

IN THE WATER COURT OF THE STATE OF MONTANA

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NOTICE OF FILING OF MASTER'S REPORT

TO: ALL PARTIES  
RE: 76M-13

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from service of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court. (This procedure is required by Rule 1.II. Water Right Claims Examination Rules and by Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 17th day of September 1991.

LORI M. BURNHAM  
Clerk of Court  
Montana Water Court  
P. O. Box 879  
Bozeman, MT 59771-0879  
(406) 586-4364  
1-800-624-3270 (in Montana)

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER BASIN (76M)  
\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION ) CASE NO. 76M-13  
OF THE EXISTING RIGHTS TO THE USE ) 76M-W-099158-00  
OF ALL THE WATER, BOTH SURFACE AND ) 76M-W-099417-00  
UNDERGROUND, WITHIN THE CLARK FORK ) 76M-W-099419-00  
RIVER BETWEEN THE BLACKFOOT RIVER ) 76M-W-099420-00  
AND FLATHEAD RIVER DRAINAGE AREA, ) 76M-W-111322-00  
INCLUDING ALL TRIBUTARIES OF THE ) 76M-W-111323-00  
CLARK FORK RIVER BETWEEN THE BLACK- )  
FOOT RIVER AND FLATHEAD RIVER IN )  
LAKE, MINERAL, MISSOULA AND SANDERS )  
COUNTIES, MONTANA. )

FILED

CLAIMANT: Edna E. Frey (Former owner), Wayne D. Bricker and  
Billye A. Bricker (Present owner)  
Myrthy E. Hagel and Edgar F. Hagel,  
Thomas M. Wheeler, Joseph P. Wheeler,  
William J. Wheeler, Blanche V. Wheeler,  
Michael A. Wheeler, William J. Wheeler, Jr.

ON MOTION OF MONTANA WATER COURT

OBJECTOR: William J. Wheeler, Jr., Wayne D. Bricker

The hearing of this case was held before Water Master  
Kathryn L. W. Lambert on February 26 and 27, 1987 in the Public  
Defender's Conference Room, Missoula, Montana.

Counsel Paul C. Meisner appeared on behalf of Edna E.  
Frey, Wayne D. Bricker and Billye A. Bricker (Brickers).

Witnesses called were Edna E. Frey, Leonard Erickson, Richard  
Hollenback, Kit Sutherland, Shirley Hollenback, Donald Frey,  
Charles Frey, Jr., Wayne D. Bricker and Dennis Workman. Exhibits  
F-1, F-5, F-9, F-12, F-14, F-15, F-16, F-17, F-18 and F-19 were  
admitted over objection. Exhibits F-2, F-3, F-4, F-6, F-7, F-10  
and F-11 were admitted without objection. Exhibits F-8 and F-13  
were not offered.

Counsel Douglas R. Austin appeared on behalf of Edgar F. Hagel, Myrthy E. Hagel, Thomas M. Wheeler, Joseph P. Wheeler, William J. Wheeler, Blanche V. Wheeler, Michael A. Wheeler and William J. Wheeler, Jr. (Wheelers). Witnesses called were John Westenberg, Kenton Lewis, Tim Lewis, Debbie Wheeler Boyes, Jackie Robb, William J. Wheeler, Jr. and Bob Wheeler. Exhibits W-1, W-2, W-9, W-11, W-12, W-13, W-14, W-15, W-16, W-17, W-18, W-19, W-20, W-21 and W-26 were admitted without objection. Exhibits W-3, W-4, W-5, W-6, W-7, W-8, W-10, W-27, W-28 and W-29 were admitted over objection. Exhibits W-23 and W-24 were refused. Admittance of Exhibit W-22 was taken under advisement. Exhibit W-25 was not offered.

The parties stipulated to the admission of the telephone depositions of Verna Gladys French Oakley, Casey Austin and William Hankinson.

Exhibit W-22 is a photocopy of an aerial photo upon which blue and green lines and arrows have been drawn by counsel Doug Austin. This was offered by Wheelers and objected to by Brickers. Although Kenton Lewis did not prepare the demonstrative exhibit, he was able to identify the markings. He further testified that the lines were correct only for a certain time, that they did not represent the natural historical route of the Creek. The Court reserved its ruling on the objection. The objection is hereby overruled and Exhibit W-22 is admitted as the exhibit was clearly and adequately identified by Kenton Lewis as required by Rule 901 Mont. R. Evid.

Counsel for Wheelers objected to the testimony of Dennis Workman concerning the impact on the Nemote Creek fishery by Mr. Hagel's rerouting of the Creek. The objection was taken under advisement. It is determined that the objection should be sustained and the testimony of Dennis Workman concerning the fishery should be stricken as the impact on the fishery is not relevant to the determination of the validity or elements of the Wheeler water right. The Brickers concerns about the degradation of the fishery and the stream bed should be pursued with the Montana Department of Fish, Wildlife and Parks.

Counsel for the Brickers objected to testimony of William J. Wheeler, Jr. concerning what Edgar Hagel told him about the seniority of water rights appurtenant to the Hagel ranch. The objection was taken under advisement. It is determined that the objection should be overruled as this testimony is relevant to the "hostile" requirement of adverse possession.

The Brickers raised two other issues concerning the nonuse of the Wheeler claims after July 1, 1973 and questioned whether irrigation of fields which are predominantly leafy spurge is a beneficial use of water. It appears that the leafy spurge has taken over these fields since 1973. Whether the Wheeler claims have been abandoned in whole or in part since July 1, 1973 and whether the post July 1, 1973 irrigation of leafy spurge is a beneficial use of water are issues which should be pursued with the Montana Department of Natural Resources and Conservation.

On June 4, 1991 a Draft Master's Report was sent to all the parties for review and comment. Comments were received from Leonard Erickson and Leona Erickson, Edna E. Frey, Wayne D. Bricker, and Doug Austin on behalf of the Wheelers. Upon review of the comments it appeared that the issue of acres irrigated for claim 76M-W-111322-00 was not fully resolved. The Court requested that the parties or their representatives meet with John Westenberg of the Montana Department of Natural Resources and Conservation, to plot the acreage on an aerial photo and to calculate the total number of acres irrigated. The parties met on August 18, 1991. On August 22, 1991 two aerial photos with irrigated acreage clearly outlined and worksheets tabulating the number of acres and determining the legal descriptions were filed by Paul Meisner on behalf of the Brickers. On September 5, 1991 a Statement specifying agreement with the acreages specified in the aerial photos and tabulations was filed by Doug Austin on behalf of the Wheelers.

Based upon the Statements of Claim, the Montana Department of Natural Resources and Conservation Withdrawals of Objection and Stipulations, the exhibits and testimony submitted, the post-hearing briefs of counsel, the aerial photos and acreage tabulations, and the Wheelers Statement, the Water Master submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CONCLUSION OF LAW 1) The Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. Sec. 85-2-233.

CONCLUSION OF LAW 2) The Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider a matter within the Court's jurisdiction on its own motion. Mont. Code Ann. Sec. 3-7-224.

76M-W-099158-00

FINDING OF FACT 1) William J. Wheeler, Jr. objected to the ownership and priority date of this Billye A. Bricker and Wayne D. Bricker stockwater claim. The objection alleged this right was lost by adverse possession by Edgar Hagel.

FINDING OF FACT 2) A Notice of Intent to Appear was filed by Billye Ann Bricker, Wayne D. Bricker and Edna E. Frey.

FINDING OF FACT 3) This Bricker stockwater claim is based on the Christian Frey Notice of Appropriation for 300.00 miner's inches of Fourteen Mile Creek (currently known as Nemote Creek) appropriated and filed for on October 13, 1902. This Notice is a sworn statement by Christian Frey that he dug the ditches and that he appropriated the water on October 13, 1902. The Notice specifies in paragraph II that the "purpose for which said water is claimed is for irrigating land." Stock use is not included.

CONCLUSION OF LAW 3) As the 1902 Christian Frey Notice of Appropriation does not include stockwater use, that is not the proper basis for this right.

CONCLUSION OF LAW 4) As this right is not based on a filed notice or a previous court decree, it is a use right. The priority date is the date the water was first put to beneficial use.

FINDING OF FACT 4) Upon review of the Statement of Claim it is clear that the cattle drink directly from the source. The place of use is the area bordering both sides of Nemote Creek as it passes through the Frey Ranch.

FINDING OF FACT 5) The Frey Ranch, historically known as the Milk Ranch, was mentioned in the April 27, 1870 edition of the Missoulian. It was a way station and had the only cattle between Missoula, Montana and Wallace, Idaho. (Testimony of Edna E. Frey and Exhibit F-5)

FINDING OF FACT 6) Since the early 1870s there have been dairy and beef cattle on the Frey Ranch. There naturally would have been stockwater use from that time as well.

CONCLUSION OF LAW 5) The priority date should be April 27, 1870. (Exhibit F-5)

CONCLUSION OF LAW 6) The requirements for adverse possession of a water right are clearly specified in Irion et al. v. Hyde et al., 81 P.2d 353, 107 Mont. 84, 88-89 (1938):

It is settled law in this state that the burden of proving adverse user of water rests upon the party alleging it. (Boehler v. Boyer, 72 Mont. 472, 234 Pac. 1086; St. Onge v. Blakely, 76 Mont. 1, 245 Pac. 532.) It is equally well settled that in order to acquire a water right by adverse user or prescription, it is essential that the proof must show that the use has been (a) continuous for the statutory period which in this state is ten years (sec. 9024, Rev. Codes); (b) exclusive (uninterrupted, peaceable); (c) open (notorious); (d) under claim of right (color of title); (e) hostile and an invasion of another's rights which he has a chance to prevent. (1 Wiel's Water Rights in the Western States, 3d ed., sec. 582, p. 628; 2 Kinney on Irrigation and Water Rights, 2d ed., sec. 1048, p. 1875; Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 Pac. 68; Smith v. Duff, 39 Mont. 374, 102 Pac. 981, 133 Am. St. Rep. 582.) All of the foregoing elements must exist before a court is

justified in declaring a superior right by adverse user or prescription, and no one element may be omitted without being fatal in the proof of adverse user.

CONCLUSION OF LAW 7) The burden of proving adverse possession is on the party claiming the right by adverse possession. Of particular importance is the actual adverse use. In a case which is remarkably similar, the Montana Supreme Court stated:

[T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other, and therefore, in order to constitute adverse possession of water, the burden is upon the claimant to show that his use of the water deprived the prior appropriators of water at times when such prior appropriators actually needed the water; the use does not become adverse until it interferes with the use thereof by the prior appropriators, and therefore proof merely that the claimant used water and claimed the right to use it is no proof whatever of adverse use.

St. Onge et al. v. Blakely et al., 245 P. 532, 76 Mont. 1, 16 (1926).

FINDING OF FACT 7) There was virtually no evidence presented to prove the elements of adverse possession of this stockwater right by Hagels or their predecessors.

CONCLUSION OF LAW 8) As there was no testimony or evidence presented that Frey was actually deprived of water at a time when he needed it, and that this stockwater right was actually adversely used by Hagel at any time for his stock, there was no adverse possession by Hagel of this Frey stockwater right.

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FINDING OF FACT 8) This Billye A. Bricker and Wayne D. Bricker irrigation claim is based upon the Peter Nickelson Notice of Water Right for 250.00 miner's inches of Fourteen Mile Creek



for irrigating and other purposes appropriated and filed for on August 4, 1891.

FINDING OF FACT 9) William J. Wheeler, Jr. objected to the ownership, priority date, place of use, acres irrigated, volume and flow rate of this Billye A. Bricker and Wayne D. Bricker irrigation claim.

FINDING OF FACT 10) The Montana Department of Natural Resources and Conservation (Department) objected to the acres irrigated.

