

4-15-2009

# Brown v. City of Pocatello Clerk's Record v. 2 Dckt. 35992

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Vol. 2 of 3

IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

LINDA BROWN

Plaintiff-Appellant \_\_\_\_\_ and

vs. **LAW CLERK**

CITY OF POCA TELLO

Defendant-Respondent \_\_\_\_\_ and

David D. Nye \_\_\_\_\_ District Judge

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

Lowell N. Hawkes

LOWELL N. HAWKES, Chartered

Attorney X For Appellant X

Blake G. Hall

ANDERSON NELSON HALL SMITH, P.A.

Attorney X For Respondent X

Filed this \_\_\_\_\_ day of \_\_\_\_\_  
2008

**FILED - COPY**  
**MAR 15 2009**

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

Clerk \_\_\_\_\_  
Deputy \_\_\_\_\_

35992

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

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

**CLERK'S RECORD**

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

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

For Appellant:

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

For Respondent:

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

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## **VOLUME I**

## **VOLUME II**

Linda Brown vs. City of Pocatello

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



## Linda Brown vs. City of Pocatello

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

Linda Brown vs. City of Pocatello

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

Date: 3/3/2009

**Sixth Judicial District Court - Bannock County**

User: DCANO

Time: 08:46 AM

ROA Report

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

Linda Brown vs. City of Pocatello

Linda Brown vs. City of Pocatello

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

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

FILED  
 BANNOCK COUNTY  
 CLERK OF DISTRICT COURT  
 2008 JUL -1 AM 11:33  
 BY *[Signature]*  
 DEPUTY CLERK

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

---

LINDA BROWN;	)	
	)	Case No. CV-2007-3303-OC
<i>Plaintiff,</i>	)	
	)	
vs.	)	
	)	<b>AFFIDAVIT OF</b>
CITY OF POCATELLO, a Municipal	)	<b>LINDA BROWN</b>
Corporation;	)	
	)	
<i>Defendant.</i>	)	

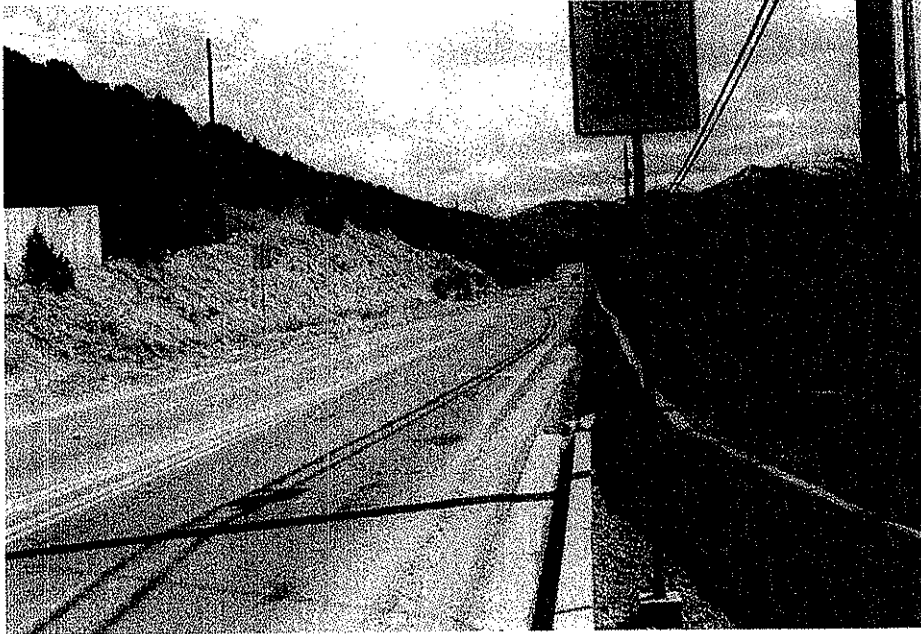
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STATE OF IDAHO     )  
                                   : ss  
 BANNOCK COUNTY    )

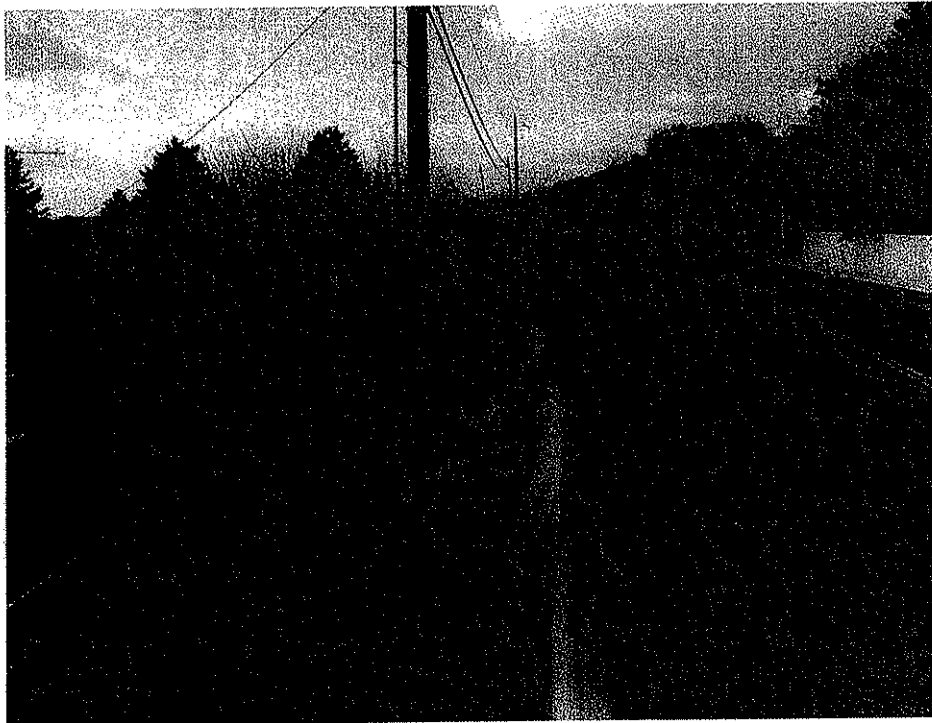
LINDA BROWN, being first duly sworn states as follows:

1. I am the Plaintiff herein and make this affidavit on personal knowledge and in support of Plaintiff's Motion for Summary Judgment.
2. I have lived at 2300 Darrell Loop, Pocatello, Idaho, since April 15, 2001. **Linda Brown Deposition 4:25-5:7.**

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

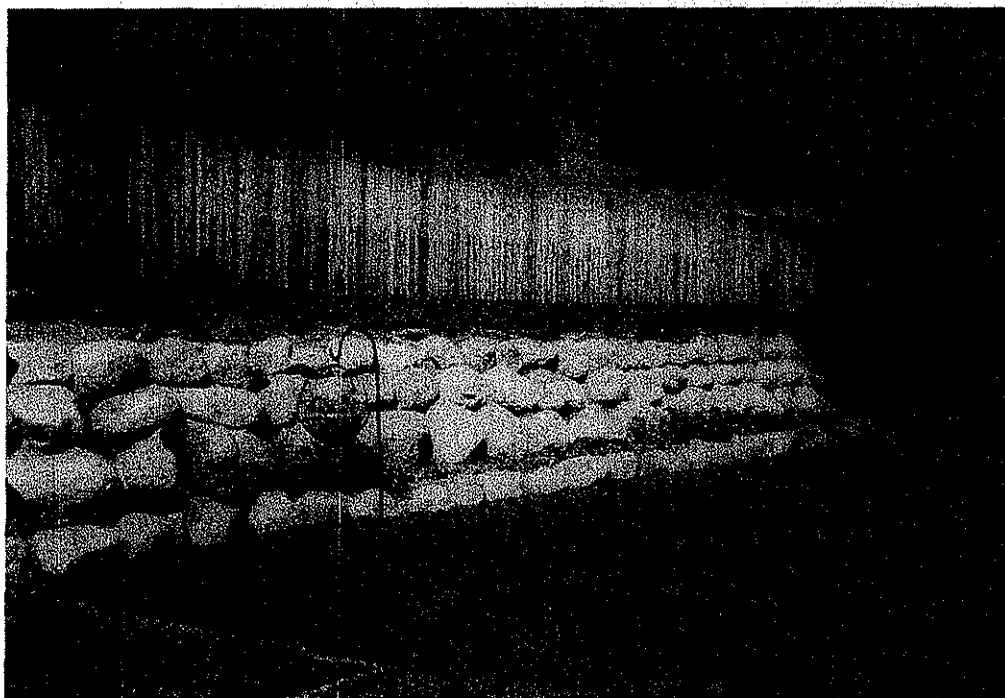


the Boy Scouts of America offices “downhill” north of my home.



4. Between June 2005 through August 2005 work on the Pocatello Creek Road was done which ended directly behind my home. **Linda Brown Deposition 62:21-63:9.** The Defendant City of Pocatello negligently altered and reconstructed the Pocatello Creek Road roadway from its prior “water-safe” condition so as to create, among other things, a new roadway depression and water run-off pattern that had *not* previously existed was created and that did not damage adjacent private properties.

5. Prior to this 2005 road work/construction, neither my home nor yard had been flooded from roadway run-off water. **Linda Brown Deposition 12:12-19; 64:20-65:6.** My backyard had never been flooded:

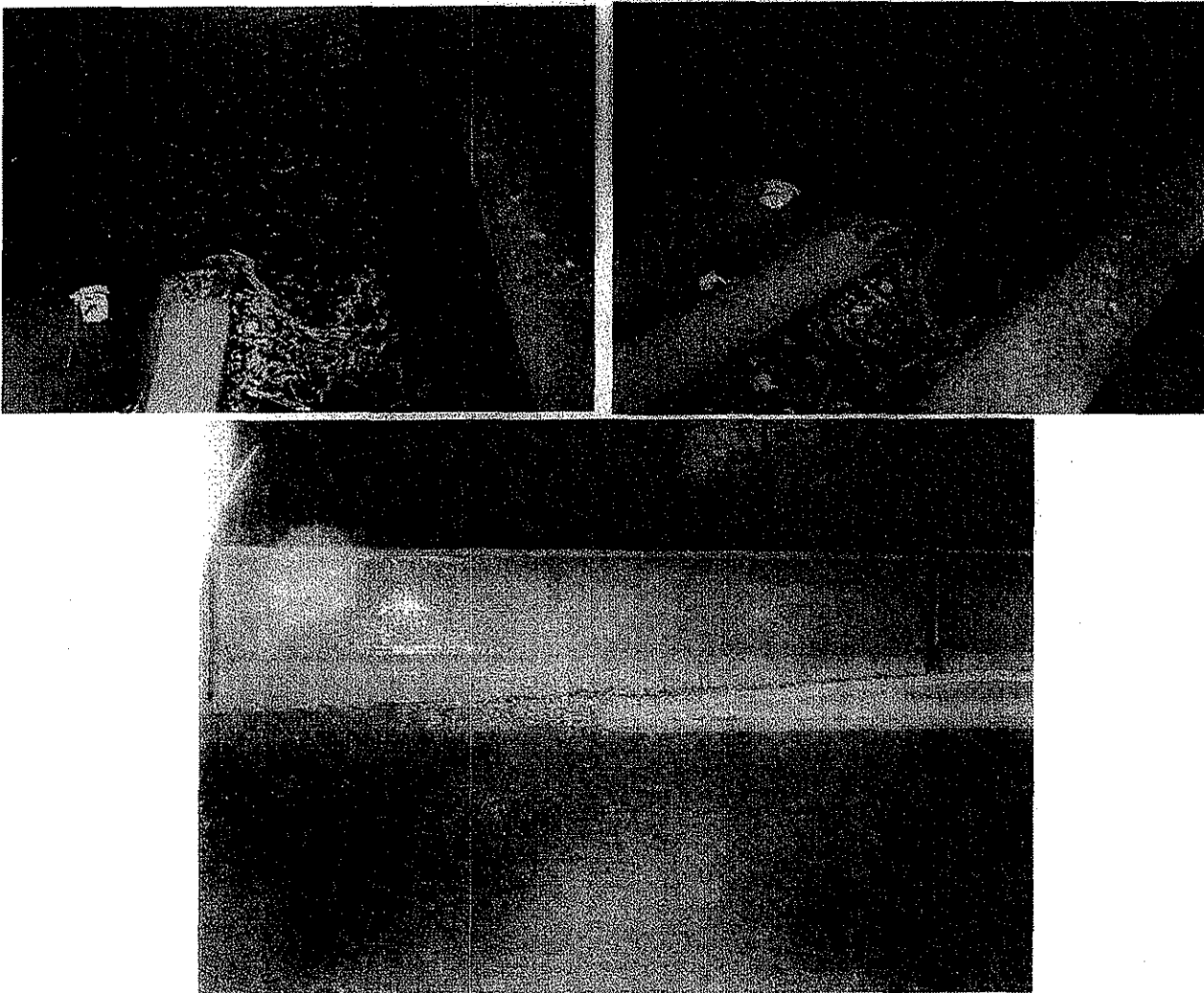


6. Following the 2005 Pocatello Creek Road work/construction, my yard and home has been subjected to numerous, frequent and inevitable occasions of flooding by water coming off of Pocatello Creek Road and into my yard and home.

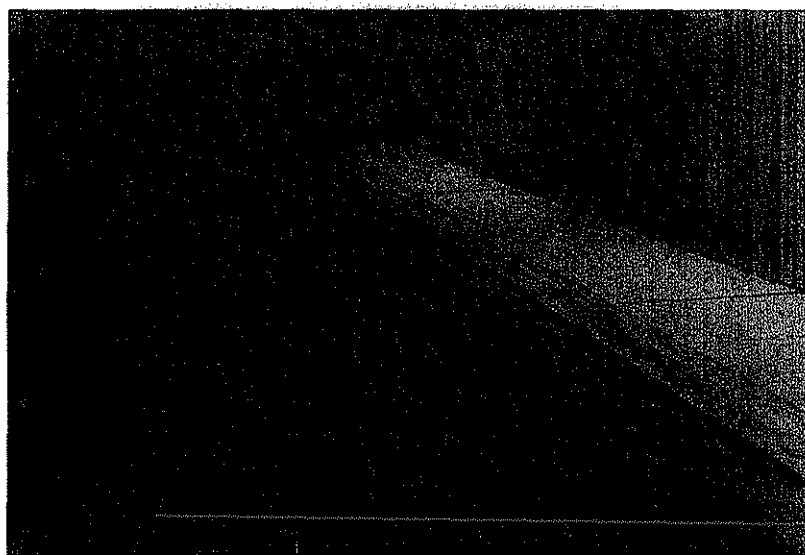
7. Ultimately — *but only after I was required to file this lawsuit* — did the City add an asphalt-to-cement barrier to keep roadway water on the road shoulders and stop the flooding from runoff into my yard and home.

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

9. **Water Does Not Reach the Curb and Gutter.** The project has a *partial* curb and gutter, but “The water will not run to that curb and gutter” it pools or stalls before it gets there:



10. **Drain is on the opposite side of the Road.** The roadway as reconstructed in the summer of 2005 allowed roadway water to pool on and adjacent to the roadway as there was no adequate design or means to properly and safely divert water without it passing onto my property; a gutter drain has been installed on the *east-uphill* side of the road but *not* on the west-downhill side of the road adjacent to my home *where it is needed.* **Linda Brown Deposition 108:25-109:7.**



11. **Flood: February 28, 2006.** My home initially flooded February 28, 2006. I came home from work at the PMC to find my “basement was entirely covered in water” from “three inches deep” to “a half inch deep.” **Linda Brown Deposition 8:11-24.** I went in the back yard and saw that the “landscaping in the backyard had been eroded away and there was a lot of silt and dirt” washed from the upper garden area onto the lawn, and “the water had come across the lawn and into the house.” **Linda Brown Deposition 10:9-15.** It was evident that the “flooding on that February 28, 2006, flood”



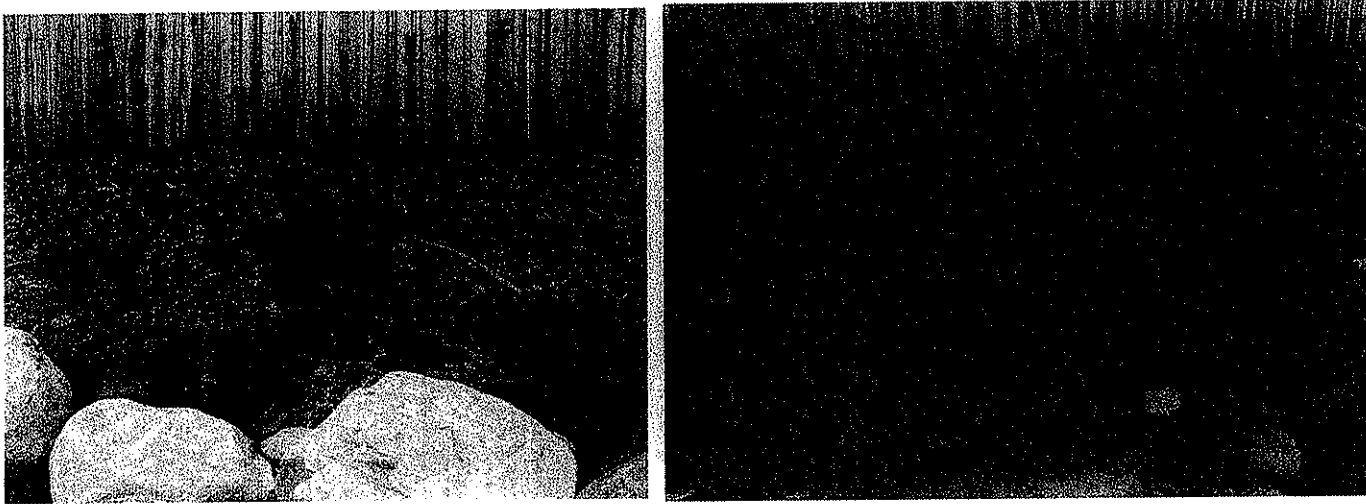
was caused by “the water” and “had come off from Pocatello Creek Road” based upon “the way that the backyard was eroded.” **Linda Brown Deposition 12:12-16.** There was a debris-water line on the window which showed where the water level had been inside the window well and where “the water had come in through the back yard into the house.” **Linda Brown Deposition 9:12-16.**

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

13. The roadway water flowed off Pocatello Creek Road and under my back yard fence as evidenced by the hole in this photo,



carrying debris and soil and rock with it into my yard and across my yard and...



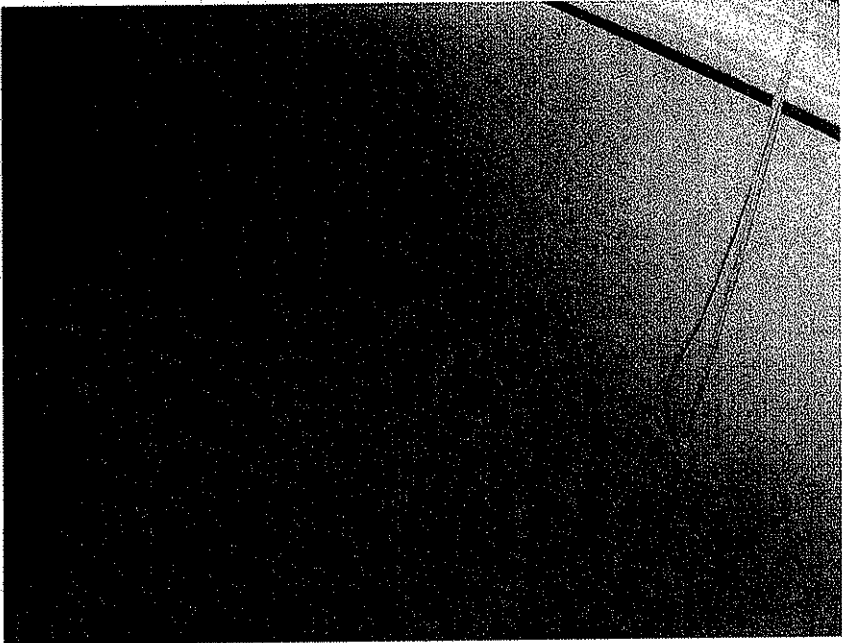
With water pouring under the fence as seen in this photo,



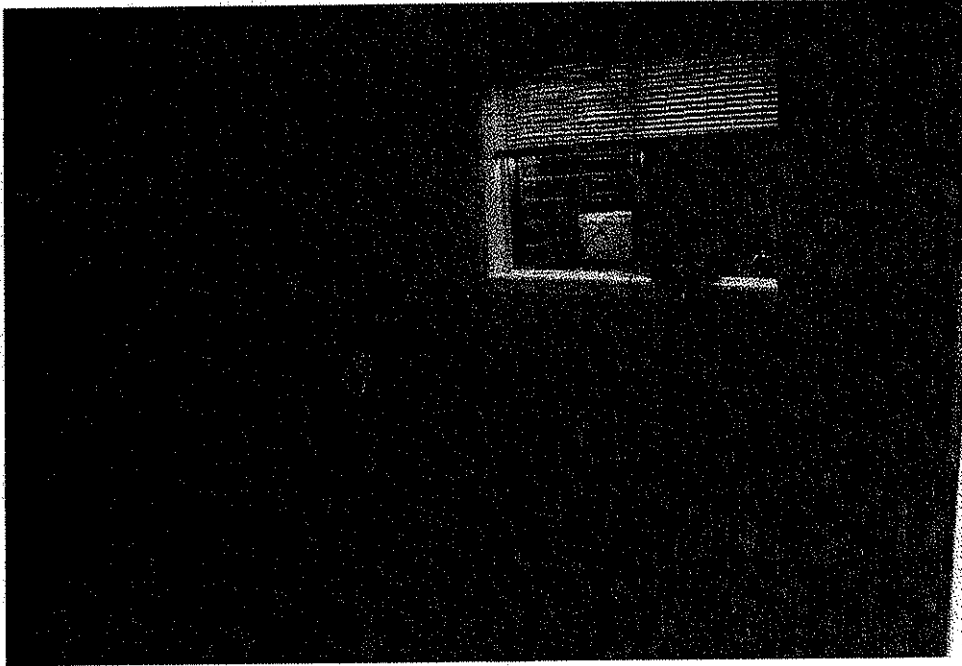
into my home through windows and...



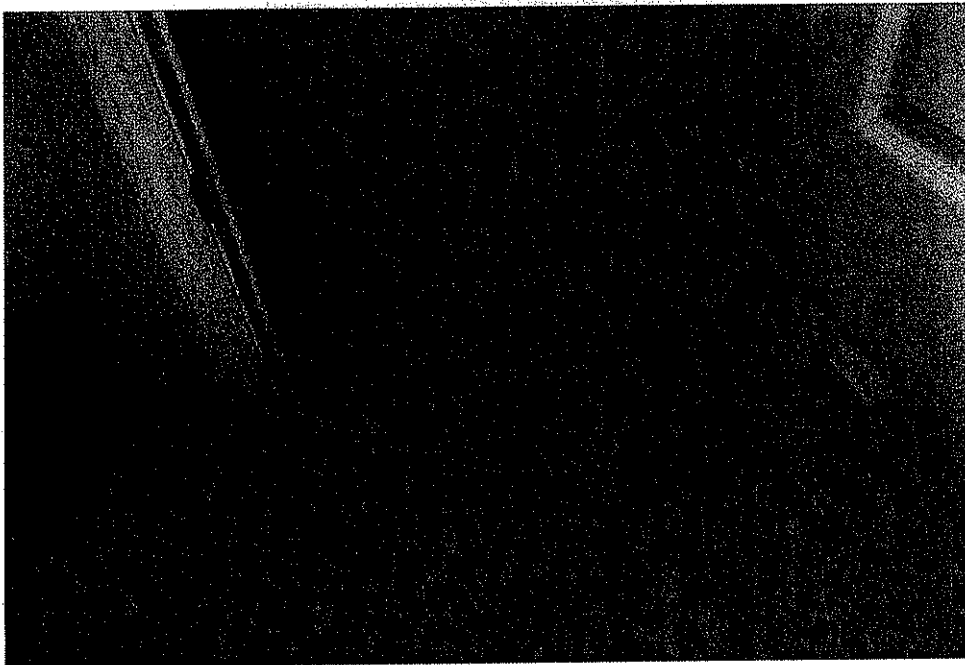
into and down my walls and...



onto floors and under carpeting...



and into other rooms and under tile.



14. Never Flooded Before. This flooding had never happened before (Linda Brown Deposition 12:17-19) in the nearly five years I had lived in my home — since April 15, 2001. Linda Brown Deposition 4:25-5:7.

15. Clean-up. I contacted Service Master and “They sent a team in with high-powered vacuums to suck up the water. All of the furniture, everything that was in the basement was moved up to the family room.

