

12-5-2016

Mortensen v. Berian Clerk's Record Dckt. 44303

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TITLE PAGE

IN THE SUPREME COURT OF THE STATE OF IDAHO

JADE MORTENSEN AND KYLIE)
MORTENSEN)
Plaintiffs-Counter-defendants-)
Respondents) SUPREME CT. CASE NUMBER 44303
VS)
GALUST BERIAN AND YVETTE N.)
STURGIS) CASE NUMBER CV-2015-626
Defendants-Counter-claimants)
Appellants)
_____)

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in
and for the County of Madison

ALAN C. STEPHENS
DISTRICT JUDGE

ATTORNEY FOR APPELLANTS

Robin D Dunn
DUNN LAW OFFICES
PO Box 277
Rigby, ID 83442

ATTORNEY FOR RESPONDENTS

Hyrum D Erickson
PO Box 250
Rexburg, ID 83440

Other Claims

Date		Judge
9/15/2015	<p>New Case Filed - Other Claims</p> <p>Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Rigby Andrus & Rigby Law, PLLC Receipt number: 0004205 Dated: 9/15/2015 Amount: \$221.00 (Check) For: Mortensen, Jade (plaintiff)</p> <p>Plaintiff: Mortensen, Jade Appearance Hyrum D Erickson</p> <p>Plaintiff: Mortensen, Kylie Appearance Hyrum D Erickson</p> <p>Summons Issued-Galust Berian</p> <p>Another Summons Issued-Yvette Sturgis</p>	<p>Gregory W Moeller</p> <p>Gregory W Moeller</p> <p>Gregory W Moeller</p> <p>Gregory W Moeller</p> <p>Gregory W Moeller</p>
9/17/2015	<p>Notice Of Service-Plaintiffs' First Set of Interrogatories To Defendants, Plaintiffs' First Request For Admissions To Defendants', First Request For Production To Defendants</p>	<p>Gregory W Moeller</p>
9/23/2015	<p>Defendant: Berian, Galust Appearance Robin D Dunn</p> <p>Defendant: Strugis, Yvette N Appearance Robin D Dunn</p> <p>Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Dunn, Robin D (attorney for Berian, Galust) Receipt number: 0004319 Dated: 9/23/2015 Amount: \$136.00 (Check) For: Berian, Galust (defendant) and Strugis, Yvette N (defendant)</p> <p>Motion for First Disqualification of Judge- Robin Dunn</p> <p>Acceptance Of Service - Robin Dunn</p>	<p>Gregory W Moeller</p> <p>Gregory W Moeller</p> <p>Gregory W Moeller</p> <p>Gregory W Moeller</p> <p>Gregory W Moeller</p>
9/24/2015	<p>Order for First Disqualification of Judge - Robin D Dunn</p>	<p>Gregory W Moeller</p>
9/28/2015	<p>Order Of Assignment</p> <p>Disqualification Of Judge - Self</p>	<p>Gregory W Moeller</p> <p>Alan C Stephens</p>
10/14/2015	<p>Hearing Scheduled (Scheduling Conference 11/10/2015 03:00 PM)</p> <p>Notice Of Hearing</p> <p>Notice Of Service - Response to Plaintiffs' First Request for Admission to defendants- Robin Dunn</p>	<p>Alan C Stephens</p> <p>Alan C Stephens</p> <p>Alan C Stephens</p>
11/10/2015	<p>Minute Entry</p> <p>Hearing type: Scheduling Conference</p> <p>Hearing date: 11/10/2015</p> <p>Time: 3:03 pm</p> <p>Courtroom: Brent J. Moss District Court</p> <p>Court reporter:</p> <p>Minutes Clerk: Angie Wood</p> <p>Tape Number:</p> <p>Party: Galust Berian, Attorney: Robin Dunn</p> <p>Party: Jade Mortensen, Attorney: Hyrum Erickson</p> <p>Party: Kylie Mortensen, Attorney: Hyrum Erickson</p> <p>Party: Yvette Strugis, Attorney: Robin Dunn</p>	<p>Alan C Stephens</p>
	<p>Hearing result for Scheduling Conference scheduled on 11/10/2015 03:00 PM: District Court Hearing Held</p> <p>Court Reporter:</p> <p>Number of Transcript Pages for this hearing estimated:</p>	<p>Alan C Stephens</p>
11/13/2015	<p>Order Setting Pretrial and Bench Trial</p>	<p>Alan C Stephens</p>

Other Claims

Date		Judge
11/13/2015	Hearing Scheduled (Pre-Trial 02/16/2016 03:00 PM)	Alan C Stephens
	Hearing Scheduled (Court Trial 02/29/2016 09:00 AM)	Alan C Stephens
12/10/2015	Answer to Complaint and Counterclaim- Robin Dunn	Alan C Stephens
12/14/2015	Notice Of Taking Deposition Kevin Thompson- Hyrum Erickson	Alan C Stephens
	Notice Of Taking Deposition -Lyle Thompson- Hyrum Erickson	Alan C Stephens
	Notice Of Taking Deposition - Yvette Sturgis	Alan C Stephens
	Notice Of Taking Deposition -Galust Berian.	Alan C Stephens
12/22/2015	Reply To Counterclaim	Alan C Stephens
1/14/2016	Notice of Deposition -Galust Berian	Alan C Stephens
	Notice of Deposition - Kevin Thompson	Alan C Stephens
1/20/2016	Notice Of Taking Deposition Duces tecum- Robin Dunn	Alan C Stephens
2/16/2016	Hearing result for Pre-Trial scheduled on 02/16/2016 03:00 PM: Hearing Held	Alan C Stephens
	Witness and Exhibit List	Alan C Stephens
	Pretrial Brief	Alan C Stephens
2/29/2016	Minute Entry Hearing type: Court Trial Hearing date: 2/29/2016 Time: 9:07 am Courtroom: Brent J. Moss District Court Court reporter: Minutes Clerk: Angie Wood Tape Number: Party: Galust Berian, Attorney: Robin Dunn Party: Jade Mortensen, Attorney: Hyrum Erickson Party: Kylie Mortensen, Attorney: Hyrum Erickson Party: Yvette Strugis, Attorney: Robin Dunn	Alan C Stephens
	Hearing result for Court Trial scheduled on 02/29/2016 09:00 AM: Hearing Held	Alan C Stephens
3/1/2016	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Berian, Galust Receipt number: 0000992 Dated: 3/1/2016 Amount: \$50.00 (Check)	Alan C Stephens
3/4/2016	Letter From T&T Reporting	Alan C Stephens
3/11/2016	Post-Trial Brief, Proposed Findings of Fact and Conclusions of Law- Jerry Rigby	Alan C Stephens
	Proposed Findings of Fact, Conclusions of Law and Argument - Robin Dunn	Alan C Stephens
3/28/2016	Findings Of Fact And Conclusions Of Law	Alan C Stephens
3/29/2016	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Mortensen, Kylie Receipt number: 0001527 Dated: 3/29/2016 Amount: \$8.00 (Cash)	Alan C Stephens
4/6/2016	Motion to Reconsider	Alan C Stephens
4/7/2016	Notice of Hearing	Alan C Stephens

Jade Mortensen, etal. vs. Galust Berian, etal.

Jade Mortensen, Kylie Mortensen vs. Galust Berian, Yvette N Strugis

Other Claims

Date		Judge
4/7/2016	Hearing Scheduled (Motion 04/25/2016 09:15 AM) Motion to Reconsider	Alan C Stephens
4/19/2016	Continued (Motion 05/17/2016 03:00 PM) Motion to Reconsider	Alan C Stephens
	Amended Notice Of Hearing- Hyrum Erickson	Alan C Stephens
5/17/2016	Minute Entry Hearing type: Motion to Reconsider Hearing date: 5/17/2016 Time: 3:02 pm Courtroom: Court reporter: Minutes Clerk: Lori Ann Lewis Tape Number: Party: Galust Berian, Attorney: Robin Dunn Party: Jade Mortensen, Attorney: Hyrum Erickson Party: Kylie Mortensen, Attorney: Hyrum Erickson Party: Yvette Strugis, Attorney: Robin Dunn	Alan C Stephens
5/18/2016	Hearing result for Motion scheduled on 05/17/2016 03:00 PM: Hearing Held Motion to Reconsider	Alan C Stephens
5/23/2016	Civil Disposition entered for: Berian, Galust, Defendant; Strugis, Yvette N, Defendant; Mortensen, Jade, Plaintiff; Mortensen, Kylie, Plaintiff. Filing date: 5/23/2016	Alan C Stephens
	STATUS CHANGED: Closed	Alan C Stephens
	Amended Findings Of Fact And Conclusions Of Law	Alan C Stephens
	Judgment \$1020.00	Alan C Stephens
	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Mortensen, Kylie Receipt number: 0002590 Dated: 5/23/2016 Amount: \$11.00 (Check)	Alan C Stephens
6/3/2016	Motion for Attorney Fees and Costs	Alan C Stephens
	Memorandum of Costs and Attorney Fees	Alan C Stephens
	Affidavit of Hyrum Erickson in Support of memorandum of Costs and Attorney Fees	Alan C Stephens
6/13/2016	Hearing Scheduled (Motion 07/13/2016 09:15 AM)	Alan C Stephens
	STATUS CHANGED: Closed pending clerk action	Alan C Stephens
6/14/2016	Notice Of Hearing- Hyrum Erickson	Alan C Stephens
	Objection to the Plaintiff's Request for Fees and Costs - Robin Dunn	Alan C Stephens
6/17/2016	Request for Additional Record- Hyrum Erickson	Alan C Stephens
	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Dunn, Robin D (attorney for Berian, Galust) Receipt number: 0003082 Dated: 6/20/2016 Amount: \$129.00 (Check) For: Berian, Galust (defendant)	Alan C Stephens

Other Claims

Date		Judge
7/13/2016	Minute Entry Hearing type: Motion Hearing date: 7/13/2016 Time: 9:20 am Courtroom: Court reporter: Minutes Clerk: Angie Wood Tape Number: Party: Galust Berian, Attorney: Robin Dunn Party: Jade Mortensen, Attorney: Hyrum Erickson Party: Kylie Mortensen, Attorney: Hyrum Erickson Party: Yvette Strugis, Attorney: Robin Dunn	Alan C Stephens
7/14/2016	Hearing result for Motion scheduled on 07/13/2016 09:15 AM: Hearing Held	Alan C Stephens
	Decision and Order RE: Motion for Attorney Fees and Costs	Alan C Stephens
	Civil Disposition entered for: Berian, Galust, Defendant; Strugis, Yvette N, Defendant; Mortensen, Jade, Plaintiff; Mortensen, Kylie, Plaintiff. Filing date: 7/14/2016	Alan C Stephens
	STATUS CHANGED: Closed	Alan C Stephens
9/22/2016	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Rigby, Andrus Receipt number: 0004843 Dated: 9/22/2016 Amount: \$1.00 (Cash)	Alan C Stephens



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Hyrum D. Erickson, ISBN 7688
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P. O. Box 250
Rexburg, Idaho 83440
Telephone: 208-356-3633

Attorneys for Plaintiff

**Case assigned to
Gregory W. Moeller
District Judge**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
MORTENSEN,)
)
Plaintiff,)
)
v.)
)
GALUST BERIAN AND YVETTE N.)
STURGIS,)
)
Defendants.)

Case No. CV-15- 6210

COMPLAINT

**FILING FEE CATEGORY: A.
FILING FEE: \$221.00**

COMES NOW the Plaintiffs, Jade Mortensen and Kylie Mortensen (hereinafter the Mortensens), husband and wife, and by and through their attorneys of record, Rigby, Andrus & Rigby Law, PLLC, hereby allege as follows:

Parties and Jurisdiction

1. Plaintiffs are residents of Rexburg, Madison County, Idaho.

2. On information and belief, Defendant Galust Berian (hereinafter “Berian”) is a single man residing in Madison County, Idaho.
3. On information and belief, Defendant Yvette N. Sturgis (hereinafter “Sturgis”) is a resident of Jackson, Mississippi, who owns property in Madison County, Idaho, which property is the subject of this Complaint.
4. This Court has jurisdiction and venue is proper.

Background Information

5. The Mortensens own approximately 3.5 acres near Lyman, Idaho, with a street address of 6314 S. 3100 W.
6. For illustrative purposes only, the Mortensen property is outlined in black on Attachment A and labeled “Mortensen.”
7. Attachment A is an aerial photograph with the rough parcel lines included. It is illustrative only and for the sole purpose of allowing the Court to orient itself as to the parcels. The Mortensens do not intend to rely on the property lines illustrated thereon.
8. The Mortensen property is served by the Reid Canal Company and the Mortensens own four shares in the Reid Canal Company.
9. Water for the Mortensen property is diverted from the Reid Canal/Texas Slough.
10. For illustrative purposes only, the point of diversion out of the Reid Canal/Texas Slough is identified on Attachment A as “P.O.D.”
11. Sturgis owns property that directly borders Mortensen’s property to Mortensen’s east.
12. For illustrative purposes only, the Sturgis property is outlined on Attachment A in red and

labeled "Sturgis."

13. From the point of diversion out of the canal, water is diverted into a ditch which crosses the Sturgis property and is then diverted onto the Mortensen property for irrigation purposes.
14. The ditch has been in place for several decades, well before either the Mortensens or Sturgis obtained their respective parcels and well before Berian first resided upon the Sturgis property.
15. At all times pertinent to this Complaint, Berian has resided on the Sturgis property.
16. At a time prior to April 2015, the Mortensens had paid for the installation of a culvert for part of the ditch crossing the Sturgis property. The Mortensens did so to facilitate Berian and another neighbor crossing the ditch.
17. In early April of 2015, that portion of the ditch which crosses over the Sturgis property was destroyed.
18. The ditch was filled in and where the ditch had been routed through the culvert, the culvert was removed and effectively destroyed.
19. Attached as Attachment B is a photograph taken on or about April 20, 2015, which accurately shows the point where the ditch leaves the Sturgis property showing the ditch having been filed in.
20. Attached as Attachment C is a photograph taken on or about April 20, 2015, which accurately shows the culvert that was removed from the ditch.
21. On information and belief, the ditch was filed in and the culvert removed by Berian,

Sturgis, or both.

Cause of Action I

Negligence

22. Berian and Sturgis owed and owe a duty to the Mortensens not to interfere with their ditch and ditch rights.
23. Berian and/or Sturgis breached that duty by filling in the ditch, causing the ditch to be filled in, or by allowing the ditch to be filled in.
24. The filling in of the ditch has injured the Mortensens by preventing the Mortensens from receiving any water through the ditch for the entire 2015 irrigation season, the precise value of such damage to be determined at trial, but less than \$35,000.

Cause of Action II

Breach of I.C. § 42-1207

25. The ditch serving the Mortensens' property was constructed across the Berian property many decades ago.
26. Berian and/or Sturgis have modified the ditch without the written permission of the owner of the ditch owner in violation of I.C. § 42-1207.
27. The Mortensens have been damaged by Berian and/or Sturgis's modification of the ditch in an amount to be determined at trial.
28. If the ditch is not returned to its original state the Mortensens will be irreparably harmed as they will have no ability to convey water to their property.

Cause of Action III

Breach of Easement/Statutory Right-Of-Way – I.C. § 42-1102

29. Mortensens have a statutory right-of-way over the Sturgis property pursuant to I.C. § 42-

1102.

30. Berian and Sturgis had notice of the Mortensens right-of-way as the ditch was visible.
31. Berian and/or Sturgis breached I.C. § 42-1102 by encroaching upon the right-of-way by filling in the ditch, causing the ditch to be filled in, or allowing the ditch to be filled in.
32. Berian and Sturgis did not receive permission, written or otherwise, prior to filling in the ditch.
33. Berian and/or Sturgis encroachments unreasonably and materially interfere with Mortensens' use and enjoyment of the right-of-way.
34. Berian and Sturgis must remove their encroachments at their own expense, restore the ditch, and pay for all damages incurred by the Mortensens, in an amount to be proven at trial, but not to exceed \$35,000.

Cause of Action IV
Attorney Fees

35. Berian and Sturgis's actions have required the Mortensens to retain the firm of Rigby, Andrus & Rigby Law, PLLC, and the Mortensens to incur reasonable attorney fees and costs.
36. On or about September 3, 2015 the Mortensens, through their attorney, sent Berian and Sturgis written demand for payment of their claim.
37. Berian and Sturgis have refused to tender any amount to the Mortensens.
38. The Mortensens are entitled to reimbursement for their reasonable attorney fees and costs thus incurred pursuant to I.C. 12-120(1), and other applicable statutes and rules.

Prayer for Relief

WHEREFORE, the Mortensens pray for judgment against Berian and Sturgis as follows:

1. For Counts I, II, and III, judgment for damages, including losses due to lack of water for the 2015 irrigation season, in an the amount to be proven at trial, but in no event shall the total damages exceed \$35,000.
2. For Counts I, II, and II, an injunction requiring Berian and Strugis to return the ditch to its original state and to prevent future modifications of the ditch except with the written permission of the Mortensens.
3. For all other special or general damages to proven at trial, but in no event shall the total damages exceed \$35,000.
4. For the Mortensens attorneys fees of \$2,000 if the action is uncontested and reasonable attorney's fees incurred in pursuing the action if contested.
5. For costs of suit and other such and further relief as the court deems just and proper.

DATED this 15th day of September, 2015.



