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Department of Water Resources

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Ben D. Jernberg

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Subcase No. 31-07311

Case No. 39576,

**MOTION TO SET ASIDE AND VACATE PARTIAL
DECREE AND TO ALLOW THE FILING OF A
LATE OBJECTION**

COMES NOW the claimant, Ben D. Jernberg, by and through his attorney of record, Roger D. Ling of the firm Ling, Robinson & Walker, and moves the Court, pursuant to Rule 7(b)(1) of the Idaho Rules of Civil Procedure, for an Order setting aside and vacating the Partial Decree entered in Subcase No. 31-07311 on the grounds and for the reasons that said partial decree is void and constitutes a fraud upon the Court, and good cause appears for the granting of such motion pursuant to Rule 60(b) of the Idaho Rules of Civil Procedure, and to grant leave to claimant to file a late objection.

MOTION TO SET ASIDE AND VACATE PARTIAL DECREE
AND TO ALLOW THE FILING OF A LATE OBJECTION

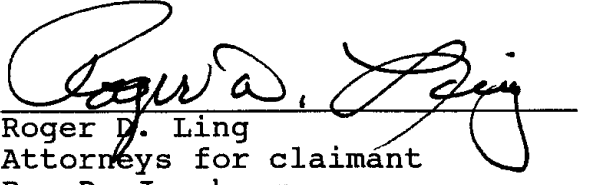
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3 Affidavits of claimant Ben D. Jernberg and Roger D. Ling,
4 and a memorandum of law are submitted herewith in support of this
5 motion, which motion is supplemental to the motion of claimant Ben
6 D. Jernberg, who filed with the court written documents deemed to
7 constitute a motion, pro se, dated April 14, 2003.

8 Oral argument is requested on this motion.

9 DATED this 15th day of July, 2003.

10 LING, ROBINSON & WALKER

11
12 By: 

13 Roger D. Ling
14 Attorneys for claimant
15 Ben D. Jernberg
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
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In Re SRBA)

Subcase No. 31-07311

Case No. 39576,)

MEMORANDUM IN SUPPORT OF MOTION TO
 SET ASIDE AND VACATE PARTIAL DECREE
 AND FOR LEAVE TO FILE LATE OBJECTION

BRIEF NARRATIVE

This is a memorandum in support of claimant's motion to set aside and vacate the partial decree entered in this subcase pursuant to Rule 60(b) of the Idaho Rules of Civil Procedure and to allow the filing of a late Objection.

POINTS AND AUTHORITIES

Unlawful Procedures of IDWR in Issuing License

Idaho Code §42-229 entitled "Methods of appropriation." states:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act;

MEMORANDUM IN SUPPORT OF MOTION TO
 SET ASIDE AND VACATE PARTIAL DECREE
 AND FOR LEAVE TO FILE LATE OBJECTION - 1

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3 But the administration of all rights to the
4 use of ground water, whenever or however
5 acquired or to be acquired, shall, unless
6 specifically excepted herefrom, be governed by
7 the provisions of this act.

8
9 Idaho Code §42-217 provides the means by which a permit
10 holder may provide proof of application to beneficial use of water
11 diverted under a permit. It further provides that upon receipt of
12 the applicant's proof, the Department of Water Resources shall
13 examine and cause to be examined:

14 1. The place where such water is diverted
15 and used, and, if the use is for irrigation,
16 he shall ascertain the area and location of
17 the land irrigated and the nature of all the
18 improvements which have been made as a direct
19 result of such use.

20 2. The capacities of the ditches or canals
21 or other means by which such water is conduct-
22 ed to such place of use, and the quantity of
23 water which has been beneficially applied for
24 irrigation or other purposes.

25 Idaho Code §42-219 entitled "Issuance of license -
26 Priority. -", provides:

27 Upon receipt by the Department of Water
28 Resources of all the evidence in relation to
such final proof, it shall be the duty of the
Department to carefully examine the same, and
if the department is satisfied that the law
has been fully complied with and that the
water is being used at the place claimed and
for the purpose for which it was originally
intended, the department shall issue to such
user or users a license confirming such use.

29 This section of the Idaho Code further provides that the
30 license shall state the purpose for which water is used, the

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3 quantity of water which may be used and if such use is for
4 irrigation, such license shall give a description, by legal
5 subdivisions, of the land which is irrigated by such water. It
6 further provides that such license shall state the capacity of the
7 works, the date when proof of beneficial use of such water was
8 made, and the date of the priority of the right confirmed by such
9 license. (I.C. §42-219(3)) Finally, Idaho Code §42-219(8)
10 provides that only when the department finds that the applicant has
11 not fully complied with the law and the conditions of the permit
12 may it issue a license for only a portion of the use which is in
13 accordance with the permit. This section does not provide, nor
14 does any other section of the Idaho Code allow the department to
15 issue any license which does not constitute a right to use the
16 water, nor may it issue a conditional license which is subject to
17 and conditional upon some future act to become a licensed right to
18 use waters of the State of Idaho.

19 Idaho Code §42-220 entitled "Effect of license. "
20 provides:

21 Such license shall be binding upon the state
22 as to the right of such licensee to use the
23 amount of water mentioned therein, and shall
24 be prima facie evidence as to such right; and
25 all rights to water confirmed under the provi-
26 sions of this chapter, or by any decree of
27 court, shall become appurtenant to, and shall
28 pass with a conveyance of the land for which
the right of use is granted. The right to
continue the beneficial use of such water
shall never be denied nor prevented for any

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3 cause other than the failure, on the part of
4 the user or holder of such right, to pay the
5 ordinary charges or assessments which may be
6 made or levied to cover the expenses for the
7 delivery or distribution of such water, or for
8 other reasons set forth in this title: Pro-
9 vided, that when water is used for irrigation,
10 no such license or decree of the court allot-
11 ting such water shall be issued confirming the
12 right to the use of more than one second foot
13 of water for each fifty (50) acres of land so
14 irrigated, unless it can be shown to the
15 satisfaction of the department of water re-
16 sources in granting such license, and to the
17 court in making such decree, that a greater
18 amount is necessary, . . .

11 Idaho Code §42-237f provides:

12 **Adjudication of water right.** - The provisions
13 of §§42-1401 - 42-1405, relative to adjudica-
14 tion of water rights shall be applicable to
15 all water rights acquired under this act.

15 In the adjudication of water rights in the State of
16 Idaho, the Director of the Department of Water Resources is
17 required to prepare a Director's Report on the water system to be
18 adjudicated as provided by §42-1411, Idaho Code. Subsection (2) of
19 this section provides, in part:

20 The director shall determine the following
21 elements, to the extent the director deems
22 appropriate and proper, to define and adminis-
23 ter the water rights acquired under state law:

24 (a) . . .

25 (b) . . .

26 (c) The quantity of water used describing the
27 rate of water diversion or, in the case of an
28 instream flow right, the rate of water flow in
cubic feet per second or annual volume of
diversion of water for use or storage in acre-
feet per year as necessary for the proper
administration of the water right;

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3 (d) The date of priority;
4 (e) The legal description of the point(s) of
5 diversion; . . .
6 (f) The purpose of use;
7 (g) . . .
8 (h) A legal description of the place of use;
9 if one (1) of the purposes of use is irriga-
10 tion, then the number of irrigated acres
11 within each forty (40) acre subdivision, . . .
12 (i) Conditions on the exercise of any water
13 right included in any decree, license, or
14 approved transfer application; and . . .
15 (Emphasis added.)

16
17 On February 20, 1979 claimant filed his application for
18 permit with the Idaho Department of Water Resources (IDWR), Permit
19 No. 31-7311, to appropriate 16 cfs of water from a well for the
20 irrigation of approximately 1200 acres. (Jernberg Affidavit, ¶13).
21 Such appropriation of water was consistent with §42-229, Idaho
22 Code. Proof was submitted to IDWR by claimant as required by Idaho
23 Code §42-217. Pursuant to said section of the Code, IDWR
24 thereafter caused an examination to be made by the Department of
25 the place where such water is diverted and used, at which time the
26 agent established the area and location of the land irrigated and
27 the capacities of the pump, ditches and works. (Jernberg Affida-
28 vit, ¶14) (See attachments to Ling Affidavit). The Beneficial Use
Field Report by the Department described two wells at two points of
diversion from which ground water was diverted for the flood
irrigation of 1124 acres in Jefferson County, Idaho owned by
claimant. In the report, it was established under paragraph G that
the new west well had a diversion capacity of 16 cfs, that the east