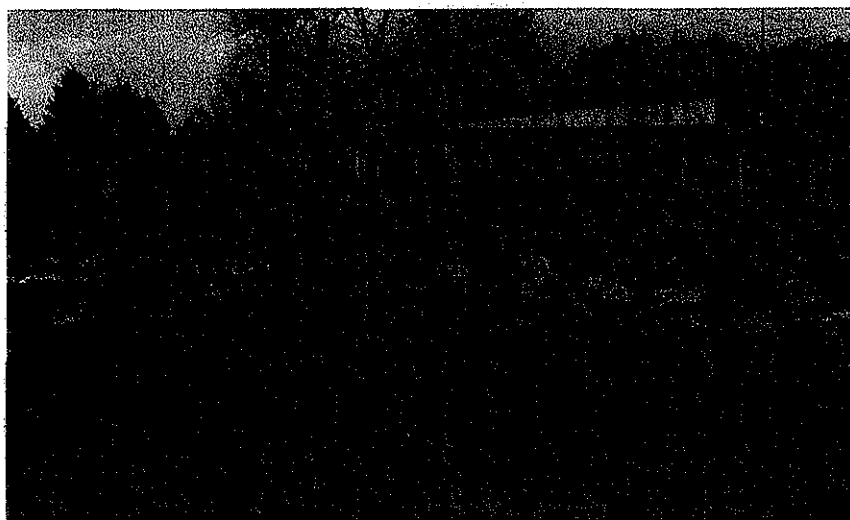


All the carpets were pulled, the padding was destroyed, and the carpets were re-laid back down on the floor to dry to see if they could be salvaged. They brought in big fans and heating units to dry out the entire basement.” Linda Brown Deposition 11:5-13. I had other contractors come in to respond to the damage. The “carpet was not salvageable in the bedroom so it was replaced by Rug Rat Floor Covering.” Linda Brown Deposition

**11:16-21.** I also “did a lot of repairs with the help of” my son at that time, including sheet rock replacement, “taking up the carpet” and some of the baseboards and some of the trim around the window.” **Linda Brown Deposition 12:1-6.** My friend, Rod Silcock, “came in and helped with some of the trim work and some of the Perfa-taping and other items that needed to be repaired.” **Linda Brown Deposition 12:6-9.**

16. **Subsequent Frequent and Inevitable Flooding.** Since that first flood, I have experienced the frequent and inevitable flooding as set forth herein.

17. **Flood: April 16, 2006.** On April 16, 2006, I was at home during a storm when water off Pocatello Creek Road again began flooding her backyard and “was able to observe where the water was coming from, which was off from Pocatello Creek Road.” **Linda Brown Deposition 12:20-13:1.** I “dug a trench” in my “lawn to divert the water away from” the “house” and was able to divert the water to protect against further damage. **Linda Brown Deposition 13:18.** That trench is seen in this photo:



18. **Plaintiff Contacted the City.** After this flood, I contacted the City of Pocatello offices and was referred to “Cac Turner” and I told him that I “had been experiencing flooding from Pocatello Creek Road and that it was entering my yard and also my home.” **Linda Brown Deposition 13:19-14:14.**

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

20. **City on Notice.** I filed a “Claim for Damages or Injury” dated April 25, 2006 with the City of Pocatello, and reported the “Flooding to basement & backyard” and included photos and described the flooding since the Pocatello Creek Road work alterations. A copy of which is attached hereto as **Exhibit A (See also Affidavit of Lindell Turner, Exhibit E, evidencing receipt by Defendant).**

21. **Flood: October 4, 2006.** On October 4, 2006, during a rainstorm, I was at home and “went upon the road and took photos and I “could see exactly why the water was entering my property” because the “new portion of the road was built too high and would not allow the proper drainage of water coming down Pocatello Creek Road into the city. *It stopped [pooled] right at my home.*” **Linda Brown Deposition 15:18-16:1.** While this caused additional “erosion” to my “landscaping,” fortunately, my diversion ditch that I had dug in my yard kept the flood water from reaching my home. **Linda Brown Deposition 16:5-12.**

22. **Flood: December 27, 2006.** On December 27, 2006, there was another “rainstorm” and “The water flowed down Pocatello Creek Road into” my “yard, across the lawn” but the trenches were “filled in with dirt, silt, water, ice, and the water again came into the house.” **Linda Brown Deposition 16:24-17:4.** I again suffered damage to my home and again reported this to the City. **Linda Brown Deposition 17:5-9.**

23. **City Meets With Linda Brown’s Son.** My son, Shawn Brown, met with City personnel at my home on February 2, 2007. **Linda Brown Deposition 17:10-14; 20:21-23.** Mr. Turner agreed “that there was a problem with the road” and I was “asked to resubmit a new list of expenses at that time and resubmit the claim that had been previously denied” which I did. **Linda Brown Deposition 17:20-18:1.**

24. **Additional Damages to the Home.** My “second round” of damages was “to the walls, specifically this time you could see the rust marks from the water near the mop boards. The carpet was again damaged. The tile in the bathroom had been damaged at this point in time.” Soon after I “began to see mold growing” around the window.” **Linda Brown Deposition 18:2-11.**

25. **Gravel Fix Failed.** The City’s prior so-called gravel fix was inadequate; I continued to see water running down my “landscaping towards” my house “every time it rained.” **Linda Brown Deposition 23:11-13.**

26. **Sandbags Are Not a Solution.** The City attempted to stop the flooding by placing sandbags as a temporary remedy. **See Answer to Request for**



**Admission Nos. 6 and 9 (See Affidavit of Counsel, Exhibit B, p. 3); Interrogatory No. 7 (See Affidavit of Counsel, Exhibit C, p. 4, 9).**

27. Sandbags Only Spread the Water on more of my property. I took pictures of the sandbags which attempted to fix the problem, but just slowed the flow of the water and did not prevent the water from entering my property. **Linda Brown**

**Deposition 24:25-25:8.**

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



The second picture shows the collection of silt and rocks on the sandbags evidencing the pooling of water.

29. August 27, 2007 — Asphalt barrier prevents Flooding. After filing the Complaint and serving discovery, the City put “asphalt up against the [concrete] barrier along Pocatello Creek Road.” I have not had “flooding since then,” or “water getting into” my “landscaping,” or “basement.” **Linda Brown Deposition 24:2-11.** Based upon Defendant’s own records, this occurred August 20, 2007. **See Answer to**

**Interrogatory No. 9 (See Affidavit of Counsel, Exhibit B, p. 4, 10).** Two weeks after service of the Complaint and First Discovery. **Affidavit of Counsel, ¶13.**

30. It took my filing of this lawsuit to get the City to take proper action to contain its roadway run-off water.

31. **Permanent Fix???** It is unknown if the asphalt placement is a “permanent” fix. I continue to worry about flooding on my property and the City’s indifference to the problem it created.

32. **Damages.** I have experienced significant damages and expenses to repair and remediate the City’s improper draining of run-off water onto my property. Among other repair and damages, I have had to repair and replace wall trim, window trim, sheetrock, taping, texturing, painting, insulation, floor molding, window molding, carpet, and tile.

33. **Clean-up Expense.** Initially, I hired Service Master Cleaning and Restoration and their bill was \$2,940.10 and has incurred at least an additional \$283.70 in finances charges. **Linda Brown Deposition 53:20-24; See Exhibit B attached hereto.**

34. **Flooring Damages.** I have incurred damages for expense to Rug Rat Floor Covering to repair carpet in the amounts of \$548.44 and \$1,830.19. **See Exhibit C, pp. 1-2 attached hereto.** I have also incurred expense in the to-date amount of \$1,066.68 to repair damaged tile — a job not yet completed. **Linda Brown Deposition 55:23-24; See Exhibit C, p. 3 attached hereto.**

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

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

37. **Mold Remediation Expert.** I was required to hire mold remediation experts including Bradley Harr and Mike Larango who prepared a pre- and post-remediation mold report which cost \$3,322.58. **See Exhibit F attached hereto.**


38. **Molded Window.** I incurred \$654.04 in damages to replace the bedroom window which had molded after the flooding. **See Exhibit G attached hereto.**

39. **Remaining Landscaping Damage.** The damage to my yard has not been repaired, but I received a bid in the amount of \$5,457.00 from “Edged in Stone” to make the landscaping repairs necessary to repair the damage. **See Exhibit H attached hereto.** The initial landscaping damage is significantly higher than originally because of

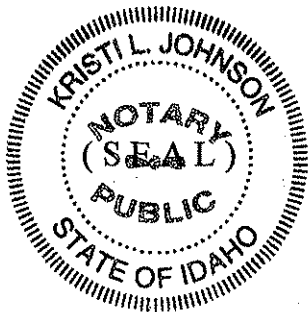
the City's failure to repair the improper water discharge after my first notice and continued damage.


40. I have further been damaged by damage to the value of my home caused by the flooding and mold, and loss of use of the lower portion of my home for the three months of February into May 2006, and eleven months from December 2006 through November 2007.

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

  
\_\_\_\_\_  
LINDA BROWN

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



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

# **Exhibit A**

S

FOR OFFICIAL USE ONLY  
 DATE RECEIVED: \_\_\_\_\_  
 RECEIVED BY: \_\_\_\_\_

# CLAIM FOR DAMAGE OR INJURY

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

Name: <u>Linda Brown</u>	Phone Number: (Home) <u>235-5225</u> (Work) <u>239-1380</u>
Current Address: <u>2300 Darrell Loop Pocatello, Idaho 83201</u>	
Address for the Six Months Immediately Prior to the Date the Damage or Injury Occurred: <u>Same</u>	
Date Damage or Injury Occurred: <u>2/28/2006</u> Time: <u>1:00</u> A.M. or <u>(P.M.)</u>	
Location of Occurrence: <u>2300 Darrell Loop</u>	
Any Property Damage? If so, what type? <u>Flooding to basement &amp; backyard</u>	
Any Injuries? <u>no</u> If so, what type?	
Describe How Damage or Injury Occurred: <u>Since the repaving of Pocatello Creek Road, the drainage has been altered, and great amounts of water is now flowing into my backyard, which faces Pocatello Creek Road. A heavy rain on February 28, 2006 washed landscaping out and flowed into my basement</u>	
Witnesses: Name:	Address:
	Phone:
<u>see attached list</u>	

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

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

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



Rainstorm  
on

4/16/06

further  
damage  
to  
retaining  
wall



Pocetello Creek  
Road in back  
of fence

Rainstorm on

4/16/06

note volume of water on lawn



After flooding

↓ note volume of water during rain storm

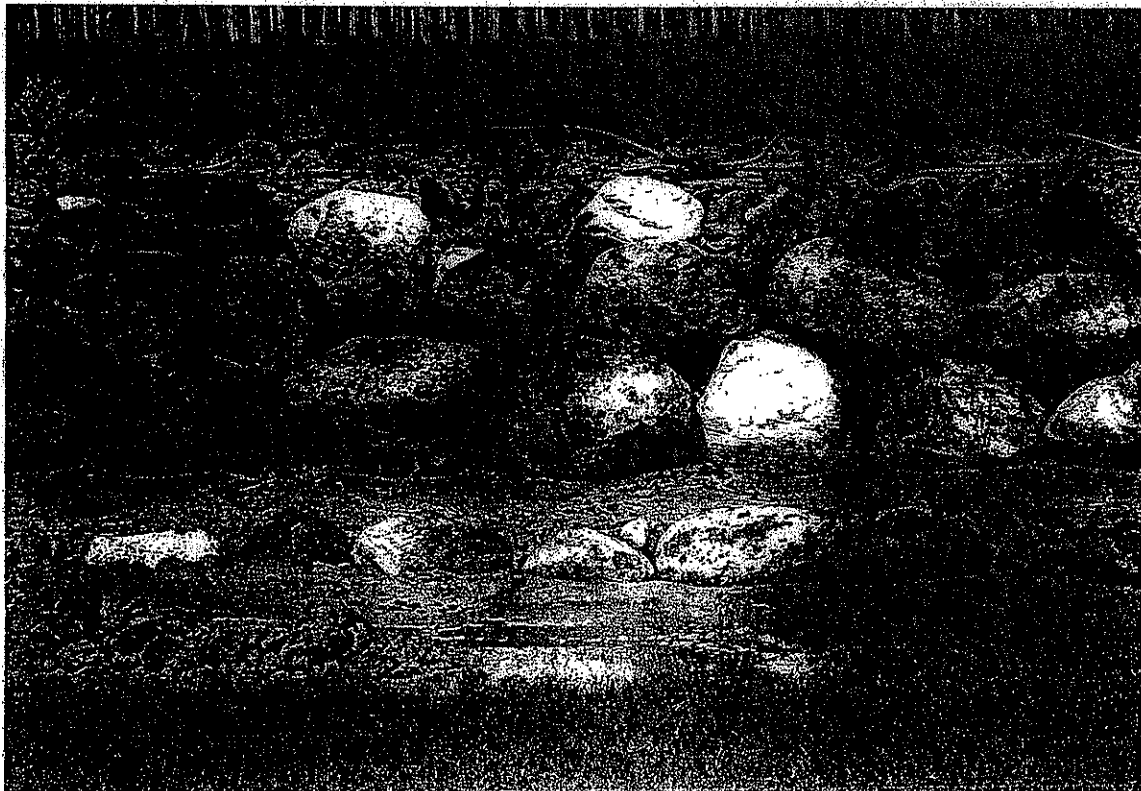


photo taken  
April 16

also  
note  
further  
damage  
to retaining  
wall  
due to  
additional  
rains



Witnesses to Damage

Cac ?

Engineer for City of Pocatello  
Street Department  
234-6212

ServiceMaster Cleaning and Restoration Team:

Calvin Boswell  
Josh Stump  
Randy Coburn  
P.O. Box 1731  
Idaho Falls, Idaho  
589-7903

Rod Silcock  
Marilyn Silcock  
P.O. Box 58  
Inkom, Idaho  
775-3398

James K. Lystrup  
7875 N. Prospector Hollow  
Pocatello, Idaho 83201  
232-6385

Terese Parmanand  
2316 Darrell Loop  
Pocatello, Idaho 83201  
233-8003

Troy J. Brown  
5447 Falconrest  
Boise, Idaho  
208-577-8956

Shawn and Brittany Brown  
2727 S. 625 W. #A303  
Bountiful, Utah 84010  
703-855-5220  
801-415-6044

LeRoy and Lorna Wilcox  
5555 S. 5700 W.  
Rexburg, Idaho 83440  
356-6680

List of Expenditures for restoring home and yard:

ServiceMaster Cleaning and Restoration Company (see attached invoice)	\$2,940.10
Rug Rag Flooring, Inc (for new carpet in Bedroom-- Original carpet too damaged for relaying—invoice attached)	\$ 548.44
Armstrong Sprinklers and Landscaping (for repair of rock retaining wall—bid only—work can not be done until drier weather)	\$ 850.00
Receipts for paint, and supplies for repairing walls	\$ 124.08
Items damaged from water or moving (lamp broken while moving, file cabinet doors sprung, other small items	\$ 100.00
My labor for sheetrock repair, texturing, replacing trim on windows and mopboards, and painting.	<u>\$ 400.00</u>
Total	\$4,962.62



ServiceMaster Cleaning & Restoration  
 PO Box 1731  
 Idaho Falls, ID 83403  
 208-524-8262 / 208-233-2048  
 E-Mail: sm8262@cablone.net

# INVOICE

INV DATE	INVOICE NO.
4/6/2006	204795

<b>BILLING ADDRESS:</b>
Linda Brown 2300 Darrel Loop Pocatello, ID 83201

<b>SERVICE ADDRESS:</b>

ITEM	DESCRIPTION	DUE DATE	SERVICE DATE
		RATE	AMOUNT
201DRRWTR	WATER MITIGATION CHARGES	4/6/2006	2/28/2006
		2,940.10	2,940.10

Thank you for your business.

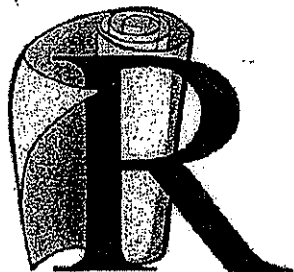
**Total** \$2,940.10

Terms: All accounts not paid within 30 days are subject to a FINANCE CHARGE of 1 1/2% per month, which is an annual percentage rate of 18%, or legal maximum rate on past due invoices. A minimum charge of \$.50 will apply.

**Payments/Credits** \$0.00

**Balance Due** \$2,940.10

Thank you for your business. We now accept VISA / Mastercard / American Express for



# Rug Rat Flooring, Inc.

212 E. Chubbuck Rd.  
 Chubbuck, ID 83202  
 Phone 208-237-1536  
 Fax 208-237-1621

## Invoice

DATE	INVOICE #
4/10/2006	5160

BILL TO
Linda Brown 2300 Darrell Loop Pocatello, ID 83202 235-5225

DUE DATE	TERMS
4/10/2006	Due on receipt
REP	PROJECT
SRW	Bedroom Carpet

DESCRIPTION	QTY	RATE	AMOUNT
12x16.25 MH 8441 Jazzfest 516 Votive	195	1.86	362.70
1/2" Visco Bond Pad W/Spillguard	195	0.39	76.05
Custom Carpet Installation	195	0.45	87.75
Service & Handling	1	21.94	21.94

1. All sales are final.
2. No refunds given for custom ordered merchandise.
3. Rug Rat Flooring is not responsible for measurements made by others.
4. We cannot guarantee merchandise arrival times due to conditions out of our control.
5. 1- 1/2% interest per month will be charged on all unpaid balances over 30 days old.

<b>Total</b>	<b>\$548.44</b>
<b>Payments/Credits</b>	<b>\$0.00</b>
<b>Balance Due</b>	<b>\$548.44</b>

2300  
DARYLL UP

**ARMSTRONG**  
*Sprinklers & Landscaping (LLC)*

**232-8476**

**Sprinkler System Bid Sheet**

All sprinkler systems are fully automatic and are **self draining**. This means you will not have to winterize (blow-out) your lines in the fall. We are so confident in the self draining system that we **warranty the system against freezing for life**. (As long as the water is turned off completely at the appropriate time.) The material used throughout the entire system is commercial grade quality. All pipe in the system will be schedule 40 PVC, with all sprinkler heads on a flexible funny pipe riser. The back-flow valve and electronic valves will be in green valve boxes at finished grade level so you can mow over them. All heads are at finished grade level also, except for those in flower beds. We also offer drip irrigation systems. The sprinkler heads, valves and timers will be **IRRITROL & TORO brands and come with a three year manufactures warranty**. A \$50.00 service charge will apply for other problems caused by negligence, vandalism, misuse etc. All systems come with a **100% head to head overlap guarantee**. (In lawn areas). The price of the system includes all material, labor, taxes and permits. We are a fully licenced, bonded and insured company with 21 years of experience and service in the area. **We will match or beat any certified and licenced competitors written bid, using the same material.**

Approximate number of watering stations: \_\_\_\_\_ Total Price: \_\_\_\_\_

Notes: REPAIR BOULDER RETAINING WALL, BACKFILL,  
REPLACE SHAWB, & 4 yards back  
TOTAL BID PRICE: 850.00

Thank you,

**Clayton H. Armstrong** (232-8476)

Date 4/21/06

**References:**

- |                                                              |                                                                           |                                                    |
|--------------------------------------------------------------|---------------------------------------------------------------------------|----------------------------------------------------|
| Sharon Manning (233-9425)<br>830 Spyglass Point<br>Pocatello | Louis Bringhurst, (234-1065)<br>5811 Moonlight Mine Rd<br>Pocatello       | Brett Jensen (251-0016)<br>730 Redman<br>Chubbuck  |
| Ted/Robyn Bell (237-7368)<br>4462 Wasatch<br>Chubbuck        | Kevin Booth (237-5896)<br>Booth Constrution<br>4745 Declaration, Chubbuck | Leonard Jensen (237-1767)<br>609 Gary<br>Pocatello |
| Gary Reinke (238-0578)<br>3000 Richard                       | Ken/Debbi Newhouse(234-4552)<br>9536 W. Katie Mt. Drive                   | Keith Rasmussen (238-7264)<br>1396 Satterfield     |

# Fred Meyer

800 Yellowstone Ave.  
Pocatello ID 83201  
208-239-4000

Your Cashier Was SUNNY

UPC/SKU/PLU	ITEM	PRICE
4122602582	HD PAINT	16.99 T
REWARDS CARD	44477277812	
TAX		0.85
**** BALANCE		17.84
CHECK		17.84
CHANGE		0.00

TOTAL NUMBER OF ITEMS SOLD = 1  
03/21/06 04:12PM 260 7 135 1181001

\*\*\*\*\*

March Fuel Rewards  
3/1/06 - 3/31/06

Use your rewards card and for every \$100 you spend in the store during March, you'll receive a 10 cent per gallon discount on fuel at any FM fuel center. See an associate for details. March Fuel rewards expire on 4/30/06

Qualifying purchases today:\$16  
Total March fuel rewards:\$46  
Remaining Feb fuel rewards:\$0

Balance must exceed \$100 to be eligible for Fuel rewards.  
Limit 25 gallons per visit.

\*\*\*\*\*  
\*\*\*\*\*

You just earned 3 reward points!

17.84  
17.84  
47.84  
23.98  
6.30  
10.34  
-----  
\$ 124.08

# Fred Meyer

800 Yellowstone Ave.  
Pocatello ID 83201  
208-239-4000

Your Cashier Was JACKIE

UPC/SKU/PLU	ITEM	PRICE
4122682432	BASKET	4.79
10% Store Discount		0.48
4122602583	HD PAINT	16.99
10% Store Discount		1.69

TAX	0.98
**** BALANCE	20.58
CHECK	20.58
CHANGE	0.00

TOTAL NUMBER OF ITEMS SOLD = 2  
03/17/06 05:14PM 260 12 305 770266

You could have earned 3 POINTS with your Fred Meyer rewards card! Ask any associate how to earn a rebate!

SAVE THIS RECEIPT FOR REFUNDS OR ADJUSTMENTS



10026001203050603171714



# SHERWIN-WILLIAMS

POCATELLO Store 8460

1117 N YELLOWSTONE AVENUE

POCATELLO ID 83201

(208) 282-2080

Fax (208) 282-2863

www.sherwin-williams.com

SALE  
Tran # 6887-3  
E07/10523  
TREVOR

4:32pm  
03/17/06  
10

Order # 0E001774108460

LINDA W BROWN

Account: 1

Job: 1 D.L.V.

Bill To:  
LINDA W BROWN

6403-54213 GALLON B31W2251

PM200 LTX SG EX NH

\*Sale Price 1.00 @ 22.78

Color: SHARP/ALICE WHITE 8/02

BGC Blend: 02 32 64 128

B1 Black 1 1

R2 Harddn 1 1

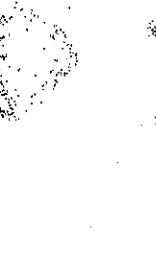
V3 Deep Gold 1 1

50¢ of Formula Book

6403-54213 GALLON B31W2251  
PM200 LTX SG EX NH  
\*Sale Price 1.00 @ 22.78

22.78

SUBTOTAL 45.56  
5.000X SALES TAX(1-12001) 2.28  
CHECK# 2849 -47.84  
TOTAL \$47.84



# SHERWIN-WILLIAMS

POCATELLO Store 8460

1117 N YELLOWSTONE AVENUE

POCATELLO ID 83201

(208) 282-2080

Fax (208) 282-2863

www.sherwin-williams.com

SALE  
Tran # 6979-8  
E03/10523  
LIZ

5:  
03/2

Order # 0E001731008460

LINDA BROWN

Account: 1

Job: 1 D.L.V.

Bill To:  
LINDA BROWN

6403-54213 GALLON B31W2251

PM200 LTX SG EX NH

\*Sale Price 1.00 @ 22.78

Color: SHARP/ALICE WHITE

BGC Blend: 02 32 64 128

B1 Black 1 1

R4 New Red 2 2

V3 Deep Gold 1 1

50¢ of Formula Book

6403-54213 GALLON B31W2251  
PM200 LTX SG EX NH  
\*Sale Price 1.00 @ 22.78

22.78

SUBTOTAL 45.56  
5.000X SALES TAX(1-12001) 2.28  
CHECK# 2853 -47.84  
TOTAL \$47.84

Returns cannot be processed for 10 days or until 10 days after check clears your bank.

