7-26-2017

Lemhi County v. Moulton Respondent's Brief Dckt. 44498

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEMHI COUNTY, a political subdivision of the State of Idaho, by the Board of County Commissioners, Robert E. Cope, Richard Snyder, and John Jacovac, Plaintiff/Counterdefendant, and VERDELL OLSON, SCOTT HARTVIGSON, as trustee of the ZENAS R. HARTVIGSON LIVING TRUST, Defendants/Counterclaimants/Cross Defendants/Appellants, v. PHILLIP F. MOULTON, JAMES SKINNER, PRATT CREEK RANCH LIMITED PARTNERSHIP; LYLE SKINNER, trustee of the ELLIS RAY SKINNER FAMILY LIVING TRUST, Cross-Defendants-Cross Claimants-Respondents.	Supreme Court Docket No. 44498-2016 Lemhi County No. CV-2011-324

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
Of the State of Idaho in and for the County of Lemhi

Honorable Alan C. Stephens Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

The Appellants, Scott Hartvigson, Trustee of the Zenas R. Hartvigson Living Trust ("Hartvigson") and Verdell Olson ("Olson") (referred to collectively as the "Appellants" or "Olsen and Hartvigson"), irrigate property downhill from Respondent Phillip F. Moulton ("Moulton" or "Respondent").

In Idaho water disputes regularly involve water users seeking more water. However Appellants want less water to enter their property[1]. Appellants also seek to change the manner and flow of the water in dispute as it has likely existed historically for centuries, and was first documented by mapping in the late 1800's. At trial Appellants alleged that bentonite sediment, transported by some of the water flowing from the Moulton property, has damaged the Hartvigson pasture area, and irrigation systems. This allegation was not proven at trial.

Appellants now challenge the Court's Findings of Fact and Conclusions of Law and Amended Judgment arguing (1) there was insufficient evidence of a prescriptive easement for unused diverted irrigation water across Appellant's real property; (2) there were errors related to the application of Idaho law relating to natural servitudes and prescriptive easements; and (3) the Amended Judgment prepared and filed by the Court is vague.

The trial record shows there was sufficient evidence of a prescriptive easement in favor of Respondent, that the doctrine of natural servitude was properly applied, and the trial court did not abuse its discretion in so ruling. Finally, the Amended Judgment specifically defines the

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[1] "In a dry and arid climate, where irrigation is necessary in order to cultivate the soil, the question as to the rights of the proprietors of upper [dominant] and lower [servient] lands in regard to the waste water has seldom arisen, because, as a general rule, the lower landowner is willing to receive, dispose of, and profit by the use of all water flowing from the upper lands of another in irrigating his own land." *Merrill v. Penrod*, 109 Idaho 46, 51 (1985) 704 P. 2d 950, *citing Boynton v. Longley,* 19 Nev. 69, 6 P. 437, 438 (1885). "What was true in 1885 is equally true today-seldom have servient landowners complained of too much water." *Beasley v. Engstrom*, 31 Idaho 14, 18, 168 P. 1145, 1146 (1917).

prescriptive easement, natural servitude, and amount of water, 3.25 Cubic Feet per Second ("cfs"), that Respondent is allowed to send down the Hartvigson draw, over and through the Hartvigson property.

B. Course of Proceedings Below

This case began on September 9, 2011 when Lemhi County filed a Verified Complaint for Declaratory Judgment, seeking declaratory relief against James Skinner, Skinner Trust, Phillip Moulton, Pratt Creek Ranch, Olson and the Hartvigson Trust. R p. 18. In 1951 Lemhi County purchased a road known as the "Lemhi Back Road" from Frank Russell Hartvigson and Eunice Hartivigson, (Scott Hartvigson's parents). The Hartvigsons also granted the County an easement adjacent to the roadway for "relocation of all irrigation and drainage ditches and structures and such surface drain ditches" as needed to ensure proper construction of the highway." R p. 20. Hartvigson Trust owns property on the West/down-hill side of the Lemhi Back Road. The Pratt Creek Ranch (referred to at trial and herein as the "Moulton Ranch") and Skinner Ranch each own or owned property on the eastern/uphill side of Lemhi Back Road. R p. 20. During the pendency of the case Respondent purchased property formerly owned by the Skinners and other cross claimants. Respondent represented these parties interests pertaining to the cross-claim. R p. 252.

Lemhi County operates a system of culverts which play an essential role in preventing waste irrigation water and naturally occurring surface water from flooding the Lemhi Back Road. R p. 21. Waste irrigation water and some naturally occurring spring and surface water that flows into and through the Lemhi County drainage culverts comes from the property formerly owned by the Skinner Trust and/or Pratt Creek Ranch, and now owned by the Moulton Ranch. The water then drains into a ditch or ditches, located on the Hartvigson Trust's property. Tr. 51:11-16, Tr. 121:11-14. The ditch or ditches located on the Hartvigson Trusts property have served as drainage

ditches for the properties owned by Skinner Trust and Pratt Creek Ranch and the present day Moulton Ranch or their predecessors-in-interest for forty (40) years, or more. R p. 21.

On or about November 7, 2010, in an apparent effort to stop irrigation water and/or naturally occurring surface water from entering ditches located on Hartvigson Trust property, Olson tampered with, obstructed, and/or otherwise rendered inoperable plaintiff's culverts, ditches, and other water drainage structures located along the Lemhi Back Road. R p. 21. Olson's actions in tampering with, obstructing and otherwise rendering inoperable plaintiff's culverts, ditches, and other water drainage structrures has caused waste irrigation water and/or naturally occurring surface water to back-up and flood portions of the Lemhi Back Road on or about November 17, 2010 and on subsequent dates. R p. 21. Olson's actions caused harm to Lemhi County, its citizens, taxpayers, and members of the traveling public at large. R p. 20-21. In its complaint, Lemhi County requested Olson cease and desist from tampering with, obstructing and/or otherwise rendering inoperable plaintiff's culverts, ditches, and other water drainage structures and to allow water to pass through the structures and flow into the drainage ditches located on Hartvigson Trust property, but defendant Verdell Olson failed and refused to do so, alleging that the water which passes from the lands owned by Skinner Trust and/or Pratt Creek Ranch (now Moulton Ranch) exceeds the scope of any existing easement and/or unlawfully damages the lands of Hartvigson Trust. R p. 22.

Lemhi County sought a Declaratory Judgment against James Skinner, Skinner Trust, Phillip Moulton, and Pratt Creek Ranch ordering compliance with Idaho statute regulating utilization of water measuring and application systems. R p. 22. Lemhi County sought declaratory judgment against Olson and the Hartvigson Trust ordering the allowance of discharge of water from the Skinner and Moulton properties. R p. 23.