Hyrum Erickson
Rigby, Andrus & Rigby Law, PLLC



Legend

Streets

- U.S. Highway
- State Highway
- Road

- City Limits
- Parcels

1: 4,513



0.1 0 0.07 0.1 Miles

No

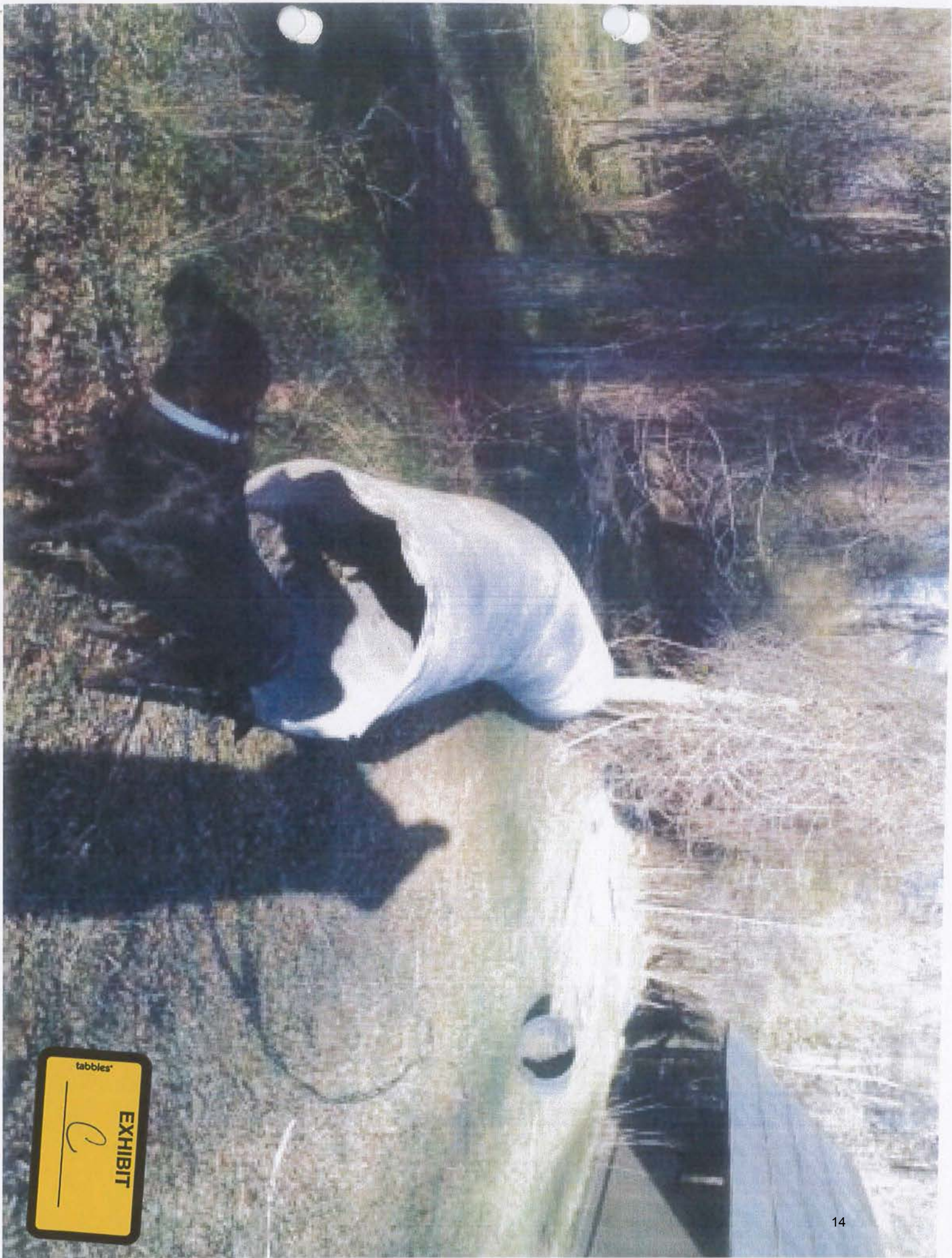
EXHIBIT

A

tabbles®



tabbles®
EXHIBIT
B



tabbles®
EXHIBIT
C

Jerry R. Rigby, ISBN 2470
Hyrum D. Erickson, ISBN 7688
RIGBY, ANDRUS & RIGBY LAW, PLLC
Attorneys at Law
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Rexburg, Idaho 83440
Telephone: 208-356-3633

Attorneys for Plaintiff

Case assigned to
Gregory W. Moeller
District Judge



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
MORTENSEN,) Case No. CV-15- 626
)
)
Plaintiff,)
)
)
v.) **SUMMONS**
)
)
GALUST BERIAN AND YVETTE N.)
STURGIS,)
)
)
Defendants.)

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: Galust Berian

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may

Summons - Page 1

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be filed in time and other legal rights protected.

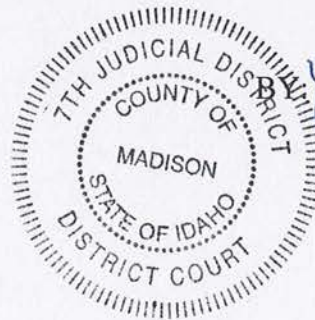
An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED This 15 day of September, 2015.

CLERK OF THE DISTRICT COURT



Shirley Warner
Deputy

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



**Case assigned to
 Gregory W. Moeller
 District Judge**

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Plaintiff,)
)
 v.)
)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Defendants.)

Case No. CV-15- 626

ANOTHER SUMMONS

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO: Yvette N. Sturgis

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may

Another Summons - Page 1

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be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED This 15 day of September, 2015.

CLERK OF THE DISTRICT COURT



BY:

Deputy

[Handwritten Signature]



Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Plaintiff,)
)
 v.)
)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Defendants.)

Case No. CV-15-626

NOTICE OF SERVICE

I hereby certify that on the 17th day of September, 2015, I served **“Plaintiffs’ First Set of Interrogatories to Defendants” “Plaintiffs’ First Request for Admissions to Defendants”** and **“Plaintiffs’ First Request for Production to Defendants”** via facsimile of the same, to the following:

Robin D. Dunn
 P.O. Box 277
 Rigby, ID 83442
 745-8160



 Jerry R. Rigby

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Plaintiff,)
)
 v.)
)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Defendants.)

Case No. CV-15-626

ACCEPTANCE OF SERVICE

The undersigned, Robin D. Dunn, attorney at law, representing Galust Berian and Yvette N. Sturgis, hereby accepts service on behalf of Defendants, Galust Berian and Yvette N. Sturgis, and acknowledges receipt this day on behalf of Galust Berian and Yvette N. Sturgis a copy of the Summons and Another Summons and Complaint in the above entitled action.

DATED This 24 day of September, 2015.

Robin D. Dunn, Attorney for Defendants

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

On this 21 day of September, 2015, before me, the undersigned, a Notary Public in and for said State, personally appeared Robin D. Dunn, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Judy McCowin
 Notary Public for Idaho
 Residing at Mesa
 My Commission Expires: 04-03-21

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB #2903
477 Pleasant Country Lane
P. O. Box 277
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)



Attorney for Defendants

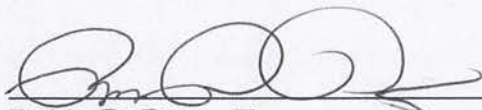
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON
MAGISTRATE DIVISION

JADE MORTENSEN AND KYLIE)
MORTENSEN,)
)
Plaintiffs,)
vs.)
)
GALUST BERIAN AND YVETTE N.)
STURGIS,)
)
Defendants.)
_____)

Case No. CV-15-626
MOTION FOR FIRST
DISQUALIFICATION OF
JUDGE

COME NOW Defendants, GALUST BERIAN and YVETTE N. STURGIS, by and through counsel of record, Robin D. Dunn, Esq., and requests that the Honorable Gregory W. Moeller be disqualified as the Judge to hear the above cause pursuant to the automatic disqualification procedures of Rule 40(d)(1), I.R.C.P. Defendants request that another District Judge be assigned to hear this cause.

DATED this 21st day of September, 2015.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB #2903
 477 Pleasant Country Lane
 P. O. Box 277
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)



Attorney for Defendants

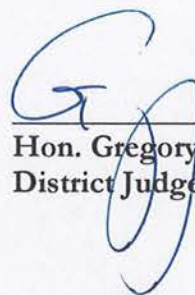
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON
 MAGISTRATE DIVISION

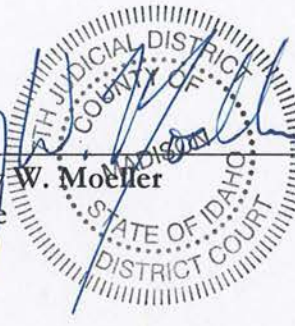
JADE MORTENSEN AND KYLIE MORTENSEN,	)	Case No. CV-15-626
)	
Plaintiffs,)	
vs.	)	ORDER FOR FIRST
	)	DISQUALIFICATION OF JUDGE
GALUST BERIAN AND YVETTE N. STURGIS,)	
)	
Defendants.)	
_____)	

The Court, having received a timely Motion to Disqualify by Defendants, GALUST BERIAN and YVETTE N. STURGIS, in the above-entitled case, and it appearing that the motion is properly presented in accordance with Rule 40(d)(1) of the Idaho Rules of Civil Procedure, and good cause appearing therefor;

IT IS HEREBY ORDERED that the undersigned judge deems himself disqualified from further proceedings in the above-entitled matter, and the case is transferred to the Seventh Judicial District Trial Court Administrator for reassignment of final disposition as is deemed proper.

Dated this 24th day of September, 2015.


 Hon. Gregory W. Moeller
 District Judge



CLERK'S CERTIFICATE OF MAILING

I certify that I am a duly elected and qualified Clerk of the District court of the Seventh Judicial District of the State of Idaho, in and for the County of ^{Madison} ~~Bonneville~~; that I mailed a copy of the foregoing Order to the following parties this 24 day of September, 2015.


ATTORNEYS OR PARTIES SERVED:

Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC
P.O. Box 277
Rigby, ID 83442

First Class Mail

Hyrum Erickson
RIGBY, ANDRUS & RIGBY LAW, PLLC
P.O. Box 250
Rexburg, ID 83440

First Class Mail



Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
MORTENSEN)
)
Plaintiff,)
)
vs.)
)
GALUST BERIAN AND YVETTE N.)
STURGIS,)
)
Defendant.)
_____)

ORDER OF ASSIGNMENT

Case No. CV 2015-626

IT IS HEREBY ORDERED that the above-entitled case is referred to the Honorable Alan

C. Stephens, District Judge for further proceedings.

DONE AND DATED September 28, 2015.

Burton W. Butler
Burton W. Butler
Trial Court Administrator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order of Assignment was personally delivered, by hand delivery to the Bonneville County Courthouse Box, sent by facsimile or mailed by first class mail with prepaid postage as indicated below on September 28, 2015:

Clerk of Court, Madison County Courthouse – email
Hon. Alan C. Stephens, District Judge, email
Robin Dunn rdunn@dunnlawoffices.com email
Hyrum Erickson heirickson@rex-law.com email
Madison County deputy clerks to distribute copies to all parties or attorneys of record and/or parties at issue that are not listed on the Certificate of Service.

Jenny Shults
Administrative Assistant



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN, ETAL)
Plaintiff,)
vs.)
GALUST BERIAN, ETAL)
Defendants.)

Case No. CV-2015-0000626

ORDER SETTING PRETRIAL AND BENCH TRIAL

Pursuant to Rule 16 of the Idaho Rules of Civil Procedure, the following pre-trial schedule shall govern all proceedings in this case:

I. IT IS HEREBY ORDERED¹:

In all cases filed outside of Jefferson County, copies of all motions, briefs, notices, and proposed jury instructions must be lodged with the judge in Jefferson County.

- 1. A pre-trial conference shall be held on February 16, 2016, at 3:00 PM.
2. A Bench Trial shall commence at 9:00 AM, on Monday, February 29, 2016.
3. All discovery shall be completed seventy (70) days prior to trial.²

¹The disclosure cut-off date, discovery completion date and motion dates are for the benefit of the Court in managing this case. They will be enforced at the Court's discretion. The disclosure date should not be relied on by the parties for discovery purposes. The disclosure, discovery and motion dates will not be modified by the Court without a hearing and assurance from the parties that the modification will not necessitate continuance of the trial. Any party making a claim such as a cross-claim, third-party claim or counter-claim shall be considered to be a plaintiff for purposes of disclosing experts supporting any such claim.

² Discovery requests must be served so that timely responses will be due prior to the discovery cutoff date.

4. All Motions for Summary Judgment must be filed sixty (60) days prior to trial in conformance with I.R.C.P. 56(a)&(b).
 5. All Motions for Summary Judgment must be heard at least twenty-eight (28) days prior to trial.
- II. IT IS FURTHER ORDERED** that each attorney shall, no later than fourteen (14) days before trial, or at the pretrial conference, whichever is sooner;
1. Submit a list of names to the court of persons who may be called to testify.
 2. Submit a descriptive list of all exhibits proposed to be offered into evidence to the court indicating which exhibits counsel have agreed will be received in evidence without objection and those to which objections will be made, including the basis upon which each objection will be made.
 3. Submit a brief to the court citing legal authorities upon which the party relies as to each issue of law to be litigated.
 4. If this is a Jury Trial, counsel shall submit proposed jury instructions to all parties to the action and the court. All requested instructions submitted to the court shall be in duplicate form as set out in I.R.C.P. 51(a)(1).
 5. Submit that counsel have in good faith tried to settle this action.
 6. State whether liability is disputed.
- III. IT IS FURTHER ORDERED** that each attorney shall no later than seven (7) days before trial:
1. Submit any objections to the jury instructions requested by an opponent specifying the instruction and the grounds for the objection.
 2. File with the Clerk of the Court all exhibits they intend to introduce at trial, except those for impeachments. The Plaintiff's Exhibits shall be numbered and the Defendant's Exhibits shall be identified alphabetically and shall be premarked.
 3. All exhibits, original and copy, to be introduced, except those for impeachment, shall be placed in binders, indexed.
- IV. IT IS FURTHER ORDERED** that not later than three (3) days before trial, counsel for each party shall stipulate to those exhibits that may be received in evidence without objections, and file a written stipulation with the Clerk who will then mark such exhibits "admitted."

V. IT IS FURTHER ORDERED that:

1. Any exhibits or witnesses discovered after the last required disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered.
2. No exhibits shall be admitted into evidence at trial other than those disclosed, listed and submitted to the clerk of the court in accordance with this order, except when offered for impeachment purposes or unless they were discovered after the last required disclosure.
3. This order shall control the course of this action unless modified for good cause shown to prevent manifest injustice.
4. The court may impose appropriate sanctions for violation of this order.

VI. IF THE PARTIES proceed to mediation they must do so under I.R.C.P. 16(k) in a good faith effort to attempt to resolve this case on or before January 29, 2016.

VII. ALTERNATE JUDGES: Notice is hereby given that the presiding judge assigned to this case intends to utilize the provisions of I.R.C.P. 40(d)(1)(G). The panel of alternate judges consists of the following judges who have otherwise not been disqualified in this action: Richard St. Clair, Gregory S. Anderson, Darla Williamson, William Woodland, Jon J. Shindurling, Joel E. Tingey, Dane H. Watkins, Jr., Gregory W. Moeller, and Peter D. McDermott.

DATED this 13th day of November, 2015



ALAN C. STEPHENS
District Judge

Copy: Hyrum Erickson
Robin Dunn



DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB #2903
 477 Pleasant Country Lane
 P. O. Box 277
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE
 MORTENSEN,)

Plaintiffs,)

vs.)

GALUST BERIAN AND YVETTE N.
 STURGIS,)

Defendants.)

Case No. CV-15-626

ANSWER TO COMPLAINT

GALUST BERIAN AND YVETTE N.
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE
 MORTENSEN,)

Counter-Defendants.)

Case No. CV-15-626

COUNTERCLAIM

COME NOW Defendants, GALUST BERIAN and YVETTE N. STURGIS, by and
 through counsel of record, Robin D. Dunn, Esq., and ANSWER THAT COMPLAINT on
 file as above-captioned as follows:

I.

The defendants deny each and every allegation of the plaintiffs' complaint not specifically admitted hereafter.

II.

The defendants allege and believe that the plaintiffs' complaint is defective and does not state a proper claim for relief and should be dismissed pursuant to IRCP, Rule 12(b)(6).

III.

As to each individual paragraph of the plaintiffs' complaint, the defendants answer as follows:

1. Admit.
2. Admit.
3. Admit and also indicate that more real property is called into question than that of the defendants.
4. The district court is the court of proper jurisdiction located in Madison County, Idaho. Admit venue is proper.
5. Conditionally admit not being sure of the acreage.
6. Admit as it pertain to the allegations of this action. The plaintiffs may own property elsewhere.
7. Statement requiring no answer and, therefore, deny.
8. Deny as to property served. Unknown as to any ownership of shares by plaintiffs and, therefore, deny.
9. Deny.
10. Deny.
11. Admit.

12. Admit.
13. Deny.
14. Deny.
15. Admit Berian has resided on the real property identified as Sturgis. Whether his residency is relevant to all times of this complaint is denied.
16. Deny as this alleged act was unknown to defendants.
17. Deny that a ditch was destroyed but was filled in as was appropriate to still allow the watering of the Sturgis real property.
18. Admit.
19. Admit the ditch was filled in and the culvert removed.
20. Admit the culvert was removed.
21. Deny. Agents of Berian removed the ditch and culvert at his request.
22. Deny.
23. Deny.
24. Deny.
25. Deny.
26. Deny.
27. Deny.
28. Deny.
29. Deny.
30. Deny that plaintiffs had a right-of-way.
31. Deny.
32. Deny as permission was not required.
33. Deny.

34. Deny.

35. Deny.

36. A self-serving letter was sent to defendants by plaintiffs' counsel.

37. Admit because nothing is owing to plaintiffs.

38. Deny.

FIRST AFFIRMATIVE DEFENSE

The plaintiffs do not have any legal right to a ditch across the defendants' real property.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs have willfully trespassed upon the real property of defendants despite being warned through proper signage and, at a later point, by verbal notice.

THIRD AFFIRMATIVE DEFENSE

The plaintiffs are attempting to force an easement across property of defendant and have no legal theory or right to such action. The plaintiffs continue to trespass and obstruct the free use of the real property of the defendants.

FOURTH AFFIRMATIVE DEFENSE

The plaintiffs have attempted to threaten, verbally abuse and intimidate Berian and have no legal right or privilege to do so.

ATTORNEY FEES

The defendant requests attorney fees as are appropriate pursuant to statute, rule and case law developed in Idaho.

COUNTER CLAIM

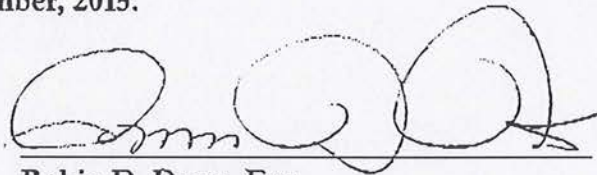
- A. The counter-claimants, Berian and Sturgis, are individuals residing in Madison County, Idaho and the State of Mississippi, respectively.
- B. The counter-defendants reside in Madison County, Idaho.
- C. Jurisdiction is proper in the District Court in Madison County. Venue is proper in Madison County, Idaho.
- D. The counter-defendants have knowingly willingly and voluntarily ignored "No Trespassing" signs and have entered onto counterclaimant's property at various times. The counter-defendants have also ignored verbal warnings not to trespass and have verbally been "trespassed" from the counter-claimants real property.
- E. The entrance onto counter-claimants real property constitutes trespass.
- F. Counter-defendants have verbally used profanity, vulgarity and other actions to threaten and intimidate Berian and his daughter.
- G. The counter-claimants have been damaged in a sum to be established at trial for the voluntary trespasses, multiple in nature by the counter-defendants.
- H. Treble damages are available for knowingly trespassing and should be awarded to the counterclaimants.
- I. The counter-claimants request fees and costs pursuant to statute, rule and case law.

WHEREFORE, the defendants/ counter-claimants pray as follows:

1. The claims contained in the complaint of the plaintiffs be dismissed with prejudice;

- 2. The defendants be awarded fees and costs on the claims contained in the complaint;
- 3. That the counter-claimants be awarded judgment for damages on their counterclaim along with fees and costs on their counterclaim; and,
- 4. For all further just relief.

DATED this 9th day of December, 2015.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of December, 2015, a true and correct copy of the foregoing was delivered to the following person(s) by:

DOCUMENT SERVED: Answer to Complaint

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Hyrum Erickson
RIGBY, ANDRUS & RIGBY LAW, PLLC
P.O. Box 250
Rexburg, ID 83440

Facsimile 356 0768



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

_____)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Kevin Thompson

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Kevin Thompson on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 7th day of January, 2016 at 2:00 p.m.