**WAL\*MART**  
**Self Check-Out**  
*Fast! Easy! Fun!*

WE SELL FOR LESS  
 MANAGER GARY BLACK  
 ( 208 ) 237 - 5090

ST# 1995 OP# 00009047 TE# 47 TR# 03093	
TRIM TRAY 072719313572	0.96 X
LINDOR MLK C 003746601931 F	<del>1.48 X</del>
GV GUMMY BEA 007874246169 F	<del>1.00 X</del>
TAPE 007535305602	1.77 X
3PK RLR COVR 007843590142	2.97 X
FOAM BRUSH 007004251008	1.00 X
TRAY LINER 007004250262	0.48 X
Y LINER 007004250262	0.48 X
NT COMPD 005286515100	2.07 X

	SUBTOTAL	12.21
TAX 1	5.000 %	0.61
	TOTAL	12.82
	MCARD TEND	12.82

ACCOUNT #5025  
 APPROVAL #327611  
 TRANS ID -  
 VALIDATION -  
 PAYMENT SERVICE - A  
 CHANGE DUE 0.00

*- 2.48*  
10.34

**WAL\*MART**  
 ALWAYS LOW PRICES.

*Always*

WE SELL FOR LESS  
 MANAGER GARY BLACK  
 ( 208 ) 237 - 5090

ST# 1995 OP# 00005634 TE# 65 TR# 05832  
 \*\* ITEM PACKAGE 48580212006 \*\*  
 FILM DEVELOP 020496830600 6.00 X  
 \*\* PACKAGED PRICE 6.00 \*\*  
 SUBTOTAL 6.00  
 TAX 1 5.000 % 0.30  
 TOTAL 6.30  
 CHECK TEND 6.30  
 CHANGE DUE 0.00

# ITEMS SOLD 1

TC# 0842 4148 2595 9461 5296



Wal-Mart supports Acres for America  
 Conservation for Wildlife & Habitat  
 04/18/06 18:56:56

# ITEMS SOLD 9

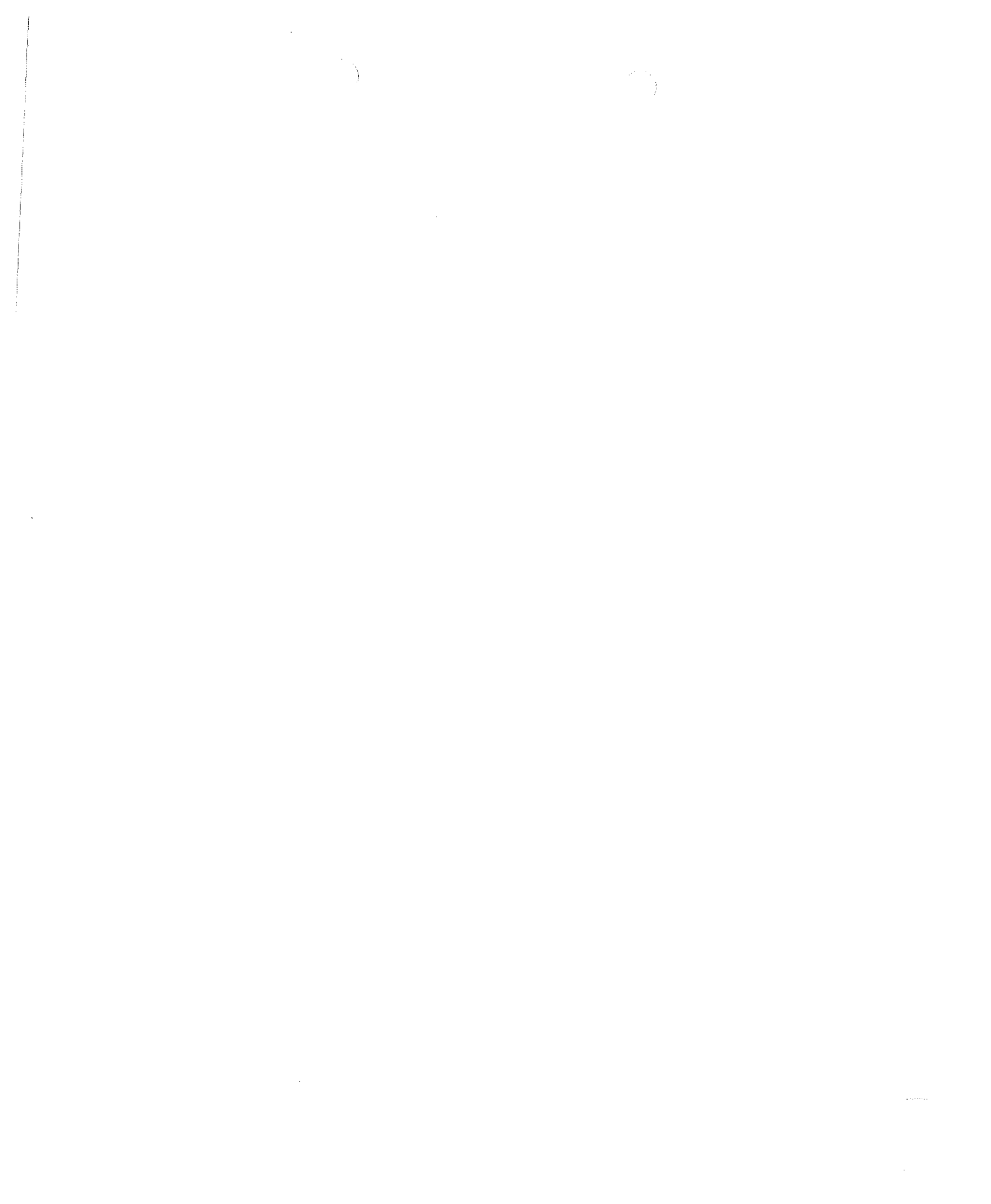
*Painting Supplies*

TC# 0841 6856 6013 5287 9428



Apply for a Wal-Mart Discover!  
 Call 877-969-3668 / Visit Walmart.com





# **Exhibit B**

5



# STATEMENT

PO. Box 1731  
 Idaho Falls, ID 83403  
 PH: 208-524-8262  
 FAX: 208-524-2610  
 E-mail: sm8262@cableone.net

BILL TO

Linda Brown  
 2300 Darrel Loop  
 Pocatello, ID 83201

Statement Date

2/6/2007

DATE	DESCRIPTION	Terms	Amount of Payment		
		Due on receipt			
03/31/2006	Balance forward				0.00
	4574 - Job --				
04/06/2006	INV #204795. Due 04/06/2006.				2,940.10
04/25/2006	CREDMEM #204858.				-121.62
05/09/2006	PMT #2699. Pmt: ROA				-500.00
05/30/2006	PMT #2720. JUNE PYMNT				-100.00
06/01/2006	INV #FC 2516. Due 06/01/2006. Finance Charge				33.28
06/21/2006	PMT #2740. JULY PMNT				-100.00
07/05/2006	INV #FC 2567. Due 07/05/2006. Finance Charge				32.28
07/20/2006	PMT #2763. AUG. PYMNT				-100.00
08/01/2006	INV #FC 2638. Due 08/01/2006. Finance Charge				30.78
08/28/2006	PMT #2777. SEPT. PMNT				-100.00
09/05/2006	INV #FC 2674. Due 09/05/2006. Finance Charge				30.22
09/22/2006	PMT #2792. OCT. PMNT				-100.00
10/11/2006	INV #FC 2754. Due 10/11/2006. Finance Charge				29.17
10/27/2006	PMT #2818. NOV. PMNT				-100.00
11/01/2006	INV #FC 2804. Due 11/01/2006. Finance Charge				28.11
11/27/2006	PMT #2832. DEC. PMNT				-100.00
12/01/2006	INV #FC 2850. Due 12/01/2006. Finance Charge				27.03
12/29/2006	PMT #2861. JAN 07 PMNT				-100.00
Current	0-30 Days	31-60 Days	61-90 Days	Over 90 Days	Amount Due
24.82	0.00	25.94	27.03	1,602.32	\$1,680.11

Thank you for your business. We now accept VISA / Mastercard / American Express for your convenience!



# STATEMENT

PO Box 1731  
 Idaho Falls, ID 83403  
 PH: 208-524-8262  
 FAX: 208-524-2610  
 E-mail: sm8262@cablone.net

BILL TO

Linda Brown  
 2300 Darrel Loop  
 Pocatello, ID 83201

Statement Date

2/6/2007

		Terms	Amount of Payment		
		Due on receipt			
DATE	DESCRIPTION	AMOUNT			
01/04/2007	INV #FC 2889. Due 01/04/2007. Finance Charge		25.94		
01/31/2007	PMT #2880. FEB 07 PMNT		-100.00		
02/06/2007	INV #FC 2933. Due 02/06/2007. Finance Charge		24.82		
		<i>Finance charges 261.63</i>			
Current	0-30 Days	31-60 Days	61-90 Days	Over 90 Days	Amount Due
24.82	0.00	25.94	27.03	1,602.32	\$1,680.11

Thank you for your business. We now accept VISA / Mastercard / American Express for your convenience!

LB080607 — 17



# STATEMENT

PO Box 1731  
 Idaho Falls, ID 83403  
 PH: 208-524-8262  
 FAX: 208-524-2610  
 E-mail: sm8262@cableone.net

BILL TO

Linda Brown  
 2300 Darrel Loop  
 Pocatello, ID 83201

Statement Date

3/6/2008

Terms	Amount of Payment
Due on receipt	

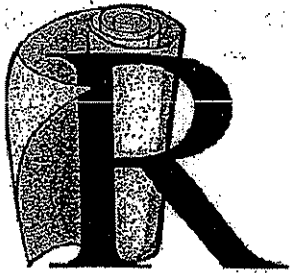
DATE	DESCRIPTION	AMOUNT
01/31/2008	Balance forward	779.57
	4574 - Job --	
02/05/2008	INV #FC 3434. Due 02/05/2008. Finance Charge	11.70
02/13/2008	PMT #3161. Feb 08 Pmt	-100.00
03/06/2008	INV #FC 3487. Due 03/06/2008. Finance Charge	10.37

*Updated -  
 We have  
 original*

Current	0-30 Days	31-60 Days	61-90 Days	Over 90 Days	Amount Due
10.37	11.70	0.00	13.00	666.57	\$701.64

Thank you for your business. We now accept VISA / Mastercard / American Express for your convenience!

# **Exhibit C**



# Rug Rat Flooring, Inc.

212 E. Chubbuck Rd.  
 Chubbuck, ID 83202  
 Phone 208-237-1536  
 Fax 208-237-1621

## Invoice

DATE	INVOICE #
4/10/2006	5160

BILL TO
Linda Brown 2300 Darrell Loop Pocatello, ID 83202 235-5225

DUE DATE	TERMS
4/10/2006	Due on receipt
REP	PROJECT
SRW	Bedroom Carpet

DESCRIPTION	QTY	RATE	AMOUNT
12x16.25 MH 8441 Jazzfest 516 Votive	195	1.86	362.70
1/2" Visco Bond Pad W/Spillguard	195	0.39	76.05
Custom Carpet Installation	195	0.45	87.75
Service & Handling	1	21.94	21.94

1. All sales are final.
2. No refunds given for custom ordered merchandise.
3. Rug Rat Flooring is not responsible for measurements made by others.
4. We cannot guarantee merchandise arrival times due to conditions out of our control.
5. 1- 1/2% interest per month will be charged on all unpaid balances over 30 days old.

<b>Total</b>	\$548.44
<b>Payments/Credits</b>	\$0.00
<b>Balance Due</b>	\$548.44

Proposal #: 001380  
 Sale Date: 02/06/2007  
 Install Date:  
 Sales Rep: Siler, Gary  
 Sales Rep:

Rug Rat Flooring, Inc.  
 12 E. Chubbuck Rd.  
 hubbuck, ID 83202  
 37-1536

**OLD TO**

Brown	Linda
300 Darrell Loop	
Pocatello	Idaho 83201
35-5225	

**SHIPPED TO**

Brown	Linda
2300 Darrell Loop	
Pocatello	Idaho 83201

**MATERIALS**

- 1) Jazz Festival-12.00 Votive  
 Comments: 12x35
- 2) Pad: 1/2" Visco Bond Pad With Spillguard

	QUANTITY	PRICE	TOTAL
	420.00 SqFt	\$2.59	\$1087.80
	420.00 SqFt	\$0.85	\$357.00
		<b>Subtotal:</b>	<b>\$1444.80</b>

**LABOR**

- 1) C-Regular Carpet
- 3) C-Pull Old Reg. Carpet \*\* \*\*
- 4) C-Haul Old Away \*\* \*\*

	QUANTITY	PRICE	TOTAL
	420.00 SqFt	\$0.45	\$189.00
	420.00 SqFt	\$0.15	\$63.00
	420.00 SqFt	\$0.15	\$63.00
		<b>Subtotal:</b>	<b>\$315.00</b>

Comments:

<b>Subtotal:</b>	\$1759.80
<b>Misc:</b>	\$70.39
<b>Total:</b>	\$1830.19
<b>Payments:</b>	
<b>Balance:</b>	\$1830.19



Rug Rat Flooring, Inc.  
 12 E. Chubbuck Rd.  
 Chubbuck, ID 83202  
 208-375-1536

Proposal #: 001379  
 Sale Date: 02/06/2007  
 Install Date:  
 Sales Rep: Siler, Gary  
 Sales Rep:

**SOLD TO**

Brown	Linda
2300 Darrell Loop	
Pocatello,	ID 83201
235-5225	

**SHIPPED TO**

Brown	Linda
2300 Darrell Loop	
Pocatello,	ID 83201

**MATERIALS**

	QUANTITY	PRICE	TOTAL
1) Dal Designer Colors 8x8 Comments: Bathroom	55.00 SqFt	\$3.79	\$208.45
2) P36891 Cove Tile	32.00 Each	\$4.39	\$140.48
3) Customs: Thinset Versabond Gray- 50#	1.00 Each	\$19.98	\$19.98
4) Hydroment Sanded Grout 25#	1.00 Each	\$16.99	\$16.99
		<b>Subtotal:</b>	<b>\$385.90</b>

**LABOR**

	QUANTITY	PRICE	TOTAL
1) T-Ceramic Labor	55.00 SqFt	\$5.00	\$275.00
2) U-Cove Base Labor	19.00 LnFt	\$4.00	\$76.00
5) T- Pull Ceramic Tile ** Tear Out Existing **	55.00 SqFt	\$3.25	\$178.75
6) V-R&R Stool ** **	1.00 Each	\$110.00	\$110.00
		<b>Subtotal:</b>	<b>\$639.75</b>

Comments:

<b>Subtotal:</b>	\$1025.65
<b>Misc:</b>	\$41.03
<b>Total:</b>	\$1066.68
<b>Payments:</b>	
<b>Balance:</b>	\$1066.68

# **Exhibit D**

5

# INVOICE

Shawn Brown  
 1284 W. 2050 S.  
 Woods Cross, UT 84087  
 801-381-9089  
 sbrown@big-d.com

INVOICE NO. 1  
 DATE December 3, 2008  
 CUSTOMER ID Linda Brown

TO Linda Brown  
 2300 Darrell Loop  
 Pocatello, ID 83201  
 208-235-5225

SALESPERSON	JOB	PAYMENT TERMS	DUE DATE
Shawn	Repairs to bedroom	Due upon receipt	30 Days

QUANTITY	DESCRIPTION	UNIT PRICE	LINE TOTAL
112 SF	Hang and finish drywall	\$ 3.24	\$ 362.88
224 SF	Texture Wall	\$ 2.02	\$ 452.48
128 SF	Insulate Exterior foundations wall	\$ 0.72	92.16
224 SF	Paint walls 2 walls	\$ 0.85	190.40
42 LF	Paint Trim on two walls including window trim	\$ 1.25	52.50
42 LF	Install Trim	\$ 3.43	144.06
42 LF	Patch and touch up trim	\$ 0.65	27.30
330 Miles	Travel	9.5 Cents/Mile	163.35
1 LS	Tools	\$ 40.00	85.00
1 LS	Screws/ Hardware Misc	85.00	85.00
1 LS	Over Head and Profit	15%	248.00
* All prices are from RS Means Construction Cost Data 2007 Edition			

Paid in Full

SUBTOTAL	\$ 1,903.13
SALES TAX	
<b>TOTAL</b>	<b>\$ 1,903.13</b>

Make all checks payable to [Your Company Name]

**THANK YOU FOR YOUR BUSINESS!**

# INVOICE

Shawn Brown  
 1284 W. 2050 S.  
 Woods Cross, UT 84087  
 801-381-9089  
 sbrown@big-d.com

INVOICE NO. 1  
 DATE December 3, 2008  
 CUSTOMER ID Linda Brown

TO Linda Brown  
 2300 Darrell Loop  
 Pocatello, ID 83201  
 208-235-5225

SALESPERSON	JOB	PAYMENT TERMS	DUE DATE
Shawn	Repairs to bedroom	Due upon receipt	30 Days

QUANTITY	DESCRIPTION	UNIT PRICE	LINE TOTAL
112 SF	Hang and finish drywall	\$ 3.24	\$ 362.88
224 SF	Texture Wall	\$ 2.02	\$ 452.48
128 SF	Insulate Exterior foundations wall	\$ 0.72	92.16
224 SF	Paint walls 2 walls	\$ 0.85	190.40
42 LF	Paint Trim on two walls including window trim	\$ 1.25	52.50
42 LF	Install Trim	\$ 3.43	144.06
42 LF	Patch and touch up trim	\$ 0.65	27.30
330 Miles	Travel	49.5 Cents/Mile	163.35
1 LS	Tools	\$ 40.00	85.00
1 LS	Screws/ Hardware Misc	85.00	85.00
1 LS	Over Head and Profit	15%	248.00
	* All prices are from RS Means Construction Cost Data 2007 Edition		

SUBTOTAL	\$ 1,903.13
SALES TAX	
TOTAL	\$ 1,903.13

Make all checks payable to [Your Company Name]

THANK YOU FOR YOUR BUSINESS!

**LOWE'S**

LOWE'S HIW, INC.  
650 BULLOCK STREET  
POCATELLO, ID 83202  
(208)236-8900

-SALE-

SALES #: FSTLANE3 13 11-02-07

250605 SHEETROCK TOTAL J 7.56  
193025 EXTENSION SPRING 29.54  
2 @ 14.77

SUBTOTAL: 37.10

TAX:

2.23

INVOICE 06775 TOTAL: 39.33

BALANCE DUE: 39.33

M/C : 39.33

M/C XXXXXXXXXXXX5025 34009B

AMOUNT: 39.33

2587 TERMINAL: 06 11/02/07 16:15:33

# OF ITEMS PURCHASED: 3  
EXCLUDES FEES, SERVICES AND  
SPECIAL ORDER ITEMS



THANK YOU  
FOR SHOPPING LOWE'S

RECEIPT REQUIRED FOR CASH REFUND.  
CHECK PURCHASE REFUNDS REQUIRE  
15 DAY WAIT PERIOD FOR CASH BACK.  
STORE MGR: JEFF KOCH

HAVE A COMMENT OR FEEDBACK?  
LET US KNOW AT  
[WWW.LOWES.COM/FEEDBACK](http://WWW.LOWES.COM/FEEDBACK)

STORE CODE: 25871-10207-06775

**LOWE'S**

LOWE'S HIW, INC.  
650 BULLOCK STREET  
POCATELLO, ID 83202  
(208)236-8900

-SALE-

SALES #: FSTLANE2 13 11-03-07

13484 PFJ BASE 3406 2 1 5.88  
160272 PFJ BASE 713 3 1/ 11.12  
44899 DAKOTA SGL CYL HN 69.97  
5893 3/4" STANDARD FIN 3.97  
63599 6 WIRE SRF MT MOD 3.97  
87322 HZ GLD NRW BTN W/ 4.98  
196558 2-5/8" LARGE SCRE 0.52  
196555 2-3/16" LARGE SCR 0.42  
196593 2-1/8" OPEN "S" HO 1.42  
245458 7/8" SWIVEL ANIM 3.16  
40353 11" PLASTIC TRAY 1.34  
2 @ 0.67  
5993 3 PC GENERAL PURP 5.27  
245256 2" SINGLE SWIVEL 3.37

SUBTOTAL: 115.39

TAX:

6.93

INVOICE 05306 TOTAL: 122.32

BALANCE DUE: 122.32

M/C : 122.32

M/C XXXXXXXXXXXX5025 64111B

AMOUNT: 122.32

2587 TERMINAL: 05 11/03/07 13:57:11

# OF ITEMS PURCHASED: 14  
EXCLUDES FEES, SERVICES AND  
SPECIAL ORDER ITEMS



THANK YOU  
FOR SHOPPING LOWE'S

RECEIPT REQUIRED FOR CASH REFUND.  
CHECK PURCHASE REFUNDS REQUIRE  
15 DAY WAIT PERIOD FOR CASH BACK.  
STORE MGR: JEFF KOCH

HAVE A COMMENT OR FEEDBACK?  
LET US KNOW AT  
[WWW.LOWES.COM/FEEDBACK](http://WWW.LOWES.COM/FEEDBACK)

STORE CODE: 25871-10307-05306



LOWE'S HW, INC.  
650 BULLOCK STREET  
POCATELLO, ID 83202  
(208)236-8900

-SALE-

SALES #: S2587SN1 1134754 10-06-07

11730 GYPSUM 4X8 1/2 IN REGULAR 32.68  
4 @ 8.17  
91109 R13 KRAFT 106.56SQ' 15"X9 32.77  
43.96 DISCOUNT EACH -11.19

SUBTOTAL: 65.45  
TAX: 3.93  
INVOICE 02180 TOTAL: 69.38

BALANCE DUE: 69.38

N/C: 69.38

TOTAL DISCOUNT: 11.19

N/C XXXXXXXXXXXX5025 69705B  
AMOUNT: 69.38

*Handwritten signature: Brenda J. Miller*

2587 TERMINAL: 02 10/06/07 09:38:18

# OF ITEMS PURCHASED: 5  
EXCLUDES FEES, SERVICES AND SPECIAL ORDER ITEMS



THANK YOU  
FOR SHOPPING LOWE'S

RECEIPT REQUIRED FOR CASH REFUND.  
CHECK PURCHASE REFUNDS REQUIRE  
15 DAY WAIT PERIOD FOR CASH BACK.  
STORE 248 JEFF KOCH

# **Exhibit E**

S

**Estimate**Structure/Contents  
Combined**BEST CLEAN CARE**

858 JONES DRIVE

POCATELLO, 83201

Phone: (208) 238-0858 FAX: (208) 238-8115

**Job:** 2221**Estimator:****Estimate:** LINDA BROWN REPORTCustomer**Company:****Customer Name:** LINDA BROWN**Address 1:** 2300 DARREL LOOP**Address 2:****City, State, Zip:** POCATELLO, ID 82301**Home Phone:** (208) 235-5225**Business Phone:** (208) 239-1380**Fax Number:** ( ) -Job Location**Site Contact:****Site Address 1:** 2300 DARREL LOOP**Site Address 2:****City, State, Zip:** POCATELLO, ID 82301**Location Phone #:** (208) 235-5225**Location Bus #:** (208) 239-1380**Location Fax #:** ( ) -**Structure Detail**

Structure	\$250.00
SubTotal	\$250.00
<b>Total</b>	<b>\$250.00</b>

Please Submit payment on  
make payment Arrangements

Thanks



Total for Master Bedroom:

\$4,714.75

**Master Bedroom - 10' 11" x 14' 0" x 7' 7"**

SFF 152.83	SFW 377.90	SFC 152.83	CF 1,158.99	PER 49.83
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Item #	Item Description	# Units	U/M	Unit Cost	Ext. Cost
1	Certified & trained technician M,T,W	14.50	HRS	\$67.54	\$979.33
2	Trained assistants M,T,W	15.50	HRS	\$43.81	\$679.06
3	Set up & preparation of safe area	152.83	SFF	\$1.49	\$227.72
4	Hepa vacuum floors including filters	152.83	SFF	\$0.04	\$6.11
5	Tyvek disposable clothing M,T	4.00	EA	\$14.25	\$57.00
6	Gloves - puncture proof - per pair	2.00	EA	\$14.50	\$29.00
7	FULL-face mask-w/hepa filter M,T	2.00	EA	\$16.50	\$33.00
8	Gloves - latex - per pair M,T	4.00	EA	\$3.00	\$12.00
9	Remove & discard contaminated base molding	26.00	LF	\$0.36	\$9.36
10	Remove & discard contaminated tack strip	52.00	LF	\$0.32	\$16.64
11	Remove & discard contaminated carpet - strip cut & bag	152.83	SFF	\$0.46	\$70.30
12	Remove contaminated insulation batts from walls	20.00	SF	\$0.10	\$2.00
13	Remove contaminated drywall from walls - single layer	40.00	SF	\$0.46	\$18.40
14	Furnish 6 c.y. dump bin CHANGE DEPENDING ON TIME	1.00	EA	\$115.00	\$115.00
15	Bio-wash w/antimicrobial, rinse & wipe down walls - 2 applications	377.90	SFW	\$0.84	\$317.44
16	Bio-wash w/antimicrobial, rinse & wipe down door & jamb	2.00	EA	\$13.91	\$27.82
17	Pressure wash & treat w/antimicrobial	152.83	SFF	\$0.84	\$128.38
18	Bio-wash w/antimicrobial, rinse & vacuum floors - 2 applications	152.83	SFF	\$1.04	\$158.94
19	Bio-wash w/antimicrobial, rinse & wipe down ceilings	152.83	SFC	\$0.91	\$139.08
20	Negative air machine / Air scrubber - large M,T CHANGEOVER	5.00	DAYS	\$115.00	\$575.00
21	Bags for removed blown insulation M,T	10.00	EA	\$3.00	\$30.00
22	Replace primary & secondary filters M,T	4.00	SET	\$19.50	\$78.00
23	Replace HEPA filter M,T	2.00	EA	\$160.00	\$320.00
24	OSHA required bio-wash down of men & equipment	8.00	HRS	\$68.04	\$544.32
25	Return to job site to remove all equipment - minimum charge	1.00	M/C	\$58.24	\$58.24
26	Double layer masking - Full containment	153.00	SF	\$0.54	\$82.62
<b>Total for Master Bedroom items:</b>					<b>\$4,714.75</b>

Total for Master Bath:

\$561.47

## Master Bath - 6' 1" x 18' 8" x 7' 7"

SFF 113.56	SFW 375.38	SFC 113.56	CF 861.13	PER 49.50
------------	------------	------------	-----------	-----------

Item #	Item Description	# Units	U/M	Unit Cost	Ext. Cost
1	Bio-wash w/antimicrobial, rinse & wipe down walls - 2 applications	375.38	SFW	\$0.84	\$315.32
2	Bio-wash w/antimicrobial, rinse & wipe down door & jamb	1.00	EA	\$13.91	\$13.91
3	Bio-wash w/antimicrobial, rinse & vacuum floors - 2 applications	113.56	SFF	\$1.04	\$118.10
4	Bio-wash w/antimicrobial, rinse & wipe down ceilings	113.56	SFC	\$0.91	\$103.34
5	Double layer masking - Full containment	20.00	SF	\$0.54	\$10.80
Total for Master Bath items:					\$561.47

Total for Walk-in Closet-2:

\$218.47

## Walk-in Closet-2 - 2' 4" x 10' 11" x 7' 7"

SFF 25.47	SFW 200.96	SFC 25.47	CF 193.16	PER 26.50
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Item #	Item Description	# Units	U/M	Unit Cost	Ext. Cost
1	Bio-wash w/antimicrobial, rinse & wipe down walls - 2 applications	200.96	SFW	\$0.84	\$168.81
2	Bio-wash w/antimicrobial, rinse & vacuum floors - 2 applications	25.47	SFF	\$1.04	\$26.49
3	Bio-wash w/antimicrobial, rinse & wipe down ceilings	25.47	SFC	\$0.91	\$23.18
Total for Walk-in Closet-2 items:					\$218.47

# Exhibit F

S

Summit Environmental, Inc.

