

FILED

IN THE WATER COURTS OF THE STATE OF MONTANA DEC 7 1990

UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)

* * * * * Montana Water Court

IN THE MATTER OF THE ADJUDICATION OF)	CASE NO. 41H-95
THE EXISTING RIGHTS TO THE USE OF ALL)	
THE WATER, BOTH SURFACE AND UNDERGROUND,)	41H-W-032976-00
WITHIN THE GALLATIN RIVER DRAINAGE AREA)	
INCLUDING ALL TRIBUTARIES OF THE)	
GALLATIN RIVER IN GALLATIN, PARK AND)	
MADISON COUNTIES, MONTANA.)	
_____)	

CLAIMANT: John A., Robert A., Richard A. and William A. Breffeilh
ON MOTION OF THE WATER COURT

OBJECTOR: United States of America (Bureau of Indian Affairs)
Montana Dept. of Natural Resources & Conservation

MASTER'S REPORT

FINDINGS OF FACT

1. Water right claim 41H-W-032976-00 was filed by John A., Robert A., Richard A. and William A. Breffeilh for irrigation.
2. The Montana Dept. of Natural Resources & Conservation (DNRC) filed an objection to this claim based on volume, place of use, acres irrigated and flow rate. Without change to this claim, the DNRC withdrew its objection on July 28, 1987.
3. The United States of America (Bureau of Indian Affairs) filed an objection to this water right claim on the basis of acres irrigated.
4. This claim was called in On Motion of the Water Court because there appeared to be problems with acres irrigated, volume and flow rate.

5. Pursuant to a December 22, 1988 Order from the Montana Water Court, a field investigation of this claim was conducted on June 21, 1989, by Rusty Taylor of the DNRC. This investigation was conducted to identify acres irrigated, volume and flow rate. The Field Investigation Report was filed with the Montana Water Court on July 13, 1989.

6. A Hearing in the above entitled matter was held on August 29, 1990. No one appeared to represent the United States of America as the objector. No one appeared to represent the Breffeilh family as claimants.

7. On August 7, 1990, George A. Breffeilh, father and representative of the claimants, filed a statement with the Montana Water Court advising the Court that claimants would be standing on their water right claim as filed. Claimants further requested the Court to read their statement into the record at the August 29, 1990 Hearing.

8. Claimants' August 7, 1990, statement does not contain personal knowledge of the actual historical use of this water for irrigation.

9. The Field Investigation did not produce any evidence of historical irrigation other than locating some farming equipment and a pump within the cabin site. No ditches were found and no permanent point of diversion was found. No evidence was produced as to the actual historical flow rate and volume for this water right.

CONCLUSIONS OF LAW

I.

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

II.

The Montana 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.

III.

Water right claim 41H-W-032976-00 is a claim of an existing right filed in accordance with 85-2-221 and such statement of claim of existing right constitutes prima facie proof of its content. See Mont. Code Ann. 85-2-227. "Prima facie evidence" is that which proves a particular fact until contradicted and overcome by other evidence. Mont. Code Ann. Sec. 26-1-102(6). The objector, therefore, has the burden of proof and must actually overcome the facts stated in the claim of existing water right. There being no evidence presented by the objector at hearing, the objector has not met the necessary burden of proof to overcome the prima facie status of water right claim 41H-W-032976-00.

IV.

The Field Investigation produced by the Montana Department of Natural Resources & Conservation under the direction of the Water Court pursuant to Mont. Code Ann. Sec. 85-2-243(1)(c) is admissible. Water Right Claim Examination Rules, Rule 1.II Water Court Procedures.

V.

Historically, there have been two means by which a person could make a valid appropriation of water. First, by simply putting the water to a beneficial use. Second, by following the statutory method enacted in 1885 requiring posting notice at the point of diversion, appropriation and filing notice of such appropriation. See R.C.M. Ann. Sec. 89-810. Even with the enactment of statutory procedures in 1885, the essence of an appropriation - a completed ditch, actually diverting water, and putting it to a beneficial use - remained the same as it had been before and a valid water right will be recognized where water has actually been diverted and put to a beneficial use. Murray v. Tingley (1897) 20 Mont. 260. Water right claim 41H-W-032976-00 was filed as a use right for irrigation but was not historically diverted and put to use.

VI.

There being no evidence as to historical acreage irrigated, volume and flow rate of water right claim 41H-W-032976-00, this claim shall be terminated and the abstract

of this water right shall not appear in the Preliminary and Final Decrees of the Gallatin River Basin (41H).

DATED this 7th day of December, 1990.

Patti L. Rowland
Patti L. Rowland
Water Master

CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

John A., Robert A., Richard A.
and William A. Breffeilh
c/o George Breffeilh
8 Fairway Drive
Lake Charles, LA 70605

Bureau of Indian Affairs
John Chaffin, Attorney
Richard Aldrich, Attorney
P. O. Box 31394
Billings, MT 59107-1394

Thomas Pacheco, Attorney
Department of Justice
P. O. Box 44378
Washington, DC 20026-4378

Tim D. Hall, Attorney
Dept. of Natural Resources
1520 East Sixth
Helena, MT 59620

DATED this 7th day of December, 1990.

Lori M. Burnham
Lori M. Burnham
Clerk of Court

STATE OF LOUISIANA

PARISH OF CALCASIEU

AFFIDAVIT

BEFORE ME, the undersigned authority duly qualified in the State and Parish aforesaid personally came and appeared GEORGE BREFFEILH who after being sworn declared:

Lake Charles, LA.
August 3, 1990

FILED

AUG 7 1990

To: State of Montana Water Court Bozeman

Montana Water Court

Ref: Case 41H-95
Claim 41H-W-032976-00

In accordance with Water Master Patti L. Rowland's letter of June 19, 1990 the Water Court is hereby advised that neither I nor other representative of the water rights claim will be available for the hearing on August 29, 1990. The owners of the property stand on their water rights claim as filed.