DATED this 14th day of December, 2015.



Hyrum Erickson

**CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION**

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 14th day of December, 2015.

RIGBY, ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
[X] Facsimile

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)
 _____)


Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Lyle Thompson

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Lyle Thompson on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 7th day of January, 2016 at 2:00 p.m.

DATED this 14th day of December, 2015.



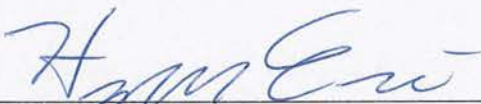
Hyrum Erickson

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DATED this 14th day of December, 2015.

RIGBY, ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

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 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

_____)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)
 _____)


Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Defendant, Yvette N. Sturgis and her attorney of record, Robin D. Dunn, Dunn Law Office, P.O. Box 277, Rigby, ID 83442

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Yvette N. Sturgis on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 7th day of January, 2016 at 9:00 a.m.

DATED this 14th day of December, 2015.




Hyrum Erickson

**CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION**

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 14th day of December, 2015.

RIGBY, ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
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Rigby, ID 83442
745-8160

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 Attorneys at Law
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 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

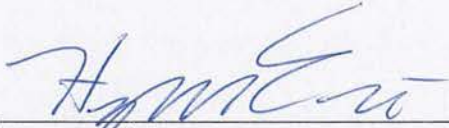
Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Defendant, Galust Berian and his attorney of record, Robin D. Dunn, Dunn Law Office, P.O. Box 277, Rigby, ID 83442

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Galust Berian on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 7th day of January, 2016 at 9:00 a.m.

DATED this 14th day of December, 2015.




Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 14th day of December, 2015.

RIGBY, ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
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Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)
 _____)

Case No. CV-15-626

REPLY TO COUNTERCLAIM

COMES NOW Jade Mortensen and Kylie Mortensen, the Counter-Defendants, and hereby reply to the counterclaim as follows:

ANSWER

1. Admits all allegations of paragraphs A, B, and C.
2. Denies all allegations of paragraphs D-I.

AFFIRMATIVE DEFENSES

3. Mortensens deny each and every allegation of the counterclaim that is not specifically admitted herein.

4. Regarding the allegation of trespassing, Mortensens assert they have a right to access the property pursuant to a valid ditch easement.

5. Mortensens deny the property was posted as required by I.C. § 6-202.

6. Mortensens deny any damage was done by the alleged trespass.

7. In the alternative, if they are found to have trespassed, Mortensens assert that no attorney fees may be awarded pursuant to I.C. § 6-202 as they entered the property as the operators of a ditch governed by chapters 11 and 12, title 42, Idaho Code.

8. The counterclaim fails to state a claim against Mortensens for which relief can be granted.

9. Counter-claimants claims, either in whole or in part, may be barred by the doctrines of waiver, estoppel, and/or laches.

10. Counter-claimants have failed, refused, and neglected to take reasonable steps to mitigate their alleged damages, if any, thus barring or diminishing any recovery.

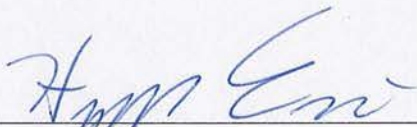
RESERVATION OF RIGHT TO AMEND

Mortensens make their reply to the counterclaim based upon information reasonably known to them at this time. However, Mortensens reserve the right to amend any or all of their responses herein, including but not limited to, their admissions or denials, to eliminate or add additional defenses or affirmative defenses, or to assert counterclaims, cross-claims or third-party claims as facts supporting such become known to them.

PRAYER FOR RELIEF

WHEREFORE, the Mortensens pray that Counter-claimants counterclaim be dismissed with prejudice, that Counter-claimants take nothing thereby, that Mortensens be awarded costs and fees pursuant to applicable law, including I.C. 12-120(3), and 12-121, and such other and further relief as the Court deems just and proper.

DATED this 22nd day of December, 2015.



Hyrum Erickson,
of Rigby, Andrus & Rigby, Law, PLLC,

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 22nd day of December, 2015.

RIGBY ANDRUS & RIGBY LAW, PLLC

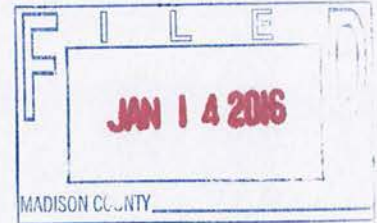


Hyrum Erickson

Robin D. Dunn
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 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

 NOTICE OF DEPOSITION - Page 1
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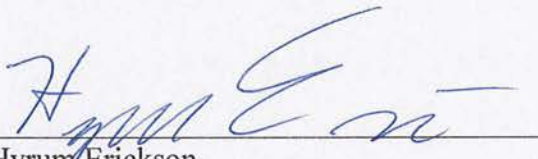
Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Defendant, Galust Berian and his attorney of record, Robin D. Dunn, Dunn Law Office, P.O. Box 277, Rigby, ID 83442

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Galust Berian on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 3rd day of February, 2016 at 9:00 a.m.

DATED this 13th day of January, 2016.



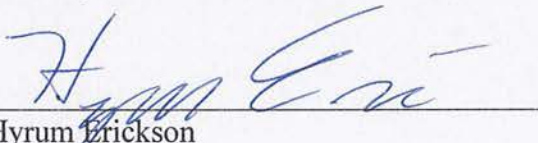
Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 13th day of January, 2016.

RIGBY, ANDRUS & RIGBY LAW, PLLC

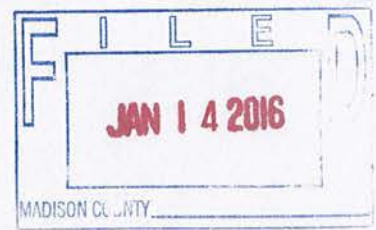


Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
[X] Facsimile

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O, Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)


Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Defendant, Yvette N. Sturgis and her attorney of record, Robin D. Dunn, Dunn Law Office, P.O. Box 277, Rigby, ID 83442

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Yvette N. Sturgis on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 3rd day of February, 2016 at 9:00 a.m.

DATED this 13th day of January, 2016.



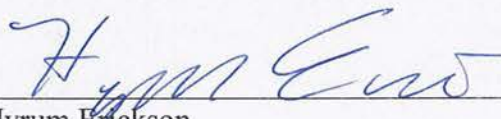
Hyrum Erickson

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DATED this 13th day of January, 2016.

RIGBY, ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
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745-8160

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[] Hand Delivery
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 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)
 _____)

Case No. CV-15-626

NOTICE OF DEPOSITION

TO: Kevin Thompson

Please take notice that Jade Mortensen and Kylie Mortensen, through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, will take the deposition of Kevin Thompson on oral examination before a certified court reporter at the law offices of Rigby, Andrus & Rigby Law, PLLC, 25 North 2nd East, Rexburg, ID 83440, on the 3rd day of February, 2016 at 2:00 p.m.

DATED this 13th day of January, 2016.



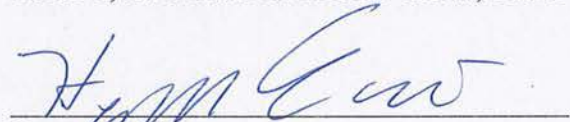
Hyrum Erickson

**CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION**

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DATED this 13th day of January, 2016.

RIGBY, ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
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745-8160

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DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB #2903
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477 Pleasant Country Lane
Rigby ID 83442-0276
Telephone: (208) 745-9202
Facsimile: (208) 745-8160

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE MORTENSEN,

Plaintiff,

v.

GALUST BERIAN AND YVETTE N. STURGIS,

Defendants.

GALUST BERIAN AND YVETTE N. STURGIS,

Counter-claimants,

v.

JADE MORTENSEN AND KYLIE MORTENSEN,

Counter-defendants.

TO: JADE MORTENSEN

Case No. CV-15-626

NOTICE OF DEPOSITION
DUCES TECUM

PLEASE TAKE NOTICE that Galust Berian, by and through his attorney of record, Robin D. Dunn, Esq., Dunn Law Offices, PLLC, will take the deposition of Jade Mortensen on oral examination before a certified court reporter at the law offices of Rigby, Andrus and Rigby, PLLC, 25 N. 2nd E. Rexburg, Idaho at the hour of 10: a.m. on the 3rd day of February,

2016 or immediately following the deposition of Galust Berian or other scheduled deponents, in the above entitled action.

You are commanded to bring the following:

- 1. All deeds to the real property in question owned or being purchased by the plaintiffs;
- 2. All water shares evidenced by the property in question which is the subject of the pending action; and,
- 3. All photographs or aerial views that support your claims in the pleadings on file.

DATED this 20th day of January, 2016.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2016, a true and correct copy of the foregoing was delivered to the following person(s) by:



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Hyrum Erickson
Rigby, Andrus & Rigby Law, PLLC
25 North Second East
P.O. Box 250
Rexburg, Idaho 83440
208 356-0768

Facsimile

T&T Reporting
P.O. Box 51020
Idaho Falls, ID 83405

(U.S. Mail)

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

Case No. CV-15-626

WITNESS AND EXHIBIT LIST

COME NOW the Plaintiffs, Jade Mortensen and Kylie Mortensen, and, pursuant to the Order Setting Pretrial and Bench Trial issued November 13, 2015, provide the following list of exhibits and witnesses they may introduce and call at trial.

WITNESSES

Larry Atkinson
Rod Robison
George Benson
Sandy Cress
Barrett Shuman
Jade Mortensen
Kylie Mortensen
Galust Berian
Yvette Sturgis
Kevin Thompson
Lyle Thompson

EXHIBITS

Aerial Photographs from the following dates all available from Google Earth:

10/7/14
10/24/13
9/4/12
7/16/12
7/11/12
9/24/11
6/23/09
6/22/06

6/15/04
7/29/92

Reid Canal Company Certificate No. 0048 for 4 shares to Jade or Kylie Mortensen dated June 16, 2004.

County Recorder Map showing location and Tax ID Number of area parcels.

2 Photos of headgate from Fyfe ditch into subject ditch.

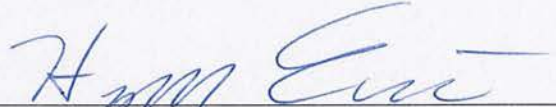
Photos of filled in ditch.

Photos of culvert removed from the ditch.

Record of Survey dated November 7, 2012, set on aerial photograph, as provided by Kevin Thompson at his deposition.

As yet, no exhibits have been stipulated to. Neither party has requested a jury trial. Rigby, Andrus & Rigby Law, PLLC, has in good faith attempted to settle this action. It is Mortensens' understanding that Sturgis and Berian continue to dispute liability.

DATED this 16th day of February, 2016.



Hyrum Erickson,
of Rigby, Andrus & Rigby, Law, PLLC,

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DATED this 16th day of February, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

Mail
 Hand Delivery
 Facsimile

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
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 Rexburg, Idaho 83440
 Telephone: 208-356-3633

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE	)	Case No. CV-15-626
MORTENSEN,)	
)	
Plaintiff,	)	PRETRIAL BRIEF
)	
v.)	
)	
GALUST BERIAN AND YVETTE N.)	
STURGIS,)	
)	
Defendants.)	
_____)	
)	
GALUST BERIAN AND YVETTE N.)	
STURGIS,)	
)	
Counter-claimants,)	
)	
vs.)	
)	
JADE MORTENSEN AND KYLIE)	
MORTENSEN,)	
)	
Counter-Defendants.)	
_____)	

COME NOW the Plaintiffs, Jade Mortensen and Kylie Mortensen, and, pursuant to the Order Setting Pretrial and Bench Trial issued November 13, 2015, provide the following brief to the Court citing legal authorities upon which they rely.

NATURE OF CASE

The matter to be tried is straightforward and set out in the Complaint and Answer. Mortensens allege that their property is served by a ditch that diverts water from the Reid Canal Company which passes through the Sturgis property and which has carried water to the Mortensen lands for many decades. Notwithstanding this long established right, early in April of 2015, Berian or Sturgis filled in the ditch. (Complaint ¶¶ 5-18). Berian and Sturgis admit they filled in the ditch (Answer ¶¶ 17-20) , but deny that Mortensens had a right-of-way across the property. (Answer ¶ 30, First Affirmative Defense).

DITCH STATUTES AND CASELAW

Ditch right-of-ways are controlled by I.C. § 42-1102. That statute is reproduced in its entirety below, with the most relevant portions emphasized with italics:

When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation. The right-of-way shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be

taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. Provided, that in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interests of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

Rights-of-way provided by this section are essential for the operations of the ditches, canals and conduits. *No person or entity shall cause or permit any encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures, or other construction or placement of objects, without the written permission of the owner of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way. Encroachments of any kind placed in such right-of-way without express written permission of the owner of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachment, upon the request of the owner of the right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way.* Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

This section shall apply to ditches, canals or other conduits existing on the effective date of this act, as well as to ditches, canals or other conduits constructed after such effective date.

Once a ditch has been constructed, the person across whose land it travels may not change or modify the ditch in any way that impedes the flow of water. Idaho Code § 42-1207 reads, in relevant part, as follows:

Where any ditch, canal, lateral or drain or buried irrigation conduit has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling said land shall have the right at their own expense to change said ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change, his heirs, executors, administrators, successors and assigns.

.....
The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner. . . .

Mortensens assert that Sturgis and Berian violated both I.C. § 42-1102 and I.C. § 42-1207, by filling in the ditch serving Mortensens' property. Alternatively, Mortensens rely on common law negligence since the statutes create a duty from Sturgis and Berian to the Mortensens and they violated that duty by filling in the ditch.

The Idaho Supreme Court has held that when a trial court determines that a ditch easement exists, it must set out the dimensions of the easement in the judgment.

A judgment that determines an easement's existence on another's land "must set forth the location, width, and length of the easement in order that conflicts between landowners may be avoided." *Bedke v. Pickett Ranch & Sheep Co.*, 143 Idaho 36, 40, 137 P.3d 423, 427 (2006). The judgment "must describe the lands specifically and with such certainty that the court's mandate in connection therewith may be executed, and such that rights and liabilities are clearly fixed and that all parties affected thereby may readily understand and comply with the requirements thereof." *Kosanke v. Kopp*, 74 Idaho 302, 307, 261 P.2d 815, 818 (1953). Thus, courts must specifically describe an easement's width and location.


Morgan v. New Sweden Irr. Dist., 156 Idaho 247, 254, 322 P.3d 980, 987 (2014). As such, Mortensens will request that the Court order a survey, at the expense of Strugis and Berian, that specifically describes that location of the easement, that the description be included in the

judgment, and that the judgment be recorded with the County.

ATTORNEY FEES STATUTES

Mortensens intend to rely on I.C. §§ 12-121 and 12-120(1) to request attorney fees.

DATED this 16th day of February, 2016.



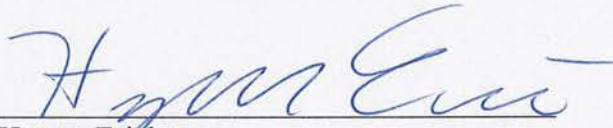
Hyrum Erickson,
of Rigby, Andrus & Rigby, Law, PLLC,

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DATED this 16th day of February, 2015.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

- Mail
- Hand Delivery
- Facsimile

COURT MINUTES

CV-2015-0000626

Jade Mortensen, etal. vs. Galust Berian, etal.

Hearing type: Court Trial

Hearing date: 2/29/2016

Time: 9:07 am

Judge: Alan C Stephens

Courtroom: Brent J. Moss District Court

Court reporter:

Minutes Clerk: Angie Wood

Party: Galust Berian, Attorney: Robin Dunn

Party: Jade Mortensen, Attorney: Hyrum Erickson

Party: Kylie Mortensen, Attorney: Hyrum Erickson

Party: Yvette Strugis, Attorney: Robin Dunn

9:00 Introduction of case

Mr Erickson makes statement regarding his exhibits

Mr Erickson makes opening statement

Mr Dunn makes opening statement

9:10 Mr Erickson calls first witness – Galust Berian W-1 sworn to testify

Plaintiffs exhibit 28 – aerial photo – submitted – admitted

9:24 Plaintiffs exhibit 3-11 various aerial photos – submitted – admitted

9:57 W-1 excused

9:58 Sandra Gay Cress sworn to testify W-2

Mr Erickson questions W-2

10:06 Mr Dunn questions W-2

10:16 W-2 excused

10:16 Larry Atkinson present by phone – sworn to testify W-3

Mr Erickson questions W-3

10:26 Mr Dunn questions W-3

10:30 Mr Erickson redirect

10:33 W-3 excused

10:34 George Benson sworn to testify W-4

Mr Erickson questions W-4

10:40 Mr Dunn questions W-4

10:44 W-4 excused

10:44 Take short break

10:59 Back on Record

10:59 Lyle Thompson present by phone – sworn to testify W-5

Mr Dunn questions W-5

11:05 Mr Erickson questions W-5

11:11 W-5 excused

11:12 Rod Robison sworn to testify W-6

Mr Erickson questions W-6

11:16 Plaintiffs exhibit 2 admitted

11:16 W-6 excused while W-7 is questioned

11:17 Kevin Thompson sworn to testify W-7

Mr Erickson questions W-7

11:21 Plaintiffs Exhibit 1 admitted (large plat map)

11:21 Mr Dunn questions W-7

11:22 Mr Erickson redirects

11:23 W-7 excused

11:23 W-6 back on stand

Mr Erickson questions W-6

Plaintiffs Exhibit 2A marked and admitted (map with canal by W-6)

11:35 Plaintiffs Exhibit 30 admitted (property deed)

11:37 Plaintiffs Exhibit 29 admitted (Water shares transfer)

11:51 Mr Dunn questions W-6

12:00 Mr Erickson redirect W-6

Plaintiffs Exhibit 29 and 2a admitted without objection

109 PA DX W- KYLIE MORTENSEN

114 PA DX W- JADE MORTENSEN

PLAINTIFFS EXHIBIT 12 ADMITTED WITHOUT OBJECTION (PHOTOGRAPH)

PLAINTIFFS EXHIBIT 13-27 – ADMITTED WITHOUT OBJECTION (PHOTOGRAPHS)

216 DA DX W- JADE MORTENSEN

DEPOSITION OF JADE MORTENSEN PUBLISHED

243 DA DX W- JULIA BERIAN

DEFENDANTS EXHIBIT A MARKED

IDENTIFIED AS ARIEL PHOTO OF –

ADMITTED WITHOUT OBJECTION

253 PA X W- JULIA BERIAN

318 BACK AFTER RECESS

MR. DUNN MAKES MOTION TO DISMISS COUNTERCLAIM

MR. ERICKSON OBJECTS TO MOTION TO DISMISS

MR. DUNN WITHDRAWS MOTION

MR. DUNN CALLS GALUST BERIAN TO TESTIFY

COURT INQUIRIES OF WITNESS

MR. DUNN INQUIRES OF GALUST BERIAN

PLAINTIFFS EXHIBIT 31 MARKED

IDENTIFIED AS PHONE RECORD OF PHONE CALL FROM MR. BERIAN TO MR. MORTENSEN

PLAINTIFFS EXHIBIT 31 ADMITTED WITHOUT OBJECTION

COUNSEL TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO
LAW CLERK

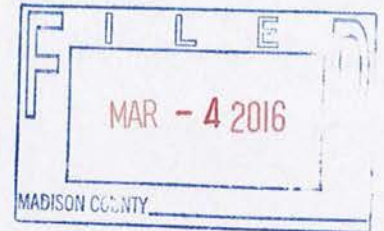
MARCH 11, 2016 AFTER 3 BUT BEFORE 5

WORD FORMAT

CLOSING ARGUMENT – BRIEF NO MORE THAN 5 PAGES

T&T REPORTING

Depositions - Videography - Video Conferencing
P.O. Box 51020
Idaho Falls, Idaho 83405 - 1020



February 11, 2016

Hyrum D. Erickson, Esq.
RIGBY, ANDRUS & RIGBY LAW, PLLC
Post Office Box 250
Rexburg, ID 83440

Robin D. Dunn, Esq.
DUNN LAW OFFICES
Post Office Box 277
Rigby, ID 83442

Re: State of Idaho, County of **Madison**
MORTENSEN vs. BERIAN, et al.
Case No.: CV-15-626
Depositions of: Galust Berian, Kevin Thompson, Rodney Robison, and Jade Mortensen
Taken: February 3, 2016

Mr. Erickson, pursuant to Rule 30 (f) (1), I have enclosed the original transcripts for the depositions of Galust Berian, Kevin Thompson, and Rodney Robison taken in the above captioned matter. I have also sent a certified electronic Min-U-Script® PDF copy of the transcript for the deposition of Jade Mortensen, along with the Verification sheet to obtain the witness' signature.