795 S. Orchard St.

Boise, ID 83705

# Statement

Date
11/15/2007

To:
Linda Brown 2300 Darrell Loop Pocatello, ID 83201

		Amount Due	Amount Enc.		
		\$3,322.58			
Date	Transaction	Amount	Balance		
12/31/2006	Balance forward		0.00		
09/28/2007	436.001.01 - 2300 Darrell Loop, Pocatello- INV #703-703.	1,485.10	1,485.10		
11/15/2007	INV #703-726.	1,837.48	3,322.58		
<b>CURRENT</b>	<b>1-30 DAYS PAST DUE</b>	<b>31-60 DAYS PAST DUE</b>	<b>61-90 DAYS PAST DUE</b>	<b>OVER 90 DAYS PAST DUE</b>	<b>Amount Due</b>
1,837.48	0.00	1,485.10	0.00	0.00	\$3,322.58

# **Exhibit G**

S

# Proposal

F No. of Pages

JoHn's Paint & Glass, Inc.  
P.O. Box 72 - 1060 S. Main  
Pocatello, ID 83204  
(208) 233-1050 - 1-800-477-1053  
Fax (208) 233-0449

PROPOSAL SUBMITTED TO Linda Brown	PHONE 235-5225	DATE 5-21-2007
STREET 2300 Darrell Loop	JOB NAME	
CITY, STATE AND ZIP CODE Pocatello, Idaho 83201	JOB LOCATION	

We hereby submit specifications and estimates for:

To furnish and install 1-4030 Certainteed Slim series white vinyl casement/picture window, With Low-E glass. This bid includes recasing the interior and trimming the exterior of the Window.

**TOTAL: \$654.04**

**LB080607 — 28**

**We Propose** hereby to furnish material and labor -- complete in accordance with above specifications, for the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_)

Payment to be made as follows: \_\_\_\_\_

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tomado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Authorized Signature *Janette Hobson*

Note: This proposal may be withdrawn by us if not accepted within 60 days.

**Acceptance of Proposal** - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature \_\_\_\_\_  
256

# Proposal

**John's Paint & Glass, Inc.**  
 P.O. Box 72 - 1060 S. Main  
 Pocatello, ID 83204  
 (208) 233-1050 - 1-800-477-1053  
 Fax (208) 233-0449

PROPOSAL SUBMITTED TO <b>Linda Brown</b>	PHONE <b>235-5225</b>	DATE <b>5-21-2007</b>
STREET <b>2300 Darrell Loop</b>	JOB NAME	
CITY, STATE AND ZIP CODE <b>Pocatello, Idaho 83201</b>	JOB LOCATION	

We hereby submit specifications and estimates for:

To furnish and install 1-4030 Certaineed Slim series white vinyl casement/picture window, With Low-E glass. This bid includes recasing the interior and trimming the exterior of the Window.

**TOTAL: \$654.04** **490778**

*John's Paint + Glass*

CUSTOMER'S ORDER NO.						DATE	
NAME <i>Linda Brown</i>							
ADDRESS							
CITY, STATE, ZIP							
SOLD BY	CASH	C.O.D.	CHARGE	ON ACCT.	MDSE. RETD.	PAID OUT	
QUAN.	DESCRIPTION				PRICE	AMOUNT	
1							
2							
3	<i>paid in full</i>				<i>654.04</i>		
4							
5							
6	<i>Per quote</i>						
7							
8							
9							
10							
11							
12							
RECEIVED BY							

**We Propose** hereby to furnish material and labor

Payment to be made as follows:

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Auth  
Sigr  
  
Not  
with

**Acceptance of Proposal** - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance \_\_\_\_\_

# **Exhibit H**

S



Edged in Stone Inc.

880 Redman St.  
Chubbuck, ID 83202

# Estimate


Date	Estimate #
5/5/2008	479

Name / Address
Linda Brown 2300 Darrel Loop Pocatello, Id. 83201

Description	Qty	Cost	Project
			Total
Tear down and rebuild boulder retaining wall as needed due to erosion caused by water draining off Pocatello Creek road. Remove sod and grade down soil Skidloader, operator and two laborers.	18	95.00	1,710.00
Install sod. existing needs to be removed due to erosion buildup and damage that will be caused in repairing boulder wall.	1,650	0.40	660.00
Remove existing cedar fence for access into back yard. Reinstall new cedar fence. Due to the condition of the existing fence removal for access will destroy material and require new material for replacement.	48	21.50	1,032.00
Remove and replace cedar gate and replace hardware.	1	300.00	300.00
Install top soil as needed to replace eroded soil above and behind boulder wall	1	75.00	75.00
Remove and replace weed barrier and shredded bark above boulder wall.	800	2.10	1,680.00
Thanks for the opportunity, we will look forward to serving you.			<b>Total</b> \$5,457.00

**CERTIFICATE OF SERVICE**

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

  
RYAN S. LEWIS

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

FILED  
BANNOCK COUNTY  
CLERK OF THE DISTRICT COURT  
2008 JUL 14 PM 4:33  
BY [Signature]

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

LINDA BROWN,

*Plaintiff,*

vs.

CITY OF POCATELLO, a Municipal  
Corporation,

*Defendant.*

Case No. CV-2007-3303-OC

**PLAINTIFF'S RESPONSE  
IN OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

**INTRODUCTION**

This is *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment.*

Filed previously by Plaintiff are *Plaintiff's Motion for Partial Summary Judgment, Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment, Affidavit of Linda Brown, and Affidavit of Counsel.* The substance of those filings is incorporated herein.

## **SUMMARY OF ARGUMENTS**

Defendant does not contend that the roadwork in question did not cause the flooding, nor that Plaintiff's home and property were not damaged by the post-roadwork flooding, rather Defendant makes two tort claims act arguments: immunity under the tort claims act and deficient tort claim notice.

Contrary to Defendant's claim, there is no immunity under the discretionary function, *Idaho Code* § 6-904(7) as the "plan or design" of the road is *not* a discretionary function. Second, Defendant has not established the elements of *Idaho Code* § 6-904(7) as to a "plan or design for construction of roads" as there has been no allegation that this road work was actually *done* according to and according to any alleged plan for which immunity is claimed.

Additionally, Defendant's claim that the tort claim notice is deficient is totally contrary to caselaw and the purposes behind the Tort Claim notice requirements.

Finally, the Idaho Tort Claims Act does not even apply to abatement and injunctive relief and the Constitutional/Federal claims of Plaintiff.

### **Plaintiff's Claims**

Plaintiff has further set forth bases in her Motion for Summary Judgment and supporting filings which *require* denial of Defendant's motion.

The "immunity" of the Tort Claims Act is *inapplicable* to the Constitutional claims and U.S.C. § 1983 claims that are included in Plaintiff's Motion for Summary

### Defendant's Facts

1. Defendant admits "The portion of Pocatello Creek Road at issue is owned and maintained by the City of Pocatello." **Defendant's Memorandum in Support of Motion for Summary Judgment, p. 1.**

2. Defendant admits "Plaintiff's property sits about twenty feet below Pocatello Creek Road, and allegedly took on water from the road as a result of the reconstruction project." **Defendant's Memorandum in Support of Motion for Summary Judgment, pp. 1-2.** This has not been disputed.

3. "The Pocatello Creek Road reconstruction project was identified as a critical transportation need by ...the City of Pocatello in the late 1990's....The process was started to create a design and plan....The City of Pocatello allotted funds for an engineering consulting firm to be hired to create the plan and design specifications for the project." **Defendant's Memorandum in Support of Motion for Summary Judgment, p. 2.**

### Plaintiff's Prior Facts

4. Plaintiff has lived at 2300 Darrell Loop, Pocatello, Idaho, since April 15, 2001. **Linda Brown Deposition 4:25-5:7 (See Affidavit of Counsel, Exhibit A).**

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

previously existed was created and that did not damage adjacent private properties.

**Affidavit of Linda Brown, ¶4.**

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

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

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

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

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

10. The *Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment*, contains photographs evidencing the new pooling water (p. 5), water pouring under the backyard fence (p. 8), and some of the damage (p. 8-11).

11. Defendant has never contended that Plaintiff's home and property was not damaged, flooded, mold and uninhabitable.

12. Defendant relies entirely on Idaho Tort Claims Act immunity.

## **IDAHO TORT CLAIMS ACT**

The Idaho Tort Claims Act *only applies* to those areas where a private person or entity could be liable.

### § 6-903. Liability of governmental entities -- Defense of employees

(a) Except as otherwise provided in this act, every governmental entity is ***subject to liability for money damages*** arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity ***if a private person or entity would be liable for money damages under the laws of the state of Idaho***, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

— ***Idaho Code § 6-903***<sup>1</sup>

### § 6-904. Exceptions to governmental liability

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the

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<sup>1</sup> All **bold** and *italics* in this *Response in Opposition* have been added unless otherwise noted.

part of a governmental entity or employee thereof, whether or not the discretion be abused.

\* \* \*

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

— **Idaho Code § 6-904(1) and (7).**

#### **Inapplicability of the Tort Claims Act**

The Tort Claims Act cannot create immunity where that immunity has already been abrogated:

“Municipal defenses -- including an assertion of sovereign immunity -- to a federal right of action are, of course, controlled by federal law.’ *Owen v. City of Independence*, 445 U.S., at 647, n. 30. ‘By including municipalities with the class of ‘persons’ subject to liability for violation of the Federal Constitution and laws, *Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State’s sovereign immunity the municipality possessed.’* *Id.*, at 647-648.” ***Howlett v. Rose*, 496 U.S. 356, 376 (U.S. 1990).**

The Defendant cannot claim immunity by the Tort Claims Act for Constitutional and federal claims.



## **ARGUMENT**

### **POINT ONE**

#### **DEFENDANT HAS NOT ESTABLISHED IMMUNITY UNDER THE TORT CLAIMS ACT**

Defendant claims immunity for the flooding based upon *Idaho Code* § 6-904(1) and (7). Defendant's claims are contradictory as there cannot be both. **See, Bingham v. Idaho Dep't of Transp., 117 Idaho 147, 149-150, 786 P.2d 538 (1989).**

#### **There Is No Discretionary Function Immunity**

Defendant claims by conclusion that the “decision to make improvements to Pocatello Creek Road was a decision involving the ‘financial, political, economic, and social’ aspects of the community” and therefore the decision was an immune “discretionary function.” **Defendant's Memorandum in Support of Motion for Summary Judgment, p. 2.** The Defendant provides *zero fact basis* for the argument that the decision *to not properly drain the roadway* thereby flooding Plaintiff's property was a “financial, political, economic, or social” decision — or that the plan even called for such a design.

Regardless of that improper conclusion, the Idaho Supreme Court has already held that the plan or design of a road *is not* a discretionary function:

“Contrary to the district court's holding, the plan or design of a highway is not immune from liability under Subsection (1).” Subsection (1) may insulate the Transportation Department from liability for having exercised

its discretion by deciding (or not deciding) to make a plan or design for Highway 39 in the first place. However, *once the Department has made the decision to plan and design the highway, it must comply with the two requirements of Subsection (8) to be immune from any suit arising out of that plan or design.*"

— **Bingham v. Idaho Dep't of Transp., 117 Idaho 147, 149-150, 786 P.2d 538 (1989).**<sup>2</sup>

In this case, once the City decided "to plan and design the highway, it must comply" with requirements of Subsection (7) "to be immune from any suit arising out of that plan or design."

Summary Judgment as to *Idaho Code* § 6-904(1) should be denied.

**Defendant Has Not Satisfied Its Burden Under Idaho Code § 6-904(7)**

Defendant also claims immunity under Idaho Code § 6-904(7) and concludes that "all of the elements which the City of Pocatello is required to establish in order to take advantage of immunity provided in subsection (7) have been conclusively established." **Defendant's Memorandum in Support of Motion for Summary Judgment, p. 8.**

The Defendant alleges immunity arguing that Plaintiff's claim:

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative

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<sup>2</sup> *Idaho Code* § 6-904(8) has been renumbered as *Idaho Code* § 6-904(7).

body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

— *Idaho Code* § 6-904(7)

**Defendant Has Never Alleged that Any Plan Was Followed**

Defendant claims that there was a “plan” but *never* alleges that this plan was *followed* and therefore Defendant has failed to establish that the claim “*Arises* out of a plan or design for construction or improvement to the highways, roads, streets,…”

Defendant’s Motion for Summary Judgment should be denied.

**POINT TWO**

**PLAINTIFF’S NOTICE WAS PROPER AND SUFFICIENT**

Defendant claims that “plaintiff filed a notice of tort claim that specifically related back to an incident of flooding which allegedly occurred in February 2006....there was never a subsequent notice of tort claim filed.” **Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 11.** This argument is based upon the repeated flooding of Plaintiff’s home after initial flooding.

Defendant fails to cite a single authority on this point and merely concludes that the Plaintiff’s notice is insufficient for notice of later flooding. Caselaw makes it clear that Plaintiff’s Notice was proper and filed even if she did not *yet* know *the full extent* of her damages.

**Plaintiff's April 25, 2006 Notice — Within Two Months of Damage**

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

Defendant admits that "April 17, 2006 was the first date that Defendant became aware of Plaintiff's claim of water run off damages." **Answer to Interrogatory No. 6 (See Affidavit of Counsel, Exhibit C, p. 3).**

Plaintiff filed a "Claim for Damages or Injury" dated April 25, 2006 with the City of Pocatello, and reported the "Flooding to basement & backyard" and included photos and described the flooding since the Pocatello Creek Road work alterations. **Affidavit of Linda Brown, ¶20, Exhibit A; (See also Affidavit of Lindell Turner, Exhibit E, evidencing receipt by Defendant).**

**Contents of the Claim/Notice**

*Idaho Code* § 6-907 sets forth the requirement of the contents of the claim:

"All claims presented to and filed with a governmental entity shall accurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose. If the claimant is incapacitated from presenting and filing his

claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the state and is absent during the time within which his claim is required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant. *A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.*

The Supreme Court has held that even a claim which failed to set forth *any monetary amount* was sufficient under this section. A letter that *did not even set forth an amount of damages* and was sent by Plaintiff's insurer to the city's insurance was sufficient and "were adequate in light of the final proviso of that section" of Idaho Code § 6-907, and in light of that final proviso, the "letter in this case *certainly put the city on notice that a claim against it was being pursued*. Thus, the city not only knew of Smith's accident but knew also that a claim against it based on that accident would be prosecuted. This case does not involve the situation where the governmental entity had "actual notice of the injury" but no notice of the claim." *Smith v. Preston, 99 Idaho 618, 621-22, 586 P.2d 1062 (1978).*

In this case, Plaintiff certainly put the City on notice of the flooding and the pursuit of that claim.

#### **Put the Reasonable Person on Inquiry Notice**

The standard is when a "reasonably prudent" person should inquire:

“This Court has held that the notice requirement begins running when a person is aware of such facts that would cause a reasonably prudent person to inquire further into the circumstances surrounding the incident *even if the full extent of damages and the government's role are not known at the time*. *Mitchell v. Bingham Mammal Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997).  
— ***Cobble v. City of Challis*, 138 Idaho 154, 157, 59 P.3d 959 (2002)**

The Plaintiff did not know the full extent of her damages when she filed her Notice, but she placed the City on notice of the flooding as required.

#### **Purpose of the Notice Provision**

“The purpose of IC § 6-906 is to (1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses.” ***Cobble v. City of Challis*, 138 Idaho 154, 157, 59 P.3d 959 (2002)**.

It is clear that Plaintiff's initial notice accomplished those three goals. It attempted to “(1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties,” even though the City chose to deny the claim and deny a permanent remedy before filing suit; it “(2) allowed] authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability,” and it (3) “allowed] the state to prepare defenses.” The Notice did exactly what it was intended to do.

The fact that later floods occurred because of the City's failure to correct the flooding is not because of any deficiency in the Notice — the City was on Notice and *not* “misled to its injury” — and *chose* not to act to permanently rededicate the flooding.

### **POINT THREE**

#### **THE CITY OWNS THE ROAD AND IS RESPONSIBLE FOR VIOLATING THE LAW OF NATURAL SERVITUDE OF NATURAL DRAINAGE BETWEEN ADJOINING LANDS**

Defendant claims that it is not liable for any work done by Parsons “which allegedly caused Plaintiff’s damages...because Jack B. Parsons Companies...was an independent contractor” and “Under plaintiff’s general negligence theory, the City of Pocatello is entitled to immunity.” **Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 12.**

Defendant’s argument relates to general negligence and not the nuisance, constitutional inverse condemnation, or federal 42 U.S.C. § 1983 claims.

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

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

This court adheres to the civil law rule (as opposed to the common enemy rule. Annot. 59 A.L.R.2d 421 [1958]) which recognizes a natural servitude of natural drainage between adjoining lands so that the lower owner must accept the "surface" water which naturally drains onto his land. *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945). However, in *Teeter v. Nampa and Meridian Irrigation Dist.*, 19 Idaho 355, 114 P. 8 (1911), it was held that waters could not be artificially accumulated and then cast upon lower lands in unnatural concentrations.

Before the expansion of the City of Burley into the area where it constructed the system of curbs and gutters and storm drains, the surface waters from rain and melting snow percolated into this ground and there was no flow of this water. Upon the expansion of the city into this new area the ability of the land to absorb this surface water was lost; and the city to remove the surface water constructed the curbs, gutters and storm drain sewers, effectively concentrating into a small area the accumulated surface water. In *Levee v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951), the Supreme Court of Oregon held that a city has no right to artificially collect drain water from a drain system and *cast them upon the lands of another in unnatural volumes* even though they were turning the waters so collected into a watercourse. This same principal was discussed by this court in *Teeter v. Nampa and Meridian Irrigation Dist.*, *supra*.  
— ***Dayley v. Burley*, 96 Idaho 101, 103-104, 524 P.2d 1073 (1974).**

The City as the owner of this road cannot shift the blame to someone else for duties it owes — the flooding has created a nuisance. This case is not even one where the city is casting additional waters into a “watercourse,” this is casting water onto Plaintiff’s residential property — her home!

The City is violating the law of “natural servitude of natural drainage between adjoining lands.”



## **POINT FOUR**

### **THE IDAHO TORT CLAIMS ACT DOES NOT APPLY TO NON-MONETARY CLAIMS**

Additionally, Defendant's motion should be denied to the extent that *non-monetary* claims are being sought. The Tort Claims Act specifically references and applies to "money damages." **Idaho Code § 6-903.**

The Idaho Supreme Court has made it clear that only claims for money damages are subject to the tort claim notice requirements. **Cobble v. City of Challis, 138 Idaho 154, 157, 59 P.3d 959, 962 (2002)**("abatement of a nuisance" is not "an action to recover damages" and therefore is not "subject to the constraints of the notice requirements under the Tort Claims Act"; "claim for abatement of a nuisance - an action that would not be limited by the requirements of the ITCA.")

#### **Plaintiff Seeks Injunction/Abatement Relief**

For a nuisance, "Damages may be recovered *along with* an injunction or abatement." **Payne v. Skaar, 127 Idaho 341, 345, 900 P.2d 1352 (1995).** See also, *Idaho Code* § 52-301. Plaintiff is also entitled to an Order of Abatement and an injunction against further encroachment.

Abatement is allowed by statute, and allows:

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

— **Idaho Code § 52-302**

Defendant admittedly did not make any “permanent” repair prior to filing this lawsuit and did so *only* after being served in this case. Similar to *Dayley v. Burley*, 96 Idaho 101, 103, 524 P.2d 1073 (1974):

The “city had no right to discharge waters into the remnants of the Goose Creek channel which crossed the plaintiffs' lands or to construct storm sewers which would discharge waters and encroach on the plaintiffs' properties.”  
— *Dayley v. Burley*, 96 Idaho 101, 103, 524 P.2d 1073 (1974)

The City had no right to flood Plaintiff's property.

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

Plaintiff should be granted summary judgment on this point and should not have been forced to file this lawsuit to obtain this relief.

### **POINT FIVE**

### **DEFENDANT'S MOTION DOES NOT EVEN APPLY TO THE CONSTITUTIONAL INVERSE CONDEMNATION CLAIMS AND 42 U.S.C. § 1983 CLAIM**

Defendant has moved for summary judgment exclusively on Idaho Tort Claims bases. Those bases do not even apply to constitutional inverse condemnation and federal 42 U.S.C. § 1983 claims.

## Federal and State Constitution

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

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

### 42 U.S.C. § 1983

42 U.S.C. § 1983 states:

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

A municipality is a “person.” ***Monell v. New York City Dept. of Social***

***Services, 436 U.S. 658, 663 (1978)***

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

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

### **Inverse Condemnation**

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

“An inverse condemnation action, such as the one before us, is ‘instituted by a property owner who asserts that his property, or some interest therein, has been *invaded* or appropriated to the extent of a taking, but without due process of law, without payment of just compensation.’ *Rueth v. State*, 100 Idaho 203, 217, 596 P.2d 75, 89 (1978). Through her counterclaim for inverse condemnation, Lindsey has not sought

compensation for the taking which occurred by virtue of the City's condemnation action, but for the City's alleged *interference with her property rights* prior to the initiation of the City's condemnation action." ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Idaho Ct. App. 1993).**

**Constitutional Violations and § 1983 Claims Trump State Tort Claims Law**

A "landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation . . . .' *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972). As noted in JUSTICE BRENNAN's dissent in *San Diego Gas & Electric Co.*, 450 U.S., at 654-655, it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself:

'The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. ***That right was guaranteed by the Constitution.*** The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." *Id.*, at 16. (Emphasis added.)  
— ***First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).**

### Idaho Tort Claims Act Does not Even Apply to Inverse Condemnation

The ITCA authorizes tort claims against governmental entities and employees for their negligence or wrongful acts or omissions when engaged in activities *for which an individual could be held liable.* ***Gordon v. Noble*, 109 Idaho 1048, 1049, 712 P.2d 749 (Ct. App. 1986).**

It is clear that no individual could be liable for inverse condemnation, because it is by definition an uncompensated governmental taking.

Plaintiff's constitutional claims themselves are founded upon the Constitution of the United States and the Constitution of the State of Idaho and cannot be undone by the Idaho legislature. They are rights that Plaintiff is "entitled to bring...as a result of 'the self-executing character of the constitutional provision'" and are "grounded in the Constitution itself" and "*guaranteed by the Constitution*" and "rested upon the Fifth Amendment [and Idaho Const. Art. I, § 14]. Statutory recognition was not necessary." ***First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).**

### 42 U.S.C. § 1983 Trumps State Tort Claims

Additionally, the Idaho Tort Claims Act is trumped by the Federal Civil Rights Act which protects against Constitutional violations.