FINDING OF FACT 11) This claim was called in on Motion of the Water Court due to the gray area remark concerning the number of acres irrigated, volume and flow rate.

FINDING OF FACT 12) A Notice of Intent to Appear was filed by Billye A. Bricker, Wayne D. Bricker and Edna Frey.

FINDING OF FACT 13) On August 5, 1985 the Department filed a Withdrawal of Objection, and the Department, Billye A. Bricker and Wayne D. Bricker filed a Stipulation specifying 186.00 acres irrigated and the legal descriptions for that acreage.

FINDING OF FACT 14) At the hearing of Case 76M-13 the Brickers stated that they are not the owners of this water right. The actual owners are Leonard Erickson and Leona Erickson. The Brickers withdrew this claim.

CONCLUSION OF LAW 9) As the Brickers have withdrawn this claim, it shall not appear in the Preliminary or Final Decree of the Clark Fork River Between The Blackfoot River and Flathead River Basin (76M).

FINDING OF FACT 15) William J. Wheeler, Jr. objected to the ownership, priority date, place of use and acres irrigated of this Billye A. Bricker, Wayne D. Bricker and Edna E. Frey claim, and alleged that he is the owner of this water right due to the adverse possession by his predecessor Edgar Hagel.

FINDING OF FACT 16) The Department objected to the acres irrigated, volume and flow rate.

FINDING OF FACT 17) This claim was called in on Motion of the Water Court due to the gray area remark concerning the number of acres irrigated.

FINDING OF FACT 18) A Notice of Intent to Appear was filed by Wayne D. Bricker, Billye Ann Bricker and Edna Frey.

FINDING OF FACT 19) This Bricker irrigation claim is based on the Christian Frey Notice of Appropriation for 300.00 miner's inches of Fourteen Mile Creek (currently known as Nemote Creek) appropriated and filed for on October 13, 1902. This Notice is a sworn statement by Christian Frey that he dug the ditches and that he appropriated the water on October 13, 1902. The Notice specifies in Paragraph II that the "purpose for which said water is claimed is for irrigating land." The number of acres irrigated was not specified. This Notice was recorded in Book F of Water Rights, page 18, Records of Missoula County.

FINDING OF FACT 20) It appears that Christian Frey sold 20.00 miner's inches of surplus water under his claimed 1902 right to the Milwaukee, Chicago & St. Paul Railroad and that this was not transferred back to the Freys. Following is an analysis of that transaction:

a) The Peter Nichol森 right is based on his August 4, 1891 Notice of Water Right for 250.00 miner's inches of Fourteen Mile Creek. (Exhibit W-10)

b) On May 24, 1901 Christ Frey purchased 160.00 acres from Big Blackfoot Milling Company. No water rights are specified in this transfer. But it is noted that if there were any water rights used on this property by the property owner, then those rights are appurtenances and are passed with the property unless excluded. Castillo v. Kunneman, 642 P.2d 1019, 197 Mont. 190 (1982). (Exhibit W-10)

c) On May 22, 1905 Christ Frey and Louise Frey transferred the same 160.00 acres (in this document "known as the Peter Nichol森 Ranch") to Mrs. Clark R. Graham. No water rights are specified, but if they were appurtenant, they were transferred as well. (Exhibit W-10)

d) On March 31, 1908 Christian Frey and Louise Frey transferred 20.00 miner's inches of the August 4, 1891 Peter Nichol森 right on Fourteen Mile Creek and "... other waters of the said Creek appropriated by the said Christian Frey October 13th, 1902 and recorded in Book 'F' of said Water Rights at Page 18, thogether (sic) with the right of entry upon the southeast quarter (SE1/4) of Section No. Sixteen (16) in Township No. Fifteen (15) North, range No. Twenty-five (25) West of the Principal

Meridian of Montana..." to the Chicago, Milwaukee & St. Paul Railway Company of Montana. Twenty inches were sold with the right of entry. (Exhibit W-10)

e) On October 1, 1917 Christian Frey filed a statement clarifying the above transfer which states "... that it was the intention of himself and wife to convey and he did actually convey by said deed, 20 inches of the waters of Fourteen Mile Creek, no more and no less." The purpose of this statement is unclear as which water right the twenty inches came from is not identified. At a minimum he confirmed that it was a Fourteen Mile Creek water right that he owned which was transferred. (Exhibit W-10)

f) On October 25, 1938 the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Charles Frey and Edna Frey entered a release concerning the pipeline right of way. There is no mention of the water right being conveyed back to the Freys. (Exhibit F-12)

It is found that the Peter Nicholzen 1891 water right was an appurtenance to the Peter Nicholzen Ranch and as such was conveyed by Christian Frey and Louise Frey to Mrs. Clark R. Graham in 1905. It is noted that the Brickers withdrew their claim 76M-W-111322-00 for this water right as it belongs to Leonard Erickson and Leona Erickson, the current owners of the Peter Nicholzen Ranch.

It is found that the transaction with the Chicago, Milwaukee, St. Paul & Pacific Railroad actually conveyed part

of the Christian Frey 1902 claimed water right and none of the Peter Nicholzen water right.

It is found that the 20.00 miner's inches came from that portion of the 1902 300.00 miner's inches right which had not yet been actually put to beneficial use, i.e., not yet perfected at the time the transfer was made. What was transferred to Milwaukee, Chicago & St. Paul Railroad Company was surplus or excess water.

CONCLUSION OF LAW 10) Excess or surplus water may not be sold.

So long as a party has all the water his necessity requires or that his ditches will carry, it is immaterial that he has a right, under decree or otherwise, to a greater flow from the creek. It is his duty to permit the excess to remain in the creek or, having diverted it to return it to the creek in such manner that it will be available to subsequent appropriators on decreed rights.

Whitcomb v. Helena Water Works, 444 P.2d 301, 151 Mont. 443, 448 (1968).

But an appropriator cannot be permitted to use the water for the purpose for which it is appropriated, and then, in the interims when not continually used by him, sell the same for use by other persons. The supreme court of Montana, in considering this question, used this language: "It has been held that an appropriator of water may change the use of his appropriation from one purpose to another, (Meagher v. Hardenbrook, 11 Mont. (385) 381, 28 Pac. 451, and cases cited), but it has never been held in this state (nor are we cited to like holding elsewhere) that after an appropriator has used the water sufficiently to answer the purpose of his appropriation, he might take the waters of the stream remaining, which he could not use for the purpose of his appropriation, and sell it to other parties, thereby depriving subsequent appropriators of their right to use the same." (Creek v. Bozeman Waterworks Co., 15 Mont. 121, 131, 38 Pac. 459; see, also, Tucker v. Missoula Light & Water Co., 77 Mont. 91, 250 Pac. 11.)

Galiger et al. v. McNulty et al., 260 P.401, 80 Mont. 339, 357 (1927). See also Brennan et al. v. Jones et al., 55 P.2d 697, 101 Mont. 551 (1936) and Sections 89-805 and 89-811 R.C.M.

Therefore, it appears that the transfer of 20.00 miner's inches of surplus water under the 1902 Frey Notice of Appropriation was not permitted in Montana. The fact that the 20.00 miner's inches were not transferred back to the Freys is immaterial.

FINDING OF FACT 21) The Frey Ranch was irrigated in 1908. There was irrigation on the bottom next to the Creek, but not on the bench. About the same amount of that field is irrigated now as was in 1908. (Deposition of Verna Gladys French Oakley)

FINDING OF FACT 22) On November 21, 1934 a Warranty Deed was filed transferring the Frey Ranch from Christian Frey and Louise Frey to Charles Frey and Edna Frey, their son and daughter-in-law. In the description of the transferred property, the Deed states:

Together with that certain water right to the use of certain water of Fourteen Mile Creek, as the same was located and recorded by said party of the first part, said record appearing in Book F of Water Rights on Page 18 on the records of Missoula County and as transcribed to the records of Mineral County in the office of the County Clerk and Recorder.

There are no other water rights specified in this Deed. The October 13, 1902 Christian Frey water right on Fourteen Mile Creek is recorded in Book F of Water Rights, Page 18, Missoula County, Montana. (Exhibit W-11)

FINDING OF FACT 23) Irrigation continued through the 1930s and 1940s. Although Edna Frey testified that there were 48.00 acres irrigated in the lower field, the parties later agreed that there were 58.50 acres irrigated as shown on the aerial photograph submitted after the hearing. (Testimony of Edna Frey and aerial photograph with tabulations)

FINDING OF FACT 24) Between 1953 and 1965 Edgar Hagel's irrigation activities (dam) upstream interfered with the delivery of Nemote Creek water to the Frey Ranch. Mr. Hagel was told by his attorney that he had the best, ie, senior right. The basis for his conclusion is not clear. (Exhibits W-2 and W-3)

The same attorney told Mrs. Frey that the Freys had the senior water right. When Mr. Hagel interfered with their right, he advised them to rip out the dam.

FINDING OF FACT 25) Although the Frey right was interfered with, and Mrs. Frey stated that she decided that the water was not worth fighting for, the Freys did continue to receive water. There was no evidence submitted that the Freys were denied their water, just that they had trouble getting it.

CONCLUSION OF LAW 11) As noted previously Irion, 107 Mont. at 88-89, specifies that the elements required to prove adverse possession are a) continuous use for the statutory period b) exclusive use, c) open use, d) use under claim of title, and e) hostile use.

CONCLUSION OF LAW 12) As noted previously St. Onge, 76 Mont. at 16, specifies that the burden of proving adverse

possession is on the party claiming the right by adverse possession.

CONCLUSION OF LAW 13) There was no testimony or evidence presented that the Freys were actually deprived of water at a time when they needed it, and that their water right was actually adversely used by Mr. Hagel at any time. It was very clear that the Frey's had trouble getting their water and that Mr. Hagel thought that he had the senior water right. But as long as the Freys did receive their water, it was not possible for Mr. Hagel to have been adversely using their water right.

As this one requirement for adverse possession was not proved, the remaining requirements need not be reviewed.

CONCLUSION OF LAW 14) There was no adverse possession by Hagel of this Frey (Bricker) water right.

FINDING OF FACT 26) In the 1940s the Freys began thinking of putting in a sprinkler to irrigate the bench in Section 21. They continued planning and consulting until the sprinkler and pumps were installed in May 1973.

FINDING OF FACT 27) Evidence concerning the irrigation from 1960-1973 was conflicting.

In 1968 the State of Montana, Water Conservation Board, surveyed this area for its Water Resource Survey. The surveyor's notes and maps specify 34 acres in Section 16 actually irrigated by the 1902 right and 20 acres in Section 21 as potentially irrigable. (Exhibits W-13 and W-14)

In the 1960s additional land in the pasture was cleared for irrigation and some land was removed from irrigation due to construction of Highway I-90. Edna Frey testified that there



were 48.00 acres historically irrigated plus 5.00 new acres in the pasture, totaling 53.00 acres in the lower field (Section 16).

Edna Frey and Wayne Bricker both testified that their Stipulation with the Montana Department of Natural Resources and Conservation accurately specifies 67.00 acres irrigated in the lower field after installation of the sprinklers in 1973.

The aerial photograph with acreage tabulations submitted by Brickers after the hearing and accepted by Wheelers, specifies 58.30 acres irrigated in the lower field after the interstate was constructed.

FINDING OF FACT 28) On December 6, 1985 the Department filed a Withdrawal of Objection, and a Stipulation signed by the Department and Wayne D. Bricker and Billye Ann Bricker. This Stipulation specifies 186.00 acres irrigated and provides the legal description for that acreage. When added the specified acreages total 177.00 acres rather than 186.00 acres. This Stipulation includes the acreage in Section 16 and Section 21.