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3 well which was licensed to divert 8.25 cfs under Water License Nos.
4 31-2395 and 31-2357 was diverting only 5.83 cfs, and the west well
5 was only diverting 13.45 cfs, for a total of 19.28 cfs, which was
6 greater than the 16 cfs sought to be obtained under the permit. It
7 was found that 1124 acres were being irrigated. In that report, it
8 was recommended that a license be issued for 16 cfs with an annual
9 volume of 3,934 acre-feet for the irrigation of 1124 acres. At
10 this point in these proceedings, the calculations, intent and
11 recommendations were consistent with the Idaho Code and the
12 statutory duties of the Director of the Department. On June 15,
13 1987, claimant received a draft of the license to be issued
14 pursuant to Permit No. 31-7311 for a diversion of 13.45 cfs for the
15 irrigation of 1124 acres. (Jernberg Affidavit, ¶15). In March,
16 1989, claims were prepared by IDWR for claimant's three water
17 rights, including the water right represented by Permit No.
18 31-7311. (Jernberg Affidavit, ¶16). A license still had not been
19 issued by that date. After numerous letters between Jernberg and
20 the Department, a license was issued on September 5, 1997 over 10
21 years after the draft license was submitted to Jernberg on June 15,
22 1987. The license issued (see attachment to Jernberg Affidavit)
23 provided for the diversion of 4.62 cfs for the irrigation of 461
24 acres and provided in the license for an additional 4.99 cfs of
25 ground water to be diverted onto 663 acres of uncultivated pasture
26 owned by Jernberg. Although it was unclear and unknown to Jernberg

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3 as to why the sum of these two diversion rates was less than the
4 amount recommended in the report of the Department, Jernberg
5 assumed, as the law must also assume, that both diversions were for
6 irrigation, as they were made under a permit for irrigation, and
7 were used for irrigation. If the license was to be interpreted in
8 any other manner, it would be inconsistent with Idaho Code §42-217
9 and would be inconsistent with the duty of the Department to issue
10 a license under Idaho Code §42-219.

11 The Department, in making its Recommendation on the claim
12 of Jernberg for Water Right No. 31-7311, caused the court to follow
13 the license it had issued for Water Right No. 31-7311, without
14 advising the court or explaining that the license was issued
15 contrary to law. It was only when claimant Jernberg attempted to
16 transfer a portion of his water rights to a new place of use that
17 he discovered the interpretation being given to the license and the
18 partial decree by the Department, shown by the letter to Jernberg
19 dated March 11, 2003 and attached to the Ling Affidavit. Claimant
20 was further advised that the license and partial decree, as to the
21 4.99 cfs authorized to be diverted, was not a water right for the
22 irrigation of lands, but it does not describe the beneficial use to
23 which the water was to be used. By issuing a license that was not
24 authorized by statute, the Department was limited in its options in
25 dealing with this right in the future, as indicated in its letter
26 of March 11, 2003.

Failure by IDWR to Recognize Irrigation of
Natural Grasses and Vegetation as a Beneficial Use

It appears that the Department issued a license that is not authorized by the statute of the State of Idaho because of its concerns that the irrigation of natural grasses and vegetation to be used for the pasturing of livestock was not a beneficial use of water for irrigation. There is absolutely no legal authority for the Department to take this position. In Pyke v. Burnside, 8 Idaho 487, 69 P. 477 (1902), the Idaho Supreme Court made it clear that the irrigation of land upon which there was a natural meadow, sagebrush and other vegetation was a beneficial use of water for irrigation and the person using the water was entitled to a water right, with the only improvements being ditches by which the water was spread over all of the land. This holding by the Idaho Supreme Court was affirmed in Rudge v. Simmons, 39 Idaho 22, 226 P. 170 (1924). The court found that in 1906, the Nortons had cleared and plowed portions of their land which they watered by surface irrigation. The remainder of the water diverted was carried through their ditch to the higher lands and allowed to flow out in such a manner as to subirrigate a considerable area of the lands which had not been cleared and plowed, but which was a natural meadow, that produced native grass sufficient to produce a partial crop of hay which they yearly harvested, and also upon the remainder of this land that was used for pasturing their stock.

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3 The court then quoted from Pyke v. Burnside, supra., where it was
4 held: "Where one constructs a ditch and conducts water upon his
5 land year after year, and permits the same to spread out over wild
6 hayland for the purpose of making hay, or using such land for
7 pasture, he thereby secures the right to the use of sufficient
8 water to irrigate such land, provided the amount of water so used
9 is sufficient for that purpose, such use being a beneficial one."

10 The court then found that the Nortons had made a valid
11 appropriation of 445 inches of water where the water that was not
12 used on the cultivated was used to subirrigate the wild hayland and
13 the pasture land, and that the yield of the wild hay and pasture
14 land was sufficiently increased to show a beneficial use.

15 Finally, the Idaho Appellate Court in McAtee v. Faulkner
16 Land & Livestock, Inc., 113 Idaho 393, 744 P.2d 121 (Idaho App.
17 1987), affirmed the above decisions when it affirmed the District
18 Court in its finding that there had been no abandonment or
19 forfeiture of the water rights of a landowner where the decreed
20 right owners had put the water to beneficial use by diverting it
21 regularly to irrigate grazing lands. The court again stated: "Our
22 supreme court has held that water is put to a beneficial use when
23 it is diverted to irrigate wild pasture."

24 There is absolutely no basis by which the Department had
25 the legal right or authority to alter a long-standing rule that the
26 irrigation of natural grasses is a beneficial use. By issuing an

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3 ambiguous and unlawful license, it was void, and the Department
4 caused this court to enter a partial decree affirming a water right
5 that is not recognized under Idaho law and is contrary to the
6 statutes of the State of Idaho in regard to the licensing of water
7 rights used for irrigation. It is respectfully submitted that the
8 partial decree entered in this case which recognizes the right to
9 use water on lands growing natural grasses used for pasture, but
10 finds that this use is not a water right issued for irrigation, is
11 beyond the jurisdiction of the court and by submitting a void
12 license to the court, the Department committed fraud upon the court
13 which is sufficient basis to relieve claimant from the partial
14 decree.

15 Authority of the Court to Set Aside and Vacate a Partial Decree

16 Rule 60(b) of the Idaho Rules of Civil Procedure provides
17 in part that "On motion and upon such terms as are just, the court
18 may relieve a party or his legal representative from a final
19 judgment, order, or a proceeding for the following reasons: . . ."
20 One of the reasons set forth in this Rule is "(4) the judgment is
21 void;". The Rule provides that a motion for this reason shall be
22 made within a reasonable time. In this case, the claimant did not
23 become aware that the partial decree did not grant him a water
24 right for the irrigation of the natural grasses for pasture, and
25 therefore he could not have determined prior to 2003 that the
26 partial decree was void. In Catledge v. Transport Tire Co., Inc.,

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3 107 Idaho 602, 691 P.2d 1217 (Idaho 1984), in discussing I.R.C.P.
4 60(b)(4), the court stated: "To hold that a judgment is void,
5 there generally must be some jurisdictional defect in the court's
6 authority to enter judgment, because the court lacks either
7 personal jurisdiction or subject matter jurisdiction. *First*
8 *Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)." It
9 is respectfully submitted that the partial decree entered in this
10 case is void, as the SRBA court lacks subject matter jurisdiction
11 to issue a decree based on a license which contained a conditional
12 use of water, allowing the diversion of 4.99 cfs of water on
13 described lands used for pasture, but fails to provide that the
14 diversion of such water is for irrigation, and which further
15 provides that such use of water on uncultivated pasture land could,
16 at the discretion of the Director, be modified or curtailed upon
17 there being any application for transfer proposing to change the
18 point of diversion, place of use, nature of use, or period of use
19 of this right. Such partial decree, following the license, is also
20 void as it provides, contrary to statutory provisions for the
21 licensing of water for irrigation, that the additional use of 4.99
22 cfs is not an appurtenance of the land upon which the water is
23 diverted. It is respectfully submitted that the court lacked
24 subject matter jurisdiction to adopt the provisions set forth in
25 the license by the Director of IDWR.

26 Claimant also seeks to set aside the partial decree under

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3 the provisions of I.R.C.P. 60(b) which allows the court "to set
4 aside a judgment for fraud upon the court." The court in Compton
5 v. Compton, 101 Idaho 328, 612 P.2d 1175 (1980) carefully reviewed
6 the relief to which a party is entitled under I.R.C.P. 60(b). The
7 court discussed the last paragraph of I.R.C.P. 60(b) and stated:
8 "I.R.C.P. 60(b) also specifically preserves 3 pre-existing means of
9 attacking a final judgment." The court then, after restating the
10 last sentence of Rule 60(b), stated:

11 The rule's preservation of these three powers
12 of the district court, to entertain an equita-
13 ble independent action to relieve a party from
14 judgment, to challenge, within one year, a
15 judgment entered against a party not served,
16 and to set aside a judgment for fraud upon the
17 court, does not amount to an affirmative grant
18 of power; instead, it only guarantees whatever
19 power existed prior to the rule's promulga-
20 tion. 612 P.2d 1180-1181.