Mr. Dunn, pursuant to Rule 30 (f) (1), I have enclosed the original transcript for the deposition of Jade Mortensen taken in the above captioned matter. I have also sent certified electronic Min-U-Script® PDF transcripts for the depositions of Galust Berian, Kevin Thompson, and Rodney Robison.

Mr. Berian has waived the right to "Read and Sign."

Mr. Thompson and Mr. Robison have been sent a copy of their transcript to "Read and Sign."

If you have any questions, please contact my office.

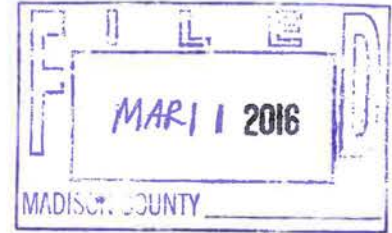
Sincerely,

for:
John Terrill

Enclosures

cc - **Clerk of the Court**
File

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB #2903
 477 Pleasant Country Lane
 P. O. Box 277
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)



Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Plaintiffs,)
 vs.)
)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Defendants.)
 _____)

Case No. CV-15-626

PROPOSED FINDINGS OF
 FACT, CONCLUSIONS OF
 LAW AND ARGUMENT

The defendants submit the following with F denoting proposed fact, C denoting proposed conclusion and A denoting argument on the matters as labeled above:

1. (F) The subject of this action occurred in Madison County, Idaho. The district court heard the matter because the allegations involved real property and the potential in controversy could confer jurisdiction on the court.
2. (C) The court has jurisdiction to hear this matter and the venue is appropriate in Madison County.
3. (F) Plaintiffs' Exhibit 28 is an aerial photograph that shows what is roughly described as the "Mortensen Property", the "Sturgis Property" and, to the far right (eastern portion), the property being lived on by the defendants.
4. (F) The real property in question is described as the Sturgis property.

5. (F) The dispute centers over a ditch that may or may not have been properly establish or was abandoned that runs east and west over the Sturgis real property.
6. (F) This alleged service ditch breaks off from a ditch that runs roughly north and south and is described as the Fyfe ditch.
7. (F) The Fyfe ditch is serviced from the Reid Canal wherein ownership rights are derived for water shares. An aerial photograph described as plaintiffs' Exhibit 2 show the entire layout of the water system. Plaintiffs' Exhibit 1 shows a Google Earth map from a survey performed by Kevin Thompson which predates the November 7, 2012 survey; and is an aerial photograph that more closely resembles the subject properties.
8. (F) The land described as Mortensen was a bare parcel of real estate that had been owned by the following denoted family names: Fyfe to Flagger; Flagger to Robison; and Robison to Mortensen. This period of time covered in excess of 30 years.
9. (F) Three neighborhood witnesses testified for the plaintiffs. Sandra Kress indicated that the east/west ditch in question that crossed the Sturgis property had not been used for years prior to Mortensens' purchase of real property. She also testified that "mother nature "had filled in any ditch. She also indicated that her dad, Fyfe had owned all of the three parcels at one time which were broken off and labeled for this hearing Mortensen, Sturgis and then, the Galust Berian household property on the east.
10. (F) Larry Atkinson testified that he cleaned the Fyfe ditch over 30 years ago and had never seen water in the ditch.

11. (F) George Benson testified that the ditch in question was not used for years and he had last seen when Larry Atkinson had cleaned which was over 30 years ago according to Atkinson. Benson stated he had never seen water delivered through the ditch in question. He stated the ditch was eroded and that he filled in a portion of the western part of the ditch on the Sturgis property over 15 years earlier. He testified the Sturgis property was flood irrigated.
12. (F) Plaintiffs' Exhibit 30 is a Warranty Deed from Rod and Sharon Robison to Jade and Kylie Robison with a date of May 11, 2004. This property is known as the Mortensen property on Exhibit 28. It is more or less about 3.5 acres. The plaintiffs placed a trailer home on the North portion of this parcel along with outbuildings and living arrangements.
13. (F) Along with the warranty deed, Robison conveyed a water certificate from the Reid Canal Company to plaintiffs for 4 shares. Robison testified that one share for each acre was the norm. The property, as stated, was about 3.5 acres. Robison further testified that the conveyance of water shares did not convey transfer of the water to a designated location but rather gave the holder of the shares rights in the Reid Canal. A ditch right is a separate property interest from a water right. The acquisition of a water right does not result in the acquisition of a right to transport the water across the lands of others.
14. (F) Plaintiffs' Exhibits 3-11 are aerial photographs that are substantially similar to Plaintiffs' Exhibits 2 and 28.
15. (C) Plaintiffs' Exhibits 3-11 do not add any material facts that are not contained on Plaintiffs' Exhibits 2 and 28 or Defendants' Exhibit A.

16. (F) Defendants have resided on the real property described as Sturgis and east thereof since approximately 1989. The entire property is approximately 30 acres.
17. (F) At all pertinent times and material to this case, the defendants have posted “No Trespassing” signs about the perimeter of the 30 acre parcel.
18. (C) The public is on notice not to trespass on the defendants’ real property.
19. (F) The witnesses who testified could not establish any actual usage of the alleged ditch by Flagger or Robison for the years before Mortensen came into existence. No one testified of ever seeing or observing water diverted across the Sturgis property during the ownership of Flagger and Robison. The last cleaning was over 30 years earlier and a portion had been filled in 15 years earlier. Ms. Cress testified that “mother nature” had pretty much filled in the entire ditch.
20. (C) The alleged ditch, if it did exist in any form, was forfeited or abandoned by the Flagger/Robison ownership of the real property described as “Mortensen”. Facts must be established by a preponderance of evidence other than evidence of interested parties. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933); *Idaho Bank of Commerce v. Chastain*, 86 Idaho 146 (1963). (However, the standard is more stringent for the establishment of a right-of-way by adversity.) Non-use for an unreasonable period of time creates a rebuttable presumption that there was an intention to abandon. *Sieber v. Frink*, 7 Colo. 148, 2 P. 901 (1883).
21. (C) Forfeiture of water rights is conceptually distinct from common law abandonment. Abandonment is predicated upon the elements of intent and conduct. It requires intent to abandon and the actual surrender or relinquishment of water rights. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981). Statutory forfeiture focuses instead upon time and conduct. Idaho

Code § 42-222(2) provides that all rights to water are lost where the appropriator fails to make "beneficial use" of the water for a continuous five-year period regardless of intent. See, e.g., *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). Under either theory, the alleged ditch, in the case at bar, was abandoned or forfeited prior to the Mortensen ownership of real property.

22. (C) Thus, the issue is whether the plaintiffs established or re-established a right-of-way across the property described as "Sturgis" by some legal theory such as prescriptive right or adversity.
23. (C) A party claiming title to property by adverse possession has the burden of proving all the elements by clear and satisfactory evidence. *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984); *Pincock v. Pocatello Gold & Copper Min. Co.*, 100 Idaho 325, 597 P.2d 211 (1979); *Standall v. Teater*, 96 Idaho 152, 525 P.2d 347 (1974). *Rice v. Hill City Stock Yards Co.*, 826 P.2d 1288, 121 Idaho 576 (Idaho 1992).
24. (C) The requirement of adversity cannot be maintained unless held openly, hostile, exclusive and notorious for a period of five (5) years. The requirement of "open, notorious, exclusive, and hostile possession of the property" necessary to establish adverse possession by clear and satisfactory evidence requires 5 years. See, I.C. §5-203; *Rice v. Hill City Stock Yards Co.*, supra.
25. (F)(C) Galust Berian testified that the ditch placed across the Sturgis property, by plaintiffs, was filled in September of 2014. He and his daughter testified that it had to be dug after December 31, 2011 because of bank proceedings on the real property identified as Sturgis property. The plaintiffs' exhibits 12-27 were not

objected to because that is how the view of the property would appear after the ditch was filled in in September of 2014. The photographs appear to be taken in the Spring of 2015 and is consistent with the April 2015 discovery by Mortensen.

26. (F) Lyle Thompson indicated he had obtained firewood from the south end of the Sturgis property for numerous years ending in 2011 or 2012. He indicated that no ditch was present as he drove with his vehicle and trailer the length of the Sturgis property. The trailer could not have cleared a ditch without high centering.
27. (F) Jade Mortensen's testimony on the alleged ditch altered as he was questioned. At one point he indicated that he immediately began to use water after the transfer of the warranty deed in 2004. Thereafter, he testified he began to use the alleged ditch in 2008. The only sure evidence was that a dug ditch existed in 2012. Jade Mortensen indicated he had purchased a machine for excavation about this time.
28. (F) Rod Robison, the seller of the property to plaintiffs, testified to immediate use of the alleged ditch in 2004 after the sale to plaintiffs. This testimony was rebutted by deposition testimony of Mortensen who had held fast to the 2008 usage. Further, Robison testified he did not get along with Berian.
29. (C) The witnesses, Jade Mortensen and Rod Robison, have conflicting evidentiary statements. One or both is not telling the truth.
30. (C) Non-existence, abandonment or forfeiture of the alleged ditch, prior to the sale to Mortensen, is consistent with the testimony of all parties. When Mortensen purchased the property, the alleged ditch did not exist, or if it did exist it was abandoned or forfeited.

31. (C) The burden of proof is on plaintiffs to show prescriptive or adverse creation of a ditch by clear and convincing evidence. The evidence between the plaintiffs and the defendants is conflicting. However, it is clear that subtle statements in the testimony of all witnesses show the ditch that was dug did not exist for 5 years prior to Berian filling in the ditch in September of 2014. Those subtle points are the presence of an artist building a small structure on the south end of the Sturgis property. He did not have to go through a ditch to build the art living space. The mention of when Jade Mortensen purchased his digging machinery is another example. The bank taking possession on December 31 of 2011 is another example. The testimony of Lyle Thomson getting fire wood is of prime importance to show the non-existence of a ditch. The 5 year period of open, notorious use is not present.
32. (F) Plaintiffs' Exhibit 12 shows fresh dirt above the head-gates/culverts placed in the Mortensen side of the real property. These head-gates/culverts could not have been in the ground for 5 years because of the lack of vegetation over these devices.
33. (C) The plaintiffs did not carry their burden of showing a ditch usage by adversity or otherwise.
34. (F) [Assuming arguendo that the court were to rule that the plaintiffs did carry their burden] The damages testified to by Jade Mortensen were not documented in any manner. He made bald assumptions without any documentation viz. cancelled checks, receipts, bid proposals or the like.

35. (C) Damages cannot be speculated upon by the fact-finder and most be proven with certainty as to actual damages for a willful violation of the water law/ditch scenario.
36. (A) The court should be aware that the entire property described as Sturgis, Mortensen and the land south of this property was all one contiguous parcel of property owned by Fyfe. It is believed that the Fyfe ditch carried water which was then allowed to flood irrigate the pasture land known as Sturgis and the Mortensen property by flooding from east to west. Ms. Cress testimony substantiates this belief. It is also believed that is consistent with the Fyfe ditch ending at the northern end of the property described as Sturgis. Quite simply, this ditch flood irrigated everything by either tubes or cuts in the ditch to allow flow. A third, but less likely scenario is the ditch was merely damned and allowed to overflow onto the Sturgis/Mortensen piece of property. The alleged ditch had not been cleaned for over 30 years by Atkinson. "Mother nature" filled in the ditch according to Cress. Benson filled in a westerly portion of the alleged ditch 15 years earlier. Thus, the alleged ditch could not have been usable.
37. (A) One must remember that this entire parcel did not have separate water shares and was not divided. The first division of this entire parcel came upon the sale to Berian. Flagger then had the Mortensen property. Thus, at first he made a crude attempt to water the Mortensen property with blue piping about 8 to 10 inches wide. That piping was removed and Flagger did nothing more.
38. (A) The property came into the possession of Robison. When he sold to Mortensen that was the FIRST TIME that shares of water were ever associated with the Mortensen property.

39. (A) Thus, it was very ordinary to have a diversion point on the Fyfe ditch to flood the Sturgis property. Berian testified he tried to hand shovel a small ditch to water some trees on the Sturgis property and could not get the water to flow to the trees.
40. (A) The digging of the ditch by Mortensen is not disputed even though he never testified he dug the ditch. The real question is when did the digging of the ditch occur. Jade Mortensen did not state he dug the ditch but stated he merely cleaned and maintained a ditch. The ditch had been partially filled in by Benson 15 years earlier. Thus, Mortensen had to re-dig the ditch. This is a material departure from establishing a ditch by prescription or adversity. Defendants are confident that the ditch did not exist for 5 years before being filled in September of 2014. The ditch was made in 2012 after the bank issues with Galust Berian and filled in September of 2014. The 5 year requirement is not met.

COUNTERCLAIM OF GALUST BERIAN

41. (C) Any person who, without permission of the owner, or the owner's agent, willfully and intentionally enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property; or who willfully and intentionally cuts down or carries off any wood or underwood, tree or timber, or girdles, or otherwise willfully and intentionally injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of or in any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor or fifty dollars (\$ 50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails. Provided however, the owner or operator of any right-of-way or easement for any ditch, canal or other conduit governed by the provisions of chapter 11 or chapter 12, title 42, Idaho Code, who is found in violation of this section shall be liable only for actual damages and not for any treble damages or attorney fees otherwise provided for under this section. I.C. §6-202.

42. (F) Jade Mortensen testified he crossed the Sturgis property, crossed the Texas slough and began shouting obscenities and threatening Galust Berian in the presence of his daughter. He indicated he knew of the “No Trespassing” signs posted about the perimeter of the Berian/Sturgis real property. This particular trespass occurred on April 18 of 2015.
43. (F) Galust Berian testified of the trespass by Jade Mortensen and the anger, hostility and vulgar language that was displayed by Mortensen in the presence of his daughter.
44. (F) Galust Berian indicated this trespass affected his emotions, his work, and his way of life among other items. He testified he could not paint for 1 year because of the emotional distress caused by the threats. Berian testified of migraine headaches as a result of this trespass and his attempts to overcome this physical symptom.
45. (C) The trier-of-fact is the sole judge in determining the amount of damages in a tort action. The action was commenced within the two year limitation established by law. Pain and suffering along with ability to perform work is a subjective determination by the fact-finder. The damages are also subject to treble the amount, per statute, along with reasonable attorney fees.
46. (C) The defendant/counter-claimant prevailed on his counter-claim and proved each element as set forth in the counter-claim. The plaintiff, Jade Mortensen, did not deny the trespass or present any argument or defense to the trespass. No rebuttal of the damages of Galust Berian was questioned on any cross-examination.

47. (A) If the court will recall, defense counsel indicated to the court that they had to prepare and be ready for the defense of this counter-claim. Yet, at trial, there was no defense, no denial, no cross-exam or witnesses presented to refute the counter-claim set forth by Galust Berian.

48. (C) On the issue of trespass, the court awards \$ _____ as damages, along with treble such amount in the total sum of \$ _____. Reasonable attorney fees are awarded to the counter-claimant upon compliance with Rule 54, IRCP. Further, fees and costs are awarded in the sum of \$ _____ for the defense of the complaint.

DATED this 11TH day of December, 2016.

/s/Robin D. Dunn
Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11TH day of December, 2016, a true and correct copy of the foregoing was delivered to the following person(s) by:

DOCUMENT SERVED: **Proposed findings of Fact, Conclusions of Law and Argument**

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

_____)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)
 _____)

Case No. CV-15-626

**POST-TRIAL BRIEF, PROPOSED
 FINDINGS OF FACTS AND
 CONCLUSIONS OF LAW**

Pursuant to the Court's order at trial, the Plaintiffs, Jade and Kylie Mortensen, submit the following post trial brief and proposed findings of fact and conclusions of law.

Closing Argument

Evidence showed that a ditch existed and that Berian wrongfully destroyed the ditch. The Mortensens are entitled to judgment pursuant to any of their three causes of action. The remedy should be an order allowing the restoration of the ditch, at the expense of Berian and Sturgis, and a judgment for the damages suffered by Mortensens. In addition, the Court should order a survey, at the expense of Berian and Galust, to provide a legal description of the right-of-way and enter a judicial deed confirming the existence of the easement and identifying its location, which judicial deed can then be recorded. The Idaho Supreme Court has made clear that any judgment determining the existence of the easement must also specify its precise location and dimensions. *Argosy Trust ex rel. Its Tr. v. Wininger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005).

Neither Mortensen, nor any of their predecessors abandoned the ditch. Abandonment of a ditch, or any property right, requires clear, unequivocal and decisive act of the alleged abandoning party. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 249, 869 P.2d 554, 566 (1993). Mere non-use does not equate to abandonment. *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000), *overruled on other grounds by Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010). Defendants presented no evidence that the water rights appurtenant to the Mortensen property were forfeited. They did not even present evidence that they were not used for any certain period of time. In any event, even if they had presented such evidence, the water rights appurtenant to the Mortensen property are owned by the Reid Canal Company, and as such, are not subject to forfeiture for non-use. I.C. § 42-223(7); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 86-87, 982 P.2d 917, 921-22 (1999).

A trespass claim was pled as a counterclaim and tried. However, the evidence did not support the counterclaim. Mortensens have a right-of-way pursuant I.C. § 42-1102 and entered onto the Sturgis property pursuant to that right-of-way. The fact that Berian wrongfully filled in the ditch does not terminate the right-of-way. In fact, Mortensens exercised laudable restraint by not entering the property and repairing the ditch as they were entitled to do.