CONCLUSION OF LAW 15) In Clausen v. Armington, 212 P.2d 440, 123 Mont. 1, 14 (1949) the Montana Supreme Court stated:

Not having constructed a ditch from Tallow Creek within a reasonable time after November 15, 1939, the date of his notice of appropriation, plaintiff's appropriation would not under sections 7100 to 7102, R.C.M. 1935, relate back to that date, but under the authorities cited above, would date from the spring of 1942 when he directed the water onto his land and continued to do so in 1943, 1944 and 1945, before defendant in the fall of 1945 removed the pipe and dam from his ditch so as to prevent any further use of the water by plaintiff. (Emphasis added)

Due diligence has been defined as follows:

What constitutes reasonable diligence must be determined on an ad hoc, case by case basis. The law in this area is summarized by a leading authority, Clark Waters & Water Rights, Vol. 6, section 514.1, pp. 308, 309, in this language:

"What constitutes due diligence is a question of fact to be determined by the Court in each case. Diligence does not require unusual or extraordinary effort, but it does require a steady application of effort - that effort that is usual, ordinary and reasonable under the circumstances. \* \* \* So long as the applicant prosecutes the construction of works in good faith with a steady effort, he should be held to have prosecuted with diligence."

\* \* \*

We hold therefore that the meaning of the words " \* \* \* proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted \* \* \* " is not confined to the commencement of actual on-site excavation or construction of the diversion works, but that it encompasses the steady on-going effort in good faith by Intake to prosecute the construction of the project under the circumstances disclosed here.

Montana Department of Natural Resources and Conservation v. Intake Water Co., 558 P.2d 1110, 171 Mont. 416, 434 and 436 (1977). See also Holmstrom Land Co., Inc. v. Meagher County Newlan Creek Water Dist., 605 P.2d 1060, 185 Mont. 409 (1980).

CONCLUSION OF LAW 16) The Notice of Appropriation was filed in 1902. The Freys began planning a sprinkler system for the bench in the 1940s and actually put in the system in 1973. It does not appear that sprinkler irrigation on the bench was part of Christian Frey's actual or intended use in 1902. (It is noted that it is common knowledge that sprinklers were not in use until after World War II). It is clear that the lapse of 38-47 years (1902 to 1940 or 1949) during which there were no plans or efforts to sprinkler irrigate the bench precludes any relation

back to the 1902 date.

The Brickers argue that the priority date should be in the 1940s when they first began planning to irrigate the bench or at least from 1969 when they actively pursued installation of the sprinklers and pump. They appear to be relying on the doctrine of relation back. Relation back occurs when one files a Notice of Appropriation but has not yet completed the appropriation. Sections 89-811 and 89-812 R.C.M. If there is a substantial period of time until the appropriation is completed and this claimant can show due or reasonable diligence in pursuing a completed appropriation, then the priority date relates back to the notice date rather than the date of actual first use. "It follows that the statute controls this doctrine of relation back, and that one who seeks to avail himself of it since passage of this act can only do so by a compliance with the statutory requirements." Murray v. Tingley, et al., 50 P. 723, 20 Mont. 260, 269 (1897). In this case there is no notice of appropriation filed in the 1940s or in 1969 to which the priority date can be related back. The priority date is the date of first use, May 1973.

FINDING OF FACT 29) There was an expansion of 118.70 acres (177.00 minus 58.30) when Brickers began sprinkler irrigating 8.70 acres in Section 16 in 1970 and 110.00 acres in Section 21 in 1973.

FINDING OF FACT 30) Water Court standards are 1.50 miner's inches per acre, 9.40 acre feet per acre per year for flood irrigating in this area and 3.80 acre feet per acre per

year of sprinkler irrigation in this area. There was no evidence presented that a greater quantity of water was actually beneficially used historically.

CONCLUSION OF LAW 17) As there was no separate Notice of Appropriation filed for the sprinkler system installed in 1970 to irrigate a portion of the lower field (Section 16), that right is a use right and the priority date is the date of first use. A separate water right 76M-W-214065-00 should be generated for this right. The place of use was determined by comparing the Stipulation and Exhibits F-4, F-6, F-11, W-14, W-17 and W-21. The flow rate and volume were calculated by multiplying the number of acres irrigated by the standards. The elements of this right are as follows:

76M-W-214065-00

OWNERS: Billye A. Bricker, Wayne D. Bricker and Edna E. Frey

PRIORITY DATE: May 31, 1970

FLOW RATE: 0.33 cfs

VOLUME: 33.06 acre feet per year

SOURCE: Nemote Creek

MAXIMUM ACRES: 8.70

PURPOSE OF RIGHT: Irrigation

PERIOD OF USE: April 1 to October 4

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>	
SESWSE	16	15N	25W	MINERAL	PUMP

PLACE OF USE FOR IRRIGATION:

	<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
	2.20	SWSWSE	21	15N	25W	MINERAL
	5.50	SESWSE	21	15N	25W	MINERAL
	1.00	NWSWSE	21	15N	25W	MINERAL
TOTAL	<u>8.70</u>					

CONCLUSION OF LAW 18) As there was no separate Notice of Appropriation filed for the sprinkler system installed in 1973 to irrigate the bench (Section 21), that right is a use right and the priority date is the date of first use. A separate water right 76M-W-214225-00 should be generated for this right. The place of use was determined by comparing the Stipulation, Exhibits F-6, W-14, W-17 and W-21 and the aerial photo with acreage tabulations submitted after the hearing. The flow rate and volume were calculated by multiplying the number of acres irrigated by the standards. The elements of this right are as follows:

76M-W-214225-00

OWNERS: Billye A. Bricker, Wayne D. Bricker and Edna E. Frey

PRIORITY DATE: May 31, 1973

FLOW RATE: 4.13 cfs

VOLUME: 418.00 acre feet per year

SOURCE: Nemote Creek

MAXIMUM ACRES: 110.00

PURPOSE OF RIGHT: Irrigation

PERIOD OF USE: April 1 to October 4

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>	
NESWSE	16	15N	25W	MINERAL	PUMP

PLACE OF USE FOR IRRIGATION:

	<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
	1.00	NWNWNE	21	15N	25W	MINERAL
	10.00	NENWNE	21	15N	25W	MINERAL
	7.00	NENENE	21	15N	25W	MINERAL
	10.00	SWNE	21	15N	25W	MINERAL
	10.00	SENE	21	15N	25W	MINERAL
	7.00	NESWNE	21	15N	25W	MINERAL
	8.00	SESWNE	21	15N	25W	MINERAL
	40.00	SENE	21	15N	25W	MINERAL
	4.00	NENWSW	21	15N	25W	MINERAL
	8.00	SENWSE	21	15N	25W	MINERAL
	3.00	NWNESE	21	15N	25W	MINERAL
	2.00	NENESE	21	15N	25W	MINERAL
TOTAL	<u>110.00</u>					

CONCLUSION OF LAW 19) Although the Notice of Appropriation is prima facie evidence, Brickers must prove that there actually has been "... beneficial use over a reasonable period of time.' Inherent in this burden of proof is the responsibility to prove the amount of water beneficially used." Holmstrom Land Co. v. Newlan Creek Water Dist., 605 P.2d 1060, 185 Mont. 409, 419 (1979). See also Irion et al. v. Hyde et al., 81 P.2d 353, 107 Mont. 84 (1938) and 79 Ranch Inc. v. Pitsch, 666 P.2d 215, 204 Mont. 426 (1983).

CONCLUSION OF LAW 20) Claim 76M-W-111323-00 should be changed to reflect the 1902 water right only as perfected. The place of use was determined by comparing the Stipulation, Exhibits F-6, W-14, W-17 and W-21, and the aerial photo with tabulations submitted after the hearing. The flow rate and volume were calculated by multiplying the number of acres irrigated by the standards. The elements of this water right are as follows:

76M-W-111323-00

OWNERS: Billye A. Bricker, Wayne D. Bricker and Edna E. Frey

PRIORITY DATE: October 13, 1902

FLOW RATE: 2.19 cfs

VOLUME: 549.90 acre feet per year

SOURCE: Nemote Creek

MAXIMUM ACRES: 58.50

PURPOSE OF RIGHT: Irrigation

PERIOD OF USE: April 1 to October 4

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>	
SWSESW	15	15N	25W	MINERAL	MULTIPLE
SESWSW	15	15N	25W	MINERAL	MULTIPLE

PLACE OF USE FOR IRRIGATION:

<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
1.50	SESESE	16	15N	25W	MINERAL
7.60	NESESE	16	15N	25W	MINERAL
10.00	NWSESE	16	15N	25W	MINERAL
4.30	SWSESE	16	15N	25W	MINERAL
7.00	SWNESE	16	15N	25W	MINERAL
5.70	NENWSE	16	15N	25W	MINERAL
10.00	SENWSE	16	15N	25W	MINERAL
9.10	NESWSE	16	15N	25W	MINERAL
3.30	SESWSE	16	15N	25W	MINERAL
TOTAL					58.50

76M-W-099417-00

FINDING OF FACT 31) This Edgar F. Hagel, Myrthy E. Hagel, Michael A. Wheeler, William J. Wheeler, Blanche V. Wheeler, Thomas M. Wheeler, Joseph P. Wheeler and William J. Wheeler, Jr. irrigation claim is based upon the Martin R. Miller Notice of Water Right of 200.00 miner's inches from the first branch of Fourteen Mile Creek for irrigation and other useful

purposes appropriated June 16, 1891 and filed on February 27, 1892. The first branch of Fourteen Mile Creek is currently called Miller Creek.

FINDING OF FACT 32) William J. Wheeler, Jr. objected to the place of use, acres irrigated, volume and flow rate.

FINDING OF FACT 33) On April 30, 1986 Douglas R. Austin, Attorney for William J. Wheeler, Jr. withdrew the objection. No changes to the claim were specified.

FINDING OF FACT 34) A Notice of Intent to Appear was filed by Wayne D. Bricker.

FINDING OF FACT 35) A late objection was filed by Wayne D. Bricker on August 20, 1986. The elements objected to are purpose of right, period of use, acres irrigated, point of diversion, means of diversion, volume and flow rate.

FINDING OF FACT 36) Following is a recital of the testimony and exhibits admitted concerning the Miller Creek water right:

- a. Edna Frey - She lived in the area from 1932 to 1971. She did not know of any time when there had been irrigation on the claimed place of use. She did not recall seeing the field plowed and thought that it was not plowable because it was rocky and gravelly.
- b. Exhibit F-1 shows a line which may be a ditch in the area of the claimed historical irrigation. It is not clear if the marking is a ditch. The contact date of this survey map is June 21, 1892.



- c. Verna French Oakley - She lived in the area from 1908 to 1915. She recalls irrigation, less than ten acres. She thinks it was grain, maybe hay. She said the property owner was Bill Graham and she recalled that he was killed in a dispute over a fence line. In her Corrections to Deposition dated February 17, 1987 Mrs. Oakley states that this testimony "...is very confusing and not accurate." No clarification is provided.
- d. William H. Hankinson - He lived on the Hankinson Ranch, just below the field claimed, from 1926 to 1955, although he was gone on occasion in the 1940s. He stated that he did not know of any irrigation in that field in the 1930s and 1940s.
- e. Leonard Erickson - He purchased the Nicholzen Ranch, which is just below the claimed place of use, in 1948 and has lived there ever since. He has never seen ditches or irrigation in those fields. When asked if Mr. Hagel could have been irrigating and Mr. Erickson just did not see it, he stated no because he can see the field from his field, and because Mr. Hagel could not take water across the road and onto fields without a sprinkler and there were no sprinklers there.
- f. Donald Frey - He lived on a Frey Ranch from 1946 to 1965. He did not ever see irrigation at the claimed place of use and is not aware of anyone ever cutting hay up there.