21 The court in Compton, supra., in discussing the "fraud upon the
22 court" power of the district court, stated:

23 Apparently such fraud will be found only in
24 the presence of such "tampering with the
25 administration of justice" as to suggest "a
26 wrong against the institutions set up to
27 protect and safeguard the public . . ." Hazel-
28 Atlis Glass Co. v. Hartford Empire Co., 322
U.S. 238, 246, 64 S.Ct. 1997, 1001, 88 L.Ed.
1250, 1256 (1944) (fraud upon the court found
where attorney for patent holder wrote article
describing patent as unique, and arranged for
publication in trade journal under name of
ostensibly disinterested expert; court relied
on article in reaching decision; construing
identical language of F.R.C.P. 60(b); . . .
612 P.2d at 1181.

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3 It is respectfully submitted that fraud upon the court did occur in
4 this proceeding, when the Department recommended a water right
5 based upon a license which was not authorized by law to be issued
6 containing the conditions and restrictions therein, and without
7 acknowledging that the use of the water was for irrigation. The
8 court also fully discussed the nature of the fraud upon the court,
9 including whether or not such fraud was intrinsic or extrinsic
10 fraud. In discussing these standards, the court agreed that the
11 distinction between intrinsic and extrinsic fraud is simply another
12 way of phrasing the question, and is of limited utility in actually
13 resolving it. The court stated: "The task remains to strike a
14 balance between two competing interests. On the one hand rests the
15 need for finality of actions. On the other is the decidedly
16 unsavory 'spectacle of the law bearing down mercilessly, and
17 perhaps ruinously, to collect and deliver over the fruits of
18 undoubted fraud.' Shammas v. Shammas, 9 N.J. 321, 88 A.2d 204, 209
19 (1952), . . ." 612 P.2d at 1182. Finally, the court stated:
20 "Determining the degree of fraud demonstrated by particular facts
21 requires an assessment of the nature of the relationship between or
22 among the parties who are alleged to have acted fraudulently, and
23 the character of the actual conduct involved." 612 P.2d at 1182.

24 It is respectfully submitted that a degree of trust and
25 obligation existed in the dealings between claimant and IDWR.
26 Although the Department may not have held a fiduciary duty in

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3 respect to the claimant, it certainly was an institution relied
4 upon by landowners to obtain a water right for their lands. It
5 also is an institution set up to protect and safeguard the public
6 in not only obtaining appropriate water rights for use on lands
7 within the State, but to protect those rights in such manner as may
8 be necessary. Although the Department's fraud upon the court may
9 have not been intentional, it nevertheless was based upon an ultra
10 vires act and was beyond the statutory authority of the Director to
11 proceed.

12 It is also respectfully submitted that this issue is
13 properly before the Court pursuant to Rule 60(b), even though no
14 independent action has been filed. The court found in Matter of
15 Estates of Cahoon, 102 Idaho 542, 633 P.2d 607 (1981), that a
16 petition in a probate proceeding to reopen the estates was
17 appropriate under I.R.C.P. 60(b). The provisions of I.R.C.P. Rule
18 60(b) that provide that an independent action may be brought to
19 relieve a party from a judgment for fraud upon the court was
20 addressed in Eliopoulos v. Idaho State Bank, 129 Idaho 104, 922 P.2d
21 401 (Idaho App. 1996). The court, in addressing a party's remedies
22 under Rule 60(b) stated: "Although an independent action for
23 equitable relief from a fraudulent judgment may, 'in theory,' be
24 brought in any court of competent jurisdiction, '[t]he normal
25 procedure to attack a judgment should be by motion in the court
26 that rendered the judgment.'" (Cases cited.) 922 P.2d at 406.

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3 The court then approved a motion that had been filed to set aside
4 a judgment under I.R.C.P. 60(b) that alleged "fraud upon the
5 court."

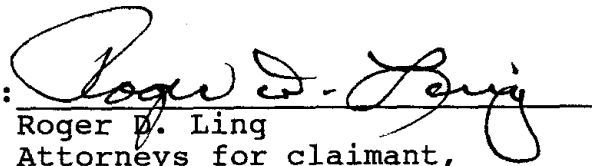
6 CONCLUSION

7 It is respectfully submitted that the *Motion to Set Aside*
8 *and Vacate the Partial Decree* entered in this subcase be granted.
9 The partial decree is void, as contemplated by Rule 60(b) of the
10 Idaho Rules of Civil Procedure in that it approves a conditional
11 water right set forth in a license for diversion of water on
12 natural grasses used for pasture, but not a right for irrigation,
13 which conditions and restrictions are not authorized by the
14 statutes of the State of Idaho which grant the Director of the
15 Idaho Department of Water Resources authority to issue licenses,
16 and is inconsistent with the laws of the State of Idaho as
17 previously established by decisions of the Idaho Supreme Court. It
18 is respectfully submitted that the *Motion to Set Aside and Vacate*
19 *the Partial Decree* is further authorized and appropriate in that
20 said partial decree was obtained by the Department of Water
21 Resources through a fraud upon the court in issuing a license that
22 was not authorized by law, was ambiguous, and is now being
23 interpreted by the Department as a license that does not establish
24 a water right and is a right to use water for the irrigation of
25 wild pasture lands and grasses but is not considered to be a right
26 for the use of water for irrigation. It is further respectfully

submitted that the issues raised in this motion should be properly framed in an Objection to the Recommendation of the Director upon the partial decree being vacated and set aside. The Snake River Basin Adjudication is a unique proceeding in which the majority of the claimants are acting in their own behalf in identifying and establishing their claims to a water right, and that claimants rely extensively upon individuals and staff of the Idaho Department of Water Resources in obtaining and establishing their claims to water rights. Because of the unique relationship between individual water users and the Department, a certain trust exists and is properly relied upon in an institution of the State charged with the appropriation and distribution of water in the State, and proceedings should be carefully construed and reviewed to insure that equity and justice prevails. Claimant should have the opportunity to establish his claim No. 31-07311 as provided by the laws of the State of Idaho.

Respectfully submitted this 15th day of July, 2003.

LING, ROBINSON & WALKER

By: 
Roger D. Ling
Attorneys for claimant,
Ben D. Jernberg

RECEIVED
JUL 16 2003
Department of Water Resources

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Attorneys for Claimant,
Ben D. Jernberg

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase No. 31-07311
Case No. 39576,	)	
	)	AFFIDAVIT OF BEN D. JERNBERG IN SUPPORT
	)	OF MOTION TO VACATE AND SET ASIDE PARTIAL
	)	<u>DECREE AND LEAVE TO FILE LATE OBJECTION</u>

STATE OF IDAHO	)	
County of Fremont	)	ss.

Ben D. Jernberg, being first duly sworn on oath, deposes
and states:

1. That your affiant is an adult resident of the State
of Montana, and makes this Affidavit on his own personal knowledge,
is competent to testify to the matters stated herein, and this
Affidavit sets forth facts as would be admissible in evidence.

2. That your affiant is the owner of over 1900 acres in
Jefferson County, Idaho, which land has been owned continuously
from 1956 to this date. On November 13, 1956, I obtained a permit
from the Idaho Department of Water Resources (IDWR) to irrigate 356

**AFFIDAVIT OF BEN D. JERNBERG IN SUPPORT
OF MOTION TO VACATE AND SET ASIDE PARTIAL
DECREE AND LEAVE TO FILE LATE OBJECTION** - 1

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3 acres from a well on my property which produced 8.25 cfs. I
4 obtained a second permit to divert water from the same well on
5 October 9, 1961, for the irrigation of 324 acres.

6 3. On February 20, 1979, I filed an Application for
7 Permit, now known as 31-7311, with IDWR to appropriate 16 cfs from
8 a new well for the irrigation of approximately 1200 acres. On
9 August 2, 1984, proof was submitted to show that the well had been
10 drilled and water was diverted from the well and used for
11 irrigation under Permit No. 31-7311, and that there was diverted
12 from said well ground water at the rate of 16 cubic feet per
13 second.

14 4. On August 21, 1986, the IDWR caused an examination
15 of the works and land irrigated under Permit No. 31-7311 to be
16 made. Under this examination, it was established that the new well
17 under Permit No. 31-7311 produced 13.45 cfs and the old well under
18 the two earlier rights produced 5.83 cfs, for a total of 19.28 cfs.
19 As this was more than the 16 cfs requested in the permit, it was
20 recommended that a license be issued under Permit No. 31-7311 for
21 16 cfs from two diversion points, for the irrigation of 1124 acres
22 found to be irrigated. A portion of 1124 acres being irrigated was
23 planted to grain crops, and a portion was pasture and meadowlands
24 used for the pasturing of livestock, which pasture consisted of
25 natural grasses and vegetation.

26 5. On June 15, 1987, I received a letter from Jim

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2
3 Johnson of IDWR, together with a draft of the license to be issued
4 pursuant to Permit No. 31-7311 for the diversion of 13.45 cfs for
5 the irrigation of 1124 acres. Nearly two years later, on March 3,
6 1989, this affiant received a letter from Gary Spackman of IDWR
7 indicating that additional information was required before the
8 license could be issued because of the use of a portion of the
9 water on uncultivated lands.

