineer Turner readily acknowledged after inspection that "I can see that there is a problem and he sent a crew up and they put a small amount of

gravel up on the road where it had initially come through the barrier.” **Linda Brown**

**Deposition 14:5-14.**

One result of that inspection was on February 5, 2007, The City of Pocatello placed sandbags on Pocatello Creek Road. **Answer to Interrogatory No. 7 (See Affidavit of Counsel, Exhibit C, p. 4, 9).**

**Inadequate Remedy Admitted**

The City “admits that sandbags were placed as a *temporary* remedy to water run-off.” **Answer to Request for Admission No. 6 (See Affidavit of Counsel, Exhibit B, p. 3).** The City further admits that “Defendant through its agents has previously acknowledged that the placement of sandbags on Pocatello Creek Road *was not intended to be nor is it an appropriate permanent remedy of the runoff water problem for the Pocatello Creek Road modification.*” **Answer to Request for Admission No. 9 (See Affidavit of Counsel, Exhibit B, p. 3).**

Thus, the City was well aware of the “nuisance” and improper drainage and only took *temporary* measures to remedy the nuisance. The City then ignored any further *non-temporary* remedy. It was not until after this lawsuit was filed that the City actually placed asphalt.

It cannot be disputed that this flooding from the City’s road is an actionable nuisance and the “*obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property*” of Plaintiff’s property in violation of *Idaho Code § 52-101.*

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## **POINT TWO**

### **PLAINTIFF IS ENTITLED TO AN ORDER OF ABATEMENT, INJUNCTIVE RELIEF AND DAMAGES**

“Concerning an award of damages for the nuisance, the ‘right of recovery depends upon the existence of the nuisance . . . the ascertainment of damages depends upon the extent of the injury.’ *Conley v. Amalgamated Sugar Co.*, 74 Idaho 416, 424, 263 P.2d 705, 709 (1953). For an award of general damages, *discomfort, annoyance and inconvenience* sustained by the plaintiff are appropriate elements of a damages award in an action for nuisance.” *Benninger v. Derifield*, 142 Idaho 486, 491, 129 P.3d 1235 (2006).

As set forth by *Conley* and *Benninger*, Plaintiff is entitled to the damages set forth above. Further damages will be presented at the trial, including but not limited to general damages.

“Damages may be recovered along with an injunction or abatement.”

*Payne v. Skaar*, 127 Idaho 341, 345, 900 P.2d 1352 (1995). See also, *Idaho Code* § 52-301. Plaintiff is also entitled to an Order of Abatement and an injunction against further encroachment.

Abatement is allowed by statute, and allows:

A person injured by a private nuisance may abate it *by removing, or, if necessary, destroying, the thing which constitutes the nuisance*, without committing a breach of the peace, or doing unnecessary injury.

— *Idaho Code* § 52-302

Defendant admittedly did not make any “permanent” repair prior to filing this lawsuit and did so *only* in the face of litigation.

The Supreme Court affirmed the trial court in *Dayley v. Burley*, 96 Idaho 101, 103, 524 P.2d 1073 (1974) that:

The “city had no right to discharge waters into the remnants of the Goose Creek channel which crossed the plaintiffs' lands or to construct storm sewers which would discharge waters and encroach on the plaintiffs' properties.”

— *Dayley v. Burley*, 96 Idaho 101, 103, 524 P.2d 1073 (1974)

Plaintiff requests this Court’s Order enjoining the City from wrongfully casting water on Plaintiff’s property *and* an Order of Abatement specifically allowing that in the event of future violations, Plaintiff may abate the nuisance and seek damages for that abatement from the Defendant.

### **POINT THREE**

## **DEFENDANT HAS WRONGLY TAKEN PLAINTIFF’S PROPERTY**

### **Federal and State Constitution**

The United States Constitution prohibits the taking of “private property... for public use, *without just compensation*.” **U.S. Constitution, Amendment V (Takings Clause).**

The Idaho Constitution states: “Private property may be taken for public use, but not *until a just compensation*, to be ascertained in the manner prescribed by law, shall be paid therefor.” **Idaho Const. Art. I, § 14 (2008).**

42 U.S.C. § 1983 states, “*Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution* and laws, *shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

“42 U.S.C. § 1983 creates a remedy for violations of federal rights committed by persons acting under color of state law. State courts as well as federal courts have jurisdiction over § 1983 cases.” *Howlett v. Rose*, 496 U.S. 356, 358 (U.S. 1990).

Violation of a person's constitutional rights “would serve as a basis for a § 1983 claim.” *Accredited Home Lenders, Inc. v. City of Seattle*, 2007 U.S. Dist. LEXIS 48135 (W.D. Wash. July 2, 2007)

**Plaintiff Entitled to Bring Inverse Condemnation Action**

“An inverse condemnation action, such as the one before us, is ‘instituted by a property owner who asserts that his property, or some interest therein, has been

invaded or appropriated to the extent of a taking, but without due process of law, without payment of just compensation.’ *Rueth v. State*, 100 Idaho 203, 217, 596 P.2d 75, 89 (1978).” ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Idaho Ct. App. 1993).**

“Where the United States does not acquire privately owned land statutorily but instead physically enters into possession or institutes regulations that restrict the land’s use, the owner has a right to bring an ‘inverse condemnation’ action to recover the value of the land. *Kirby Forest*, 467 U.S. at 4-5. “Such a suit is ‘inverse’ because it is brought by the affected owner, not by the condemnor. The owner’s right to bring such a suit derives from the *self-executing character of the constitutional provision* with respect to condemnation.” *Kirby Forest* at 5, n.6” ***United States v. 191.07 Acres of Land*, 482 F.3d 1132, 1136 (9th Cir. Alaska 2007).**

The U.S. Supreme Court has ruled that compensation for property taken is “guaranteed by the Constitution”:

“The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.” *Id.*, at 16. (Emphasis added.) ***First English Evangelical Lutheran***

***Church v. County of Los Angeles*, 482 U.S. 304, 315 (U.S. 1987)(quoting *Jacobs v. United States*, 290 U.S. 13 (1933)).**

**Plaintiff Is Entitled to Compensation for the Defendant's Unlawful Taking**

Defendant's conduct amounts to taking of Plaintiff's property.

"The United States Supreme Court has held that landowners are entitled to bring actions in inverse condemnation by virtue of the Fifth Amendment's guarantee of just compensation for the taking of private property." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987). ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Ct. App. 1993)**

The Idaho Supreme Court has ruled:

"Constitutional jurisprudence has extended this protection for property owners and, in addition to an outright taking, ***governmental interference with an owner's use or enjoyment*** of his private property may also require compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 2892-93, 120 L. Ed. 2d 798 (1992). As Justice Holmes opined, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922). If a regulation of private property that amounts to a taking is later invalidated, this action converts the **taking to a "temporary"** one for which the government must pay the landowner for the value of the use of the land during that period. *First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304, 319, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987)." ***McCuskey v. Canyon County Comm'Rs*, 128 Idaho 213, 215-216, 912 P.2d 100 (1996)**

**The Issue of a "Taking" Is for This Court With Damages for the Jury**

"Whether a taking has occurred in a particular case is ultimately a question

of law. *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.” ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Ct. App. 1993).**

“It is for the court to determine whether a taking occurred, the nature of the property interest taken, and when the taking occurred. Once the trial court has made these findings, the extent of the damages and the measure thereof become questions for the jury. *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004. Our Supreme Court has stated that it is desirable that the trial court enter findings and conclusions pertinent to all issues other than just compensation.” *Rueth*, 100 Idaho at 222-23, 596 P.2d at 94-95. ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Ct. App. 1993).**

“Where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” ***First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (U.S. 1987)**

### Frequent Flooding

The frequency and continued flooding of the Plaintiff's property cannot be questioned. Defendant cannot escape its Constitutional violations by a post-filing attempted remediation of Pocatello Creek Road.



## **POINT FOUR**

### **PLAINTIFF'S DAMAGES**

Plaintiff's damages are as follows:

Service Master Cleaning and Restoration	\$3,223.80	<b>Affidavit of Linda Brown, ¶ 33, Exhibit B</b>
Rug Rat Floor Covering	\$3,445.31	<b>Affidavit of Linda Brown, ¶ 34, Exhibit C</b>
Basement Repair	\$2,300.05	<b>Affidavit of Linda Brown, ¶ 35, Exhibit A, D</b>
Best Clean Care	\$6,883.25	<b>Affidavit of Linda Brown, ¶ 36, Exhibit E</b>
Summit Environmental	\$3,322.58	<b>Affidavit of Linda Brown, ¶ 37, Exhibit F</b>
John's Paint & Glass	\$654.04	<b>Affidavit of Linda Brown, ¶ 38, Exhibit G</b>
Edged in Stone	\$5,457.00	<b>Affidavit of Linda Brown, ¶ 39, Exhibit H</b>
<b>TOTAL</b>	<b>\$25,286.03</b>	


Plaintiff has suffered additional damages including the damage to the value of her home caused by the flooding and mold, and loss of use of the lower portion of her home for the three months of February into May 2006, and eleven months from December 2006 through November 2007. **Affidavit of Linda Brown, ¶40.** The value of this will be a jury question.

### **CONCLUSION**

Plaintiff respectfully requests this Court's Order granting summary judgment to Plaintiff on the basis that Defendant's conduct constitutes a nuisance to Plaintiff as set forth herein and a violation of the Fifth Amendment of the United States Constitution, the Idaho Constitutional Art. I, § 14 (2008), and 42 U.S.C. § 1983.

Further that Plaintiff is entitled to an order enjoining any further nuisance and an order of abatement, and that there is no genuine issue of material fact as to the foregoing damages, with remaining damage regarding loss of use, diminution in value and general damages reserved for trial.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
RYAN S. LEWIS

**CERTIFICATE OF SERVICE**

I certify that on this 30<sup>th</sup> day of June, 2008 I faxed and mailed a copy of the foregoing to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490 Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254.

  
\_\_\_\_\_  
RYAN S. LEWIS

Lowell N. Hawkes (ISB #1852)  
 Ryan S. Lewis (ISB #6775)  
 LOWELL N. HAWKES, CHARTERED  
 1322 East Center  
 Pocatello, Idaho 83201  
 Telephone: (208) 235-1600  
 FAX: (208) 235-4200  
 Attorneys for Plaintiff

FILED  
 BANNOCK COUNTY  
 CLERK OF DISTRICT COURT  
 2008 JUL -1 AM 11:34  
 BY NW  
 DEPUTY CLERK

**IN THE SIXTH JUDICIAL DISTRICT COURT**  
**BANNOCK COUNTY, IDAHO**  
 The Honorable David C. Nye

LINDA BROWN;

*Plaintiff,*

vs.

CITY OF POCATELLO, a Municipal  
 Corporation;

*Defendant.*

Case No. CV-2007-3303-OC

**AFFIDAVIT OF  
 COUNSEL**

STATE OF IDAHO )  
 : ss  
 BANNOCK COUNTY )

RYAN S. LEWIS, being first duly sworn states as follows:

1. I am one of counsel for the Plaintiff herein and make this affidavit on personal and professional knowledge and in support of Plaintiff's Motion for Summary Judgment.
2. The *Complaint* was filed, August 3, 2007.

5


3. On August 6, 2007 I personally served the Complaint and First Discovery on Defendant.

4. On December 13, 2007 Defendant took to the Deposition of Plaintiff Linda Brown. Attached hereto as Exhibit A is a true and correct copy of the Deposition of Linda Brown.

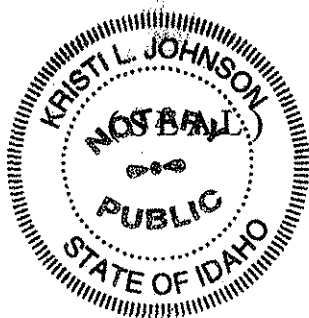
5. Attached here to as Exhibit B is a true and correct copy of Defendant's Answers to Plaintiffs First Request for Admissions to Defendant received on September 5, 2007.


6. Attached hereto as Exhibit C is a true and correct copy of Defendant's Answers to Plaintiffs First Discovery to Defendant received September 25, 2007.

DATED this 30<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
RYAN S. LEWIS

SUBSCRIBED AND SWORN TO before me this 30<sup>th</sup> day of June, 2008.



  
\_\_\_\_\_  
NOTARY PUBLIC for Idaho  
Residing at Pocatello  
My Commission Expires 4-21-2009

5

# **Exhibit A**

DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. CV-07-3303-OC
	)	
CITY OF POCA TELLO, a Municipal	)	
Corporation,	)	
	)	
Defendant.	)	

COPY

ORAL DEPOSITION OF LINDA K. BROWN  
Taken on December 13, 2007

APPEARANCES:

For the Plaintiff:	LOWELL N. HAWKES Lowell N. Hawkes, Chartered Attorney at Law 1322 East Center Pocatello Idaho
--------------------	---

For the Defendant:	SAM L. ANGELL Anderson Nelson Hall Smith Attorneys at Law P. O. Box 51630 Idaho Falls Idaho
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1 BE IT REMEMBERED that on the 13th day of  
 2 December, 2007, at the hour of 9:07 a.m. the deposition  
 3 of LINDA K. BROWN, produced as a witness at the instance  
 4 of the defendant in the above-entitled action now pending  
 5 in the above-named court, was taken before Paul D.  
 6 Buchanan, CSR #7, and notary public, State of Idaho, in  
 7 the law offices of Lowell N. Hawkes, 1322 East Center,  
 8 Pocatello, Bannock County, Idaho.

9  
 10 WHEREUPON, the following proceedings were had:

11  
 12 MR. ANGELL: Let the record reflect that this  
 13 is the time and place set for the deposition of Linda  
 14 Brown, plaintiff in this matter. My name is Sam Angell,  
 15 I work with Blake Hall's office. I am an attorney for  
 16 the defendant, City of Pocatello. Ms. Brown is here  
 17 today with her attorney, Mr. Hawkes. This deposition is  
 18 being taken pursuant to notice and the Idaho Rules of  
 19 Civil Procedure.

20  
 21 LINDA K. BROWN,  
 22 called at the instance of the defendant, having been  
 23 first duly sworn, was examined and testified as follows:

1 EXAMINATION  
 2 BY MR. ANGELL:  
 3 Q. A couple of preliminary things before we  
 4 start, Mrs. Brown, have you ever had your deposition  
 5 taken before?  
 6 A. No.  
 7 Q. Let me explain the process briefly. Your  
 8 attorney probably has, but we have a court reporter here,  
 9 Mr. Buchanan, who will take down everything that we say,  
 10 so it's important that we speak clearly and not over the  
 11 top of one another so that he can get everything down. I  
 12 will ask you a series of questions. My questions are  
 13 meant to find out information from you. I am not trying  
 14 to trick you, so if a question doesn't make sense, just  
 15 have me reword it and let me know and I'll restate that.  
 16 If you answer one of my questions, I will  
 17 assume that you understood the question. And then I  
 18 guess the last thing, when you answer questions, don't  
 19 use uh-huh or huh-huh, I'll try to remind you. That  
 20 doesn't come through real good on the transcript, so  
 21 yeses and noes are better.  
 22 Could you state your full name?  
 23 A. Linda Kay Wilcox Brown.  
 24 Q. What is your address?  
 25 A. 2300 Darrell Loop, Pocatello.

1 Q. Let me get some background information from  
 2 you. Are you married?  
 3 A. No.  
 4 Q. Do you have kids that live at home?  
 5 A. No.  
 6 Q. How long have you lived at that address?  
 7 A. I have lived there since April 15 of 2001.  
 8 Q. Where did you live before then?  
 9 A. In Inkom.  
 10 Q. How long had you lived in Inkom?  
 11 A. For 27 years.  
 12 Q. Why did you move to that address?  
 13 A. At the time of my divorce I was unable to keep  
 14 the home in Inkom and moved to Pocatello.  
 15 Q. What is your education history?  
 16 A. I have an associates degree.  
 17 Q. How about employment, are you employed?  
 18 A. Yes, I am.  
 19 Q. What did you do for a living?  
 20 A. I am a certified pharmacy technician.  
 21 Q. Do you work here in Pocatello?  
 22 A. Yes, I do.  
 23 Q. About how much do you make a year?  
 24 A. Between 30 and \$33,000.  
 25 Q. When you moved into that home on 2300 Darrell

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1 Loop, do you remember who you bought the home from?  
2 A. The last name I believe was Hall.  
3 Q. Would you have any way of getting in touch  
4 with those people today?  
5 A. Not that I know of.  
6 Q. You don't know where they moved to?  
7 A. No.  
8 Q. Do you know how old this home is when it was  
9 built?  
10 A. It was built approximately between 1975 and  
11 1977.  
12 Q. Do you know how many people have lived in it,  
13 do you know if the people you bought it from were the  
14 original homeowners?  
15 A. I do not know.  
16 Q. What about the basement in this home, was it  
17 finished when you bought it?  
18 A. Yes, it was.  
19 Q. Do you know when the basement was finished?  
20 Was it finished at the same time the house was built or  
21 was it finished later on?  
22 A. I assume that it was built at the same time  
23 because the carpeting was very old.  
24 Q. And the walls and trim looked like they  
25 matched the upstairs?

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1 A. Exactly.  
2 Q. Have you made any improvements to the home  
3 since you have lived there?  
4 A. Yes, I have put in new windows.  
5 Q. Upstairs and down?  
6 A. Yes, throughout the house. I have a new door,  
7 entry door from the garage into the house. I have put  
8 insulation in the home. I have repainted several of the  
9 rooms and recarpeted the dining room.  
10 Q. When you say repainted, did you also repaint  
11 the basement?  
12 A. No.  
13 Q. Let me ask that question again and I will  
14 focus specifically on the basement. What have you done  
15 down in the basement since you moved in as far as repairs  
16 or improvements?  
17 A. Nothing had been done until it was flooded.  
18 Q. Have you ever filed any claims against the  
19 City of Pocatello before?  
20 A. No.  
21 Q. I am going to go through your response to our  
22 discovery questions, which was that set of questions we  
23 sent to you to answer.  
24 A. Okay.  
25 Q. So I might refer back to that occasionally. I

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1 don't know if your attorney might have a copy of that  
2 laying around that you could look at, I don't have an  
3 extra copy.  
4 MR. HAWKES: You didn't bring your copy, did  
5 you, Linda?  
6 THE WITNESS: I did.  
7 Q. In response to our Interrogatory No. 7 --  
8 MR. HAWKES: Give us a page number, if you  
9 can, Sam.  
10 MR. ANGELL: Page 14.  
11 Q. The question was generally about the water  
12 damage that you sustained, and then you gave some dates,  
13 and I want you to start with the first one, which I  
14 believe you state initial flooding was on February 28,  
15 2006. Tell me what happened there, describe for each  
16 date we are going to go through and do that.  
17 A. February 28 about 1:00 there was a very heavy  
18 rainstorm. I ended up working late that day but when I  
19 got home it was a couple of hours before I went  
20 downstairs and my basement was entirely covered in water.  
21 Q. How deep?  
22 A. In the bedroom where the water had come in, it  
23 was approximately three inches deep. In other areas it  
24 was approximately a half inch deep.  
25 Q. What time of day would that have been?

