

Montana Water Court  
PO Box 879  
Bozeman, MT 59711-0879  
1-800-624-3270 (In-state only)  
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
BOULDER RIVER, TRIBUTARY OF THE JEFFERSON RIVER (41E)  
\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF )  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND )  
WITHIN THE BOULDER RIVER, TRIBUTARY OF )  
THE JEFFERSON RIVER DRAINAGE AREA, )  
INCLUDING ALL TRIBUTARIES OF THE )  
BOULDER RIVER, TRIBUTARY OF THE )  
JEFFERSON RIVER IN JEFFERSON COUNTY, )  
MONTANA. )

CASE 41E-93  
41E-W-120845-00

FILED

SEP 17 1993

For King Mark 30/9

CLAIMANT: Diane K. Lanz Foran (former owner), G. Vinson Dover, S. G. Middleton, J. Russell Ivie, David W. Luncefore, Jr. (former owners), Robert E. and Janis C. Sims (present owners), Herbert E. and Rita W. Prussack (former Owners), Lance and Rita Bullock (present owners), Delbert C. F. Ashmore Trust, William E. S. Reely Trust, John Reely Trust (Joined Parties)

OBJECTOR: Diane K. Lanz Foran, John Dawson, Rae Cille Dawson, George D. Dawson, Anne Marie Dawson, Louise Steingard, Jeanine Jones, John Carey Ranch, Inc.

ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, §85-2-233(4), the above entitled case was assigned to Water Master Michael J. L. Cusick. On August 13, 1993 the Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. Over ten (10) days have elapsed since service, and no objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed carefully the Water Master's Findings and Conclusions. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim 41E-W-120845-00 as it appears in the Temporary Preliminary Decree of the Boulder River Tributary of the Jefferson River Basin (41E).

DATED this 17<sup>th</sup> day of September 1993.

  
C. Bruce Loble  
Chief Water Judge

CERTIFICATE OF SERVICE

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

Herbert E. Prussack  
925 Highland Blvd.  
Bozeman, MT 59715

Jeanine Jones  
1316 Oakcrest  
Casper, WY 82601

Leanne Schraudner, Attorney  
108 S. Church  
Bozeman, MT 59715

Louis Steingruber  
Box 65  
Willow Creek, MT 59760

Lance and Rita Bullock  
Box 374  
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Paul B. Smith, Attorney  
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Allen LeMieux, Attorney  
37 Hubbard Lane  
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Diane Lanz  
8316 Shepherd Rd.  
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Robert E. and Janis C. Sims  
8358 Coconut Street  
Hobe Sound, FL 33455

William E. S. Reely Trust  
John Reely Trust  
Delbert C.F. Ashmore Trust  
2501 Catlin, Suite 100  
Missoula, MT 59801

John Carey Ranch, Inc.  
Star Route  
Boulder, MT 59632

John W. & Rae Cille Dawson  
George D. Dawson,  
Ann Marie Dawson  
Star Route  
Boulder, MT 59632

DATED this 17 day of September 1993.

  
\_\_\_\_\_  
Janet Fulcher  
Deputy Clerk of Court

IN THE WATER COURT OF THE STATE OF MONTANA

\* \* \* \* \*

NOTICE OF FILING OF MASTER'S REPORT

FILED

AUG 13 1993

TO: ALL PARTIES

RE: Case 41E-93, claim 41G-W-120845-00

Montana Water Court

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 4th day of August 1993.

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)

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CASE 41E-93  
41E-W-120845-00  
AUG 13 1993

Montana Water Court

CLAIMANT: Diane K. Lanz Foran (former owner)  
G. Vinson Dover, S. G. Middleton, J. Russell Ivie,  
David W. Luncefore, Jr. (former owners), Robert E. Sims  
and Janis C. Sims (present owners), Herbert E.  
and Rita W. Prussack (former Owners), Lance and Rita  
Bullock (present owners), Delbert C. F. Ashmore Trust,  
William E. S. Reely Trust, John Reely Trust (Joined  
Parties)

OBJECTOR: Diane K. Lanz Foran, John Dawson, Rae Cille Dawson,  
George D. Dawson, Anne Marie Dawson, Louise  
Steingruber, Jeanine Jones, John Carey Ranch, Inc.

MASTER'S REPORT

PROCEDURAL BACKGROUND

Herbert E. and Rita W. Prussack filed Statement of Claim  
for Existing Water Rights 41E-W-120845-00 for irrigation purposes.  
John Dawson, Rae Cille Dawson, George D. Dawson, Anne Marie Dawson,  
Louise Steingruber and Jeanine Jones objected to the acres  
irrigated, place of use and point of diversion of this claim. The  
John Carey Ranch, Inc. also objected to the acres irrigated, place  
of use and point of diversion of this claim.

The objections to this claim were heard before Water  
Master Patrick E. Sheridan on December 10, 1990 at Whitehall,

Montana. After hearing, the Water Master ordered the Montana Department of Natural Resources and Conservation (DNRC) to conduct a field investigation of this claim and another claim apparently based on the same notice of appropriation, 41E-W-127860-00. The Water Master also re-consolidated the case to include claim 41E-W-127860-00.

The field investigation was conducted on May 23, 1991. The DNRC filed its Field Investigation Report with the Water Court on December 2, 1991. In the interim between the field investigation and the filing of the report, Water Master Sheridan left his employment with the Water Court and the case was referred to a new Water Master.

On September 16, 1992 a Water Right Transfer Certificate was filed evidencing the transfer of water right claim number 41E-W-120845-00 from Herbert E. and Rita Prussack to Lance and Rita Bullock.

Pursuant to a Stipulation entered between the claimants of 41E-W-127860-00 and the objectors to that claim (also objectors to claim 41E-W-120845-00), further proceedings regarding claim 41E-W-127860-00 were stayed pending resolution of the objections that were heard regarding claim 41E-W-120845-00.

A scheduling conference was held regarding claim 41E-W-120845-00 on May 4, 1993. At the scheduling conference, the parties, by and through their attorneys of record, consented to the current water master issuing findings of fact and conclusions of law based on the record made at the December 10, 1990 evidentiary

hearing before the former water master. Pursuant to Rule I.11(2), Water Right Claim Examination Rules, the Court scheduled a limited hearing on the results of the field investigation for July 20, 1993. On July 7, 1993 the parties, by and through their attorneys of record, filed an agreement with the Water Court waiving their right to a hearing on the results of the field investigation as set forth in the report.

The evidence having already been presented, and the parties having consented to the Master issuing a decision based on the current record, the Master makes the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

1. Herbert E. and Rita Prussack filed Statement of Claim for Existing Water Rights 41E-W-120845-00 for water diverted from the Boulder River historically used for irrigation purposes in section 29, T03N, R02W, Jefferson County.<sup>1</sup>

2. The Statement of Claim appears to be based on a Notice of Appropriation filed and recorded by Dennis G. Sheehy on December 11, 1889. The notice indicates that Sheehy appropriated 400 miner's inches (10 cubic feet per second) of water from the Boulder River with a priority date of June 1, 1881 for use upon the Ranch of Roseanna M. Sheehy, located in sections 29 and 30. From June 1, 1889 through December 11, 1889, the Sheehy Ranch consisted

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<sup>1</sup>All subsequent references to lands in sections 29 and 30 are in T03N, R02W, Jefferson County, Montana.

of 80.0 acres in the west 1/2 of the NW 1/4 of section 29 and 80.0 acres in the east 1/2 of the NE 1/4 of section 30.

3. Claimants Prussacks were successors-in-interest to some of the Sheehy lands. At the time of the hearing in this matter, Prussacks were purchasing all of the lands in section 29 under a Contract for Deed. Claimants claimed place of use is for 200.00 acres in section 29. The claim appeared in the Temporary Preliminary Decree as follows:

WATER RIGHT NUMBER 41E-W-120845-00

PRIORITY DATE: June 1, 1881  
FLOW RATE: 5.00 CFS  
VOLUME: 1540.00 ACRE FEET PER YEAR  
SOURCE: BOULDER RIVER  
MAXIMUM ACRES: 200.00  
PURPOSE (USE): IRRIGATION  
PERIOD OF USE: MAY 1 TO OCT 4

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
		NENWSW	29	03N	02W	JEFFERSON	PUMP
		SWNWNW	29	03N	02W	JEFFERSON	PUMP
		NWSWSW	29	03N	02W	JEFFERSON	PUMP

PLACE OF USE FOR IRRIGATION:

<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	200.00			29	03N	02W	JEFFERSON

4. The general trend of the Boulder River's course in the area of the lands in question is from north to south. Along

this course the river meanders back and forth across the section line dividing sections 29 and 30 several times. Section 29 is to the east of this line; section 30 to the west. Historically, the Sheehy Ditch tapped the Boulder River on its west bank and then ran in a southerly direction approximately parallel to the course of the river, eventually running through section 30. There are approximately 51.0 acres that lie below the Sheehy Ditch on the lands originally encompassed by the Sheehy Ranch in the east 1/2 of the NE 1/4 of section 29 and the west 1/2 of the NW 1/4 of section 30. Of these 51.0 acres lying between the ditch and the west bank of the river, 8.1 acres lie in section 29 and the remaining acres lie in section 30. The 8.1 acres consist of two narrow parcels of land located on the inside of river meanders on the west bank of the river that extend across the section line into section 29. Due to their elongated appearance on the map, at the hearing these 8.1 acres were referred to as "the fingers." (See exhibits 1 through 5 from attached Field Investigation Report)

5. According to the map filed as an attachment to the Statement of Claim, the Prussacks only claimed that a very small portion of the lands west of the River in section 29 (i.e., a portion of the 8.1 acres located in the "fingers") were irrigated prior to July 1, 1973.