It is the wishes of the claimants that the inclosed statement be read to the Water Court at the August 29, 1990 hearing.

George A. Breffeilh
George A. Breffeilh

THUS DONE AND SIGNED THIS 3rd DAY OF August, 1990
AT LAKE CHARLES, LOUISIANA

Julie Ann Powell
NOTARY PUBLIC

Ar

RECEIVED

8 Fairway Drive
Lake Charles, LA 70605
August 3, 1990

Montana Water Court
Bozeman, Montana 59715

AUG 7 1990

Re: Case 41H-95
Claim 41H-W-032976-00

Montana Water Court

Pursuant to Water Master Patti L. Rowland's letter of June 19, 1990, I am sending the following comments and observations for presentation to the Water Court hearing to be held August 29, 1990.

The Claim involves 120 acre feet of water per year to irrigate 30 acres of land on the West Gallatin River.

Title to the land and water rights were granted to Mrs. Anna Benham by President Woodrow Wilson on Patent No. 711363 dated October 7, 1919.

When the land was selected by Mr. Benham, homesteaders were going through many difficulties to secure land on which to make a living. In this case the homesteader selected a parcel of land level enough on which to plant crops and alongside the West Gallatin River to supply water for his operations. If Mr. Benham's crops needed water, he logically considered the river a reliable and permanent source. The proximity of the river was probably the major factor in selecting that particular parcel of land.

The land was cleared of boulders and trees were removed from 30 of the 160 acres. A cabin and shelter for live stock were built. A barbed wire fence and discarded agriculture tilling equipment are still to be seen in the field. So it is clear that Mr. Benham built a fence, purchased farming equipment, prepared the field and evidently planted crops but apparently did not use water from the river on his crops.

There appears to be no evidence that water from the river was ever used on the crops. There are no ditches, pipelines or other distribution structures to convince one that irrigation was practiced. The lack of evidence could possibly be due to the financial status of the owner. Those were war and depression years when people survived on a minimum of practically everything. If it became necessary, the farmer delivered water to the crops he and his family needed to survive. The irrigation facilities could not have been elaborate and were probably used only during dry periods.

For example, one visiting the property today would wonder how the early settlers crossed the river to get to their land. There is no evidence today that a bridge was built across the river near the cabin; however, I have a letter mentioning the bridge. Could irrigation have been a similar situation?

It is understood that the irrigation claim for 30 acres is being contested by the Bureau of Indian Affairs. This seems strange. From June to December, my son Richard, with his dog as companion, paddled a canoe from the West Gallatin River to our home in Lake Charles, Louisiana. He actually

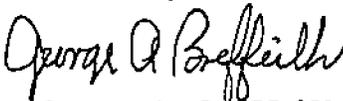
paddled along thousands of acres of Indian land on the Missouri River and lakes. Practically none were under cultivation nor irrigated. When the land was deeded to the Indians, they probably received water rights the same as did Mr. Benham. Are those rights being threatened because the water has not been used to irrigate the idle land?

It is not the intention of the present landowners to deprive the Indians, or anyone else, of water. They do not expect to exploit the land for commercial purposes. One of the owners, like Mr. Benham, plans to earn part of his living on the land when he retires from the military.

It is not certain if the river water will ever be used for irrigation, and it is most probable it will not be used in the maximum quantities. However, if and when it is needed to serve the land, it should be available as originally intended.

It is doubtful that the Bureau of Indian Affairs can tell the Court exactly where the 120 acre feet of water will be used each year, or what it will produce. With the assurance of that water, the occupant of the land along the Gallatin can plant the 30 acres with a degree of satisfaction that his crop will not be lost due to a water shortage. We are not requesting the continual consumption of water, but rather that we are assured that crops will not be lost due to a lack of water.

Sincerely,


George A. Breffeilh

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BOZEMAN WATER RIGHTS FIELD OFFICE



TED SCHWINDEN, GOVERNOR

1201 EAST MAIN STREET

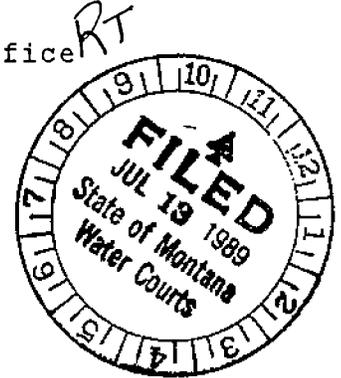
STATE OF MONTANA

(406) 586-3136

BOZEMAN, MONTANA 59715

FIELD INVESTIGATION REPORT

TO: Montana Water Courts - Bill Dockins
FROM: Rusty Taylor, Bozeman DNRC Field Office
APPROVED BY: Larry Holman, Bureau Chief
DATE: June 30, 1989
RE: Case No. 41H-95 (Breffelth)



AUTHORIZATION AND PURPOSE

Pursuant to a December 22, 1988 Order from the Montana Water Court, a field investigation of water right claim 41H-032976 was completed on June 21, 1989 by Rusty Taylor of the Department of Natural Resources and Conservation (DNRC). This investigation was completed to review on site evidence of historical use.

SOURCES OF INFORMATION

- Primary Source: -Field investigation completed by Rusty Taylor on June 21, 1989.
- Secondary Source: - USDA Aerial Photograph 30031-279-2L, dated 1979.
- 1953 Gallatin County Water Resources Survey (WRS)
- USGS Topographic Quadrangle Map, Spanish Peaks, Montana, dated 1950.
- Aerial Photograph M-30, dated 1947.