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1 A. That was about 6:30 in the evening.  
2 Q. When you say it had been raining, it had  
3 rained pretty hard all day?  
4 A. It had rained very hard around the time that I  
5 had taken lunch at work, which is around 1:00. And I  
6 work in the basement, so then I don't know what time the  
7 rain had stopped.  
8 Q. It was on February 28. Do you happen to  
9 remember what the snow level was like around here, was  
10 there snow that day?  
11 A. There was no snow.  
12 Q. And when you got home, did you know what the  
13 flooding was from?  
14 A. I could tell by the water on the sheet rock  
15 and the high water mark on the window well that the water  
16 had come in through the back yard into the house.  
17 Q. What do you mean by high water mark on the  
18 window well?  
19 A. There was a line on the window where the water  
20 had been up to and you could tell.  
21 Q. You say high water mark. It makes me think  
22 there is a lower water mark on that window. Had there  
23 been water on that window before?  
24 A. No.  
25 Q. So you just saw a line across the window?



Page 10

- 1 A. Exactly.  
2 Q. Was there still water standing in the window  
3 well?  
4 A. A small amount, yes.  
5 Q. But it wasn't up into the window area?  
6 A. Not at that time.  
7 Q. Was it still raining when you got home?  
8 A. No.  
9 Q. Did you go out in the back yard to look at it?  
10 A. Yes.  
11 Q. What did you see?  
12 A. That my landscaping in the back yard had been  
13 eroded away and there was a lot of silt and dirt on my  
14 lawn, and that the water had come across the lawn and  
15 into the house.  
16 Q. So what did you do at that point?  
17 A. I called my insurance company to see if I had  
18 insurance coverage.  
19 Q. Do you?  
20 A. No.  
21 Q. Then what did you do?  
22 A. Then I asked my insurance agent if he knew of  
23 anyone that could help with the cleanup, and he  
24 recommended a company to come in.  
25 Q. And who was that?

Page 11

- 1 A. It was ServiceMaster.  
2 Q. What was your insurance company that you  
3 called?  
4 A. Allstate.  
5 Q. What did ServiceMaster do?  
6 A. They sent a team in with high-powered vacuums  
7 to suck up the water. All of the furniture, everything  
8 that was in the basement was moved up to the family room.  
9 All the carpets were pulled, the padding was destroyed,  
10 and the carpets were re-laid back down on the floor to  
11 dry to see if they could be salvaged. They brought in  
12 big fans and heating units to dry out the entire  
13 basement.  
14 Q. Did you report that claim to anybody else?  
15 A. Not at that time.  
16 Q. Did you have any other people come in to work  
17 on your home after that February 28 flood?  
18 A. Yes.  
19 Q. Do you remember who they were?  
20 A. Yes, the carpet was not salvageable in the  
21 bedroom so it was replaced by Rug Rat Floor Covering.  
22 Q. Do you recall anybody else that came in and  
23 worked after that flooding?  
24 A. I did a lot of repairs with the help of my son  
25 at that time.

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- 1 Q. What other repairs needed to be done?  
2 A. Sheet rock needed to be replaced where it had  
3 run in through the window well. In the course of taking  
4 up the carpet, they had also taken up some of the  
5 baseboards and some of the trim around the window and  
6 that needed to be replaced. I had a friend, Rod Silcock,  
7 who also came in and helped with some of the trim work  
8 and some of the Perfa-taping and other items that needed  
9 to be repaired.  
10 Q. Anybody else?  
11 A. No.  
12 Q. Were you able to make a determination of what  
13 caused the flooding on that February 28, 2006, flood?  
14 A. I could tell from the way that the back yard  
15 was eroded that the water had come off from Pocatello  
16 Creek Road.  
17 Q. And had that ever happened before in your  
18 yard?  
19 A. No.  
20 Q. What about the April 16, 2006, rain,  
21 apparently there was some flooding then, can you describe  
22 what happened that time?  
23 A. Yes. I had another rainstorm at that time, it  
24 was on a Sunday. I happened to be home, so I was able to  
25 observe where the water was coming from, which was off

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- 1 from Pocatello Creek Road. I had gone out, dug a trench  
2 in my lawn to divert the water away from my house. And  
3 the photos that are in the original claim to the City of  
4 Pocatello are included in that.  
5 Q. Did you dig the trench on April 16 to divert  
6 the water?  
7 A. Yes.  
8 Q. When it started raining, you went out and did  
9 it?  
10 A. Yes.  
11 Q. Did that help?  
12 A. Yes.  
13 Q. Did the water get into your basement on that  
14 day?  
15 A. No, it did not.  
16 Q. So there was no damage to your home from that  
17 day, you were able to divert that one.  
18 A. That is correct.  
19 Q. Did you report that claim to anybody?  
20 A. Yes.  
21 Q. Who?  
22 A. The City of Pocatello.  
23 Q. Who did you talk to, do you remember?  
24 A. I called the city offices, asked who I would  
25 talk to. They put me in touch with Cac Turner.

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1 Q. What was your report to him?  
2 A. I told him that I had been experiencing  
3 flooding from Pocatello Creek Road and that it was  
4 entering my yard and also my home.  
5 Q. What did he say?  
6 A. He said that he would go up and take a look at  
7 it and call me back.  
8 Q. Did he do that?  
9 A. Yes, he did.  
10 Q. And what did he report back to you?  
11 A. He said I can see that there is a problem and  
12 he sent a crew up and they put a small amount of gravel  
13 up on the road where it had initially come through the  
14 barrier.  
15 Q. Did you ever go up personally and inspect the  
16 road barrier area?  
17 A. Yes.  
18 Q. What did you see?  
19 A. I could see where there was a small amount of  
20 gravel placed there. The water had eroded the ground  
21 around the barriers and had left a hole where it was  
22 running through prior to the gravel being placed there.  
23 Q. Did you see the hole and the water running  
24 through before the gravel was put there?  
25 A. Yes, I did.

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1 Q. Was it running through the little forklift  
2 notches, is that where it was coming through?  
3 A. Yes.  
4 Q. And, for clarification, the barrier we are  
5 talking about is the big cement block barriers they put  
6 up for I assume road safety purposes?  
7 A. Exactly.  
8 Q. Did you report that one to the insurance  
9 company or anybody else?  
10 A. No.  
11 Q. What happened on December 27, 2006, when there  
12 was some flooding?  
13 A. On December 27 there was another rainstorm.  
14 The water came --  
15 MR. HAWKES: We skipped October 4, Sam. Did  
16 you intend to do that?  
17 MR. ANGELL: No, I didn't. Let's back up.  
18 Q. What happened on October 4, 2006?  
19 A. Another rainstorm. I was able to be home. I  
20 went up on the road and took photos. I could see exactly  
21 why the water was entering my property.  
22 Q. Why was it?  
23 A. The new portion of the road was built too high  
24 and it would not allow the proper drainage of the water  
25 coming down Pocatello Creek Road into the city. It

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1 stopped right at my home.  
2 Q. Was it running through the forklift notch  
3 again?  
4 A. Yes.  
5 Q. Did that flooding get down into your house?  
6 A. Not at that time.  
7 Q. Did you still have the diversion ditch up in  
8 your back yard?  
9 A. Yes.  
10 Q. Was there any damage caused to your yard or  
11 home on that one?  
12 A. There was more erosion to my landscaping, yes.  
13 Q. Did you report that to the city?  
14 A. No.  
15 Q. Mr. Turner had sent a crew up to put the dirt  
16 along the barrier back on April 16, so apparently the  
17 dirt had washed out again?  
18 A. Yes.  
19 Q. Could you see where it had washed out?  
20 A. Yes.  
21 Q. But you didn't report that it had washed out  
22 to the city.  
23 A. No.  
24 Q. What happened on December 27, 2006?  
25 A. Another big rainstorm. The water flowed down

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1 Pocatello Creek Road into my yard, across the lawn, which  
2 was then frozen, so any of the trenches that I had dug  
3 had been filled in with dirt, silt, water, ice, and the  
4 water again came into the house.  
5 Q. So you had damage in your house after this  
6 one.  
7 A. Yes.  
8 Q. Did you report this one to the city?  
9 A. Yes.  
10 Q. What did the city do?  
11 A. I asked my son to help me with this. He  
12 called Mr. Turner and arranged a meeting with Mr. Turner,  
13 the city's attorney, I believe the head of the street  
14 department; and they met at my home on February 2.  
15 Q. Were you party to that discussion, did you  
16 meet with them?  
17 A. I did not.  
18 Q. What did your son relay to you that they had  
19 spoken about?  
20 A. He relayed that Mr. Turner was in agreement  
21 that there was a problem with the road, but that was  
22 about all. I was asked to resubmit a new list of  
23 expenses at that time and resubmit the claim that had  
24 been previously denied.  
25 Q. Did you do that?

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1 A. Yes.  
2 Q. What sort of new expenses did you have from  
3 the flooding on the 27th?  
4 A. Again damage to the walls, specifically this  
5 time you could see the rust marks from the water near the  
6 mop boards. The carpet was again damaged. The tile in  
7 the bathroom had been damaged at this point in time. And  
8 soon after my son meeting with the city officials, I  
9 began to see mold growing in my home.  
10 Q. Where was the mold at?  
11 A. What I would see was around the window.  
12 Q. Did you have people come in to do work to fix  
13 these problems?  
14 A. Which problems are you referring to?  
15 Q. The ones on the 27th.  
16 A. Yes.  
17 Q. Who did you hire to come and work on -- I  
18 suppose there was some cleaning and drying again?  
19 A. I did not hire a company to come in and clean  
20 and dry, because as I would come home every day I would  
21 mop up about 40 to 50 gallons of water. And without an  
22 end in sight of the water, there is no point of hiring a  
23 cleaning company to come in.  
24 Q. You say every day you would come home and mop  
25 up 40 to 50 gallons starting when?

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1 A. Well, January was very cold, so when it  
2 started thawing, the ground had become very saturated in  
3 my back yard and as the ground started thawing and there  
4 was any moisture from the snow melting or anything, that  
5 moisture ended up into the house.  
6 Q. How was it getting in?  
7 A. Through the window well.  
8 Q. Could you see water standing in the window  
9 well?  
10 A. No.  
11 Q. Was it coming through the window area or was  
12 it coming through the cement below the window?  
13 A. Probably the cement below the window.  
14 Q. On those days that you say you would come home  
15 and mop up water, would you see water, that water line  
16 you talked about in your window, would you see that water  
17 standing up there again?  
18 A. No.  
19 Q. Did that happen again on the 27th, was there  
20 water standing in that window?  
21 A. It did not stand in the window at that time.  
22 Q. But it was somehow getting in and flooding  
23 your basement.  
24 A. Yes.  
25 Q. You talk about your yard being saturated and

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1 as it thawed that caused the water to run into your  
2 basement.  
3 A. Yes.  
4 Q. Did that happen on a daily occurrence?  
5 A. Yes.  
6 Q. Starting when? Give me some approximate  
7 dates.  
8 A. It was somewhere close to the first part of  
9 February. My son met with the city officials the 2nd of  
10 February and it started after that.  
11 Q. Did they come down in your house and look at  
12 your house?  
13 A. No.  
14 MR. HAWKES: I thought you said they met at  
15 your house.  
16 THE WITNESS: They met in the living room but  
17 they did not go down into the basement.  
18 Q. Did they go up on the road and look --  
19 A. They looked at the road; that was their area  
20 of focus.  
21 Q. On those dates in February of -- that would be  
22 2007, right, February 2 of 2007?  
23 A. Yes, that is correct.  
24 Q. On those dates that the water was coming into  
25 your house, did you have somebody come in to take the

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1 sheet rock down to figure out how the water was getting  
2 to your basement?  
3 A. No, I did not.  
4 Q. Has the sheet rock ever been taken down since  
5 that date?  
6 A. Yes.  
7 Q. Did that reveal anything about how the water  
8 was getting in?  
9 A. Not specifically.  
10 Q. Did it reveal anything unspecifically,  
11 generally?  
12 A. There are no cracks in the foundation.  
13 Q. Do you know, is there a gap between the window  
14 and the foundation?  
15 A. There may have been.  
16 Q. I am just trying to figure out how that water  
17 would get in if it wasn't coming through the window. Do  
18 you have any idea?  
19 A. Well, it seems like once water has a channel  
20 to go through and it's made a channel, then it  
21 continually goes through that same channel.  
22 Q. Did we find that channel? Do we know where  
23 it's at?  
24 A. No. The window has now been replaced.  
25 Hopefully that has taken care of it.

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1 Q. You said you had your son come and help you  
2 work on your house. Was that during this time period  
3 February of 2007, did he help you fix problems in your  
4 basement?  
5 A. Not in February, no.  
6 Q. Who was it who came and did the work after the  
7 flooding in February? You said you had some sheet rock  
8 replaced, a window replaced.  
9 A. It was not done until October of this year.  
10 Q. So during February of 2007 when the water was  
11 running into your basement every day, you were mopping up  
12 all the water, you didn't have anybody come in and tear  
13 walls down at that time?  
14 A. No.  
15 Q. Just to clarify, the actual source of how that  
16 water was getting in during February of 2007, you don't  
17 know exactly where it was coming in?  
18 A. Near the window.  
19 Q. Near the window. But it was not running over  
20 the window like over the trim and stuff and dripping down  
21 on the inside of the wall?  
22 A. No.  
23 Q. And there wasn't water standing in the window  
24 well that you could see up above the window level?  
25 A. No.

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1 Q. So I assume after February of 2007, you don't  
2 say anything in here, that that flooding stopped at some  
3 point when your yard dried up a little bit?  
4 A. When the yard dried up somewhat, yes, and also  
5 the fact that I had trenches dug in the yard again.  
6 Q. Okay, did you dig new trenches?  
7 A. When the ground thawed, yes.  
8 Q. And that diverted some water away from the  
9 house?  
10 A. Yes.  
11 Q. Would you still see water running down your  
12 landscaping towards your house during this time?  
13 A. Every time it rained.  
14 Q. The next date you have listed is August 17,  
15 2007, you say photos taken. Was there some flooding  
16 then?  
17 A. Yes.  
18 Q. What happened then?  
19 A. There was more erosion to the back yard.  
20 Q. Did that flooding get into your basement?  
21 A. No.  
22 Q. Why? Did the trenches stop that?  
23 A. That is correct.  
24 Q. So there was no damage done to your home on  
25 that time.

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1 A. That's correct.  
2 Q. The next date you list, roadway fixed on  
3 August 27, 2007. What happened there?  
4 A. I took photos of the city crew putting asphalt  
5 up against the barrier along Pocatello Creek Road.  
6 Q. Have you had flooding since then?  
7 A. No.  
8 Q. No water getting into your landscaping?  
9 A. No.  
10 Q. No water getting into your basement?  
11 A. No.  
12 Q. Does that cover all the flooding incidents?  
13 A. Yes.  
14 MR. HAWKES: Can I ask just to clarify, I have  
15 got August 17, photos taken and roadway fixed, August 27.  
16 Why did you take photos on August 17?  
17 THE WITNESS: Because the city had come in and  
18 put sandbags along the road and the photos were taken to  
19 show that the sandbags were not letting the water drain  
20 down to the city drain as well, it was still allowing the  
21 water to come into my yard.  
22 Q. So August 17 there was some rain and flooding  
23 again, water running down Pocatello Creek Road?  
24 A. Yes.  
25 Q. And you took the photos there to show that it

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1 was pooling up, the sandbags were stopping the flow?  
2 A. The sandbags were not preventing the water  
3 from coming into my yard.  
4 Q. Do you know when the sandbags were placed?  
5 A. Sometime the first part of February.  
6 Q. During that period of time when you were  
7 having the every day water come in?  
8 A. Exactly.  
9 Q. Did the sandbags seem to help at that time?  
10 A. They spread the water out so that it wasn't in  
11 one great big river coming down, but it dispersed it more  
12 evenly throughout the yard.  
13 Q. You have listed a number of witnesses here. I  
14 assume those are friends, neighbors, people you know.  
15 A. Correct.  
16 Q. Have you spoken with other neighbors along  
17 that road with regard to the flooding coming down, are  
18 any of them having problems with water running into their  
19 back yard?  
20 A. No.  
21 Q. And you have specifically spoken with them  
22 about it?  
23 A. Yes.  
24 MR. ANGELL: Let's go off the record for a  
25 minute.

1 (Discussion off the record.)  
2 MR. ANGELL: Let's go back on the record.  
3 Q. Ms. Brown, let me ask you to give me a  
4 description of why you have listed some people here as  
5 persons having knowledge about the case and what it is  
6 that they know. Let's start with Ryan and Matina  
7 Roberts.  
8 A. Ryan is my son-in-law. Matina is my daughter.  
9 They were at home for Christmas last December, when the  
10 flooding occurred on December 27. They helped me move  
11 the furniture and the carpet and padding out of the  
12 basement at that time.  
13 Q. And with regard to liability or damages, what  
14 would their testimony be if you called them at trial?  
15 A. I can't say what their testimony would be.  
16 MR. HAWKES: What do you believe they know  
17 that they could testify to?  
18 A. They know that I have had problems with water  
19 coming into my home since the repaving of Pocatello Creek  
20 Road.  
21 Q. What about Rod and Marilyn Silcock?  
22 A. Rod has been in to help me with some damages  
23 to help repair them and to help me move items back into  
24 the bedroom after the first flooding.  
25 Q. How do you know Rod and Marilyn?

1 before the repaving of Pocatello Creek Road.  
2 Q. Did he help you do any repairs on the home?  
3 A. Yes.  
4 Q. What did he help you do?  
5 A. He helped me replace sheet rock, replace  
6 insulation, replace floor molding, window molding.  
7 Q. When you say replace sheet rock, where did he  
8 help you replace sheet rock at, what part of the  
9 basement?  
10 A. In the master bedroom down there.  
11 Q. Is that close to the window where the water  
12 was coming in?  
13 A. Yes.  
14 Q. So would he have knowledge about where the  
15 water is getting in the house?  
16 A. Yes.  
17 Q. Do you happen to know what his guess is or his  
18 estimate is as to where the water is coming in?  
19 A. Near the window.  
20 Q. No more descriptive than that?  
21 A. No.  
22 Q. Did Shawn Brown come up and see the initial  
23 flooding back in February of 2006?  
24 A. No.  
25 Q. He came in February of 2007?