6. Diane Lanz Foran filed Statement of Claim for Existing Water Rights 41E-W-127860-00 for 75.0 acres of irrigation in the east 1/2 of the NE 1/4 of section 30, also apparently based on the Sheehy Notice of Appropriation. The extent of this right



was not at issue at the hearing nor is it at issue at this point of this proceeding. The 1956 Water Resources Survey for Jefferson County attached to the Statement of Claim shows the Sheehy Ditch running down the west side of the river and capable of irrigating those lands in section 30 now a part of claim 41E-W-127860-00 and also those lands in section 29 west of the river (the "fingers") that were part of the Prussack claim.

7. In the early 1970's, Fred and Bonnie Brown owned the lands in the place of use claimed by Prussacks in section 29. The Browns subsequently deeded all of section 29 to Delbert Ashmore and John and William Reely, "[t]ogether with all ditch and ditch rights, water and water rights in the Boulder River consisting of the present Decreed rights upon an irrigated acre bases." At the time of the hearing, the Browns were selling the east 1/2 of the NE 1/4 of section 30 to Diane (Lanz) Foran under a Contract for Deed, "[t]ogether with all tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including all water and water rights, ditches and ditch rights, had, used, upon any manner enjoyed in connection with said premises."

8. At the hearing, Fred Brown testified that his intent in splitting the property in the Ashmore/Reely sale and the sale to Foran was to split the water rights equally between section 29 and section 30. Mr. Brown also testified that although the Deed to Ashmore and Reely refers to the "present Decreed rights upon an irrigated acres basis," he did not know the exact legal meaning of the term "decreed rights" nor did he understand that the filed

appropriation rights in question were never the subject of a district court decree.

9. Mr. Brown also testified regarding the historic use of these rights on the place of use claimed by Prussacks in section 29. Mr. Brown testified that he first began irrigating lands in section 29 east of the river in late July or August of 1973. Although he could not remember with certainty the specific date he began irrigating east of the river, he testified that it was very unlikely that it was before late July unless it had been a drought year and spring run-off had ended early. He also testified that prior to July of 1973, he irrigated the lands under the ditch in the NE 1/4 of section 30 and the lands in "the fingers" west of the river in section 29. Several other witnesses testified that historically the east side of the river in section 29 was never irrigated. Thus, aside from the claim form itself and some speculative testimony, there was no evidence presented that the lands in section 29 on the east side of the river claimed as irrigated by Dr. Prussack were ever irrigated prior to July 1, 1973.

10. In addition to Fred Brown, several other witnesses testified regarding pre-July 1, 1973 irrigation of "the fingers" west of the river in section 29. Bud Chambers, Don Hoerauf, Dennis Smith, Larry Foran, and Martin Carey, all testified that no irrigation took place in "the fingers" in section 29 prior to July 1, 1973. Don Hoerauf, whose parents owned the property at one time, testified that the mainline of the sprinkler system used at

the time extended west from the river in the NENENE of section 30 with laterals extending north and south; he further testified that the north-south laterals did not have elbows in the lines that allowed for extension of additional east-west laterals into "the fingers" in section 29.

11. The Field Investigation Report indicates that the lands in "the fingers" are "naturally flood irrigated" and that no sprinkler irrigation was taking place in the fingers at the time of the investigation. The report does not indicate either way whether irrigation other than "natural flood irrigation" took place prior to July 1, 1973.

The claimant introduced the 1956 Jefferson County Water Resources Survey at the hearing. The Survey indicates that all the lands lying between the Sheehy Ditch and the Boulder River--including those lands west of the River in section 29, i.e. "the fingers"--were irrigated in 1956.

Cross-hatching on the map filed as an attachment to the Statement of Claim indicates that the Prussacks only claimed that a very small portion of 8.1 acres west of the river in section 29--approximately 2.0 acres--were irrigated prior to July 1, 1973.

12. No evidence to the contrary having been presented at the hearing, the Court finds that no irrigation historically took place on section 29 east of the Boulder River prior to July 1, 1973. As to irrigation of the 8.1 acres west of the River in section 29 (i.e., "the fingers"), the evidence is conflicting. Fred Brown's testimony and the 1956 Jefferson County Water

Resources Survey indicate that these lands were irrigated prior to July of 1973. The overwhelming weight of the evidence, however, in the form of the testimony of several knowledgeable witnesses, indicates that while irrigation of this land from the Sheehy Ditch was practicable, it never actually took place prior to July 1, 1973. It appears that the only irrigation of "the fingers" that ever occurred with any certainty is historical natural flooding during the spring. Furthermore, no evidence was presented that the place of use of the original appropriation west of the river was moved to the place of use claimed by Prussack prior to July 1, 1973. The Court, therefore, finds accordingly. Prior to July 1, 1973, there simply was no irrigation taking place on any of the lands that are the basis of water right claim 41E-W-120845-00 filed by the Prussacks.

#### CONCLUSIONS OF LAW

##### I

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

##### II

Pursuant to Rule 1.II(2), Water Right Claim Examination Rules, investigation reports of water right claims promulgated by the Montana Department of Natural Resources and Conservation under the direction of the Water Court are admissible without further foundation and not subject to the hearsay objection, subject to the

rights of any party or claimant to cross-examine the producer or drafter of the written material and to controvert the same by other evidence. Due provisions are to be made by the Water Court to allow a party to controvert any such written report, data or information accepted as evidence under this Rule. By agreement filed July 7, 1993, the parties waived their right to a hearing on the results of the field investigation. Furthermore, the parties have given their consent for the current Water Master to issue Findings of Fact and Conclusions of Law based on a record made before the former Water Master. See Phalen v. Rilley, 154 Mont. 399, 465 P.2d 102 (1970), Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). Procedurally, there is nothing impeding the Court from issuing its decision at this time.

### III

The Montana Water Court has jurisdiction over matters relating to the determination of existing water rights. An "existing right" is a right to the use of water which would be protected under the law as it existed prior to July 1, 1973. If the right to beneficially use water was not perfected by an appropriator before July 1, 1973, that appropriator's use is subject to the permit requirements of Title 85, Chapter 2, Part 3, Mont. Code Ann. It is clear from the evidence that no right to the use of water on section 29 was ever perfected prior to July 1, 1973.

### IV

The Brown to Ashmore deed conveyed "all . . . water and

water rights in the Boulder River consisting of the present Decreed rights upon an irrigated acre bases." In construing a deed, the court must, if possible, ascertain intention of the parties to the sale as expressed by the deed. McCafferty v. Young, 144 Mont. 385, 397 P.2d 96 (1964). A deed must be construed as written; a court cannot insert words that are not there, nor can it give a construction to words directly contrary to their obvious meaning. Bodine v. Bodine, 149 Mont. 29, 422 P.2d 650 (1967).

The law regarding conveyances of appurtenant water rights is well settled:

. . . [W]hen an owner of a tract of land with an appurtenant water right grants a portion of the tract without any division or reservation, the appurtenant water right is divided in respective amounts to each tract measured in proportion as the number of acres irrigated with the water right on the land conveyed bears to the total number of acres irrigated by the water.

Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963). Apart from the reference to "decreed rights," the language in the deed from Brown to Ashmore conveying section 29 is simply a reiteration of this rule.

Evidence presented at the hearing appears to indicate that the Sheehy appropriation was perfected on the west bank of the river entirely in section 30. Regardless of where the Sheehy right was perfected, no evidence was presented that any water right--established either by filed Notice of Appropriation, by use or by court decree--was perfected on and became appurtenant to section 29. Notwithstanding Mr. Browns's testimony regarding his intent

when he divided and sold sections 29 and section 30, the deeds are controlling and speak for themselves. McReynolds v. McReynolds, 147 Mont. 476, 482, 414 P.2d 531 (1966).

Because no water right was perfected prior to July 1, 1973 on section 29, there simply was no water right, decreed or otherwise, that was transferred as an appurtenance to section 29 by operation of the Brown to Ashmore deed. All subsequent deeds in the chain conveying section 29 simply transferred to the grantee the grantor's interest in any appurtenant water rights, which, the objectors have demonstrated to be non-existent. The Prussacks claim to an existing right must fail regardless of what their predecessor's-in-interest purported to convey.

V

Similarly, the evidence presented is insufficient to support a finding that the place of use of the original appropriation was moved to the place of use claimed by Prussack prior to July 1, 1973. In particular, the Court specifically rejects any theory that a portion of this claimed right was perfected on lands west of the river in section 29, and then subsequently was moved and used to irrigate a portion of the claimed place of use either prior to or after July 1, 1973. The Court has already found that these "fingers" were not irrigated prior to July of 1973. Any theory that the claimant's predecessors changed the place of use of this claimed right is speculative and not supported by the evidence.