"The assumed analogy between the federal right created by the Civil Rights Act and the state created remedies and immunities found in the Tort Claims Act is

ephemeral [or fleeting]. As Mr. Justice Harlan observed concurring in *Monroe v. Pape* (1961) 365 U.S. 167, 196, 81 S. Ct. 473, 488, 5 L. Ed. 2d 492 ‘*a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy* even though the same act may constitute both a state tort and the deprivation of a constitutional right.’” ***Donovan v. Reinbold*, 433 F.2d 738, 741-742 (9th Cir. Cal. 1970).**

The *Donovan* Court noted the supreme nature of the Federal Civil Rights Act as relates to a state’s sovereign immunity:

“Congress has not evinced any intention to defer to the states the definition of the federal right created in section 1983, *or to adopt the states’ remedies or procedures for the vindication of that right*. It has never indicated an intent to engraft onto the federal right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed, the history of section 1983, summarized in *Monroe v. Pape*, supra, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, vividly demonstrates that *state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act*. (See also, *Beauregard v. Wingard* (S.D.Cal.1964) 230 F. Supp. 167, 173.) An incorporation of such state created policies “would practically constitute a judicial repeal of the Civil Rights Act.” (*Hoffman v. Halden* (9th Cir. 1959) 268 F.2d 280, 300; *Jobson v. Henne* (2d Cir. 1966) 355 F.2d 129.)” ***Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. Cal. 1970).**

#### **Sovereign Immunity Is Controlled by Federal Law**

“Municipal defenses -- including an assertion of sovereign immunity -- to a federal right of action are, of course, *controlled by federal law*. By including

municipalities with the class of 'persons' subject to liability for violation of the Federal Constitution and laws, *Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed.*" **Howlett v. Rose, 496 U.S. 356, 376 (U.S. 1990)(citations omitted).**

The *Howlett* Court continued:

"Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) *cannot be immunized by state law*. A construction of the federal statute which permitted a state immunity defense to have controlling effect *would transmute a basic guarantee into an illusory promise*; and the supremacy clause of the Constitution insures that the proper construction may be enforced." — **Howlett v. Rose, 496 U.S. 356, 376-377 (U.S. 1990).**

The Idaho Supreme Court agrees:

"The question of immunity from an action predicated upon 42 U.S.C. § 1983 is *one of federal law*. *Jones v. Marshall*, 528 F.2d 132 (2d Cir.1975); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir.1970); *Ligon v. State of Maryland*, 448 F.Supp. 935 (D.C.Md.1977); see also *Martin v. Duffie*, 463 F.2d 464 (10th Cir.1972). The notice of claim requirements of IC § 6-905 are inapplicable to a cause of action brought under 42 U.S.C. § 1983. *Doe v. Ellis*, 103 Wis.2d 581, 309 N.W.2d 375 (1981); *Perrote v. Percy*, 452 F.Supp. 604 (E.D.Wis.1978). See also *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir.1970)." — **Overman v. Klein, 103 Idaho 795, 798-799, 654 P.2d 888 (1982).**

The constitutional claim in *Harkness* was based on the United States Constitution and brought pursuant to 42 U.S.C.A. § 1983. A state's notice-of-claim statute which provides that no action may be brought or maintained against a state



government subdivision unless claimant provides written notice within a certain period of time is preempted when a federal civil rights action is brought in state court. See *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982). Since the constitutional claim in *Harkness* was brought pursuant to 42 U.S.C.A. § 1983, the notice of claim requirement of IC § 50-219 was preempted by the federal statute and distinguishes *Harkness* from the instant appeal.” ***Sweitzer v. Dean*, 118 Idaho 568, 572-573, 798 P.2d 27 (1990).**

**The City Attempts to Place — and Justify — Placing Societal Burden on Plaintiff**

The City argues, “It is unfortunate<sup>3</sup>, and certainly unforeseeable<sup>4</sup>, that plaintiff would suffer the damages that she has alleged, however, the Idaho Legislature has intentionally provided immunity to local governments to be free from this type of suit.” **Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 10.** Defendant’s argument is Plaintiff should bear society’s burden.

“It is axiomatic that the Fifth Amendment’s just compensation provision is ‘designed to bar Government from *forcing some people alone to bear public burdens* which, in all fairness and justice, should be *borne by the public* as a whole.’ *Armstrong*

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<sup>3</sup> If it truly were “unfortunate” as claimed, then the City would have remedied this flooding prior to multiple floods and ultimately requiring the filing of this lawsuit.

<sup>4</sup> Perhaps the first flooding was “unforeseeable;” however, the subsequent floodings were no longer “unforeseeable” and the City could have earlier remedied the problem as to the later “foreseeable” flooding.

v. *United States*, 364 U.S., at 49.” ***First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-319 (U.S. 1987).**

**Fixing the Flooding Does Not Undo the Taking**

The Defendant may argue that it has fixed the flooding. This does not absolve it from compensating for the taking. “Where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” ***First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (U.S. 1987).**

**CONCLUSION**

Defendant’s Motion for Summary Judgment should be denied.


Defendant has not established that any “plan or design” was actually followed causing Plaintiff’s property to flood. Defendant’s motion should likewise be denied as to any “non-monetary” and Constitutional/federal claims.

Plaintiff Motion for Partial Summary Judgment should be granted.

Plaintiff’s claims for an injunction and abatement are proper under the circumstances where Defendant’s road is now casting water on Plaintiff’s property causing a nuisance and damaging Plaintiff. Plaintiff’s constitutional and federal claims trump any “sovereign immunity” claimed by Defendant.


DATED this 14<sup>th</sup> day of July, 2008

LOWELL N. HAWKES, CHARTERED

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

**CERTIFICATE OF SERVICE**

I certify that on this 14<sup>th</sup> day of July, 2008 I faxed a copy of the foregoing to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490 Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254, and that a courtesy copy has been hand-delivered to the Honorable David C. Nye at his chambers at the Bannock County Courthouse.

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

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FILED  
 BANNOCK COUNTY  
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2008 JUL 23 PM 2:05

BY: [Signature]  
 CLERK

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

LINDA BROWN,

*Plaintiff,*

vs.

CITY OF POCA TELLO, a Municipal  
 Corporation,

*Defendant.*

Case No. CV-2007-3303-OC

**PLAINTIFF'S REPLY IN  
 SUPPORT OF HER MOTION  
 FOR SUMMARY JUDGMENT**

The parties in this case have filed cross Motions for summary judgment.

This is Plaintiff's Reply supporting her Motion for Partial Summary Judgment.

Filed previously by Plaintiff are (1) *Plaintiff's Motion for Partial Summary Judgment*, (2) *Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment*, (3) *Affidavit of Linda Brown*, (4) *Affidavit of Counsel*, and (5) *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment*. The substance of those filings are incorporated herein.

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## **SUMMARY OF RESPONSE**

### **Repealed Law**

Defendant in response argues, first that Plaintiff Complaint does not “set forth *a cause of action* for ‘nuisance’” and that there is “no such claim or allegation” of “inverse condemnation.” ***Defendant's Memorandum in Opposition to Summary Judgment, p. 5, 12.***

Defendant's argument is antiquated law not valid in Idaho since 1958 when the *statutory* Rules of Civil Procedure were repealed.

### **Elements in fact are pleaded**

Defendant further argues that Plaintiff has not established a nuisance; to the contrary, Plaintiff has established the elements of nuisance as set forth in *Idaho Code* § 52-101 and 111 nor the elements of “inverse condemnation.” ***Defendant's Memorandum in Opposition to Summary Judgment, p. 5, 12, 13.***

Point One that follows show that in fact the elements of both are pleaded and otherwise Plaintiff has established an uncompensated taking as evidenced by the pleadings, admissions, and Affidavits; that Plaintiff's property has been subjected to frequent and recurrent flooding.

## **REPLY ARGUMENT**

### **POINT ONE** **PLAINTIFF'S COMPLAINT PROPERLY PLEADS NUISANCE AND INVERSE CONDEMNATION CLAIMS**

Defendant argues Plaintiff's *Complaint* does not "set forth *a cause of action*<sup>1</sup> for 'nuisance'" and there is "no such claim or allegation" of "inverse condemnation" or "taking." ***Defendant's Memorandum in Opposition to Summary Judgment*, p. 5, 12, 13.**

#### **Bad Law Since 1958**

Idaho has not required a Complaint to plead a "Cause of Action" since 1958. Prior to 1958 the *statutory* Idaho Rules of Civil Procedure required "a statement of the facts constituting the cause of action, in ordinary and concise language." *Archer v. Shields Lumber Co.*, 91 Idaho 861, 867, 434 P.2d 79, 85 (1967) (quoting *Idaho Code* § 5-605). "***This is a different standard than what is required today*** by I.R.C.P. 8(a)(1), requiring a short and plain statement of the claim showing that the pleader is entitled to relief." *Seiniger Law Office v. North Pacific Insurance Company*, — Idaho —, 2008 Idaho Lexis 10, 11, 178 P.3d 606 (2008). The *Idaho Rules of Civil Procedure* were formally adopted by the Idaho Supreme Court on November 1, 1958.

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

Defendant recognizes that under Rule 8(a), *Idaho Rules of Civil Procedure* only a “short and plain statement of the claim showing that the pleader is entitled to relief” is required. ***Defendant’s Memorandum in Opposition to Summary Judgment*, p. 12.** Defendant just overlooked “the rest of the story” since 1958 when the words “cause of action” were removed from Rule 8 by the Supreme Court.

**Specific “Legal Theories” Need Not Be Pled — Only “Facts”**

Defendant’s argument that Plaintiff has somehow not met the law in not setting forth “legal theories” stating “nuisance” and “inverse condemnation” is also not the law. It is noteworthy Defendant does not cite to *any* law that requires the pleading of “legal theories.”

“Under the modern form of pleading a *complaint need not state the specific legal theories* upon which the plaintiff relies. A simple, concise statement of the *operative facts is sufficient.*” ***Bauer v. Minidoka Sch. Dist.*, 116 Idaho 586, 589, 778 P.2d 336 (1989).** That is what Plaintiff did.

“*There is no requirement that a complaint include a statement of the various legal theories* upon which the plaintiff relies. *Bauer v. Minidoka School Dist. No. 331*, 116 Idaho 586, 589, 778 P.2d 336, 339 (1989); *Collord v. Cooley*, 92 Idaho 789, 793, 451 P.2d 535, 539 (1969). The purpose of a complaint is to inform the defendant of *the material facts* upon which the plaintiff rests the action.” ***Quinto v. Millwood Forest***

**Prods., 130 Idaho 162, 167, 938 P.2d 189, 194 (Ct. App. 1997).** Plaintiff's Complaint

fully "informed" Defendant of "the material facts."

**Plaintiff's Pleaded Facts Clearly Satisfy the Requirement**

Plaintiff's *Complaint* clearly states the material facts:

2. Plaintiff Linda Brown is a resident of Pocatello, Bannock County, Idaho residing at 2300 Darrell Loop where she has lived since April of 2001....

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

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

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

6. The obvious roadway depression and "cupping" is easily seen where the City of Pocatello and Bannock County boundaries meet on Pocatello Creek Road. That difference at the junction was, and *should have been, clear and conspicuous to City of Pocatello roadway designers, engineers, and workers with resultant recognition of the need to deal with roadway water runoff.* The completed roadway from the City-County junction line did *not* flow smoothly but created a depression and allowed for pooling of water and water runoff into Plaintiff's yard and home and ultimately, as

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more fully set forth herein, requiring protection of Plaintiff's home by sandbags.

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

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

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

\* \* \*

12. As a direct and proximate cause of the negligent Pocatello Creek Road reconstruction, the roadway water flowed off Pocatello Creek Road and under Plaintiff's back yard fence *carrying debris and soil and rock with it into the Plaintiff's yard and across the Plaintiff's yard and into Plaintiff's home* through windows and into and down walls and onto *floors and under carpeting and into other rooms and under tile*.

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

14. As a direct and proximate cause of the Defendant City of Pocatello's negligence *and failings as set forth*

*herein*, the Plaintiff has been specially and generally damaged in her home and property, cleaning and repair expense, replacement expense, resultant mold and *loss of use and benefit of her home* and other damages incidental to all of the foregoing.

— **Complaint and Jury Demand, ¶¶ 2-14.**

These “operative facts” are the *same* facts on which Plaintiffs rely in support of her Motion for Partial Summary Judgment. They sufficiently apprise Defendant of the “*operative facts*” (*Bauer v. Minidoka Sch. Dist.*, 116 Idaho 586, 589, 778 P.2d 336 (1989) and the “*material facts* upon which the plaintiff rests the action.” *Quinto v. Millwood Forest Prods.*, 130 Idaho 162, 167, 938 P.2d 189, 194 (Ct. App. 1997).

The “operative” and “material facts” were provided, including the City’s role as a “municipal corporation” and its alteration of the roadway, such that Plaintiff’s property was flooded, and suffered damages including the “resultant mold and *loss of use and benefit of her home.*” **Complaint and Jury Demand, ¶15.** That is loss of use is exactly what inverse condemnation is.

These facts, among the others set forth in the Complaint, are sufficient.

#### **Relief Was to Move For a More Definite Statement**

A party may move for a “more definite statement of the claim...under I.R.C.P. 12(e)” if the party feels that the Complaint does not fairly apprise him of the basis of the claim against him. *Quinto v. Millwood Forest Prods.*, 130 Idaho 162, 167, 938 P.2d 189, 194 (Ct. App. 1997). Defendant did not do that.

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**Controversies Are to Be Determined on the Merits**

It is long-established law in Idaho, and generally, that controversies should be determined and disposed of each on the specific facts of the case as substantial justice may require. The proper exercise of judicial discretion should tend to bring about a judgment on the merits. ***Bunn v. Bunn*, 99 Idaho 710, 711, 587 P.2d 1245, 1246 (1978).** The keystone of the *Idaho Rules of Civil Procedure* is *liberality* which favors a final decision predicated on the merits over a dismissal based upon a technicality. ***Gerstner v. Wash. Water Power Co.*, 122 Idaho 673, 675, 837 P.2d 799, 801 (1992).**

Rule 1(a) is a constant reminder that “a just result is always the ultimate goal to be accomplished.” ***Gerstner v. Wash. Water Power Co.*, 122 Idaho 673, 675, 837 P.2d 799, 801 (1992).**

“A 'determination' of an action within the meaning of Rule 1 is meant to be a *determination of the controversy on the merits — not a termination on a procedural technicality which serves litigants not at all.* A determination entails a finding of the facts and an application of the law in order to resolve the legal rights of the litigants who hope to resolve their differences in the courts. The 'liberal construction' of the rules required by Rule 1, while it cannot alter compliance which is mandatory and jurisdictional, will ordinarily preclude dismissal of an appeal for that which is but technical noncompliance. This will be especially so where no prejudice is shown by any delay which may have been occasioned.” ***Gerstner v. Wash. Water Power Co.*, 122 Idaho 673, 675, 837 P.2d 799, 801 (1992)(quoting *Bunn v. Bunn*, 99 Idaho 710, 712, 587 P.2d 1245, 1247 (1978).**

What Defendant seeks is not consistent with the long established judicial policy of hearing cases on the merits. Plaintiff has met her pleading burden as to the “nuisance” and “inverse condemnation” requirements.

Plaintiff has met her pleading burden as to the “nuisance” and “inverse condemnation” requirements.

## **POINT TWO**

### **DEFENDANT'S ACTIONS CONSTITUTE A NUISANCE — SUBJECT TO MONETARY AND NON-MONETARY RELIEF**

Defendant next contends that Plaintiff’s claim for nuisance fails because of she has not established,

(1) the parameters of the ‘natural servitude’ i.e. the ‘natural drainage’ that she was required to accept. (2) that the City of Pocatello ‘artificially accumulated’ water, and (3) cast said water upon her land in ‘unnatural concentrations’; and that (4) said actions were caused by the City of Pocatello; and that said actions (5) were an obstruction to the free use of her property.” **Defendant’s Memorandum in Opposition to Summary Judgment, p. 7.**

Defendant, however, has not cited any law that the above are required to establish “nuisance.” Defendant is misstating the burden.<sup>2</sup> An action for nuisance is

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<sup>2</sup> Notwithstanding that overstatement, Plaintiff’s “facts” properly demonstrate a history of no prior flooding, that the City is the owner of the road in question, that only after the road modification did flooding occur on multiple occasions (i.e. casting of water in unnatural concentrations).

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defined by *Idaho Code* § 52-111, titled “**Actions for Nuisance**” which states that a nuisance is:

*Anything* which is *injurious to health* or morals, or indecent, or *offensive to the senses*, or an *obstruction to the free use of property*, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action.

Only those set forth in the statute are the requisite elements. Plaintiff has satisfied all of those.

In fact, Plaintiff has established that Defendant violated the law of natural servitude of drainage — which is the cause of this nuisance — and as set forth in *Dayley v. Burley*, 96 Idaho 101, 103-104, 524 P.2d 1073 (1974):

“This court adheres to the civil law rule (as opposed to the common enemy rule. Annot. 59 A.L.R.2d 421 [1958]) which recognizes a natural servitude of natural drainage between adjoining lands so that the lower owner must accept the “surface” water which *naturally* drains onto his land. *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945). However, in *Teeter v. Nampa and Meridian Irrigation Dist.*, 19 Idaho 355, 114 P. 8 (1911), it was held that waters could not be artificially accumulated and then cast upon lower lands in unnatural concentrations.”

The City’s roadway changes *artificially* caused the roadway water to accumulate until it diverted off through Plaintiff’s property causing damage; prior to the 2005 roadway changes, the roadway water created no problem.

Plaintiff has thus satisfied the elements of nuisance, (1) Plaintiff has demonstrated that the City is the *owner* of the road in question; (2) that historically she

had no flooding; (3) because of the city's change she has subsequently on multiple occasions, and (4) suffered flooding, damage and loss of use all of which has been "indecent, or *offensive to the senses*, or an *obstruction to the free use of property*, so as to interfere with the comfortable enjoyment of life or property."

Plaintiff has demonstrated nuisance.

### **Objection to Defendant's Speculation**

Defendant argues/speculates that "Plaintiff's installation of a stone retaining wall *could have* affected the absorption rate of the slope between the road and her property thereby causing flooding to occur." **Defendant's Memorandum in Opposition to Summary Judgment, p. 8.** This argument/speculation is just that; not supported by any facts, testing, or testimony. Speculation in argument does not create a question of fact. **Defendant's Memorandum in Opposition to Summary Judgment, p. 8.**

### **Plaintiff Has Established No Prior Flooding**

Defendant has *never* disputed the fact of no prior flooding; only after the 2005 road work did flooding commence. And the photographs of water accumulation on the roadway make it obvious that a new problem was born in 2005.

Defendant's argument seeks to impose a duty to essentially determine a historical "volume" of discharge onto plaintiff's property. **Defendant's Memorandum in Opposition to Summary Judgment, p. 8.** Such has never been required under Idaho law. Such was not required in *Dayley*, "where the surface waters from rain and melting snow

percolated into this ground and there was no flow of this water.” *Dayley v. Burley*, 96 Idaho 101, 103-104, 524 P.2d 1073 (1974)

The volume of water entering Plaintiff’s home previously was zero! After the 2005 road changes, there was a new “run-off pattern” different than existed before and as evidenced by the photos. **Affidavit of Linda Brown, ¶¶ 4-6.**

Defendant argues that “she was simply the victim of unusually excessive rain and/or snow which overloaded the historical or natural drainage of water off the road.” **Defendant’s Memorandum in Opposition to Summary Judgment, p. 9.** Again, an argument of total speculation — without factual support. What is supported is that Plaintiff subsequently suffered regular flooding, and that this flooding *did not affect any neighbors* because the water was only running into . **Affidavit of Linda Brown, ¶4.**

Defendant argues that Plaintiff has not satisfied her burden of proving “the City of Pocatello caused water to be artificially accumulated.” **Defendant’s Memorandum in Opposition to Summary Judgment, p. 9.** Defendant refuses to acknowledge the nuisance elements which focuses on the “landowner.” It is undisputed that the “portion of Pocatello Creek Road at issue is owned and maintained by the City of Pocatello.” **Defendant’s Memorandum in Support of Motion for Summary Judgment, p. 1; Answer to Request for Admission No. 1 (See Affidavit of Counsel, Exhibit B, p. 2).**

Plaintiff has satisfied her burden as to her nuisance claims.

### **POINT THREE**

#### **THE CITY HAS NO NUISANCE IMMUNITY**

Defendant claims immunity for the nuisance claim under the IDAHO TORT CLAIMS ACT, *Idaho Code* § 6-904(7) relating to construction plans. **Defendant's Memorandum in Opposition to Summary Judgment, p. 10.**

Defendant argues there was a “plan” — but *never* alleges that this “Plan” was even *followed* — so Defendant has failed to establish that the claim “*Arises* out of a plan or design for construction or improvement to the highways, roads, streets,…” See also, *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment*, pp. 9-10.

#### **Plaintiff's Notice Was Sufficient**

Defendant further claims immunity based upon *Idaho Code* § 50-219 claiming that Plaintiff's notice for damages did not state “nuisance” and therefore did not comply with the tort claim notice requirements. **Defendant's Memorandum in Opposition to Summary Judgment, p. 10.**

In fact, *Idaho Code* § 50-219 only requires notice of the claim be given pursuant to *Idaho Code* § 6-901 et seq. Defendant admits that Plaintiff placed it on notice of the subsequent flooding but claims that Plaintiff did not plead a legal theory or say “nuisance.” **Defendant's Memorandum in Opposition to Summary Judgment, p. 10-11.**



No Idaho statute requires any person — homeowner or even lawyer — plead “a legal theory” in filing a Tort Claim notice. And Defendant cites no law so requiring.

This argument is a diversion from the obvious indifference of the City to the flooding its roadway work of 2005 caused.

Plaintiff filed a timely notice of claim with the City. Defendant cites *no* case — again — to support its position that the failure to use the word “nuisance” makes that notice deficient. In fact, Plaintiff’s notice is proper as Plaintiff complied with the Tort Claim Notice requirements of *Idaho Code 6-901 et seq.*:

*Idaho Code § 6-907* sets forth the requirement of the contents of the claim:

“All claims presented to and filed with a governmental entity shall accurately describe the ***conduct and circumstances*** which brought about the injury or damage, describe the injury or ***damage***, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose. If the claimant is incapacitated from presenting and filing his claim within the time prescribed or if the claimant is a minor or if the claimant is a nonresident of the state and is absent during the time within which his claim is required to be filed, the claim may be presented and filed on behalf of the claimant by any relative, attorney or agent representing the claimant. ***A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact misled to its injury thereby.***

Plaintiff's claim gave the "*conduct and circumstances*" as required. The Tort Claim notice statute does *not* require the pleading of legal theories.

In fact, "The purpose of IC § 6-906 is to (1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses." ***Cobble v. City of Challis*, 138 Idaho 154, 157, 59 P.3d 959 (2002).**

The City had this opportunity; it failed to act.

The Supreme Court has held that even a claim which failed to set forth *any monetary amount* was sufficient under this section. A letter that *did not even set forth an amount of damages* and was sent by Plaintiff's insurer to the city's insurance was sufficient and "were adequate in light of the final proviso of that section" of *Idaho Code* § 6-907, and in light of that final proviso, the "letter in this case *certainly put the city on notice that a claim against it was being pursued*. Thus, the City not only knew of Smith's accident but knew also that a claim against it based on that accident would be prosecuted. This case does not involve the situation where the governmental entity had "actual notice of the injury" but no notice of the claim." ***Smith v. Preston*, 99 Idaho 618, 621-22, 586 P.2d 1062 (1978).**

In this case the City was certainly on notice a claim being pursued — and elected not to act. Plaintiff's notice was sufficient.

**The Tort Claims Immunity and Notice Requirements  
Do Not Apply to Abatement and Injunctive Relief**

Additionally, and as set forth in detail in *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment*, pp. 16-17, the Tort Claims Act does not even apply to Plaintiff's injunctive and abatement relief requested.

For a nuisance, "Damages may be recovered *along with* an injunction or abatement." *Payne v. Skaar*, 127 Idaho 341, 345, 900 P.2d 1352 (1995). See also, *Idaho Code* § 52-301. In addition to money damages, Plaintiff is also entitled to an Order of Abatement and an injunction against further encroachment.

Abatement is allowed by statute, and allows:

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

— *Idaho Code* § 52-302

The Tort Claims Act specifically applies to "money damages." *Idaho Code* § 6-903. The Idaho Supreme Court has made it clear that only claims for money damages are subject to the Tort Claim Notice requirements. *Cobble v. City of Challis*, 138 Idaho 154, 157, 59 P.3d 959, 962 (2002) ("abatement of a nuisance" is not "an action to recover damages" and therefore is not "subject to the constraints of the notice requirements under the Tort Claims Act"; "claim for abatement of a nuisance - an action that would not be limited by the requirements of the ITCA.")