1 A. They have been friends of mine for 27 years.  
2 Q. What did Rod help you repair when he was at  
3 your home?  
4 A. He helped me with some of the wall trim and  
5 window trim.  
6 Q. Would he have knowledge about how the water  
7 was getting into the home?  
8 A. Yes.  
9 Q. After which flooding did he come and help you  
10 do the --  
11 A. The initial flooding in February.  
12 Q. The initial flooding on February 28, 2006?  
13 A. That is correct.  
14 Q. Did he come back and help you work after any  
15 of the other floodings?  
16 A. No.  
17 Q. What about Shawn and Brittany Brown?  
18 A. Shawn is my son. He met with city officials.  
19 Q. Can you give me the approximate date again  
20 when he met with the city officials?  
21 A. He met with the city officials February 2 of  
22 2007.  
23 Q. So what knowledge does he have about the  
24 flooding?  
25 A. He again knows that I had no prior flooding

1 A. He did.  
2 Q. Was that the first time he had been there to  
3 see the flooding?  
4 A. He had seen the damages prior to that.  
5 Q. But he hadn't actually been there when the  
6 water was running in?  
7 A. Correct.  
8 Q. What does he do for a living?  
9 A. He works in construction.  
10 Q. Does he own his own company?  
11 A. No.  
12 Q. He works for somebody?  
13 A. Yes.  
14 Q. Who does he work for?  
15 A. He works for Big D Construction.  
16 Q. Is that where he still works?  
17 A. Yes.  
18 Q. And that's out of Woods Cross, Salt Lake area?  
19 A. Salt Lake.  
20 Q. What about Steve and Judy Summerill, what  
21 would their testimony be?  
22 A. Just that they know that I have had problems  
23 with flooding.  
24 Q. How do you know them?  
25 A. I go visiting teaching to Judy and Robin.

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1 Q. I guess you call them friends?  
2 A. Yes.  
3 Q. Have they actually observed the flooding  
4 incidents or have they just been to your house after the  
5 effects?  
6 A. They have not been to my home, I have been to  
7 their home and we have had conversations about it.  
8 Q. So they wouldn't have any knowledge of how the  
9 water is getting in your house?  
10 A. No.  
11 Q. And for future reference when I ask what they  
12 might know, I am getting more to what they are going to  
13 know from their personal observations as opposed to what  
14 they might know from what you told them. Does that make  
15 sense? Let me rephrase that question. Steve and Judy,  
16 do they have any personal knowledge from their  
17 observations of what the damages are to your house or how  
18 the water was getting in?  
19 A. No.  
20 Q. Blair Coombs, what personal knowledge would, I  
21 assume it's a he, have about the damages to your house or  
22 how the water was getting in?  
23 A. He saw the cleaning company at my home and  
24 inquired about why it was there back in February and I  
25 had a resulting conversation with him of what was

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1 happening and he has followed up with me from time to  
2 time on what is occurring and what is currently going on.  
3 Q. Has he been to your home to personally observe  
4 it?  
5 A. No.  
6 Q. You say back in February. February of which  
7 year?  
8 A. 2006.  
9 Q. How do you know him again, neighbor, friend?  
10 A. Neighbor.  
11 Q. What about Mike and CaraLee Hughes?  
12 A. They are neighbors.  
13 Q. What personal knowledge would they have about  
14 the flooding or damage to your home?  
15 A. Mike has been to my back yard, he has seen the  
16 erosion. We have had resulting conversation from that.  
17 They have their own personal story about Pocatello Creek  
18 Road and some of the problems that it has created for  
19 them as well.  
20 Q. What is their story?  
21 A. Since the revision of the road they have had  
22 numerous cars in their yard.  
23 Q. Cars in their yard?  
24 A. Yes.  
25 Q. Explain that to me.

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1 A. They have altered the road, made it two lanes  
2 in each direction, east and west, and a lot of people are  
3 not used to one of them being a forced turn, so several  
4 cars have missed the turn and ended up into their back  
5 yard rather than going straight up Pocatello Creek Road.  
6 Q. What does that have to do with your case, is  
7 there any significance there?  
8 A. Just the fact that we both have problems with  
9 Pocatello Creek Road.  
10 Q. How about Terese and Shashi Parmanand?  
11 A. They are my next door neighbors.  
12 Q. On which side?  
13 A. To the east.  
14 Q. What personal observations do they have about  
15 the flooding or damages?  
16 A. They have looked over my fence and seen the  
17 landscaping and the mess that my back yard has been in.  
18 Q. Have they had any flooding in their back yard?  
19 A. No.  
20 Q. Have they done anything to help you with  
21 repair work or --  
22 A. No.  
23 Q. How about Jim Lystrup?  
24 A. Jim Lystrup was my home teacher at the time.  
25 He came and he took photos of both the house and the yard

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1 as well as photos of Pocatello Creek Road.  
2 Q. When did he come and do that?  
3 A. That was March, mid March.  
4 Q. 2006?  
5 A. Yes.  
6 Q. What is his profession?  
7 A. He is an architect.  
8 Q. Has he helped you do any repair work to the  
9 home?  
10 A. No, he has not.  
11 Q. He is an architect. What is his opinion about  
12 why the water was running in your yard?  
13 A. He could tell that it had come off of  
14 Pocatello Creek Road.  
15 Q. Any more specific detail than that?  
16 A. No.  
17 Q. Did he come back after any subsequent  
18 floodings?  
19 A. No.  
20 Q. He had only been to your home the one time,  
21 then, for that purpose?  
22 A. For that purpose, yes.  
23 Q. Jessica Lungman, Susan Wilson, Gary Goy, are  
24 those coworkers?  
25 A. Jessica Lungman was a girl friend at the time

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1 of my older son, Troy.  
2 Q. What about Susan Wilson?  
3 A. A coworker.  
4 Q. Gary Goy is a coworker?  
5 A. Yes.  
6 Q. Jan O'Neil?  
7 A. Coworker.  
8 Q. Dorothy Galloway?  
9 A. The same.  
10 Q. Robin Kent?  
11 A. The same.  
12 Q. She is the mayor's daughter.  
13 A. Yes.  
14 Q. Does Robin Kent have any personal observations  
15 or knowledge about the flooding or damage to your home?  
16 A. She was at my home at a party where we were  
17 talking about the flooding.  
18 Q. How about Jamie Sommer, who is she?  
19 A. Coworker.  
20 Q. Travis Lynn, Scott Killian, Donna Taylor,  
21 Nikki Chopski, Karen and Arnold Davis, all coworkers?  
22 A. Karen is a coworker and the rest mentioned  
23 were coworkers.  
24 Q. None of them have personal knowledge, personal  
25 observations of your home?

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1 A. No.  
2 Q. Then Tristan, Delight Wilcox, Garth Wilcox,  
3 they are your relatives; right?  
4 A. That's correct.  
5 Q. Do they have personal knowledge or  
6 observations of your home?  
7 A. Tristan was at my home soon after the initial  
8 flooding and saw all the furniture in my family room that  
9 had been moved out of the basement.  
10 Q. Richard and Sharon Wilcox, brother and  
11 sister-in-law; correct?  
12 A. Correct.  
13 Q. Do they have any personal knowledge or  
14 observations of your home?  
15 A. No.  
16 Q. The next individual is Bill Ivanich, Josh  
17 Mecham, Valerie Gardner, Preston Maxwell, Mike  
18 Bringhurst, they are all coworkers?  
19 A. That's correct.  
20 Q. Do they have any personal knowledge or  
21 observations of your home?  
22 A. No.  
23 Q. How about Mavis Willey?  
24 A. Is a lady that I go visiting teaching to that  
25 time around the loop from me. And she has not been in

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1 my home.  
2 Q. How about Patrees Stucki?  
3 A. Is a friend of mine. We have had  
4 conversations about my flooding.  
5 Q. The next one is Darin Pace, Carmen Medina,  
6 Parker Brown, Scott Milner, Michelle Haskell, other --  
7 A. All people from work.  
8 Q. -- coworkers. They haven't been to your home.  
9 A. No.  
10 Q. Joey Benedetti, Kerry Roberts, that's more  
11 coworkers?  
12 A. Yes.  
13 Q. What knowledge do the reporter and cameraman  
14 from the TV station, Ashli Kimenker and Tyler Hieb,  
15 have?  
16 A. They came to my home, they saw the basement,  
17 they took photos of it, took photos of the back yard and  
18 also photos of Pocatello Creek Road with sandbags.  
19 Q. Were they there on a day when the water was  
20 running down Pocatello Creek Road?  
21 A. No.  
22 Q. It was a dry day?  
23 A. Yes.  
24 Q. And they ran a news story about it?  
25 A. Yes.

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1 Q. What was the gist of the news story? I didn't  
2 see it.  
3 A. It was that I had filed suit against the City  
4 of Pocatello.  
5 Q. This was after your lawsuit was filed?  
6 A. Yes.  
7 Q. This was pretty recently, then.  
8 A. August.  
9 Q. Bradley Harr, who is that?  
10 A. He is an industrial hygienist out of Boise. I  
11 originally had talked to him about coming to my home and  
12 sampling the air sample, so he knew of the flooding  
13 because of our conversation over the telephone.  
14 Q. He doesn't have any personal knowledge or  
15 observation of your home?  
16 A. He does not.  
17 Q. And you are not going to call him as a witness  
18 but you might call somebody else with his group?  
19 A. Yes.  
20 Q. Who would that be?  
21 A. His name is Mike Larango, he was the  
22 consultant who was put in charge of coming to my home.  
23 Q. And you have provided me today with a Summit  
24 Environmental report. Is he the one who prepared that  
25 report?



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1 A. He is.  
2 Q. We will go over that later after I have had a  
3 chance to look at it. Turn to Page 11 with me on your  
4 answers to our discovery requests. You have listed some  
5 companies and individuals who witnessed the flooding and  
6 damages. First is ServiceMaster Cleaning & Restoration  
7 team, you have listed Calvin Boswell, Josh Stump and  
8 Randy Coburn. All those individuals, they have all been  
9 to your home?  
10 A. Yes.  
11 Q. That was the crew that came in and worked the  
12 first time after the February 28, 2006, flooding?  
13 A. That's correct.  
14 Q. What will they testify to?  
15 A. That there was a great amount of water --  
16 MR. HAWKES: Why don't you look through the  
17 list, Linda, and see if you can add anything to what's  
18 there by each of them without having to repeat what's  
19 already typed in. Is that okay, Sam?  
20 MR. ANGELL: Yes.  
21 Q. Let me ask a couple of things about  
22 ServiceMaster. Were you pleased with the work that they  
23 did on your home, did they seem to fix it up okay?  
24 A. Yes.  
25 Q. They have provided you with a statement that

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1 we will get to in a minute. Is that all the charges that  
2 you have from ServiceMaster, is on the statement you  
3 received from them?  
4 A. Yes.  
5 Q. And that has not been paid by your insurance,  
6 you have paid that or it's still outstanding?  
7 A. I have paid it.  
8 Q. Were any of the ServiceMaster people there  
9 when the flooding was actually occurring or were they  
10 just there after the fact?  
11 A. After the fact.  
12 Q. And they did not come back again to clean up  
13 after the February 28, 2006, flood?  
14 A. They did not.  
15 Q. Which one of the group there is the, I don't  
16 know, supervisor, team boss?  
17 A. Calvin Boswell.  
18 Q. Rod and Marilyn Silcock, we have talked about  
19 them already. Is there anything you want to add?  
20 A. No.  
21 Q. Terese Pamanand, we have talked about her,  
22 again. Is there anything you want to add as far as what  
23 she is going to testify about?  
24 A. No.  
25 Q. Troy Brown, we haven't talked about him. What

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1 knowledge does he have about the damage or repairs?  
2 A. He is my son. He has been to the home and  
3 seen the damages to the walls, the back yard.  
4 Q. Did he help with any of the repair work?  
5 A. No.  
6 Q. Has he been there on days when the water was  
7 actually running in?  
8 A. No.  
9 Q. Shawn and Brittany Brown we have talked about  
10 already. Anything you want to add?  
11 A. They were there when the water was coming in.  
12 Q. Why did you have Shawn work with Cac Turner  
13 and Kirk Bybee and you didn't meet with them?  
14 A. I made no progress with meeting with the city  
15 and felt like maybe my son would be able to make some  
16 more progress.  
17 Q. You have LeRoy and Lorna Wilcox listed again.  
18 Is there anything new that they can add?  
19 A. No.  
20 Q. Tadd with Armstrong Landscaping.  
21 A. Yes.  
22 Q. What did he do?  
23 A. I contacted Armstrong Landscaping to come in  
24 and give me a bid to repair the landscaping in the back  
25 yard.

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1 Q. And you provided me with that bid, I believe.  
2 A. Yes.  
3 Q. Has that work been done?  
4 A. No.  
5 Q. Has Tadd with Armstrong Landscaping or any of  
6 their other employees been there to see flooding when it  
7 was happening?  
8 A. No.  
9 Q. Just after the fact gave you a bid to repair  
10 the damage?  
11 A. Yes.  
12 Q. How about Shane Ward and Gary Siler of Rug Rat  
13 Flooring?  
14 A. They have both been into the home to see it to  
15 estimate for new carpet.  
16 Q. And they actually replaced some carpet; right?  
17 A. Yes.  
18 Q. Were they there when the water was coming in?  
19 A. No.  
20 Q. But they would have knowledge about some of  
21 the damages and what was done with the carpet?  
22 A. Yes.  
23 Q. And we have a statement from Rug Rat Flooring.  
24 Is that all the charges that you have from them?  
25 A. Yes, currently.



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1 Q. Ryan and Matina Roberts, we have already  
2 talked about them. Anything else you want to add?  
3 A. No.  
4 Q. John McCasland, Best Clean Care, what did he  
5 do?  
6 A. His specialty is mold abatement, so he came  
7 into the home and took some initial air samples,  
8 determined that there was mold in the house, then came  
9 back and took care of the mold abatement.  
10 Q. Do you have a report or anything from him?  
11 A. I do.  
12 Q. Was that provided to me, do you know?  
13 A. I do not know.  
14 Q. I don't remember seeing it. Could you make a  
15 note maybe to dig that up?  
16 A. Okay.  
17 MR. HAWKES: Do you think you have given it to  
18 us?  
19 THE WITNESS: I know I have.  
20 MR. HAWKES: I feel like I have given it to  
21 them. We will double check that.  
22 Q. When did John McCasland come, after which  
23 flooding date?  
24 A. He actually came in May.  
25 Q. Which year?

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1 A. Of 2007.  
2 Q. Any other times?  
3 A. He has been to my home numerous times since  
4 that time to do the mold abatement.  
5 Q. That was the first time, then, in May of 2007.  
6 A. Yes.  
7 Q. Mike Larango we have already talked about.  
8 A. Yes.  
9 Q. John's Paint & Glass, what did they do?  
10 A. They came to the home to measure for a new  
11 window for the back bedroom.  
12 Q. You mentioned you had replaced windows in your  
13 house, one of the first questions I asked. Did you  
14 replace the basement windows when you replaced windows?  
15 A. When you say basement, I have a floor level,  
16 so my family room could actually be considered as  
17 basement and the windows were replaced in that. The  
18 lower level, which is where the bedroom is at, I did not  
19 replace the windows at that time.  
20 Q. So the flooding happened, I am just going to  
21 make a note, stop here --  
22 MR. ANGELL: Do you have a piece of paper,  
23 Lowell?  
24 Q. You don't happen to have a floor plan of your  
25 house. do you?

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1 A. I don't, but I know that ServiceMaster's  
2 statement had a floor plan.  
3 MR. HAWKES: If you want a really big sheet, I  
4 have some of those.  
5 Q. Can you sketch a floor plan of the basement  
6 that was flooded for me?  
7 A. Okay. I am no artist.  
8 (Pause in proceedings.)  
9 Q. Now that I have told you to do that I have  
10 found the sketch from ServiceMaster. Would you look at  
11 this sketch for me. This is ServiceMaster's sketch;  
12 right?  
13 A. Yes.  
14 Q. Is that pretty close to accurate?  
15 A. Very accurate.  
16 Q. It looks like there is one window here that  
17 ServiceMaster has marked as the cause of loss. Is that  
18 the window we have been talking about?  
19 A. Yes, it is.  
20 Q. It's the one that faces towards the back yard  
21 where the water was coming in?  
22 A. Correct.  
23 Q. Is that the only window in that lower  
24 basement?  
25 A. Yes.

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1 Q. That window was not replaced by you during the  
2 repair work you have talked about earlier?  
3 A. That is correct.  
4 Q. But this is the window that John's Paint &  
5 Glass came to bid to replace?  
6 A. Yes.  
7 Q. And they actually replaced that window?  
8 A. Several weeks ago, yes.  
9 Q. And you haven't had any water running since  
10 then?  
11 A. No.  
12 Q. You haven't had any water getting down in your  
13 yard since then.  
14 A. That's correct.  
15 MR. ANGELL: Let's have this marked as an  
16 exhibit.  
17 (Deposition Exhibit No. 1 marked for  
18 identification.)  
19 (Short recess.)  
20 MR. ANGELL: Back on the record.  
21 Q. Another question about the document we have  
22 marked as Deposition Exhibit No. 1, which is the drawing  
23 of your basement. In which rooms was there water damage  
24 after -- let's start with the first flooding incident of  
25 February 28, 2006.

