

MAR 10 2000

IN THE WATER COURT OF THE STATE OF MONTANA

Montana Water Cou

EDNA M. GILLESPIE and RICHARD)
E. GILLESPIE,)

Plaintiffs and)
Counter-Defendants,)

-v-)

HOWARD BLAKELY, YOLANDA BLAKELY,)
LORENE BLAKELY, BLAKELY FARMS,)
BECKY BLAKELY, in her capacity as)
Trustee of Blakely Farms, and)
PAUL BLAKELY and STAN LONG, in)
their capacity as Purported)
trustees of BLAKELY FARMS,)

Defendants and)
Counter-Claimants)

LORENE L. BLAKELY and YOLANDA)
BLAKELY,)
Cross-Claimants,)

-v-)

HOWARD BLAKELY, BLAKELY FARMS,)
BECKY BLAKELY, in her capacity)
as Trustee of Blakely Farms,)
and PAUL BLAKELY and STAN LONG,)
in their capacity as Purported)
trustees of BLAKELY FARMS,)

Cross-Defendants.)

CASE NO. WC-99-1

**ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Introduction

On January 25, 2000, Plaintiffs Edna M. Gillespie and Richard E. Gillespie filed their Motion for Summary Judgment and a memorandum in support. Plaintiffs have moved for summary judgment in their favor on the question certified from the Montana Eighteenth Judicial District Court, Gallatin County, i.e., that Howard Blakely a/k/a Ralph H. Blakely, or by any other alias, Lorene L. Blakely, Yolanda Blakely, Blakely Farms, or any purported successor in interest from any of them did not have any water rights from Rea¹ Creek for any use on any of the land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E, in 1994 and have not had any water rights since. This Motion is based upon the failure of Defendants to respond to certain discovery requests propounded by Plaintiffs. On February 22, 2000, Plaintiffs filed their Motion for Summary Ruling with Memorandum in Support. As of this date, none of the Defendants against whom summary judgment is sought have responded to Plaintiffs' motions.

Procedural History

The Plaintiffs filed suit in the Montana Eighteenth Judicial District Court, Gallatin County, Cause No. DV-95-209, against the Defendants in July of 1995, claiming that Howard Blakely had committed several acts that infringed on ditch and water rights of the Plaintiffs. At paragraphs 8 and 9 of the Complaint, Plaintiffs alleged:

8. None of the defendants have any water rights from Rea Creek for any use on any of the land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E.
9. In July, 1994...with an earthen dam Howard Blakely completely blocked the flow of water in the "Gillespie-Trim bath Ditch" at the point where that ditch enters the SE1/4 of Section 21, T2N, R2E. He diverted the water westward through a ditch and flume across Rea Creek and put the water to an unlawful and improper use on the Blakely

¹ Rea Creek and Rea Creek are the same source. Rea Creek is the preferred name by DNRC because it is the source name reflected in the United States Geological Survey topographic map of the area. See Rule 2. VI(1), Water Right Claim Examination Rules. Since the District Court and the parties use the term Rea Creek throughout the proceedings, this Order will use Rea Creek to maintain consistency. However, any claim abstract for Rea Creek will identify the source as Rea Creek.

property west of Rea Creek for some period of time in 1994. Although ordered by this Court's water mediator...to remove the obstruction in the "Gillespie-Trim bath Ditch," none of the defendants did until some time between May 28, 1995 and July 2, 1995, when, without consent of the plaintiffs, the earthen dam was replaced with a makeshift dam of corrugated metal and sticks so that the defendants have been and are putting Rea Creek water to an unlawful and improper use on the Blakely property west of Rea Creek.

In February 1996, Plaintiffs moved for partial summary judgment concerning the water rights of the Defendants west of Rea Creek. The District Court found that issues of material fact existed concerning the rightful ownership and use of the water in question, and noted that the Water Court has exclusive jurisdiction to determine existing water rights pursuant to Section 3-7-501, MCA. On January 25, 1999, the District Court certified this question to the Montana Water Court:

Whether Howard Blakely a/k/a Ralph H. Blakely, or by any other alias, Lorene L. Blakely, Yolanda Blakely, Blakely Farms, or any purported successor in interest to any of them had any water rights from Rea Creek for any use on any of the land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E, in 1994 or have had since.