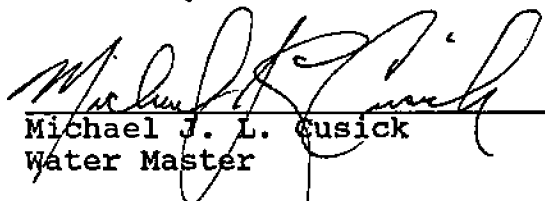
VI

For purposes of adjudicating rights, a claim of existing right filed in accordance with the statute or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. Section 85-2-227, MCA. Thus, the burden of proof falls on the objector to overcome the presumption that a claim of existing right is valid and correct as filed. In this case, the objectors have met their burden.

VII

Based on the foregoing Findings of Fact and Conclusions of Law, water right claim 41E-W-120845-00 should be terminated and should not appear in the preliminary or final decrees of the Boulder River Basin (41E).

DATED this 13<sup>th</sup> day of August 1993.

  
\_\_\_\_\_  
Michael J. L. Cusick  
Water Master



CERTIFICATE OF SERVICE

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

Herbert E. Prussack  
925 Highland Blvd.  
Bozeman, MT 59715

Jeanine Jones  
1316 Oakcrest  
Casper, WY 82601

Leanne Schraudner, Attorney  
108 S. Church  
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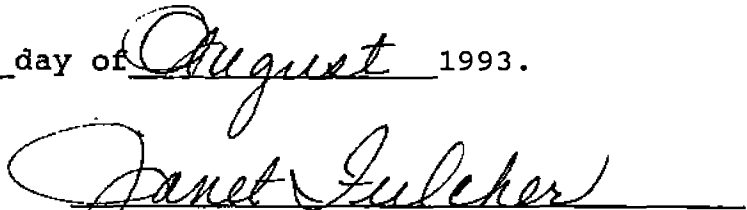
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John W. & Rae Cille Dawson  
George D. Dawson,  
Ann Marie Dawson  
Star Route  
Boulder, MT 59632

DATED this 13 day of August 1993.

  
Janet Fulcher  
Deputy Clerk of Court

FILED

JUL 7 1993

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
BOULDER RIVER, TRIBUTARY OF THE JEFFERSON RIVER (Montana Water Court

IN THE MATTER OF THE ADJUDICATION OF )  
THE EXISTING RIGHTS TO THE USE OF ALL ) CASE 41E-93  
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WITHIN THE BOULDER RIVER, TRIBUTARY OF ) 41E-W-120845-00  
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CLAIMANT: Diane K. Lanz Foran (former owner)  
G. Vinson Dover, S. G. Middleton, J. Russell Ivie,  
David W. Luncefore, Jr. (present owner)  
Herbert E. and Rita W. Prussack (former owners)  
Lance and Rita Bullock (present owners)  
Delbert C. F. Ashmore Trust, William E. S. Reely Trust,  
John Reely Trust (jointed parties)

OBJECTOR: Diane K. Lanz Foran, John Dawson, Rae Cille Dawson,  
George D. Dawson, Anne Marie Dawson, Louise  
Steingruber, Jeanine Jones, John Carey Ranch, Inc.

AGREEMENT

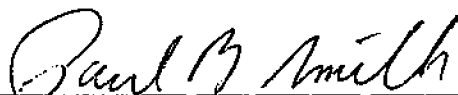
Come now Paul B. Smith, counsel for objectors, and Allen  
LeMieux, counsel for Lance and Rita Bullock, present owners, and  
hereby stipulate and agree to the following regarding the Field  
Investigation Report scheduled for a limited hearing Tuesday, July  
20, 1993, in the above matter.

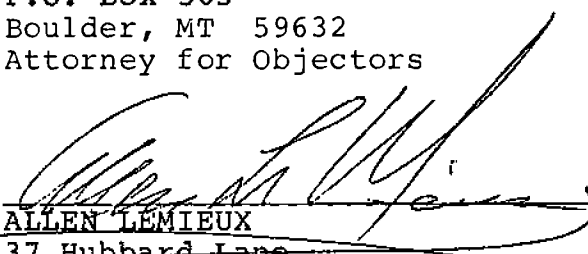
1. Counsel agree that the current Water Master may consider  
the Field Investigation Report without having a limited hearing  
as provided for Under Rule I.11(2) and hereby request that the  
July 20, 1993 hearing date be vacated.

2. Counsel agree that no further testimony or evidence is  
to be submitted at this time by their respective parties

"explaining, clarifying, or disputing" the Field Investigation Report and that the current Water Master may issue his findings of fact and conclusions of law based on the record as it now has been submitted, including, but not limited to, the Field Investigation Report.

So agreed this 6<sup>th</sup> day of July, 1993.

  
\_\_\_\_\_  
PAUL B. SMITH  
P.O. Box 565  
Boulder, MT 59632  
Attorney for Objectors

  
\_\_\_\_\_  
ALLEN LEMIEUX  
37 Hubbard Lane  
Boulder, MT 59632  
Attorney for Lance & Rita Bullock

**CERTIFICATE OF SERVICE**

I, Paul B. Smith, hereby certify that on the 6<sup>th</sup> day of July, 1993, a true and correct copy of the above AGREEMENT was duly served upon the following persons by depositing the same, postage prepaid, in the United States mail:

Leanne Schraudner, Attorney  
108 S. Church  
Bozeman, MT 59715

G. Vinson Dover, S. G. Middleton,  
J. Russell Ivie, David W. Luncefore, Jr.  
P.O. Box 731  
Dahlonega, GA 30533

Suzanne Nellen, Attorney  
1800 W. Koch, Suite 5  
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John Carey Ranch, Inc.  
Star Route  
Boulder, MT 59632

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William E. S. Reely Trust  
John Reely Trust  
Delbert C. F. Ashmore Trust  
2501 Catlin, Suite 100  
Missoula, MT 59801

  
\_\_\_\_\_  
PAUL B. SMITH

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



STAN STEPHENS, GOVERNOR

LEE METCALF BUILDING  
1520 EAST SIXTH AVENUE

STATE OF MONTANA

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

HELENA, MONTANA 59620-2301

MEMORANDUM

**FILED**

DEC 2 1991

TO: Michael J. L; Cusick

FROM: Ronald J. Schofield *RJS*

REVIEWED: Larry Holman, Bureau Chief *LH*

**Montana Water Court**

DATE: November 8, 1991

SUBJECT: Water Court ordered field investigation, Case 41E-93  
(claims 41E-W-120845-00 and 41E-W-127860-00)

BACKGROUND

Water right statement of claim 41E-W-127860-00 was filed by Diane K. Foran and received by the Department of Natural Resources and Conservation (Department) on April 14, 1982. The claim is for sprinkler irrigation, diverting water by pump from the Boulder River. On August 3, 1988 this water right claim was transferred from Diane K. Lanz (formerly Diane Foran) to G. Vinson Dover, S. G. Middleton, David W. Lunceford, Jr and J. Russell Ivie.

Water right statement of claim 41E-W-120845-00 was filed by Herbert E. and Rita W. Prussack and received by the Department on February 23, 1982. The claim is for sprinkler and natural flood irrigation from the Boulder River.

Both claims were verified by the Department and were included in the Temporary Preliminary Decree issued by the Montana Water Court for Basin 41E (Boulder River) on June 20, 1985. The Montana Water Court ordered the Department to conduct a field investigation on claims 41E-W-120845-00 and 41E-W-127860-00 during the 1991 irrigation season. The Court also ordered that the field investigation be limited to an examination of the acres irrigated, flow rate, places of use and points of diversion.

CONDUCT OF FIELD INVESTIGATION

On April 17, 1991, notice was sent to the following involved parties scheduling a field investigation for May 23, 1991 at 10:00 A.M.

Herbert E. Prussack  
Leanne Schraudner  
Paul B. Smith  
John W. and ReaCille Dawson  
Louise Steingruber  
Diane K. Lanz Foran  
S. G. Middleton  
Delbert C. F. Ashmore, Trust  
William E. S. Reely, Trust  
John Reely, Trust  
John Cary Ranch, Inc.  
George D. and Anne Marie Dawson  
Jeanine Jones  
G. Vinson Dover  
David W. Lunceford, Jr  
Patrick E. Sheridan

The Water Court ordered field investigation commenced on May 23, 1991 at 10:00 A.M. The field investigation was completed by 3:00 P.M.

Persons present were;

G. Vinson Dover- claimant 41E-W-127860-00  
Lance Bullock- tenant on Mr. Dover's ranch  
John W. (Jack) Dawson- objector  
ReaCille Dawson- objector  
Louise Steingruber- objector  
Patrick Cary- objector  
Patrick Sheridan- Water Master  
Ron Schofield- DNRC

Somewhere in the process, the field investigation report was lost. The report apparently was never delivered to the Water Court during the ordered time period. As the person assigned to the field investigation I accept full responsibility for the failure of the Department to deliver the field investigation report. I am now rewriting the report based on the information gathered at the May 23, 1991 field investigation.

Claim 41E-W-127860-00

At the time of the field investigation no irrigation was taking place or had taken place during this season. The Boulder River was flowing full, low areas and meanders were flooded (photo #1).