Defendant admittedly did not make any “permanent” repair prior to filing this lawsuit and did so *only* after being served in this case. Similar to *Dayley v. Burley*, 96 Idaho 101, 103, 524 P.2d 1073 (1974):

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

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

The City had no right to flood Plaintiff's property. Plaintiff is entitled to this Court's Order enjoining the City from wrongfully flooding Plaintiff's property *and* an Order of Abatement specifically allowing Plaintiff to abate future flooding and seek damages for that abatement from the Defendant.

#### **POINT FOUR**

#### **PLAINTIFF MAKE NO RESPONDEAT SUPERIOR CLAIM**

Defendant argues that Plaintiff is trying to hold Defendant liable under a theory of respondeat superior, attempt to hold the city liable for the conduct of its employees or independent contractors. **Defendant's Memorandum in Opposition to Summary Judgment, pp. 13-14.**

Plaintiff has not alleged any respondeat superior — or employment of a tortfeasor. Defendant has not pointed to any pleading or fact in summary judgment for such an argument.

To the contrary, it is *the City's own official action*, as outlined by the Defendant own filings and official action that is the source of the inverse condemnation.

Defendant admits in its own "*Statement of Facts*" its own actions:

The Pocatello Creek Road reconstruction project *was identified as a critical transportation need by ...the City of Pocatello* in the late 1990's...See, *Affidavit Turner*, ¶3...

The City of Pocatello allotted funds for an engineering consulting firm to be hired to create the plan and design specifications for the project...After the City of Pocatello had received the final plans and specifications from Rocky Mountain Engineering, *it authorized the Mayor to move forward* with...See, *Affidavit Turner*, ¶7...

When the plan and specifications were completed for the Pocatello Creek Road project, the City of Pocatello, *as sponsor*, entered an agreement with the State of Idaho Department of Transportation...for the administration of the Pocatello Creek project on August 15, 2003. See, *Affidavit Turner*, ¶5. The *Pocatello City Council passed Resolution No. 2003-13 on August 7, 2003, which gave authority for the Mayor to enter the "State/Local Agreement"* with the State of Idaho. See, *Affidavit Turner*, ¶6...

— **Defendant's Memorandum in Opposition to Summary Judgment, pp. 2-3 (citing Defendant's own filed Affidavit of Lindell Turner.**

This was the City's action. It can blame no one else.

It is clear in *Monell*, a case cited by Defendant, that municipal corporations and similar governmental entities are "persons," under Section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 663 (1978).

Plaintiff is not seeking to hold Defendant liable under respondeat superior and there is not a single fact to support such an argument.

Defendant has not established — or even alleged — the failing of any subcontractor, and Plaintiff has neither. It is the City's official action that is the issue.

### **POINT FIVE**

#### **THE CITY HAS NO IMMUNITY FOR INVERSE CONDEMNATION — AS A MATTER OF LAW**

The City argues — without supporting authority — that the Idaho Tort Claims Act supercedes the Idaho Constitution or United States Constitution, and 42 U.S.C. § 1983, and provides immunity even for constitutional violations. **Defendant's Memorandum in Opposition to Summary Judgment, p. 15.** Besides the fact that statutes do *not* overrule the Constitution or federal rights, in fact, there is no immunity.

The Idaho Supreme Court has already taken a clear position as to Defendant's — *citeless* — attempt to claim immunity for inverse condemnation:

This provision of the Constitution [Idaho Const. Art. I, § 14], therefore, *waives the immunity of the State from suit*, and if the State takes the property without condemning, the landowner, to give full force and effect to the provision of the Constitution as self-executing, must be entitled to sue therefor and such are the universal holdings of the courts which have had occasion to consider this specific point; i.e., where the State has taken private property for public use without paying for it, and tries to avoid paying by claiming immunity.

\* \* \*

In the administration of constitutional guaranties, the *State cannot afford to be other than square and generous*. To *deprive* the citizen of his property by other than legal processes and depend on escape from the consequences under cover of the plea of nonsuability of the State is *too*

*anomalous and out of step with the spirit and letter of the law* to claim protection under the Constitution.

— **Renninger v. State, 70 Idaho 170, 178, 213 P.2d 911 (1950).**

Likewise, Plaintiff's United States Constitutional claim (and § 1983 claim)

are *not* claims from which the City is *immune*:

“Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) *cannot be immunized by state law*. A construction of the federal statute which permitted a state immunity defense to have controlling effect *would transmute a basic guarantee into an illusory promise*; and the supremacy clause of the Constitution insures that the proper construction may be enforced.”

**Howlett v. Rose, 496 U.S. 356, 376-377 (U.S. 1990)**

A “landowner is entitled to bring an action in inverse condemnation as a result of ‘the self-executing character of the constitutional provision with respect to compensation . . . .’ *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972). As noted in JUSTICE BRENNAN's dissent in *San Diego Gas & Electric Co.*, 450 U.S., at 654-655, it has been established, at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself:

‘The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution*. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay

was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." *Id.*, at 16. (Emphasis added.)

— ***First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)**

“Congress has not evinced any intention to defer to the states the definition of the federal right created in section 1983, or to adopt the states' remedies or procedures for the vindication of that right. \* \* \* Indeed, the history of section 1983, summarized in *Monroe v. Pape*, supra, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, vividly demonstrates that state *concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act*. (See also, *Beauregard v. Wingard* (S.D.Cal.1964) 230 F. Supp. 167, 173.) An incorporation of such state-created policies “would practically constitute a *judicial repeal of the Civil Rights Act*.” ( *Hoffman v. Halden* (9th Cir. 1959) 268 F.2d 280, 300; *Jobson v. Henne* (2d Cir. 1966) 355 F.2d 129.) ***Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970).**

The City has *no* “Idaho Tort Claims Act” immunity for the Constitutional and federal claims.

## **POINT SIX**

### **THE CITY HAS TAKEN PLAINTIFF'S PROPERTY IN VIOLATION OF THE IDAHO CONSTITUTION**

Defendant claims that Plaintiff has failed to demonstrate a “taking” under the Idaho Constitution and therefore “has failed to establish that there is no genuine issue



as to *any* material fact on her motion for summary judgment with regard to the issue of inverse condemnation.” **Defendant’s Memorandum in Opposition to Summary**

**Judgment, p. 17.** As to the Idaho Constitutional claim, Defendant *only* takes issue with respect to the issue of a “taking.” **Defendant’s Memorandum in Opposition to Summary Judgment, p. 18.**

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

**Plaintiff’s Property Was “Taken”**

Defendant claims that Plaintiff has no claim unless Plaintiff’s property was “taken.” **Defendant’s Memorandum in Opposition to Summary Judgment, p. 18.**

Defendant claims “mere interruption of the use of one’s property, as it is less than a permanent (complete) deprivation, does not mandate compensation.” **Defendant’s Memorandum in Opposition to Summary Judgment, p. 18.** Defendant overstates the law of “taking.”

Defendant relies on two cases: *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002); and *Moon v. North Idaho Farmers Ass’n*, 140 Idaho 536, 96 P.3d 637 (2004). However, neither is similar to the facts of this case and neither is a direct-impact case. *Covington* involved “increased traffic in the area, increased noises,

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offensive odors, dust, flies and litter” and *Moon* was a field burning “smoke” case as set forth below.

*Moon* cites to *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950) as good authority on flooding. *Renninger* does **not** support the City. To the contrary, *Renninger* specifically supports a temporary flooding as compensable.

**Defendant’s Cases Are Inapplicable — They Do Not Deal With Loss of Use**

In *Covington*,

“The Covingtons contend a taking has occurred because the operation of the landfill has caused increased traffic in the area, increased noises, offensive odors, dust, flies and litter. However, *there has been no loss of access to or denial of any use* of the Covingtons' property.” ***Covington v. Jefferson County*, 137 Idaho 777, 782, 53 P.3d 828 (2002).**

In *Moon*, the Court cited to *Covington* stating:

The taking asserted by the plaintiffs is not a physical taking because the plaintiffs' land is not appropriated and because the smoke complained of does not result in a loss of access or of any complete use of the property. See *Hughes v. State of Idaho*, 80 Idaho 286, 328 P.2d 397 (1958) (impairment of a right of access constituted a 'taking of property'). See also *Covington*, supra (where there has been no loss of access to *or denial of any use of the Covingtons' property*). ***Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 542, 96 P.3d 637 (2004).**

In *Covington* and *Moon*, because there had been no loss of access or use there was no “taking.”

Plaintiff in this case, however, has *specifically alleged the requisite loss of access/use:*

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

Additionally, Plaintiff has demonstrated the factual basis for the loss of use and access to her home and for residential purposes:

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

\* \* \*

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

\* \* \*

This February 28, 2006 flood caused "water damage" in the "whole basement." **Linda Brown Deposition 45:21-46:8.**

\* \* \*

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

\* \* \*

Plaintiff had other contractors come in to respond to the damage. The "carpet was not salvageable in the bedroom so

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it was replaced by Rug Rat Floor Covering.” **Linda Brown Deposition 11:16-21; Affidavit of Linda Brown, ¶15.**

\* \* \*

Since that first flood, Plaintiff experienced frequent and inevitable flooding. **Affidavit of Linda Brown, ¶16.**

\* \* \*

On December 27, 2006, there was another “rainstorm” and “The water flowed down Pocatello Creek Road into” Plaintiff’s “yard, across the lawn” and the trenches “filled in with dirt, silt, water, ice, and the water again came into the house.” **Linda Brown Deposition 16:24-17:4; Affidavit of Linda Brown, ¶22.**

\* \* \*

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

\* \* \*

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

\* \* \*

#### **Sandbags Are Not a Solution**

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

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

### **Admitted Inadequate Remedy**

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

### **The Case on Point is *Renninger***

*Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950) is good law as evidenced by its citation in Plaintiff’s cited case: *Moon v. North Idaho Farmers Ass’n*, 140 Idaho 536, 542, 96 P.3d 637 (2004).

In *Renninger* the Plaintiffs owned certain real estate in Latah County used as a recreation park, dance hall, cafe and home.” As to Plaintiffs’ property:

“The Highway No. 95 is a public highway crossing the Palouse River on adjacent land. In 1946 and 1947, the Department of Public Works constructed a concrete bridge with approaches across the Palouse River, replacing an old bridge, and in so doing *the highway was raised in grade and the same acted as a dam partially obstructing the natural flow of the river*, causing it to overflow lands owned by the plaintiffs *during high water and freshet stages.*

The bridge is so constructed that the *plaintiffs’ property has been overflowed for a period of several days and the flooding of plaintiffs’ property by the overflow from the Palouse River has, according to the complaint, rendered*

S

*the property unfit for recreational purposes and has rendered the residence, cafe and other buildings untenable during certain periods of the year.*

— *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950)

The *Renninger* Court found a “taking” based upon these facts of Plaintiff’s property being “overflowed *for a period of several days*” which has “rendered the residence,...untenable during certain periods of the year.”

The *Renninger* Court noted the absurd result that would follow if the takings clause were interpreted and applied as Defendant argued; no “absolute conversion” is required for their to be a compensable Constitutional “taking”:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from *the absolute conversion* of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. *Such a construction would pervert the constitutional provision* into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

\* \* \*

"But there are numerous authorities to sustain the doctrine that *a serious interruption to the common and necessary*

S

*use of property* may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. \* \* \* As it is the Constitution of that State that we are called on to construe, these decisions of her Supreme Court, *that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument*, are of special weight if not conclusive on us.

\* \* \*

But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, *so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution*, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.”

— *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950) (citing *Pumpelly v. Green Bay & Mississippi Canal Co.*, 13 Wall. 166, 80 U.S. 166, 20 L.Ed. 557 at pages 560-561).

The *Renninger* Court noted that the *Pumpelly* case “has been followed approving the doctrine that the government cannot, by abstaining from absolute conversion of property, inflict permanent and irreparable injury on it *without making any compensation*, under a *plea that it is not “taken”* for the public use.” *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950).

That is exactly what Defendant attempts in this case, and attempting “by abstaining from absolute conversion of property,” to “inflict permanent and irreparable

injury on it *without making any compensation*, under a *plea that it is not 'taken'* for the public use.”

The Court should find a taking as set forth by the doctrine in *Renninger*: a “taking” based upon the fact that the recurrent flooding caused by Plaintiff’s action has caused flooding of Plaintiff’s residence for greater than the “period of several days” in *Renninger* which flooding has “rendered [Plaintiff’s] residence,...untenable during certain periods of the year.”

**Plaintiff’s “Taking” Damages Require Her Remediation**

The prior briefing itemized the “*taking*” damages which required repair. The are also set forth in affidavit and deposition testimony. **Affidavit of Linda Brown, ¶¶32-40; Linda Brown Deposition 27:4-5; 28:4-6; 42:4-9; 50:20-23; 53:20-24;**

**POINT SEVEN**

**THE CITY HAS TAKEN PLAINTIFF'S PROPERTY  
IN VIOLATION OF THE UNITED STATES CONSTITUTION**

Finally, Defendant argues that Plaintiff has not suffered a taking under the United States Constitution. In this case, Plaintiff has been subjected to recurring flooding, put the City on notice of that and failed to remedy the problem — forcing this lawsuit. Plaintiff has properly set forth a taking.



## United States Constitution

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

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

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

### The City’s Tort Theory Fails — This is Recurrent Flooding

Defendant focuses on an inapplicable line of cases discussing a tort versus taking analysis — failing to cite a *single* controlling U.S. Supreme Court case. Defendant has even failed to provide the criterion for determining whether to apply this tort-verses-taking analysis.

The tort-versus-taking analysis applies *only to* where there is *not* inevitably recurring flooding:

the critical element of an inverse condemnation taking in a flooding case is that of *inevitable recurring floods*. *Bartz v. United States*, 224 Ct. Cl. 583, 593, 633 F.2d 571, 577 (1980). Government-induced flooding must be inevitable and recurring to constitute a compensable taking, otherwise it is

merely consequential injury or a tort which, in such instances, recovery is not authorized in this court.”

***Singleton v. United States*, 6 Cl. Ct. 156, 162 (Cl. Ct. 1983)  
(single flooding incident after a dam overflowed  
subsequent to a hundred year flood).**

The tort-versus-taking analysis argued by Defendant is clearly not applicable here, where subsequent to the road construction, Plaintiff has experienced frequent and inevitable flooding. **Affidavit of Counsel, ¶16.** This includes flooding after December 27, 2006 where “it kept flooding continually from then on” and through “March of 2007.” **Linda Brown Deposition 93:3-14; 110:8-12 (Exhibit A, Affidavit of Counsel (6-30-08)).**

This is an undisputed and unrefuted fact.

#### **The City Effectuated a “Taking” Under the United States’ Constitution**

The Defendant also set forth law regarding categorical and non-categorical takings, arguing that this is merely a “non-categorical” taking, as opposed to a “categorical” taking. **Defendant’s Memorandum in Opposition to Summary Judgment, pp. 20-21.** This “red-herring” argument merely looks at whether there is a *per se* categorical taking, or whether there must be a factual determination of a taking. **See, Defendant’s Memorandum in Opposition to Summary Judgment, pp. 20.**

#### **The City Provides An Improper Analysis of Inverse Condemnation**

The City then claims that “plaintiff has not even cited the proper analysis for an inverse condemnation case under the Fifth Amendment” in reference to the City’s

attempt to have a “tort” analysis. **Defendant’s Memorandum in Opposition to Summary**

**Judgment, pp. 22.** The City; however, is who has failed to provide “proper analysis.”

The elements are simply this:

Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that ‘private property [shall not] be taken for public use, without just compensation.’ As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. See *Williamson County*, 473 U.S., at 194; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297, n. 40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *United States v. Jones*, 109 U.S. 513, 518 (1883). This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather *to secure compensation in the event of otherwise proper interference amounting to a taking*. Thus, government action that works a taking of property rights necessarily implicates the “constitutional obligation to pay just compensation.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

— **First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-315 (U.S. 1987).**

The elements are therefore, was there a “*government action that works a taking of property rights*” that “necessarily implicates the ‘constitutional obligation to pay just compensation.’”

In this case there was. There is unrefuted frequent and inevitable flooding.

### **Plaintiff Has Stated a Proper Claim for a Taking**

The U.S. Supreme Court law is clear — Plaintiff's claim is for a taking under the United States Supreme Court case, *United States v. Cress*, 243 U.S. 316, 329 (U.S. 1917):

“Where the government by the construction of a dam or *other public works* so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, *yet it takes away the use and value*; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto -- in this case those at least which belong to a riparian proprietor -- pass to the government and it becomes henceforth the owner." *There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows*; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain. Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, *as he may, to recover compensation for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require* ( *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656; *United States v. Lynah*,

188 U.S. 445, 465), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking;

— *United States v. Cress*, 243 U.S. 316, 329 (U.S. 1917)

### The Idaho Supreme Court's *Renninger* Decision Conforms

Similar to *Cress*, the Idaho Supreme Court likewise found a taking on similar facts where the government in constructing a bridge “raised the grade” causing the river “to overflow lands owned by the plaintiffs *during high water and freshet stages.*” and “The bridge is so constructed that the *plaintiffs' property has been overflowed for a period of several days and the flooding of plaintiffs' property by the overflow from the Palouse River has, according to the complaint, ...rendered the residence ...untenable during certain periods of the year.*” *Renninger v. State*, 70 Idaho 170, 172, 213 P.2d 911 (1950).

### The City Must Compensate for the Time Taken

The City also argues that because it finally (after the filing of this lawsuit) attempted a remedy, that Plaintiff's claim is not “permanent” and therefore not compensable. **Defendant's Memorandum in Opposition to Summary Judgment, pp. 19.**

The United States Supreme Court has stated that temporary takings are still takings:

“We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was

effective. ***First English Evangelical Lutheran Church v. County of Los Angeles***, 482 U.S. 304, 321 (U.S. 1987).

The finding of a taking is a matter of law for this Court. ***City of Lewiston v. Lindsey***, 123 Idaho 851, 856, 853 P.2d 596 (Idaho Ct. App. 1993). Plaintiff requests this Court's finding of a compensable taking.

### **POINT EIGHT**

#### **CERTAIN DAMAGES ARE UNDISPUTED**

Finally, Plaintiff has set forth, and Defendant has failed to refute any of the following damages, which Plaintiff requests the Court award given the absence of any genuine issue of material fact:

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

Plaintiff has suffered additional damages including the damage to the value of her home caused by the flooding and mold, and loss of use of the lower portion of her home for the three months of February into May 2006, and eleven months from

December 2006 through November 2007. **Affidavit of Linda Brown, ¶40.** The value of this will be a jury question.

**CONCLUSION**

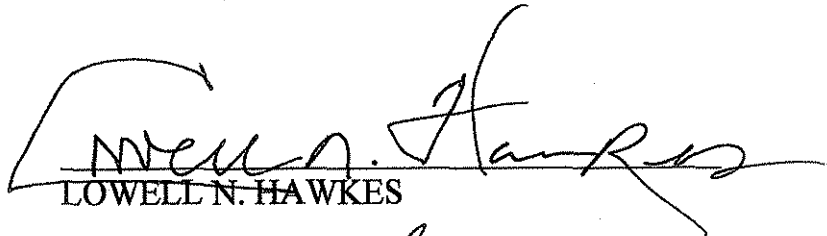
Plaintiff's home and yard were seriously damaged because the City was indifferent to adequate roadway water run off. The City was indifferent to adequate repair. The City was indifferent to the undisputed fact that the problem came into being only with the 2005 roadway work.

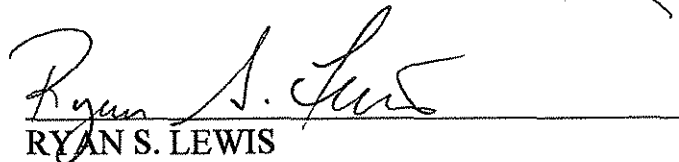
Plaintiff should not have had to file suit to get a meaningful remedy and fair compensation. The City has been indifferent to the law *and* the facts.

Plaintiff has demonstrated a compensable tort claim and violations of the Idaho and United States Constitution. Summary Judgment should be granted in favor of Plaintiff as to the unrefuted damages.

DATED this 21<sup>st</sup> day of July, 2008

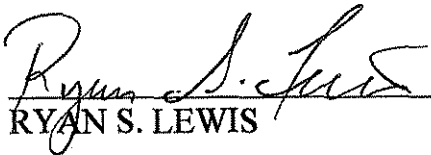
LOWELL N. HAWKES, CHARTERED

  
LOWELL N. HAWKES

  
RYAN S. LEWIS

**CERTIFICATE OF SERVICE**

I certify that on this 21<sup>st</sup> day of July, 2008 I faxed a copy of the foregoing to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490 Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254, and that a courtesy copy has been hand-delivered to the Honorable David C. Nye at his chambers at the Bannock County Courthouse.

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





## FACTS

Plaintiff, Linda Brown, is a resident of Pocatello, Bannock County, Idaho, residing at 2300 Darrell Loop where she has lived since April of 2001. Her back yard is adjacent to Pocatello Creek Road. Defendant, City of Pocatello, is a Municipal Corporation located in Bannock County, incorporated under the laws of the State of Idaho and having responsibility for the roadway system.

The portion of Pocatello Creek Road at issue is owned and maintained by the City of Pocatello. Plaintiff's property sits about twenty feet below Pocatello Creek Road. Plaintiff's basement was flooded on February 28, 2006. Plaintiff alleges that the flooding was a result of Defendant City of Pocatello's negligence in altering and reconstructing the Pocatello Creek Road roadway from its prior "water-safe" condition so as to create, among other things a new roadway depression and water run-off pattern than had previously existed.

Plaintiff states that prior to the summer of 2005 she had never had any water or water runoff damage to her property from water or rain on Pocatello Creek Road, nor had the prior home owners. In the summer of 2005 Defendant undertook construction on the Pocatello Creek Road behind Plaintiff's home. Plaintiff states that in so doing, Defendant negligently altered and reconstructed the roadway. Plaintiff alleges that the roadway as reconstructed allowed roadway water to pool on and adjacent to the roadway as there was no adequate means to properly and safely divert water without it passing onto Plaintiff's property.

Plaintiff states that as a result of the Pocatello Creek Road reconstruction, the roadway water flowed off Pocatello Creek Road and under Plaintiff's back yard fence carrying debris and soil and

rock with it into and across Plaintiff's yard and into Plaintiff's home.

Defendant states that the Pocatello Creek Road reconstruction project was identified as a critical transportation need by the Bannock Planning Organization and the City of Pocatello in the late 1990's. The proposed project was placed on the Statewide Transportation Improvement Program for development as a Federal Aid project.

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

Throughout the design process by Rocky Mountain Engineering, periodic reviews were held by the City of Pocatello to ensure the plans and specifications were developed to accepted City, State, and Federal standards. When the plan and specifications were completed for the Pocatello Creek Road project, the City of Pocatello, as sponsor, entered an agreement with the State of Idaho Department of Transportation. That agreement is the "State/Local Agreement" for administration of the Pocatello Creek Project. It is dated August 15, 2003. The Pocatello City Council passed Resolution No. 2003-13 on August 7, 2003, which gave authority for the Mayor to enter the "State/Local Agreement" with the State of Idaho. Ultimately, the City of Pocatello, through the State of Idaho Department of Transportation, contracted with Jack B. Parsons Companies to modify

and re-pave the section of Pocatello Creek Road that runs along Ms. Brown's property.

Defendant states that though the initial claimed damages to Plaintiff's home occurred in February 2006, Plaintiff did not file a notice of tort claim until April 25, 2006. The April 25<sup>th</sup> tort claim only purported to cover damages arising from the February 2006 flooding. Subsequently, Plaintiff alleged that her basement flooded in April 2006, October 2006 and again in the early winter of 2007. Plaintiff did not file a notice of tort claim with the City of Pocatello as to those alleged subsequent occurrences.

#### **STANDARD OF REVIEW**

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995); *Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007). Generally, the record is to be construed in the light most favorable to the party opposing summary judgment, with all reasonable inferences drawn in that party's favor. *Id.* If reasonable persons could reach different conclusions or inferences from the evidence, the motion

must be denied. *Id.* However, the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. The nonmoving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Id.*; *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994). When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to determine the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Pizzuto v. State*, --- P.3d ----, 2008 WL 466568 (Idaho 2008). This is because the court alone will be responsible for resolving the conflict between those inferences. *Jenkins v. Barsalou*, 145 Idaho 202, 177 P.3d 949 (2008).

Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting IDAHO R. CIV. P. 56(e); *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990)). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

## DISCUSSION

Plaintiff and Defendant each filed a Motion for Summary Judgment, and those motions will be addressed separately.