By letter dated May 5, 1999 and with the agreement of the parties, the Water Court requested the assistance of the Department of Natural Resources and Conservation (DNRC) to prepare a report identifying all water right claims of any type which were filed on any land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E.

On May 12, 1999, Rusty Taylor, Water Resources Specialist with the Bozeman DNRC, filed his report. The report identified four active water right records for use on land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E. Two represented irrigation/stock well certificates. One claim, 41F-B-214773-00, was a "late" Madison River irrigation claim. Only one claim, 41F-W-046022-00, represented an irrigation claim for Rea Creek waters.

Claim 41F-W-046022-00 was originally filed by Yolanda Blakely out of Rea Creek for irrigation purposes. The Temporary Preliminary Decree on the Madison River Basin (Basin 41F)

was issued in 1984. Claim 41F-W-046022-00 was included in the Temporary Preliminary Decree and identified the owner as Yolanda Blakely, the source as Rea Creek, and the place of use for irrigation as 80 acres in the SE1/4, Section 21, T2N, R2E. The 80 acre place of use is broad enough to include land west of Rea Creek. According to the May 12, 1999 DRNC report, this claim is currently in the name of Blakely Farms.

Claim 41F-B-214773-00, also referenced in the May 1999 DNRC report, asserts a place of use on land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E. A DNRC remark on the claim abstract questions whether claims 41F-W-046022-00 and 41F-B-214773-00 are redundant. The question certified by the District Court does not address Madison River water and consequently, this Order does not address claim 41F-B-214773-00.

On August 10, 1999, the Plaintiffs submitted a motion for summary judgment on the question certified to the Water Court. On September 29, 1999, this Court found a genuine issue of material fact concerning the source of the water the Blakelys were using for irrigation, denied the motion, and set a pre-hearing schedule.

Subsequently, the Plaintiffs entered a stipulation with Defendants Yolanda Blakely, Lorene Blakely, and Becky Barker, f/k/a Becky Blakely, agreeing that the Water Court could enter an order that none of those Defendants had a water right for lands west of Rea Creek. This stipulation was filed with the Water Court on November 30, 1999. The same stipulation was extended to Howard Blakely and Blakely Farms, however, these Defendants did not sign the stipulation.

A separate order addresses the November 30, 1999 stipulation. With the agreement of the parties, the Court issued a new discovery schedule. On December 2, 1999, the Plaintiffs served Howard Blakely, Blakely Farms, Paul Blakely and Stan Long with requests for admission relating to ownership of a water right for use on lands west of Rea Creek. These Defendants have not

responded to any of the requests for admission.

Discussion

Motions for summary judgment are governed by Rule 56, M.R.Civ.P. Rule 56(c) provides that:

[t]he motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c), M.R.Civ.P. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. Town of Cascade*, 284 Mont. 167, 173, 943 P. 2d 1262 (1997) citing *Berens v. Wilson*, 246 Mont. 269, 271, 806 P.2d 14, 16 (1990).

The Court shall render judgment in favor of the party requesting summary judgment if the record demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Once the moving party has sufficiently demonstrated the absence of any genuine material fact issues, the burden shifts to the non-moving party to demonstrate the existence of material fact issues rendering summary judgment improper. *Thelen v. City of Billings*, 238 Mont. 82, 85, 776 P.2d 520 (1989).

Generally, failure to file an answer brief to an adverse motion, as the Defendants have done here, is considered an admission that the motion is well taken. Rule 2(b), Montana Uniform District Court Rules. However, in the case of summary judgment, Rule 56(c) contemplates that the party opposing the motion may serve opposing affidavits raising a genuine material fact issue up until the day prior to hearing. Thus, the general rule is that where the motion is one for summary judgment, the essential question for the Court is whether a genuine issue of material fact exists, and this

question cannot be decided on a mere technical fact, such as the failure to file briefs on time. *Cole v. Flathead County*, 236 Mont. 412, 416, 771 P.2d 97 (1989). Because a factual issue may be raised by opposing affidavits served the day prior to the time set for hearing, the general rule is that unless the right to a hearing on a Rule 56 motion is specifically waived by all parties, either the movant or the adverse parties are entitled to a hearing in the ordinary case. *Cole*, 236 Mont. at 419. Simply failing to file briefs on time does not amount to a specific waiver of the right to a hearing under *Cole*.