10 6. On March 10, 1989, this affiant sent a letter to
11 IDWR explaining that he diverts 20 cfs from his two wells for the
12 irrigation of his cropland on which grain is grown and the pasture
13 land used for the pasturing of this affiant's cattle. Nothing was
14 heard further from IDWR on this affiant's Permit No. 31-7311. On
15 March 31, 1989, a Claim was filed, with the aid of IDWR, in the
16 Snake River Basin Adjudication for 13.45 cfs for the irrigation
17 from the new well of 1124 acres, in conjunction with Water Right
18 Nos. 31-02357 and 31-02395 which had been previously obtained and
19 are above referred to. That SRBA Claim prepared by IDWR for this
20 affiant to sign shows that the basis of the claim was a "permit."

21 7. On July 6, 1995, this affiant inquired as to why a
22 license for Permit No. 31-7311 had not been issued and the fact
23 that this affiant had received no word from IDWR since filing a
24 claim for said water right in the Snake River Basin Adjudication.

25 8. On July 31, 1995, this affiant received a letter
26 from the IDWR advising me that the license had not been issued and

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3 that there was a need to obtain additional information on the
4 volume of the diversion from the well. On August 5, 1995, this
5 affiant wrote to IDWR advising it that all of the water diverted
6 from the two wells was used for the irrigation of this affiant's
7 lands.

8 9. On September 5, 1997, a license was issued for Water
9 Right No. 31-7311. This license indicated that this affiant had
10 the right to divert 4.620 cfs for the irrigation of 461 acres and
11 an additional 4.99 cfs for the irrigation of 663 acres of unculti-
12 vated pasture land owned by this affiant. No explanation was given
13 to this affiant as to why the previous recommendations as to the
14 rate of diversion was substantially reduced even though the total
15 acres to be irrigated was 1124 acres, nor did the Idaho Department
16 of Water Resources or any representative of it advise this affiant
17 that a right to divert in addition to the 4.62 cfs, 4.99 cfs did
18 not constitute a valid water right. A copy of said water right
19 license is attached hereto as Exhibit "A" and made a part hereof.
20 This affiant received no explanation as to what the condition which
21 states ". . . this additional use is not an appurtenance of the
22 land upon which it occurs." means. Condition number 9 on the
23 license was also strange and ambiguous to me, and was never
24 explained as to what it might mean. I assumed that IDWR was
25 providing me the same license that they had originally indicated
26 would be given to me, with a slight reduction in the rate of

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3 diversion. All water diverted under these three rights was for
4 irrigation, and was used to irrigate lands of this affiant, some of
5 which were cropland and some of which were natural pastures.
6 Without such irrigation, no crops or pasture could or would have
7 existed.

8 10. Preliminary Recommendations were sent to this
9 affiant from IDWR on his claims in the SRBA on January 18, 2001.
10 A Notice of Error was sent to the Idaho Department of Water
11 Resources on April 11, 2001, but no changes were made to the
12 Preliminary Recommendations. It appears that the Recommendations
13 on the water rights of affiant were made by IDWR and mailed to
14 affiant on May 2, 2001, but at a new address that had not been
15 previously used. Unfortunately, these Recommendations were not
16 discovered by this affiant for over a year and a half after they
17 were mailed. Again, this affiant had no reason to believe that he
18 did not have a water right to irrigate the 1124 acres he was
19 irrigating under Water License No. 31-07311.

20 11. From January 18, 2001 to February, 2003, this
21 affiant has continued to use the diversion from these two wells for
22 the irrigation of cultivated crops and natural pasture lands, that
23 said irrigation was necessary to grow a crop and to grow grasses
24 and other natural vegetation for the pasture, and no restrictions
25 or concerns have been asserted that such diversions were not
26 authorized under a duly adjudicated water right.

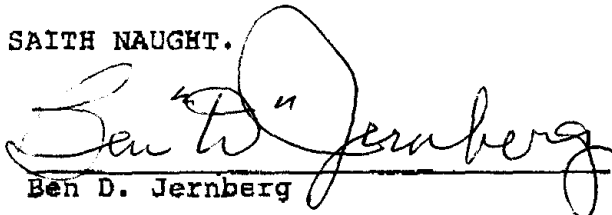
12. In February, 2003, this affiant contemplated a transfer of a portion of his water rights to new lands for the irrigation of those new lands. In reviewing the requirements to make a transfer, and in discussions with employees and representatives of the Idaho Department of Water Resources, this affiant was advised, for the first time, that he did not have a water right to divert the 4.99 cfs for the irrigation of 663 acres of dry land grazing lands and that the 4.99 cfs in his Water Right No. 31-7311 could be cancelled on seeking to transfer the water to a new place of use. On March 5, 2003, this affiant sent a letter to the Department of Water Resources expressing his concern that historically the early water rights obtained for the irrigation of his lands in Jefferson County were used to irrigate uncultivated pasture ground until such time as the lands were from time to time converted to cultivated croplands. He expressed his concern with the Department's position that they were justified in reducing the amount of his license because he was irrigating pasture lands, that all lands being irrigated were not included in the Recommendations, and that the water rights were now being interpreted by IDWR to not be water rights at all, but some unknown right to use water which may be cancelled at the discretion of the Director. In later conversations with IDWR employees, this affiant discovered that IDWR was now requesting that he employ an agricultural consultant to assess the amount of feed grown on his pasture ground using

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3 Water Right Nos. 31-02357 and 31-07311. This affiant expressed his
4 concern to IDWR about this new requirement in his letter of March
5 8, 2003. On March 11, 2003 this affiant, in a discussion with an
6 employee of IDWR, first discovered that he did not have a water
7 right for the irrigation with 4.99 cfs his pasture lands and that
8 in any attempt to transfer that use, the use could be modified or
9 curtailed by the Director. Additional letters were written by this
10 affiant expressing his concern with the position taken by IDWR in
11 letters of March 13, 16 and 18, 2003.

12 13. On March 19, 2003, this affiant was advised by
13 Harold Jones of the Idaho Department of Water Resources that
14 partial decrees had been entered and the time for challenging those
15 decrees had expired, and that the Department could do nothing
16 further for this affiant and that it would be necessary for this
17 affiant to provide the data on water use volumes on the irrigated
18 pasture lands. On March 25, 2003, this affiant was advised by
19 Jones of IDWR that this affiant would have to go to court to get
20 the partial decrees changed, and that he should proceed with the
21 help of an attorney. On April 14, 2003, this affiant sent a letter
22 to the Snake River Basin Adjudication District Court in Twin Falls,
23 Idaho in regard to the position of IDWR that he does not have a
24 water right for the irrigation of his natural pasture lands and
25 that any attempt to transfer the place of use of that water could
26 prevent him from irrigating any lands with the water diverted.

14. That this affiant has always required the full capacity of his two wells to irrigate his cropland and uncultivated pasture lands. After receiving the Order of the Honorable Roger S. Burdick, Presiding Judge in the Snake River Basin Adjudication, dated April 24, 2003, this affiant employed an attorney to appear at the status conference set for June 4, 2003, and said attorney, Roger D. Ling, is presently employed by this affiant to represent him in his efforts to have the partial decree for Water Right No. 31-07311 set aside and vacated, and that this affiant be given the opportunity to file a late Objection to the Recommendations of the Director for said water right. In view of the joint use under Water Right Nos. 31-02357 and 31-02395, it would be advisable for all three water rights to be set aside and vacated for further action before the SRBA Court.

FURTHER THIS AFFIANT SAITH NAUGHT.


Ben D. Jernberg

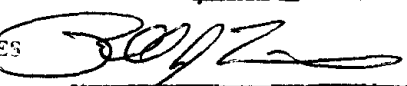
SUBSCRIBED AND SWORN to before me this 12 day of July, 2003.

MY COMMISSION EXPIRES
October 24, 2006

BONDED THRU NOTARY PUBLIC UNDERWRITERS

(SEAL)

RICHARD J. ZIMMERMAN
Notary Public
State of Idaho


Notary Public for Idaho

Residing at: ISLAND PARK
My Commission expires: 10-24-06

AFFIDAVIT OF BEN D. JERNBERG IN SUPPORT
OF MOTION TO VACATE AND SET ASIDE PARTIAL
DECREE AND LEAVE TO FILE LATE OBJECTION

State of Idaho
Department of Water Resources

WATER RIGHT NO. 31-07311

Priority: APRIL 23, 1978

Maximum Diversion Rate:
Maximum Diversion Volume:

4.62 CTS
367.5 AT

DAVID K. JERNBERG
BEN D. JERNBERG
This is to certify, that

3170 SYCAMORE LN
BILTMORE HT 59102
The permit issued pursuant to Application for Permit dated February 20, 1979, and dated 1987, at examination indicates

[illegible]

367.5 AF	1.63	CT8	DATE OF EXAMINATION	PERIOD OF USE	BENEFICIAL USE
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INDICATOR
04/15/69 10/15
4:02 PM
RANGE

LOCATION OF POINT(S) OF DIVERSION: Sec. 10, Township 37 N., Range 10 E., Jefferson County, Missouri

[illegible]

Total number of acres irrigated:

CONDITIONS OF APPROVAL AND REWARD

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under a right of the use of water confirmed by this right is intended to reflect the use of water confirmed by this right is intended to reflect the amount that can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use of an implement accepted standard of diversion and use efficiency.