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1 A. All rooms.  
2 Q. Was that recurring, all rooms would be damaged  
3 after the water would come in on later flooding dates?  
4 A. That was confined to the bedroom and the  
5 bathroom.  
6 Q. So to clarify, on February 28, 2006, the water  
7 came in, got the whole basement wet.  
8 A. Correct.  
9 Q. Thereafter when the water was coming in, it  
10 only got into the master bedroom and bathroom.  
11 A. Correct.  
12 Q. And those dates you said you were mopping up  
13 buckets of water, that would have been out of the bedroom  
14 and bathroom?  
15 A. Correct.  
16 Q. How do you know Armstrong Landscaping?  
17 A. I hired them to do the initial landscaping of  
18 my back yard.  
19 Q. How about John McCasland, Best Clean Care, how  
20 did you know them?  
21 A. I knew I needed a mold remediation specialist,  
22 so I checked the phone book and he was the one listed.  
23 Q. How about Rug Rat Flooring, how do you know  
24 that company?  
25 A. Both Shane and his father, Ron Ward, are

1 A. Ronda Johnson, who is the city clerk.  
2 Q. Anybody else?  
3 A. No.  
4 Q. With Cac Turner you have described some of the  
5 conversations you have had with him. Is there anything  
6 else significant that you would want to admit as evidence  
7 in this trial that he has said?  
8 A. I had the initial conversation with him in  
9 February, or actually it would have been April after the  
10 second flooding. And then I have not spoken with him.  
11 Q. How about Kirk Bybee, when did you talk to  
12 him?  
13 A. I turned my claim in to the city on April 25.  
14 I checked on it periodically throughout the summer and  
15 the response was always to me it has not been 90 days.  
16 At the end of July --  
17 Q. Can I interrupt you right there. The response  
18 to you, who did that come from?  
19 A. Ronda Johnson.  
20 Q. Now continue, sorry.  
21 A. In July when I knew the 90 days were up and I  
22 had had no response to my claim, I called the city clerk,  
23 who was Ronda Johnson, and asked her, okay, where do we  
24 go from here, and she then transferred me to Kirk Bybee.  
25 Q. What did Kirk say?

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1 personal friends of mine from out in Inkom.  
2 Q. How about Summit Environmental Group, how do  
3 you know them?  
4 A. They were recommended to me by Mr. McCasland  
5 from Best Clean Care.  
6 Q. And John's Paint & Glass, how do you know that  
7 company?  
8 A. They replaced the windows in my home.  
9 Q. How did you find them?  
10 A. Phone book.  
11 Q. The last witness you have listed again this  
12 Ashli Kimenker, reporter. Is there anything that she  
13 would add that you haven't talked before?  
14 A. No.  
15 Q. If you call James Lystrup as a witness, would  
16 he be called as an expert, are you going to have him come  
17 and do some --  
18 MR. HAWKES: I'll answer that. It would be my  
19 expectation that he would give testimony in the nature of  
20 expert testimony.  
21 Q. We have touched on some of your conversations  
22 with the city employees, Cac Turner -- have you spoken  
23 personally with Kirk Bybee?  
24 A. Yes.  
25 Q. Any other city employees about this?

1 A. He said we have never had a rainstorm like  
2 that in Pocatello before. He said that they did not  
3 alter the road. He also said that they would have to  
4 have a crew go up and resurvey the road and that the city  
5 crews were very busy at that time.  
6 Q. Anything else?  
7 A. He said I will look at this claim and I will  
8 get back with you.  
9 Q. Did he get back with you?  
10 A. Approximately a week to ten days later he  
11 called back and left an answer on my phone machine.  
12 Q. What did he say?  
13 A. He said we have decided we are going to deny  
14 this claim.  
15 Q. When he said that he doesn't remember having a  
16 rainstorm like that in Pocatello, would you agree with  
17 him?  
18 A. No.  
19 Q. Why do you say that?  
20 A. Pocatello notoriously gets downpours of rain  
21 periodically throughout the summer and spring.  
22 Q. Did you think that the rain in either February  
23 or April of 2006 -- he says there was not another one  
24 like it -- do you remember it being bad, a heavy rain?  
25 A. I remember several heavy rainstorms.

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1 Q. Did you have any other conversations with Kirk  
2 Bybee after that, the message he left on your answering  
3 machine?

4 A. No.

5 Q. How about Ronda, anything significant that  
6 would play in this case?

7 A. After a period of time I knew that I was going  
8 to have to pursue other legal action and so I contacted  
9 Ronda Johnson at the city and asked if I could come up  
10 and pick up my photos that I had turned in with my claim.

11 Q. Any conversation with any other employees?

12 A. No.

13 MR. HAWKES: Did she give you back your  
14 originals?

15 THE WITNESS: Yes.

16 Q. I want to go over and make sure that I have  
17 all of the damages that you have claimed, expenses that  
18 you have submitted.

19 A. Okay.

20 Q. You submitted us a bill from Best Clean Care  
21 at \$250 and then a subsequent one at \$13,590.44. Is  
22 there anything else from Best Clean Care?

23 A. No.

24 Q. I have looked over the invoice from Best Clean  
25 Care for \$13,590. Has the work been done that is

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1 outlined in that invoice?

2 A. Yes.

3 Q. All of it?

4 A. Yes.

5 Q. So that's a bill that you owe?

6 A. Yes.

7 Q. Has any insurance paid anything on that?

8 A. No.

9 Q. Was it Mr. McCasland that came and did the  
10 work for Best Clean Care?

11 A. Yes.

12 Q. Was he actually on the job doing work?

13 A. Yes.

14 Q. Did they have a crew that came in and did it?

15 A. He had one other person with him.

16 Q. Could you give me the approximate date of when  
17 that work was completed?

18 A. They started October 30, I believe.

19 Q. Of which year?

20 A. Of 2007. And it was completed a week later.

21 Q. As I have looked through this invoice, it  
22 essentially is a major cleanup, I guess cleaning carpets,  
23 cleaning walls, baseboards, that sort of thing; is that  
24 right?

25 A. The carpet in the bedroom again had been

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1 damaged beyond repair, so it was completely removed. The  
2 mop boards are all taken off the walls. There was sheet  
3 rock all along the wall with the window that was removed.

4 And also sheet rock between the walls of the bedroom and  
5 the bathroom.

6 Q. And a lot of work it looks like to remove mold  
7 type of issues, antimicrobial type of stuff?

8 A. Correct.

9 Q. To your understanding, has the work that Best  
10 Clean Care completed, has that solved your mold problems?

11 A. That report is from Mr. Larango from Summit  
12 Environment.

13 Q. That's going to tell me it's solved once I  
14 read it?

15 A. Yes.

16 Q. John's Paint & Glass, I have a statement from  
17 them of \$654. That's for replacement of the window?

18 A. Yes.

19 Q. That work has been completed?

20 A. Yes.

21 Q. And that was done, you told me, October of  
22 this year?

23 A. November.

24 Q. Big D Construction, \$6,987, what was that bid  
25 for?

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1 A. That was for the replacement of insulation in  
2 the wall, sheet rock, window molding, floor molding.

3 Q. Is that your son's company?

4 A. Yes, it is.

5 Q. Did he come and do the work?

6 A. He did.

7 Q. Did it get billed through the company or did  
8 you pay him directly?

9 A. I will pay him directly.

10 Q. He has not been paid?

11 A. No.

12 Q. But the work has been done?

13 A. Yes.

14 Q. Did you get any second bids for that?

15 A. No.

16 Q. When was that work completed?

17 A. November 17.

18 Q. Of this year?

19 A. Yes.

20 Q. The ServiceMaster bill, \$2,940.10, that work  
21 was completed back in 2006?

22 A. Yes.

23 Q. ServiceMaster has been paid?

24 A. I'm still paying on that bill.

25 Q. Are there any other charges related to that

1 that you would be claiming at this time, interest, late  
2 charges --  
3 A. Interest and late charges, yes.  
4 Q. Can you provide us with a statement that's  
5 updated?  
6 A. Yes.  
7 Q. Are there any other, I don't know, late  
8 charges, interest fees from these other companies that  
9 have not been submitted to us that you would be  
10 submitting at trial?  
11 A. No.  
12 MR. HAWKES: We would at trial, Sam, claim  
13 interest on money that was paid, you understand that.  
14 MR. ANGELL: What I am asking is has any  
15 company added anything to what these totals are, and  
16 there is nothing else.  
17 A. No.  
18 Q. The next one I have is Rug Rat Flooring,  
19 \$548.44. That was replacement of the carpet in the  
20 master bedroom?  
21 A. The first time.  
22 Q. The first time. Has that been paid?  
23 A. Yes.  
24 Q. Anything additional owed to them?  
25 A. Not at that time.

1 Q. But then there is a second bid that's included  
2 in the Best Clean Care, right, for replacement of the  
3 carpet?  
4 A. Not with Best Clean Care, no.  
5 Q. I don't think I have it, then. So there is a  
6 second amount that was paid to Rug Rat Flooring?  
7 A. There is a second bid from Rug Rat Floor  
8 Covering for replacement of the carpet in the bedroom the  
9 second time, also the hallway and the sewing room because  
10 they had been down in the mold for so long.  
11 Q. How much was that one?  
12 A. That one was \$1,804.  
13 Q. Would you make a note of that, I don't think I  
14 saw one.  
15 A. Okay. There was also a bid for the  
16 replacement of the tile in the bathroom which has not  
17 been done at that time.  
18 MR. HAWKES: Rug Rat gave that bid?  
19 THE WITNESS: Yes.  
20 Q. Has Rug Rat replaced the carpet that you just  
21 discussed, the \$1,800 worth?  
22 A. Yes.  
23 Q. How much is the tile bid, do you remember?  
24 A. It's around a thousand dollars.  
25 Q. So the total would be \$2,800 that's still out

1 there for Rug Rat Flooring, plus or minus some?  
2 A. Yes.  
3 Q. Armstrong Sprinklers & Landscaping, \$850, that  
4 was to repair the --  
5 A. The landscaping in the back yard.  
6 Q. Has that been completed?  
7 A. No.  
8 MR. HAWKES: That probably would have to be  
9 updated, Sam, it would probably cost more now, would be  
10 my guess.  
11 Q. When did they give you this bid?  
12 A. That was the summer of 2006.  
13 Q. So there has been more damage since then?  
14 A. That is correct.  
15 Q. I'll make a note of that one. You sent in  
16 some miscellaneous receipts, paint supplies, \$125. Are  
17 there any other of those miscellaneous receipts?  
18 A. No.  
19 Q. Any other damages I have missed, as we have  
20 discussed the property damage?  
21 A. No.  
22 Q. Or expenses that you have incurred.  
23 A. No.  
24 MR. HAWKES: There are other damages, but not  
25 other expenses.

1 Q. What are the other damages?  
2 MR. HAWKES: Tell him about your mold concern,  
3 Linda.  
4 A. Well, there is a real concern for health risks  
5 of living in a home for over ten months with mold in it.  
6 I am concerned about the salability of my home since it  
7 has been damaged by mold --  
8 Q. Let me stop you. I want to go one by one  
9 here. What health concerns are you worried about?  
10 A. Well, I work at the hospital. I see people  
11 who come in all the time with infections from fungus and  
12 how much it costs to treat them and the long-term  
13 prognosis for those people.  
14 Q. Is that the bedroom you sleep in, this master  
15 bedroom?  
16 A. Yes, it is.  
17 Q. Have you experienced any problems, been to see  
18 a doctor?  
19 A. I have not.  
20 Q. Do you know of other people having had the  
21 problems with mold and fungus, is there any reason you  
22 have to think that you are having any health problems  
23 now?  
24 A. I am not currently having health problems, but  
25 a lot of times problems with mold infections can lay

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1 dormant for a number of years before they appear.  
2 **Q. How do you know that?**  
3 A. I work in the medical industry.  
4 **Q. Did you talk to a doctor that's told you that?**  
5 A. No.  
6 **Q. So that's one. You mentioned another concern**  
7 **for expense. What was that?**  
8 A. The re-salability of my home.  
9 **Q. What's concerning you with that?**  
10 A. Well, it probably will go on the city records,  
11 but that home has been damaged by water and it has been  
12 remediated now, but it is still on record. I have a  
13 concern that it will occur again because the fix that  
14 they have made right now is the asphalt up against the  
15 concrete barrier. But as that asphalt ages and it cracks  
16 like it does for potholes in the road, then it will open  
17 that up and I will have the flooding back into the yard  
18 again unless the road is actually fixed.  
19 **Q. Or until you move off the hill.**  
20 A. I'm not on a hill.  
21 **Q. Any other concerns, expenses, property**  
22 **damages?**  
23 A. I don't know how much the landscaping will  
24 cost to redo now.  
25 **Q. You have listed in your complaint general**

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1 **damages, lost use of your home.**  
2 A. Yes.  
3 **Q. Have we got a dollar amount on that?**  
4 A. No. But I have lost half of the use -- the  
5 use of half of my home.  
6 **Q. For how long?**  
7 A. For over ten months.  
8 **Q. How much is that worth to you?**  
9 A. I have not put a specific dollar amount on  
10 that.  
11 **Q. You can give me a better guess than I can**  
12 **make.**  
13 MR. HAWKES: Make us an offer, Sam. We would  
14 probably bring in a realtor or somebody like that. I  
15 kind of put that in the area of a general damage thing  
16 that the jury could just decide.  
17 **Q. Well, as you sit here today I am just**  
18 **wondering if you have a number in your head.**  
19 MR. HAWKES: If you have a number in mind,  
20 Linda, tell him.  
21 A. I don't have a number in mind. The thing that  
22 has been of concern to me is I haven't even been able to  
23 have my children come home and stay for the weekends  
24 because I didn't have bedroom space for them.  
25 **Q. Any other general damages? You mentioned**

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1 **specifically lost use of your home. Is there anything**  
2 **else? General being anything else you can think of.**  
3 A. My stress.  
4 **Q. Somewhere in your answer to discovery you**  
5 **mentioned a time when the Kirkham apartments were**  
6 **flooded.**  
7 A. Kirkwood Meadows.  
8 **Q. Kirkwood Meadows, excuse me. When did that**  
9 **happen?**  
10 A. That occurred approximately a year before the  
11 Pocatello Creek Road was repaved, so it would have  
12 occurred somewhere 2004.  
13 **Q. And why was that mentioned, why did you bring**  
14 **that up?**  
15 A. Well, in my conversation with Mr. Bybee he  
16 said that it had never rained like that in Pocatello  
17 before. And I used Kirkwood Meadows, which is less than  
18 a half block from me, as an example, that it had rained  
19 like that in Pocatello before.  
20 **Q. Did the water that flooded the Kirkwood**  
21 **apartments come off of that Pocatello Creek Road?**  
22 A. Some of it down Pocatello Creek Road and some  
23 of it down Satterfield Drive.  
24 **Q. When the water came off Pocatello Creek Road**  
25 **and got into the Kirkwood apartments, did it come by your**

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1 **house?**  
2 A. Yes.  
3 **Q. How close?**  
4 A. My back yard faces Pocatello Creek Road.  
5 **Q. If that happened in 2004 you would have been**  
6 **living there at the time.**  
7 A. That is correct.  
8 **Q. Do you remember seeing the water running off**  
9 **the road that got in the apartments?**  
10 A. I have a big fence in my back yard.  
11 **Q. So you couldn't see it?**  
12 A. So I couldn't see the water coming down.  
13 **Q. I am just wondering if it was close to your**  
14 **house. If water was running off close to your house in**  
15 **2004.**  
16 A. Yes.  
17 **Q. But it didn't get in your back yard.**  
18 A. Correct.  
19 **Q. When I say close, how close, like the neighbor**  
20 **next door?**  
21 MR. HAWKES: You mean Kirkwood Meadows?  
22 MR. ANGELL: Yes.  
23 MR. HAWKES: It's kind of around the corner.  
24 A. It's around the corner.  
25 MR. HAWKES: It's on the other side of Booth.

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1 isn't it, on the west side of Booth?  
2 THE WITNESS: Yes. I am the third house on  
3 Darrell Loop and then there is Booth Road, another  
4 townhouse and then --  
5 Q. Is that towards the east; is that right?  
6 A. To the west. Booth Road is to my west.  
7 MR. HAWKES: You are here, we have Booth Road  
8 here, Kirkwood right here, this would be north this way  
9 (indicating) and this is Satterfield Drive taking you up  
10 on the hill. It's not to scale.  
11 Q. When this flooding happened in 2004, was that  
12 flooding close to where, I am going to say adjacent to  
13 the portion of Pocatello Creek Road that was repaired by  
14 the city?  
15 A. When you say adjacent, how --  
16 Q. Well, the water that was running off the road  
17 that flooded the Kirkwood apartments, was it running off  
18 the portion of the road that was later repaired by the  
19 city?  
20 A. Yes.  
21 Q. Because it was the portion of the road to the  
22 east of you, not the west, that was not repaired by the  
23 city; correct, left --  
24 A. The portion of Pocatello Creek Road to my east  
25 was never repaired, it is to my west.

1 looking at the carpet that was coming out of the  
2 basement.  
3 A. Correct.  
4 Q. And because it was dated or old, you assumed  
5 it had never been replaced from flooding.  
6 A. That's correct.  
7 Q. But you haven't spoken with the prior  
8 homeowners to know if their basement ever flooded.  
9 A. No.  
10 Q. Have you spoken with neighbors or other people  
11 that might know if that basement has ever flooded before?  
12 A. Yes, I have.  
13 Q. What did they say?  
14 A. They said no.  
15 Q. To the best of their knowledge?  
16 A. That's correct.  
17 Q. Do you have neighbors that have lived next  
18 door or close to your home for the entire time of its  
19 existence?  
20 A. Parmanands who live to my east have lived  
21 there since their house was built.  
22 Q. Which would be close to the same time period  
23 that your house was built?  
24 A. That is correct. And the Hughes on the corner  
25 have lived in that very vicinity for that length of time

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Page 65

1 Q. And the seam is almost exactly behind your  
2 house; right?  
3 A. That is correct.  
4 Q. Do you remember the time frame when that  
5 improvement or work was done to the Pocatello Creek Road?  
6 A. Yes.  
7 Q. From when to when?  
8 A. Started in June of 2005 and it ended the very  
9 end of August of 2005.  
10 Q. Summer, actually June, July, and August?  
11 A. Yes.  
12 Q. Were those barriers moved during the  
13 construction, the work on the Pocatello Creek Road?  
14 A. Some to the west of me were, yes, the ones  
15 directly behind me were not.  
16 Q. So that section of barriers that's right  
17 behind your fence wasn't moved.  
18 A. Correct.  
19 Q. You made a statement that you didn't believe  
20 that this home had ever been flooded from Pocatello Creek  
21 Road before, I think you made that statement.  
22 A. Yes.  
23 Q. How did you know that?  
24 A. The carpet in the basement was very dated.  
25 Q. So you made that determination based on

1 as well.  
2 Q. Have you asked them whether or not the  
3 basement in your home had ever flooded before?  
4 A. Yes.  
5 Q. What did they say?  
6 A. No.  
7 Q. You did some landscaping in your back yard  
8 after you moved in; right?  
9 A. Yes.  
10 Q. What did you do?  
11 A. I had some boulders moved in to make a  
12 retaining wall.  
13 Q. When did you do that?  
14 A. That was done in the spring of 2005.  
15 Q. Spring of 2005.  
16 A. Yes.  
17 Q. Which month?  
18 A. April.  
19 Q. When did the road construction start, again?  
20 Was it June of 2005?  
21 A. Yes.  
22 Q. Did you do any work on the fence around your  
23 yard?  
24 A. No.  
25 Q. That fence was existing when you moved in?