On October 3, 2011 Olson and Hartvigson answered the Verified Complaint setting forth a number of affirmative defenses and requesting attorney fees. Olson and Hartvigson also filed a counterclaim alleging inverse condemnation, violation of Article VIII § 4 of the Idaho Constitution, and that the County exceeded its authority *Ultra Vires*. R pp. 26-36. Olson and Hartvigson also filed a cross claim against Moulton and Skinner alleging negligence, trespass and nuisance. R p. 38-44.

On October 24, 2011 Lemhi County replied to Olson and Hartvigson's counterclaim. R pp. 49-58. On November 16, 2011 Skinner and Moulton answered Olson and Hartvigson's Crossclaim. R pp. 59-65. On November 22, 2011 Skinner and Moulton answered the County's complaint. R pp. 66-72. On October 24, 2013 Olson and Hartvigson dismissed their claims against Lemhi County. R. pp 73-75.

On December 20, 2013 Moulton and Skinner filed a cross-claim against Olson and Hartvigson requesting declaratory relief in the form of a prescriptive easement. R pp. 76-84. On January 10, 2014 Olson and Hartvigson answered the Complaint for injunctive relief. R. p. 85-157. On February 12, 2014, Lemhi County filed an Amended Complaint for Declaratory Judgment. R. p. 158-166. On May 9, 2016 (right before trial on the Moulton and Skinner cross-claim for declaratory relief) Appellants settled with the County. R p. 207-209. Notably, this Stipulated Judgment entered into freely between Appellants and Lemhi County authorized the County to send 3.25 cubic feet per second of natural water through the North culvert maintained by Lemhi County across the Lemhi Back Road, subject to weather events or other natural conditions which may result in larger amounts of water traveling under the Lemhi road and onto the ranch. R.p 214-218.

Trial on Respondent's cross-claim for declaratory relief for prescriptive easement across the Hartvigson Ranch was held on May 11 through May 13, 2016. Shortly before resting, counsel for Respondent moved the Court pursuant to Idaho Rules of Civil Procedure, Rule 15(e) for leave

to amend the cross-claim to conform with the evidence, and allow a claim of natural servitude. Counsel for Appellants did not object to the motion. Tr. 252:1-253:20.

On July 14, 2016 the District Court entered its findings of fact and conclusions of law, granting Respondent both a prescriptive easement and natural servitude across the Hartvigson property for 3.25 CFS. R. p. 251-68. On August 25, 2016 Hartvigson and Olsen appealed from the District Court's ruling. R. pp 251-68. On October 12, 2016 the District Court entered an Amended Judgment in order to comply with Idaho Rules of Civil Procedure, Rule 54. R. pp 302-304. On October 25, 2016, Hartvigson and Olson filed an Amended Notice of Appeal of the Amended Judgment. R pp. 305-311.

C. Statement of Facts

1. Geography, History and Present Dispute.

Moulton moved with his family to the Salmon area in 1971 when they purchased the first 1400 acre portion of what is today the Moulton Ranch. Tr 44:11-18. Moulton was nine years old at the time, and worked on the ranch through high school. Moulton's duties included irrigating the ranch. Tr. 44:23-45:4. Moulton left the ranch after high school for approximately 14 years, then returned to manage the ranch in 1994 which he has done ever since. Tr 45:7-24. When the Moultons first purchased the ranch the irrigation systems consisted entirely of flood irrigation. Tr. 46:4-8. In the fall of 2014 Moulton purchased approximately 900 acres from Jim Skinner, consisting of the cattle production area of the Skinner Ranch. This purchase created the modern day Moulton Ranch. R. p. 252.

Pratt creek is a free-flowing creek which cascades through a steep canyon from the great divide and the Beaverhead mountains in an easterly-westerly direction. Tr 49:14-18; Cross-Claimant's Ex. 25, Tr 72: 23-25. Historically the Moultons diverted water from Pratt creek to irrigate their property. That practice still exists today. Tr. 50:1-4. Pratt creek is susceptible to rapid

and uncontrollable fluctuations dependent upon weather, snowpack and runoff. In the winter, one to eighteen inches of snow can accumulate on the Moulton Ranch, while six to seven feet can accumulate in the mountains above, the snow run-off feeds Pratt Creek. Tr. 72:23-25, Tr. 73:1-2.

Since 1957 James Skinner's family has operated a ranching operation on land to the North of the Moulton ranch. Tr. 214: 16-18. Skinner lived on the ranch for practically his entire life. Tr. 215:1-20.

The present day Moulton ranch consists of a series of drainages, with an elevation drop from the top of the Moulton property to the Hartvigson draw of approximately 1100 feet. There is 1) a low elevation drainage near Pratt Creek which drains into Sandy Creek; 2) a middle, "basin" drainage, and the upper drainage on the northern end of the ranch which eventually flows into the Hartvigson draw; and 3) The northern drainage which drains into the warm springs area and then discharges into Wimpey Creek. R. p. 253. Tr. 50:2-25, 51:1-17.

The Moultons began converting from flood irrigation to sprinkler irrigation in the 1970's. Today (except a small 40 acre flood irrigated section) the Moulton ranch is entirely irrigated by an integrated sprinkler pivot and wheel line system. Due to the 1100 foot drop in elevation, the entire cohesive system is gravity fed. Tr. 66:19-25, 235:22-25. The purpose of the 40 acres of flood irrigation is two-fold, 1) the flood irrigated section slows the speed and volume of the water sent down through the system, and ultimately to the Hartvigson draw; and 2) the flood irrigated section acts as a safety valve to prevent flooding further below in the event Pratt Creek suddenly rises, or one of the Moulton pivots shuts off during irrigation. Tr. 485:11-17.

The watercourses that carry water from Pratt Creek through the Moulton Ranch consist of definite channels, containing beds and banks, and ultimately discharge into another stream. The parties and the trial court were able to physically view these waterways on May 12, 2013 when the trial court traveled to the Moulton ranch for the viewing of the property. Tr. 12:23-25, 13:1-6.

Jim Skinner and Moulton have each witnessed water traveling down the defined waterway (as mapped in 1898) through the Moulton property and into the Hartvigson draw since 1971. Tr. 59:19-25, 60:1-15.