Water rights pursuant to the described place of use and water rights are subject to all prior water rights and may be forfeited by five years of non-use.

Political entities or variance from this license must be made within the limits of section 42-222 Idaho Code or the applicable Idaho law.

Applicable Idaho law shall apply.

Water rights when combined with all other rights shall provide no more than one acre per acre, not more than 1/2 of an acre for each acre of land, and no more than 1/2 of an acre for each acre of land above the irrigation of the land above.

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 31-07311

CONDITIONS OF APPROVAL AND REPEALS

6. Water diverted under this right, and an additional 4.99 cfs of ground water diverted from the points of diversion described above, may also be diverted onto 663 acres of uncultivated pasture located in Sections 15, 16, 21, and 22 of Township 7 North, Range 34 East, B.M., but this additional use is not an appurtenance of the land upon which it occurs.
7. Two points of diversion are located in the SE¹/₄, S10, T7N, R34E. Rights 31-02357 and 31-02395 are also diverted from the points of diversion described above.
8. Any application for transfer proposing to change the point of diversion, place of use, nature of use, or period of use of this right or any portion of this right shall include for consideration by the director the entire use of water on the uncultivated pasture land referenced above. Action taken by the director on any such transfer application may include modification or curtailment of all or any part of the use of water on the uncultivated pasture land.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this 5TH day of SEPTEMBER, 1992.

Acting for
KARL J. DREHER, Director

Roger D. Ling, Esq.
LING, ROBINSON & WALKER
Attorneys at Law
P. O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1018

Attorneys for Claimant,
Ben D. Jernberg

RECEIVED
JUL 16 2003
Department of Water Resources

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Subcase No. 31-07311

Case No. 39576,

AFFIDAVIT OF ROGER D. LING

STATE OF IDAHO

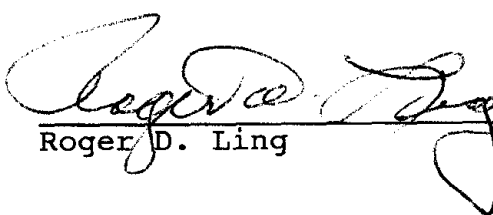
County of Minidoka

ss.

Roger D. Ling, being first duly sworn on oath, deposes
and states:

That the attached documents are copies of documents
received from Idaho Department of Water Resources as part of its
file on License No. 31-07311.

FURTHER THIS AFFIANT SAITH NAUGHT.


Roger D. Ling

AFFIDAVIT OF ROGER D. LING

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SUBSCRIBED AND SWORN to before me this 15th day of July, 2003.

JUDY BARNES
NOTARY PUBLIC
STATE OF IDAHO

(SEAL)

Judy Barnes
Notary Public for Idaho
Residing at: Rupert, Idaho
My Commission expires: 02/12/2005

(31-7311)

8-22-06

From John Arambarr
To File 31-7311

RECEIVED
OCT 9 1986

Subj Place of Use

Department of Water Resources

Two distinctly different irrigation uses were found. One use was for the irrigation of a grain crop; the other being irrigation for enhancement of natural vegetation used as cattle pasture (see photos).

I feel that possibly the crop land and pasture land should be licensed separately. It was obvious that the pasture needs and receives less acre feet per annum than the grain crop, and I recommend the licensing volume be reduced accordingly for the pasture land.

The grain crop is outlined in solid yellow on the ~~area~~ aerial photo, while the pasture is outlined in red dashed lines.

MICROFILMED
SEP 10 1997

RECEIVED

OCT 9 1988

Form 219
8/88STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
BENEFICIAL USE FIELD REPORT

Department of Water Resources

A. GENERAL INFORMATIONPermit No. 31-7311

1. Owner: Ben & David Ternberg Phone No. 406-252-6022
 Current Address: P.O. Box 1442 Billings, MT 59103
2. Accompanied by: Joe Llamas EXAM. DATE: 8-21-86
 Address: HC 63 Box 1710 Terreton Phone No. 663-4496
 Relationship to Permit Holder: Operator
3. Source: groundwater tributary to N/A

B. OVERLAP REVIEW

1. Other water rights with same place of use: 31-2357, 31-2395
☒ Copies Attached
2. Other water rights with same point of diversion: 31-2357, 31-2395 Both from
East Well ☒ Copies Attached ☒ Copies of Field Exam's Attached

C. SYSTEM DESCRIPTION

1. Diversion System Diagram: Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable. ☒ Alternative diagram attached

Scale: 1" = _____

2. ☒ Copy of U.S.G.S. Quadrangle Attached
 Showing location(s) of point(s) of diversion and
 place(s) of use (required).

- ☒ Photo of Diversion and System Attached
 (required for all but single household domestic groundwater, and stockwater.

- ☒ Aerial Photo Attached
 (required for irrigation of 10 acres or more).

MICROFILMED
SEP 10 1987

3. Narrative: Description (As operating at time of measurement. Indicate pressure, number of sprinklers, etc.)
 West Well: pump driven by tractor (3:1, rpm: pto)
 open discharges into ditch used for flood irrigation.
 East Well: pump open discharges downstream
 from west well.
 * Note ditch flow can be reversed depending
 upon use.

- | Well or Diversion Identification No.* | Motor Make | Hp | Motor Serial No. | Pump Make | Pump Serial No. or Discharge Size |
|---------------------------------------|-------------|----|------------------|-----------|-----------------------------------|
| West | N/A | ? | N/A | Amarillo | 580 |
| East | U.S. Motors | 60 | 990653 | Wintroath | 9767 |
| | | | | | |
| | | | | | |

- [illegible]

[illegible]

SEP 10 1997

Do not use this space

D. FLOW MEASUREMENTS☒ Additional Data Sheets Attached

1.

Measurement Equipment	Type	Make	Model No.	Serial No.	Size	Calib. Date
Pygmy Meter		Scientific		090187	2 1/2'	

2. Measurements:

West Well = 13.45 cfs

East Well = 5.83 cfs

Total = 19.28 cfs

R.P.M.: 3000 rpm @ motor = 1000 rpm @ pump
(3:1 reducing ratio)**E. FLOW CALCULATIONS**☒ Additional Computation Sheets Attached

1. Measured Method: See Discharge Notes

2. Alternate Method for Checking Purposes: None Available

F. PUMP EFFICIENCY DATA (Optional)

Discharge Pressure: 0 psi x 2.31 = _____ ft (1); Dynamic pumping level: _____ ft (2)

Total Head: (1) + (2) = _____ (3) : Flow rate: _____ cfs (4)

Water HP: (3) x (4) ÷ 8.8 = _____ (5)

Meter Input KW: 3.6 x _____ KH x _____ CTR or _____ MULT x _____ PTR x _____ N/ _____ T = _____ (6)

Meter Input HP: (6) x 1.34 = _____ (7)

Panel Input KW: _____ Ave PF x _____ Ave Volts x _____ Ave Amps x .001732 = _____ (6)

Panel Input HP: (6) x 1.34 = _____ (7) Efficiency: (5)/(7) x 100 = _____ %

G. VOLUME CALCULATIONS

1. Volume Calculations for Irrigation:

 $V_{i.r.} = (\text{Acres Irrigated}) \times (\text{Irrigation Requirement}) = 1124 \times 3.5 = 3934.0$ $V_{d.r.} = [\text{Diversion Rate (cfs)}] \times (\text{Days in Irrigation Season}) \times 1.9835 = 16.00 \times 214 \times 1.9835 = 67915.0$ $V = \text{Smaller of } V_{i.r.} \text{ and } V_{d.r.} = 3934.0$

2. Volume Calculations for Other Uses: None

MICROFILMED
SEP 10 1997

H. REMARKS AND OVERLAP REVIEW ANALYSIS

R 17 (31-2357/31-2395) 19.28 cfs

R 05

16.00 cfs recommended by permit

0.02 cfs/ac X 1124 ac = 22.48 cfs > 16.00 cfs

Capacity = 19.28 cfs > 16.00 cfs

* See Memo on place of use (Aug 22, 1986) *

I. RECOMMENDATIONS**1. Recommended Amounts**

Beneficial Use	Period of Use		Rate of Diversion Q (cfs)	Annual Volume V (afa)
	From	To		
Irrigation	4-1	11-1	16.00	3934.0
Totals:			16.00 cfs	3934.0 afa

2. Recommended Amendments☒ Change P.D. as reflected above☐ Add P.D. as reflected above☐ None☒ Change P.U. as reflected above☒ Add P.U. as reflected above☐ Other**J. AUTHENTICATION**

Field Examiner's Name

John Arambarri

Signature

John Arambarri

Certification Date

8-21-86

CONSULTANT SEAL

Field Report Preparation Date

K. Licensing recommendation shall be prepared by an Idaho Department of Water Resources employee on a computer printout attached hereto.