Claim 41E-W-127860-00 is for 75 acres of sprinkler irrigation. The claimed place of use is SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 30, Township 3 North, Range 2 West. From onsite observation and discussion with the claimant the correct description of the place of use is E $\frac{1}{2}$ NE Section 30, Township 3 North, Range 2 West. A portable pump, powered by a diesel engine, is located on the property but not at the pumping location. The unit consists of a Cornell pump, model 4 RB 60B4-3 which is driven by an Allis-Chalmers model 2800 diesel engine (photo #2). According to Mr. Dover and Mr. Bullock the pumping location from the Boulder River for this unit is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 30, Township 3 North, Range 2 West (photo #3). I have identified this location as "A" on the map labeled Exhibit 1. Mr. Dover said this pumping unit was on the property when he bought the land in 1988. Mr. Dawson said he thought this unit was first used in the late 1970's.

The sprinkler system consists of a 5 inch diameter mainline (photo #4) which runs from east to west for approximately  $\frac{1}{4}$  mile. The handline laterals run north and south for approximately  $\frac{1}{2}$  mile at the longest set. The lateral pipes (photo #5) are 4 inch and 3 inch diameter and the nozzle size was measured at 13/64 inch. The area irrigated by this sprinkler system and the incidental natural flood irrigation of the low areas and meanders along the river is 72 acres. These are identified on Exhibit 2.

Prior to the use of the current diesel powered pump unit, a portable electric pump was used to irrigate the same area. The date this portable electric pump was first used was not known by any of the participants in the field investigation. Electric lines were run to two pumpsites by Montana Power Company. These locations are marked "B" and "C" on Exhibit 1. One of the power poles had a metal tag with the date 1968 stamped in it (photo #6). I talked to Roger Keune, Montana Power Company engineer in the Helena Construction Division, on November 6, 1991. Mr. Keune said that the poles are stamped when they are made but normally they are immediately used. He said this particular pole was probably set in 1968 or early 1969.

Before the use of any sprinkler system, this farm was irrigated from the Sheehy Ditch. The Sheehy Ditch is identified in the Jefferson County Water Resources Survey published in June 1956. The point of diversion of the Sheehy Ditch as identified by the above mentioned Survey is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  Section 17, Township 3 North, Range 2 West. I was able to find remains of this ditch

where it enters the Dover property (photo #7) and again just before it exits the Dover property (photo #8). These locations are identified as "M" and "N" on Exhibit 3. The historical location of the Sheehy Ditch is also shown on Exhibit 3. The historical area on the Dover property irrigated from the Sheehy Ditch and identified by the Jefferson County Water Resources Survey published in June 1956 are 60 acres and are also identified on Exhibit 3.

Claim 41E-W-120845-00

Claim 41E-W-120845-00 is for 200 acres of irrigation in Section 29 Township 3 North Range 2 West. The method of irrigation claimed is natural flood and sprinkler. Located on the property was a portable BOSS traveling gun sprinkler powered by a diesel engine (photo #9). Mr. Cary and Mr. Dawson stated that this was the only sprinkler system they could remember being used on the Prussack property and as they recalled was first used in the early 1980's. The irrigation system was supplied by the Foster Irrigation Company of Townsend. Jim Foster, a former partner in the Company said the system was supplied in 1979 or 1980. The claimed points of diversion are identified as "F" (photo #10), "G" and "H" on Exhibit 4. I could find no evidence of pumping station structures, electrical power or pipelines at the claimed points of diversions. It appears that no sprinkler irrigation occurred on the claimed place of use prior to July 1, 1973. The irrigation equipment that is currently located on the Prussack property was probably not in use until ~~1970~~ or 1980.

1979  
Natural flood irrigation was occurring on low areas and meanders along the Boulder River. These areas are located in the  $W\frac{1}{2}W\frac{1}{2}$  Section 29, Township 3 North, Range 2 West and are identified as on Exhibit 5. There are approximately 37 acres of natural flood irrigation associated with this water right claim.

The Jefferson County Water Resources Survey published in June 1956 records "traces of Mooney Ditch" in the  $W\frac{1}{2}$  Section 29, Township 3 North, Range 2 West. During the field investigation I could not clearly identify an irrigation ditch in the  $W\frac{1}{2}$  of Section 29. Photos #11 and #12 are representative of the claimed places of use of claim 41E-W-120845-00.

SUMMARY

CLAIM 41E-W-127860-00

- 1) The place of use is the  $E\frac{1}{2}NE\frac{1}{4}$  Section 30, Township 3 North, Range 2 West. A total of 72 acres are currently being irrigated.
- 2) Low areas and meanders along the Boulder River are naturally flood irrigated.



3) A portable diesel powered sprinkler system is currently used to irrigate the place of use. This unit was apparently first used in the late 1970's. The point of diversion is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 30, Township 3 North, Range 2 West.

4) The sprinkler system consists of a 5 inch diameter mainline approximately  $\frac{1}{4}$  mile long and 3 inch and 4 inch diameter handline with a maximum length of  $\frac{1}{2}$  mile. The nozzle size of the sprinkler heads is 13/64 inch.

5) Based on a maximum of 64 sprinkler nozzles each 13/64 inch and an operating pressure of 40 pounds per square inch, an approximate maximum flow rate would be 500 gallons per minute.

6) The predecessor of the current pumping system was a portable electric powered sprinkler system. Electricity was located at the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 30, Township 3 North, Range 2 West and the pumping unit was moved between these two points of diversion. The system appears to have been first used in 1968 or 1969.

7) Historically, 60 acres of the claimed place of use were irrigated from the Sheehy Ditch. Evidence of the Sheehy Ditch is clearly visible.

Claim 41E-W-120845-00

1) The claimed places of use are clarified as part of the W $\frac{1}{2}$  and the SE $\frac{1}{4}$  Section 29, Township 3 North, Range 2 West.

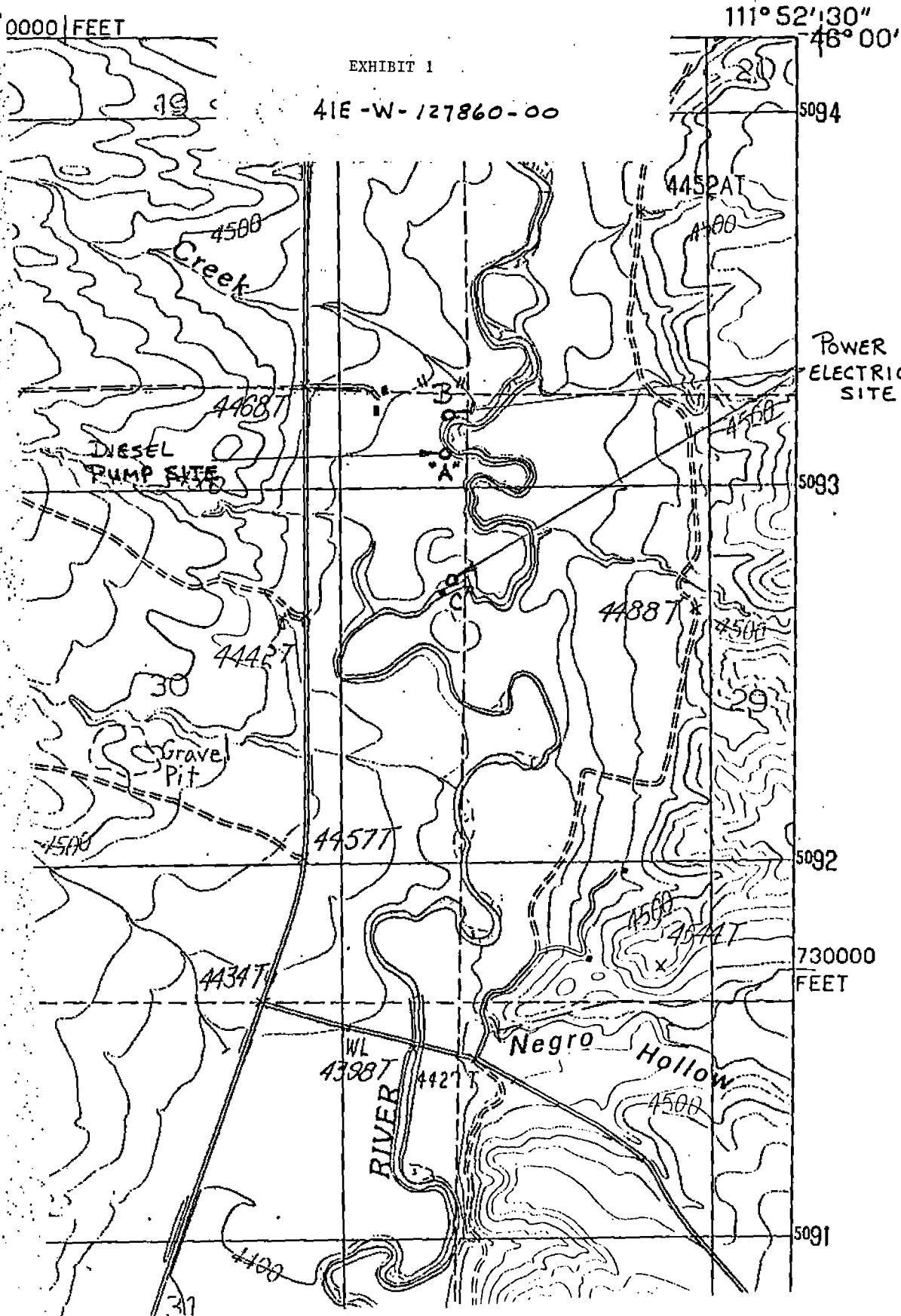
2) Low areas and meanders along the Boulder River are naturally flood irrigated. A total of 37 acres are natural flood irrigation.