- g. Charles Frey, Jr. - He lived on Frey Ranch from 1944 to 1962. He used to fish Miller Creek as a boy. He never saw any ditches or other diversions of water out of Miller Creek by Mr. Hagel. The culvert which might have carried water under the road to the fields was torn out years ago. He never saw any water going through the culvert.
- h. Richard Hollenback - He purchased the Homer French ranch in 1960. He has never seen ditches or evidence of cultivation in the claimed place of use.
- i. Kenton Lewis - Except for 1977-78, he has lived in the area since 1949. Mr. Hagel talked about irrigating the Miller Creek field. He thinks there was grain grown one year and maybe some hay was cut in 3 or 4 years. But he never saw the irrigation or assisted with the crops. He simply recollects Mr. Hagel talking about it.
- j. Exhibit F-2 is a photocopy of an aerial photo taken in 1964. There is a mark which may be the trace remnants of a ditch. It is very unclear.
- k. Casey Austin - He has lived in the area off and on since 1966. He helped Mr. Hagel with the irrigation. He stated that they did not do any irrigating on the Miller Creek side of the ranch.
- l. Wayne Bricker - He has lived on Frey Ranch since 1968 and has been familiar with the area since 1961. He detailed the Graham/Hollis dispute and shooting over a ditch in 1910-1915. The implication is that there

might have been some irrigation taking place. The culvert was torn out when the road was rebuilt in 1957. There is no way to get Miller Creek water across the road for irrigation.

The Water Master's conclusion drawn from all this evidence is that there might have been some irrigation prior to 1915 and that Mr. Hagel may have cut hay for 3 or 4 years some time after that. It is not known if Mr. Hagel irrigated those fields or if the runoff and rains naturally provided sufficient moisture.

FINDING OF FACT 37) This water right has not been used since 1915. A 58 year period of nonuse occurred from 1915 to 1973.

CONCLUSION OF LAW 21) As objector has not alleged that this claimed water right was not perfected and has alleged that it was last used in 1915, the finding of this Court is that the water right was put to use and perfected prior to 1915.

CONCLUSION OF LAW 22) The statute governing abandonment was section 89-802 (7094) R.C.M. (1885) which states:

Appropriation must be for a useful purpose - abandonment. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

CONCLUSION OF LAW 23) There are two elements of abandonment - intention to abandon and actual nonuser. "Neither an intention to abandon nor nonuser is sufficient; the union of

both is indispensable to constitute abandonment."

Thomas et al. v. Ball et al., 213 P. 597, 66 Mont. 161, 167 (1923).

CONCLUSION OF LAW 24) In 79 Ranch, the claimant had not used the water for at least 40 years. The Montana Supreme Court held "[i]n effect, such a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse." 79 Ranch, Inc., et al. v. Pitsch, 666 P.2d 215, 204 Mont. 426, 432 (1983).

CONCLUSION OF LAW 25) The 58 year period of continuous nonuse raises the rebuttable presumption of abandonment and shifts the burden of proof onto the Wheelers to explain the reasons for nonuse, i.e. to prove that there has not been an intention to abandon the water right, that this presumption is erroneous.

CONCLUSION OF LAW 26) There was insufficient evidence presented to prove that the various owners from 1915 to 1973 did not have an intention to abandon this Miller Creek right. The presumption of intention to abandon was not rebutted.

CONCLUSION OF LAW 27) As there is an intent to abandon coupled with actual nonuse, this water right has been abandoned.

CONCLUSION OF LAW 28) As this water right has been abandoned, it should be dismissed and should not appear in the Preliminary Decree or Final Decree for this basin.

FINDING OF FACT 38) William J. Wheeler, Jr. objected to the priority date of this Myrthy E. Hagel, Edgar F. Hagel, Thomas M. Wheeler, Joseph P. Wheeler, Michael A. Wheeler, Blanche V. Wheeler, William J. Wheeler and William J. Wheeler, Jr. irrigation claim stating "[b]ased on a claim of Adverse Use, as supported in the Amendment to the above claim and the Affidavit filed in conjunction therewith, the priority date should precede the earliest priority date granted to Wayne D. and Billye A. Bricker, which at present is June 1, 1850 (See Bricker claim #s 76M-W-099158, 76M-W-111322 and 76M-W-111323.)"

It is noted that this Wheeler claim is for the South Fork of Nemote Creek whereas the Bricker claims which Wheelers claim to have acquired by adverse possession are on Nemote Creek and Miller Creek. A review of the Temporary Preliminary Decree indicates that there are no Bricker claims to water from the South Fork of Nemote Creek.

FINDING OF FACT 39) The Department objected to the acres irrigated.

FINDING OF FACT 40) A Notice of Intent to Appear was filed by Wayne D. Bricker, Billye Ann Bricker and Edna E. Frey.

FINDING OF FACT 41) A late objection was filed on August 20, 1986 by Wayne D. Bricker. The elements objected to were priority date, purpose of right, period of use, acres irrigated, point of diversion, means of diversion, volume and flow rate.

FINDING OF FACT 42) This creek has been known by several names: Schaffer Creek, Jakey Creek and South Fork of Nemote Creek.

FINDING OF FACT 43) The Jacob Schaffer Notice of Appropriation states that he diverted 400.00 miner's inches of Schaffer Creek and put it to use in sections 8 and 19 of T. 15 N R. 24W and sections 13 and 24 of T. 15N R. 25W. Paragraph IV states: "That I appropriated and took said water on the 23rd day of December A.D. 1911, by means of said ditch".

FINDING OF FACT 44) As there is no Bricker water right on the South Fork of Nemote Creek for Hagel to have acquired by adverse possession, there has been no adverse possession.

CONCLUSION OF LAW 29) As there is no Bricker water right on the South Fork of Nemote Creek for Hagel to have acquired by adverse possession, the priority date of this Wheeler claim will not be changed to an earlier date.

CONCLUSION OF LAW 30) As there was no evidence presented substantiating actual use of this water claimed by Jacob Schaffer prior to December 23, 1911, the date he specified in his sworn and acknowledged Notice of Appropriation, the priority date should remain as December 23, 1911.

FINDING OF FACT 45) The only evidence presented concerning use of this claimed right from 1911 to 1930 was from Edna Frey. She testified that she had heard that Jacob Schaffer did irrigate some when he owned the ranch. Verna Gladys French Oakley lived in the area from 1908 to 1915. She recalled Jacob Schaffer owning the ranch at that time, but did not know if he irrigated out of the South Fork of Nemote Creek.

FINDING OF FACT 46) There was irrigation out of the South Fork of Nemote Creek during the 1930s and early 1940s when the Flys leased the ranch from the Smiths. Native hay was irrigated. (Deposition of William Hankinsen)

FINDING OF FACT 47) There was no irrigation out of the South Fork of Nemote Creek from the mid 1940s to the time Edgar and Myrthy Hagel purchased the ranch, but there was some native hay growing in the South Fork field. (Testimony of Edna Frey and Leonard Ericson)

FINDING OF FACT 48) In 1953 Myrthy Hagel and Edgar Hagel purchased this ranch and its appurtenant water rights. (Exhibit W-9)

FINDING OF FACT 49) There was seemingly contradictory testimony concerning irrigation from 1953 to 1973. Those who were associated with Mr. Hagel testified about the actual irrigation in which they assisted and the neighbors testified that they never saw ditches or actual irrigation although they did see a hay field and some harvesting. The Court finds that Edgar Hagel did irrigate the field bordering the South Fork of Nemote Creek. Due to the nature of the soils it is credible that ditches used may have been shallow and hence not readily apparent during the irrigation season or lasting for future observation. (Testimony of Edna Frey, Leonard Erickson, Richard Hollenback, Shirley Hollenback, Kit Sutherland, Wayne Bricker, Tim Lewis and Kenton Lewis, Depositions of Casey Austin and William Hankinson and Exhibits W-3, W-26, W-27, W-28 and W-29)

FINDING OF FACT 50) On August 7, 1985 the Department filed a Withdrawal of Objection, and the Department, Myrthy E. Hagel, Thomas M. Wheeler, Joseph P. Wheeler, William J. Wheeler, Jr., Michael A. Wheeler, William J. Wheeler and Blanche V. Wheeler filed a Stipulation specifying 40.60 acres irrigated and legal descriptions. At the signature line for Edgar F. Hagel the following is inserted: (deceased: Joint Tenancy has been terminated in favor of Myrthy E. Hagel).

CONCLUSION OF LAW 31) Upon review of the Withdrawal of Objection and Stipulation, it appears that the changes to place of use and acres irrigated specified by this Withdrawal and Stipulation, are proper and are accepted by this Court.

CONCLUSION OF LAW 32) As the Temporary Preliminary Decree for the Clark Fork River Between the Blackfoot River and Flathead River Basin (76M) correctly states that the number of acres irrigated is 40.60 acres, it does not require change.

CONCLUSION OF LAW 33) The place of use should be changed to reflect the correct number of acres. The Temporary Preliminary Decree for the Clark Fork River Between the Blackfoot River and Flathead River Basin (76M) states that the place of use is:

	<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
	10.00	NWNWNW	19	15N	24W	MINERAL
	4.00	NENWNW	19	15N	24W	MINERAL
	1.00	SWNWNW	19	15N	24W	MINERAL
	3.00	SENWNW	19	15N	24W	MINERAL
	7.00	SESESE	13	15N	25W	MINERAL
	0.60	NWNENE	24	15N	25W	MINERAL
	9.00	NENENE	24	15N	25W	MINERAL
	5.00	SWSWSW	18	15N	24W	MINERAL
TOTAL	<u>39.60</u>					



The place of use should be:

<u>ACRES</u>	<u>QTR.SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
10.00	NWNWNW	19	15N	24W	MINERAL
4.00	NENWNW	19	15N	24W	MINERAL
2.00	SWNWNW	19	15N	24W	MINERAL
3.00	SENWNW	19	15N	24W	MINERAL
5.00	SWSWSW	18	15N	24W	MINERAL
7.00	SESESE	13	15N	25W	MINERAL
0.60	NWNENE	24	15N	25W	MINERAL
9.00	NENENE	24	15N	25W	MINERAL
TOTAL					
40.60					

CONCLUSION OF LAW 34) As noted earlier, the flow rate specified in a Notice of Appropriation is not conclusive. It is the actual beneficial use which is the measure of a water right. Holmstrom Land Co., 185 Mont. 409, Irion, 107 Mont. 84 and 79 Ranch Inc., 204 Mont. 426.

FINDING OF FACT 51) It is doubtful that Jacob Schaffer actually diverted 400.00 miner's inches to irrigate this field. Clearly a lesser amount was actually perfected. Jacob Schaffer did irrigate the claimed area with water from the South Fork of Nemote Creek.

FINDING OF FACT 52) Water Court standards are 1.50 miner's inches per acre and 9.40 acre feet per acre per year for flood irrigating in this area. There was no evidence presented that a greater quantity of water was actually beneficially used historically.

FINDING OF FACT 53) For this water right which has historically been used on 40.60 acres, the flow rate should be reduced from 10.00 cfs (400.00 mi) to 1.52 cfs (60.90 mi). The volume should be reduced from 3000.00 acre feet per year to 381.64 acre feet per year.

FINDING OF FACT 54) William J. Wheeler, Jr. objected to the priority date of this Myrthy E. Hagel, Edgar F. Hagel, Thomas M. Wheeler, Joseph P. Wheeler, Blanche V. Wheeler, Michael A. Wheeler, William J. Wheeler and William J. Wheeler, Jr. irrigation claim stating "[b]ased on a claim of Adverse Use, as supported in the Amendment to the above claim and the Affidavit filed in conjunction therewith, the priority date should precede the earliest priority date granted to Wayne D. and Billye A. Bricker, which at present is June 1, 1850 (See Bricker claim #s 76M-W-099158, 76M-W-111322 and 76M-W-111323.)"