Prior to the Moulton purchase of the Skinner ranch, both ranches shared a combined water right out of Pratt Creek for 20 CFS. Approximately 6 shared CFS was sent down to the property in question in this case. The Skinner and Moulton water rights share the same priority date. Tr. 70:12-24, 71:1-6. In addition to the Pratt creek water, there are a number of natural springs that discharge into the basin on the Skinner ranch, above the Hartvigson draw. Like Pratt Creek, the natural waterway on the Skinner ranch is free flowing, and has no storage capacity. There is one small pond on the Skinner property, however this pond is evaporative, and lacks both an inlet and outlet. Moulton does not store any water on his property. Tr. 55:12-18.

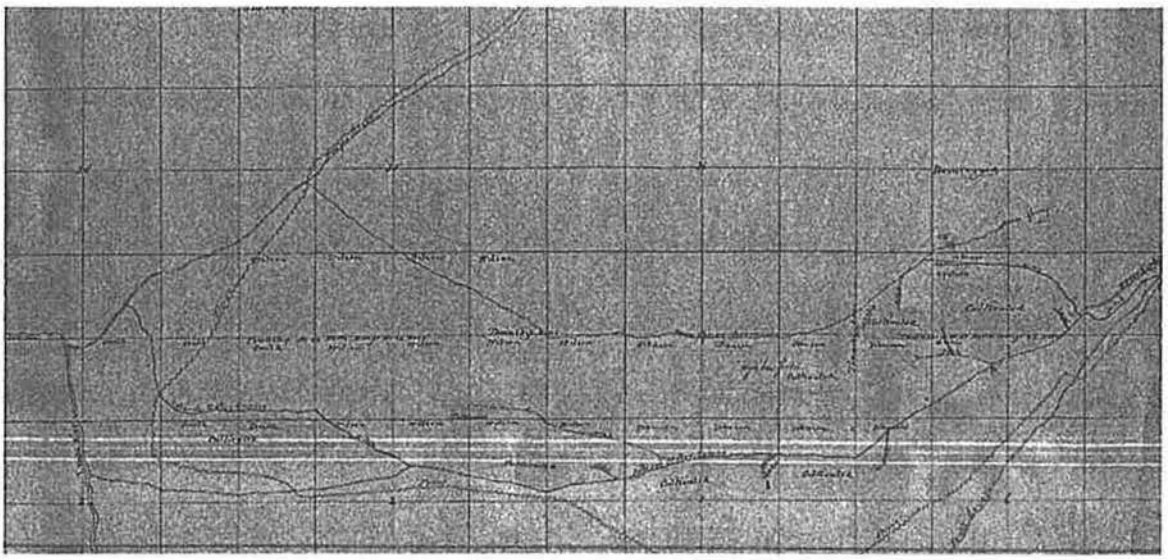
There was a diversion created, referred to at trial as the "upper Y" located near what was the north ditch. The north ditch is man-made, and has existed since at least 1898. With this system, water could be diverted from continuing downward, toward the Hartvigson draw and be sent through the north ditch toward the Wilson/Drake property. The waterway then travels steeply to the Lemhi County backroad, passes through a culvert near the Gino Otonello property, and ultimately discharges into the Lemhi River. Tr.87:15-23.

The basin's natural watercourse is located about 100 yards above the upper Y. When the Skinners owned the property, irrigation water was sent down this channel. During flood irrigation the Skinners diverted water from the north ditch to irrigate hay ground located further downstream. Tr. 221:16-22.

Historically, any natural surface or spring water located in the Moulton basin would travel down a defined natural watercourse, travel through the Hartvigson draw, hit the Lemhi Valley

floor, travel through a natural watercourse across what is today the Hartvigson property, and travel through the Sandy Slough, ultimately discharging into the Lemhi River. Tr. 222:22-25.

There was a water right complaint and adjudication in 1898 which sought to adjudicate 50 inches of water from Pratt Creek. Some of the case filings from the 1898 case were admitted as evidence at this trial. Exhibits 12-14. Notably exhibit 15 admitted at trial was a map from the 1898 case. This map documents a natural watercourse which is nearly identical to the watercourse traveling through the Moulton Ranch today. In the 1898 map the natural watercourse traveled through what is today known as the Skinner Ranch, Hartvigson Draw, and the Hartvigson property. Moulton Exhibit 15, Tr. 64:1-25, 65:1-25.



Additionally, the first aerial map of the area shot in 1939 depicts the watercourse traveling through the Hartvigson draw, and the existence of the old Lemhi Back Road prior to its destruction in 1950. The map also depicts the Hartvigson house and a series of willows leading west from the back road toward the Sandy Slough. Exhibit 7, Tr. 67:1-25, 68:1-25.

The Hartvigson ranch lies to the downhill (westerly) direction of the Moulton ranch, and has been in the Hartvigson family since the 1890's. Tr. 256:18-22, Tr. 68:12-15. Pratt Creek

travels south of the Hartvigson ranch. The Ranch consists of approximately 200 acres, and is mostly located on the Lemhi Valley Floor bordering the Lemhi River. Verdell Olson has leased and operated the Hartvigson ranch since 1976. Tr. 275:16-20.

The Hartivigson ranch was decreed two water rights from Sandy Creek Slough and the Lemhi River in 1970 under the Lemhi River Basin Adjudication. Additionally, Eunice Hartvigson filed for a wastewater right from Pratt Creek for .40 CFS in order to irrigate 20 acres. In her application Eunice claimed her property had used wastewater from Pratt Creek since 1896. Eunice Hartvigson also claimed a spring right out of the Hartvigson draw for .40 CFS for domestic use. This water was used to operate the toilets and the showers in the old Hartvigson home, located on what is today the Hartvigson Ranch. Tr. 291:23-25, 292:1-3, Tr. 74:9-13, Tr. 75:1-5. The date of use for both these water rights was either 1895 or 1896. Tr. 75:1-20, Tr. 76:8-15. Moulton exhibit 20.

Retired Lemhi County Road and Bridge Supervisor Bud Bartlett began working for the county in 1948. Mr. Bartlett's testimony from video deposition was played for the court during trial. Mr. Bartlett testified that in 1951 the Lemhi Back Road was rebuilt and an 18 inch culvert was installed to carry water from the Hartvigson draw to and across the Hartvigson property. Eventually the 18-inch culvert was replaced by a 12 inch culvert. Record P. 257.

Mr. Bartlett testified that since at least 1948 surface water came through the Hartvigson draw, entered the south culvert, or a culvert in that location, and traveled out into the Sandy Slough. There was a French drain installed in the area in order to collect underground seepage water, and to prevent the seepage water from damaging the County road. The French drain system was neither designed nor installed to address issues with surface water. Lemhi County installed the system. The system consists of an eight inch perforated pipe, which travels a substantial distance along the

topside of the Lemhi Back Road, then travels under the road, and into a buried line across the north end of the Hartvigson field and into the Lemhi River. R. p. 257.