3) A diesel powered traveling gun sprinkler is located on the property. It appears this sprinkler system was first used in 1979 or 1980.

4) No pumping station structures, power lines or pipelines were found during the field investigation.

5) I found no evidence that the claimed places of use were historically flood irrigated by ditch from the Boulder River.

DOHERTY MOUNTAIN QUADRANGLE  
MONTANA-JEFFERSON CO.  
7.5 MINUTE SERIES (TOPOGRAPHIC)



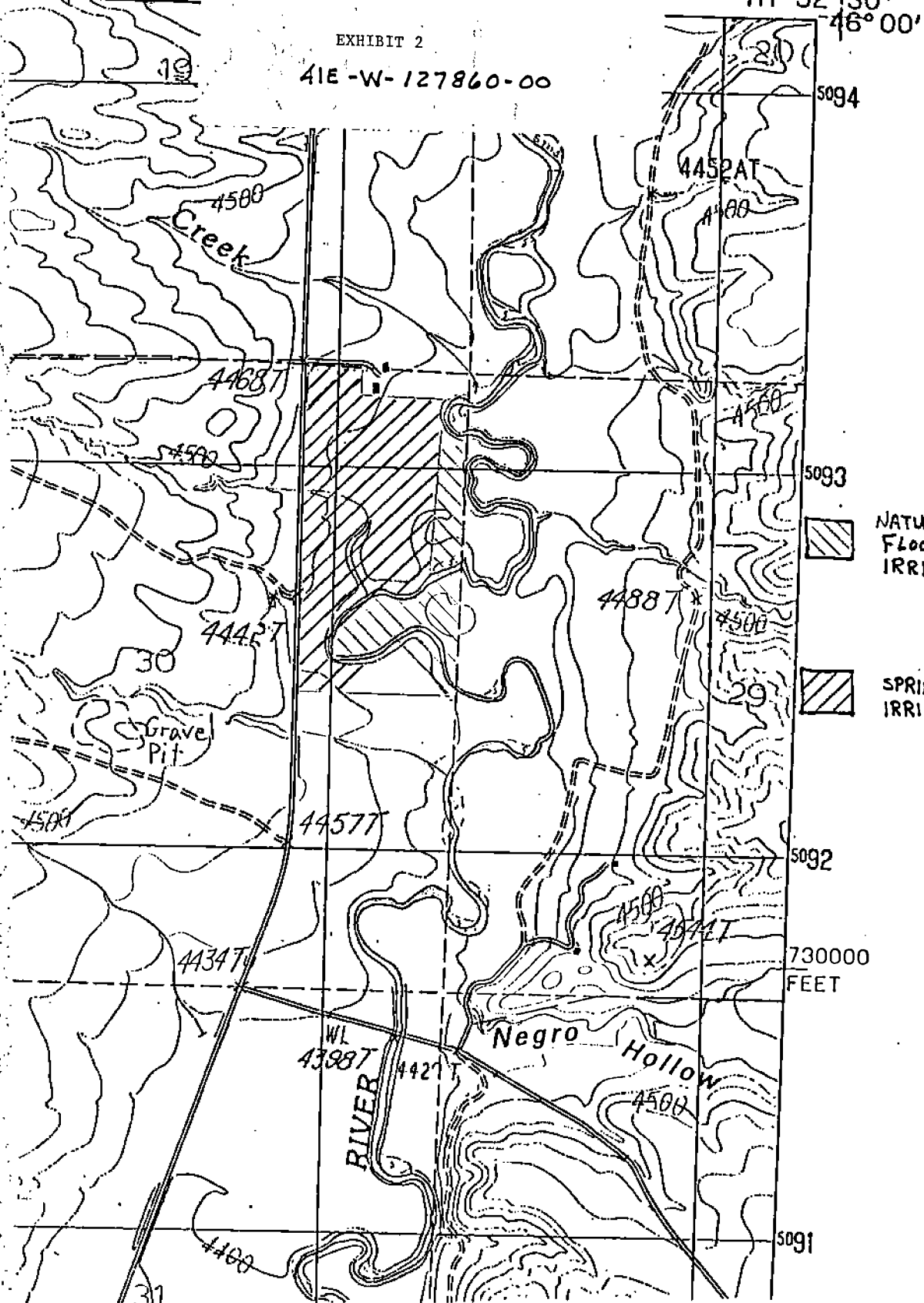
DOHERTY MOUNTAIN QUADRANGLE  
MONTANA-JEFFERSON CO.  
7.5 MINUTE SERIES (TOPOGRAPHIC)

0000 FEET

111° 52' 30"  
46° 00'

EXHIBIT 2

41E-W-127860-00



NATURAL  
FLOOD  
IRRIGATION

SPRINKLER  
IRRIGATION

730000  
FEET

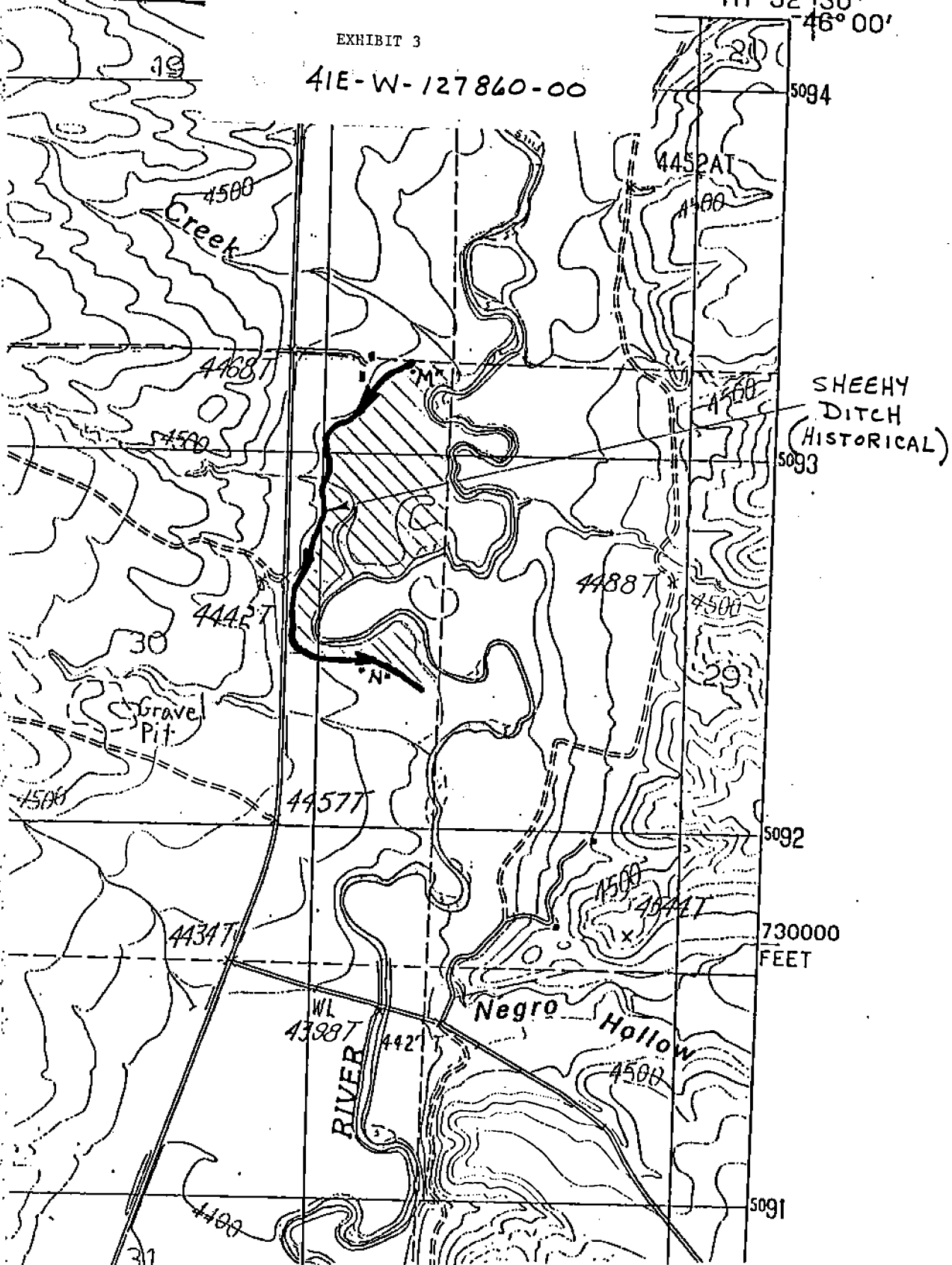
DOHERTY MOUNTAIN QUADRANGLE  
MONTANA-JEFFERSON CO.  
7.5 MINUTE SERIES (TOPOGRAPHIC)

0000 FEET

111° 52' 30"  
46° 00'