FINDING OF FACT 55) A Notice of Intent to Appear was filed by Wayne D. Bricker, Billye Ann Bricker and Edna E. Frey.

FINDING OF FACT 56) A late objection was filed on August 20, 1986 by Wayne D. Bricker. The elements objected to were priority date, purpose of right, period of use, place of use, acres irrigated, point of diversion, means of diversion, volume and flow rate.

FINDING OF FACT 57) The Creek has been known as Fourteen Mile Creek. The current USGS name is Nemote Creek.

FINDING OF FACT 58) The Jacob Schaffer Notice of Appropriation states that 500.00 miner's inches were diverted and put to use in sections 18 and 19 of T. 15N R. 24W and sections 13 and 24 of T. 15N R. 25W. Jacob Schaffer specifically states in Paragraph IV: "That I appropriated and took said water on the 23rd day of December A.D. 19 1, by means of said ditch". It is dated December 23, 1911.

FINDING OF FACT 59) As previously determined in Finding of Fact 13 and Conclusion of Law 14, the Wheelers did not acquire the senior Bricker water right by adverse possession.

CONCLUSION OF LAW 35) As the Wheelers did not acquire the senior Bricker water right by adverse possession, the priority date of this Wheeler claim will not be changed to the Brickers' priority date.

CONCLUSION OF LAW 36) As there was no evidence presented substantiating actual appropriation and use prior to December 23, 1911 the priority date will not be changed.

FINDING OF FACT 60) Jacob Schaffer irrigated out of Nemote Creek and grew hay for his stock. Verna Gladys French Oakley lived in the area from 1908 to 1915. She recalled seeing irrigation during this time on both the field below what is now the Fold of the Messiah and the field farther downstream below where the old ranch house used to be, but did not specify which years. (Deposition of Verna Gladys French Oakley)

FINDING OF FACT 61) There was no evidence submitted confirming or disproving irrigation out of Nemote Creek from 1915 to 1930.

FINDING OF FACT 62) Elbert Fly leased the ranch from Dr. Smith through the 1930s and into the early 1940s. He irrigated native hay in both the field below the Fold and the field below the old ranch. He irrigated approximately 100.00 acres in these two fields plus the South Fork of Nemote Creek field. (Deposition of William Hankinson)

FINDING OF FACT 63) Charles and Edna Frey leased the property from 1941 to 1944. Between 1941 and 1944 there was about 20 to 25 acres of hay field and possibly some grain irrigated by Nemote Creek. (Testimony of Edna Frey and Exhibits F-7 and W-1)

FINDING OF FACT 64) It is unclear whether there was any irrigation out of Nemote Creek from 1944 to 1953. Leonard Erickson testified that he did not recall any irrigation during those years.

FINDING OF FACT 65) In 1953 Myrthy Hagel and Edgar Hagel purchased this ranch and its appurtenant water rights. (Exhibit W-9)

FINDING OF FACT 66) From 1953 to 1973 Edgar Hagel irrigated the field below the Fold and the field below the old ranch house. Irrigation was either observed or conducted by some of the witnesses. Others assumed it had occurred. He or his employees used a tractor with a blade to make cuts in the main ditch (substantially a rerouting of the Creek) and those cuts were changed every few days once a particular area had been sufficiently flooded. There was hay harvested from the fields every year from at least 1961 to 1973. (Testimony of Edna Frey, Richard Hollenback, Leonard Erickson, Shirley Hollenback, Donald Frey, Kenton Lewis, Tim Lewis, Jackie Robb and Bill Wheeler, and Depositions of Casey Austin and William Hankinson) Some witnesses characterized the irrigation as not being a beneficial type of irrigation, as uncontrolled or accidental. Regardless of these characterizations, the irrigation occurred.

FINDING OF FACT 67) It was clear that the soil is of such a loose gravelly nature that the ditches could be easily cut and washed out. This explains why there are no permanent laterals across the field which were readily apparent.

CONCLUSION OF LAW 37) As there was no clear evidence substantiating a lesser number of acres irrigated than as decreed, the number of acres irrigated and the place of use do not require change.

FINDING OF FACT 68) It is doubtful that Jacob Schaffer actually diverted 500.00 miner's inches to irrigate these fields. Clearly a lesser amount was actually perfected. Jacob Schaffer did irrigate the claimed area with water from Nemote Creek.


CONCLUSION OF LAW 38) As noted earlier, the flow rate specified in a Notice of Appropriation is not conclusive. It is the actual beneficial use which is the measure of a water right. Holmstrom Land Co., 185 Mont. 409, Irion, 107 Mont. 84 and 79 Ranch Inc., 204 Mont. 426.

FINDING OF FACT 69) Water Court standards are 1.50 miner's inches per acre and 9.40 acre feet per acre per year for flood irrigating in this area. There was no evidence presented that a greater quantity of water was actually beneficially used historically.

FINDING OF FACT 70) For this water right which has historically irrigated 79.00 acres, the flow rate should be reduced from 12.50 cfs (500.00 miner's inches) to 2.96 cfs (118.50 miner's inches). The volume should be reduced from

3750.00 acre feet per year to 742.60 acre feet per year.

DATED this 17 day of September 1991.

  
Kathryn L. W. Lambert  
Water Master

CERTIFICATE OF SERVICE

I, Janet Lackey Fulcher, Deputy Clerk of Court, Montana State Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT, FINDINGS OF FACT, CONCLUSIONS OF LAW, was duly served upon the following persons listed herein, by depositing the same, postage prepaid, in the United States mail.

Edgar F. and Myrthy E. Hagel  
Route 2  
Superior, MT 59872

Douglas R. Austin, Atty.  
520 Brooks Street  
Missoula, MT 59801

William J. and Blanche V. Wheeler  
P. O. Box 8924  
Missoula, MT 59807

Wayne D. and Billye A.  
Bricker  
Route 2, Box 6750  
Superior, MT 59872

Joseph P. Wheeler  
Wheeler Village Office  
Missoula, MT 59802

Edna Frey  
Route 2, Box 6760  
Superior, MT 59872

Thomas M. Wheeler  
Wheeler Village Office  
Missoula, MT 59802

Donald L. Frey  
12803 S.E. 231st Way  
Kent, WA 98031


Michael A. Wheeler  
Wheeler Village Office  
Missoula, MT 59801

Charles H. Frey  
1843 35th Street  
Missoula, MT 59801

William J. Wheeler, Jr.  
Box 8624  
Missoula, MT 59801

Paul Meisner, Attorney  
P. O. Box 7909  
Missoula, MT 59807

DATED this 17 day of September 1991.

  
Janet Lackey Fulcher  
Deputy Clerk of Court

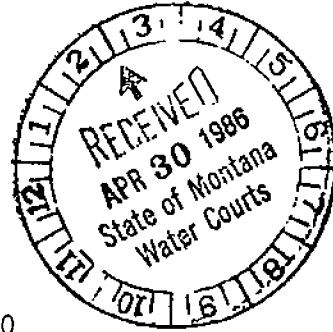
CONGDON LAW OFFICES

520 BROOKS STREET  
MISSOULA, MONTANA 59801

JAMES E. CONGDON  
DOUGLAS R. AUSTIN  
WALTER E. CONGDON

April 24, 1986

(406) 721-1160



Kathryn L. W. Lambert  
Watermaster  
P. O. Box 879  
Bozeman, Montana 59715

Re: Water Right Claim #76M-W-099417-00

Dear Kathryn:

Please be advised that William J. Wheeler Jr., has decided to withdraw his objection to the above-referenced claim, and he has further decided to withdraw his amendment on the same claim. Further investigation has revealed that we could not support the additional acreage which we previously thought may have been historically irrigated.

Thank you,

Very truly yours,

A handwritten signature in cursive script that reads "Douglas R. Austin".

Douglas R. Austin

DRA/oc

cc: William J. Wheeler, Jr.  
% Westview Park Village  
500 Schramm  
Missoula, Montana 59802

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IN THE WATER COURTS OF THE STATE OF MONTANA  
CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER BASIN

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE )  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, WITHIN THE CLARK FORK ) WATER RIGHT CLAIM  
RIVER BETWEEN THE BLACKFOOT RIVER ) NO. 76M-W-111323  
AND FLATHEAD RIVER DRAINAGE AREA, )  
INCLUDING ALL TRIBUTARIES OF THE )  
CLARK FORK RIVER BETWEEN THE )  
BLACKFOOT RIVER AND FLATHEAD RIVER )  
IN LAKE, MINERAL, MISSOULA, AND )  
SANDERS COUNTIES, MONTANA. )

\* \* \* \* \*

\* \* \* \* \*



WITHDRAWAL OF OBJECTION

The Montana Department of Natural Resources and Conservation (DNRC), by and through the undersigned attorney, withdraw the Notice of Objection to the above-captioned water right claim(s) as it is no longer necessary to have a Hearing on the above-captioned matter before the Water Courts.

DATED this 2nd day of Dec, 1985.

By Candace J. West  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, Montana 59620

16



CERTIFICATE OF SERVICE

I, the undersigned attorney for the Department of Natural Resources and Conservation, hereby certify that on the 2nd day of Dec, 1985, a true and accurate copy of the WITHDRAWAL OF OBJECTION was duly served upon all parties or counsel of record, by depositing the same, postage prepaid, in the United States Mail.

Billye and Wayne Bricker  
Rt. 2, Box 550  
Superior, MT 59872

Edna E. Frey  
Box 464  
Superior, MT 59872

By Candace J West  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, Montana 59620

IN THE WATER COURTS OF THE STATE OF MONTANA  
 CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE  
 BLACKFOOT RIVER AND FLATHEAD RIVER BASIN

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION )	
OF THE EXISTING RIGHTS TO THE USE )	
OF ALL THE WATER, BOTH SURFACE AND )	STIPULATION
UNDERGROUND, WITHIN THE CLARK FORK )	
RIVER BETWEEN THE BLACKFOOT RIVER )	
AND FLATHEAD RIVER DRAINAGE AREA, )	WATER RIGHT CLAIM
INCLUDING ALL TRIBUTARIES OF THE )	NO. 76M-W-111323
CLARK FORK RIVER BETWEEN THE )	
BLACKFOOT RIVER AND FLATHEAD RIVER )	
IN LAKE, MINERAL, MISSOULA, AND )	
SANDERS COUNTIES, MONTANA. )	

\* \* \* \* \*

COMES NOW the Department of Natural Resources and Conservation (DNRC), by and through one of its attorneys, and Billye A. Bricker, and Wayne D. Bricker, to stipulate as follows in regard to Water Right Claim No. 76M-W-111323:

1) That the Temporary Preliminary Decree for the Clark Fork River Basin should be changed at pages 1395 and 1396 to read as follows:

MAXIMUM ACRES: 186

PLACE OF USE FOR IRRIGATION:

3.00 ACRES	NESESE	SEC 16	T15N	R25W
6.00 ACRES	NWSESE	SEC 16	T15N	R25W
3.00 ACRES	SWSESE	SEC 16	T15N	R25W
6.00 ACRES	NENWSE	SEC 16	T15N	R25W
5.00 ACRES	NWNWSE	SEC 16	T15N	R25W
2.00 ACRES	SESESE	SEC 16	T15N	R25W
4.30 ACRES	SWSESE	SEC 16	T15N	R25W
1.00 ACRES	SESWSE	SEC 16	T15N	R25W
0.70 ACRES	NWNESE	SEC 16	T15N	R25W
5.00 ACRES	SWNESE	SEC 16	T15N	R25W
9.00 ACRES	SENWSE	SEC 16	T15N	R25W
4.00 ACRES	SWNWSE	SEC 16	T15N	R25W
9.00 ACRES	NENWSE	SEC 16	T15N	R25W
6.00 ACRES	SESWSE	SEC 16	T15N	R25W
3.00 ACRES	NWSWSE	SEC 16	T15N	R25W
1.00 ACRES	NWNWNE	SEC 21	T15N	R25W
10.00 ACRES	NENWNE	SEC 21	T15N	R25W
7.00 ACRES	NENENE	SEC 21	T15N	R25W
10.00 ACRES	SWNESE	SEC 21	T15N	R25W
10.00 ACRES	SENENE	SEC 21	T15N	R25W
0.00 ACRES	NWSWNE	SEC 21	T15N	R25W