INVOLVED PARTIES

On June 5, 1989 all parties were sent letters advising them of the field investigation date and time and giving them notice of their opportunity to attend. Only George and Robert Breffelth accompanied me on the investigation.

OBJECTION TO CLAIM

The Water Court moving on its own motion with regard to acres irrigated, volume and flow rate.

OBJECTOR

GENERAL BASIS FOR OBJECTION

U.S. Bureau of Indian Affairs

Acres irrigated

DESCRIPTION OF SYSTEM

The property and system are located approximately 25 miles southwest of Bozeman, on the east side and adjacent to the West Gallatin River.

POINT OF DIVERSION/CONVEYANCE SYSTEM

No permanent diversion point could be determined. This system consists of a 2 1/2 HP diesel powered pump currently located within a cabin on the site.

This pump was manufactured by the Root and Van Dervort Engineering Company with a patent date of 1903-1904. I contacted five (5) pump suppliers in the Bozeman area and none had heard of this model. Only Van Dyke Irrigation Service Inc. would hazard a guess at the flow rate output of this pump which operates at only 360 RPM. Van Dyke Irrigation System Inc. said 40 gpm is the maximum flow rate they thought this pump could provide.

According to George Breffeilh this pump may have provided some irrigation water as late as 1935. He has no absolute knowledge of the use of this pump but considers it reasonable that the pump was used because it exists at the cabin. No other evidence of irrigation was found, but old farming equipment was located.

PLACE OF USE

The claimed place of use consists of 20-30 acres of irrigable lands. Currently this ground is in native grasses, sage and young tree growth. No evidence of irrigation exists at the site beyond the pump itself, no ditches were found. Practically speaking water must be pumped to get to the fields claimed. Aerial photograph M-30 dated May 6, 1947 does not readily identify this ground as being irrigated at that time. Much of the young tree growth appears absent in the 1947 aerial. It is quite probably that this ground was farmed prior to 1935 but the actual use of the pump, if it was ever used for an extended period of time, appears to pre date this 1947 aerial.

The 1953 Gallatin County WRS does not identify any of the claimed ground as irrigated.

RESULTS OF INVESTIGATION

It appears from evidence at the site that some attempt at farming this ground was made. It seems reasonable that someone used the pump at some point in history. It may have been used to supply water for some very limited irrigation. That use, if it ever existed was about 50 years ago.