Notwithstanding this general rule, it is not necessary for the Water Court to hold a hearing on the Motion for Summary Judgment in this case. The facts of this case distinguish it from "the ordinary case" presented in *Cole*. Here, the opposing parties not only failed to respond to the Plaintiffs' Motion for Summary Judgment, they first failed to respond in a timely manner to discovery requests made pursuant to Rule 36, M.R.Civ.P. Pursuant to Rule 36, Howard Blakely, Blakely Farms, Paul Blakely and Stan Long were asked to admit the truth of the following statements:

A permit has not been issued by the Montana Department of Natural Resources and Conservation (DNRC) since July 1, 1973, to divert water from Rea Creek for any beneficial use on the land west of Rea Creek in the SE1/4, Section 21, T2N, R2E, in Gallatin County, Montana [hereinafter SE1/4 of Section 21].

A permit has not been issued by DNRC since July 1, 1973, to divert water from the Madison River through Rea Creek for any beneficial use on the land west of Rea Creek in the SE1/4 of Section 21.

Defendant Howard Blakely, by any name, has never had an ownership interest or any other interest in law or equity in the SE1/4 of Section 21.

Defendant Howard Blakely, by any name, does not claim any interest or any other interest in law or equity in the SE1/4 of Section 21.

Defendant Howard Blakely, by any name, has never had any ownership interest in any water right for use on the west side of Rea Creek in the SE1/4 of Section 21.

Defendant Howard Blakely, by any name, does not claim any ownership interest in any water

right for use on the west side of Rea Creek in the SE1/4 of Section 21.

The defendants, by any name, did not irrigate any of the land in the SE1/4 of Section 21 prior to July 1, 1973.

The defendants, by any name, did not irrigate any of the land in the SE1/4 of Section 21 until after 1974.

Blakely Farms never had any ownership interest in any water right for use anywhere on the SE1/4 of Section 21 prior to July 1, 1973.

Regardless of the source, the headgate in the NE1/4NE1/4NE1/4, Section 28, T2N, R2E, Gallatin County, Montana, has been the point of diversion of any water diverted from Rea Creek by or on behalf of the defendants or their successors for irrigation of the land west of Rea Creek in the SE1/4 of Section 21.

Ditches east of Rea Creek from the point of diversion to a conveyance across Rea Creek to the west side has been the means of transporting any water diverted from Rea Creek by or on behalf of any of the defendants or their successors for irrigation of the land west of Rea Creek in the SE1/4 of Section 21.

The conveyance in the ditch across Rea Creek that transports water for irrigating the land west of Rea Creek in the SE1/4 of Section 21 was constructed after July 1, 1973.

The only source of a water right for irrigation of the land west of Rea Creek in the SE1/4 of Section 21 is claim 41F-W-046022-00 or late claim 41F-W-B214773-00.²

Failure to respond to a Rule 36 request carries with it consequences independent of Uniform District Court Rule 2 and Rule 56. Rule 36(a) provides that a request for admission is deemed admitted unless answered or objected to within thirty days after service of the request. Rule 36(b), M.R.Civ.P. then provides that "[a]ny matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." (Emphasis added.)

Several cases have held that admissions obtained by use of Rule 36 may show that there are no genuine issues of material fact and justify the entry of summary judgment. *See Holmes & Turner*

² Claim 41F-W-046022-00, as discussed on pages 3 and 4, is an irrigation claim for Rea Creek water currently in the name of Blakely Farms and with a broadly defined place of use on 80 acres in the SE1/4 of Section 21. Claim "41F-W-B214773" (more properly denominated as 41F-B-214773-00) is a "late" irrigation claim for Madison River water as discussed on page 4, and not relevant to the question certified by the District Court.

v. Steer-In, 222 Mont. 282, 721 P.2d 1276 (1986)³; *Morast v. Auble*, 164 Mont. 100, 105, 519 P.2d 157 (1974), *citing* 8 Wright & Miller, *Federal Practice and Procedure: Civil Section* 2264. These cases were decided prior to *Cole* and the issue of the necessity for setting a hearing was not addressed. Regardless, these cases can be reconciled with *Cole*. *Cole* specifically recognizes that there are exceptions to the hearing requirement:

. . . unless the right to a hearing on a Rule 56 motion is specifically waived by all parties (and not waived simply by the failure to file briefs) either the movant or the adverse parties are entitled to a hearing under Rule 56 in the ordinary case. There may be an occasion when under the law and the facts adduced, the movant would be so clearly entitled as a matter of law to a summary judgment that a district court might by order dispense with the necessity of a hearing.