MICROFILMED

SEP 10 1987

J-200
-63

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
31-7311

Aug 21, 1984 DISCHARGE MEASUREMENT NOTES

River at Total

Dist. from initial point	Width	Depth	Time in sec.	VELOCITY		Area	Discharge
				At point	Mean in sec.		
0.35	0.7	2.38	45	2.22		1.67	3.71
1.0	1.0	2.36	43	2.79		2.36	6.64
2.2	1.0	2.38	40	3.75		2.38	8.93
						Total	19.28
						West	-13.45
						East	5.83

MICROFILMED
SEP 10 1997

LJ-200
1-63

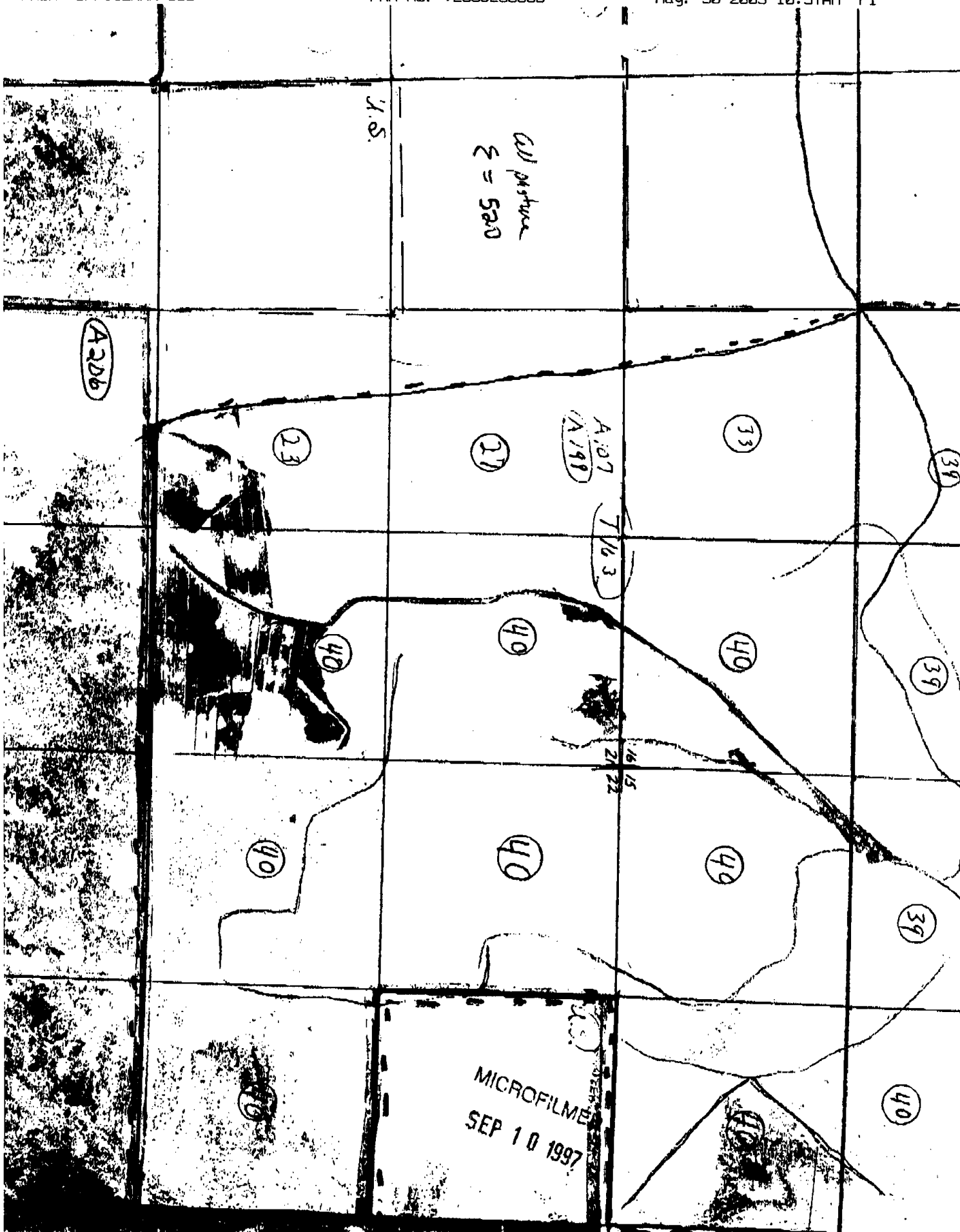
STATE OF IDAHO
DEPARTMENT OF RECLAMATION
31-7311

Aug 21, 1984 DISCHARGE MEASUREMENT NOTES

River at West Weir

Dist. from initial point	Width	Depth	Time in sec.	VELOCITY		Area	Discharge
				At point	Mean in sec.		
0.3	0.6	2.48	41	1.95		1.49	2.91
1.1	1.0	2.48	40	2.25		2.48	5.58
2.1	1.0	2.48	45	2.00		2.48	4.96
						Total	13.45
						CFs	