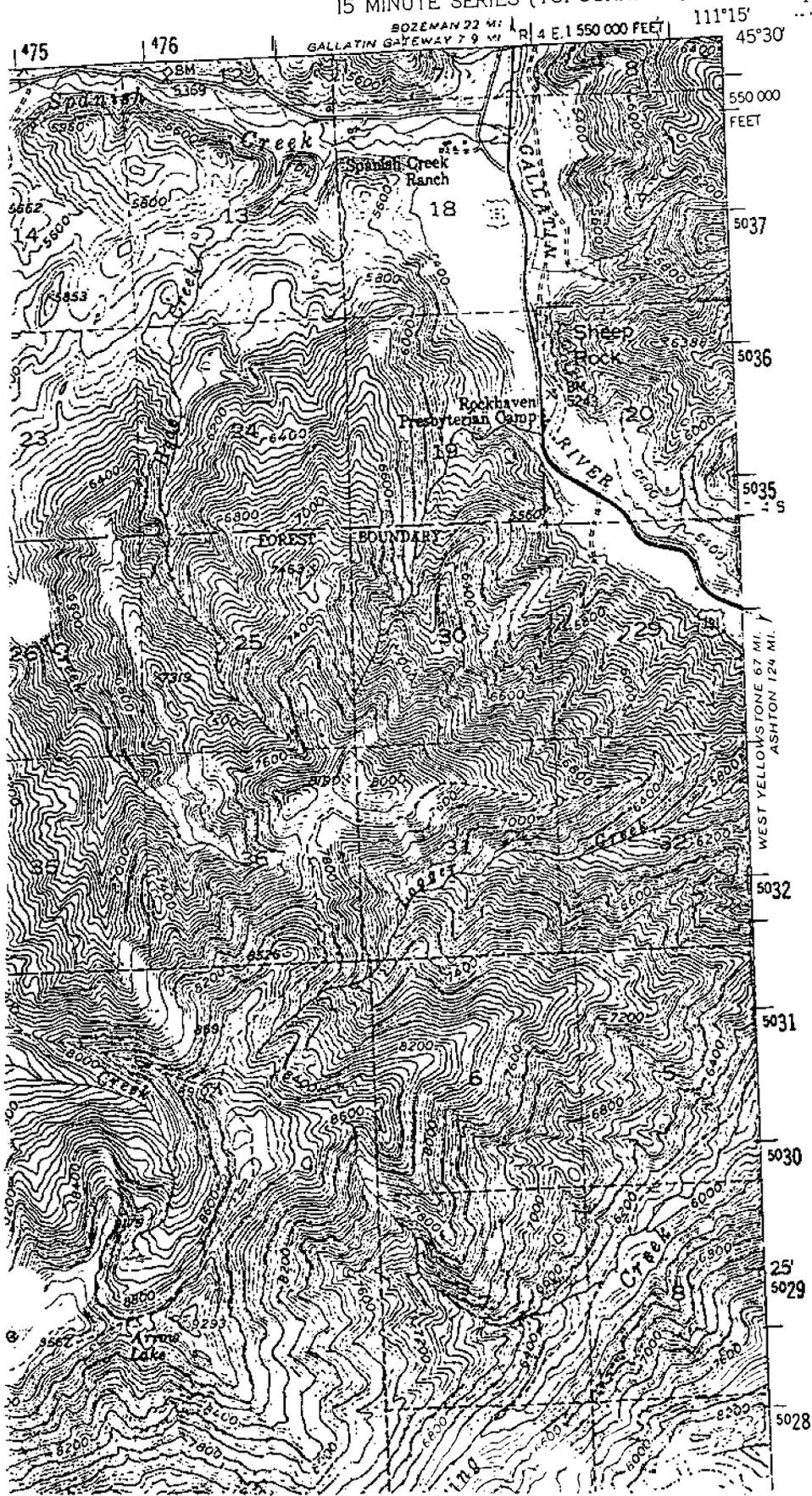
01081 2681 N

20



Shows general flat topography of area

SPANISH PEAKS QUADRANGLE
MONTANA
15 MINUTE SERIES (TOPOGRAPHIC)

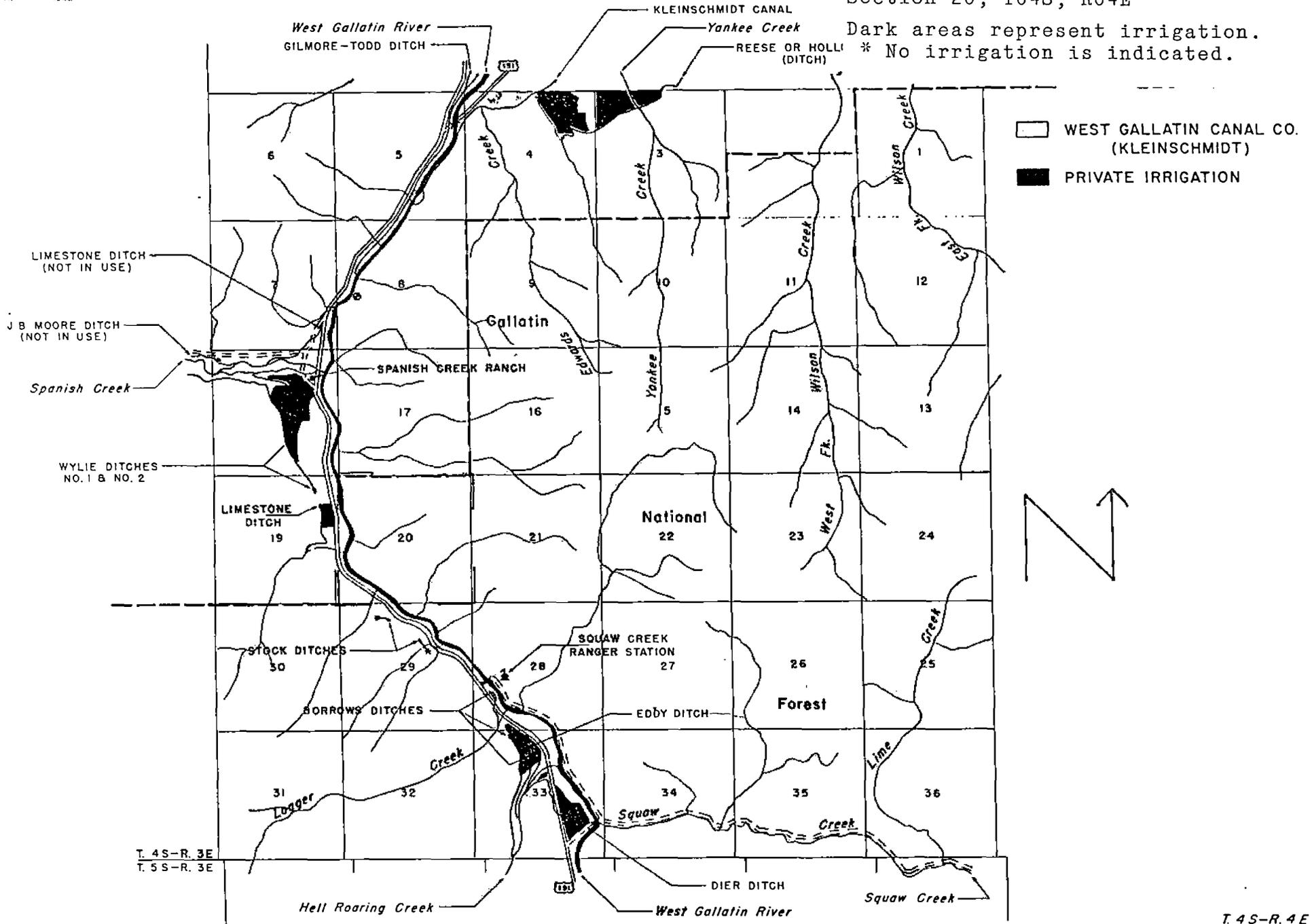


Case No. 41H-95

Scale: 1 Inch = 1 Mile

Section 20, T04S, R04E

Dark areas represent irrigation.
* No irrigation is indicated.