At Olson's request, in the 1980's the County installed a culvert in the County road, north of the original South culvert. The installation of this culvert resulted in what was referred to at trial as the lower Y, where water could either be diverted to the South culvert and head toward Sandy Creek and the Lemhi River, or to the north culvert to irrigate a portion of the Hartvigson ranch. Mr. Bartlett testified that prior flooding of the Lemhi Back Road occurred in the winter, and as a result of freezing. There was some testimony at trial that flooding occurring on the Lemhi Back Road occurred in early spring prior to irrigation season, this flooding was caused by an early spring rain-on-snow event, resulting in significant runoff. In the 1970's Olsen's father installed a man-made ditch on the Hartvigson property to carry water from the Lemhi Back Road to Sandy Creek Slough and the Lemhi River. R. p. 258, Tr. p. 342:8-9. There were a number of trial exhibits and testimony at trial proving the construction and existence of this ditch. The Hartvigson Ranch ditch was constructed to channelize the natural streamflow into the new channel, versus the natural, historic meandering willow-flow system depicted in the 1939 aerial. Exhibits 16 a-1/b.

The stipulated judgment entered into between Hartvigson, Olson and Lemhi County declares a Natural Servitude in favor of Lemhi County for drainage of natural surface water across the lands of Defendant. The judgment allows "3.25 cubic feet per second, subject to weather events or other natural conditions that may result in larger amounts of natural surface water flowing under the Lemhi Road and onto the Ranch." This judgment allows the County to send this water to the North culvert. R. p. 212-215.

The Respondent's servitude and prescriptive easement is for the rest of the water which travels across the Moulton property, and through a natural waterway, and has done so since at least 1898. Exhibit 15. Several old willows, trees and stumps exist along the natural waterway which

travels down the basin on the Moulton ranch and into the Hartvigson draw. The existence of these trees and vegetation, the 1898 map, the 1939 aerial, and testimony that Olsen's father revamped the waterway channeling the Hartvigson draw water across the Hartvigson Ranch prove that water has been traveling naturally through the waterway for many years. Like the channel above, the Hartvigson draw consists of a definite channel, with a bed and banks, and discharges into another stream, thus legally defining the Hartvigson draw as a natural waterway. The existence of this historic natural waterway, the fact that water has been traveling through the draw, and across the Hartvigson property through a ditch (that was revised and rebuilt in 1970 by owner/operators of the Hartvigson property) prove that water has been flowing freely through the Hartvigson draw and across the Hartvigson Ranch for well over a century.

Appellants argue that Moulton is prevented under a theory of prescriptive easement, or natural servitude, from asserting a right to send 3.25 CFS of water through the Hartvigson draw and across the Hartvigson ranch. The testimony below, presented at trial proved that historically different amounts and types of water traveled through the natural waterway, across the Hartvigson draw and onto the Hartvigson Ranch.

Testimony of Philip Moulton referring to Moulton exhibit 15:

Q. So – and the map actually uses that term, "natural waterway?"

A. Yes, it does.

Q. So can you trace for the court that red line from the top –

A. Uh-huh. So it starts right here, goes down here, down through to – all the way to the Lemhi River.

Q. And how does that compare with the physical facts of the natural watercourse that exists today?

A. Well, if you look at the natural lay of the land out there, which you will get a chance to do today, it's pretty obvious that that's where the water has to flow.

Q. But my point is in 1898 that water was at the same location that it is in 2016?

A. Yes. Tr. 67:9-25.

Testimony of Philip Moulton referring to Moulton exhibit 7:

A. And it shows – here's the draw. Right about in there would be Hartvigson's house and taking water across to the Lemhi River area, right in through here. Tr. 68:23-25.

Testimony of Phillip Moulton regarding natural water heading down Harvigson Draw:

A. And when that snow melts – you know, the water's got to go downhill, and it goes down here sometimes. It goes down – naturally, it goes down towards this draw, unless its diverted someplace else. Naturally, its going to go right down this draw that goes right to Hartivigsons. Tr. 121:11-21.

Testimony of Kerrie Neal Cheney regarding water traveling across Lemhi Back Road, the capacity of the south culvert, and spring discharge from the Hartvigson draw:

Q. But you have observed water flowing through the south culvert and across that waterway?

A. There has been water there.

Q. Okay. And the – in your duty do you know the approximate capacity of a 12-inch culvert, as far as cfs?

A. It would probably carry about 3, 4 cfs, a 12-inch culvert would.

Q. And there's been testimony of a request of 3.25 by Mr. Moulton. So that culvert should normally carry that capacity?

A. Yes, it should carry that capacity.

Q. And the ditch that you cleaned out, it, likewise, can carry that capacity?

A. It's well-capable of carrying way more than that, yes.

A. I worked with Verdell quite a bit, trying to figure out – and Moulton. We've had several meetings, trying to figure out what the best actions were. We put in several different options, trying to see what would work. I walked up into that draw, from the bottom to the top, clear up

into the pond, where they set the end of the –his 40 acres there, where he uses that water to sub out from there. I've walked the full length of that four or five times through the year. As the water come – as the water comes down – a lot of it goes underground way early, and then comes – resurfaces again further down the draw. And there are several springs that come out of both sides of the hill, above where the bentonite draw comes out. So I've been up and down it quite a bit, checking out. And I've – we tried different things to see what would work and what wouldn't work. And so here we are again today. Tr. 168;18-25,169:1-6.

Testimony of Jim Skinner regarding previous flows across Hartvigson draw, relationship with Hartvigson:

Q. And I understand it would vary, but what quantities of wastewater would you possibly send down the draw?

A. After we had used this water from three to five times, it was – there was water, yes, but not a lot.

Q. Can you give the court an approximate quantity?

A. At the most, probably 3 – 3 to 31/2 cfs. Tr. 217:5-12.

A. Well, two or three years ago, when – I think it was in January – we had probably a foot of snow up there, and then it rained. And that was the highest water I'd ever seen, but it was hard to get a visual because both culverts were blocking. It was all running down the roads, scattered all over. But I would say there would have been 6 or 7 cfs, you know, coming down, with no irrigation water diverted. Tr. 228: 10-18.

Appellant's expert Roger Warner regarding natural watercourse:

Q. And would you agree with me that in order for a natural watercourse to exist, it doesn't need to be perennially filled with water; doesn't have to flow year-round?