EXHIBIT 3

41E-W-127860-00



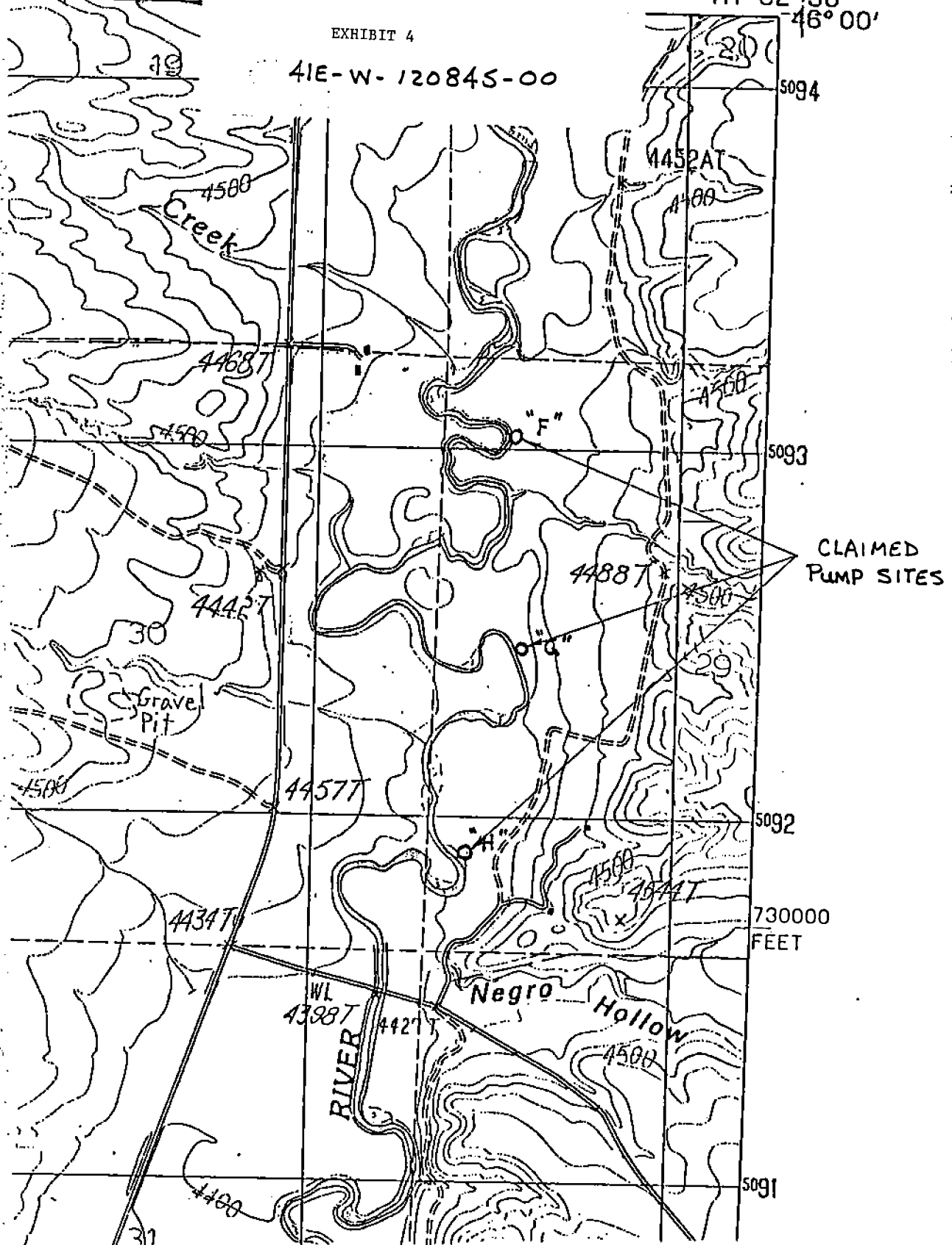
DOHERTY MOUNTAIN QUADRANGLE  
MONTANA-JEFFERSON CO.  
7.5 MINUTE SERIES (TOPOGRAPHIC)

0000 FEET

111° 52' 130"  
46° 00'

EXHIBIT 4

41E-W-120845-00



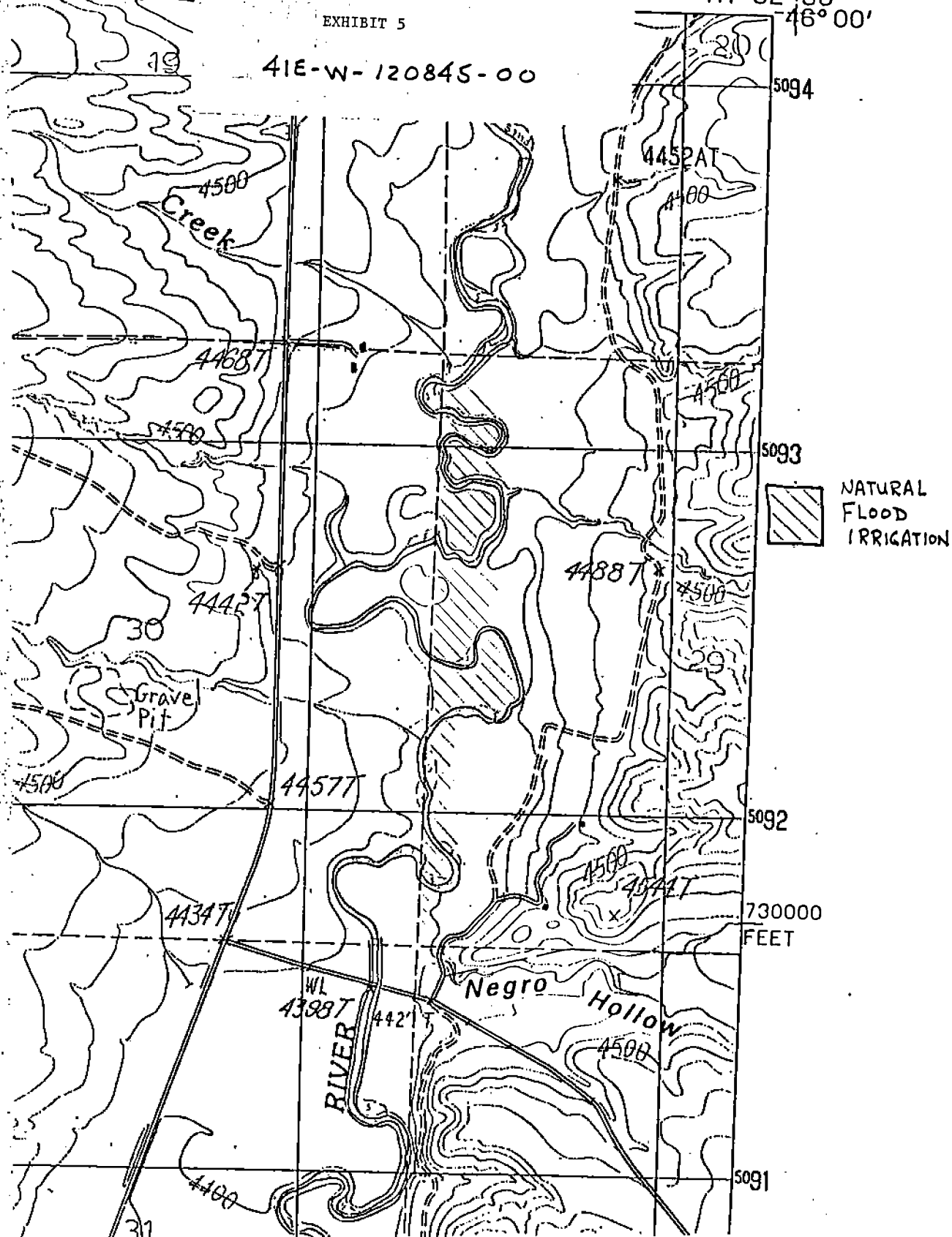
DOHERTY MOUNTAIN QUADRANGLE  
MONTANA-JEFFERSON CO.  
7.5 MINUTE SERIES (TOPOGRAPHIC)

1000 FEET

EXHIBIT 5

41E-W-120845-00

111° 52' 30"  
46° 00'



CLAIM # 41E-W-127860-00



PHOTO # 1 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW SOUTH LOCATION DOVER PROPERTY  
SUBJECT NATURAL FLOOD IRRIGATION