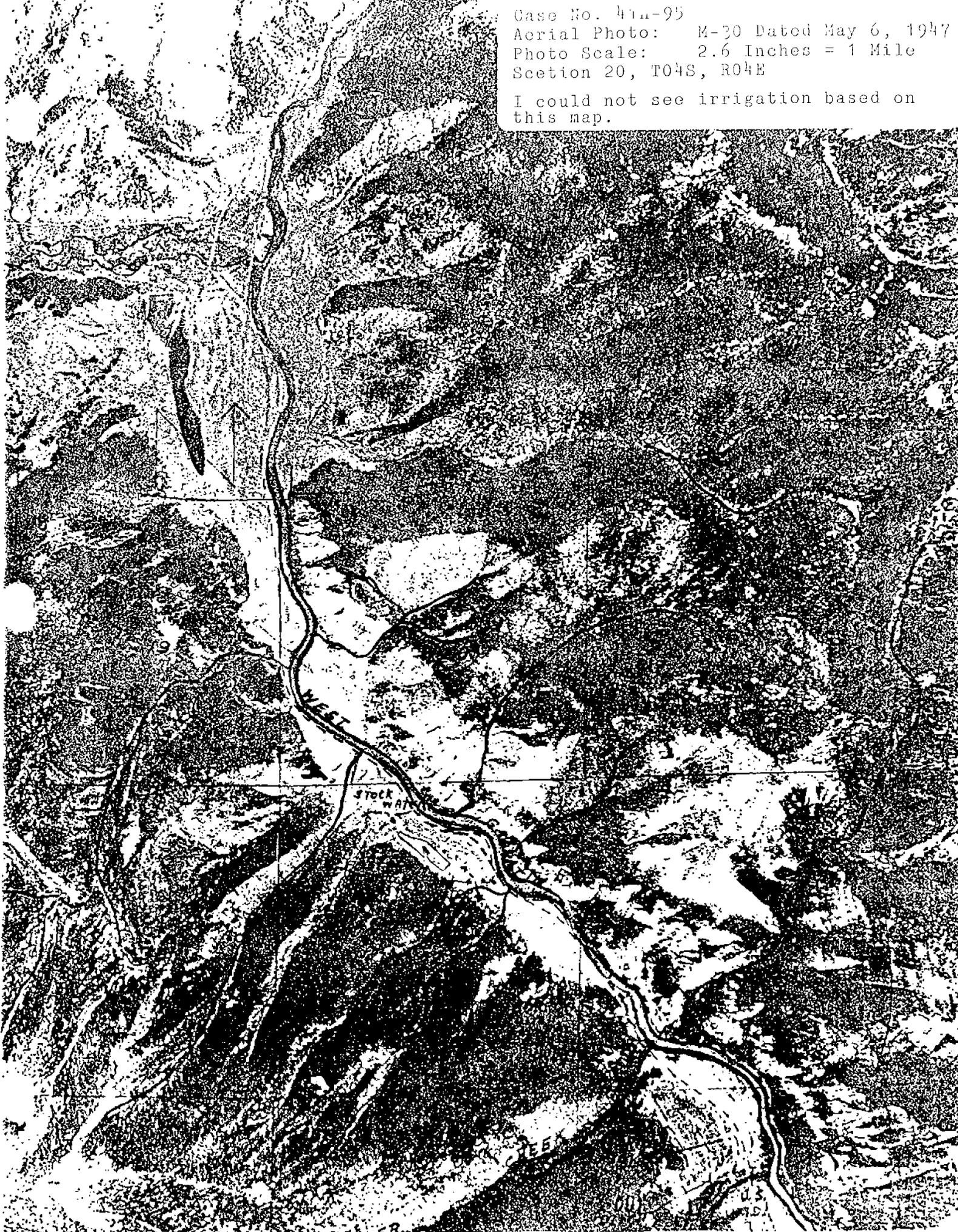
Case No. 411-95

Aerial Photo: M-30 Dated May 6, 1947

Photo Scale: 2.6 Inches = 1 Mile

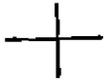
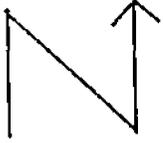
Section 20, T04S, R04E

I could not see irrigation based on
this map.



Case No. 41H-95

Numbers on this map relate to location pictures were taken.



20

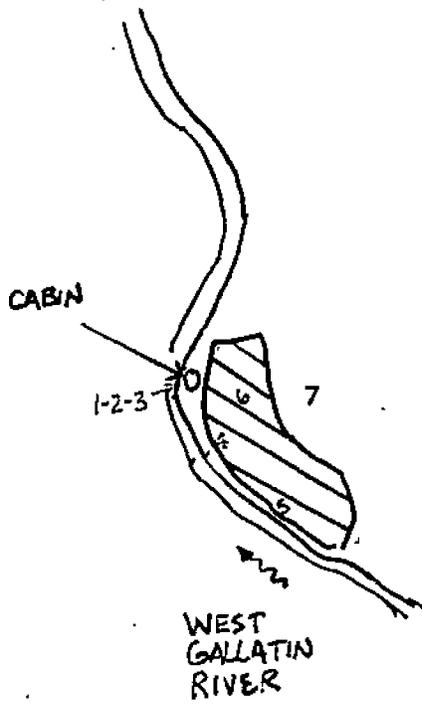


PHOTO NO. 1

SUBJECT - DIESEL POWERED PUMP
LOCATED WITHIN THE CABIN
APPEARED LIKE IT HAD BEEN USED
AT SOME POINT IN HISTORY.