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1 A. It was.  
2 Q. How did they get those boulders in there?  
3 A. I had to tear the fence down on the west side  
4 of my home and then they had a front end loader.  
5 Q. They didn't come in from Pocatello Creek Road,  
6 they didn't take the back fence down?  
7 A. No.  
8 Q. They came in from the west side, is it like a  
9 neighbor's yard or something?  
10 A. It was my yard.  
11 Q. They took the fence down, drove past your  
12 house and then came in with a loader.  
13 A. Exactly.  
14 Q. Did they haul in any fill dirt?  
15 A. Yes.  
16 Q. How much?  
17 A. I don't know how much it was.  
18 Q. Would Armstrong Landscaping know?  
19 A. Yes.  
20 Q. They are the ones that did the work?  
21 A. Yes.  
22 Q. April of 2005 to the time that that road  
23 construction started, did you have any big rainstorms  
24 that you remember?  
25 A. No.

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1 Q. No rain?  
2 A. No.  
3 Q. Dry summer?  
4 A. Dry summer.  
5 Q. And the fence along the back of your yard was  
6 never altered during the relandscaping?  
7 A. Not at all.  
8 Q. Have you had to replace any boards or anything  
9 on that fence?  
10 A. No.  
11 Q. Painted it?  
12 A. No.  
13 Q. That's good, it's a wood fence. So before you  
14 put the boulders in, what did the back yard look like  
15 below the fence?  
16 A. It just was the road bank from the fence down  
17 to the lawn.  
18 Q. Do you have a picture of it before then,  
19 before the landscaping?  
20 A. I don't.  
21 Q. Besides rocks, the big boulders and fill dirt,  
22 what else did they do for landscaping?  
23 A. That was all.  
24 Q. Did they put in a sprinkler system up there?  
25 A. No.

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1 Q. Did they alter the grass in your back yard at  
2 all?  
3 A. No.  
4 Q. The grass was already planted and growing?  
5 A. They took out the grass next to the boulders  
6 because they were driving on it with the front end loader  
7 and then they replaced it with sod.  
8 Q. How many feet of grass in front of those  
9 boulders do you think?  
10 A. Well, the total length of the property is  
11 about 80 feet. There is about 20 foot of garden, so that  
12 leaves about 60 feet. So 60 feet by four foot, 240  
13 square feet of grass.  
14 Q. You are thinking about four feet  
15 (indicating) --  
16 A. Just wide enough for the front end loader to  
17 drive along.  
18 Q. So the grass from your back door in your house  
19 walking towards the boulders, there is probably 40 or 50  
20 feet of grass there that was not touched?  
21 A. That's correct.  
22 Q. And you didn't put that grass in, that was  
23 there when you moved in?  
24 A. That is also correct.  
25 Q. You didn't do any of the landscaping in the

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1 entire yard?  
2 A. No.  
3 Q. How much did that rock wall cost when you put  
4 it in?  
5 A. \$3,000.  
6 Q. Total bid for everything?  
7 A. Yes.  
8 Q. Why did you put that in?  
9 A. My son was getting married and wanted to have  
10 a reception in my back yard.  
11 Q. Did you have an engineer or anybody come and  
12 look at it before you put that rock wall in?  
13 A. No.  
14 Q. Who designed the layout?  
15 A. His name was Clayton Armstrong.  
16 Q. Part of the Armstrong sprinkler company  
17 people?  
18 A. That's correct.  
19 MR. HAWKES: He is the owner.  
20 Q. Do you know if he has any expertise and  
21 training in that field or anything about him?  
22 A. He is a licensed contractor.  
23 Q. You have rain gutters along the back of your  
24 house; right?  
25 A. Yes, I do.



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1 Q. Were those installed when you moved into the  
2 house?  
3 A. Yes.  
4 Q. You didn't put them on.  
5 A. No.  
6 Q. Have you ever had problems with rain gutters  
7 during a rainstorm sending water down into the window  
8 well area?  
9 A. No.  
10 Q. Do you remember a guy by the name of Dan  
11 Weeks, an adjuster who came out to your house?  
12 A. Yes.  
13 Q. Did you have a conversation with him?  
14 A. Most of the conversation was also with Mr.  
15 Hawkes, who came with him.  
16 Q. What do you remember about that conversation?  
17 A. That he just looked around and was asking me  
18 questions about what had happened.  
19 Q. Who else was in that meeting, I guess?  
20 A. That was all.  
21 Q. The three of you?  
22 A. Yes.  
23 Q. He was a claims rep. What was his purpose in  
24 being there, do you know?  
25 A. Mr. Hawkes had asked him to come.

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1 MR. HAWKES: No, that's not right. Kirk Bybee  
2 advised me that he was an adjuster for the city.  
3 Q. Was your son present in one of those meetings  
4 with him, a meeting with him?  
5 A. No.  
6 Q. Do you remember telling Dan Weeks that you  
7 thought the water was coming in through cracks in the  
8 basement foundation?  
9 A. No.  
10 Q. You don't remember telling him that?  
11 A. No.  
12 Q. Do you know if the grade of your yard is such  
13 that it slopes into the back of the house from the  
14 retaining wall?  
15 A. It does now.  
16 Q. Why does it do it now?  
17 A. Because there has been so much fill dirt  
18 washed down from the retaining wall onto the lawn that  
19 now it does drain towards the house.  
20 Q. It didn't do that before the flooding  
21 problems?  
22 A. It did not.  
23 Q. Did you have it surveyed?  
24 A. No.  
25 Q. How do you know it didn't drain into the

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1 house?  
2 A. Observation, you could see that it actually  
3 sloped towards the boulders. With the loader, front end  
4 loader driving on it, it had packed the dirt down so that  
5 it was actually lower than the rest of the lawn.  
6 Q. It must be pretty close though. It must be  
7 fairly flat if the runoff now has caused it to build up  
8 where it drains into your house a little bit.  
9 A. Yes.  
10 Q. When the rock wall was being installed, were  
11 you out there watching, observing?  
12 A. Yes.  
13 Q. Were there workers there during the day when  
14 you weren't there?  
15 A. Yes.  
16 Q. You said it took them about a week to do it;  
17 is that right?  
18 A. That's correct.  
19 Q. Were you working during that week, too?  
20 A. Yes.  
21 Q. So you would come home and kind of see what  
22 they were doing at night, that sort of thing?  
23 A. Yes.  
24 Q. I have asked this before, but just to clarify,  
25 you are sure that they didn't approach your house from

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1 Pocatello Creek Road to do any work bringing lifts or  
2 trucks or anything back through that way?  
3 A. Absolutely certain.  
4 MR. ANGELL: Off the record.  
5 (Discussion off the record.)  
6 MR. ANGELL: Back on the record.  
7 Q. I am going to hand you some photographs that  
8 you have provided to us. I'd like you to tell me who  
9 took them, when they were taken, and kind of generally  
10 what they depict. I have numbered them for my purposes  
11 in the bottom corner. This is Page 46 which has four  
12 photographs on them.  
13 A. These are photos taken by Jim Lystrup in March  
14 of 2006. The first picture denotes the sheet rock on the  
15 bedroom wall that was damaged by the water. The other  
16 one is the sewing room, which also shows water damage.  
17 The bottom one on the left shows the window well. And  
18 the bottom one on the right is the utility room, which  
19 was also flooded.  
20 Q. I have marked them and I will have the rest of  
21 these, where there are four pictures on a page, marked A,  
22 B, C, D; A being in the upper left; and then B upper  
23 right; C, lower left; D lower right.  
24 Looking at Picture C, you say that's the  
25 window well. You are talking about the hard water line



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1 you can see? I don't see it in there. Can you see it?  
2 A. Yes. It was approximately this area through  
3 here (indicating).  
4 Q. You are indicating the middle of the window.  
5 A. Yes.  
6 Q. Was this picture taken after that line was on  
7 the window?  
8 A. Yes.  
9 Q. How come it's not there?  
10 A. It did not come through in the photograph.  
11 Q. Did you wash the window, do you know?  
12 A. No.  
13 Q. But you say to the best of your recollection  
14 it's just not coming through on the picture, but there  
15 was actually a hard water or a line on it when --  
16 A. Yes.  
17 Q. Page No. 47.  
18 A. Also photos taken by Jim Lystrup. Picture A  
19 is the sewing room with some furniture left back in  
20 there. Picture B is the utility room looking into the  
21 closet. Picture C is of the sewing machine. And Picture  
22 D is the utility room with the closet opening into the  
23 water heater.  
24 Q. Page No. 47.  
25 A. Picture A is the bathroom. Picture B is my

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1 window well level, do you remember?  
2 A. It was not to the top of the window well, it  
3 only came up halfway on the window. Or do you mean the  
4 water outside of the window well?  
5 Q. I mean the water outside.  
6 A. It did not come up to the height of the window  
7 well. What you cannot see in this picture here is if you  
8 can see this piece of board here (indicating), there is  
9 also a board running here along (indicating), which is  
10 built up higher so that it is built up to the height of  
11 the window well. The water did not come up to the height  
12 of that board, it has come around this side where the  
13 decking is and has run down into the window well on that  
14 side (indicating).  
15 Q. What's underneath that decking?  
16 A. Cement.  
17 Q. Just a patio or something?  
18 A. No, it was the original step and the decking  
19 was put on because the step was a big drop down to the  
20 step.  
21 Q. So you had wood steps built over the top.  
22 A. Exactly.  
23 Q. A smaller step.  
24 A. Right.  
25 Q. Did you ever have water standing on the grass

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1 family room with all of the items from the basement  
2 dumped into it. Picture C is the utility room with a few  
3 of the shelves left in it. And Picture D is the stairs  
4 leading to the lower level of the basement.  
5 Q. Where is your family room at?  
6 A. The family room is just the level up from the  
7 bedroom.  
8 Q. Jim Lystrup took these pictures?  
9 A. That's correct.  
10 Q. The same day he was there for the other ones?  
11 A. Yes.  
12 Q. Page 48?  
13 A. Pictures also taken by Mr. Lystrup. Picture A  
14 shows the window well with sandbags that I had purchased  
15 and put there to prevent any further flooding, should  
16 there be any --  
17 Q. Can I stop you on that picture. Did you go  
18 outside and actually see water running over the top of  
19 that window well?  
20 A. It did not come over the top. It came around  
21 the side (indicating), particularly the west side.  
22 Q. Between the cement and where the window well  
23 is bolted onto the cement?  
24 A. That is correct.  
25 Q. Was the water up pretty high to the top of the

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1 and dirt and whatnot that abuts this window well on the  
2 outside?  
3 A. Yes.  
4 Q. And it was kind of seeping down through and  
5 running around the side?  
6 A. That is correct.  
7 Q. Was that ground saturated around that window  
8 well, did you ever stick a shovel in it and dig down a  
9 little bit?  
10 A. Yes, it was very saturated.  
11 Q. Was that true around the other edges of your  
12 house where there aren't windows, did you ever go stick a  
13 shovel in it to see if the ground was saturated around  
14 the other edges of the house?  
15 A. It was not.  
16 Q. How about along the back of the house, the  
17 length of the house?  
18 A. The only place that it has become saturated is  
19 from a few feet beyond the window well to the east and  
20 down past the garage.  
21 Q. I think you were on Picture B.  
22 A. Picture B is another picture taken by Mr.  
23 Lystrup. It shows the erosion caused by the water coming  
24 from behind the fence down onto my property, and there is  
25 a big rock here (indicating) that has also fallen back

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1 in, and Picture D shows it better. Picture C is more  
2 photos of the family room with all of the furniture and  
3 items from the basement thrown into it. Picture D also  
4 shows one other thing here, and that is the amount of  
5 soil that has washed onto the grass (indicating).  
6 MR. HAWKES: Sam, do you know what the term  
7 metadata means? In every one of these digital pictures  
8 we have given you, there is electronically accessible  
9 metadata that tells you the date and time of the picture.  
10 That assumes that the camera is set correctly. But, for  
11 instance, this is one of Jim Lystrup's right here  
12 (indicating), see, and this gives the date and time of  
13 it.  
14 But you can take virtually any program that  
15 will handle pictures and right click on the digital photo  
16 and that will give you a screen of which one of the  
17 words, usually towards the bottom, is properties, and it  
18 will tell you the time and date of that picture.  
19 MR. ANGELL: Was your camera set, the one that  
20 you and Ryan took?  
21 MR. HAWKES: Yes.  
22 MR. ANGELL: And Jim Lystrup's was?  
23 Q. How about your camera?  
24 A. Mine is a film camera.  
25 MR. HAWKES: I am looking at Jim Lystrup's

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1 pictures here, that's why I thought I would mention it to  
2 you.  
3 MR. ANGELL: Thanks for the heads up.  
4 Q. Page 49, just to move a little faster, these  
5 are pictures again taken by Jim Lystrup?  
6 A. That is correct.  
7 Q. And on the same date as the rest of these  
8 pictures which was, again, I have already forgotten,  
9 sometime in March of 2006?  
10 A. March, yes.  
11 Q. So A shows --  
12 A. The erosion. This Picture B shows the cement  
13 barrier along Pocatello Creek Road, and this is my fence  
14 (indicating). Picture C is also the erosion and how it  
15 has cut away all the soil. Picture D, the same thing  
16 again.  
17 Q. Page 50, the same day, different angles of  
18 the --  
19 A. Up Pocatello Creek Road.  
20 Q. Anything else that you want to add about those  
21 of significance?  
22 A. No.  
23 Q. Page 51, photos again taken by Mr. Lystrup?  
24 A. Yes.  
25 Q. And showing again the erosion. Is there

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1 anything else that you want to add specifically about any  
2 of those photographs?  
3 A. No. As you can see in Picture B, however, you  
4 can see how much soil has washed down onto the grass.  
5 Q. Page 52, the same day, pictures from Mr.  
6 Lystrup; correct?  
7 A. That's correct.  
8 Q. Is there anything that you want to add  
9 specifically about any of these? Picture B shows the  
10 embankment where -- is that where you assumed the water  
11 was coming through?  
12 A. Yes. You can even see right through here  
13 (indicating) where that cupping section is.  
14 Q. And that's your opinion and that of Mr.  
15 Lystrup that the water was running underneath the  
16 forklift notches of the cement barriers?  
17 A. That is correct.  
18 Q. In this dipped area or the cupped area.  
19 Picture D shows the end of the Pocatello Creek Road  
20 project, right, where that curb ends?  
21 A. Yes. Actually the Pocatello Creek project  
22 started here with the curb and gutter. The water will  
23 not run to that curb and gutter (indicating).  
24 Q. It gets stalled before there?  
25 A. Yes.

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1 Q. Page 53, again, pictures by Mr. Lystrup, I  
2 assume.  
3 A. Yes.  
4 Q. The same day.  
5 A. Yes.  
6 Q. Is there anything else you want to add about  
7 any of those?  
8 A. Picture C shows the hole where the water has  
9 run under the fence.  
10 Q. Page 54, again, the same day. Is there  
11 anything you want to add about that picture?  
12 A. No.  
13 Q. Page 55, who took those photographs?  
14 A. I took those photographs.  
15 Q. And they are dated before the summer of 2005?  
16 A. Yes, that is just to show what my back yard  
17 looked like prior to flooding.  
18 Q. This is probably right after you got the  
19 landscaping finished?  
20 A. Yes.  
21 Q. Page 56, photographs taken by you.  
22 A. Yes.  
23 Q. We don't remember the exact date --  
24 A. April 16.  
25 Q. Okay, April 16.

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1 A. In this photograph you can see the erosion and  
2 the rock that was the third tier, has actually fallen  
3 completely back under there at this point in time because  
4 there has been so much soil eroded from around it. You  
5 can also see the depth of the dirt and soil on the lawn,  
6 because these rocks here on this bottom layer  
7 (indicating) are approximately 15 to 18 inches tall and  
8 some of them you can just barely see.  
9 What you also might can see a little bit here  
10 (indicating) is that this dirt here has been turned up.  
11 What I have done is dug the trench alongside here and put  
12 that dirt in the back to help build that up. What I was  
13 trying to attempt to do was get the water to drain off to  
14 the west rather than come across the lawn and into the  
15 house.  
16 And you can see the amount of water that is  
17 starting to build up there (indicating).  
18 Q. Now, this flood, you didn't get water in your  
19 house, your ditch had done its job; right?  
20 A. That's correct.  
21 Q. But the second photograph on Page 56 shows the  
22 water built up in the yard.  
23 A. Yes.  
24 Q. Page 57 looks like two more views of the same  
25 day?

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1 A. That's correct, more water building up and by  
2 the time this storm had finished, that entire back east  
3 portion of my lawn was covered with water (indicating).  
4 Q. Page 58, what does that depict?  
5 A. Okay, I have marked a line here because it  
6 doesn't show very well in reproductions, but this line  
7 indicates the water level in the window well.  
8 Q. And this photograph is dated 2/28/06?  
9 A. That's correct.  
10 Q. And you are trying to show, trying to get a  
11 picture of that line in the window.  
12 A. Yes.  
13 Q. What about the second photograph on that page?  
14 A. The bottom photograph shows the water damaged  
15 wall underneath the window.  
16 Q. Was that water damage on the outside of the  
17 sheet rock?  
18 A. Yes.  
19 Q. Could you actually see water running like over  
20 the inside of the --  
21 A. On that original flooding, yes.  
22 Q. So if you walked up and touched the wall, you  
23 would get your hand wet?  
24 A. Very much so. It had bubbled all the paint  
25 completely off from it

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1 Q. And that didn't happen again after this  
2 flooding?  
3 A. No.  
4 Q. After this flooding --  
5 A. It went between the wall and the cement.  
6 Q. Page 59, two photographs, one from April 17,  
7 one from April 16?  
8 A. Okay, the April 16th photograph, which is the  
9 bottom one, just depicts some more of the water coming  
10 onto the lawn. The next morning it turned to snow and I  
11 went out and can show you that the water is still coming  
12 off the road and down into the yard, and that's depicted  
13 by the areas of brown.  
14 Q. And these are again photographs taken by you?  
15 A. Yes.  
16 Q. Page 60, were those taken by you?  
17 A. I believe so.  
18 Q. And they show the erosion?  
19 A. Yes. You can see here that there is quite a  
20 gap between the fence and this is weed cloth underneath  
21 here with bark on top, and there has become quite a gap  
22 there because it has been all eroded from the bottom. So  
23 it's just left to sag. And then you can see the erosion  
24 here (indicating).  
25 Q. Those pictures aren't dated. What date would

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1 they be, do you know?  
2 A. They would have to be spring because the  
3 bushes are not leafed out.  
4 Q. The spring of 2006?  
5 A. Yes.  
6 Q. Page 61, photos taken by you?  
7 A. Yes.  
8 Q. The approximate date on those?  
9 A. April 17 again. It shows the water still  
10 running off the road under the fence and down into the  
11 yard.  
12 Q. Page 62, photos taken by you?  
13 A. Yes. The same thing again.  
14 Q. Approximately the same date, snow on --  
15 A. The snow on this date of April 17 and the  
16 bottom one sometime in that same time period.  
17 Q. Page 63, photographs taken by you?  
18 A. Yes.  
19 Q. More erosion. Do you know the date on this?  
20 A. April.  
21 Q. It would have been the same rainstorm in  
22 April?  
23 A. Yes. And you can see the trails of water that  
24 has run through here and down onto the lawn (indicating).  
25 Q. Is that a pipe in the top picture?