In his complaint, Berian sought treble damages. Berian and others testified that there were no trespassing signs posted, however, I.C. § 6-202 requires that signs be posted not less than each 660 feet. No testimony was presented at trial regarding the spacing or frequency of the signs that establishes the required spacing.

Even if the evidence did support a counterclaim for trespassing, it was undisputed at trial that the trespassing resulted in no damage to the property. The remedy for trespassing is an award of the amount necessary to repair the damage done by the trespass if the damage is temporary. *Bumgarner v. Bumgarner*, 124 Idaho 629, 639, 862 P.2d 321, 331 (Ct. App. 1993). If the damage is permanent, the remedy is an award of the diminution in value of the property. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 644-45, 152 P.3d 2, 5-6 (2006). Because the evidence did not support the counter-claim of trespass, and even if it did, no damages were shown, the Court should dismiss the counter-claim.

Proposed Findings of Fact

1. The Mortensens own approximately 3.5 acres near Lyman, Idaho, in Madison County, more specifically described in the Warranty Deed recorded as Instrument No. 311974 recorded in Madison County Idaho on May 12, 2004.
2. The Mortensens own 4 shares of Capital Stock in the Reid Canal, which shares represent the right to receive water from the Reid Canal Company and are appurtenant to the Mortensens' parcel.
3. Prior to September of 2014, the Reid Canal Company water was delivered to the Mortensen property by a ditch.
4. Immediately before entering the Mortensen property, the ditch traveled east to west across property referred to at trial as the "Sturgis" property, which consists of approximately 14.85 acres
5. The Sturgis property was formerly owned by Galust Berian, a defendant in this matter.
6. At some point, Berian lost the property to a bank, and Yvette N. Sturgis, another defendant in this matter, obtained the property.
7. Sturgis is the current owner of the Sturgis property. She has entered into an arrangement with Berian whereby Berian will trade artwork for the Sturgis property.

8. The ditch conveying water to the Mortensen property has been in existence for many decades and it has not always been well maintained. Nevertheless it was able to convey water.
9. Sandra Cress, whose father, Myrtus Fyfe owned both properties testified that the ditch was in place when she was a girl.
10. Larry Atkinson, a neighbor, testified that he cleaned and did maintenance on the ditch decades ago.
11. George Benson, a neighbor, testified that he did work on the ditch for prior owners of the Mortensen property decades ago.
12. Rod Robison, a neighbor, President of the Reid Canal Company, and former owner of the Mortensen property, testified that the ditch has been in place for decades.
13. No evidence was presented the ditch was abandoned by Mortensen or their predecessors in interest. Rather, the evidence showed that the prior owners Fyfe, Flagglar, and Robison, conducted maintenance on the ditch.
14. Ariel photographs show the ditch in the same location in 1992, 2004, 2011, 2012, 2013, and 2014. No ariel photographs were presented in which the ditch does not appear.
15. The ditch was built to serve both the Mortensen property and at least some portion of the Sturgis property.
16. The ditch was present and visible both when Berian first obtained the property and when Sturgis obtained the property.
17. Mortensens purchased the property in 2004, and used the ditch each irrigation season from 2005 to the time it was filled in.
18. In 2010, Mortensen purchased excavation equipment for his business, cleaned the ditch, and began using it more often than in past years.
19. In 2010, Mortensen requested and received permission from Berian to clean the larger ditch on the length of the Sturgis property. He was seen by Rod Robison cleaning the ditch on the Sturgis property and Berian was nearby at the time.
20. Berian testified that there was no ditch prior to 2013. He testified that the only ditch in existence prior to 2013 was a ditch he dug by hand to water some trees, and that in 2013,

- Mortensen dug the ditch for the first time.
21. Berian clearly and unequivocally denied ever having discussed the ditch with Jade. However, the phone records entered into evidence indicate strongly that she did.
 22. At trial, it was clear that Berian had strong feelings regarding the matter. However, he had difficulty responding to questions directly and maintaining his train of thought in his responses.
 23. Berian is very protective of his privacy and has had difficulties with many of his neighbors.
 24. Berian's testimony regarding the non-existence of the ditch is not credible in light of the aerial photographs, the testimony of several persons with knowledge of the existence of the ditch, photographs of the headgate and cement ditch headgates on the Sturgis property, Mortensen's repeated use of Reid Canal water prior to 2013, and the inconsistencies of his own testimony.
 25. On June 6, 2011¹, Berian called Mortensen and spoke with him regarding flooding in the ditch. Mortensen spoke with a tenant on the property by the name of Barrett. Barrett had filled in part of the ditch to allow for access to a cabin he built south of the ditch and when water flowed in the ditch, it was flooding his cabin. Mortensen agreed to place a culvert in the ditch. He spoke with Berian, received his permission, and placed the culvert in the ditch at his own expense.
 26. The testimony of Julia Berian regarding the presence of the ditch is not credible. Although her testimony presented no indication that she was not stating things as she recalled them, her recollection is not accurate. She did not recall seeing either the ditch or the fence and all parties agree that the fence has been in existence for many decades. Given Ms. Berian's failure to recall the presence of the fence, her failure to recall the presence of the ditch cannot be taken as evidence that it was not there.
 27. The testimony of Lyle Thompson established that he occasionally had visited the property

¹Counsel does not have a copy of the phone records entered into evidence and this date is from his recollection. However, the precise date is highlighted in yellow on the exhibit.

to collect wood. His visits had nothing to do with irrigation or the ditch. His testimony did not establish that there was not a ditch on the property and was not inconsistent with the presence of the ditch. The testimony of Jade Mortensen was that the ditch varied in height and depth. Mr. Thompson's recollection was uncertain regarding dates, he had taken no steps to refresh his recollection or review maps or photographs and there is no inconsistency between his testimony and the presence of a ditch. If in fact Mr. Thompson traveled south of the ditch, he simply passed over it in a location where the ditch was not particularly pronounced or because he was not interested in the ditch, he did not make a mental note of its presence.

28. In September of 2014, Berian determined to fill in the ditch.
29. Berian contacted Sturgis and received permission from her to fill in the ditch.
30. Berian called an unknown individual and paid that individual to fill in the ditch using a small tractor.
31. The ditch was entirely destroyed for the length of the Sturgis property.
32. When confronted about the ditch, Berian indicated that Mortensens would need to speak with the new owner of the property.
33. Mortensens were unable to irrigate their property for the entire 2015 irrigation season.
34. As a result of the ditch being filled in, the Mortensens have missed work which has resulted in lost wages in the amount of \$5,000.²
35. As result of the ditch being filled in, Mortensens were forced to buy feed for animals in an amount of \$1,000.
36. Jade Mortensen has an excavation and leveling business.
37. Jade Mortensen has both the equipment and the expertise to redig the ditch properly.
38. Jade would charge a third party \$1,000 to dig the ditch.
39. Mortensens entered the Sturgis property to maintain the ditch.
40. No evidence was presented that the Sturgis property was posted consistent with I.C. § 6-202.

²Counsel does not recall the number testified to by Jade and neglected to make note of it.

41. Mortensens entry onto the Sturgis property did not do any damage, temporary or permanent, to the property.

Proposed Conclusions of Law

42. Mortensens have a valid right-of-way across the Sturgis property pursuant to I.C. § 42-1102.

43. As the ditch was visible, both Berian and Sturgis had notice of the presence of the ditch and the existence of the right-of-way pursuant to I.C. § 42-1102.

44. Mortensens had the right to enter the Sturgis property to maintain and repair their ditch.

45. Mortensens' right to enter the Sturgis property included the right to enter for the purpose of evaluating and documenting the condition of the ditch.

46. Berian and Sturgis wrongfully filled in the ditch.

47. By filling in the ditch, Berian and Sturgis violated I.C. § 42-1209.

48. As Sturgis authorized the destruction of the ditch on property owned by her, Sturgis and Berian and both liable for the damage done to the ditch.

Proposed Relief

49. Jade Mortensen is authorized to repair the ditch.

50. The Madison County Sheriff's office is ordered to provide a civil standby if requested by Jade Mortensen.

51. Berian and Sturgis are ordered to obtain and pay for a survey of the ditch to establish a precise legal description of the right-of-way. If necessary, an additional evidentiary hearing will be held to establish the width of the easement.

52. Judgment will be entered jointly and severally against Berian and Sturgis in the amount of \$7,000, which represents lost wages, extra feed purchased in 2015, and the cost of repairing the ditch.

DATED this 11th day of March, 2016



Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 11th day of March, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC


Hyrum Erickson

Robin D. Dunn
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745-8160

Mail
 Hand Delivery
 Facsimile



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON**

JADE MORTENSEN AND KYLIE
MORTENSEN,

Plaintiff,

VS.

GALUST BERIAN AND YVETTE N.
STURGIS,

Defendants.

GALUST BERIAN AND YVETTE N.
STURGIS,

Counter-Claimants,

VS.

JADE MORTENSEN AND KYLIE
MORTENSEN,

Counter-Defendants.

Case. No. CV-2015-626

FINDINGS OF FACT &
CONCLUSIONS OF LAW

This matter came before the Court for a one day trial on February 29, 2016 in Madison County, Idaho. At the close of the trial, the parties were ordered to submit proposed findings and conclusions and were permitted to submit any closing arguments in writing to be included with their findings and conclusions. All documents were filed and this matter deemed submitted on March 15, 2016.

The Court has reviewed the proposed findings and conclusions and the closing arguments prepared by the parties and finds and concludes as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1

FINDINGS OF FACT

1. The subject of this action occurred in Madison County, Idaho. The district court heard the matter because the allegations involved real property and the potential in controversy could confer jurisdiction on the court.
2. The Mortensens own approximately 3.5 acres near Lyman, Idaho, in Madison County, more specifically described in the Warranty Deed recorded as Instrument No. 311974 recorded in Madison County Idaho on May 12, 2004.
3. Sandra Kress testified that the Mortensen property was once part of a larger parcel, owned by her father, but is now owned by three parties. The properties owned by these parties were described at trial as the Mortensen property, the Sturgis property, and the Berian property.
4. The Mortensens own 4 shares of Capital Stock in the Reid Canal, which shares represent the right to receive water from the Reid Canal Company and are appurtenant to the Mortensens' parcel.
5. Prior to September of 2014, the Reid Canal Company water was delivered to the Mortensen property by a ditch.
6. Immediately before entering the Mortensen property, the ditch traveled east to west across Sturgis property, which consists of approximately 14.85 acres
7. The Sturgis property was formerly owned by Galust Berian, a defendant in this matter.
8. At some point, Berian lost the property to a bank, and Yvette N. Sturgis, another defendant in this matter, obtained the property.
9. Sturgis is the current owner of the Sturgis property. She has entered into an arrangement with Berian whereby Berian will trade artwork for the Sturgis property and Berian will

have control over the property until payment is complete.

10. The ditch conveying water to the Mortensen property has been in existence for many decades and it has not always been well maintained. Nevertheless it was able to convey water.
11. Sandra Cress, whose father, Myrtus Fyfe owned both properties testified that the ditch was in place when she was a girl, but that it fell into disrepair at certain times when the property was exchanged.
12. Larry Atkinson, a neighbor, testified that he cleaned and did maintenance on the ditch decades ago.
13. George Benson, a neighbor, testified that he did work on the ditch for prior owners of the Mortensen property decades ago.
14. Rod Robison, a neighbor, President of the Reid Canal Company, and former owner of the Mortensen property, testified that the ditch has been in place for decades.
15. No evidence was presented that the ditch was abandoned by Mortensen or their predecessors in interest. Rather, the evidence showed that the prior owners Fyfe, Flaggler, and Robison, conducted maintenance on the ditch.
16. Aerial photographs show the ditch in the same location in 1992, 2004, 2011, 2012, 2013, and 2014. No aerial photographs were presented in which the ditch does not appear.
17. The ditch was built to serve both the Mortensen property and at least some portion of the Sturgis property.
18. The ditch was present and visible both when Berian first obtained the property and when Sturgis obtained the property.
19. The Mortensens purchased their property in 2004, and used the ditch each irrigation

season from 2005 to the time it was filled in by Berian.

20. In 2010, Mortensen purchased excavation equipment for his business, cleaned the ditch, and began using it more often than in past years.
21. In 2010, Mortensen requested and received permission from Berian to clean the larger ditch on the length of the Sturgis property. He was seen by Rod Robison cleaning the ditch on the Sturgis property and Berian was nearby at the time.
22. Berian testified that there was no ditch prior to 2013. He testified that the only ditch in existence prior to 2013 was a ditch he dug by hand to water some trees, and that in 2013, Mortensen dug the ditch for the first time.
23. Berian clearly and unequivocally denied ever having discussed the ditch with Jade. However, the phone records entered into evidence indicate that he did. Additionally, Berian's credibility was damaged by several statements that could not have been true, including his denial of knowing the phone number listed on the Mortensens' phone records, which his counsel verified was the number he used to contact Berian in preparation for trial.
24. Berian's testimony regarding the non-existence of the ditch is not credible in light of the aerial photographs, the testimony of several persons with knowledge of the existence of the ditch, photographs of the headgate and cement ditch headgates on the Sturgis property, Mortensen's repeated use of Reid Canal water prior to 2013, and the inconsistencies of his own testimony.
25. On June 6, 2011, Berian called Mortensen and spoke with him regarding flooding in the ditch. Mortensen spoke with a tenant on the property by the name of Barrett. Barrett had filled in part of the ditch to allow for access to a cabin he built south of the ditch and

when water flowed in the ditch, it was flooding his cabin. Mortensen agreed to place a culvert in the ditch. He spoke with Berian, received his permission, and placed the culvert in the ditch at his own expense.

26. The testimony of Julia Berian regarding the presence of the ditch is not credible. Although her testimony presented no indication that she was not stating things as she recalled them, her recollection is not accurate. She did not recall seeing either the ditch or the fence and all parties agree that the fence has been in existence for many decades. Given Ms. Berian's failure to recall the presence of the fence, her failure to recall the presence of the ditch cannot be taken as evidence that it was not there.
27. The testimony of Lyle Thompson established that he occasionally had visited the property to collect wood. His visits had nothing to do with irrigation or the ditch. His testimony did not establish that there was not a ditch on the property and was not inconsistent with the presence of the ditch. Mr. Thompson's recollection was uncertain regarding dates, he had taken no steps to refresh his recollection or review maps or photographs and there is no inconsistency between his testimony and the presence of a ditch. If in fact Mr. Thompson traveled south of the ditch, he did not make a mental note of its presence.
28. In September of 2014, Berian determined to fill in the ditch.
29. Berian contacted Sturgis and received permission from her to fill in the ditch.
30. Berian called an unknown individual and paid that individual to fill in the ditch using a small tractor.
31. The ditch was entirely destroyed for the length of the Sturgis property.
32. Jade Mortensen has an excavation and leveling business.

33. Jade Mortensen has both the equipment and the expertise to dig the ditch properly.
34. Mortensen would charge a third party \$85 per hour to dig the ditch and that would take 12 to 14 hours to complete. He is asking for \$1,000 to do the work himself.
35. Mortensen is asking for damages for lost wages for his time spent bringing this action in the amount of \$5,000.
36. Mortensen entered the Sturgis property to maintain the ditch and to confront Berian for filling in the ditch.
37. At all pertinent times, the defendants have posted "No Trespassing" signs about the perimeter of the 30 acre parcel.
38. No evidence was presented of any actual damages cause by Mortensen's entry onto the Sturgis property or onto the Berian property.

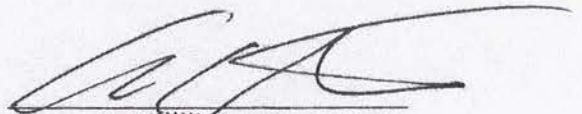
CONCLUSIONS OF LAW


39. The Mortensens have, and have had since the purchase of their property, a valid right-of-way across the Sturgis property pursuant to I.C. § 42-1102.
40. As the ditch was visible, both Berian and Sturgis had notice of the presence of the ditch and the existence of the right-of-way pursuant to I.C. § 42-1102.
41. The Mortensens have the right to enter the Sturgis property to maintain and repair their ditch.
42. The Mortensens' right to enter the Sturgis property includes the right to enter for the purpose of evaluating and documenting the condition of the ditch.
43. Berian and Sturgis wrongfully filled in the ditch.
44. By filling in the ditch, Berian and Sturgis violated I.C. § 42-1209.
45. As Sturgis authorized the destruction of the ditch on property owned by her, Sturgis and

Berian are both liable for the damage done to the ditch.

46. Jade Mortensen is authorized to repair the ditch.
47. The Madison County Sheriff's office is ordered to provide a civil standby if requested by Jade Mortensen.
48. Berian and Sturgis are ordered to obtain and pay for a survey of the ditch to establish a precise legal description of the right-of-way. If necessary, an additional evidentiary hearing will be held to establish the width of the easement.
49. Judgment will be entered jointly and severally against Berian and Sturgis in the amount of \$1,020, which represents the cost of repairing the ditch (\$85/hr x 12hrs).
50. Berian's counter-claim that Jade Mortensen trespassed onto the Sturgis property to repair the ditch is unfounded because Mortensen had the right to enter onto the Sturgis property to maintain the ditch.
51. The counter-claim that Jade Mortensen trespassed onto the property where the Berian home is located was dropped during trial and will not be ruled on by this Court.
52. The Mortensens are the prevailing parties
53. Plaintiff shall provide the Court with a proposed judgment

Dated this 23rd day of March, 2016.


Alan C. Stephens, District Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of March, 2016, I did send a true and correct copy of the forgoing document upon the parties listed below my mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by cause the same to be had delivered.

ROBIN D. DUNN
DUNN LAW OFFICES, PLLC.
477 Pleasant Country Lane
P.O. Box 277
Rigby, ID 83442

JERRY RIGBY
HYRUM ERICKSON
RIGBY, ANDRUS & RIGBY LAW, PLLC.
25 North Second East
P.O. Box 250
Rexburg, ID 83440

Clerk of the District Court
Madison County Idaho

BY:  _____

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Case No. CV-15-626

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

MOTION TO RECONSIDER

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

Comes now, Jade and Kylie Mortensen, through their attorney of record, and pursuant to I.R.C.P. 11(a)(2)(B) and 60(a), moves the court reconsider or amend paragraph 51 of its Findings of Fact and Conclusions of Law.

Paragraph 51 of the Court's Findings of Fact and Conclusions of Law addresses Galust Berian's counter-claim and reads as follows:

The counter-claim that Jade Mortensen trespassed onto the property where the Berian home is located was dropped during trial and will not be ruled on by this Court.

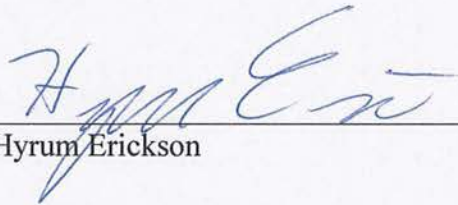
Mortensen believes that the Court's decision indicates that Berian's counter-claim is to be dismissed with prejudice. However, the statement that the counter-claim was "dropped" and "will not be ruled on" is not entirely clear.