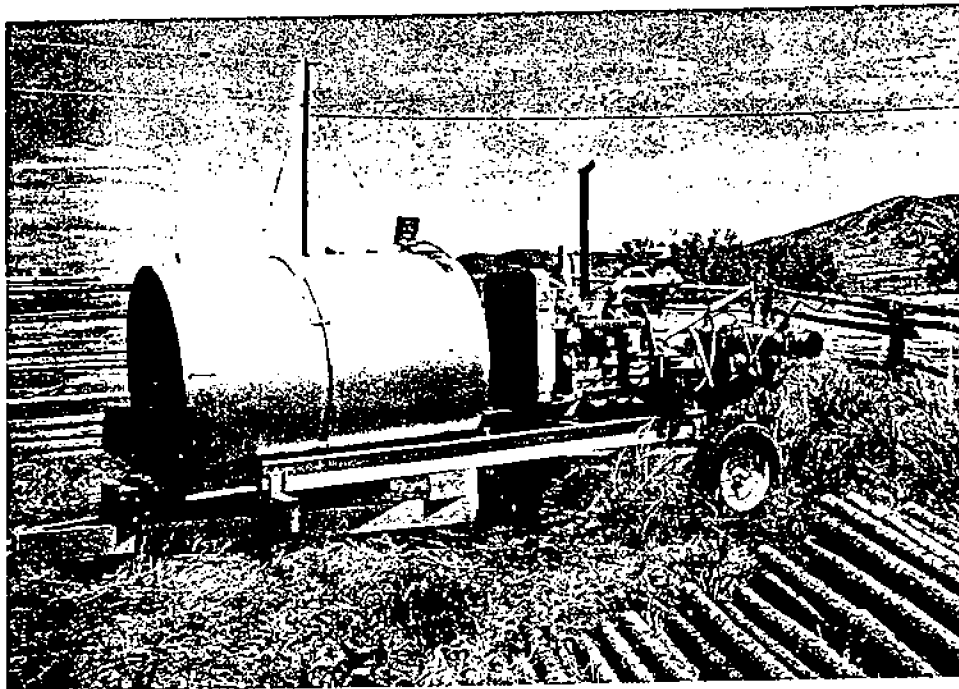


PHOTO # 2 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW NORTH LOCATION DOVER PROPERTY  
SUBJECT PORTABLE PUMP AND DIESEL ENGINE

CHAIN # 41E-W-127860-00

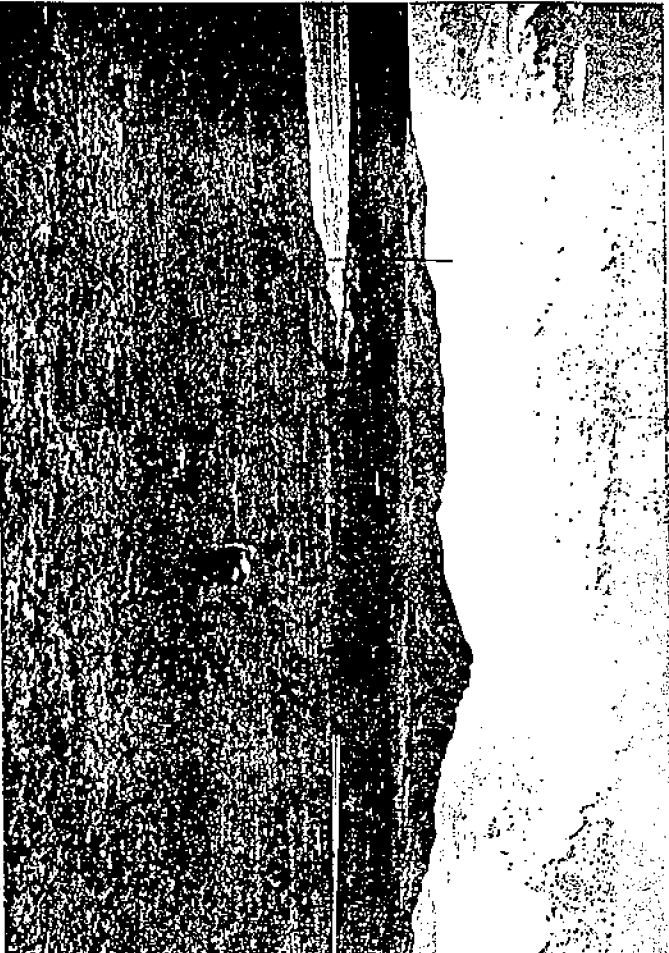


PHOTO # 3 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW SOUTH LOCATION DOVER PROPERTY  
SUBJECT PUMP SITE FOR PORTABLE DIESEL POWERED  
UNIT 1 NAME NE NE NE S 20 T 3 N R 2 W



PHOTO # 4 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW SOUTHWEST LOCATION DOVER PROPERTY  
SUBJECT 5" MAINLINE



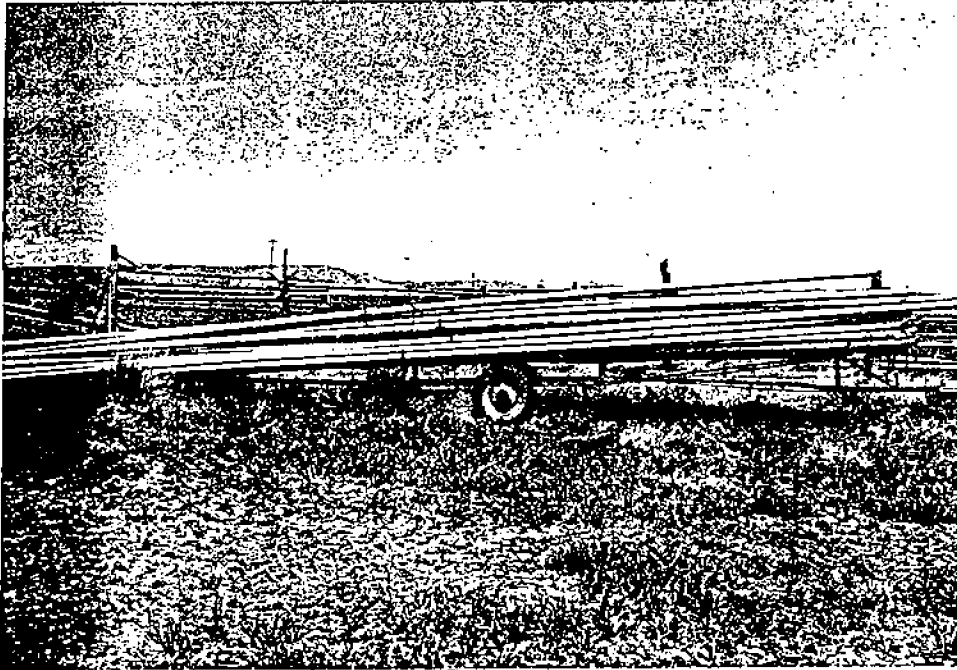


PHOTO # 5 TAKEN BY KON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW NORTH  
SUBJECT HANDLINE LATERALS ON TRAILER

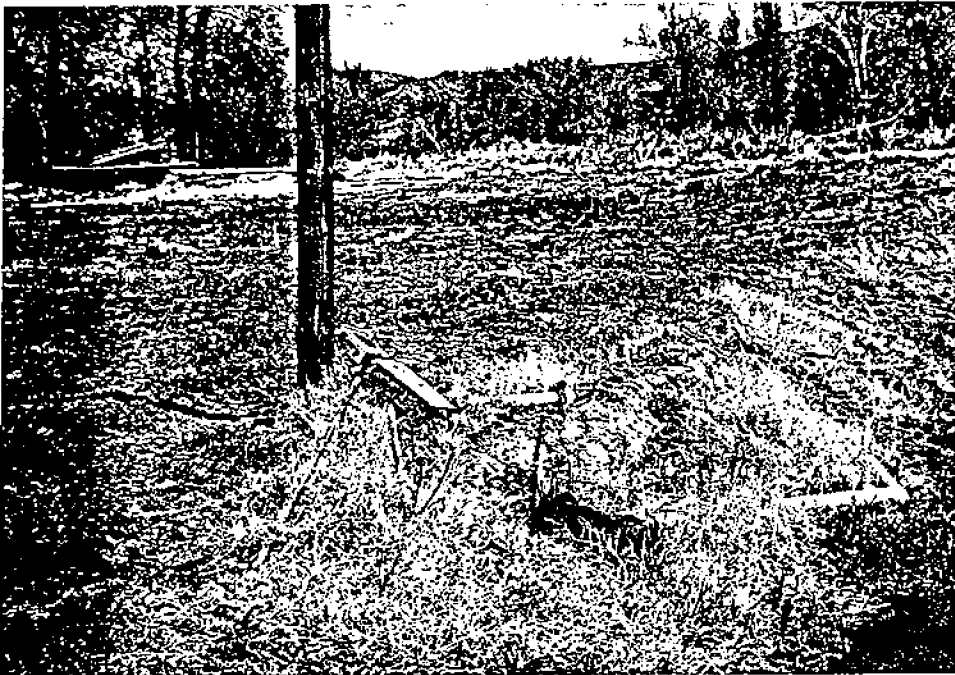


PHOTO # 6 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW NORTH  
SUBJECT POWER POLE AND REMAINS OF PUMP SITE  
FOR PORTABLE ELECTRIC PUMP UNIT  
NENE NE S30 T3N R2W



PHOTO # 7 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW NORTH  
SUBJECT EVIDENCE OF "SHEEHY DITCH" WHERE  
IT ENTERS DOVER PROPERTY



PHOTO # 8 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW EAST  
SUBJECT EVIDENCE OF "SHEEHY DITCH" JUST BEFORE  
IT EXITS DOVER PROPERTY