### **1. Plaintiff's Motion for Partial Summary Judgment**

Plaintiff's Motion for Summary Judgment requests partial summary judgment against Defendant on the issues of "nuisance" and "inverse condemnation." Plaintiff's Complaint and Demand for Jury Trial, however, does not set forth a cause of action for nuisance or for inverse condemnation. Idaho Rule of Civil Procedure 8(a) requires a "short and plain statement of the claim showing that the pleader is entitled to relief" in order for a pleading to be sufficient.

The only theory of liability named in Plaintiff's Complaint is negligence. Nuisance and inverse condemnation were raised for the first time in Plaintiff's Motion for Summary Judgment. A cause of action which was not originally raised in a party's pleading may not be raised and considered on summary judgment. *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005) ("A cause of action not raised in a party's pleadings may not be considered on summary judgment . . .") (quoting *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 178, 75 P.3d 733, 739 (2003); *Coleman v. Quaker*, 232 F.3d 1271 (9th Cir. 2000); *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004)). Because nuisance and inverse condemnation were not raised properly in Plaintiff's Complaint, they will not be considered on Summary Judgment. Plaintiff's Motion for Summary Judgment on the issues of nuisance and inverse condemnation is denied.

## 2. Defendant's Motion for Summary Judgment

### a. Immunity

Based on Idaho Code and Idaho case law, a governmental entity "is subject to liability for money damages arising out of its negligent conduct and those of its employees acting within the course and scope of their employment to the extent a party would be liable pursuant to I.C. § 6-903." *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 163 P.3d 211, 213 (2007). A governmental entity may qualify for immunity, however, "under one of the exceptions to government liability provided in I.C. § 6-904." *Id.*

The City of Pocatello states that Idaho Code § 6-904 provides two exceptions to governmental liability: Sub-paragraph (7) provides an exception to governmental liability for conduct that arises out of the "plan or design for construction of roads," *Lawton v. City of Pocatello*, 126 Idaho 454, 460, 886 P.2d 330, 336 (1994), and sub-paragraph (1) provides an exception commonly known as the "discretionary function" defense. The City of Pocatello claims that it is entitled to immunity under both these exceptions.

#### Idaho Code § 6-904 (7):

Idaho Code § 6-904 (7) provides immunity to decisions and actions of governmental entities, stating that a "governmental entity . . . shall not be liable for any claim which:"

Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the

legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

This section was amended in 1988, but prior to its amendment, subsection (7), then numbered subsection (8), provided immunity for a claim which:

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

*Lawton*, 126 Idaho at 458-459, 886 P.2d at 334-335. The 1988 amendment by the legislature added the word “or” and “clearly indicates that immunity is available under the provision if the governmental entity shows substantial conformance or advance approval.” *Id.* at 459, 335.

Therefore, as amended, in order for a governmental entity to gain immunity under Idaho Code § 6-904 (7) it must show that (1) a plan or design for construction or improvement existed, and that it was either (2) prepared in substantial conformance with existing engineering or design standards, or (3) approved in advance of the construction by the legislative body exercising discretion to give authority for such approval. *Id.*

Defendant has established that a plan or design for construction or improvement existed based on the following facts: the City of Pocatello hired Rocky Mountain Engineering to create a plan or design for construction work to be done on the Pocatello Creek Road. In the late 1990's, the



Pocatello Creek Road reconstruction project was identified as a critical transportation need by the Bannock Planning Organization and the City of Pocatello. The proposed project was placed on the Statewide Transportation Improvement Program for development as a Federal Aid project. The process was started to create a design and plan and begin construction.<sup>1</sup>

Defendant further states that in anticipation of the project, the City of Pocatello entered into a "Professional Agreement" with Rocky Mountain Engineering to provide designs for the project.<sup>2</sup> Pursuant to the professional agreement, Rocky Mountain Engineering provided detailed specifications for the reconstruction project. These plans and specifications were reviewed by engineers for the City of Pocatello.<sup>3</sup> All plans and specifications were completed prior to beginning construction on the Pocatello Creek Road project. In fact, the plans were completed before the project was submitted to the State of Idaho for administration of the contract.

To comply with the requirements for immunity under Idaho Code § 6-904 (7), The City of Pocatello needs to prove only one of the second or third elements. However, the City of Pocatello has submitted evidence supporting both the second and third elements.

With regard to the second element, the City of Pocatello assured that the plans and specifications were "prepared in substantial conformance with existing engineering or design standards." City of Pocatello states that Rocky Mountain Engineering is a reputable engineering firm and that Rocky Mountain Engineering created the design plans and specifications in

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<sup>1</sup> See, Affidavit of Turner, ¶ 3.

<sup>2</sup> See, Affidavit of Turner, ¶ 4.

<sup>3</sup> See, Affidavit of Turner, ¶ 10.

accordance with American Association of State Highway and Transportation Officials.<sup>4</sup> The plans were reviewed by licensed engineers for the City of Pocatello, and were found to be in compliance with generally recognized engineering and design standards.<sup>5</sup> These actions on the part of the City of Pocatello ensured that the design and plan for the Pocatello Creek Road project would be carried out in conformance with industry standards.

With regard to the third element, the City of Pocatello states that prior approval for the Pocatello Creek Road project was given by the Pocatello City Council, which is the local legislative body. The procedure for approval was as follows: The City of Pocatello outlined a general plan for reconstruction of a section of the road, in this case, Pocatello Creek Road. The City submitted its preliminary plan to the state of Idaho Transportation Department and entered into an agreement—“State/Local Agreement (Construction) STP-7161 (100).” In so doing, the City turned over supervision of the Pocatello Creek Road project to the State of Idaho Department of Transportation, but retained certain rights and obligations as outlined in the agreement.

The Pocatello City Council passed Resolution No. 2003-13 on August 7, 2003, which gave authority for the Mayor to enter the “State/Local Agreement” with the State of Idaho.<sup>6</sup> Prior to the passage of Resolution No. 2003-13, the City of Pocatello had received the final plans and specifications from Rocky Mountain Engineering. Resolution No. 2003-13 authorized the Mayor to

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<sup>4</sup> *Id.*

<sup>5</sup> See, Affidavit of Turner, ¶ 11.

<sup>6</sup> See, Affidavit of Turner, ¶ 6.

move forward with presenting the project to the State of Idaho for bidding.<sup>7</sup>

By hiring a reputable engineering firm to create a design and plan, and the reviewing that plan and presenting the Pocatello Creek Road project to the Pocatello City Council for approval, the City of Pocatello did everything required for prior approval by the local legislative body.

Plaintiff argues that Defendant's claims of governmental immunity under Idaho Code § 6-904 (7) are invalid because although Defendant states that there was a plan, Defendant has no evidence to show that this plan was actually followed. The requirement for governmental immunity set forth by the legislature in Idaho Code 6-904 (7), however, requires only that the governmental entity show that (1) a plan or design for construction or improvement existed, and that it was either (2) prepared in substantial conformance with existing engineering or design standards, or (3) approved in advance of the construction by the legislative body exercising discretion to give authority for such approval. Idaho Code does not require that the governmental immunity prove that the plan was followed. Absent any legislative mandate or case law establishing that a plan be followed, this Court will not impose any such requirement on governmental immunity.

The City of Pocatello has provided evidence that (1) a plan or design for construction on the Pocatello Creek Road existed, (2) that it was prepared in substantial conformance with existing engineering or design standards, and that (3) it was approved in advance of the construction by the legislative body exercising discretion to give authority for such approval. For these reasons this Court finds that the City of Pocatello is entitled to governmental immunity for the Pocatello Creek

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<sup>7</sup> See, Affidavit of Turner, ¶ 7.

Road construction based on Idaho Code section 6-904 (7).

Idaho Code § 6-904 (1), Discretionary Function:

Idaho Code § 6-904 (1) provides immunity to decisions and actions of governmental entities which:

Arise[] out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

The City of Pocatello states that it is entitled to immunity under this discretionary function defense because the City of Pocatello's decision to make improvements to Pocatello Creek Road was a decision involving the "financial, political, economic, and social" aspects of the community. *Dorea Enterprises*, 163 P.3d at 214.

In another case determining whether I.C. § 6-904 (7) or § 6-904 (1) applied, the Idaho Supreme Court stated:

[E]ither provision might apply in this case depending upon whether . . . the City failed to formulate a plan or design. As we stated in *Bingham v. Idaho Dep't of Transp.*, "the plan or design of a highway is not immune from liability under Sub-section (1)."

*Lawton*, 126 Idaho at 460, 886 P.2d at 336 (citing *Bingham v. Idaho Dep't of Transp.*, 117 Idaho 147, 149, 786 P.2d 538, 540 (1989)). The Court went on to state that if a plan did exist, the question would be whether the plan substantially conformed to existing design standards or whether it

received advance approval, moving the determination to the factors under I.C. §6-904 (7). The Court then stated that if there were no plan or design in existence, then I.C. § 6-904 (1) would be applied in determining whether the City was entitled to immunity. *Id.*

In this case, a plan or design was in existence, and this Court has found that the plan or design did substantially conform to existing design standards and that it received advance approval, granting governmental immunity under I.C. §6-904 (7). Because a plan or design was in existence and governmental immunity was granted under I.C. §6-904 (7), I.C. §6-904 (1) need not be applied, and in fact would not apply because “the plan or design of a high way is not immune from liability under Sub-section (1).” *Id.* The City of Pocatello does not have governmental immunity under I.C. § 6-904 (1).

**b. Idaho Tort Claims Act**

Whether Notice Was Adequate:

Defendant has raised the issue of whether Plaintiff was on notice of the flooding. Because this Court has found that the Plaintiff has governmental immunity under § 6-904 (7), it will not reach the issue of notice.

Acts of Independent Contractor:

The City of Pocatello states that it is not liable for operational error in constructing the roadway which allegedly caused plaintiff's damages, because such operational errors, if any, were committed by Jack B. Parsons Companies, which was an independent contractor.

Idaho Code § 6-902(4) defines “employee” as:

[A]n officer; employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity, temporarily or permanently in the service of the governmental entity, whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claims.

The Idaho Torts Claim Act only allows Plaintiff to bring claims against governmental entities or their employees, and independent contractors are excluded from the definition of employees.

Prior to the beginning of the road reconstruction, and pursuant to the “State/Local Agreement” the State of Idaho advertised for bids and awarded a contract to the lowest responsive bidder, Jack B. Parsons Co. (“Parsons”). Parsons was an independent contractor.<sup>8</sup> The State of Idaho oversaw and administered this project—as it was a project which utilized federal funding. The City of Pocatello retained a limited supervisory role, but was not involved in the day-to-day management of the project.<sup>9</sup> Under plaintiff’s general negligence theory, the City of Pocatello is entitled to immunity pursuant to the Idaho Tort Claims Act because Parsons was not an “employee” of the City, and because a governmental entity is not liable for the acts of an independent contractor. Plaintiff has presented no evidence that would create a genuine issue of material fact on this defense.

### CONCLUSION

A cause of action which was not originally raised in a party’s pleading may not be raised

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<sup>8</sup> See, Affidavit of Turner ¶ 8.

<sup>9</sup> *Id.*

and considered on summary judgment. Plaintiff's Motion for Partial Summary Judgment on the issues of nuisance and inverse condemnation is denied because these issues were not raised in Plaintiff's Complaint.

Idaho Code provides an exception to governmental liability for conduct that arises out of the plan or design for construction of roads. Defendant has shown that a plan or design was in existence as to the road reconstruction of Pocatello Creek Road, and so Defendant is immune under Idaho Code § 6-904 (7). Also, Defendant, a governmental entity, is not liable for acts of an independent contractor, and so the City of Pocatello is immune from the actions of Jack B. Parsons in the road reconstruction. Because Defendant has been found to have governmental immunity, Plaintiff is not entitled to monetary damages or injunctive relief from Defendant. Defendant has shown that there is no genuine issue as to any material fact. Defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

DATED: September 4, 2008.



DAVID C. NYE  
District Judge

**CERTIFICATE OF SERVICE**

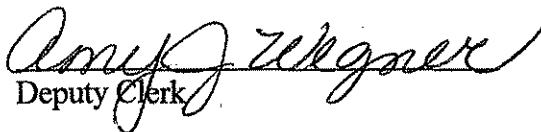
I HEREBY CERTIFY that on the 4<sup>th</sup> day of September, 2008, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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

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 Overnight Delivery  
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Blake G. Hall  
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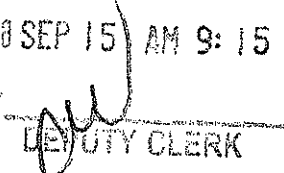
  
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BY   
DEPUTY CLERK

BLAKE G. HALL (2434)  
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Attorneys for City of Pocatello

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

LINDA BROWN,

Plaintiff,

v.

CITY OF POCATELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

**JUDGMENT OF DISMISSAL**

This matter having come before the Court upon Defendants' Motion for Summary Judgment, and the Court having entered its Decision on Motions for Summary Judgment granting Defendant's Motion for Summary Judgment, and good cause appearing therefor;

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Complaint is dismissed with prejudice, with Plaintiff taking nothing thereunder.

Dated this 15<sup>th</sup> day of September, 2008.

  
DAVID C. NYE, District Judge

**CLERK'S CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing document upon the following this 16<sup>th</sup> day of September 2008, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

Lowell N. Hawkes  
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Deputy Clerk

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

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

Case No. CV-2007-3303-OC

*NR*

**MOTION FOR  
 RECONSIDERATION**

Plaintiff moves the Court for its Reconsideration of its prior Memorandum Decision and Order granting summary judgment to the City of Pocatello. This Motion is made on the grounds and for the reasons that a full and correct application of the law and allowance of all inferences in favor of the Plaintiff, as against Defendant City's motion for summary judgment, entitle Plaintiff to a trial on the merits and for the further reasons as more fully set forth in a supporting memorandum to be filed herein.

*S*

DATED this 26<sup>th</sup> day of September, 2008

  
LOWELL N. HAWKES

**CERTIFICATE OF SERVICE**

I certify that on this 26<sup>th</sup> day of September 2008 I faxed and mailed a copy of the foregoing to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490 Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254.

  
LOWELL N. HAWKES

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

*[Handwritten initials]*

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

Case No. CV-2007-3303-OC

**MEMORANDUM  
 SUPPORTING PLAINTIFF'S  
 MOTION FOR  
 RECONSIDERATION**

Plaintiff has previously moved this Court pursuant to Rule 11(a)(2)(B), *Idaho Rules of Civil Procedure* for its reconsideration of its *Decision on Motions for Summary Judgment* denying summary judgment to Plaintiff and granting summary judgment to the Defendant. This Memorandum is in support of that prior Motion filing.

**Procedural Context**

Plaintiff's Motion for Summary Judgment was previously denied on the basis that the "*only theory of liability named in Plaintiff's Complaint is negligence.*"

**Decision on Motions for Summary Judgment, p. 6.** However, the law does *not* require

*[Handwritten mark]*

a cause of action or “theory of liability” to be pleaded, only that “*facts*<sup>1</sup> upon which relief can be granted” be provided. **Rule 8 (a)(1), Idaho Rules of Civil Procedure.**

The Plaintiff’s Complaint properly provided sufficient “facts” that, when applied to the law, established that Plaintiff was entitled to relief for inverse condemnation as required under Rule 8(a), *Idaho Rules of Civil Procedure* and the caselaw interpreting Rule 8.

Additionally, Plaintiff was entitled to “all favorable inferences” with respect to the Defendant City of Pocatello’s Motion for Summary Judgment. Those inferences allow for a finding of negligence for failure to establish compliance with the “plan” which was *allegedly* created. The Defendant cannot turn a blind eye to its own compliance with a plan upon which it claims immunity; at a minimum, immunity depends upon compliance.

### **POINT ONE**

#### **THE COURT ERRED IN REQUIRING THE NAMING OF A “THEORY OF LIABILITY” IN THE COMPLAINT**

The Court denied the entirety of Plaintiff’s claims by a single sentence, and without specific citation to Plaintiff’s Complaint stating that Plaintiff’s Complaint “does not set forth a *cause of action* for nuisance and inverse condemnation....The only *theory of liability named* in Plaintiff’s Complaint is negligence.” **Decision on Motions for**

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

**Summary Judgment, p. 6.** That was error because — since 1958 — a Plaintiff is *not* required to name a “theory of liability” or “causes of action” in a Complaint; a Plaintiff need only provide facts that, when applied to the law, are a legally sufficient basis for recovery. Plaintiff did.

**1958 Changes — Removes Requirement of “Cause of Action”**

Idaho has not required a Complaint to plead a “Cause of Action” since 1958. Prior to 1958 the *statutory* IDAHO RULES OF CIVIL PROCEDURE required “a statement of the facts *constituting the cause of action*, in ordinary and concise language.” *Archer v. Shields Lumber Co.*, 91 Idaho 861, 867, 434 P.2d 79, 85 (1967) (quoting *Idaho Code* § 5-605). “*This is a different standard than what is required today* by I.R.C.P. 8(a)(1), requiring a short and plain statement of the claim showing that the pleader is entitled to relief.” *Seiniger Law Office v. North Pacific Insurance Company, — Idaho —*, **2008 Idaho Lexis 10, 11, 178 P.3d 606 (2008)**. The *Idaho Rules of Civil Procedure* were formally adopted by the Idaho Supreme Court on November 1, 1958.

No “cause of action” or “theory of liability” must be “named.”

**No Specific Legal Theory Needs to Be Named**

“Under the modern form of pleading a *complaint need not state the specific legal theories* upon which the plaintiff relies. A simple, concise statement of the *operative facts is sufficient.*” *Bauer v. Minidoka Sch. Dist.*, **116 Idaho 586, 589, 778 P.2d 336 (1989)**.

**“Theories” Need Not Be Pleaded**

“There is *no requirement* that a complaint include a statement of the various *legal theories* upon which the plaintiff relies. *Bauer v. Minidoka School Dist. No.* 331, 116 Idaho 586, 589, 778 P.2d 336, 339 (1989); *Collord v. Cooley*, 92 Idaho 789, 793, 451 P.2d 535, 539 (1969). The purpose of a complaint is to inform the defendant of *the material facts* upon which the plaintiff rests the action.” ***Quinto v. Millwood Forest Prods.*, 130 Idaho 162, 167, 938 P.2d 189, 194 (Ct. App. 1997).** Plaintiff’s Complaint fully “informed” Defendant of “the material facts.”

In *Quinto*, the court discussed the determined that despite the fact that breach of contract was not a named theory — nor was there such a requirement — the facts as pleaded included:

“The complaint alleges that Quinto delivered rough lumber to Millwood with instructions that Millwood was to process the lumber into siding, that Millwood did process the wood as directed by Quinto, that Quinto paid [\*\*\*15] Millwood “the agreed price,” that Quinto instructed Millwood to load the lumber onto a Davis Transport Company truck and that, notwithstanding these instructions, Millwood loaded the siding onto a truck of Point to Point Trucking, with the consequence that the siding has been lost to Quinto.

Millwood did not move for a more definite statement of the claim prior to trial, as was its option under I.R.C.P. 12(e), and there is no indication that Millwood complained that it lacked sufficient notice that Quinto was pursuing a breach of contract claim. In our view, the allegations of Quinto’s complaint fairly apprise Millwood of a cause of action for breach of contract.”

— ***Quinto v. Millwood Forest Prods.*, 130 Idaho 162, 167, 938 P.2d 189, 194 (Ct. App. 1997).**



In *Collard*, the Idaho Supreme Court determined that despite the fact the “Complaint never stated their parents agreed to create irrevocable mutual and reciprocal wills devising their estates to their children and that such agreement should be specifically enforced. It is our conclusion that such a theory is adequately presented by the appellants' complaint. *Under the modern form of pleading a complaint need not state the specific legal theories upon which the plaintiff relies.* A simple, concise statement of the operative facts is sufficient....In their complaint appellants alleged the execution of mutual and reciprocal wills by their parents. Such an allegation *presents an issue as to the intent* with which the testators executed those wills.” ***Collord v. Cooley*, 92 Idaho 789, 793-794 (1969).**

This Court erred in requiring a “cause of action” or naming of a “theory of liability” in the Complaint.

### **Plaintiff's Complaint Set Forth the Material Facts for Inverse Condemnation**

#### **Federal and State Constitution**

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

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

“The United States Supreme Court has held that landowners are entitled to bring actions in inverse condemnation by virtue of the Fifth Amendment's guarantee of just compensation for the taking of private property.” *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250

(1987). ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Ct. App. 1993)**

With respect to the IDAHO CONSTITUTION, The Idaho Supreme Court has ruled that governmental interference with an owner's used or enjoyment of property requires compensation. The two elements that establish an inverse condemnation under either the Idaho or United States Constitution are: (1) Government action, and (2) Taking of property:

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

“Whether a taking has occurred in a particular case is ultimately a question of law. *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.” ***City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596 (Ct. App. 1993).**

Both of the requirements for inverse condemnation were specifically satisfied as the “material facts” have been provided:

<b><u>INVERSE CONDEMNATION REQUIREMENT</u></b>	<b><u>MATERIAL FACTS PLEADED IN COMPLAINT</u></b>
<b>Government action</b>	<p>3. Defendant City of Pocatello, is a <i>Municipal Corporation</i> located in Bannock County, incorporated under laws of the State of Idaho and having responsibility for the design and maintenance of the Pocatello Creek Road behind Mrs. Brown's residence.</p> <p style="text-align: center;">* * *</p> <p>5. In the summer of 2005, primarily July and August, Defendant <i>City of Pocatello undertook construction on the Pocatello Creek Road behind Plaintiff Linda Brown's home.</i> In so doing the Defendant City of Pocatello negligently altered and reconstructed the Pocatello Creek Road roadway from its prior "water-safe" condition so as to create, among other things, <i>a new roadway depression and water run-off pattern</i> than had previously existed and that did not damage adjacent private properties.</p> <p style="text-align: center;">* * *</p> <p>6. ....The completed roadway from the City-County junction line did <i>not</i> flow smoothly but created a depression and allowed for pooling of water and water runoff into Plaintiff's yard and home....</p> <p style="text-align: center;">* * *</p> <p>12. As a direct and proximate cause of the negligent Pocatello Creek Road reconstruction, the roadway water flowed off Pocatello Creek Road and under Plaintiff's back yard fence carrying debris and soil and rock with it into the Plaintiff's yard and across the Plaintiff's yard and into Plaintiff's home through windows and into and down walls onto floors and under carpeting and into other rooms and under tile.</p>
<b>Taking of property</b>	<p>14. As a direct and proximate cause of the Defendant City of Pocatello's negligence <i>and failings as set forth herein</i>, the Plaintiff has been <i>specially and generally damaged in her home and property</i>, cleaning and repair expense, replacement expense, resultant mold and <i>loss of use and benefit</i> of her home and other damages incidental to all of the foregoing.</p>

Thus, Plaintiff specifically set forth the requisite factual and legal basis for inverse condemnation — governmental action which resulted in the taking of Plaintiff's property.

**Plaintiff's Complaint Sets Forth the Material Facts For Nuisance**

A nuisance is statutorily defined as:

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

— **Idaho Code § 52-101**

The “anything” prefatory requirement is satisfied by the *actions of the City* which were identified in paragraphs 5 and 12 of the Complaint:

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

\* \* \*

12. As a direct and proximate cause of the negligent Pocatello Creek Road reconstruction, the roadway water flowed off Pocatello Creek Road and under Plaintiff's back yard fence *carrying debris and soil and rock with it into the Plaintiff's yard and across the Plaintiff's yard and into Plaintiff's home* through windows and into and down walls and onto *floors and under carpeting and into other rooms and under tile*. — **Complaint and Jury Demand, ¶¶ 5, 12**

The action of the City in altering this roadway is the “anything.” The injury portion is:

<b><u>NUISANCE REQUIREMENT</u></b>	<b><u>COMPLAINT ALLEGATIONS</u></b>
“injurious to health or morals, or is indecent, or offensive to the senses,”	14. ....Plaintiff has been specially and generally damaged in her home and property, cleaning and repair expense, replacement expense, <i>resultant mold</i> ...and other damages incidental to all of the foregoing. — <b>Complaint and Jury Demand, ¶14.</b>
[OR] which is ... an <i>obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property,</i>	14. ...Plaintiff has been specially and generally damaged in her home and property, ...and <i>loss of use and benefit of her home</i> and other damages incidental to all of the foregoing. — <b>Complaint and Jury Demand, ¶14.</b>

Thus, Plaintiff’s Complaint more than adequately identified the material facts constituting nuisance and that “simple, concise statement of the *operative facts is sufficient.*” ***Bauer v. Minidoka Sch. Dist., 116 Idaho 586, 589, 778 P.2d 336 (1989).***

The grant of summary judgment is contrary to long-established law that controversies should be determined on the specific facts of the case as substantial justice may require. The proper exercise of judicial discretion should tend to bring about a judgment on the merits. ***Bunn v. Bunn, 99 Idaho 710, 711, 587 P.2d 1245, 1246 (1978).***

The keystone of the *Idaho Rules of Civil Procedure* is *liberality* which favors a final decision predicated on the merits over a dismissal based upon a technicality. ***Gerstner v. Wash. Water Power Co., 122 Idaho 673, 675, 837 P.2d 799, 801 (1992).***

**Plaintiff's Affidavit and Deposition Provided Additional Supporting Facts**

In addition to the *Complaint and Jury Demand* facts setting forth inverse condemnation and nuisance facts, those facts have been supplied by discovery and Affidavit, including the fact that the City altered the roadway causing frequent and inevitable flooding which had never happened before:

4. Between June 2005 through August 2005 work on the Pocatello Creek Road was done which ended directly behind my home. **Linda Brown Deposition 62:21-63:9.** The Defendant City of Pocatello negligently altered and reconstructed the Pocatello Creek Road roadway from its prior "water-safe" condition so as to create, among other things, a new roadway depression and water run-off pattern that had *not* previously existed was created and that did not damage adjacent private properties.