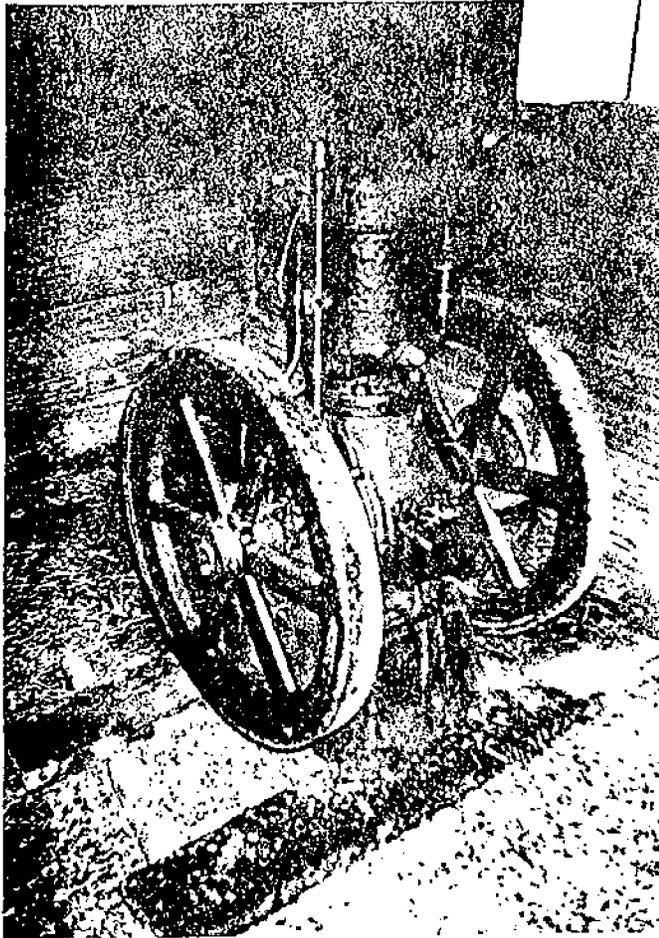


PHOTO NO. 2

SUBJECT - DIESEL POWERED PUMP
LOCATED IN CABIN. THIS PUMP
WAS THE ONLY EVIDENCE OF
IRRIGATION FOUND.

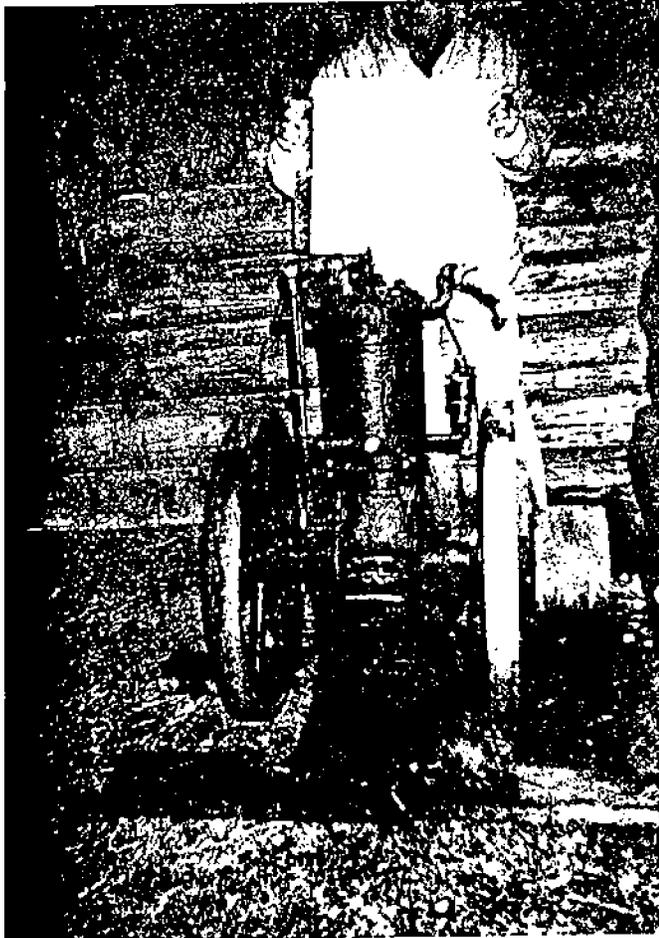


PHOTO NO. 3
DIRECTION OF VIEW IS NORTHEAST
SUBJECT - CABIN WHICH HOUSES
A PUMP. THIS CABIN WAS BUILT
ABOUT 1920.

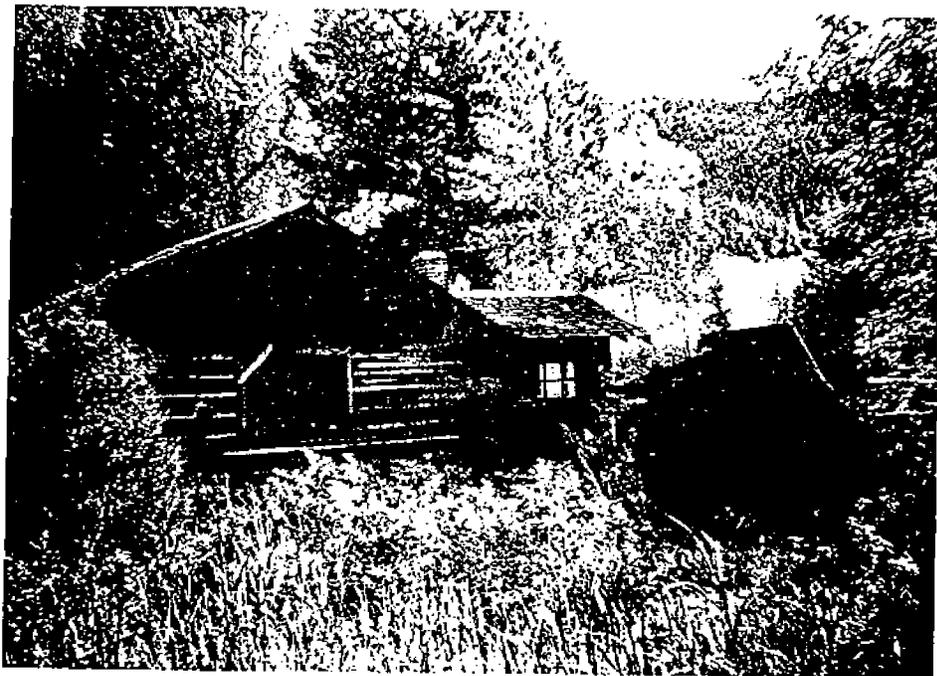


PHOTO NO. 4
SUBJECT - THIS SMALL HARROW WAS
LOCATED AT THE FIELDS EDGE.
OTHER REMNENTS OF FARMING
EQUIPMENT WERE ALSO LOCATED.