It is the recollection of Mortensens' counsel that at trial, Berian moved to voluntarily dismiss his counter-claim. Mortensen objected to that dismissal unless the dismissal was with prejudice and the Court denied Berian's motion. Berian's counsel proceeding to introduce evidence regarding the counter-claim. Mortensen reasserts his objection to any attempt by Berian to dismiss his counter-claim without prejudice.

Berian choose to bring a counter-claim. He pled it. He provided discovery related to it. He included it in his proposed findings of fact and conclusions of law. If he failed to prosecute his counter-claim sufficiently, it must be dismissed with prejudice consistent with I.R.C.P. 41(b). Mortensen should not be subject to an additional lawsuit by Berian merely because Berian did not prosecute his claim artfully or effectively. Berian only gets one bite at the apple – and this was it.

Filed concurrently herewith is a proposed Judgment. It explicitly dismisses Berian's counter-claim with prejudice. If that was the Court's intention, Mortensen has no objection to the Court simply entering that Judgment. This motion would then be moot. However, if that was not the Court's intention, Mortensen requests the Court reconsider paragraph 51 of its Conclusions of Law and make explicit that Berian's counter-claim is to be dismissed with prejudice.

DATED this 6th day of April, 2016




Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 6th day of April, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
[] Facsimile

Jerry R. Rigby, ISBN 2470
Hyrum D. Erickson, ISBN 7688
RIGBY, ANDRUS & RIGBY LAW, PLLC
Attorneys at Law
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Rexburg, Idaho 83440
Telephone: 208-356-3633

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
STURGIS,)

Defendants.)

GALUST BERIAN AND YVETTE N.)
STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
MORTENSEN,)

Counter-Defendants.)
_____)

Case No. CV-15-626

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Jade Mortensen and Kylie Mortensen have a valid right-of-way across the Sturgis property.

Jade Mortensen is authorized to repair the ditch.

The Madison County Sheriff's office is ordered to provide a civil stand by if requested by Jade Mortensen.

Galust Berian and Yvette N. Sturgis are jointly and severally ordered to obtain and pay for a survey of the ditch to establish a precise legal description of the right-of-way. Following that survey, an additional judgment setting out the precise description of the easement will be entered. If necessary, an additional evidentiary hearing will be held to establish the width of the easement.

Judgment is entered against Galust Berian and Yvette N. Sturgis jointly and severally in favor of Jade Mortensen and Kylie Mortensen in the amount of \$1,020.

The counter-claim against Jade Mortensen and Kylie Mortensen is dismissed with prejudice.

Jade Mortensen and Kylie Mortensen are the prevailing parties.

DATED this ___th day of April, 2016

Alan C. Stephens, District Judge

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
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 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Case No. CV-15-626

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

NOTICE OF HEARING

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)


TO: Galust Berian and Yvette N. Sturgis, and their attorney, Robin D. Dunn, Attorney at Law,

Notice of Hearing- Page - 1
 HEMortensenjk.NOH

P. O. Box 277, Rigby, ID 83442

PLEASE TAKE NOTICE that Hyrum Erickson of the law firm of Rigby, Andrus & Rigby Law, PLLC, shall bring his "Motion to Reconsider" on for hearing before the Court at the Madison County Courthouse, in Rexburg, Idaho on the 25th day of April, 2016, commencing at the hour of 9:15 a.m.

DATED this 6th day of April, 2016.



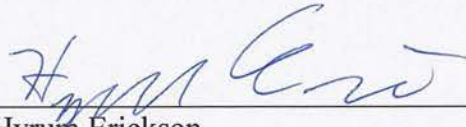
Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 6th day of April, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Defendants.)

_____)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Counter-Defendants.)
 _____)

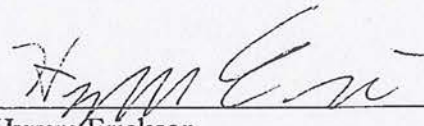
Case No. CV-15-626

AMENDED NOTICE OF HEARING

TO: Galust Berian and Yvette N. Sturgis, and their attorney, Robin D. Dunn, Attorney at Law, P. O. Box 277, Rigby, ID 83442

PLEASE TAKE NOTICE that Hyrum Erickson of the law firm of Rigby, Andrus & Rigby Law, PLLC, shall bring his "Motion to Reconsider" on for hearing before the Court at the Madison County Courthouse, in Rexburg, Idaho on the 17th day of May, 2016, commencing at the hour of 3:00 p.m.

DATED this 19th day of April, 2016.



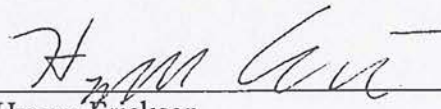
Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

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DATED this 19th day of April, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
[X] Facsimile

COURT MINUTES

CV-2015-0000626

Jade Mortensen, etal. vs. Galust Berian, etal.

Hearing type: Motion to Reconsider

Hearing date: 5/17/2016

Time: 3:02 pm

Judge: Alan C Stephens

Courtroom:

Court reporter:

Minutes Clerk: Lori Ann Lewis

Tape Number:

Party: Galust Berian, Attorney: Robin Dunn

Party: Jade Mortensen, Attorney: Hyrum Erickson

Party: Kylie Mortensen, Attorney: Hyrum Erickson

Party: Yvette Strugis, Attorney: Robin Dunn

3:01 pm Introduction of case

Hyrum Erickson – argues the Motion to Reconsider

Requesting that this case be dismissed with prejudice

3:04 pm Rob Dunn – responds

Mr. Erickson responds



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON**

JADE MORTENSEN AND KYLIE
MORTENSEN,

Plaintiff,

VS.

GALUST BERIAN AND YVETTE N.
STURGIS,

Defendants.

GALUST BERIAN AND YVETTE N.
STURGIS,

Counter-Claimants,

VS.

JADE MORTENSEN AND KYLIE
MORTENSEN,

Counter-Defendants.

Case. No. CV-2015-626

AMENDED FINDINGS OF FACT &
CONCLUSIONS OF LAW

This matter came before the Court for a one day trial on February 29, 2016 in Madison County, Idaho. At the close of the trial, the parties were ordered to submit proposed findings and conclusions and were permitted to submit any closing arguments in writing to be included with their findings and conclusions. All documents were filed and this matter deemed submitted on March 15, 2016. The Court issued a decision on March 23, 2016. The Plaintiff then timely filed a motion to reconsider and a hearing was held on the motion on May 17, 2016. The motion is HEREBY GRANTED and the Court AMENDS its decision as follows:

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1

The Court has reviewed the proposed findings and conclusions and the closing arguments prepared by the parties and finds and concludes as follows:

FINDINGS OF FACT

1. The subject of this action occurred in Madison County, Idaho. The district court heard the matter because the allegations involved real property and the potential in controversy could confer jurisdiction on the court.
2. The Mortensens own approximately 3.5 acres near Lyman, Idaho, in Madison County, more specifically described in the Warranty Deed recorded as Instrument No. 311974 recorded in Madison County Idaho on May 12, 2004.
3. Sandra Kress testified that the Mortensen property was once part of a larger parcel, owned by her father, but is now owned by three parties. The properties owned by these parties were described at trial as the Mortensen property, the Sturgis property, and the Berian property.
4. The Mortensens own 4 shares of Capital Stock in the Reid Canal, which shares represent the right to receive water from the Reid Canal Company and are appurtenant to the Mortensens' parcel.
5. Prior to September of 2014, the Reid Canal Company water was delivered to the Mortensen property by a ditch.
6. Immediately before entering the Mortensen property, the ditch traveled east to west across Sturgis property, which consists of approximately 14.85 acres
7. The Sturgis property was formerly owned by Galust Berian, a defendant in this matter.
8. At some point, Berian lost the property to a bank, and Yvette N. Sturgis, another defendant in this matter, obtained the property.

9. Sturgis is the current owner of the Sturgis property. She has entered into an arrangement with Berian whereby Berian will trade artwork for the Sturgis property and Berian will have control over the property until payment is complete.
10. The ditch conveying water to the Mortensen property has been in existence for many decades and it has not always been well maintained. Nevertheless it was able to convey water.
11. Sandra Cress, whose father, Myrtus Fyfe owned both properties testified that the ditch was in place when she was a girl, but that it fell into disrepair at certain times when the property was exchanged.
12. Larry Atkinson, a neighbor, testified that he cleaned and did maintenance on the ditch decades ago.
13. George Benson, a neighbor, testified that he did work on the ditch for prior owners of the Mortensen property decades ago.
14. Rod Robison, a neighbor, President of the Reid Canal Company, and former owner of the Mortensen property, testified that the ditch has been in place for decades.
15. No evidence was presented that the ditch was abandoned by Mortensen or their predecessors in interest. Rather, the evidence showed that the prior owners Fyfe, Flaggler, and Robison, conducted maintenance on the ditch.
16. Aerial photographs show the ditch in the same location in 1992, 2004, 2011, 2012, 2013, and 2014. No aerial photographs were presented in which the ditch does not appear.
17. The ditch was built to serve both the Mortensen property and at least some portion of the Sturgis property.
18. The ditch was present and visible both when Berian first obtained the property and when

Sturgis obtained the property.

19. The Mortensens purchased their property in 2004, and used the ditch each irrigation season from 2005 to the time it was filled in by Berian.
20. In 2010, Mortensen purchased excavation equipment for his business, cleaned the ditch, and began using it more often than in past years.
21. In 2010, Mortensen requested and received permission from Berian to clean the larger ditch on the length of the Sturgis property. He was seen by Rod Robison cleaning the ditch on the Sturgis property and Berian was nearby at the time.
22. Berian testified that there was no ditch prior to 2013. He testified that the only ditch in existence prior to 2013 was a ditch he dug by hand to water some trees, and that in 2013, Mortensen dug the ditch for the first time.
23. Berian clearly and unequivocally denied ever having discussed the ditch with Jade. However, the phone records entered into evidence indicate that he did. Additionally, Berian's credibility was damaged by several statements that could not have been true, including his denial of knowing the phone number listed on the Mortensens' phone records, which his counsel verified was the number he used to contact Berian in preparation for trial.
24. Berian's testimony regarding the non-existence of the ditch is not credible in light of the aerial photographs, the testimony of several persons with knowledge of the existence of the ditch, photographs of the headgate and cement ditch headgates on the Sturgis property, Mortensen's repeated use of Reid Canal water prior to 2013, and the inconsistencies of his own testimony.
25. On June 6, 2011, Berian called Mortensen and spoke with him regarding flooding in the

ditch. Mortensen spoke with a tenant on the property by the name of Barrett. Barrett had filled in part of the ditch to allow for access to a cabin he built south of the ditch and when water flowed in the ditch, it was flooding his cabin. Mortensen agreed to place a culvert in the ditch. He spoke with Berian, received his permission, and placed the culvert in the ditch at his own expense.

26. The testimony of Julia Berian regarding the presence of the ditch is not credible. Although her testimony presented no indication that she was not stating things as she recalled them, her recollection is not accurate. She did not recall seeing either the ditch or the fence and all parties agree that the fence has been in existence for many decades. Given Ms. Berian's failure to recall the presence of the fence, her failure to recall the presence of the ditch cannot be taken as evidence that it was not there.
27. The testimony of Lyle Thompson established that he occasionally had visited the property to collect wood. His visits had nothing to do with irrigation or the ditch. His testimony did not establish that there was not a ditch on the property and was not inconsistent with the presence of the ditch. Mr. Thompson's recollection was uncertain regarding dates, he had taken no steps to refresh his recollection or review maps or photographs and there is no inconsistency between his testimony and the presence of a ditch. If in fact Mr. Thompson traveled south of the ditch, he did not make a mental note of its presence.
28. In September of 2014, Berian determined to fill in the ditch.
29. Berian contacted Sturgis and received permission from her to fill in the ditch.
30. Berian called an unknown individual and paid that individual to fill in the ditch using a small tractor.

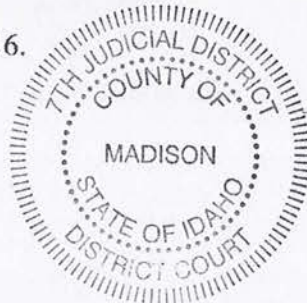
31. The ditch was entirely destroyed for the length of the Sturgis property.
32. Jade Mortensen has an excavation and leveling business.
33. Jade Mortensen has both the equipment and the expertise to dig the ditch properly.
34. Mortensen would charge a third party \$85 per hour to dig the ditch and that would take 12 to 14 hours to complete. He is asking for \$1,000 to do the work himself.
35. Mortensen is asking for damages for lost wages for his time spent bringing this action in the amount of \$5,000.
36. Mortensen entered the Sturgis property to maintain the ditch and to confront Berian for filling in the ditch.
37. At all pertinent times, the defendants have posted "No Trespassing" signs about the perimeter of the 30 acre parcel.
38. No competent evidence was presented of any actual damages cause by Mortensen's entry onto the Sturgis/Berian property.


CONCLUSIONS OF LAW

39. The Mortensens have, and have had since the purchase of their property, a valid ditch right-of-way across the Sturgis property pursuant to I.C. § 42-1102.
40. As the ditch was visible, both Berian and Sturgis had notice of the presence of the ditch and the existence of the right-of-way pursuant to I.C. § 42-1102.
41. The Mortensens have the right to enter the Sturgis property to maintain and repair their ditch.
42. The Mortensens' right to enter the Sturgis property includes the right to enter for the purpose of evaluating and documenting the condition of the ditch.
43. Berian and Sturgis wrongfully filled in the ditch.

44. By filling in the ditch, Berian and Sturgis violated I.C. § 42-1209.
45. As Sturgis authorized the destruction of the ditch on property owned by her, Sturgis and Berian are both liable for the damage done to the ditch.
46. Jade Mortensen is authorized to replace and repair the ditch in its original location across the Sturgis property.
47. The Madison County Sheriff's office is ordered to provide a civil standby if requested by Jade Mortensen.
48. Judgment will be entered jointly and severally against Berian and Sturgis in the amount of \$1,020, which represents the cost of repairing the ditch (\$85/hr x 12hrs).
49. Berian's counter-claim that Jade Mortensen trespassed onto the Sturgis property to repair the ditch is unfounded because Mortensen had the right to enter onto the Sturgis property to maintain the ditch.
50. Jade Mortensen violated I.C §6-202 when he trespassed onto the property where the Berian home is located to confront him about filling in the ditch.
51. At the time Mortensen trespassed to confront Berian for filling in the ditch, no actual damage was done to Berian or his property.
52. The Court awards nominal damages to Berian for the trespass in the amount of \$50.00.
53. The Mortensens are the prevailing parties

Dated this 20th day of May, 2016.




Alan C. Stephens, District Judge

CERTIFICATE OF SERVICE

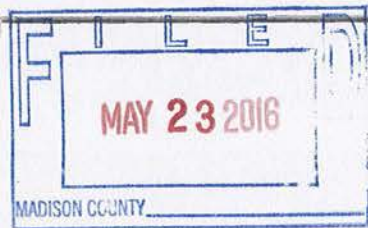
I hereby certify that on this 23 day of May, 2016, I did send a true and correct copy of the forgoing document upon the parties listed below my mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by cause the same to be had delivered.

ROBIN D. DUNN
DUNN LAW OFFICES, PLLC.
477 Pleasant Country Lane
P.O. Box 277
Rigby, ID 83442

JERRY RIGBY
HYRUM ERICKSON
RIGBY, ANDRUS & RIGBY LAW, PLLC.
25 North Second East
P.O. Box 250
Rexburg, ID 83440

Clerk of the District Court
Madison County Idaho

BY: 



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON**

JADE MORTENSEN AND KYLIE
MORTENSEN,

Plaintiff,

VS.

GALUST BERIAN AND YVETTE N.
STURGIS,

Defendants.

GALUST BERIAN AND YVETTE N.
STURGIS,

Counter-Claimants,

VS.

JADE MORTENSEN AND KYLIE
MORTENSEN,

Counter-Defendants.

Case. No. CV-2015-626

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Jade Mortensen and Kylie Mortensen have a valid ditch right-of-way across the Sturgis property pursuant to I.C. §42-1102.

Jade Mortensen is authorized to replace and repair the ditch in its original location across the Sturgis property.

The Madison County Sheriff's office is ordered to provide a civil stand by if requested by Jade Mortensen.

JUDGMENT

1

Judgment is entered against Galust Berian and Yvette N. Sturgis jointly and severally in favor of Jade Mortensen and Kylie Mortensen in the amount of \$1,020.

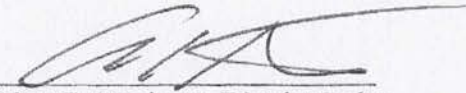
Judgment is entered against Jade Mortensen in favor of Berian in the amount of \$50.00.

All other counter-claims are dismissed with prejudice.

Jade and Kylie Mortensen are the prevailing parties.

Dated this 20th day of May, 2016.




Alan C. Stephens, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of May, 2016, I did send a true and correct copy of the forgoing document upon the parties listed below my mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by cause the same to be had delivered.

ROBIN D. DUNN
DUNN LAW OFFICES, PLLC.
477 Pleasant Country Lane
P.O. Box 277
Rigby, ID 83442

JERRY RIGBY
HYRUM ERICKSON
RIGBY, ANDRUS & RIGBY LAW, PLLC.
25 North Second East
P.O. Box 250
Rexburg, ID 83440

Clerk of the District Court
Madison County Idaho

BY:  _____



Jerry R. Rigby, ISBN 2470
Hyrum D. Erickson, ISBN 7688
RIGBY, ANDRUS & RIGBY LAW, PLLC
Attorneys at Law
25 North Second East
P. O. Box 250
Rexburg, Idaho 83440
Telephone: 208-356-3633

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
STURGIS,)

Defendants.)

GALUST BERIAN AND YVETTE N.)
STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
MORTENSEN,)

Counter-Defendants.)
_____)

Case No. CV-15-626

**MOTION FOR ATTORNEY FEES AND
COSTS**

Plaintiffs, Jade Mortensen and Kylie Mortensen (Mortensen), through their attorney of

record, Hyrum Erickson, of Rigby, Andrus & Rigby, Chtd., pursuant to I.R.C.P. 54(d), move the Court for an award of costs and attorney fees.

1. Mortensen is the prevailing party pursuant to I.R.C.P. 54(d).

The Court identified Mortensen as the prevailing party in its decision. *Am. Findings of Fact and Conc. Of Law*, ¶ 53. As such, Mortensen is entitled to the costs set out in I.R.C.P. 54(d)(1)(C).

2. Mortensen is entitled to attorney fees pursuant to I.C. § 12-120(1).

Idaho Code section 12-120(1) provides for a prevailing plaintiff to receive attorney fees if the amount pleaded is less than \$35,000, and they have made written demand for the payment not less than 10 days before the commencement of the action.