*kc*

7.00	ACRES	NESWNE	SEC 21	T15N	R25W
0.00	ACRES	SWSWNE	SEC 21	T15N	R25W
8.00	ACRES	SESWNE	SEC 21	T15N	R25W
40.00	ACRES	SENE	SEC 21	T15N	R25W
0.00	ACRES	NWNWSE	SEC 21	T15N	R25W
4.00	ACRES	NENWSE	SEC 21	T15N	R25W
8.00	ACRES	SEWSE	SEC 21	T15N	R25W
3.00	ACRES	NWNESE	SEC 21	T15N	R25W
0.00	ACRES	NESWSE	SEC 21	T15N	R25W
0.00	ACRES	NESESE	SEC 21	T15N	R25W
0.00	ACRES	SWSESE	SEC 21	T15N	R25W
0.00	ACRES	SESESE	SEC 21	T15N	R25W
2.00	ACRES	NENESE	SEC 21	T15N	R25W
0.00	ACRES	SWNESE	SEC 21	T15N	R25W
0.00	ACRES	SENESE	SEC 21	T15N	R25W
<u>186.00</u>	ACRES	TOTAL			

SUPPLEMENTAL RIGHTS STATEMENT: This objection will affect the acreage and volume figures contained in this remark.

2) That upon the signing of this stipulation by both parties, the DNRC will file a "Withdrawal of Objection" with the Montana Water Courts, thereby concluding this litigation.

DATED this 2nd day of December 1985.

By Candace F. West  
Candace F. West  
Legal Counsel  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, Montana 59620

By Wayne D. Bricker  
Wayne D. Bricker or  
Legal Representative

By Billye Ann Bricker  
Billye A. Bricker or  
Legal Representative

IN THE WATER COURTS OF THE STATE OF MONTANA  
CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER BASIN

\* \* \* \* \*



IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE )  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, WITHIN THE CLARK FORK )  
RIVER BETWEEN THE BLACKFOOT RIVER )  
AND FLATHEAD RIVER DRAINAGE AREA, )  
INCLUDING ALL TRIBUTARIES OF THE )  
CLARK FORK RIVER BETWEEN THE )  
BLACKFOOT RIVER AND FLATHEAD RIVER )  
IN LAKE, MINERAL, MISSOULA, AND )  
SANDERS COUNTIES, MONTANA. )

WATER RIGHT CLAIM  
NO. 76M-W-099419


\* \* \* \* \*

WITHDRAWAL OF OBJECTION

I, Tim D. Hall, Legal Counsel for the Montana Department of Natural Resources and Conservation (DNRC), withdraw the Notice of Objection to Water Right Claim No. 76M-W-099419 as it is no longer necessary to have a Hearing before the Water Courts on these water rights.

DATED this 5<sup>th</sup> day of August, 1985.

By

  
Tim D. Hall  
Legal Counsel  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, Montana 59620

*re*

CERTIFICATE OF SERVICE

I, Tim D. Hall, Attorney, Department of Natural Resources and Conservation, hereby certify that on the 5<sup>th</sup> day of April, 1985, a true and accurate copy of the WITHDRAWAL OF OBJECTION was duly served upon all parties or counsel of record, as listed below by depositing the same, postage prepaid, in the United States Mail.

Edgar F. Hagel  
Route 2  
Superior, MT 59872

Thomas M. Wheeler  
Wheeler Village Office  
Missoula, MT 59801

Myrthy E. Hagel  
Route 2  
Superior, MT 59872


Joseph P. Wheeler  
Wheeler Village Office  
Missoula, MT 59801

Michael A. Wheeler  
Wheeler Village Office  
Missoula, MT 59801

William J. Wheeler, Jr.  
Wheeler Village Office  
Missoula, MT 59801

Blanche V. Wheeler  
Wheeler Village Office  
Missoula, MT 59801

William I. Wheeler  
Wheeler Village Office  
Missoula, MT 59801

  
\_\_\_\_\_  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, Montana 59620

IN THE WATER COURTS OF THE STATE OF MONTANA  
 CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE  
 BLACKFOOT RIVER AND FLATHEAD RIVER BASIN

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION )  
 OF THE EXISTING RIGHTS TO THE USE )  
 OF ALL THE WATER, BOTH SURFACE AND ) STIPULATION  
 UNDERGROUND, WITHIN THE CLARK FORK )  
 RIVER BETWEEN THE BLACKFOOT RIVER )  
 AND FLATHEAD RIVER DRAINAGE AREA, )  
 INCLUDING ALL TRIBUTARIES OF THE )  
 CLARK FORK RIVER BETWEEN THE ) WATER RIGHT CLAIM  
 BLACKFOOT RIVER AND FLATHEAD RIVER ) NO. 76M-W-099419  
 IN LAKE, MINERAL, MISSOULA, AND )  
 SANDERS COUNTIES, MONTANA. )

\* \* \* \* \*

COMES NOW the Department of Natural Resources and Conservation (DNRC), by and through one of its attorneys, and Myrthy E. Hagel, Edgar F. Hagel, Thomas M. Wheeler, Joseph P. Wheeler, William J. Wheeler, Jr., Michael A. Wheeler, William I. Wheeler and Blanche V. Wheeler, to stipulate as follows in regard to Water Right Claim No. 76M-W-099419.

1) That the Temporary Preliminary Decree for the Clark Fork River Basin should be changed at page 238 to read as follows:

PLACE OF USE FOR IRRIGATION:

10	ACRES	NWNWNW	SEC 19	T15N	R24W
4	ACRES	NENWNW	SEC 19	T15N	R24W
2	ACRES	SWNWNW	SEC 19	T15N	R24W
3	ACRES	SENWNW	SEC 19	T15N	R24W
7	ACRES	SESESE	SEC 13	T15N	R25W
0.6	ACRES	NWNESE	SEC 24	T15N	R25W
9	ACRES	NENENE	SEC 24	T15N	R25W
5	ACRES	SWSWSW	SEC 18	T15N	R24W
40.6	ACRES	TOTAL			

2) That upon the signing of this stipulation by both parties, the DNRC will file a "Withdrawal of Objection" with the Montana Water Courts, thereby concluding this litigation.

DATED this 5th day of August, 1985

By [Signature]  
 Tim D. Hall  
 Legal Counsel  
 Department of Natural Resources  
 and Conservation  
 32 South Ewing  
 Helena, Montana 59620

By [Signature]  
 Myrthy E. Hagel or  
 Legal Representative

ke

By (deceased; Joint Tenancy has been  
Edgar F. Hagel or terminated in favor  
Legal Representative of Myrtle E. Hagel

By Thomas M. Wheeler  
Thomas M. Wheeler or  
Legal Representative

By Joseph P. Wheeler  
Joseph P. Wheeler or  
Legal Representative

By William J. Wheeler, Jr.  
William J. Wheeler, Jr. or  
Legal Representative

By Michael A. Wheeler  
Michael A. Wheeler or  
Legal Representative

By William J. Wheeler  
William J. Wheeler or  
Legal Representative

By Blanche V. Wheeler  
Blanche V. Wheeler or  
Legal Representative

GARLINGTON, LOHN & ROBINSON

STEVEN S. CAREY  
GARY B. CHUMRAU  
LAWRENCE F. DALY  
E. CRAIG DAUE  
CANDACE C. FETSCHER  
GEORGE D. GOODRICH  
GARY L. GRAHAM  
GREGORY L. HANSON  
LARRY W. JONES  
WILLIAM EVAN JONES  
MAUREEN H. LENNON  
SHERMAN V. LOHN  
BRADLEY J. LUCK  
TERRY J. MACDONALD

ATTORNEYS AT LAW

199 W. PINE • Corner of Pine and Ryman  
P.O. Box 7909

MISSOULA, MONTANA 59807-7909

~~406-728-1200~~

~~TELEFAX 406-728-8039~~

406-523-2500

Telefax 406-523-2595

CHARLES E. McNEIL  
PAUL C. MEISMER  
JOHN O. MUDD  
MICHAEL C. PREZEAU  
LARRY E. RILEY  
SUSAN P. ROY  
ROBERT E. SHERIDAN  
W. DENNIS STARKEL  
WILLIAM T. WAGNER  
KELLY M. WILLS

J.C. GARLINGTON  
R.H. "TY" ROBINSON  
OF COUNSEL

August 21, 1991

RECEIVED

AUG 22 1991

Ms. Kathryn Lambert  
Montana State Water Courts  
P.O. Box 879  
Bozeman, MT 59715

Montana Water Court

RE: Claim No. 76M-13

Dear Ms. Lambert:

Enclosed please find the original DNRC Examination Worksheet, POU Addendum prepared by John Westonberg in a meeting with Wayne Bricker and Edna Frey last Thursday. Also enclosed are the maps prepared by Mr. Westonberg. As you can see, the documents indicate the pre-interstate place of use and post-interstate place of use for the milk ranch irrigated field out of Nemote Creek.

If you require any additional detail or information, please advise.

Very Truly Yours,

GARLINGTON, LOHN & ROBINSON

By

  
Paul C. Meismer

PCM/lkh

Enclosures

c: Wayne Bricker  
Edna Frey  
Doug Austin  
John Westonberg



DNRC EXAMINATION WORKSHEET POU ADDENDUM

Page 1 of 1  
Data Source #1

USDA Air Photo 979-127

Claim# \_\_\_\_\_  
Date 9/22/79

PARCEL	ACRES	LOT	BLK	QTR SEC	SEC	TWP	RGE	CNTY
001	<u>1.5</u>	_____	_____	<u>SE SE SE</u>	<u>16</u>	<u>15N</u>	<u>25W</u>	<u>Mi</u>
002	<u>7.6</u>	_____	_____	<u>NE SE SE</u>	<u>16</u>	_____	_____	_____
003	<u>1.0</u>	_____	_____	<u>NW SE SE</u>	_____	_____	_____	_____
004	<u>4.3</u>	_____	_____	<u>SW SE SE</u>	_____	_____	_____	_____
005	<u>7</u>	_____	_____	<u>SW NE SE</u>	_____	_____	_____	_____
006	<u>5.7</u>	_____	_____	<u>NE NW SE</u>	_____	_____	_____	_____
007	<u>1.0</u>	_____	_____	<u>SE NW SE</u>	_____	_____	_____	_____
008	<u>9.1</u>	_____	_____	<u>NE SW SE</u>	_____	_____	_____	_____
009	<u>3.3</u>	_____	_____	<u>SE SW SE</u>	↓	↓	↓	↓
010	_____	_____	_____	_____	_____	_____	_____	_____
011	_____	_____	_____	_____	_____	_____	_____	_____
012	_____	_____	_____	_____	_____	_____	_____	_____
013	_____	_____	_____	_____	_____	_____	_____	_____
014	_____	_____	_____	_____	_____	_____	_____	_____
015	_____	_____	_____	_____	_____	_____	_____	_____
016	_____	_____	_____	_____	_____	_____	_____	_____
017	_____	_____	_____	_____	_____	_____	_____	_____
018	_____	_____	_____	_____	_____	_____	_____	_____
019	_____	_____	_____	_____	_____	_____	_____	_____
020	_____	_____	_____	_____	_____	_____	_____	_____