Cole, 236 Mont. at 419 (Emphasis added).

In this case, the admissions requested by the Plaintiffs (and now deemed admitted by Defendants' failure to respond) are that the Defendants did not have any water rights from Rea Creek for use on any of the land west of Rea Creek in the SE 1/4 of Section 21, T2N, R2E in 1973, and have not acquired any right since. Once these facts are admitted, they essentially answer the question certified to this Court. A fact deemed admitted by the operation of Rule 36, M.R.Civ.P. is conclusively established.

³ For example, in *Holmes*, the sole factual allegation in the complaint was as follows:

Defendants, and each of them, owe plaintiff SIX THOUSAND THREE HUNDRED THIRTY FIVE DOLLARS (\$6,335.00) for accounting services rendered by plaintiff to defendants, and each of them, between July 15, 1980 and January 5, 1981, with interest at the rate of eighteen percent (18%) per annum.

Defendants denied this allegation in their answer and alternatively pled the affirmative defense of failure of consideration. Later, the plaintiffs made the following request for admission pursuant to Rule 36 M.R.Civ.P.:

Admit that the Defendant Steer-In owes Plaintiff the sum of \$6,335 plus interest at the rate of 18% per annum for accounting services rendered by Plaintiff to Defendant between July 15, 1980 and January 5, 1981.

Over eight months passed between the time Steer-In was served with the request and when the Court issued its Order deeming the facts in the request admitted and granting summary judgment to the plaintiff. The Supreme Court affirmed, holding that summary judgment based on a fact deemed established by the operation of Rule 36, M.R.Civ.P. was proper. The Court reasoned that once the particular request was admitted, there could no longer be any issues of fact for determination at trial. The Court further noted that "the very purpose of Rule 36 is to lessen the time of trial and ultimately to set the stage for summary judgment." *Holmes*, 222 Mont. at 285.

The burden has shifted to these Defendants to raise a genuine material fact issue regarding the existence of their water rights. *Thelen*, 238 Mont. at 85. To do this, the Defendants must file late answers to the requests for admissions.

A party has no absolute right to file late answers to requests for admissions. The matter rests within the discretion of the trial court, and the court's decision will not be disturbed in the absence of a manifest abuse of discretion. Rule 36, M.R.Civ.P.; *Swenson v. Buffalo Building Co.*, 194 Mont. 141, 148, 635 P.2d 978 (1981). None of the Defendants in this summary judgment proceeding filed timely answers or requested leave of Court to file late answers to the discovery requests. For whatever reasons, these Defendants chose to take little or no further action to support their claim of water rights.

The only "Blakely" claim for a Rea Creek water right for use on land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E, is claim 41F-W-046022-00. As a result of the actions of the Defendants in this case, the place of use identified in claim 41F-W-046022-00 should be refined to exclude land west of Rea Creek in the SE1/4 of Section 21.

To facilitate the refinement, the Court requested Rusty Taylor of the Bozeman DNRC to identify the acreage east of Rea Creek in the SE 1/4 of Section 21, T2N, R2E. A copy of his review is attached. The parties are encouraged to review the DNRC legal description and provide an alternative proposal if they wish to do so. If no alternative is filed by March 27, 2000, the place of use for irrigation and the maximum acres on the abstract of Claim 41F-W-046022-00 will appear, together with a clarification remark, as follows:

	<u>ACRES</u>	<u>QTR. SEC.</u>	<u>SEC.</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	14.0	N2SESE	21	2N	2E	GALLATIN
002	37.0	NESE	21	2N	2E	GALLATIN
003	<u>20.0</u>	NWSE	21	2N	2E	GALLATIN
TOTAL	71.0					

IN WATER COURT CASE WC-99-1, IT WAS DETERMINED THAT NO LAND WEST OF REY CREEK IS IRRIGATED WITH THIS CLAIM.

After the abstract of claim 41F-W-046022-00 is modified, this decision will be returned to the District Court in accordance with Section 85-2-406(2)(b), MCA. The Court anticipates filing its report with the District Court after April 10, 2000. A copy of this Order and subsequent orders in this case affecting claim 41F-W-046022-00 will be placed in the 41F-W-046022-00 claim file.