Mortensen's Complaint specifically pled damages of less than \$35,000 as required. *Complaint* pp. 4, 5, 6. Mortensen sent Berian and Sturgis written demand for payment of their claim and Berian and Sturgis refused to tender any amount to Mortensen. *Complaint* ¶¶ 36, 37; *Answer* ¶¶ 36, 37; *Aff. Of Hyrum Erickson*, ¶ 4, Ex. B. As such, Mortensen is entitled to an award of reasonable attorney fees pursuant to I.C. § 12-120(1).

3. Mortensen is entitled to attorney fees pursuant to I.C. § 12-121 as Berian and Sturgis's defense of this matter was without foundation.

The Court may, in its discretion, award attorney fees pursuant to I.C. § 12-121 when a case is brought, or defended frivolously, unreasonably, or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979).

The defense brought by Berian and Sturgis was unreasonable and without foundation. Idaho law regarding the rights of ditches owners is longstanding and clear. The evidence at trial

showed that the ditch had been in place for decades. Berian testified that prior to his filling it in, the ditch carried water to the Mortensen property. The Defendants made no reasonable argument why Idaho's ditch right-of-way statutes did not apply to this ditch. This case presents a straightforward application of Idaho's ditch right-of-way statutes (Idaho Code Title 42, Chapter 11). Even if Berian and Sturgis were not familiar with Idaho law regarding ditch rights-of-way when they filled in the ditch, when they were made aware of it, the only reasonable action for them to take was to allow the ditch to be repaired. Instead, their unreasonable defense of the case has required Mortensen to extend thousands of dollars to have the ditch restored. The Court should award Mortensen reasonable attorney fees pursuant to I.C. § 12-121.

Conclusion

Mortensen is the prevailing party and is entitled to costs. In addition, Mortensen is entitled to reasonable attorney fees pursuant to I.C. §§ 12-120(1) and 12-121.

DATED this 3rd day of June, 2016.



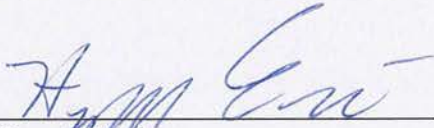
Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 3rd day of June, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

Mail
 Hand Delivery
 Facsimile

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)
 _____)

Case No. CV-15-626

**MEMORANDUM OF COSTS AND
 ATTORNEY FEES**

COME NOW the Plaintiffs, Jade Mortensen and Kylie Mortensen, and through their attorney of record, Hyrum Erickson, of Rigby, Andrus & Rigby Law, PLLC, hereby submit the following Memorandum of Costs and Attorney Fees pursuant to Idaho Rule of Civil Procedure, Rule 54(d) and 54(e), and Idaho Code § 12-120(3). This is based upon the “Affidavit of Hyrum Erickson in Support of Memorandum of Costs” filed simultaneously herewith.

Costs

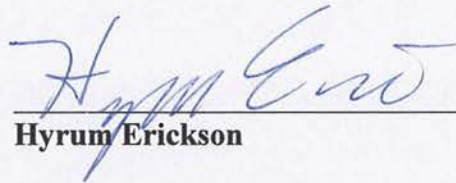
Non Discretionary Costs (I.R.C.P. 54(d)(1)(C))	
Deposition Costs to T&T Reporting	\$586.01
Filing Fee	\$221.00
Trial Exhibits (Quick Ship & Copy)	\$2.08
Trial Exhibits (Alpha Graphics)	\$123.70
Total Costs	\$932.79

Attorney Fees

(See Affidavit of Hyrum Erickson)

Total Attorney Fees	\$14,250.00
Total Attorney Fees and Costs	\$15,182.79

DATED this 3rd day of June, 2016.

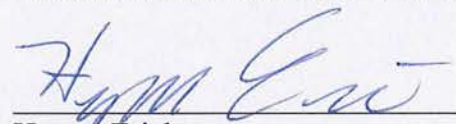

Hyrum Erickson

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OR FACSIMILE TRANSMISSION

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DATED this 3rd day of June, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC


Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

Mail
 Hand Delivery
 Facsimile

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

Case No. CV-15-626

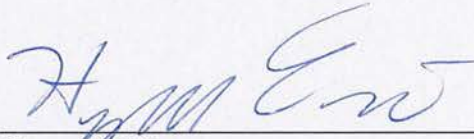
**AFFIDAVIT OF HYRUM ERICKSON IN
 SUPPORT OF MEMORANDUM OF
 COSTS AND ATTORNEY FEES**

**AFFIDAVIT OF HYRUM ERICKSON IN SUPPORT OF MEMORANDUM OF COSTS
 AND ATTORNEY'S FEES - Page 1**

HE\mortensenk.aff

9. These fees are reasonable given the time and labor required.


DATED this 3rd day of June, 2016.



Hyrum Erickson

SUBSCRIBED AND SWORN To before me this 3rd day of June, 2016.





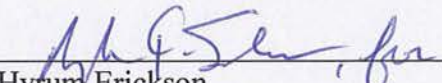
Notary Public for Idaho
Residing at Rexburg
Commission Expires: 4/29/2022

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 3rd day of June, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

- Mail
- Hand Delivery
- Facsimile

EXHIBIT “A”

RIGBY, ANDRUS & RIGBY LAW, PLLC
 25 North 2nd East - P.O. Box 250
 Rexburg, ID 83440-0250

Invoice submitted to:
 JADE & KYLIE MORTENSEN
 6314 S. 3100 W.
 REXBURG, ID 83440

June 3, 2016

In Reference To: MORTENSEN, Jade & Kylie - Water Matter
 21132 J
 Opened: 04-22-15

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
4/20/2015 Consultation with client re: ditch and Investigating maps.	1.50 215.00/hr	322.50
4/21/2015 Receipt and review Pics.	0.30 215.00/hr	64.50
4/29/2015 Receipt and review call from UT. atty.	0.10 215.00/hr	21.50
4/30/2015 Receipt and review and reply to counsel letter (email); Investigating old maps; Telephone call with client and Consultation with client.	0.70 215.00/hr	150.50
5/1/2015 Receipt and review pics and letter (email) counsel.	0.35 215.00/hr	75.25
5/5/2015 Receipt and review and reply to counsel letter (email) and Telephone call to opposing counsel.	0.30 215.00/hr	64.50
5/7/2015 Telephone conference w/client; Receipt and review and reply to several counsel letter (email) and new counsel questions.	0.50 215.00/hr	107.50
5/8/2015 Tel. call w/opposing counsel.	0.20 215.00/hr	43.00
5/13/2015 letter (email) counsel.	0.10 215.00/hr	21.50
5/14/2015 Receipt and review counsel letter (email) and letter (email) client.	0.20 215.00/hr	43.00

	<u>Hrs/Rate</u>	<u>Amount</u>
5/15/2015 Receipt and review counsel letter (email) and reply.	0.20 215.00/hr	43.00
5/18/2015 Receipt and review and reply to client letter (email).	0.10 215.00/hr	21.50
5/20/2015 Receipt and review statements and send to counsel.	0.20 215.00/hr	43.00
5/27/2015 Consult with opposing counsel.	1.00 215.00/hr	215.00
5/28/2015 letter (email) client re: meeting with Dunn and response to client's questions.	0.30 215.00/hr	64.50
6/1/2015 Review, Receipt and Reply to Client Email.	0.20 215.00/hr	43.00
6/2/2015 letter (email) counsel.	0.20 215.00/hr	43.00
6/6/2015 Review, Receipt and Reply to Client Email.	0.30 215.00/hr	64.50
6/10/2015 Receipt and review Dunn letter (email) and send.	0.20 215.00/hr	43.00
6/24/2015 Review, Receipt and Reply to Client Email and letter (email) atty.	0.20 215.00/hr	43.00
6/26/2015 Consultation with clients	0.80 215.00/hr	172.00
7/6/2015 Consultation with Jerry Rigby; Preparing complaint	0.50 175.00/hr	87.50
7/16/2015 Receipt and review letter (email) from Jerry Rigby; Start Complaint	0.10 175.00/hr	17.50
7/24/2015 Draft complaint	4.20 175.00/hr	735.00
7/25/2015 Edit and revise complaint and send to client for review.	0.30 215.00/hr	64.50
7/27/2015 Receipt and review email from Jerry Rigby; Edit and revise complaint; Consultation with Rich Andrus	0.83 175.00/hr	145.25
7/28/2015 Reviewing; Legal services	0.50 160.00/hr	80.00

	<u>Hrs/Rate</u>	<u>Amount</u>
7/28/2015 Investigating correct numbers for complaint.	0.20 215.00/hr	43.00
7/29/2015 Draft Letter; Edit and revise complaint; Consultation with Rich Andrus; Edit and revise letter and complaint; email Jerry Rigby	1.25 175.00/hr	218.75
8/11/2015 Receipt and review client letter (email).	0.10 215.00/hr	21.50
9/2/2015 Edit and revise complaint.	0.30 215.00/hr	64.50
Edit and revise complaint and letter; email Jerry; Edit and revise	0.93 175.00/hr	162.75
9/3/2015 Edit letter; Receipt and review letter (email) from Robin Dunn; Reviewing aerial photos	0.25 175.00/hr	43.75
Investigating ditch history.	0.30 215.00/hr	64.50
9/8/2015 Edit and revise complaint and discovery request	0.45 175.00/hr	78.75
Investigating further ditch witnesses.	0.20 215.00/hr	43.00
9/9/2015 Preparing discovery requests	0.33 175.00/hr	57.75
9/10/2015 Edit and revise discovery	0.70 175.00/hr	122.50
9/14/2015 Edit and revise documents	0.08 175.00/hr	NO CHARGE
Edit and revise discovery docs Telephone conference with witness.	0.60 215.00/hr	129.00
9/15/2015 Review and sign complaint	0.17 175.00/hr	29.75
9/16/2015 Preparing acceptance of Service and letter (email) counsel.	0.60 215.00/hr	129.00
9/17/2015 Edit and revise docs; execute and send to opposing attorney.	0.50 215.00/hr	107.50
9/25/2015 File Review; Receipt and review notice of assignment	0.25 175.00/hr	43.75

	<u>Hrs/Rate</u>	<u>Amount</u>
9/28/2015 Receipt and review order of disqualification; Reviewing related motion and acceptance of service	0.32 175.00/hr	56.00
10/14/2015 Receipt and review notice and send.	0.20 215.00/hr	43.00
10/27/2015 File Review; Telephone call with client; email client	0.62 175.00/hr	108.50
10/28/2015 Consultation with Jerry Rigby re: how to proceed	0.17 175.00/hr	29.75
Consultation re: depositions.	0.15 215.00/hr	32.25
10/30/2015 Draft Letter to Opposing counsel	0.58 175.00/hr	101.50
11/2/2015 Edit and revise letter (email).	0.10 215.00/hr	NO CHARGE
11/9/2015 Consultation with client; Edit and revise letter and send to Opposing counsel	1.32 175.00/hr	231.00
11/10/2015 Appearance at status conference; Receipt and review voicemail from client; email client	0.88 175.00/hr	154.00
12/10/2015 Receipt and review email from client; Receipt and review answer and counterclaim; Consultation with Jerry Rigby; draft response to counterclaim; email client; draft notice of deposition; Letter to opposing counsel	1.68 175.00/hr	294.00
12/14/2015 Receipt and review email from client; email Opposing counsel	0.10 175.00/hr	NO CHARGE
12/21/2015 Receipt and review email from client; contact potential witnesses; draft affidavit; draft reply to counterclaim	1.53 175.00/hr	267.75
1/5/2016 Attempt to contact Opposing counsel; left message with Robin's assistant; Attempt to contact Sandy Cress; Attempt to contact George Benson; Attempt to contact Barrett Shuman; check with court regarding trial dates; Telephone call to opposing counsel regarding depositions	0.97 175.00/hr	169.75
1/8/2016 Attempt to contact Opposing counsel (left message with assistant); Attempt to contact Sandy Cress; Telephone conference with George Benson	0.37 175.00/hr	64.75
1/13/2016 Telephone conference w/client regarding notices of deposition	0.25 175.00/hr	43.75
1/26/2016 Receipt and review message from Kevin Thompson	0.10 175.00/hr	17.50

	<u>Hrs/Rate</u>	<u>Amount</u>
1/27/2016 Receipt and review voice mail from Robin Dunn; Attempt to contact Robin Dunn; and Telephone conference with Robin Dunn	0.67 175.00/hr	117.25
2/2/2016 Receipt and review voice mail from Opposing counsel; Telephone call to opposing counsel; Consultation with Sandy Cress; and Attempt to contact client	1.27 175.00/hr	222.25
2/3/2016 Telephone conference with Kevin Thompson; Deposition of Galust Berian; Telephone conference with Rod Robison; Deposition of Kevin Thompson; Deposition of Rod Robison; Consultation with client; and Draft brief	7.52 175.00/hr	1,316.00
2/4/2016 Receipt and review message from Rod Robison; Telephone conference with Rod	0.18 175.00/hr	31.50
2/13/2016 Preparing witness list and exhibits	1.38 175.00/hr	241.50
2/15/2016 Preparing pretrial brief and disclosures; Research; letter (email) Jerry Rigby; letter (email) client; Preparing for pretrial hearing and trial	2.47 175.00/hr	432.25
2/16/2016 Preparing for trial; file witness exhibit list; Research Judicial notice of Google Earth; attend pretrial; and Consultation with client	3.35 175.00/hr	586.25
2/17/2016 Preparing for trial	0.33 175.00/hr	57.75
2/18/2016 Consultation with Ralph Robison	0.10 175.00/hr	17.50
2/22/2016 Telephone conference with Larry Atkinson	0.17 175.00/hr	29.75
2/25/2016 Telephone conference w/client; Preparing for trial; Telephone conference; and Telephone conference with Kevin Thompson	2.37 175.00/hr	414.75
2/26/2016 Prepare for trial; contact witnesses	0.57 175.00/hr	99.75
2/27/2016 Prepare for trial	4.82 175.00/hr	843.50
Prepare for trial (Administrative Work)	3.00 50.00/hr	150.00
2/28/2016 Attempt to contact client; Attempt to contact witness; and Prepare for trial	1.00 175.00/hr	175.00
2/29/2016 Prepare for trial; Trial; and Prepare closing brief	9.05 175.00/hr	1,583.75
3/10/2016 Draft Brief	1.37 175.00/hr	239.75

	<u>Hrs/Rate</u>	<u>Amount</u>
3/11/2016 Edit and revise brief; Legal research.	0.70 215.00/hr	150.50
Draft brief; Telephone call with client; Consultation with Jerry Rigby; Receipt and review findings from Opposing counsel; edit brief; file and letter (email) to court; and letter (email) client	3.03 175.00/hr	530.25
Consultation with Hyrum Erickson and Research regarding closing brief	0.25 215.00/hr	53.75
3/16/2016 Receipt and review letter (email) court personnel regarding brief; letter (email) court personnel different formats	0.15 175.00/hr	26.25
3/29/2016 Consultation with Hyrum re: decision	0.20 215.00/hr	NO CHARGE
Receipt and review decision; Consultation with Jerry Rigby; letter (email) client; and Draft motions and judgment	0.77 175.00/hr	134.75
4/4/2016 Draft documents	1.73 175.00/hr	302.75
4/5/2016 Receipt and review and comment on motion to reconsider.	0.20 215.00/hr	43.00
Preparing motion	0.10 175.00/hr	NO CHARGE
4/11/2016 Receipt and review message from court regarding postponement; and Telephone call with client	0.10 175.00/hr	NO CHARGE
4/19/2016 Receipt of message regarding changing hearing date; and Letter to opposing counsel	0.10 175.00/hr	NO CHARGE
4/21/2016 letter (email) client regarding hearing delayed until next month	0.27 175.00/hr	47.25
5/17/2016 Appearance at court hearing and Consultation with client	0.65 175.00/hr	113.75
5/24/2016 Receipt and review decision and order from court; and letter (email) client	0.30 175.00/hr	52.50
5/28/2016 Receipt and review letter (email) from client; File review; letter (email) client; and prepare attorney fees motion	0.65 175.00/hr	113.75
6/3/2016 Draft motion for attorney fees and costs and supporting documents; letter (email) client	1.97 175.00/hr	344.75
For professional services rendered	<u>81.72</u>	<u>\$14,284.00</u>

Additional Charges :

	<u>Amount</u>
9/15/2015 Filing fee - Madison County Clerk of the Court - Complaint	221.00
2/17/2016 Photocopy documents of new complaint	6.00
2/27/2016 Costs re: Trial Exhibits - Quick Ship	2.08
Costs re: Trial Exhibits - Alphagraphics	123.70
2/29/2016 Costs re: T&T Court Reporters - Depositions	586.01
Total additional charges	<u>\$938.79</u>

EXHIBIT “B”

Law Offices

RIGBY, ANDRUS & RIGBY LAW, PLLC

*Ray W. Rigby, Retired
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam (1954-2001)
Hyrum D. Erickson
Tyler J. Salvesen
Sean P. Bartholick*

*P.O. Box 250
25 North Second East
Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
jrigby@rex-law.com*

September 3, 2015

Robin Dunn
Dunn Law Offices
PO Box 277
Rigby, ID 83442

Sent via regular & email
rdunn@dunnlawoffices.com

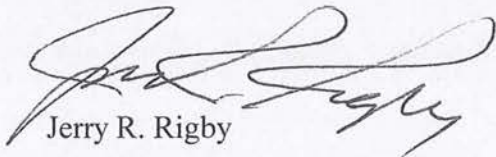
RE: Jade & Kylie Mortensen v. Galust Berian and Yvette Sturgis

Dear Robin,

Pursuant to I.C. § 12-120(1), Jade and Kylie Mortensen hereby demand that your clients, Galust Berian and Yvette Sturgis, pay the damages suffered by Jade and Kylie Mortensen due to the destruction the ditch serving their property and their inability to irrigate their property for the 2015 crop year.

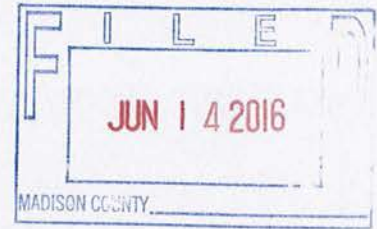
The Mortensens demand payment of damages in the amount of \$4,500, which includes Mortensens' costs and fees to date, and that your clients restore the ditch.

Sincerely,


Jerry R. Rigby

JRR/md
sb/mortensenjk.lt1.wpd

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Case No. CV-15-626

Plaintiff,)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)

NOTICE OF HEARING

Defendants.)

 GALUST BERIAN AND YVETTE N.)
 STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)

Counter-Defendants.)

TO: Galust Berian and Yvette N. Sturgis, and their attorney, Robin D. Dunn, Attorney at Law,
P. O. Box 277, Rigby, ID 83442

PLEASE TAKE NOTICE that Hyrum Erickson of the law firm of Rigby, Andrus &
Rigby Law, PLLC, shall bring his "**Motion for Attorney Fees and Costs**" on for hearing before
the Court at the Madison County Courthouse, in Rexburg, Idaho on the 13th day of July, 2016,
commencing at the hour of 9:15 p.m.

DATED this 14th day of June, 2016.




For: Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date
served upon the persons named below, at the addresses set out below their name, either by mail-
ing, hand delivery or by telecopying to them a true and correct copy of said document in a
properly addressed envelope in the United States mail, postage prepaid; by hand delivery to
them; or by facsimile transmission.