1 A. That is actually a soaker hose.  
 2 Q. There are soaker hoses running through the  
 3 landscaping up there?  
 4 A. Yes, in order to water, I just have one of  
 5 those small soaker hoses to water the shrubs.  
 6 Q. Does it run lengthwise across the back of the  
 7 yard?  
 8 A. Yes.  
 9 Q. On each level of the terracing, I am guessing.  
 10 A. Yes.  
 11 Q. And that is to water the shrubs.  
 12 A. Yes.  
 13 Q. There is no sprinkler up there that sprinkles  
 14 water?  
 15 A. No.  
 16 Q. The soaker hose was put in at the same time  
 17 the wall was installed?  
 18 A. They are just commercial soaker hoses that you  
 19 place on top of the ground.  
 20 Q. Oh, they are not buried.  
 21 A. No.  
 22 Q. And you put those in yourself?  
 23 A. Yes.  
 24 Q. The sprinkler people didn't put those in?  
 25 A. No.

1 Q. Are they run on an automatic sprinkler system  
 2 or do you hook them up to a hose?  
 3 A. Hook them up to a hose and turn them on very  
 4 slightly and it irrigates.  
 5 Q. Page 64, two photographs dated February 28. I  
 6 am guessing they just show the wetness on the floor?  
 7 A. Wetness. I think what it is showing is the  
 8 equipment that ServiceMaster had brought in to dry out  
 9 the entire basement. They are big fans and heating  
 10 units.  
 11 Q. Page 65, one photograph.  
 12 A. That is my chair turned upside-down in the  
 13 family room where everything was dumped.  
 14 Q. I am going to start back at Page 1. Do you  
 15 know who took those photographs?  
 16 A. Not for certain.  
 17 MR. ANGELL: Lowell, do you know if these are  
 18 your guys' photographs?  
 19 MR. HAWKES: I can't tell from what you have  
 20 got here, but I can show you later which ones would be on  
 21 my camera, because the digital will identify.  
 22 THE WITNESS: I know that they are not mine; I  
 23 know they are not Mr. Lystrup's. But they could be yours  
 24 or they could be Mr. McCasland's from Best Clean Care, or  
 25 they could be Mr. Larango's from Environmental.

1 MR. HAWKES: We don't know the source of your  
 2 pictures -- I think, Sam, I took pictures like that.  
 3 Q. This shows the sandbags in Photograph C.  
 4 A. Yes.  
 5 Q. So it would have had to have been after  
 6 February of 2007.  
 7 A. That is correct.  
 8 Q. Is there anything you want to say about these  
 9 pictures, what they are meant to show?  
 10 A. That there has been an attempt to try to get  
 11 the flooding to stop by putting the sandbags and the  
 12 gravel in, and it did not stop the flooding, it just  
 13 dispersed the water more evenly.  
 14 MR. HAWKES: Let me take a quick look here  
 15 because there is another way I maybe can tell you.  
 16 MR. ANGELL: Let's go off the record for a  
 17 minute.  
 18 (Discussion off the record.)  
 19 MR. ANGELL: Back on the record.  
 20 Q. Page 2, I think we have identified these as  
 21 being taken by Lowell or somebody in his office.  
 22 A. Picture A you can see the erosion, the cement  
 23 barrier is here in the very corner. You can see the  
 24 erosion of the dirt down to the fence and from there it  
 25 goes under the fence and into the yard.

1 MR. ANGELL: Do we have a date on that?  
 2 MR. HAWKES: 3/8/07, somewhere between 1:17  
 3 p.m. and depending on which picture there.  
 4 Q. Picture B there is some cable or something.  
 5 Do you know what that is, anything significant with this  
 6 case?  
 7 A. No.  
 8 Q. Is there anything else you want to add about  
 9 those pictures?  
 10 A. No.  
 11 Q. Page 3, the same date, the same pictures,  
 12 taken by your attorney.  
 13 A. Okay, this one (indicating) is across the road  
 14 from my home. This one shows the sandbags along the  
 15 road --  
 16 Q. And a nice photograph of Ryan. Page 4,  
 17 pictures taken the same day. Is there anything you want  
 18 to add about those?  
 19 A. Just shows the erosion in the yard on Photo B.  
 20 Q. Page 5, again I think photos taken the same  
 21 day. Is there anything you want to add?  
 22 A. The only thing I might add is the depth of the  
 23 cavern that has been caused here.  
 24 Q. Photo C, I am assuming that's the trench that  
 25 you dug in your back yard?

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1 A. Yes, that is the trench.  
2 **Q. Page 6, Photo A, describe that one for me.**  
3 A. This is taken by Mr. Hawkes. Prior pictures  
4 show the trench in the back yard, but I have also taken  
5 all my flower pots and dumped soil along here and laid  
6 out rugs and put sandbags and anything I could possibly  
7 think of along that area of the house to keep the water  
8 from running in.  
9 **Q. The window well, where is it located?**  
10 A. The window well is right to the left here  
11 (indicating).  
12 **Q. Facing the door it's on the left side of the**  
13 **door?**  
14 A. That is correct.  
15 MR. HAWKES: I think we are mixing pictures on  
16 two different occasions at this point.  
17 MR. ANGELL: Do you know, was this taken on a  
18 different day?  
19 MR. HAWKES: This particular thing does not  
20 show up as 3/8, so I'll have to look here and see if I  
21 can find it.  
22 **Q. These pictures on Page 6 would have been in**  
23 **the spring sometime of 2006, though, wouldn't they?**  
24 A. As ground started thawing, yes.  
25 **Q. Is there anything else that you want to add**

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1 **about any of the pictures on that page?**  
2 A. No.  
3 **Q. Page 7, I guess taken by Mr. Hawkes again,**  
4 **spring of 2006.**  
5 A. Yes. Okay, I do want to comment about these  
6 pictures. You can see that there is a great amount of  
7 dirt that has eroded and come down onto the property here  
8 on Picture B. Picture C, my son actually dug a lake  
9 here, as we were trying to divert the water from running  
10 across the lawn, he had dug a trench along here and then  
11 tried to get it to drain into here (indicating) so it  
12 formed more of a lake and stayed away from the house.  
13 Here is the trench that has been dug next to  
14 the boulders here and the grass which has been laid back  
15 here as a further deterrent. This works pretty good when  
16 the ground is not frozen, but once the ground freezes,  
17 the trench very rapidly fills up with the dirt coming  
18 down off the boulders. And then runs across the lawn  
19 anyway.  
20 **Q. Page 8, I guess some more views of the**  
21 **erosion.**  
22 A. Yes.  
23 **Q. Is there anything else you want to add about**  
24 **that page?**  
25 A. The rock that is completely missing is here

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1 (indicating). As I mentioned before, the initial  
2 flooding came down right here. Then Mr. Turner brought a  
3 crew out, he put a little patch of gravel up on the road.  
4 Well, it quit flooding specifically in that area but then  
5 it started on this area and this rock (indicating), so it  
6 just moved down to the next opening, is all it did. So I  
7 was continuing to get flooded but from this section to  
8 this section (indicating).  
9 MR. HAWKES: I am pretty sure, Sam, that the  
10 ones you are looking at now are the 8th, taken on the  
11 8th, but approaching 5:00 p.m.  
12 **Q. Page 9 will be the same day, the 8th.**  
13 **Anything else you want to add about those?**  
14 A. No.  
15 MR. ANGELL: Picture 10 was taken by you,  
16 Lowell? It's a set of pictures --  
17 MR. HAWKES: I have got several like that. I  
18 think this one looks like one I took at 5:02.  
19 **Q. Picture 10, is there anything you want to add**  
20 **to that?**  
21 A. At this point in time, although there is not  
22 water on the floor at the moment, you can see that I have  
23 had a shop vac in to vacuum up the water, fan and heater  
24 to try to keep it dry, and also a lot of towels along the  
25 floor to absorb the water coming in.

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1 **Q. That was March 8 of '07?**  
2 A. Yes.  
3 **Q. So that would have been after the February**  
4 **floods where you were having --**  
5 A. The February floods were in 2006. This is  
6 after the December 27 flooding and it kept flooding  
7 continually from then on.  
8 **Q. So after December 27, 2006 --**  
9 A. Yes.  
10 **Q. -- into 2007 you had flooding through the**  
11 **month, before you told me approximately the month of**  
12 **February. Apparently it's also still wet on the 8th of**  
13 **March --**  
14 A. Yes. I could not keep it dry.  
15 **Q. The next page, Page 11, is there anything you**  
16 **want to add to those photographs? They look to be taken**  
17 **the same day.**  
18 A. Yes, they are. Other than I have been asked  
19 what the bucket in the window well was for, and at one  
20 point in time I was out there at midnight trying to bail  
21 water out of the window well to prevent it from coming  
22 into the house.  
23 **Q. Page 12. I assume those were taken the same**  
24 **day. Do you know what they are meant to depict?**  
25 A. This is the window. I believe that part of it

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1 depicts the mold that is in the left-hand corner of the  
2 window that has grown.  
3 Q. This is before that window was replaced;  
4 right?  
5 A. That's correct.  
6 Q. You said when they were replacing the window,  
7 they replaced the trim around the window as well?  
8 A. Yes.  
9 Q. Page 13, do you know if those were taken that  
10 same day?  
11 A. I am pretty certain they were.  
12 Q. And what do they depict?  
13 A. Just towels on the floor to absorb the water.  
14 And this one is in the bathroom. The white material that  
15 you see here they call effervescence, and it's from being  
16 soaked with water for a period of time, and it's the  
17 minerals and salts from the water that come up through  
18 the concrete.  
19 Q. Page 14 I am guessing shows some of that same  
20 mineral deposit?  
21 A. That's correct. This is the tile in the  
22 bathroom. You can see that the tile grout has been  
23 cracked and chipped and the effervescence around it, and  
24 these tiles, because they have been continually wet, have  
25 come loose, and that's why the tile in the bathroom to

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1 this date still needs to be replaced.  
2 Q. Page 15, do you know if those are photographs  
3 taken on the same date or a different date?  
4 A. I think they are the same date.  
5 Q. What are they meant to depict?  
6 A. Just what a mess I had in the bathroom and  
7 made it unusable and more pictures of the window well.  
8 It shows that the trim has been torn off from it.  
9 Q. This has to be a different day, I think.  
10 MR. ANGELL: Do you have this picture on your  
11 list there, Lowell? Did you take that one?  
12 MR. HAWKES: Let's see if I can find it.  
13 THE WITNESS: That one might be Mr.  
14 McCasland's.  
15 MR. ANGELL: Let's go off the record here for  
16 a minute.  
17 (Discussion off the record.)  
18 MR. ANGELL: Back on the record.  
19 Q. (By Mr. Angell.) Page 16, that was a  
20 photograph you indicated taken by Mr. Lystrup?  
21 A. It was.  
22 Q. That would have been in the spring of 2006?  
23 A. Yes.  
24 Q. And Picture B shows some repair work done to  
25 the wall?

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1 A. Actually that is paint that has peeled off the  
2 wall.  
3 Q. Prior to the repair work being done?  
4 A. Yes.  
5 Q. What is Picture A supposed to show?  
6 A. I'm not certain.  
7 Q. Let's look at Page 17. I assume those were  
8 taken the same day, it looks like they were.  
9 A. Yes.  
10 Q. Look at Picture B. Are those wet spots on the  
11 wall by where the window is?  
12 A. No.  
13 Q. Is that the wall where the window is?  
14 A. No. This is in the sewing room. What it  
15 shows, though, is the rust spots on the carpet from the  
16 furniture.  
17 Q. Page 18, again, it looks like it's the same  
18 day. Is there anything specific you want to state about  
19 those pictures?  
20 A. No.  
21 Q. Page 19 looks like it's again the same day.  
22 A. Yes.  
23 Q. Anything specific about those pictures?  
24 A. No.  
25 Q. Page 20, again the same day, it looks like.

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1 A. Yes.  
2 Q. Anything specific about those?  
3 A. No.  
4 Q. The top picture doesn't seem to show any tile  
5 damage.  
6 A. No, it does not.  
7 Q. That effervescence didn't show up until the  
8 following year; is that right?  
9 A. That's correct.  
10 Q. Page 21, it looks like that depicts your stuff  
11 in your family room.  
12 A. Yes.  
13 Q. Page 22 I had wanted to look at earlier, gives  
14 a better view of your window well; is that correct?  
15 A. Yes, it is.  
16 Q. Do you know when that picture was taken?  
17 A. March of 2006. I am certain this is a picture  
18 taken by Mr. Lystrup as well.  
19 Q. The wood, it looks like there may be four by  
20 four posts that go around the window well. Were they  
21 placed there for a specific purpose?  
22 A. They are part of the landscaping of the back  
23 yard. That board that runs here runs the length of the  
24 house, and then there is the bark on it and it comes out  
25 about three and a half to four foot so I don't have to

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1 water or mow right next to the house.  
2 Q. That four by four and the bark, is it up  
3 higher than the grass?  
4 A. Yes, it is.  
5 Q. Page 23, do you know when those were taken and  
6 by whom?  
7 A. I do not.  
8 MR. ANGELL: These look like more of yours,  
9 Lowell.  
10 MR. HAWKES: Yes.  
11 Q. That would be the spring of --  
12 MR. HAWKES: I am pretty sure those are the  
13 8th of March of '07.  
14 Q. And it was in '07 when you described to me the  
15 fact that the water had changed course in the back yard,  
16 it wasn't pouring down the same spot that it was in 2006.  
17 A. Right.  
18 Q. And that's you think because Mr. Cac Turner  
19 had his guys put the gravel in along the barrier --  
20 A. That's correct.  
21 Q. -- which redirected the water.  
22 A. Right. Because the original one was about  
23 this portion of the picture right here on Picture B  
24 towards the forefront because the rock has disappeared.  
25 Here is the next section with the big hole (indicating).

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1 Q. Page 24 looks like the same day. Is there  
2 anything you want to add specifically about those  
3 photographs?  
4 A. No.  
5 Q. Page 25, look at Picture C, and can you  
6 indicate where you think the water was coming through?  
7 Is that what that's meant to show?  
8 A. I'm not sure if that's what it is or not,  
9 because this (indicating) is the very east portion of my  
10 yard right here in the very side. This is actually my  
11 neighbor's yard (indicating).  
12 Q. Is there anything you want to add about those  
13 pictures?  
14 A. No.  
15 Q. Page 26.  
16 A. Nothing specific other than here again you can  
17 see the silting effect on the lawn.  
18 Q. But this one had to have been taken before --  
19 this had to be the spring of 2006; right?  
20 A. Yes.  
21 Q. Because there are no sandbags up on the road,  
22 is what I am guessing.  
23 A. Right.  
24 Q. The same with Page 27, it must have been taken  
25 in 2006; is that correct?

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1 A. That's correct. You can see again here how it  
2 comes along here and all of a sudden there is this big  
3 cup right in here (indicating).  
4 Q. That's Picture B and you are showing the edge  
5 of the road --  
6 A. Yes, where it just drops off.  
7 Q. In between the road and the cement barrier.  
8 A. Right. Here on Picture A you can see a big  
9 hole where it has eroded the dirt from under the fence.  
10 Q. Is there anything else you want to add there?  
11 A. No.  
12 Q. Page 28, probably the same day, again there is  
13 no sandbags along the barrier.  
14 A. Right.  
15 Q. Is there anything you want to add about those  
16 pictures?  
17 A. No.  
18 Q. Page 29 looks like a different day.  
19 A. Yes, these are my photos again off the  
20 original --  
21 Q. Oh, okay.  
22 A. Duplicates.  
23 Q. And these would have been taken in April 16, I  
24 think.  
25 A. Yes.

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1 Q. Page 20, Picture A, that was taken by you  
2 April 17, 2006?  
3 A. Yes. There is a stream of water coming from  
4 this hole in the barrier.  
5 Q. It looks like a forklift notch, if I am  
6 guessing right.  
7 A. Yes, and it runs directly down to the fence  
8 and then into the yard.  
9 Q. Is there anything else you want to add about  
10 those pictures?  
11 A. No.  
12 Q. Page 31, the same day taken by you?  
13 A. Yes.  
14 Q. Is there anything you want to add about those?  
15 A. No.  
16 Q. Page 32, it looks like pictures from April 17  
17 again, 2006.  
18 A. Yes, they are.  
19 Q. Is there anything you want to add?  
20 A. No.  
21 Q. Page 33, I don't know when those were taken,  
22 there is no snow.  
23 A. This is August of 2006.  
24 Q. And this was one of the times that it rained  
25 but did not flood your basement?