CLAIM # 41E-W-12084S-00

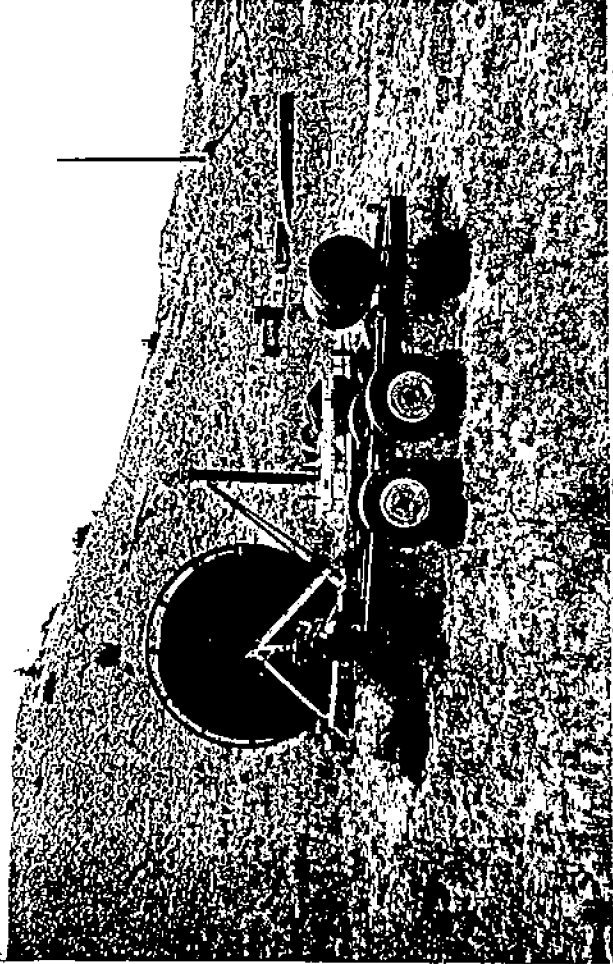


PHOTO # 9 TAKEN BY KON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW EAST LOCATION PRUSSACK PROPERTY  
SUBJECT "BOSS" TRAVELING ANTENNA

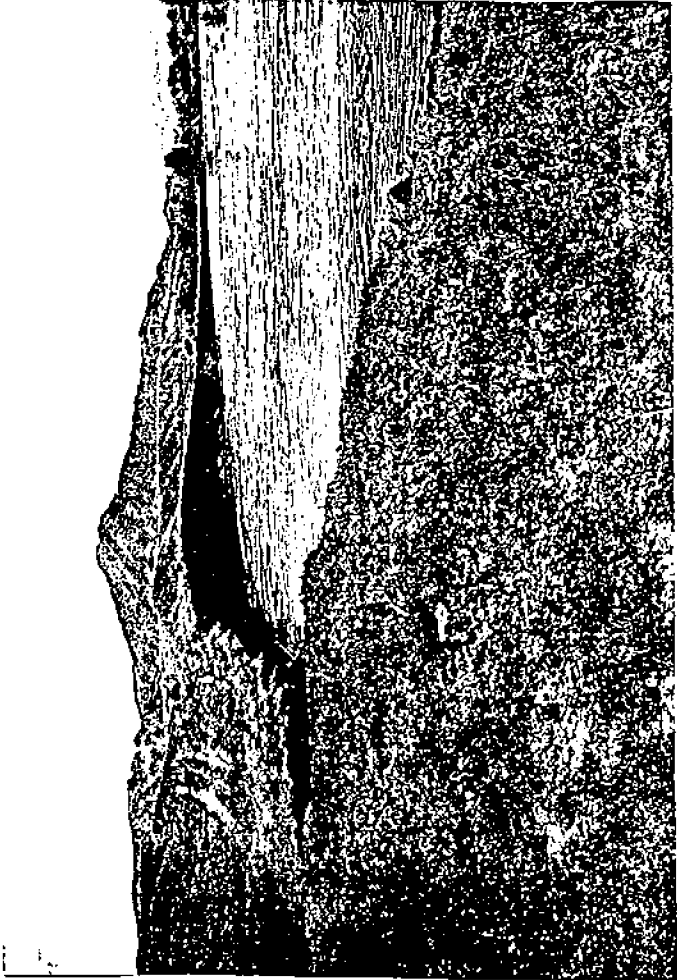


PHOTO # 10 TAKEN BY KON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW SOUTH LOCATION PRUSSACK PROPERTY  
SUBJECT CLAIMED POINT OF DIVERSION  
SW. 1/4 NW. 5. 23. T. 3 N. R. 2 W.

CLASH #41E-W-120845-00

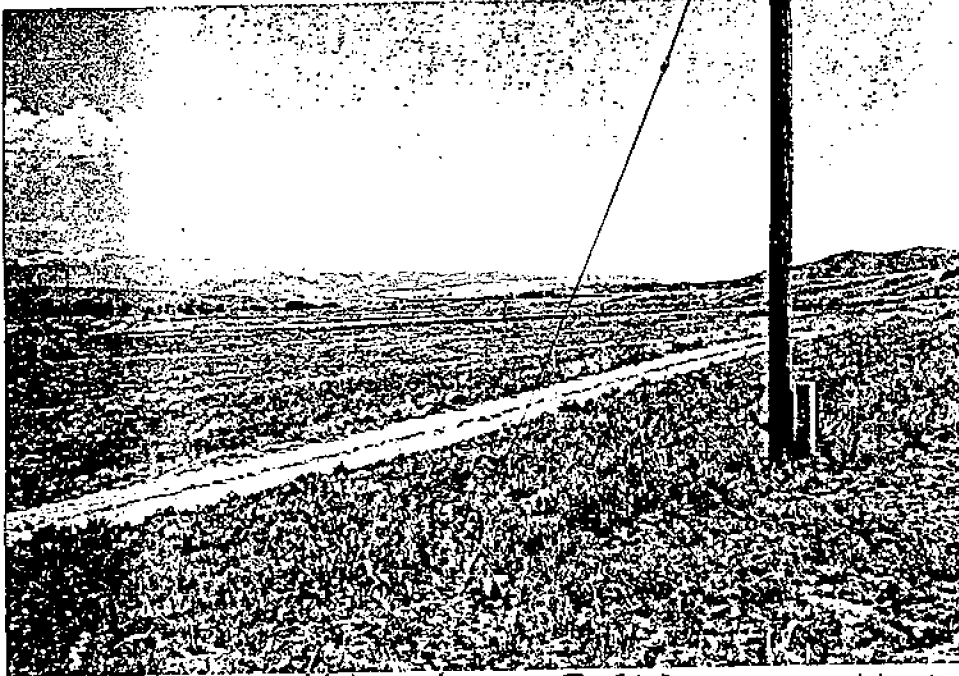


PHOTO # 11 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW NORTHWEST LOCATION PRUSSACK PROPERTY  
SUBJECT CLAIMED PLACE OF USE - W $\frac{1}{2}$  S 29 T3N R2W

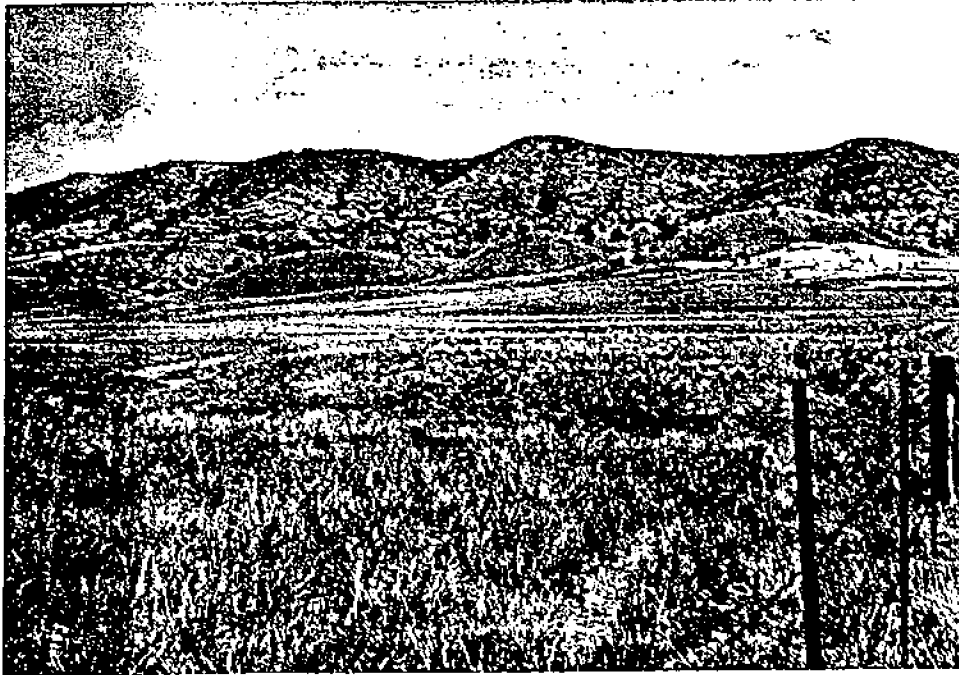


PHOTO # 12 TAKEN BY RON SCHOFIELD DATE MAY 23, 1991  
DIRECTION OF VIEW EAST LOCATION PRUSSACK PROPERTY  
SUBJECT CLAIMED PLACE OF USE - SE S 29 T3N R2W

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FIELD INVESTIGATION REPORT (Claim Nos. 41E-W120845-00 and 41E-W127860-00, Case No. 41E-93) was served by mail by Rita Nason, an employee of the Department of Natural Resources and Conservation upon all parties of record at their address or addresses this 26<sup>th</sup> day of November, 1991 as follows:

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