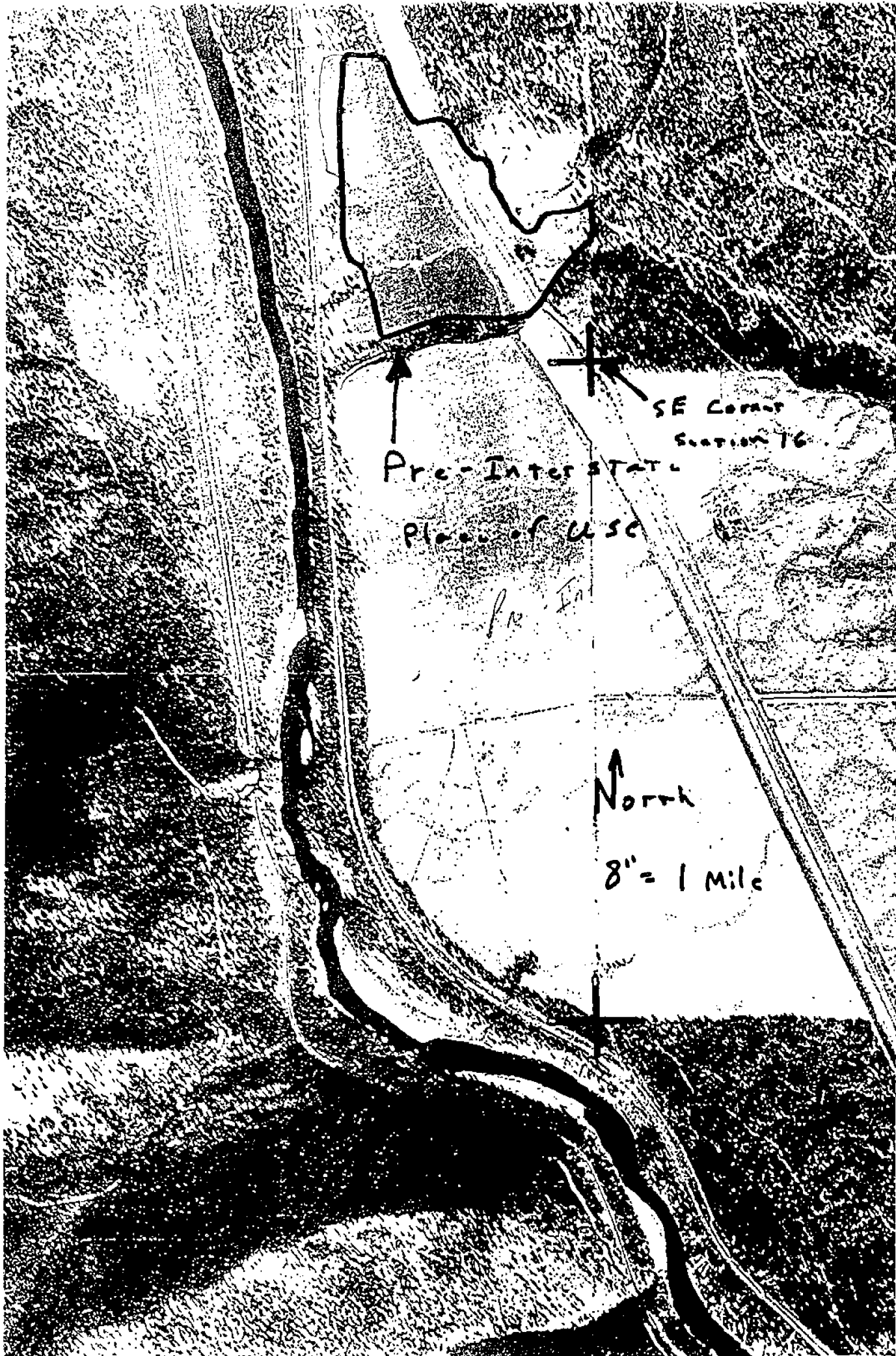
58.5 Total Acres This Page Contact Range= \_\_\_\_\_ to \_\_\_\_\_

Data Source #2 \_\_\_\_\_ Date \_\_\_\_\_

PARCEL	ACRES	LOT	BLK	QTR SEC	SEC	TWP	RGE	CNTY
001	_____	_____	_____	_____	_____	_____	_____	_____
002	_____	_____	_____	_____	_____	_____	_____	_____
003	_____	_____	_____	_____	_____	_____	_____	_____
004	_____	_____	_____	_____	_____	_____	_____	_____
005	_____	_____	_____	_____	_____	_____	_____	_____
006	_____	_____	_____	_____	_____	_____	_____	_____
007	_____	_____	_____	_____	_____	_____	_____	_____
008	_____	_____	_____	_____	_____	_____	_____	_____
009	_____	_____	_____	_____	_____	_____	_____	_____
010	_____	_____	_____	_____	_____	_____	_____	_____
011	_____	_____	_____	_____	_____	_____	_____	_____
012	_____	_____	_____	_____	_____	_____	_____	_____
013	_____	_____	_____	_____	_____	_____	_____	_____
014	_____	_____	_____	_____	_____	_____	_____	_____
015	_____	_____	_____	_____	_____	_____	_____	_____
016	_____	_____	_____	_____	_____	_____	_____	_____
017	_____	_____	_____	_____	_____	_____	_____	_____
018	_____	_____	_____	_____	_____	_____	_____	_____
019	_____	_____	_____	_____	_____	_____	_____	_____
020	_____	_____	_____	_____	_____	_____	_____	_____

\_\_\_\_\_ Total Acres This Page Contact Range= \_\_\_\_\_ to \_\_\_\_\_

Examined By: \_\_\_\_\_ Date: \_\_\_\_\_



Pre-Interstate  
Place of Use

SE Corner  
Section 16

North

8" = 1 Mile

DNRC EXAMINATION WORKSHEET POU ADDENDUM

Page \_\_\_ of \_\_\_

Data Source #1 979-127 (USDA Air Photo)

Claim# \_\_\_\_\_

Date 979-127

PARCEL	ACRES	LOT	BLK	QTR SEC	SEC	TWP	RGE	CNTY
001	<u>.6</u>	_____	_____	<u>SE SE SE</u>	<u>16</u>	<u>15N</u>	<u>25W</u>	<u>MJ</u>
002	<u>4.0</u>	_____	_____	<u>NE SE SE</u>	_____	_____	_____	_____
003	<u>3.6</u>	_____	_____	<u>SW SE SE</u>	_____	_____	_____	_____
004	<u>5.2</u>	_____	_____	<u>NW SE SE</u>	_____	_____	_____	_____
005	<u>.8</u>	_____	_____	<u>SW NE SE</u>	_____	_____	_____	_____
006	<u>5.6</u>	_____	_____	<u>NE NW SE</u>	_____	_____	_____	_____
007	<u>9.7</u>	_____	_____	<u>SE NW SE</u>	_____	_____	_____	_____
008	<u>1.0</u>	_____	_____	<u>NE SW SE</u>	_____	_____	_____	_____
009	<u>5.5</u>	_____	_____	<u>SE SW SE</u>	_____	_____	_____	_____
010	<u>2.2</u>	_____	_____	<u>SW SW SE</u>	_____	_____	_____	_____
011	<u>3.6</u>	_____	_____	<u>NW SW SE</u>	_____	_____	_____	_____
012	<u>7.5</u>	_____	_____	<u>E 1/2 NW SE</u>	_____	_____	_____	_____
013	_____	_____	_____	_____	_____	_____	_____	_____
014	_____	_____	_____	_____	_____	_____	_____	_____
015	_____	_____	_____	_____	_____	_____	_____	_____
016	_____	_____	_____	_____	_____	_____	_____	_____
017	_____	_____	_____	_____	_____	_____	_____	_____
018	_____	_____	_____	_____	_____	_____	_____	_____
019	_____	_____	_____	_____	_____	_____	_____	_____
020	_____	_____	_____	_____	_____	_____	_____	_____

58.3 Total Acres This Page Contact Range= \_\_\_\_\_ to \_\_\_\_\_

Data Source #2 \_\_\_\_\_ Date \_\_\_\_\_

PARCEL	ACRES	LOT	BLK	QTR SEC	SEC	TWP	RGE	CNTY
001	_____	_____	_____	_____	_____	_____	_____	_____
002	_____	_____	_____	_____	_____	_____	_____	_____
003	_____	_____	_____	_____	_____	_____	_____	_____
004	_____	_____	_____	_____	_____	_____	_____	_____
005	_____	_____	_____	_____	_____	_____	_____	_____
006	_____	_____	_____	_____	_____	_____	_____	_____
007	_____	_____	_____	_____	_____	_____	_____	_____
008	_____	_____	_____	_____	_____	_____	_____	_____
009	_____	_____	_____	_____	_____	_____	_____	_____
010	_____	_____	_____	_____	_____	_____	_____	_____
011	_____	_____	_____	_____	_____	_____	_____	_____
012	_____	_____	_____	_____	_____	_____	_____	_____
013	_____	_____	_____	_____	_____	_____	_____	_____
014	_____	_____	_____	_____	_____	_____	_____	_____
015	_____	_____	_____	_____	_____	_____	_____	_____
016	_____	_____	_____	_____	_____	_____	_____	_____
017	_____	_____	_____	_____	_____	_____	_____	_____
018	_____	_____	_____	_____	_____	_____	_____	_____
019	_____	_____	_____	_____	_____	_____	_____	_____
020	_____	_____	_____	_____	_____	_____	_____	_____

\_\_\_\_\_ Total Acres This Page Contact Range= \_\_\_\_\_ to \_\_\_\_\_

Examined By: \_\_\_\_\_ Date: \_\_\_\_\_

FILED

SEP 5 1991

1 IN THE WATER COURT OF THE STATE OF MONTANA  
2 CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE Montana Water Court  
3 BLACKFOOT RIVER AND FLATHEAD RIVER BASIN (76M)


4	IN THE MATTER OF THE ADJUDICATION	)	Cause No. 76M-13
5	OF THE EXISTING RIGHTS TO THE USE	)	76M-W-099158-00
6	OF ALL THE WATER, BOTH SURFACE AND	)	76M-W-099417-00
7	UNDERGROUND, WITHIN THE CLARK FORK	)	76M-W-099419-00
8	RIVER BETWEEN THE BLACKFOOT RIVER	)	76M-W-099420-00
9	AND FLATHEAD RIVER DRAINAGE AREA,	)	76M-W-111322-00
	INCLUDING ALL TRIBUTARIES OF THE	)	76M-W-111323-00
	CLARK FORK RIVER BETWEEN THE BLACK-	)	
	FOOT RIVER AND FLATHEAD RIVER IN	)	
	LAKE, MINERAL, MISSOULA AND SANDERS	)	STATEMENT
	COUNTIES, MONTANA.	)	