PHOTO NO. 5
DIRECTION OF VIEW IS SOUTH
SUBJECT - CLAIMED PLACE OF USE.



PHOTO NO. 6
DIRECTION OF VIEW IS EAST
SUBJECT - CLAIMED PLACE OF USE.



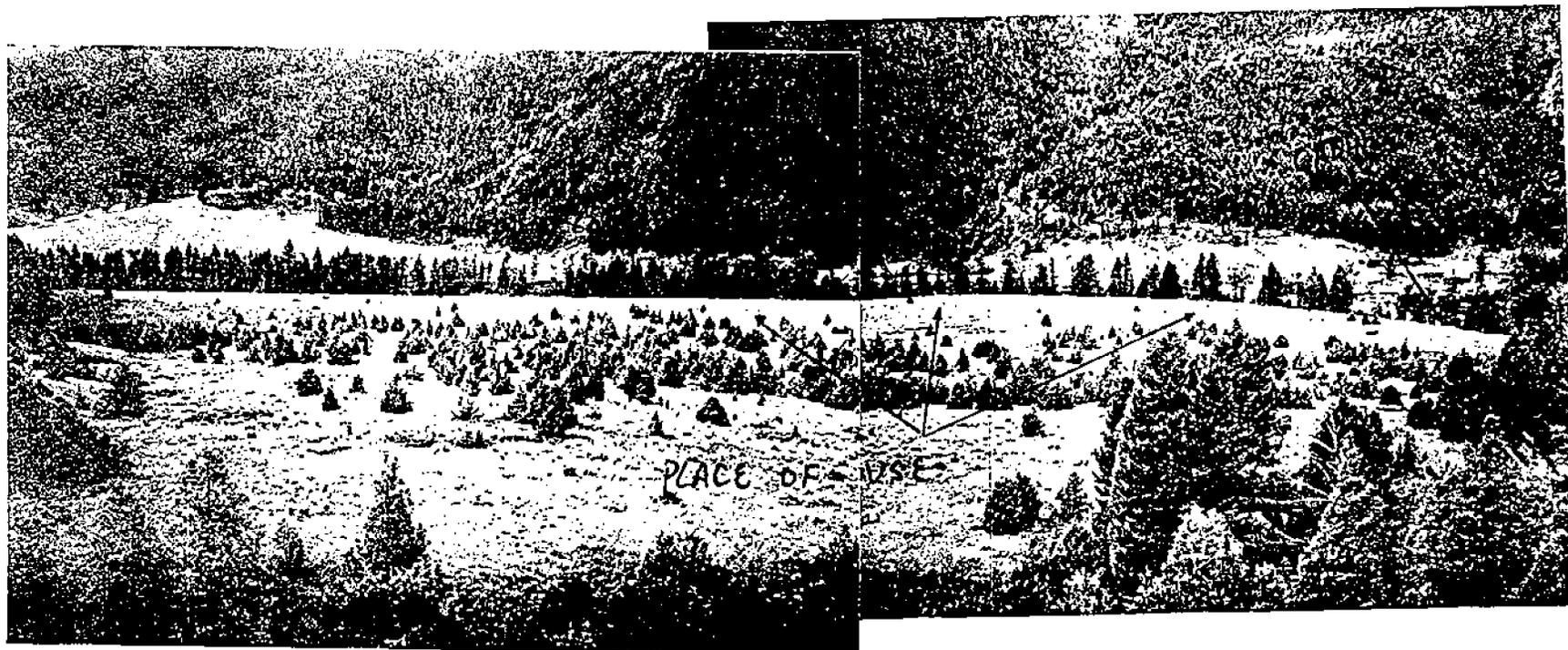
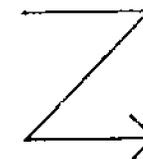


PHOTO NO. 7
DIRECTION OF VIEW IS WEST
SUBJECT - THIS PICTURE INCLUDES THE GROUND THE BREFFEILHS BELIEVE MAY HAVE
BEEN HISTORICALLY IRRIGATED (CLAIMED PLACE OF USE).



DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BOZEMAN WATER RIGHTS FIELD OFFICE



TED SCHWINDEN, GOVERNOR

1201 EAST MAIN STREET

STATE OF MONTANA

(406) 586-3136

December 27, 1988

BOZEMAN, MONTANA 59715

George A. Breffeilh
Robert A. Breffeilh
Richard A. Breffeilh
William A. Breffeilh
8 Fairway Drive
Lake Charles, LA. 70605

RE: Case 41H-95. Water Court Order issued December 22, 1988 to field investigate water use related to claim 41H-W032976.

Dear Sirs,

As mentioned above, the Montana Water Court has directed me to field review your water right claim on the West Gallatin River. Because of snow cover conditions it will not be possible to accomplish this until next spring. By chance, will any of the owners be in the Bozeman area next spring or summer? I think it's always best when the owner can be present during the field investigation. Please let me know when or if any of the owners of this claim would be available next May or June so I may notify the federal government and the Water Court of the field investigation date and time.