\* \* \*

5. Prior to this 2005 road work/construction, neither my home nor yard had been flooded from roadway run-off water. **Linda Brown Deposition 12:12-19; 64:20-65:6.**

\* \* \*

6. Following the 2005 Pocatello Creek Road work/construction, my yard and home has been subjected to numerous, *frequent and inevitable occasions of flooding* by water coming off of Pocatello Creek Road and into my yard and home.

— **Affidavit of Linda Brown, ¶¶ 4-6.**

It is significant to recognize that it was the filing of this lawsuit that finally provoked the City to remedy the new flooding problem:

7. Ultimately — *but only after I was required to file this lawsuit* — did the City add an asphalt-to-cement barrier to keep roadway water on the road shoulders and stop the flooding from runoff into my yard and home.

— **Affidavit of Linda Brown, ¶7.**

### Damage — Loss of Use and Otherwise Offensive

The flooding caused “water damage” in the “whole basement.” **Linda Brown Deposition 45:21-46:8. Affidavit of Linda Brown, ¶12.** I have experienced significant damages and expenses to repair and remediate the City’s improper draining of run-off water onto my property. Among other repair and damages, I have had to repair and replace wall trim, window trim, sheetrock, taping, texturing, painting, insulation, floor molding, window molding, carpet, and tile. **Affidavit of Linda Brown, ¶32.**

### Mold Problems

Mold and the dangers attendant with it were also a result of the City’s failings. Mrs. Brown was required to hire John McCasland, Best Clean Care’ a specialist to determine and remove the mold. **Linda Brown Deposition 42:4-9; Affidavit of Linda Brown, ¶36.** She also hired “mold remediation experts including Bradley Harr and Mike Larango who prepared a pre- and post-remediation mold report.” **Affidavit of Linda Brown, ¶37.** It cannot be reasonably disputed that mold is certainly “injurious to health or morals, or is indecent, or offensive to the senses,” and an obstruction to the free use of the property.

### Loss of Use

Mrs. Brown also provided evidence as to the “ damage to the value of my home” and “loss of use” of her home for *months* at a time. **Affidavit of Linda Brown, ¶40.**

**The City Was Aware of Claims — So they Remediated the Flooding**

The City was on notice of these claims. In fact, “It took [Plaintiff’s] filing of this lawsuit to get the City to take proper action to contain its roadway run-off water.”

**Affidavit of Linda Brown, ¶30.** If the City truly believed that this was a mere “negligence” case, then they do not need to remediate because of their contended “immunity.”

**A “Just Result”**

Rule 1(a) is a constant reminder that “a just result is always the ultimate goal to be accomplished.” ***Gerstner v. Wash. Water Power Co.*, 122 Idaho 673, 675, 837 P.2d 799, 801 (1992).**

“A 'determination' of an action within the meaning of Rule 1 is meant to be a *determination of the controversy on the merits — not a termination on a procedural technicality which serves litigants not at all.* A determination entails a finding of the facts and an application of the law in order to resolve the legal rights of the litigants who hope to resolve their differences in the courts. The 'liberal construction' of the rules required by Rule 1, while it cannot alter compliance which is mandatory and jurisdictional, will ordinarily preclude dismissal of an appeal for that which is but technical noncompliance. This will be especially so where no prejudice is shown by any delay which may have been occasioned.” ***Gerstner v. Wash. Water Power Co.*, 122 Idaho 673, 675, 837 P.2d 799, 801 (1992)(quoting *Bunn v. Bunn*, 99 Idaho 710, 712, 587 P.2d 1245, 1247 (1978).**

The order denying Plaintiff’s Motion for Summary Judgment should be reconsidered and reversed. Both the pleadings and the evidence preclude summary judgment.



**POINT TWO**

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
FAILED TO ESTABLISH  
COMPLIANCE WITH ANY CLAIMED "PLAN"**

"Motions for summary judgment should be granted with caution." *Parsons Packing, Inc. V. Masingil*, 140 Idaho 480, 481, 95 P.3d 631, 632 (2004). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment *must be denied*. *Parsons Packing, Inc. V. Masingil*, 140 Idaho 480, 481, 95 P.3d 631, 632 (2004).

Plaintiff was entitled to all favorable inferences with respect to the Defendant's Motion for Summary Judgment and on that basis, the City's Motion should have been denied for failure to establish compliance with the plan which was allegedly created. There was no evidence by the City that it had even complied with any "plan." Failure to comply with a plan is the same as not having a "plan." The City even asserted negligence by the constructing contractor.

**No Evidence of a Plan to Flood Adjacent Property Owners**

Further, there was no evidence presented by the City that its alleged "plan" called for (1) road reconstruction to *lesser standards* than with the previously-existing roadway, or that (2) that the "plan" called for a diversion of roadway water so as to flood adjacent property owners.

### **No Evidence of Plan Compliance**

Defendant through its motion and supporting affidavit *never* alleged that the plan as designed or approved was complied with. Plaintiff is entitled to a favorable inference that the plan as designed and approved was *not* designed and approved to flood neighboring landowners. If Defendant contends otherwise it should be required to such evidence.

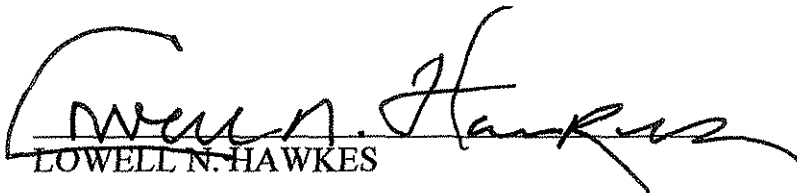
The reasonable inference is that the plan was *not* designed or approved to change or alter the water run-off pattern so as to divert the Pocatello Creek Road run-off onto landowners — rather the drain that sits across the street.

Defendant's Motion should not have been granted.

### **CONCLUSION**

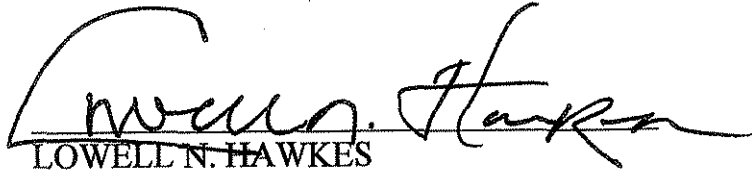
Plaintiff's Complaint was sufficient as was her evidence. This Court should allow all reasonable inferences in Plaintiff's favor relative to the Defendant's claimed immunity and reconsider and review the Complaint and the "operative" and "material facts" which set forth the elements necessary to establish nuisance and inverse condemnation.

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

  
LOWELL N. HAWKES

**CERTIFICATE OF SERVICE**

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

  
LOWELL N. HAWKES

BLAKE G. HALL (2434)  
SAM L. ANGELL (7012)  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
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FILED  
BANNOCK COUNTY  
CLERK OF DISTRICT COURT  
2008 OCT 14 AM 10:35  
BY [Signature]  
DEPUTY CLERK

Attorneys for City of Pocatello

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

LINDA BROWN,

Plaintiff,

v.

CITY OF POCATELLO, a Municipal  
Corporation;

Defendant.

Case No. CV-07-3303-OC

**DEFENDANT'S OBJECTION TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION**

COMES NOW Defendant City of Pocatello, by and through its attorney of record,  
Blake G. Hall, and hereby files its objection to plaintiff's motion for reconsideration. This  
objection is supported by the memorandum in opposition filed herewith.

Dated this 10 day of October, 2008.

[Signature]  
BLAKE G. HALL

## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 10 day of October, 2008, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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

- Mailing
- Hand Delivery
- Fax
- Overnight Mail

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

LAJET\0186.304\Objection.wpd

FILED  
BANNOCK COUNTY  
CLERK OF THE COURT  
2008 NOV -7 AM 10:11  
BY [Signature]  
DEPUTY CLERK

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

LINDA BROWN,	)	
	)	Case No. CV-2007-3303-OC
Plaintiff	)	
	)	
vs.	)	<b>DECISION ON MOTION FOR</b>
	)	<b>RECONSIDERATION</b>
CITY OF POCA TELLO, a Municipal	)	
Corporation,	)	
	)	
Defendant.	)	
_____	)	

This matter came before the Court on October 20, 2008, for oral argument on Plaintiff's Motion for Reconsideration. Appearing on behalf of the Plaintiff, Linda Brown, was Lowell Hawkes. Appearing on behalf of the Defendant, City of Pocatello, was Sam Angell. Stephanie Morse was the Court Reporter. At the hearing the Court heard oral argument from all parties and took the matter under advisement. The Court now issues its decision. The Court **denies** Plaintiff's Motion for Reconsideration.

Register No. CV-2007-3303-OC  
DECISION ON MOTION FOR RECONSIDERATION  
Page 1

## DISCUSSION

The primary issue before this Court is whether Plaintiff sufficiently pled the claims of nuisance and inverse condemnation in its Complaint. Rule 8(a)(1) governs general rules for pleading—claims for relief, and states:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) if the court be of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

In their application of Rule 8(a)(1), Plaintiff and Defendant disagree as to what constitutes the pleading of a "claim," fulfilling the requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiff states that 8(a)(1) requires that a Plaintiff "need only provide facts that, when applied to the law, are a legally sufficient basis for recovery."<sup>1</sup> Plaintiff further states, "under the modern form of pleading a complaint need not state the specific legal theories upon which the plaintiff relies. A simple, concise statement of the operative facts is sufficient." Citing *Bauer v. Minidoka Sch. Dist.*, 116 Idaho 586, 589, 778 P.2d 336 (1989). In oral argument before this Court, Plaintiff stated that they had pled every fact for nuisance and inverse condemnation in the complaint, and were essentially equating "facts" with "claims."

Defendant states that "even the most liberal reading of plaintiff's complaint cannot result in a finding that she stated a claim for inverse condemnation. Her claims which were literally

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<sup>1</sup> Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment, at 3.

characterized as a cause of action for negligence simply did not fairly appraise the City of Pocatello of a hidden claim for inverse condemnation.”<sup>2</sup> In oral argument before this Court, Defendant stated that “claim” constituted not just a pleading of facts, but that a claim is some mixture of facts and legal theory that is sufficient to put the Defendant on notice.

Plaintiff and Defendant have both cited to numerous cases in support of their argument as to what constitutes a sufficient claim, as stated in Rule 8(a)(1). Plaintiff and Defendant have, in fact, both cited to the 2007 Idaho Supreme Court case *Siniger v. North Pacific* to support their argument of what constitutes a sufficiency of claim. 145 Idaho 241, 178 P.3d 606 (2007). In *Siniger*, the Supreme Court of Idaho looked at the question of what constituted an adequate claim within a complaint. The Court came to the conclusion that a “party’s pleadings should be liberally construed to secure a just, speedy and inexpensive resolution to the case,” but further stated, “[t]he key issue in determining the validity of the complaint is whether the adverse party is put on notice of the claims brought against it.” 178 P.3d at 611-612 (quoting *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 427, 95 P.3d 34, 45 (2004)).

In determining whether the defendant was put on notice, the Supreme Court looked at the Defendant’s answer. The Supreme Court cited a prior case, *Vendelin v. Costco Wholesale Corp.*, where the Court had determined that a Defendant had been put on notice of a particular claim because “the defendant raised three separate defenses to the claim for punitive damages in its

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<sup>2</sup> Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Reconsideration, at 6.



amended answer.” *Siniger*, 178 P.3d at 612 (quoting *Vendelin*, 95 P.3d at 45). Because the Defendant had raised defenses to claims in their answer, the complaint was sufficient to put the Defendant on notice of these claims.

The question before this Court, then, is whether the claims raised in the complaint were sufficient to put the City of Pocatello on notice of the claim for nuisance and taking. Like the Supreme Court, this Court will look to the Defendant’s answer to determine whether the Defendant was put on notice of the claim for nuisance and taking.

Unlike the defendant in *Vendelin*, the City of Pocatello did not raise any defenses to any inverse condemnation or nuisance claims in its answer. Defendant City of Pocatello’s response was in no way sufficient to demonstrate that it had been put on notice of, or was acknowledging the claims of inverse condemnation or nuisance. In fact, Defendant was the first to file their Motion for Summary Judgment. This Motion focuses solely on the claim of negligence. The first time there is any indication of the Plaintiff’s claims of inverse condemnation and nuisance is in Plaintiff’s Motion for Summary Judgment.

While the specific legal theories may not need to be stated with particularity in the complaint, Rule 8(a)(1) does require that the pleading set forth a claim for relief, including “a short and plain statement of the claim showing that the pleader is entitled to relief.” The Supreme Court of Idaho has set the standard for determining whether this requirement has been met, and that is whether the Defendant has been put on notice. Defendant City of Pocatello was not put on notice of the claims of taking and nuisance in this case, due to an insufficient pleading of these claims in

Plaintiff's complaint, and the Motion for Reconsideration is denied as to this issue.

The second issue raised by Plaintiff is whether the Court properly granted Defendant's motion for summary judgment on the basis of immunity. In raising this issue, Plaintiff did not come forward with any new facts or case law that would impact the Court's original decision. Instead, Plaintiff simply re-argues the position that the City had to comply with its "plan" in order to obtain immunity. As discussed in the original decision, in order for a governmental entity to gain immunity under Idaho Code § 6-904 (7) it must show that (1) a plan or design for construction or improvement existed, and that it was either (2) prepared in substantial conformance with existing engineering or design standards, or (3) approved in advance of the construction by the legislative body exercising discretion to give authority for such approval. *Lawton v. City of Pocatello*, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994). There is no requirement that the City show that the work complied with the plan but only that the plan either substantially conformed with existing engineering or design standards or was approved in advance by the proper legislative body. If there were design issues, liability must be pursued against the engineering firm that designed the plan. If there were implementation or construction issues, liability must be pursued against the contractor that did the work or the State of Idaho that "administered" the work. However, Plaintiff has not even placed into the record any evidence that the plan was not followed.


### CONCLUSION

A Plaintiff's complaint must set forth a claim for relief, sufficient that a Defendant will be put on notice of that claim. Brown failed to adequately plead nuisance and taking in her complaint,

and the Defendant was not put on notice of these claims. Additionally, Plaintiff has not provided any additional evidence or argument sufficient to overcome the Court's original decision regarding immunity. The Motion for Reconsideration is therefore denied.

IT IS SO ORDERED.

DATED: November 7, 2008.



DAVID C. NYE  
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the <sup>4<sup>th</sup></sup> 10 day of November, 2008, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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

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

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

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

  
Deputy Clerk

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

FILED  
 BANNOCK COUNTY CLERK  
 2008 DEC 19 AM 1:32  
 BY \_\_\_\_\_  
 DEPUTY CLERK

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

LINDA BROWN;	)	
	)	Case No. CV-2007-3303-OC
<i>Plaintiff,</i>	)	
	)	
vs.	)	<b>NOTICE OF APPEAL</b>
	)	
CITY OF POCATELLO, a Municipal Corporation;	)	
	)	
<i>Defendant.</i>	)	

TO: THE ABOVE-NAMED DEFENDANT CITY OF POCATELLO, ITS COUNSEL,  
 AND THE CLERK OF THIS COURT. NOTICE IS HEREBY GIVEN THAT:

1. Plaintiff hereby appeals to the Idaho Supreme Court from the *Decision on Motions for Summary Judgment (9-4-08); Judgment of Dismissal (9-15-08); and Decision on Motion for Reconsideration Order (11-7-08)* by The Honorable David C. Nye.
2. Plaintiff has a right to appeal to the Idaho Supreme Court because the *Decision on Motions for Summary Judgment (9-4-08); Judgment of Dismissal (9-15-08); and Decision on Motion for Reconsideration Order (11-7-08)* by The Honorable David C.

Nye are final within the meaning of Rule 11(a)(1) *Idaho Appellate Rules*, pertaining to “judgments, orders and decrees.”

3. Appellant’s preliminary statement of issues on appeal:

- (a) The Court erred in granting Defendant’s Motion for Summary Judgment;
- (b) The Court erred in denying Plaintiff’s Motion for Summary Judgment;
- (c) The Court erred in finding nuisance and inverse condemnation are not pled;
- (d) The Court erred in finding immunity; and
- (e) The Court erred in denying Plaintiff’s Motion for Reconsideration.

4. A Reporter’s Transcript of the July 28, 2008 Motion for Summary Judgment hearing; October 20, 2008 Motion for Reconsideration and any other proceedings herein is requested, excluding nothing.

- (a) Plaintiff otherwise requests the preparation of the entire reporter’s standard transcript as defined in Rule 25(c), I.A.R.
- (b) Plaintiff requests pursuant to Rule 26.1, *Idaho Appellate Rules*, that the reporter provide disks, or electronic media, of all transcripts.

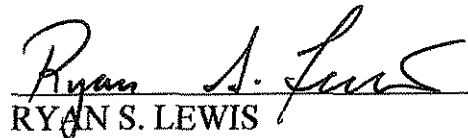
5. Plaintiff requests the following to be included in the Clerk’s Record in addition to those automatically included under Rule 28, *Idaho Appellate Rules*:

- (a) All motion filings of the parties and the Court, including Memoranda and Affidavits filed relative to the respective Motions for Summary Judgment;
  - (b) All motion filings of the parties including all Memoranda filed relative to Plaintiff's *Motion for Reconsideration*; and
  - (c) All documents not formally filed by the Court or Clerks but treated as "lodged" with the Court or Clerk, including memoranda or otherwise.
6. No order has been entered sealing any portion of the record.
7. I certify that:
- (a) A copy of this *Notice of Appeal* has been served on the reporter;
  - (b) The Clerk of the District Court has been paid \$100.00 in advance to be held in trust for the Court Reporter for preparation of the transcript pursuant to Rule 24(c), *Idaho Appellate Rules*; any additional will be paid upon determination of the amount required;
  - (c) The Clerk of the District Court has been paid \$100.00 in advance for preparation of the Clerk's Record pursuant to Rule 27(d), *Idaho Appellate Rules*;
  - (d) The Appellate Filing Fees of \$15.00 to the Clerk of the District Court and \$86.00 to the Idaho Supreme Court have been tendered with this filing;

(e) Service has been made upon all parties required to be served pursuant to Rule 20, *Idaho Appellate Rules* and upon Stephanie Morse, Court Reporter to the Honorable David C. Nye, P.O. Box 4165, Pocatello, Idaho, 83205, pursuant to Rule 24(c), *Idaho Appellate Rules*.

DATED this 19<sup>th</sup> day of December, 2008

LOWELL N. HAWKES, CHARTERED

  
RYAN S. LEWIS

**CERTIFICATE OF SERVICE**

I certify that on this 19<sup>th</sup> day of November 2008 I faxed a copy of the foregoing to Blake G. Hall and Sam L. Angell of Anderson, Nelson, Hall & Smith, P.A., 490 Memorial Drive, Idaho Falls, ID 83405-1630, Fax 523-7254; and mailed a copy to Stephanie Morse, Court Reporter to the Honorable David C. Nye, P.O. Box 4165, Pocatello, Idaho, 83205.

  
RYAN S. LEWIS



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

LINDA BROWN,	)	
	)	Supreme Court No.
Plaintiff,	)	
vs.	)	
	)	CLERK'S CERTIFICATE
	)	OF
CITY OF POCATELLO, a Municipal	)	
Corporation;	)	APPEAL
	)	
Defendant,	)	
_____	)	

Appealed from: Sixth Judicial District, Bannock County

Honorable David C. Nye, presiding.

Bannock County Case No: CV-2007-3303-OC

Order of Judgment Appealed from: Decision on Motions for Summary Judgment filed the 4<sup>th</sup> day of September, 2008; Judgment of Dismissal filed the 15<sup>th</sup> day of September, 2008; and Decision on Motion for Reconsideration filed the 7<sup>th</sup> day of November, 2008.

Attorney for Appellant: Lowell N. Hawkes, Ryan S. Lewis; LOWELL N. HAWKES, CHARTERED, Pocatello

Attorney for Respondent: Blake G. Hall, Sma L. Angell; ANDERSON NELSON HALL SMITH, P. A.

Appealed by: Plaintiff

Appealed against: Defendant

Notice of Appeal filed: 12-19-08

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: Stephanie Morse

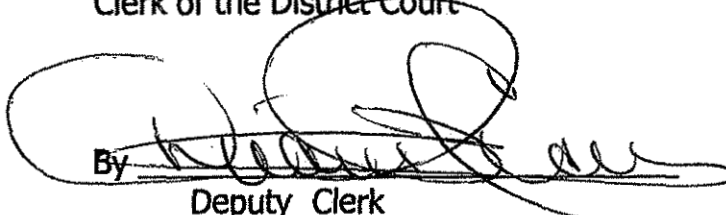
Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages:

Dated 12-26-08

DALE HATCH,  
Clerk of the District Court

(Seal)

By   
Deputy Clerk

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

LINDA BROWN,	)	
	)	Supreme Court No. 35992-2009
Plaintiff-Respondent,	)	
	)	
vs.	)	CLERK'S CERTIFICATE
	)	
CITY OF POCA TELLO, a Municipal	)	
Corporation;	)	
Defendant-Appellant.	)	
_____	)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true, full, and correct record of the pleadings and documents as are automatically required under Rule 28 of the Idaho appellate Rules.

I do further certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 3 day of 3, 2009.

(Seal)

DALE HATCH,  
Clerk of the District Court  
Bannock County, Idaho Supreme Court

By   
Deputy Clerk

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

LINDA BROWN,	)	
	)	Supreme Court No. 35992-2009
Plaintiff-Respondent,	)	
	)	
vs.	)	CERTIFICATE OF EXHIBITS
	)	
CITY OF POCA TELLO, a Municipal	)	
Corporation;	)	
	)	
Defendant-Appellant.	)	
_____	)	

I, DALE HATCH, the duly elected, qualified and acting Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, do hereby certify that there were no exhibits marked for identification and introduced into evidence at trial. The following exhibit will be treated as a exhibit in the above and foregoing cause, to wit:

1. Memorandum in Support of Motion for Summary Judgment dated 6-9-08.
2. Affidavit of Lindell Turner dated 6-9-08.
3. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment dated 7-15-08.
4. Defendant's Reply Brief dated 7-22-08.
5. Defendant's Memorandum in Opposition to Plaintiff's Motion for Reconsideration dated 10-14-08.

I FURTHER CERTIFY that the above exhibit is attached to, and made a part of, the original transcript on appeal in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this the 3 day of 3, 2009.

DALE HATCH, Clerk of the District Court  
Bannock County, State of Idaho

(Seal)

By: 

Deputy Clerk

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

LINDA BROWN, )  
 ) Supreme Court No. 35992-2009  
 Plaintiff-Respondent, )  
 )  
 vs. ) CERTIFICATE OF SERVICE  
 )  
 )  
 CITY OF POCATELLO, a Municipal )  
 Corporation; )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States mail, one copy of the REPORTER'S TRANSCRIPT and CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

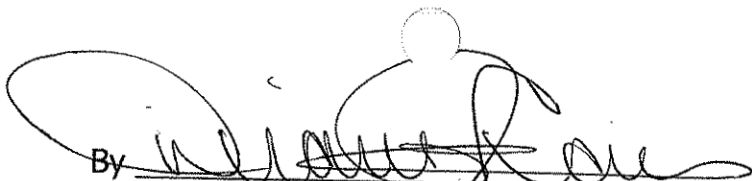
**LOWELL N. HAWKES**  
**RYAN S. LEWIS**  
**LOWELL N. HAWKES, Chartered**  
**1322 East Center**  
**Pocatello, Idaho 83201**

**BLAKE G. HALL**  
**SAM L. ANGELL**  
**ANDERSON NELSON HALL**  
**SMITH, P.A.**  
**P.O. Box 51630**  
**Idaho Falls, Idaho 83405-1630**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 11 day of March, 2009.

(Seal)

DALE HATCH,  
Clerk of the District Court  
Bannock County, Idaho Supreme Court

By   
Deputy Clerk