11 CLAIMANT: FREY--Bricker--Wheeler

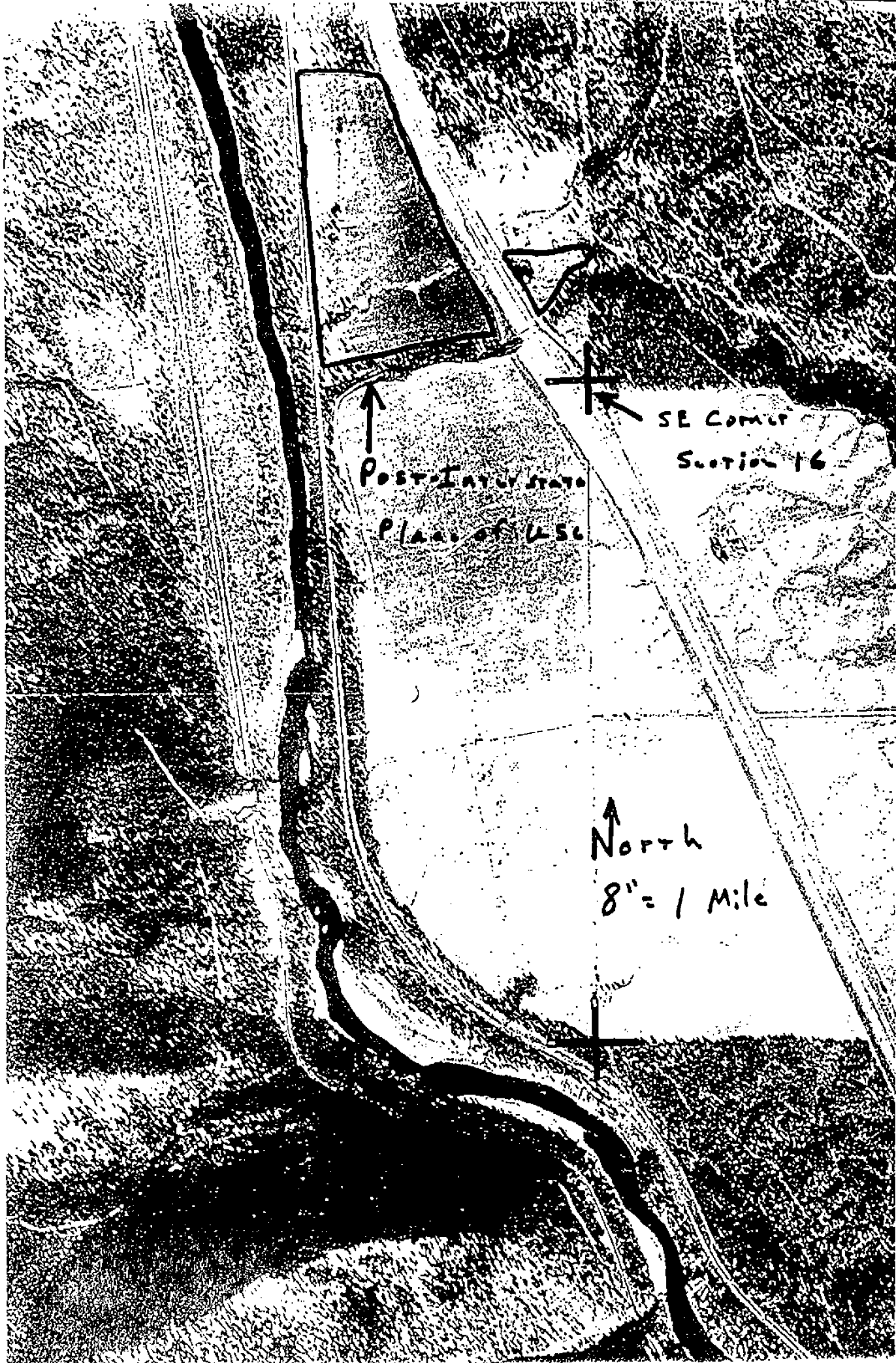
12 OBJECTOR: Wheeler--Bricker

13 COMES NOW, DOUGLAS R. AUSTIN, attorney for Claimants  
14 Wheelers, and advise the water master that the place of  
15 use worksheets prepared by John Westenberg of the DNRC,  
16 showing pre and post interstate acres irrigated on the  
17 Frey-Bricker ranch (58.5 acres and 58.3 acres respectively),  
18 have been reviewed. Even though the acreage is slightly  
19 more than indicated by the evidence at the hearing, it  
20 is probably accurate. Wheelers have no objection to the  
21 use of these worksheets as a basis for the Frey-Bricker  
22 water rights, so long as the water rights granted to Wheelers  
23 in the proposed Order are not altered.

24 DATED this 4 day of September, 1991.

25   
Douglas R. Austin  
Douglas R. Austin

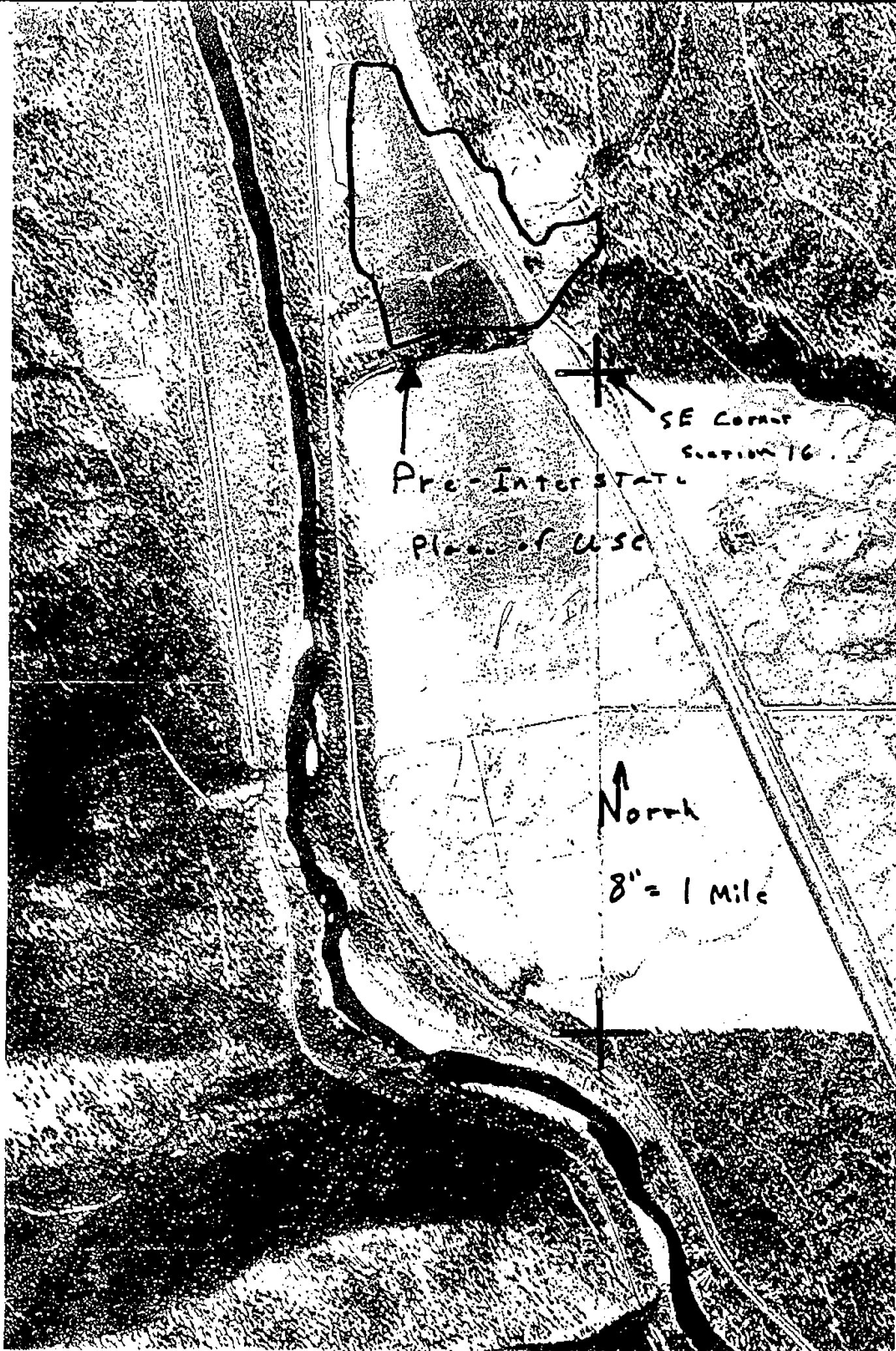
STATEMENT 1



Post-Industrial State  
Plan of USC

SE Corner  
Section 16

North  
8" = 1 Mile

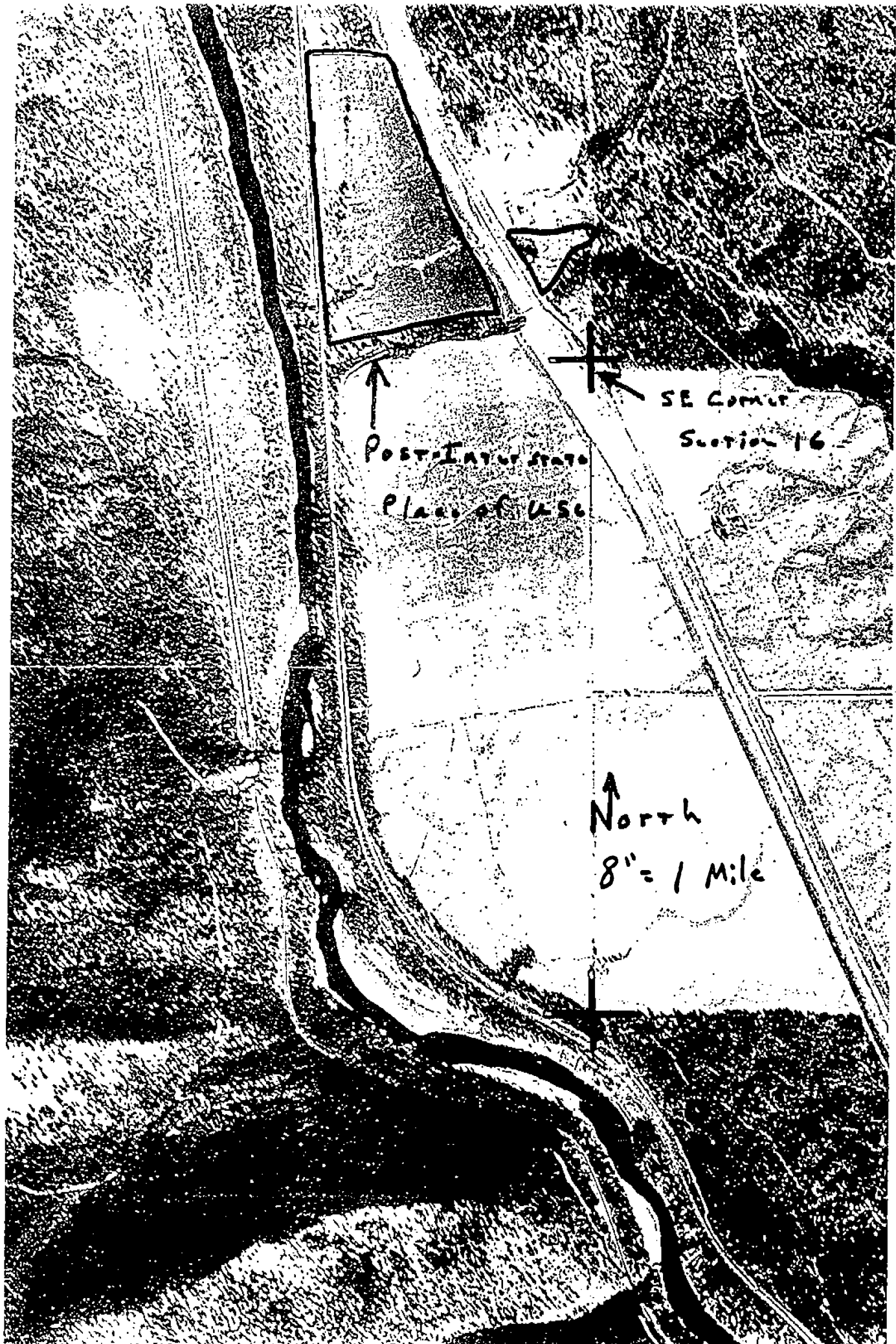


Pre-Interstate  
place of use

SE Corner  
SECTION 16

North

8" = 1 Mile



↑  
Post-Int'l State  
Place of Use

SE Corner  
Section 16

↑  
North  
8" = 1 Mile