A. Oh, no, it doesn't have to be.

Q. And based on your visit to the area, this Y that we're talking about – the area that goes down the draw, would you consider that a natural watercourse?

A. I think so. I mean, that's even more deeply incised, as you drop down below the Y. You know there's just no other place to go. I mean, that's not even a remotely level area. I mean, it's a V-shaped stream. It all goes down to that location.

Thus, for over a century water has been traveling through the Hartvigson draw, and across the Hartvigson ranch. Wastewater, springwater, rainwater, and runoff from the nearby Beaverhead mountains and Great Divide. As with all free flowing, run-off fed streams, throughout the year Pratt creek fluctuates from a blown out gushing creek, to a small trickle. These fluctuations affect the amount of water traveling downhill and crossing the Hartvigson draw. However, there was sufficient evidence proving that an easement or servitude of 3.25 cfs would adequately control the highest foreseen fluctuation from Pratt Creek, or other run-off producing event. Likewise, there was sufficient evidence that 3.25 cfs has previously traveled through the Hartvigson draw, and across the Hartvigson ranch, and that the ditch and culvert could accommodate transfer of 3.25 cfs.

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court properly granted a prescriptive easement in favor of Moulton, across the Hartvigson property for 3.25 CFS of water.

B. Whether the District Court properly granted a natural servitude in favor of Moulton, across the Hartvigson property for 3.25 CFS of water.

C. Whether the District Court's amended judgment is clear, and provides a ruling based on prescriptive easement, and natural servitude, allowing passage of 3.25 CFS through the Hartvigson draw and across the Hartvigson property.

III. STANDARD OF REVIEW

Following a bench trial, this Court's review "is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 346 P.3d 286 (2015) *citing Borah v. McCandless*, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009). " [T]his Court will liberally construe the trial court's findings of fact in favor of the judgment entered" and "will not set aside a trial court's findings of fact unless the findings are clearly erroneous." *Id.* However, this Court exercises free review over matters of law and is not "bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented." *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 194, 321 P.3d 739, 744 (2014).

It is the province of the District Court acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. However, we exercise free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Brown v. Greenheart*, 187 Idaho 156, 355 P.3d 1 (2014) citing *Hardy v. McGill*, 137 Idaho 280, 285, 47 P.3d 1250, 1255 (2002) (quoting *Conley v. Whittlesey*, 133 Idaho 265, 269, 985 P.2d 1127, 1131 (1999)).

IV. ARGUMENT

A. THE DISTRICT COURT PROPERLY GRANTED A PRESCRIPTIVE EASEMENT IN FAVOR OF MOULTON, ACROSS THE HARTVIGSON RANCH FOR 3.25 CFS OF WATER.

Prescriptive easements for water in Idaho require that: "The dominant landowner must submit 'reasonably clear and convincing' proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient tenement, for the prescriptive period." *West v. Smith,* 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973) (footnotes

omitted). Idaho Code section 5-203 provides that the statutory period is 20 years, with an effective date of July 1, 2006. Idaho Code § 5-203.

Regarding the "continuous" element, "it is unnecessary for the dominant landowner to be bodily on the land every minute. It is enough that the frequency of use is normal for the type of easement claimed. *Merrill*, 109 Idaho at 48 (Ct. App. 1985) *citing* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 8.7 at 455 (1984). This holding makes sense in the irrigation and water law context, as naturally there may be times throughout the year when a water system is dry.

Regarding the scope of the easement "it is incumbent upon the party claiming an easement by prescription to show the extent of that easement," and "the right need only be exercised without substantial change for the prescriptive period. It does not need to be exercised without any change whatsoever." *Merrill* 109 Idaho at 53 (1985) *citing Loosli v. Heseman, supra.*

Finally, the use "must be hostile, and cannot be by acquiescence or consent." *Weitz v. Green*, 148 Idaho 851, 860, 230 P.3d 743, 752 (2010) *citing Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997).

In *Merrill*, much like this case, plaintiffs brought an action to establish their rights to easement across the property of Defendants, claiming easements for the purpose of diverting surface water and irrigation waste water, to defendant's property. Plaintiffs also sought injunctive relief to prevent Defendant's further interference with the man made ditch used to divert this water. *Merrill* 09 Idaho 46, 48 (1985).

The servient tenement had knowledge of water traveling through the draw, so the remaining elements are addressed below.

1. ***Moulton proved the scope of the prescriptive easement.***

There was sufficient evidence at trial to prove that 3.25 cfs of water had regularly traveled through the Hartvigson Draw, and across the Hartvigson Ranch. Lemhi County employee Kerri Neal Cheney testified that the ditch and the south culvert was 12 inches in diameter, and would carry 3.25 cfs of water. This testimony is compelling considering Mr. Cheney is a Lemhi County employee, and as such has spent time near and around the Hartvigson draw, Lemhi Back Road and the north and south culverts. Tr. 168: 18-25, 169:1-6. Regarding the South culvert, Mr. Cheney testified "there has been water there." Tr. 142:15. Mr. Cheney also testified extensively to existence of water in the Hartvigson draw and the springs located in the Hartvigson draw. 168: 18-25.

Jim Skinner, former owner of a portion of the Moulton Ranch testified that he had lived and worked on what is the present day Moulton ranch nearly continuously since 1957. Tr. 214: 22-25, 215:1-5. Mr. Skinner testified that before sprinkler irrigation, they would send 3 to 3.5 cfs of water down the Hartvigson draw and across the Hartvigson Ranch. Tr. 217:5-12. Mr. Skinner also testified that there is a "big marshy spring" at the bottom of that pasture. Tr. 229:16-20. Mr. Skinner also testified to six to seven cfs coming down the draw during a storm event. Tr. 228: 10-18.

Evidence at trial admitted by Appellants, and Olsons's own acts showed that at least, if not more, than 3.25 cfs had traveled through the Hartvigson Draw, and across the Hartvigson Ranch. Olson testified to using the springwater from the draw for irrigation.

Q. So – just so we're understanding each other, before 1990, the springwater coming out of the draw, during the irrigation season you would use that to irrigate the field that you've previously shown the judge; correct?

A. Yeah. It would come down through the north culvert, and irrigate the field there. Tr. 295:16-22.

A. You know at one time there was probably, oh, I don't know, 2 cfs, with a lot of mud in it, filling my ditches (testifying about the 2008 irrigation season). Tr. 302:5-7.

Olson also testified to the correlation between higher snow years, and increased water traveling through the draw.

A. And in 2008 it was back to what I would call a normal snowpack, and so there was a lot of water that came out of that draw. Tr. 298:18:20.