Thank you,

A handwritten signature in cursive script that reads "Rusty Taylor".

Rusty Taylor
Water Rights Specialist
Bozeman Water Rights Field Office

cc: Bill Dockins
Richard Aldrich
Thomas Pacheco

8 Fairway Drive
Lake Charles, LA 70605
February 10, 1989

Mr. Rusty Taylor
Dept. of Natural Resources and Conservation
1201 East Main Street
Bozeman, MT 59715

Dear Mr. Taylor,

Thank you for your interest in our water rights and for your letter of 27 December 1988.

Unfortunately, I was in Costa Rica the latter part of December and most of January, and could not answer your letter.

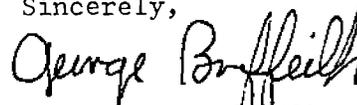
I am the father of the four Breffeilh men, and the former owner of the land for which the water rights are sought.

My son, Maj. Robert Breffeilh, will be moving to Juneau, Alaska in June or July, 1989. He will drive from Fort Campbell, Ky. to Seattle. Since I am the only one familiar with the water rights question, we have decided to be in Bozeman the latter part of June or early July. Unfortunately, I cannot give you a specific date since Robert's plans have not been firmed up.

I'm still confused about the denial of water rights. The land is part of the 160 acres granted to Mrs. Anna Benham on October 7, 1919 on patent number 711363, a copy of which is enclosed.

I thank you and Bill Dockins for the interest you all have shown in this case.

Sincerely,


George A. Breffeilh

RECEIVED

FEB 16 1989

MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

Bozeman 06259

RECEIVED

FEB 16 1989

THE UNITED STATES OF AMERICA,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING MONTANA D.N.R.C.

BOZEMAN FIELD OFFICE

WHEREAS, a certificate of the Register of the Land Office at Bozeman, Montana, has been deposited in the General Land Office whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain" and the acts supplemental thereto, the claim of Anna Benham, widow of Sedgwick F Benham, has been established and duly consummated in conformity to law for the southwest quarter of section twenty in township four south of range four east of the Montana Meridian, Montana, containing one hundred sixty acres, according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

NOW KNOW YE, that there is, therefore, granted by the United States unto the said claimant the tract of land above described: TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereof, unto the said claimant forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed. GIVEN UNDER MY HAND in the District of Columbia, the Seventh day of October in the year of our Lord one thousand nine hundred and NINETEEN and of the Independence of the United States the one hundred and forty fourth.

BY THE PRESIDENT. Woodrow Wilson,
By M.P. Le Roy, Secretary
L.C.C. Lamar
Recorder of the General Land Office.

(SEAL)

RECORDED: Patent Number 711363

claimant

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



STAN STEPHENS, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699
TELEFAX NUMBER (406) 444-6721

HELENA, MONTANA 59620-2301

February 21, 1989

George A. Breffeilh
8 Fairway Dr.
Lake Charles, LA. 70605

RE: Case 41H-95

Dear Mr. Breffeilh,

Thank you for your letter. When you know for sure when you will be in Bozeman please let me know, I will need at least 2 weeks notice so I can give all parties a chance to participate in the field investigation.

Your water right claim has not been denied, but it has been questioned. You were to make your claim based on actual use prior to July 1, 1973 and any affected parties have the right to question your claims accuracy and validity. That is the basis of Montana's Adjudication process. The DNRC (this office) attempted to confirm your ground as irrigated by use of aerial photographs and review of a water inventory study completed in the early 1950's. Neither of these data sources identified your ground as irrigated. Basically, your claim was objected to because your claimed use could not be substantiated by the above mentioned data sources. The Montana Water Court has decided that they want someone from the Department of Natural Resources and Conservation's Water Rights Bureau (this office) to go to the claimed area to look for and report evidence as it relates to your claim. Periods of extended non-use can also be a problem. The Water Court will make the final determination based on the facts, the law and evidence presented as they see it.

CENTRALIZED SERVICES
DIVISION
(406) 444-6700

CONSERVATION DISTRICTS
DIVISION
(406) 444-6667

ENERGY
DIVISION
(406) 444-6697

OIL AND GAS
DIVISION
(406) 444-6675

WATER RESOURCES
DIVISION
(406) 444-6601

That is a very quick review of this process and undoubtedly it is a bit different than what you are use to in the much wetter climate and riparian standards used in Louisiana. Most of Montana is basically a very high desert and surface water beyond snow runoff is quite limited and demand easily exceeds availability. The West Gallatin River is a very competitive source of supply.

Sincerely,

Rusty Taylor

Rusty Taylor
Water Rights Specialist
Bozeman Water Rights Field Office

cc: Bill Dockins
Richard Aldrich
Tom Pacheco

RECEIVED

JUN 02 1989

MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

216 Andrew Drive
Hopkinsville Ky 42246

502 885 4874
29 May 1989

Mr. Rusty Taylor
Dept. of Natural Resource & Conservation
1201 East Main Street
Bozeman, MT. 59715

Re: Case 41 H-95

Dear Mr. Taylor

Please refer to your letter of 21 Feb. '89 regarding the water rights of the Breffleith property in the Gallatin Canyon.

As requested to be advised at least two weeks before we would arrive in Bozeman for an on site inspection of the property. Please be advised we shall be in Bozeman 21 June '89. I shall call your office this week.

Unless we hear to the contrary we shall be at the Dept of Natural Resources and Conservation Office, 1201 East Main, Bozeman at 9:00 am 21 June '89.

The above address in Hopkinsville is temporary until about 7 June. Another contact point would be Great Falls 406-453-1416

Sincerely

George Breffleith