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1 A. Right, because my trench held up.  
2 Q. What were these photographs meant to depict?  
3 A. Okay, A depicts how much soil has been eroded  
4 from between the rocks. Picture B is up on Pocatello  
5 Creek Road. It shows the new curb and gutter system that  
6 was installed on the road. But it also shows that there  
7 is not enough flow of water coming down Pocatello Creek  
8 Road that it will even move the garbage off. That is a  
9 cigarette package (indicating). So there is virtually no  
10 water hitting this curb and gutter.  
11 Most of it will drain off into my yard, but  
12 what little bit does make it by actually drains behind  
13 the curb and gutter rather than down it.  
14 Q. What about Picture D on that page, is it meant  
15 to depict anything?  
16 A. Just more erosion, and Picture D is a photo of  
17 the curb and gutter that is close to the drain and there  
18 finally is becoming some water in it, but it is water  
19 that has come across the road.  
20 Q. Back in Picture B, it's your testimony, as you  
21 observed it, that the water pools up where the curb  
22 begins, if I can recap that, and if it does flow down the  
23 road, it goes behind the curbing?  
24 A. It pools up back here (indicating) which is my  
25 property. If it makes it to here, if there is enough

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1 volume of water that it makes it to the curb and gutter,  
2 it still does not run down the curb and gutter, it runs  
3 behind it.  
4 Q. Page 34 looks like the same day. Is that what  
5 you remember?  
6 A. Yes.  
7 Q. Is there anything specific you want to add  
8 about those photographs?  
9 A. Okay, Picture A, it's not a great picture  
10 because of the weeds, but there is quite a bit of volume  
11 of water coming up behind that barrier (indicating).  
12 Picture B, this is just east of my property a little  
13 ways, and it shows that there is a great deal of water  
14 running down Pocatello Creek Road. Here is the actual  
15 water that's pooling up behind my property. You can see  
16 the lines from my fence, and that's where most of it will  
17 drain. Then it continues to pool up here. Here is the  
18 beginning of the new curb and gutter right here and the  
19 water flowing behind it (indicating).  
20 Q. Page 35 looks like the same day, photos taken  
21 by you. Is there anything you want to add?  
22 A. Okay, the patch of gravel that I was talking  
23 about that Mr. Turner came, this is it right there  
24 (indicating).  
25 Q. I will mark that as Picture A. So you can see

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1 the pool of water here. Originally it would run off  
2 about this area. Now it's coming on down because of the  
3 gravel and it's coming into the yard right here  
4 (indicating)?  
5 Q. So you are indicating with your finger that it  
6 used to run through where the gravel sits now and now it  
7 comes downstream a little more --  
8 A. Yes. Here (indicating) is the hole in the  
9 barrier. This is on the side of my fence and look at all  
10 the water that is there. The same thing again, here is  
11 the barrier, pools of water.  
12 Q. That's Pictures C and D.  
13 A. Yes. And, again, Picture B is the water  
14 pooling up but never running down the curb and gutter.  
15 MR. HAWKES: I think those were taken the 7th  
16 of March of '07.  
17 MR. ANGELL: Of '07?  
18 MR. HAWKES: Yes.  
19 MR. ANGELL: Were they taken by you?  
20 MR. HAWKES: Yes.  
21 A. I thought they were my pictures because I took  
22 most of the pictures in the rain. It may be. But I have  
23 got them here digitally.  
24 Q. Were you using a digital camera at some point?  
25 MR. HAWKES: She doesn't have a digital

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1 camera.  
2 A. If I took them to Wal-Mart and had them put on  
3 a digital CD and then we took them off that.  
4 Q. So you are pretty sure pages like 34 and 35 --  
5 A. It was me taking the pictures.  
6 MR. HAWKES: The thing that would suggest you  
7 are right on that is these are very small digital  
8 pictures. For instance, that one is 87 kilobytes.  
9 Q. Let's look at Page 36. That's again a picture  
10 taken in the rain, I am guessing that's yours.  
11 A. Yes. Picture A here, again you can see the  
12 pooling of the water. Picture B doesn't give you a real  
13 good idea of how much water is actually right there on  
14 the road, but here is the new curb and gutter and there  
15 is nothing running down it. Picture C through that  
16 entire rainstorm, you can see very little water has ever  
17 made it to the curb and gutter because the cigarette  
18 package is still sitting right there. And Picture D,  
19 again, the pooling.  
20 Q. And that was the same day, the 7th of March of  
21 2007?  
22 A. I believe those were actually taken in August.  
23 Q. August of 2007?  
24 A. Yes, because the trees are all leafed out and  
25 green.



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1 Q. How about Page 37, when were those taken?

2 A. The same time.

3 MR. HAWKES: Let me see what we are looking  
4 at. I am thinking those are the 30th of September but I  
5 am uncertain on that. I feel like I took those because  
6 there is one with the mirror of the car, I think that's  
7 my car's rearview mirror from the driver's side.

8 MR. ANGELL: That would have been from the  
9 30th of September of 2007?

10 MR. HAWKES: There is a date here on actually  
11 what it says is 9/30/02, so I am up in the air on that.  
12 I really kind of remember that that's when Ryan was with  
13 me and we went up there and shot those, and then the rain  
14 let up a little bit and we shot some more.

15 A. It just shows the depth of the water along  
16 that barrier (indicating). At one time there was an  
17 attempt to make -- I had shoveled out some of the dirt  
18 from behind the barrier and put in front of the barrier  
19 to see if I could help block some of the water coming  
20 down there, and that's what you see in this picture.

21 Picture C --

22 MR. HAWKES: This may not help you, Sam, but  
23 it may be that we picked up that the date was bad. Could  
24 these have been as early as January 3 of '07, Linda?

25 THE WITNESS: Not January, no.

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1 A. Yes. Here again, the pile of gravel on A and  
2 C that Mr. Turner and his crew put in and they also show  
3 exactly where the water is flowing to. And Pictures B  
4 and D are my originals from the original claim to the  
5 city.

6 Q. Page 41, would those have been pictures from  
7 your original claim as well?

8 A. No, they are just some pictures of my back  
9 yard that were taken, A and C. Pictures B and D, I am  
10 not certain when those were taken, nor by who.

11 Q. How about Page 40, is there any significance  
12 to those.

13 A. I don't know. There may be a significance to  
14 it. If you notice on the north side of the road there is  
15 no gutter on that side of the road. So there is quite a  
16 steep hill on this side, so all the water coming off that  
17 hill was hitting here and also coming across the road  
18 (indicating). So I not only had the water just coming  
19 from here, but I also had water coming from this side of  
20 the road going on to that side of the road (indicating).  
21 That's how it would account for so much volume in my yard  
22 at times.

23 Q. Page 42, do you know when those were taken?

24 A. I do not.

25 Q. Do you know what they are supposed to show?

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1 Q. There are no sandbags there so it makes me  
2 think that they are not after March --

3 A. I think they are back in August of 2006.

4 Q. August of 2006.

5 A. Yes.

6 MR. HAWKES: And the size of the pictures  
7 suggests that maybe Kelsey was messing with the dates,  
8 because they are not that camera (indicating).

9 Q. Page 38 shows the dirt pile that you put out  
10 there. These pictures were probably taken in August of  
11 2006.

12 A. Yes.

13 Q. And then the water.

14 A. Right.

15 Q. Is there anything you want to add to those?

16 A. No.

17 Q. Page 39 looks like the same day.

18 A. Yes. Actually what you can't hardly see on  
19 this Picture B is that the ripples and the way the water  
20 is pulling towards the barrier. This is the road bank  
21 and that water is flowing straight to the barrier and  
22 then down into my yard.

23 Q. Page 40, Pictures A and C, it looks like they  
24 are sometime when the water was running. Pictures B and  
25 D look like they were shot before the first --

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1 A. No. I do know that Picture B is the opposite  
2 side of the road, and there is a drain installed on that  
3 side and without the gutter before that --

4 MR. HAWKES: Ryan and I took this; I took that  
5 picture to show that there is a drain on the opposite  
6 side of the street than from where this house is and the  
7 problem is. I can find those.

8 Q. Page 43 looks like the same day. Lowell  
9 probably took those as well?

10 A. Yes, he did, and at this point sandbags had  
11 been placed.

12 Q. It was in the spring, no leaves on the trees,  
13 spring of 2007.

14 A. Yes. Sometime after my son met with the city  
15 officials, which was February 2, and when Mr. Hawkes came  
16 to my home in March.

17 MR. HAWKES: Yes, we took 37 pictures right  
18 after lunch, 1:15 to 1:20 on the 8th of March.

19 Q. Page 44 is another set of same pictures;  
20 correct?

21 A. Yes.

22 Q. Page 45 looks like another couple of the same  
23 pictures.

24 A. Right.

25 MR. ANGELL: Let's take a break for a minute.

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1 (Recess taken from 12:08 to 12:15 p.m.)  
2 Q. Let me ask you a couple more, and then I am  
3 done. Have you had problems with snow melt in your yard  
4 contributing to the water running into the basement?  
5 A. No.  
6 Q. Do you get standing snow in your yard very  
7 often?  
8 A. Haven't had for the past two winters.  
9 Q. In March, February and March of 2007 when you  
10 had the continual water coming in, was there snow  
11 standing in the yard?  
12 A. A little bit. Not a significant amount.  
13 Q. How many inches, do you know?  
14 A. Maybe one.  
15 Q. In 2006, both February 28 and April 16, was  
16 there snow standing in the yard?  
17 A. There was not snow on the ground. There was  
18 some ice up next to the house because it is in the shade.  
19 But there was no snow in the yard. And in April, the  
20 Sunday pictures that I took, there was no snow. By  
21 Monday morning it had turned to snow. But it quickly  
22 melted off, too.  
23 Q. On this diagram we have marked as Exhibit  
24 No. 1, it was the February 28 of 2006 flooding that got  
25 it all wet to begin with.

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1 A. Yes.  
2 Q. How do you know the water that got, say, the  
3 utility room wet came from the window area in the master  
4 bedroom?  
5 A. It was the only source of water entry.  
6 Q. Was there any flooring on the utility room  
7 floor?  
8 A. Yes.  
9 Q. What kind?  
10 A. It's glue-down carpeting.  
11 Q. Did you take that up?  
12 A. No.  
13 Q. How about in -- is it the sewing room?  
14 A. Yes.  
15 Q. Did you take the flooring up in there?  
16 A. Yes.  
17 Q. Any cracks in the floor?  
18 A. No.  
19 Q. How about the wallboard in the sewing room,  
20 utility room, sheet rock, was that ever taken down?  
21 A. No.  
22 MR. HAWKES: When you say wallboard, you mean  
23 like sheet rock?  
24 MR. ANGELL: Sheet rock, yes.  
25 A. No.

Page 112

1 Q. In the master bedroom you said some sheet rock  
2 was placed in here (indicating).  
3 A. Yes.  
4 Q. How much, can you indicate?  
5 A. The initial flooding, it was just underneath  
6 the window, where it had bubbled the paint completely  
7 off, so it had to be replaced there, because it also took  
8 the Perfa-tape cement and the texturing off. So that was  
9 replaced at that time. After the second flooding, Mr.  
10 McCasland from Best Clean Care was the one who took the  
11 sheet rock off the wall.  
12 Q. How much did he take off then?  
13 A. He took everything under the window and it  
14 continued to the corner of the bathroom and then it went  
15 around the corner of the bathroom so he could see if  
16 there was moisture between the wall of the bathroom and  
17 the bedroom, and then it also continued this way toward  
18 the closet (indicating) for the length of the wall.  
19 Q. And did that sheet rock come off from the wall  
20 all the way to the ceiling or did they take a cross  
21 section out?  
22 A. They take four feet down from the window  
23 below.  
24 Q. Did that reveal any cracks in that cement?  
25 A. No.

Page 113

1 Q. How about when you removed the carpet in the  
2 master bedroom, did it reveal any cracks in the  
3 foundation?  
4 A. Hairline cracks, is all.  
5 Q. Could you tell if there had been any water  
6 running through those cracks?  
7 A. There had not been.  
8 Q. And your cleaning and restoration people would  
9 have seen those cracks, I assume.  
10 A. Yes.  
11 MR. ANGELL: I don't have any other questions.  
12 MR. HAWKES: I don't have any. Thank you,  
13 Sam.  
14 (Witness excused at 12:19 p.m.)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 STATE OF IDAHO )  
 2 County of Bannock ) ss.  
 3 I, PAUL D. BUCHANAN, CSR #7 and notary public in  
 4 and for said county and state, do hereby certify that the  
 5 facts as stated by me in the caption hereto are true; the  
 6 above and foregoing answers of the witness,  
 7 LINDA K. BROWN,  
 8 to the interrogatories as indicated were made before me  
 9 by the said witness, after being first duly sworn to  
 10 testify the truth, and the same were thereafter reduced  
 11 to typewriting under my direction; that the above and  
 12 foregoing deposition, as set forth in typewriting, is a  
 13 full, true, and correct transcript of proceedings had at  
 14 the time of taking said deposition.  
 15 I further certify that I am neither attorney nor  
 16 counsel for, nor related to, nor employed by any of the  
 17 parties to the action in which this deposition is taken,  
 18 and further that I am not a relative or employee of any  
 19 counsel employed by the parties hereto, or financially  
 20 interested in the action  
 21 GIVEN UNDER My Hand and Seal of Office on this  
 22 31st day of December, 2007.  
 23  
 24 \_\_\_\_\_  
 Notary Public in and for  
 25 the State of Idaho

VERIFICATION

STATE OF IDAHO )  
 ) ss.  
 COUNTY OF \_\_\_\_\_ )

I, LINDA K. BROWN, do hereby certify that I am  
 the deponent referred to in the foregoing deposition  
 taken on the 13th day of December, 2007, consisting of  
 Pages 1 through 113, that I have read the foregoing  
 deposition and have made the foregoing additions or  
 corrections:

Page Line Change

\_\_\_\_\_  
 LINDA K. BROWN

GIVEN UNDER My hand and Seal of Office on this \_\_\_\_ day  
 of \_\_\_\_\_, 2007, at \_\_\_\_\_, Idaho.

\_\_\_\_\_  
 Notary Public In and for Idaho  
 My Commission Expires

**Exhibit B**

BLAKE G. HALL (2434)  
 ANDERSON NELSON HALL SMITH, P.A.  
 490 Memorial Drive  
 Post Office Box 51630  
 Idaho Falls, Idaho 83405-1630  
 Telephone (208) 522-3001  
 Fax (208) 523-7254

Attorneys for City of Pocatello

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,

Plaintiff,

v.

CITY OF POCATELLO, a Municipal  
 Corporation;

Defendant.

Case No. CV-07-3303-OC

**DEFENDANT'S ANSWERS TO  
 PLAINTIFFS FIRST REQUEST  
 FOR ADMISSIONS TO  
 DEFENDANT**

**TO: Linda Brown and her attorney of record, Lowell N. Hawkes, Esq.**

COMES NOW the Defendant, City of Pocatello, by and through its attorney of record,  
 and responds to Plaintiff's Interrogatories as follows:

**GENERAL OBJECTION**

Defendant, City of Pocatello, objects to all of Plaintiff's Request for Discovery, to the  
 extent that they call for information and documents which are privileged, including, but not  
 limited to, items of information and documents prepared in anticipation of litigation or for trial,

requests for information or documents which fall within the attorney/client privilege, or requests that are vague, overly broad, irrelevant and unduly burdensome.

**REQUESTS FOR ADMISSION**

**REQUEST FOR ADMISSION NO. 1:** Admit that the Defendant is the owner of the roadway at issue herein.

**ANSWER TO REQUEST NO. 1:** Admit.

**REQUEST FOR ADMISSION NO. 2:** Admit that the Defendant modified or contracted to modify the area of Pocatello Creek Road at issue herein.

**ANSWER TO REQUEST NO. 2:** Defendant admits that at times the subject roadway has been modified and/or improved.

**REQUEST FOR ADMISSION NO. 3:** Admit that in or about 2005 a portion of Pocatello Creek road was modified at or near the location identified by the photos in Plaintiff's Complaint and Jury Demand. (This road modification is hereinafter referred to as "Pocatello Creek Road modification.")

**ANSWER TO REQUEST NO. 3:** Defendant objects to this request on the grounds that it is vague and ambiguous. Without waiving said objection, Defendant admits that the subject roadway has been modified and/or improved.

**REQUEST FOR ADMISSION NO. 4:** Admit that the Defendant received prior notice of the water runoff caused by the Pocatello Creek Road modification which is at issue in this case.

**ANSWER TO REQUEST NO. 4:** Defendant objects to this request on the grounds that it is vague and ambiguous. Without waiving said objection, Defendant denies the same.

**REQUEST FOR ADMISSION NO. 5:** Admit that since being placed on notice of the

water runoff caused the City of Pocatello has refused to make any subsequent road modification to resolve the water runoff.

ANSWER TO REQUEST NO. 5: Deny.

REQUEST FOR ADMISSION NO. 6: Admit that since being placed on notice of the water runoff caused by the Pocatello Creek Road modification the City of Pocatello has placed sandbags to attempt to remedy the water runoff.

ANSWER TO REQUEST NO. 6: Defendant admits that sandbags were placed as a temporary remedy to water run-off.

REQUEST FOR ADMISSION NO. 7: Admit that prior to the filing of this lawsuit, Defendant and its agents claimed that this Pocatello Creek Road modification "did not significantly alter Pocatello Creek Road."

ANSWER TO REQUEST NO. 7: Admit.

REQUEST FOR ADMISSION NO. 8: Admit that prior to filing this lawsuit Plaintiff put Defendant on notice of the damage to Plaintiff's property which occurred subsequent to this Pocatello Creek Road modification.

ANSWER TO REQUEST NO. 8: Defendant admits that it received a notice of tort claim referencing alleged water run-off which occurred on February 28, 2006.

REQUEST FOR ADMISSION NO. 9: Admit that Defendant through its agents had previously acknowledged that the placement of sandbags on Pocatello Creek Road was not intended to be nor is it an appropriate permanent remedy of the runoff water problem for the Pocatello Creek road modification.

ANSWER TO REQUEST NO. 9: Admit.

REQUEST FOR ADMISSION NO. 10: Admit that Defendant through its agents assured Plaintiff that the Pocatello Creek Road condition at issue would be corrected in the summer of 2007 but as of this date there has been no correction.

ANSWER TO REQUEST NO. 10: Deny.

REQUEST FOR ADMISSION NO. 11: Admit that prior to the Pocatello Creek Road modification at issue herein, that Defendant had never received a complaint relative to water running into Plaintiff's property, whether by Plaintiff or her predecessors.

ANSWER TO REQUEST NO. 11: Defendant has made reasonable inquiry and is without information sufficient to be unable to admit or deny this request. Defendant has not kept written records of every complaint (formal and informal) which has been reported to City of Pocatello employees over the course of the years.

REQUEST FOR ADMISSION NO. 12: Admit that served contemporaneously with this First Discovery to Defendant are plaintiff's discovery documents labeled LB080607-1 through LB080607-60 (including LB080607-60 which is a CD containing photos labeled LBPHOTOS - 1 through LBPHOTOS - 158).

ANSWER TO REQUEST NO. 12: Deny. Defendant admits that it received a CD containing various digital photographs sometime after being served with discovery requests, but Defendant has been unable to identify the labeling referenced herein.