Q. And during this irrigation season of 2010, the amounts of water you saw coming down the draw was more than you had seen in years previous to 2008, 2007; is that correct?

A. Yes. It just seemed like it got more intense, more and more water. Our precip – our annual precip was up. The snowpack was good. So we seen more water come out of there.

A. There was a large amount of water came out that in 2011. I would have guessed there's probably close to – I would say between 5 and 6 cfs came down – across the road. There was also testimony that the Hartvigson ranch had a wastewater right and a springwater right (totaling .80 cfs) for irrigation and domestic use. Tr. 291:23-25, 292:1-3.

The testimony above shows that water has been traveling through the Hartvigson draw, and across the Hartvigson ranch for at least more than a century, and probably much longer. Witnesses at trial testified to the existence of .80 cfs of Hartvigson water rights through the draw then 2, 3, 3.25, 3.5, 5, 6 and 7 cfs traveling through the draw, and onto the Hartvigson ranch. This evidence is sufficient for a trial court to find a prescriptive easement of 3.25 cfs appropriate. The analysis under the circumstances of free-flowing irrigation water is not proving an exact amount, rather that the amount of water is exercised without substantial change for the prescriptive period, not exercised without any change whatsoever. In *Merrill* this court reviewed trial testimony which

indicated that during the 20 year period the amount of water varied between ten and fifty miner's inches, but that fifty miners inches frequently flowed into the community ditch. *Merrill,* 109 Idaho at 53 (1985). The *Merrill* court did not find the required abuse of discretion to set aside the finding of 50 miner's inches. Likewise, this court should not set aside the 3.25 cfs granted to Moulton at trial since, as provided above, this finding was supported by a similar evidence relied upon by the Merrill Court. A precise measurement is not necessary, nor a precise and consistent average flow, as evidenced in *Merrill.*

2. Moulton's easement was open, notorious, and hostile under a claim of right.

The testimony provided above shows that Moulton, Skinner and their predecessors sent volumes of water down the Hartvigson draw and across the Hartvigson Ranch. The existence of this water in the Hartvigson draw was first documented in 1898 by the map admitted as Moulton exhibit 15. The 1939 map admitted at exhibit 7 further proves that water has been sent down the Hartvigson draw in an open an notorious manner for decades. Finally, the witness testimony from the remaining parties, and Lemhi County employees support the fact that Moulton, and all of his predecessors in interest have been sending water down the Hartvigson Draw in an open and notorious manner.

Appellant's argue for various reasons that the existence of the wastewater right cannot be used to support an argument for prescriptive easement. Whether the Hartvigson right was used or not, the right was applied for and decreed. So as far back as 1896 there was at least .8 cfs of water running through the Hartvigson Draw and across the Hartvigson ranch, or the state of Idaho would have been unable to decree such a right. While Hartvigson or Olsen's use of the .8 cfs decreed right may be permissive, there was no evidence at trial that the spring-water right to the home have been used in the last 20 years statutory period. The existence of the Hartvigson .8 CFS decreed water rights, even though permissive, are noteworthy to show water has traveled down the

Hartvigson Draw for over a century. In 1990 Appellants stopped sending water through the south culvert when not irrigating, and sent the water toward the new French drain system installed by the County. Tr. 295:16-25, 269:1-20.

3. Moulton's easement was continuous and uninterrupted for the statutory period.

Although not addressed by Appellants, the final factor of prescriptive easement is the 20 year statutory time frame. As provided above, water has traveled through the Hartvigson Draw, and across the Hartvigson Ranch for well over a century. Jim Skinner and Phillip Moulton each testified that the water has been traveling in the same manner through the draw since at least 1971. Based on the evidence presented at trial, the statutory time frame for prescriptive easement is met.

B. THE DISTRICT COURT PROPERLY HELD THAT A NATURAL WATERCOURSE EXISTS THROUGH THE HARTVIGSON DRAW AND ACROSS THE HARTVIGSON RANCH, AND PROPERLY GRANTED A NATURAL SERVITUDE IN FAVOR OF MOULTON, ACROSS THE HARTVIGSON RANCH FOR 3.25 CFS OF WATER

1. Natural watercourses

The Idaho Supreme Court set forth the requirements needed to ascertain the duty of care an upstream water user owes to downstream property owners. *Burgess v. Salmon River Canal Co., Ltd.*, 119 Idaho 299, 805 P.2d 1223 (1991) involved the Salmon River Canal Company, which constructed and operated the Salmon Falls Dam for irrigation purposes only, and downstream landowners whom alleged that they were flooded after an exceptionally wet and snowy winter of 1983-1984.

The court set forth the following standard of care for an upstream water user:

> We now consider what duty of care, if any, SRCC owed to the downstream property owners. In order to ascertain the applicable duty of care, we must determine: (1) whether SRCC had a right to discharge water into the original creek bed; and (2) the limitations of this right.
>
> In order to determine whether SRCC had a right to discharge water

> into Salmon Falls Creek, we must find that Salmon Falls Creek is a natural watercourse. If it is no longer a natural watercourse, SRCC could not discharge waters into it. *Dayley v. City of Burley,* 96 Idaho 101, 524 P.2d 1073 (1974).
>
> This Court has defined a natural watercourse or drain as:
>
> [A] stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Loosli v. Heseman, 66 Idaho 469, 481, 162 P.2d 393, 398 (1945). *Burgess, 119 Idaho* 299, 305 (1991).

This Court then applied the definition above to the facts of the case and held that Salmon Falls Creek met the definition of a natural watercourse, finding that:

> before the dam was completed in 1911, Salmon Falls Creek flowed unimpeded to the Snake River. The dam altered the flow of the creek but did not alter the original channel below the dam. Evidence showed that approximately 25 cfs seeps through the abutments of the dam into the original channel. As this water flows to the Snake River, it is joined by water from Cedar Creek, Devil Creek, Deep Creek, and other smaller streams. This combination of waters causes a substantial and constant flow of water in the original creek bed that allows pump operators to operate pumping stations on Salmon Falls Creek and use the water for irrigation purposes. Therefore, it is evident that there exists a definite and constant flowing stream of water within the original channel. Since Salmon Falls Creek meets this criteria of a natural watercourse, SRCC had the right to discharge water into the original channel. *Id.*

The court then analyzed the limits of a right to discharge water in a stream channel, noting that in *Dayley v. City of Burley* the Court reaffirmed adherence to the civil law rule that recognizes a servitude of natural drainage between joining landowners. This rule requires a lower landowner to accept the suface waters that naturally drain from the upper landowner. *Id. See also Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945). This Court also recognized that a servitude in favor of an upstream user does not mean that an upper landowner can "artificially accumulate the water

only to release it upon the lower landowner in an unnatural concentration." *Burgess, 119 Idaho* 299, 305 (1991), *citing Teeter v. Nampa & Meridian Irrigation Dist.*, 19 Idaho 355, 114 P. 8(1911).