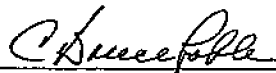
ORDER

A hearing is not necessary on the Plaintiffs' Motion for Summary Judgment because the Defendants against whom summary judgment is sought have admitted that they do not have any water rights from Rea Creek for any use on any of the land west of Rea Creek in the SE1/4 of Section 21, T2N, R2E, in 1973 and have not had any water rights since. Therefore, pursuant to Rules 36 and 56, M.R.Civ.P., it is

ORDERED that the facts stated in the Plaintiffs' requests for admissions are DEEMED ADMITTED with respect to the Defendants against whom summary judgment is sought;

ORDERED that the Plaintiffs' Motion for Summary Judgment is **GRANTED**.

DATED this 7 day of MARCH, 2000.



C. Bruce Loble
Chief Water Judge

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TO: Judge Loble
From: RT
Date: 3-3-2000

RECEIVED

MAR 06 2000

Montana Water Court

RE: Blakely (41F W046022)

Judge, my review of the aerial indicates about 71 acres vs. 80, as follows:

14.0 N2SESE 21

37.0 NESE 21

20.0 NWSE 21

71.0 TOTAL

PS. Best maps to follow in mail.

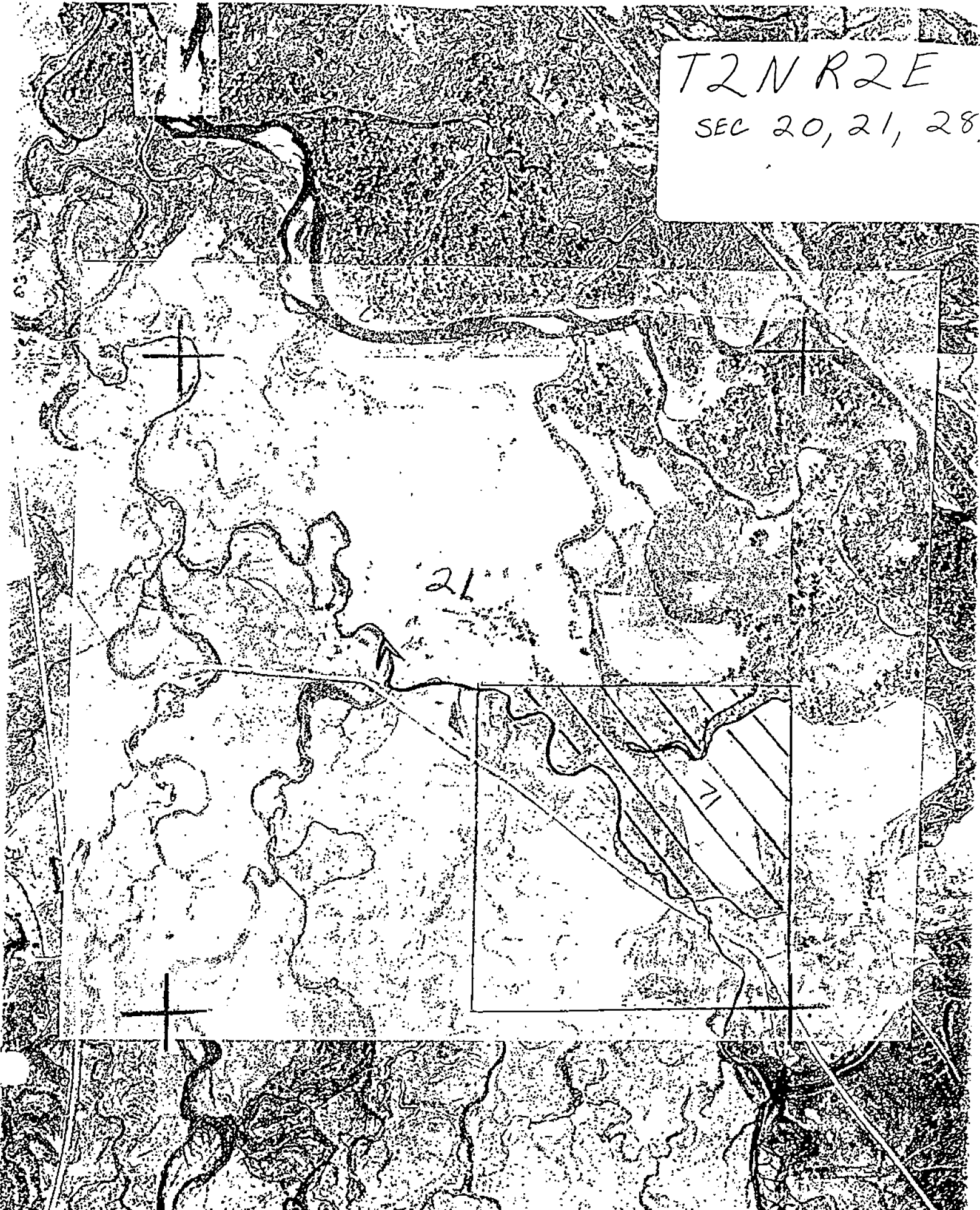
AERIAL 179-46L/1979

T2N R2E

SEC 20, 21, 28

21

21



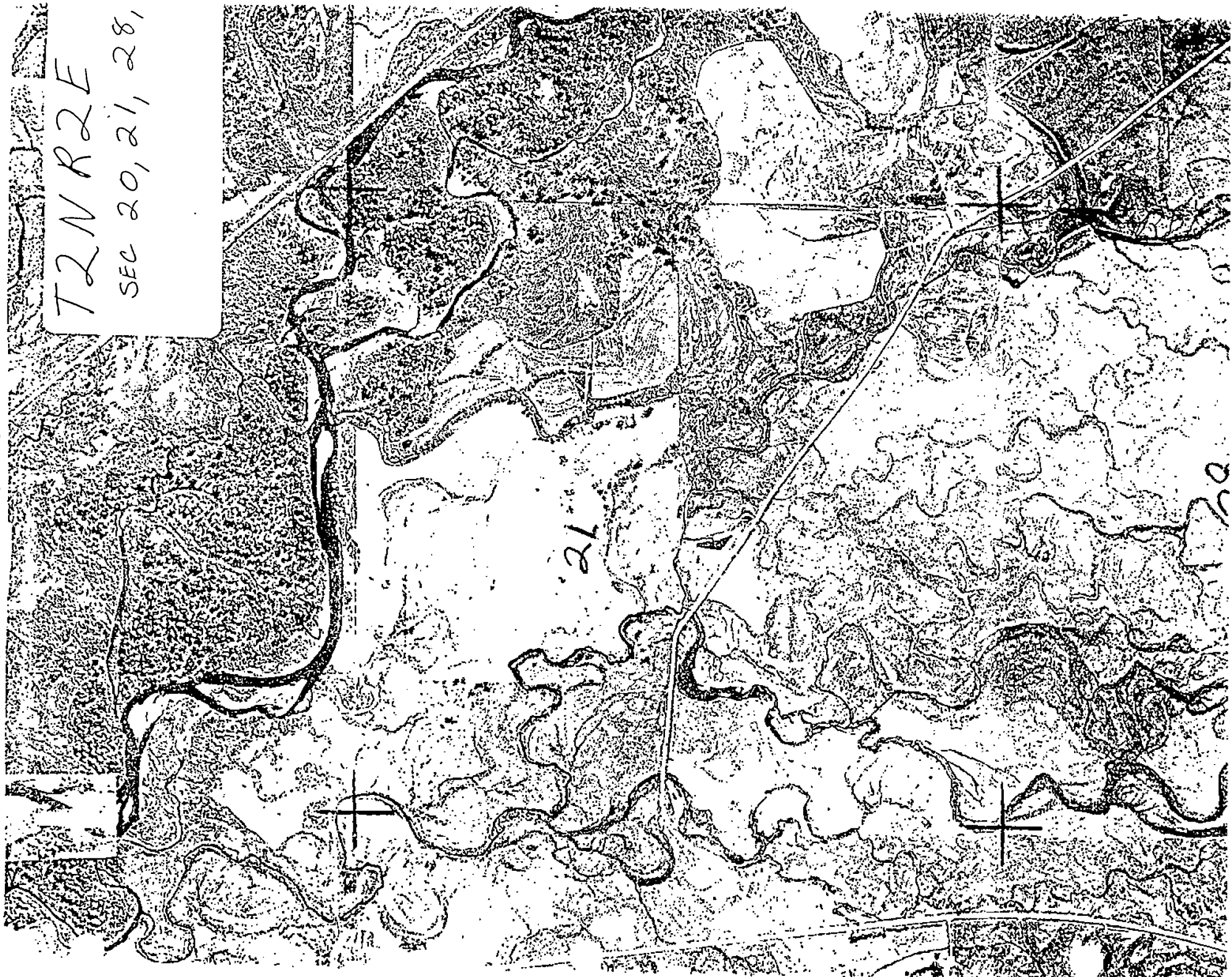
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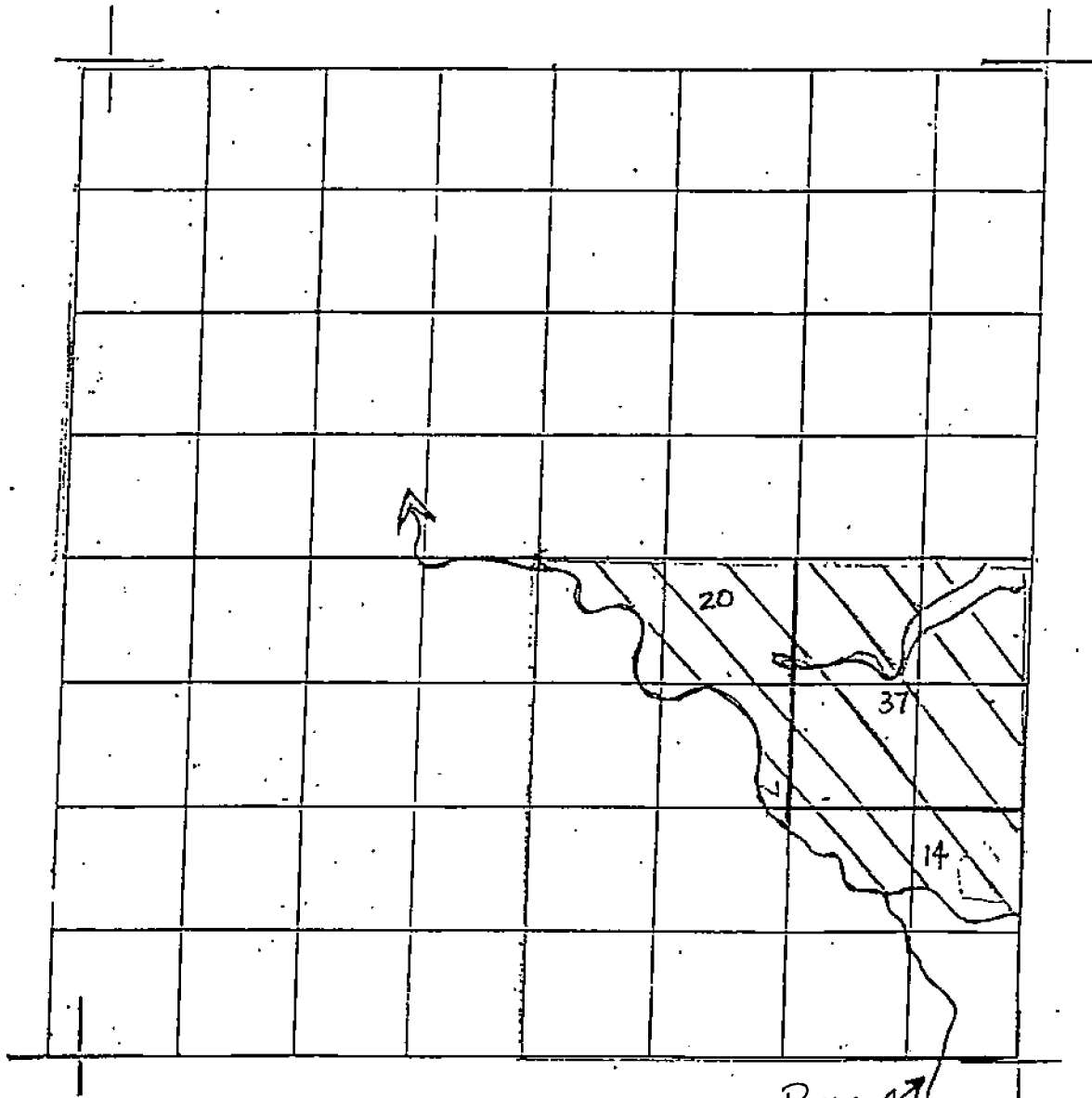
T2NR2E

SEC 20, 21, 28,

21

20





REY CREEK

14 AC N2SESE
37 AC NESE
20 AC NWSE

71 AC