REQUEST FOR ADMISSION NO. 13: Admit that genuineness of the documents listed in Request for Admission No. 12 as allowed by Rule 36(a).

ANSWER TO REQUEST NO. 13: Deny. Defendant has no knowledge of the "genuineness" of the aforementioned documents.



REQUEST FOR ADMISSION NO. 14: Admit that the City of Pocatello has breached its duty to Plaintiff by allowing a nuisance to be created by the Pocatello Creek Road modification.

ANSWER TO REQUEST NO. 14: Deny.

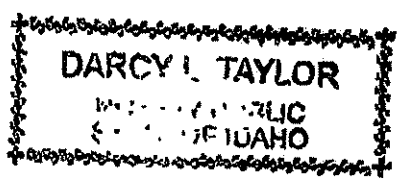
REQUEST FOR ADMISSION NO. 15: Admit that the City of Pocatello continues to breach its duty to Plaintiff by failing to abate the nuisance created by the Pocatello Creek Road modification.

ANSWER TO REQUEST NO. 15: Deny.

*Lindell W. Turner*  
City Engineer  
for Defendant City of Pocatello

SUBSCRIBED AND SWORN TO before me this 5<sup>th</sup> day of September, 2007.

*Darcy L. Taylor*  
NOTARY PUBLIC FOR IDAHO  
Residing at: *Pocatello, ID*  
My Commission Expires: *8/12/12*

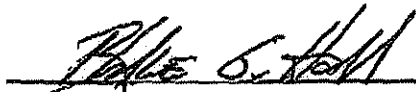


**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing document upon the following this 5 day of September, 2007, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
Ryan S. Lewis  
1322 East Center  
Pocatello, ID 83201

- Mailing
- Hand Delivery
- Fax
- Overnight Mail

  
 \_\_\_\_\_  
 BLAKE G. HALL

L:\JET\0186.504\Answer.request.admission.wpd

5



ANDERSON NELSON HALL SMITH, P.A.

Attorneys & Counselors

490 Memorial Drive  
PO Box 51630  
Idaho Falls, ID 83405-1630  
Phone: (208) 522-3001  
Fax: (208) 523-7254  
e-mail: anhs@anhs.net  
www.anhslaw.com

Douglas R. Nelson  
Blake G. Hall  
Marvin M. Smith\*  
Scott R. Hall  
Joel E. Tingey  
Steven R. Parry\*  
Brian T. Tucker  
Jeffery W. Banks  
Wiley R. Dennert  
Marvin K. Smith  
Weston S. Davis  
Sam L. Angell  
W. Joe Anderson  
(1923-2002)

\*Also Member of Utah Bar

Via Facsimile: (208) 235-4200

September 5, 2007

Lowell N. Hawkes  
1322 East Center  
Pocatello, ID 83201  
Fax: (208) 235-4200

RE: *Linda Brown v. City of Pocatello*

Dear Lowell:

Please find enclosed Defendant's answer to Plaintiff's requests for admission.

Sincerely,

  
BLAKE G. HALL

Enclosure

**Exhibit C**

BLAKE G. HALL (2434)  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
Telephone (208) 522-3001  
Fax (208) 523-7254

RECEIVED

SEP 25 2007

Attorneys for City of Pocatello

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

LINDA BROWN,

Plaintiff,

v.

CITY OF POCATELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

**DEFENDANT'S ANSWERS TO  
PLAINTIFFS FIRST DISCOVERY  
TO DEFENDANT**

**TO: Linda Brown and her attorney of record, Lowell N. Hakes, Esq.**

COMES NOW the Defendant, City of Pocatello, by and through its attorney of record,  
and responds to Plaintiff's Interrogatories as follows:

**GENERAL OBJECTION**

Defendant, City of Pocatello, objects to all of Plaintiff's Request for Discovery, to the extent that they call for information and documents which are privileged, including, but not limited to, items of information and documents prepared in anticipation of litigation or for trial, requests for information or documents which fall within the attorney/client privilege, or requests that are vague, overly broad, irrelevant and unduly burdensome.

## INTERROGATORIES

INTERROGATORY NO. 1: State the name, address, and phone number of each person who, to your knowledge or that of your agents or attorneys, has knowledge of any of the material facts of this case and what you contend such facts to be.

### ANSWER TO INTERROGATORY NO.1 :

Lindell W. Turner P.E. P.O. Box 4169 Pocatello, ID 83205-4169,  
City Engineer City of Pocatello's project manager  
Knowledge of construction and conversations with Mrs. Brown and her son.

Steve Szymanski P.O. Box 4169 Pocatello, ID 83205-4169; 234-6250  
Street Superintendent City of Pocatello  
Knowledge of maintenance procedures to mitigate the flooding problem.

Darren Brower P.. Box 4002 Pocatello, ID 83205-4002; 232-5796  
Superintendent for Jack B. Parson Company  
Knowledge of construction Pocatello Creek Project.

Mitch Greer P.O. 155 S. 2<sup>nd</sup> Pocatello, ID 83201; 234-0110  
Owner of Rocky Mountain Engineering and Surveying  
Consulting Engineer and Principle Designer of Pocatello Creek Road Project  
Knowledge of design of Pocatello Creek Road.

Brian J. Poole P.O. P.O. Box 4700 Pocatello, ID 83205-4700; 239-3358  
Resident Engineer Idaho Transportation Department  
Engineer in charge of construction on Pocatello Creek Project representing the City and Federal Highway Administration  
Knowledge of construction of Pocatello Creek Project.

Ramon Gutierrez P.O. Box 4700 Pocatello, ID 83205-4700; 239-3360  
Inspector, Idaho Transportation Department  
Knowledge of Construction fo Pocatello Creek Road Project.

INTERROGATORY NO. 2: For all persons which you have any basis to believe may have any knowledge (including hearsay) of any of the information potentially relevant to this case, please state their name, address, telephone number, job title, capacity, occupational experience, and the material substance of such information.

ANSWER TO INTERROGATORY NO. 2: See response No. 1.

INTERROGATORY NO. 3: Identify each witness you intend to call at trial or otherwise introduce evidence through (whether by deposition or otherwise), including name, address, phone number, and what you contend their material testimony will be.

ANSWER TO INTERROGATORY NO. 3: Defendant has made no determination at this time who may be called as a witness at the time of trial. Defendant could potentially call any party, and any person listed in answer to Interrogatory No. 1.

INTERROGATORY NO. 4: Describe with specificity all exhibits you intend to offer into evidence at trial or use incidental to the examination of any witness.

ANSWER TO INTERROGATORY NO. 4: Defendant has made no determination as to exhibits which may be used at the time of trial.

INTERROGATORY NO. 5: Please state the name, address, and phone number of each persons who, to your knowledge or that of your agents or attorneys, was involved with the modification of Pocatello Creek Road which are the subject of the nuisance at issue in this case.

ANSWER TO INTERROGATORY NO. 5: Defendant objects to this interrogatory on the grounds it is overly broad, vague, and ambiguous. Without waiving the aforesaid objection, Defendant is in the process of reviewing the Plaintiff's claims and determining the identity of individuals who may have knowledge regarding those allegations. See answer to Interrogatory No. 1.

INTERROGATORY NO. 6: Please state the date which the City of Pocatello was first put on notice of the water runoff and damages which have been and continue to be incurred based upon the Pocatello Creek Road modifications at issue in this case.

ANSWER TO INTERROGATORY NO. 6: April 17, 2006 was the first date that Defendant became aware of Plaintiff's claim of water run off damages.

INTERROGATORY NO. 7: Please state the date on which sandbags were placed on Pocatello Creek Road as evidenced by the photographs on pages 2, and 4 of the Complaint and Jury Demand including the purpose for which the sandbags were placed and the names, address,

phone number and job description of all persons involved in that decision process and the actual placement of the sandbags.

ANSWER TO INTERROGATORY NO. 7: Please see the attached invoice for placement of sandbags.

INTERROGATORY NO. 8: Please state with specificity the factual detail regarding the Pocatello Creek Road modification at issue, including the date of modification, the persons performing the modifications for the Defendant, all contract documents, and all progress reports or documents of a similar nature regarding the modifications.

ANSWER TO INTERROGATORY NO. 8: The Idaho Department of Transportation and Parsons Construction would be in possession of the information requested in this interrogatory. Please also see the documents attached hereto.

INTERROGATORY NO. 9: Please state when the Defendant first was put on notice of the water runoff at issue herein, including all action subsequently taken to remedy the water runoff since being put on notice.

ANSWER TO INTERROGATORY NO. 9: Please see answer to interrogatory no. 7. In addition, Defendant at Plaintiff's request shoveled dirt into the holes in the barrier guardrail at some time in April, 2006 City of Pocatello also installed an asphalt berm in the summer of 2007. Please see the attached work order for installation of the asphalt berm.

INTERROGATORY NO. 10: Please state with specificity all factual and legal knowledge possessed by Defendant which corroborates or tends to prove any allegation in Plaintiffs' Complaint and Jury Demand, and identify each document that you content evidences or supports your answer to this Interrogatory.

ANSWER TO INTERROGATORY NO. 10: Objection, attorney client privilege and attorney work product. Notwithstanding said objection, please see the documents attached hereto.

INTERROGATORY NO. 11: Please state with specificity all factual and legal



knowledge possessed by Defendant which you contend corroborates or tends to prove any denial, Defense or Affirmation Defense alleged (or which you will allege) in your Answer, and identify each document that you contend evidences or supports your answer to this Interrogatory.

ANSWER TO INTERROGATORY NO. 11: Objection, attorney client privilege and attorney work product. Notwithstanding said objection, please see the documents attached hereto.

INTERROGATORY NO. 12: If you object to any discovery request on claiming it is vague or ambiguous, please identify each "vague" or "ambiguous" word and provide the definition for each term for each persons signing the discovery responses.

ANSWER TO INTERROGATORY NO.12: Defendant's objection to interrogatory no. 5 is based in part upon the definition of "nuisance".

INTERROGATORY NO. 13: If you answer to any Request for Admission with anything other than an unqualified admission please provide the specific factual detail for the failure to unqualifiedly admit and identify each document that you contend evidences or supports your failure to unqualifiedly admit.

ANSWER TO INTERROGATORY NO.13: Please see answers to request for admission.

INTERROGATORY NO. 14: With respect to the discovery answers and responses herein, please state whether you have made a reasonable and diligent effort to identify and provide not only facts within your knowledge, but also facts reasonably available to you with respect to each Interrogatory.

ANSWER TO INTERROGATORY NO. 14: Defendant has signed this answer to interrogatories pursuant to Idaho Rules of Civil Procedure 11.

#### **REQUEST FOR PRODUCTION OF DOCUMENTS**

REQUEST FOR PRODUCTION NO. 1: All documents or things which are called for by description in any foregoing Interrogatory (even if not identified in answer to the

Interrogatory) or which mention, refer to or are evidence of any defense claimed by Defendant.

ANSWER TO REQUEST NO. 1: See documents attached hereto.

REQUEST FOR PRODUCTION NO. 2: All construction and engineering documents relating to any of the Pocatello Creek Road modification work at issue herein.

ANSWER TO REQUEST NO 2: Defendant has attached a copy of the plans and specifications available and in the possession of Pocatello City. There may be other plans and specifications in possession of Parsons Construction. Defendant does not know whether or not those documents relate to the issues herein.

REQUEST FOR PRODUCTION NO. 3: All documents which corroborate or tend to prove any element of Plaintiffs' case or Compliant allegations.

ANSWER TO REQUEST NO.3 : Defendant does not know which documents tend to corroborate or prove any element of Plaintiffs' case notwithstanding, please see the documents attached hereto.

REQUEST FOR PRODUCTION NO. 4: All documents which corroborate or tend to establish any denial, Defense or Affirmation Defense alleged (or which you will allege) in your Answer.

ANSWER TO REQUEST NO. 4: Defendant is in possession of photographs provided by the Plaintiff which tend to establish denials, defenses, or affirmative defenses of the Defendant. In addition, Defendant is providing photographs of the site and areal photo with contours, city survey work orders and other documents attached hereto.

REQUEST FOR PRODUCTION NO. 5: All minutes, videotapes and other records from all City Council meetings relative to any problems or issues regarding the Pocatello Creek Road modification and damage to Plaintiff's property at issue.

ANSWER TO REQUEST NO. 5: To the best of Defendant's knowledge, there are no such records in possession of the City of Pocatello.

REQUEST FOR PRODUCTION NO. 6: All documents evidencing recommendations

and/or concerns delivered to the Defendant or its agents from all City departments, boards, committees, councils, and from any other citizen or entity, relative to the modification of Pocatello Creek road at issue in this case, whether prior or subsequent to the modification at issue.

ANSWER TO REQUEST NO. 6: To the bests of the Defendant's knowledge, there have been no other complaints on run off problems to the City of Pocatello, relative to the modification of Pocatello Creek Road at issue.

REQUEST FOR PRODUCTION NO. 7: Any and all documents evidencing any other complaints or damage regarding the Pocatello Creek Road modification at issue in this case.

ANSWER TO REQUEST NO. 7: See answer to request for production no. 6.

REQUEST FOR PRODUCTION NO. 8: All documents which constitute any record, journal, diary, communication, or log of the Defendant relating to the construction work or Complaint and damage at issue in this case.

ANSWER TO REQUEST NO. 8: See documents attached hereto.

REQUEST FOR PRODUCTION NO. 9: All documents evidencing efforts to remedy or repair or the condition which is causing the water runoff at issue in this case

ANSWER TO REQUEST NO. 9: See documents attached hereto.

Dated this 24 day of September, 2007.


  
\_\_\_\_\_  
BLAKE G. HALL

## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 24 day of September, 2007, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
Ryan S. Lewis  
1322 East Center  
Pocatello, ID 83201

- Mailing
- Hand Delivery
- Fax
- Overnight Mail

  
\_\_\_\_\_  
BLAKE G. HALL

L:\JET\0186.304\Answer.discovery.inter&request.wpd

JOB CODE ST0412

LET DEPARTMENT WORK REPORT DATE 2 20 07

Filled Out By: \_\_\_\_\_

Check if Overtime or  ~~Call Out~~

Employee Name	Hours	Employee Name	Hours	Part-time Employee Name	Hours
Baldwin Steve		Kirkman, Tom	1/2		
Borstelman, Cody		Lammers, Brad	1/2		
Bringman, Wade		Mitchell, Steve	1/2		
Cherry, Geary		Paschal, Dave			
Davies, Trisha		Peterson, Rod			
Day, Larry		Richardson, Gary			
Ellertson, Steve		Rosenberger, Rosie			
Foster, Les	1/2	Szymanski, Steve			
Gilmore, Brett	1/2	Taylor, Tony			
Holyoak, Max					

Truck	Hours	Truck	Hours	Truck	Hours	Truck	Hours	Truck	Hours	Truck	Hours
1		12		28		44		60		76 SWD	
2		13		29		45		61 SWD		77 SWD	
2A		14		30		46		62		78	
3		15		31 SWD		47		63 Miller		79	
3A		16		32 SWD		48		64		80	
4		17		33 SWD		49		65		81	
4A		18		34 SWD		50 SWD		66		82	
5		19		35		51		67		83	
5A		20 SWD		36		52		68		84	
6		21		37 SWD		53		69		85 broom	
7		22		38 SWD		54 SWD		70			
8		23		39 SWD		55		71			
9		24		40		56		72			
9A		25		41		57	1/2	73		WDSander	
10		26		42		58		74		Sheepfoot	
11		27		43		59		75		Dozer	

SC-800	SS-1	SAND	2@ GR	3/4@ GR	CaCL	SALT	OTHER	OTHER

DESCRIPTION OF WORK: SAND BAGGED JERSEY BARRICADE ON POC. CREEK

- STC001/BR Barton Road Realignment
- STC002/South 5<sup>th</sup> Widening
- STC003/Ross Park Project
- STC004/West Clark Project
- STC005/Skateboard Park-Ross Park
- STC006/Greenway-Walk Path
- STC007/Halliday Stormwater Phase I
- STC008/Halliday Stormwater Phase II
- STC031/OV Overlay/Paving

- STO001/OD Other Departments
- STO002/Meetings & Training
- STO036/CRS Chip/Crack Sealing
- STO037/PT Patching
- STC038/SR Snow Removal-Sanding-Salting
- STO039/BL Maintenance-Blading & Grading
- STO045/ER Maintenance-Equipment Repair
- STO413/RC Maintenance-Portneuf River Channel

- STO530/CH City Hall Parking Lot
- WLG056/WL Wetlands
- PACDOL/City Hall Xeriscape
- STO0TM/Maint. Other Dept. Equipment Repair
- STORMWATER DEPT. CODES**
- STO411/SW Maintenance-Street Sweeping
- STO412/SS Maintenance-Storm Drainage
- STOSTM/Maint. Stormwater Equipment Repair

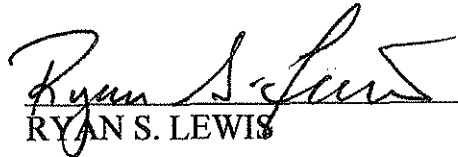
# Daily Detail Work Report - Street Dept.

9/30/2007

Job Code	Date	Type	Comment / Description	Job	Rate	Quantity	Amount	Key
STO039	8/20/2007		Asphalt along side of Pocatello Creek and shoulder on other.	Maintenance - Blading and Grading				
STO039	8/20/2007	EMP	Anderson, Nolan		22.71	8.00	181.67	9,172
STO039	8/20/2007	EMP	Gilmore, Brett		28.96	8.00	231.65	9,172
STO039	8/20/2007	EMP	Peterson, Rod		32.13	8.00	257.04	9,172
STO039	8/20/2007	EMP	Taylor, Joe		11.98	8.00	95.81	9,172
		<u>EMP</u>		<u>4</u>			<u>766.17</u>	
STO039	8/20/2007	VEH	28 - CatGrader		66.40	8.00	531.20	9,172
STO039	8/20/2007	VEH	29 - Single Axle Dump		36.00	8.00	288.00	9,172
STO039	8/20/2007	VEH	31 - Street Sweeper		66.83	8.00	534.64	9,172
STO039	8/20/2007	VEH	41 - 830 Loader/Cat		42.88	8.00	343.04	9,172
		<u>VEH</u>		<u>4</u>			<u>1,696.88</u>	
		<u>STO039</u>		<u>8</u>			<u>2,463.05</u>	

**CERTIFICATE OF SERVICE**

I certify that on this 30<sup>th</sup> day of June, 2008 I faxed a copy of the foregoing  
to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490  
Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254.

  
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RYAN S. LEWIS