The Idaho Court of Appeals more narrowly defined the definition of "watercourse" as a watercourse with a regular seasonal flow, and additional storm flows. A watercourse does not require a constant stream of water. *Smith v. King Creek Grazing Ass'n*, 105 Idaho 644, 648 (1983) 671 P.2d 1107.

Based on the above standard and the District Courts findings of fact, a natural watercourse does in fact exist from Pratt creek, through the Moulton Ranch, Hartvigson Draw, and across the Hartvigson Ranch. Moulton Exhibit 15 indicated that this watercourse was first mapped in 1898, and testimony at trial supported that the watercourse mapped in 1898 is located in the same location today. Appellant's own expert witness, Roger Warner testified as follows regarding the existence of a natural watercourse:

Q. And would you agree with me that in order for a natural watercourse to exist, it doesn't need to be perennially filled with water; doesn't have to flow year-round?

A. Oh, no, it doesn't have to be.

Q. And based on your visit to the area, this Y that we're talking about – the area that goes down the draw, would you consider that a natural watercourse?

A. I think so. I mean, that's even more deeply incised, as you drop down below the Y. You know there's just no other place to go. I mean, that's not even a remotely level area. I mean, it's a V-shaped stream. It all goes down to that location.

There was testimony at trial, maps, and photo exhibits which prove that the watercourse consisted of a definite channel, bed banks and sides, and discharged into another stream (eventually the Lemhi River). In addition to testimony, the Court was able to physically view the natural watercourse during the trial when the parties traveled to the Moulton ranch for viewing.

Based on the foregoing, the court properly concluded the water traveling from Pratt creek, through the Moulton ranch and Hartvigson Draw, and across the Hartvigson ranch was a natural watercourse. As provided above, there was sufficient evidence presented from both sides that 3.25 cfs of water had traveled through the natural watercourse. The District Court was not confused in so ruling, as argued by Appellants.

2. Natural watercourses can and do include wastewater, irrigation water and water diverted for irrigation purposes.

Appellants argue that the district court "was confused by the natural servitude doctrine and the prescriptive easement doctrine." App. Br. p. 30. Appellants also argue "the natural servitude doctrine is limited to natural water that flows, such as rain or snow melt and does not include irrigation water, wastewater, or water that is diverted for irrigation to be artificially accumulated and then "cast upon lower lands in unnatural concentrations." App. Br. p. 30.

In *Burgess*, this court found a natural watercourse, and therefore a natural servitude existed in Salmon Falls Creek. Salmon Falls Creek was dammed in 1911 for the storage of irrigation water, which was thereafter delivered via a canal system to local water users. The dam altered the normal stream flow of Salmon Falls Creek, and the only water now entering the creek is water that seeps out from the dam's rocky abutments. *Burgess 119 Idaho* 299, 302 (1991). The Court in *Burgess* specifically stated:

> Evidence showed that approximately 25 cfs seeps through the abutments of the dam into the original channel. As this water flows to the Snake River, it is joined by water from Cedar Creek, Devil Creek, Deep Creek, and other smaller streams. This combination of waters causes a substantial and constant flow of water in the original creek bed that allows pump operators to operate pumping stations on Salmon Falls Creek and use the water for irrigation purposes. *Id.*

The water argued over in Burgess was not "rain or snow melt" but rather seepage from a dam constructed to hold irrigation water. Nonetheless this Court declared a natural watercourse

existed. Likewise, in *Smith v. King Creek Grazing Ass'n*, 105 Idaho 644 (1983) 671 P.2d 1107. the water at issue was developed spring water that was being used to water cattle. This water was neither "rain or snow melt" rather a developed stock-water source. In Smith the Court found the existence of a natural servitude.

In this case there was ample testimony at trial that much of the water traveling down the natural watercourse, through the Hartvigson Draw and across the Hartvigson Ranch was spring water, rain-water, and run-off. Thus, Appellant's assertion that water diverted from Pratt creek cannot create a natural servitude is baseless.

Appellant's are correct that:

> a dominant land owner may not increase the burden upon servient lands by accumulating surface waters with man-made structures and discharging those accumulated waters, through an artificial channel, onto the lower lands. To obtain that right, he must establish an easement, by prescription or agreement, to discharge the altered flow. *Merrill* 109 Idaho 46, 54, (Ct. App 1985).

However in this case, there is no evidence that Respondent stores any of the water diverted from Pratt creek. To the contrary, the evidence showed that the Moulton system was free flowing, and that Moulton did not store any water on the system. Tr. 55: 12-18.

C. THE DISTRICT COURT'S AMENDED JUDGMENT IS CLEAR, AND PROVIDES A RULING BASED UPON PRESCRIPTIVE EASEMENT AND NATURAL SERVITUDE, ALLOWING PASSAGE OF 3.25 CFS OF WATER THROUGH THE HARTVIGSON DRAW AND ACROSS THE HARTVIGSON RANCH.

The District Court's amended Judgment provides:

> The watercourse that carries irrigation water from the Pratt Creek Diversion, through the Moulton Property, down the Hartvigson Draw, and ultimately onto the Hartvigson Ranch is a natural watercourse, and Moulton may send waste water down this natural watercourse through the Hartvigson draw and onto the Hartvigson Ranch in the amount of 3.25 CFS.

> Defendant and Cross-claimant Moulton also has a prescriptive easement for the drainage of surface waters down the Hartvigson Draw onto the Hartvigson Ranch in the amount of 3.25 cubic feet per second. R. p. 24.

Appellants argue the judgment is vague for various reasons, and pursuant to the holding in *Four Seasons v. Lakesites Prop. Owners Ass'n v. Dungan*, 781 S.W.2d 269, 271 (Mo. Ct. App. 1989)[2], which states "a judgment that is indefinite and vague can be voided." Appellant's argue that an Idaho District Court judgment can be set aside based on the standard of review set forth above, succinctly stated as "clearly erroneous," and whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law.

First Appellants allege the District Court failed to state whether the natural watercourse was pursuant to the doctrine of natural servitude, or prescriptive easement, and that Moulton cannot, under Idaho law "send diverted Pratt Creek water through the Hartvigson ranch pursuant to the doctrine of natural servitude." App. Br. p. 31.