DATED this 14th day of June, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



For: Hyrum Erickson

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
[x] Facsimile

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB #2903
477 Pleasant Country Lane
P. O. Box 277
Rigby, ID 83442
(208) 745-9202 (r)
(208) 745-8160 (f)



Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
MORTENSEN,)

Plaintiffs,)

vs.)

GALUST BERIAN AND YVETTE N.)
STURGIS,)

Defendants.)

GALUST BERIAN AND YVETTE N.)
STURGIS,)

Counter-claimants,)

vs.)

JADE MORTENSEN AND KYLIE)
MORTENSEN,)

Counter-Defendants.)
_____)

Case No. CV-15-626

OBJECTION TO THE
PLAINTIFFS' REQUEST
FOR FEES AND COSTS

COMES NOW, Defendant and OBJECTS to the Plaintiffs' request for fees and costs. The objection is based upon Rule 54 IRCP and specifically Rule 54(d)(6) and 54(e)(6).

Idaho follows what has been named "the American Rule"¹ when deciding the issue of attorney fees. The Supreme Court of the State of Idaho has in place, for numerous years, guidance on this issue. The first major treatise on the issue was written by *Lon Davis, Esq* in 1990. He was the personal attorney for the Idaho Supreme Court for numerous years. A treatise was updated by the Hon. Jesse Walters entitled, "*A Primer for Awarding Attorney Fees in Idaho*", *Idaho Law Review*, Volume 38, Number 1 (2001)². The Walters publication explains the major statutes and all cases through the date of the publication. His treatise walks the reader through every step in the fee award process. According to the Justice, fees cannot be awarded as an "equity" determination or by the court sua sponte if not claimed under a pertinent statute. There is no inherent power of the court to award attorney fees. In sum, there must be a statute or rule to rely upon except in limited circumstances.³

Therefore, in the instant case the plaintiff relies upon the statutory language of I.C. Section 12-120 which states as follows:

(1) Except as provided in subsections (3) and (4) of this section, in any action where the amount pleaded is thirty-five thousand dollars (\$35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff.

(2) The provisions of subsection (1) of this section shall also apply to any counterclaims, cross-claims or third party claims which may be filed after the initiation of the original action. Except that a ten (10) day written demand

1 The American Rule only allows for fees if there is an underlying statute or contract for entitlement.

2 Justice Walters personally awarded this primer to the undersigned, after its publication, on March 29, 2002.

3 One noted exception is the Private Attorney General provision which is not relevant in the case at bar.

letter shall not be required in the case of a counterclaim.

(3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs. The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code Ann. § 12-120 .

The plaintiff sent a demand letter prior to commencing this action requesting attorney fees. It is odd that the request for fees was the basis of the \$35,000 or less requirement. As an aside, the letter states to replace the ditch. The court awarded \$1,020 for replacement of the ditch. No specific amount was ever demanded by the plaintiffs for the ditch replacement. It was impossible for the defendant to respond to a request for an amount that was not tendered as required above. No sum was demanded; thus, the statutory requirement was not fulfilled.

Second at trial the plaintiff asked the court for sums of money approaching \$10,000.00. The court did not award these sums. Thus, when the court states that the plaintiff prevailed, the defendant has a hard time believing the plaintiff prevailed when the damages were not awarded that were requested at trial.

Third, the defendant completely prevailed on its counterclaim for trespass. The court awarded nominal damages. The court did not treble the amount as required by the trespass statute; nor did the court award fees as required by the trespass statute. See, Idaho Code §6-202 which was contained in the defendant's proposed findings and conclusions.

If the court were to award fees, the court looks to IRCR 54(e) for the prevailing party and the award of fees and of costs. The factors of 54(e) are as follows:

Rule 54(e)(3). Amount of attorney fees. In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

In sum, a statutory basis must exist for the award of fees; and, the rule [54] provides fees for the prevailing party. Costs are determined as of right and by discretion pursuant to IRCP, Rule 54(d)(1). Therefore, the court fixes the appropriate award. As discussed above, §12-120(1) cannot apply because no sum was demanded.

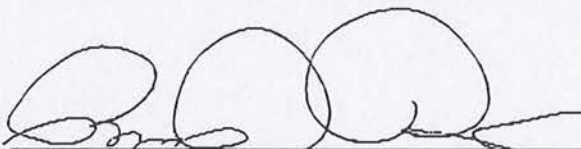
The plaintiffs have also relied upon §12-121. This section must be read in conjunction with IRCP, Rule 54(e)(1). This is the "frivolous" section that applies to fees. All witnesses testified that the ditch had not been regularly maintained. In more telling fashion, the court left out the testimony of a key witness of the plaintiff in its discussion of the evidence. George Benson testified he had filled the ditch in 15 years prior on the west end. The court chose not to discuss this testimony. This testimony is vital to the defendants because it then corroborates the testimony of Lyle Thomson who the court said was not reliable in his recollection. Without belaboring the point, it is alleged that the defendant did not pursue or defend this cause without basis. The testimony of both parties

was heavily contested. The court believed the plaintiffs' version of the facts.

CONCLUSION

The defendant objection is well founded because a contract or statutory basis does not exist to support fees. Additionally, the court should have awarded fees for the trespass. The plaintiffs could not have been the prevailing party based upon the evidence and upon the prevailing of the counter-claim by the defendants.

Dated this 14th day of June, 2016.



Robin D. Dunn, Esq.

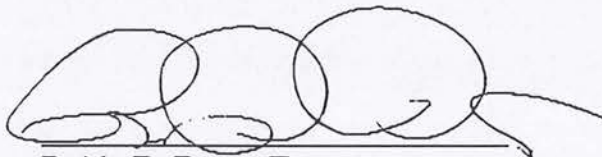
NOTICE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2016, I delivered a true and correct copy of the foregoing to:

Rigby, Andrus and Rigby Law, PLLC
P.O. Box 250
Rexburg, ID 83440

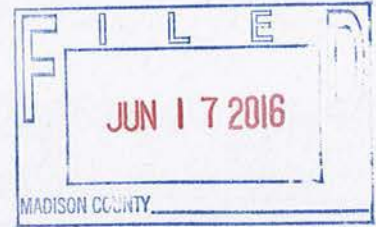
- Hand Delivery
- Postage-prepaid Mail
- Facsimile Transmission
- Courthouse Box

Hon. Alan Stephens
(courtesy copy lodged in chambers)



Robin D. Dunn, Esq.
Dunn Law Offices, PLLC

DUNN LAW OFFICES, PLLC
 Robin D. Dunn, Esq., ISB #2903
 477 Pleasant Country Lane
 P. O. Box 277
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)



Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE MORTENSEN,)	
	)	Case No. CV-15-626
)	
Plaintiffs,	)	NOTICE OF APPEAL
vs.)	
)	
GALUST BERIAN AND YVETTE N. STURGIS,	)	I.A.R. 11, 17
)	
)	
Defendants.)	
_____)	
GALUST BERIAN AND YVETTE N. STURGIS,)	
)	
)	
Counter-claimants,)	
vs.)	
)	
JADE MORTENSEN AND KYLIE MORTENSEN,)	
)	
Counter-Defendants.))	
_____)	

TO: THE ABOVE NAMED RESPONDENTS; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above named Respondents to the Idaho Supreme Court from the final Order Re: Findings of Fact and Conclusions of

Law entered in the above entitled action on the 23rd day of March, 2016, the Honorable Alan Stephens, presiding. Thereafter, the court entered “Amended Findings of Fact and Conclusions of Law” dated May 20, 2016. Judgment was entered May 20, 2016.

2. The Appellants have a right to appeal to the Idaho Supreme Court, and the judgment/order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a) I.A.R., as follows: (1) Final judgments, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure including judgments of the district court granting or denying peremptory writs of mandate and prohibition

3. The issue(s) on appeal include, but are not limited, to the following:

a. The findings of fact are inconsistent with the conclusions of law as to the abandonment/forfeiture of a ditch.

b. The court did not consider all of the evidence of abandonment and/or forfeiture of the ditch.

c. The defendants prevailed on their counterclaim and the court incorrectly entered the memorandum findings and the Judgment.

d. Attorney fees should have been awarded on the counterclaim.

e. Attorney fees and costs should be awarded to the Appellants at trial and on appeal.

f. Attorney fees are currently under consideration and should be reviewed if awarded to the plaintiffs.

4. No order has been entered sealing all or any portion of the record.

5. A reporter’s transcript is requested including the standard documents as set forth in the appellate rules.

6. The Respondents request that the following documents be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

- The repository of the case.
- The minute entry.
- The court's memorandum decision and order dated March 23, 2016.
- the court's amended memorandum decision and Judgment dated May 20, 2016.
- The court's post-trial rulings.

7. The undersigned certifies:

- a. That a copy of the notice of appeal has been served on the certified short hand reporter and specifically requests the trial testimony;
- b. That the Appellants have made contact with the clerk of the district court and are in the process of obtaining the estimated fee for preparation of the clerk's record;
- c. That the estimated fee for preparation of the clerk's record has been paid or will be paid;
- d. That the estimated fee for preparation of the pertinent portions of the trial transcript of the short hand reporter's record has been paid or will be paid;
- e. That appellate filing fee has been paid; and
- f. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 15 day of June, 2016.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of June, 2016, a true and correct copy of the foregoing was delivered to the following persons(s) by:

DOCUMENT SERVED: Notice of Appeal

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Hyrum Erickson
RIGBY, ANDRUS & RIGBY LAW, PLLC
P.O. Box 250
Rexburg, ID 83440

Facsimile 356 0768

MaryAnn Elliott
District Court
210 Courthouse Way
Rigby, ID 83442

Hand Delivery

Courtesy Copy To:
Honorable Alan Stephens
District Judge
210 Courthouse Way
Rigby, ID 83442

Hand Delivery



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

Jerry R. Rigby, ISBN 2470
 Hyrum D. Erickson, ISBN 7688
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 Attorneys at Law
 25 North Second East
 P. O. Box 250
 Rexburg, Idaho 83440
 Telephone: 208-356-3633



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Plaintiffs, Respondents)

v.)

GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Defendants, Appellants.)

Case No. CV-15-626

**REQUEST FOR ADDITIONAL
 RECORD**

_____)
 GALUST BERIAN AND YVETTE N.)
 STURGIS,)
)
 Counter-claimants,)
 Appellants.)

vs.)

JADE MORTENSEN AND KYLIE)
 MORTENSEN,)
)
 Counter-Defendants,)
 Respondents.)

TO: THE ABOVE NAMED APPELLANTS AND THE PARTY'S ATTORNEY,
AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN, that the Respondents in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal.

- I. All exhibits admitted at trial.
- II. Mortensen's Pretrial Brief filed February 16, 2016.
- III. Mortensen's Post-Trial Brief, Proposed Findings of Fact and Conclusions of Law filed March 11, 2016.
- IV. Berian and Sturgis's Proposed Findings of Fact, Conclusions of Law and Argument filed March 11, 2016.
- V. Mortensen's Motion to Reconsider filed April 6, 2016.

I certify that a copy of this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 17th day of June, 2016.




Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 17th day of June, 2016.

RIGBY ANDRUS & RIGBY LAW, PLLC



Hyrum Erickson

Clerk of the Court
Madison County Courthouse
Rexburg, ID 83440

[] Mail
[x] Hand Delivery
[] Facsimile

Robin D. Dunn
P.O. Box 277
Rigby, ID 83442
745-8160

[] Mail
[] Hand Delivery
[x] Facsimile

Honorable Alan C. Stephens
Jefferson County Courthouse
210 Courthouse Way, Suite 120
Rigby, ID 83442
745-6636

COURT MINUTES

CV-2015-0000626

Jade Mortensen, etal. vs. Galust Berian, etal.

Hearing type: Motion

Hearing date: 7/13/2016

Time: 9:20 am

Judge: Alan C Stephens

Courtroom:

Court reporter:

Minutes Clerk: Angie Wood

Tape Number:

Party: Galust Berian, Attorney: Robin Dunn

Party: Jade Mortensen, Attorney: Hyrum Erickson

Party: Kylie Mortensen, Attorney: Hyrum Erickson

Party: Yvette Strugis, Attorney: Robin Dunn

920 J INTRO

MR. ERICKSON ARGUES MOTION FOR ATTORNEY FEES AND COSTS

MR. DUNN RESPONDS TO MOTION - ARGUES HIS OBJECTION

MR. ERICKSON RESPONDS

COURT WILL TAKE MATTER UNDER ADVISEMENT



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON**

JADE MORTENSEN AND KYLIE
MORTENSEN,

Plaintiff,

VS.

GALUST BERIAN AND YVETTE N.
STURGIS,

Defendants.

Case. No. CV-2015-626

DECISION AND ORDER RE:
MOTION FOR ATTORNEY FEES
AND COSTS

GALUST BERIAN AND YVETTE N.
STURGIS,

Counter-Claimants,

VS.

JADE MORTENSEN AND KYLIE
MORTENSEN,

Counter-Defendants.

Plaintiffs timely filed a motion requesting reasonable attorneys' fees. The Court has reviewed the memoranda in support and in opposition to the motion and held a hearing on the matter. The Motion is **HEREBY GRANTED IN PART AND DENIED IN PART.**

First, the Court finds that since the Plaintiffs are the prevailing party, they should receive costs as a matter of right.

Second, the Court finds that the claims were not defended frivolously and therefore, the Plaintiffs' Motion for Attorney Fees under I.C. §12-121 is **DENIED.**

DECISION AND ORDER RE: MOTION FOR ATTORNEY FEES

1

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of July, 2016, I did send a true and correct copy of the forgoing document upon the parties listed below my mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by cause the same to be had delivered.

ROBIN D. DUNN
DUNN LAW OFFICES, PLLC.
477 Pleasant Country Lane
P.O. Box 277
Rigby, ID 83442

JERRY RIGBY
HYRUM ERICKSON
RIGBY, ANDRUS & RIGBY LAW, PLLC.
25 North Second East
P.O. Box 250
Rexburg, ID 83440

Clerk of the District Court
Madison County Idaho

BY:  _____

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

JADE MORTENSEN AND KYLIE)	
MORTENSEN)	
Plaintiffs-Counter-defendants-)	
Respondents	)	SUPREME COURT NO.
	)	CASE NO. CV-2015-626
vs	)	CLERK'S CERTIFICATE OF
	)	APPEAL
GALUST BERIAN AND YVETTE N.)	
STURGIS)	
)	
Defendants-Counter-claimants-)	
Appellants)	
)	

APPEAL FROM: 7th Judicial District Madison County
HONORABLE Alan C. Stephens PRESIDING
CASE NO. FROM COURT: CV-2015-626
ORDER OF JUDGMENT APPEALED FROM: Order RE: Findings of Fact and
Conclusions of Law dated March 23, 2016, Amended Findings of Fact and Conclusions of
Law dated May 23, 2016 and Judgment dated May 23, 2016
ATTORNEY FOR APPELLANTS: Robin D Dunn, DUN LAW OFFICES, PO Box 277,
Rigby, ID 83442
ATTORNEY FOR THE RESPONDENT: Hyrum D Erickson, PO Box 250, Rexburg, ID
83440
APPEALED BY: Galust Berian and Yvette N Sturgis
APPEALED AGAINST: Jade Mortensen and Kylie Mortensen
NOTICE OF APPEAL FILED: June 17, 2016
AMENDED NOTICE OF APPEAL FILED: NA
NOTICE OF CROSS-APPEAL FILED: NA
AMENDED NOTICE OF CROSS-APPEAL FILED: NA
APPELLATE FEE PAID: Yes
RESPONDENT OR CROSS RESPONDENT'S REQUEST FOR ADDITIONAL RECORD:
Yes
WAS DISTRICT COURT REPORTER'S TRANSCRIPT REQUESTED?: Yes
IF SO, NAME OF REPORTER and ESTIMATED NUMBER OF PAGES: Mary Ann
Elliott, Pages not specified

Dated this 23 day of June, 2016

Kim H Muir

BY *Ann Curtis*

DEPUTY CLERK

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR MADISON COUNTY

)	
JADE MORTENSEN AND KYLIE)	
MORTENSEN)	
)	
Plaintiffs-Counter-defendants	)	SUPREME COURT NO. 44303
Respondents	)	CASE NO. CV-2015-626
VS	)	CERTIFICATE OF EXHIBITS
)	
GALUST BERIANAND YVETTE N.)	
STURGIS)	
Defendants-Counter-claimants)	
Appellants)	

I, Gwen Cureton, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Madison County, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

NO.	DESCRIPTION	SENT/RETAINED
1	Large Plat Map	Sent
2	Aerial Photo 10/7/14 Wide Angle	Sent
2A	Aerial Photo	Sent
3	Aerial Photo 10/7/14	Sent
4	Aerial Photo 10/24/13	Sent
5	Aerial Photo 9/4/12	Sent
6	Aerial Photo 7/16/12	Sent
7	Aerial Photo 7/11/12	Sent
8	Aerial Photo 9/4/12	Sent
9	Aerial Photo 9/24/11	Sent
10	Aerial Photo 6/15/04	Sent
11	Aerial Photo 7/29/92	Sent
12	Photo of ground, ditch and fence	Sent
13	Photo of ground, fence on right	Sent
14	Photo of ground, fence on left	Sent
15	Photo of culvert in background	Sent
16	Photo of fence w/dog	Sent
17	Photo of ground, bushes on right	Sent
18	Photo Headgate	Sent
19	Photo of Cement item in background	Sent

20	Photo Headgate	Sent
21	Photo of Culvert with dog and building	Sent
22	Photo Culvert	Sent
23	Photo of Damage to Culvert	Sent
24	Photo of Ground	Sent
25	Photo of Cement Item in Trees	Sent
26	Photo Building and Culvert	Sent
27	Photo of ground	Sent
28	Aerial Photo with markings	Sent
29	Letter from Reid Canal Stock cert #0048	Sent
30	Warranty Deed #311974	Sent
31	Verizon Bill	Sent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 7th day of December , 2016.

KIM H MUIR
CLERK OF THE DISTRICT COURT

By Gwen Cureton

Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR MADISON COUNTY

JADE MORTENSEN AND KYLIE)	
MORTENSEN)	
Plaintiffs-Counter-defendants)	
Respondents)	
VS)	
)	
GALUST BERIAN AND YVETTE N.)	
STURGIS)	
Defendants-Counterclaimants	)	SUPREME COURT NO. 44303
Appellants	)	CASE NO CV-2015-626
	)	CERTIFICATE OF SERVICE

I, Gwen Cureton, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Madison, do hereby certify that I have personally served or mailed, by United States Mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

ATTORNEY FOR APPELLANTS

ATTORNEY FOR RESPONDENTS

Robin D Dunn
DUNN LAW OFFICES
PO Box 277
Rigby, ID 83442

Hyrum D Erickson
PO Box 250
Rexburg, ID 83440

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the
seal of the said Court this 7th day of December , 2016

KIM H MUIR
CLERK OF THE DISTRICT COURT

By Gwen Cureton
Deputy Clerk