The leading Idaho cases on an upstream landowners right to send water through a natural waterway are *Burgess*, and *Smith* (cited above) which set forth that a natural watercourse is the requirement to obtain a natural servitude. Both cases focus the analysis on the existence of a natural watercourse. In fact a key word search of the *Burgess* case reveals that the term natural servitude was used one time, servitude was used seven times, and natural watercourse was used six times. *See generally Burgess*, 119 Idaho 299 (1991).

The Smith case reveals that the term "natural servitude" was never mentioned, while the term servitude was used four times, and natural watercourse was used eighteen times, and watercourse was used 52 times. *See generally Smith* 105 Idaho 644 (1983).

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[2] *Four Seasons v. Lakesites Prop. Owners Ass'n v. Dungan* is a 1989 Missouri case. Appellants fail to provide any Idaho or Ninth Circuit case precedent for their vagueness argument.

The key here is that the term natural watercourse by its meaning, and usage in court opinions, grants an upstream user a right, or "natural servitude" to send water down the natural watercourse. Therefore, the District Courts judgment which finds the existence of a natural watercourse, and grants Moulton the right to send 3.25 cfs of water through the natural watercourse is not clearly erroneous, or unsupported by the evidence or findings of fact. A finding of the existence of a natural watercourse means that a natural servitude exists.

Next, Appellants argue that since the term "surface waters" was never used at trial, it is unclear to what the District Court is referring to in the judgment. App. Br. p. 31. Surface waters is a term used throughout Idaho jurisprudence. It simply means water flowing above ground, or on the surface. "Respondents contend that the same rule is to be applied to the appropriation of these subterranean waters as is applied to surface waters, namely, first in time is first in right." *Hinton v. Little*, 50 Idaho 371, 374 296 P. 582 (1931). "The ground water in the Aquifer is hydraulically connected to the Snake River and tributary surface waters at various places and in varying degrees." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 794, 252 P.3d 71 (2011). "The servitude requires a lower landowner to accept the surface waters that naturally drain from the upper landowner." *Burgess* 119 Idaho 299, 305 (1991). Some of the water traveling through the Hartvigson draw is "surface water." Thus the Judgment granting Moulton a prescriptive easement for the drainage of surface waters down the Hartvigson Draw and onto the Hartvigson Ranch in the amount of 3.25 cubic feet per second is neither clearly erroneous, nor unsupported by the evidence or findings of fact. The term surface water clearly means water on the surface, as opposed to underground water.

Third, Appellants argue that the judgment fails to clarify whether Moulton can send 3.25 cfs of water down the draw for each doctrine (prescriptive easement and natural servitude) for a

total of 6.50 cfs, or if Moulton has a total easement/servitude for 3.25 cfs across the Hartvigson Ranch pursuant to the rulings. App. Br. p. 33.

The evidence at trial showed that at most, during a large rain on snow event, there was 6 to 7 cfs of water flowing through the draw. A plain reading of the District Court's judgment provides Moulton a cumulative right to send 3.25 cfs of water through the draw, consisting of waste and surface water, pursuant to the doctrine of natural servitude, and prescriptive easement. Since the evidence supports a finding of 3.25 cfs, and not a finding of 6.5 cfs under two doctrines, 3.25 cfs is the proper amount, and the amount ordered by the court. This finding in the judgment is neither clearly erroneous, nor unsupported by the evidence or findings of fact.

Finally, Appellants argue that the Judgment is vague since it fails to "state the location of the servitude or easement through the Hartvigson Ranch." App. Br. p. 33. As explained above, there was sufficient evidence presented at trial regarding the location of the natural watercourse from Pratt Creek, across the Moulton Ranch, through the Hartvigson Draw and across the Hartvigson Ranch. It would be difficult to draft and attach a legal description for such an area as this natural watercourse. The natural watercourse is well defined, by its bed, bank and channel. That is why the District Court properly deemed it a natural watercourse. The watercourse is easy to see if you are physically on the property, (as all parties and the court were at trial during the site visit.) The court's description of "the watercourse that carries irrigation water from the Pratt Creek Diversion, through the Moulton Property, down the Hartvigson Draw, and ultimately onto the Hartvigson Ranch" is a "specific and certain description of the lands such that rights and liabilities are clearly fixed on all parties affected thereby and so they may readily understand and comply with the requirements thereof," as set forth in *Kosane v. Kopp*, 74 Idaho 302, 261 P.2d 815, 818 (1953). The judgment describes where the water runs, which is specific and certain, and neither

clearly erroneous, nor unsupported by the evidence or findings of fact. Everyone involved in this case could walk you right to the natural watercourse referred to by the court.

In the event the Court does conclude there is no reason for the District Court to retry the case, Idaho Rule of Civil Procedure Rule 60B provides:

> (a) Corrections based on Clerical Mistakes, Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.
>
> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> 1. Mistake, inadvertence, surprise, or excusable neglect;
>
> 2. Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> 3. Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> 4. The judgment is void;
>
> 5. The judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> 6. Any other reason that justifies relief.

Accordingly, if the Court finds that the District Court Judgment is vague, the Supreme Court could simply request that the District Court clarify the Judgment as set forth in I.R.C.P. 60B.

V. REQUEST FOR ATTORNEY'S FEES

"The Court will award attorney fees and costs on appeal under Idaho Code §12-121 when the Court believes that the action was pursued, defended, or brought frivolously, unreasonable, or without foundation. *Sweet v. Foreman*, 159 Idaho 761, 767, 367 P.3d 156. Based on the standard

of review, and the District Court's judgment, Appellants have pursued this appeal frivolously, unreasonably and without foundation. Accordingly, Respondents are entitled to attorney fees.

VI. CONCLUSION

Based on the foregoing, and with deference to the clearly erroneous standard of review, this honorable Court should uphold the Judgment of the District Court.

DATED: This 26th day of July, 2017.

GILES & THOMPSON LAW, PLLC

Chip Giles
Attorneys for Plaintiff/Appellant/Cross-Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of July, 2017, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Benjamin C. Ritchie, ISB No. 7210 Moffatt, Thomas, Barrett, Rock & Fields, Chartered 412 W. Center Street, Suite 2000 Post Office Box 817 Pocatello, Idaho 83204-0817 Telephone: (208) 419-3860 Facsimile: (208) 232-0150 bcr@moffatt.com Attorneys for Appellants	[ ] [ ] [ ] [X] [ ] [ ]	U.S. Mail, Postage Prepaid Express Mail Hand Delivery Facsimile Transmission Federal Express Electronic Mail
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