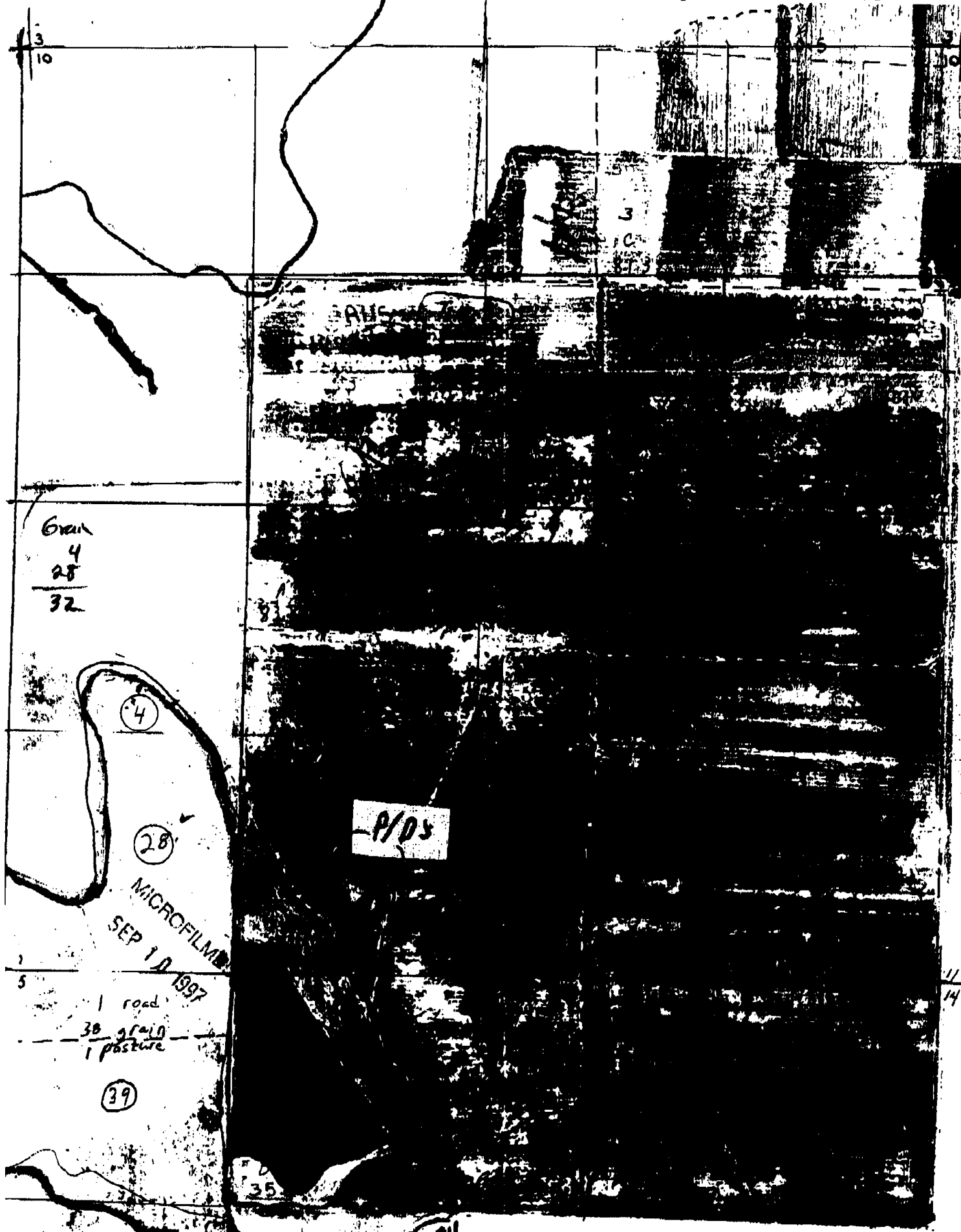
MICROFILMED
SEP 10 1997

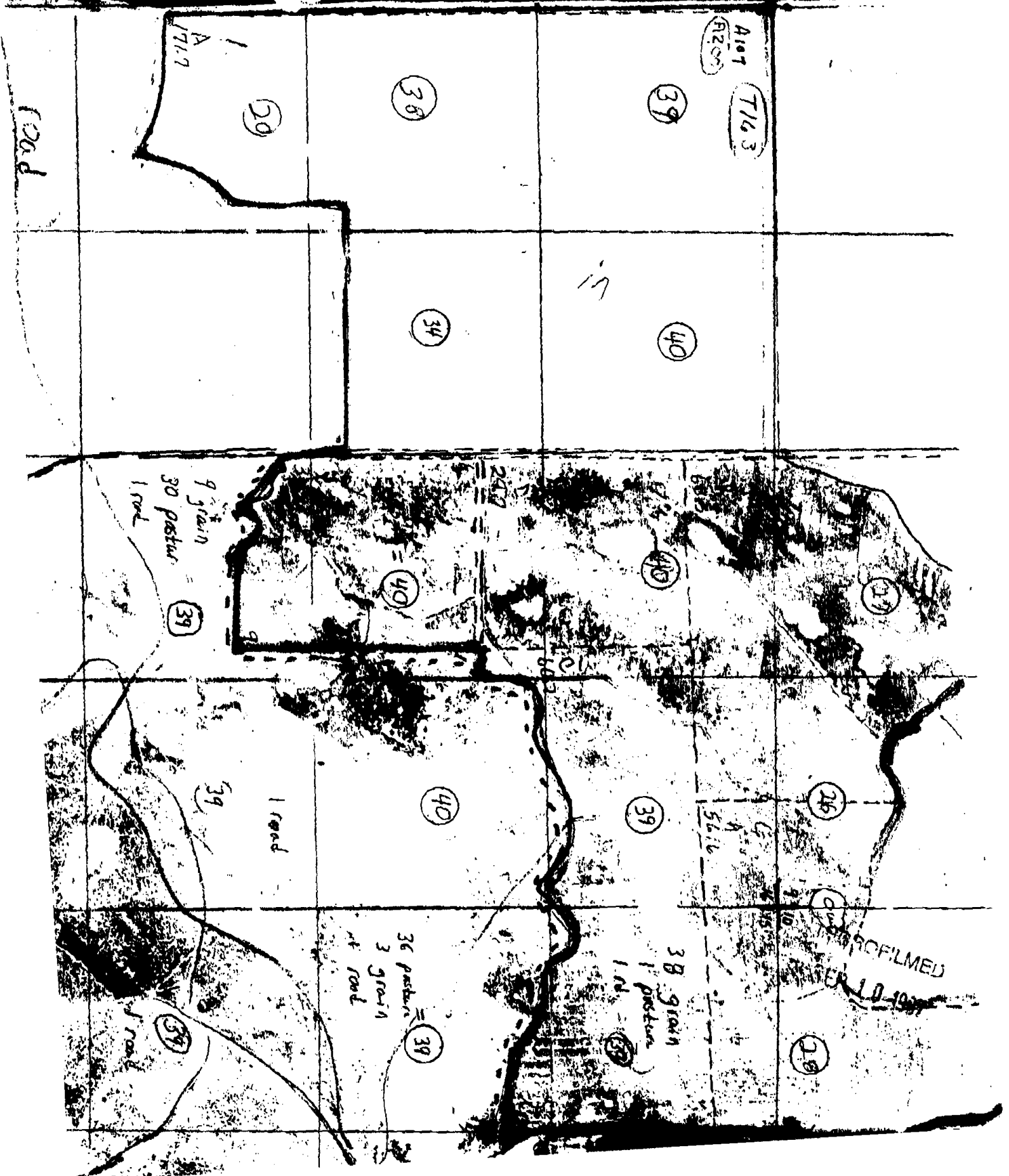




Pasture	Grain
1	38
36	3
40	34
38	80
39	
39	
40	
40	
40	
353	

MICROFILMED
SEP 10 1997



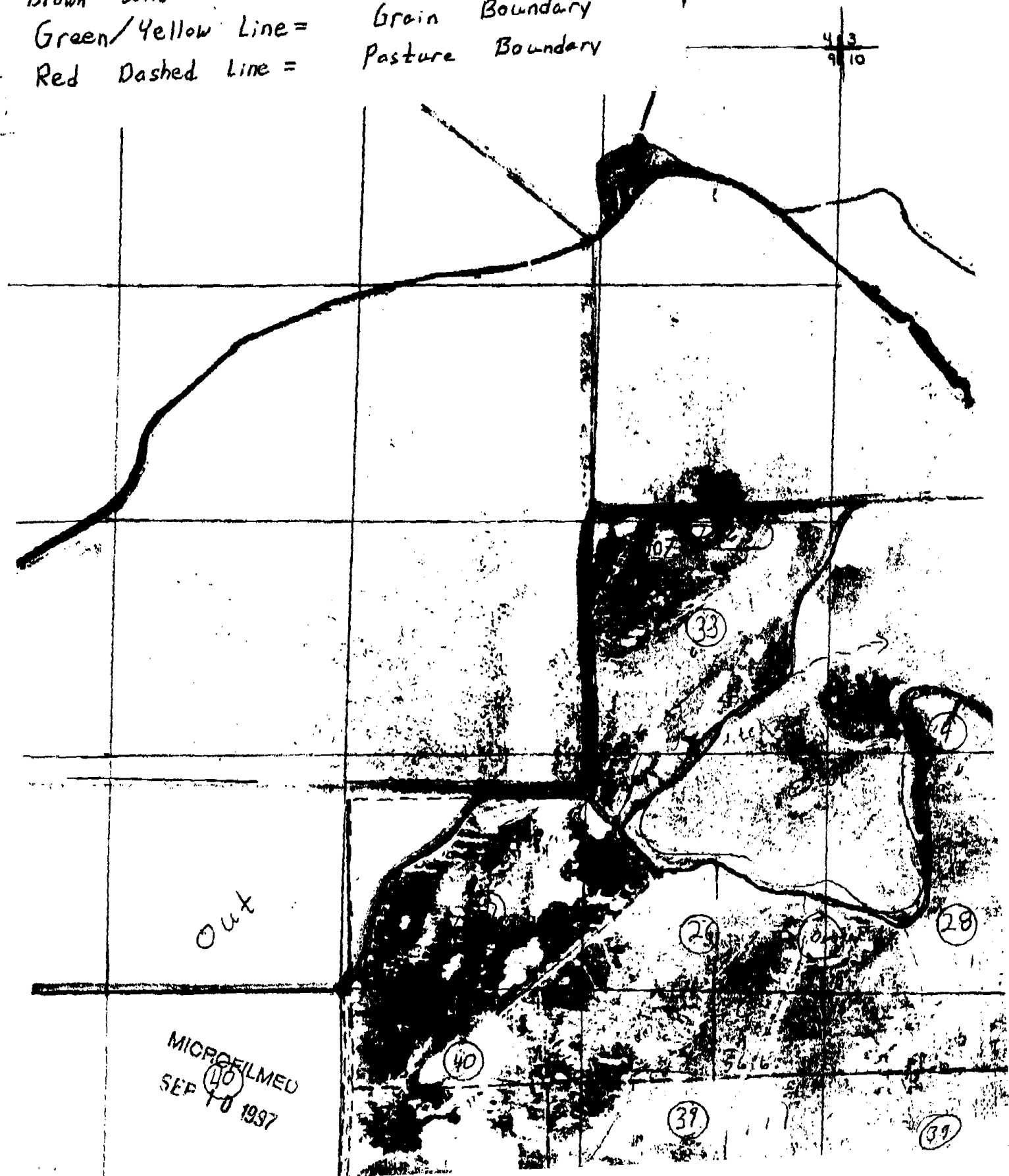


FROM : OFFICEMAX 666

FAX NO. : 2085286606

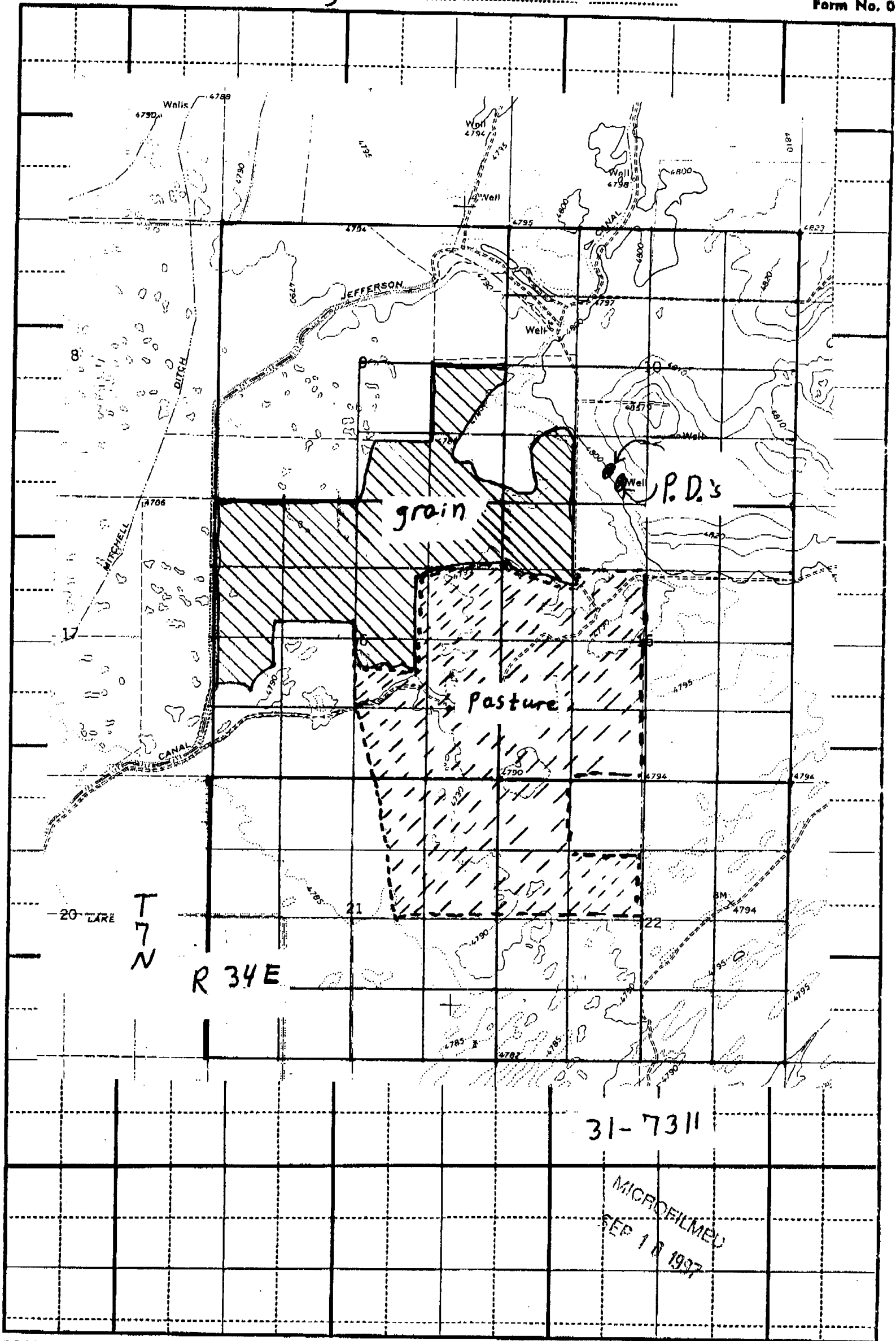
May. 30 2003 10:40AM P5

Red Solid Line = Major Ditch
Brown Solid Line = Road
Green/Yellow Line = Grain Boundary
Red Dashed Line = Pasture Boundary

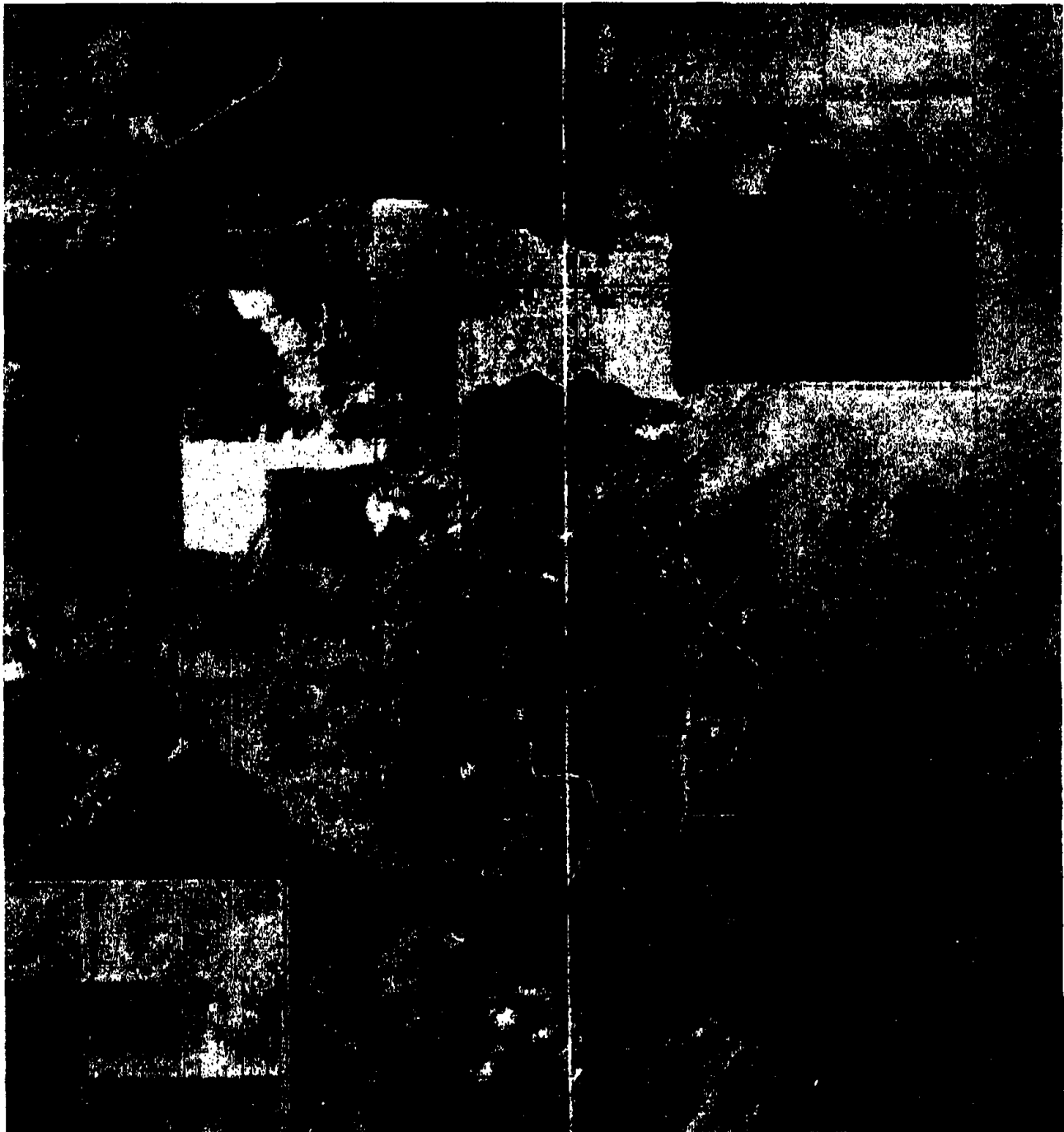


NAME OF APPLICANT Je. org

Form No. 0



SCALE: 2 Inches Equal 1 Mile. Draw Plan in Ink.



late 1970s/early 1980s NAPP W40



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A, Idaho Falls, ID 83402-1718 • Phone: (208) 525-7161 FAX: (208) 525-7177

EASTERN REGION
March 11, 2003

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

Ben Jernberg
14306 W. Morningstar Tr.
Surprise, Az. 85374

Mr. Jernberg:

Our Boise office and I have both received your fax about the transfer of water rights 31-7311 and 31-2395.

As I stated to you on the phone, you will have to have a qualified consultant who is not a Department Employee work on your transfer proposal.

That consultant would have to establish actual water/acre foot use patterns on the grazing ground referred to on water right 31-7311. That ground is the uncultivated pasture in conditions/remarks #2 on the partial decree.

I've included another copy of water right #31-7311. As you can see conditions/remarks No. 1 & 2 are specific to the unique nature of this right only when utilized in its original place of use. Any transfer proposal can jeopardize that status.

You can always submit a transfer proposal without the consultant information. However, I doubt it would be approved. This is the only option we can offer you at this time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Harold W. Jones'.

Harold W. Jones
Water Resource Supervisor

Cc: Jim Rush

RECEIVED
JUL 16 2003
Department of Water Resources

Roger D. Ling, Esq.
LING, ROBINSON & WALKER
P. O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804
ISB No. 1018

Attorneys for Claimant,
Ben D. Jernberg

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)

Subcase No. 31-07311

Case No. 39576,)

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of July, 2003, I served copies of claimant's Motion to Set Aside and Vacate Partial Decree and to Allow the Filing of a Late Objection, Memorandum in Support of Motion to Set Aside and Vacate Partial Decree and for Leave to File Late Objections, Affidavit of Ben D. Jernberg in Support of Motion to Vacate and Set Aside Partial Decree and Leave to File Late Objection, and Affidavit of Roger D. Ling upon:

IDWR Document Depository
P. O. Box 83720
Boise, Idaho 83720-0098

Chief, Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

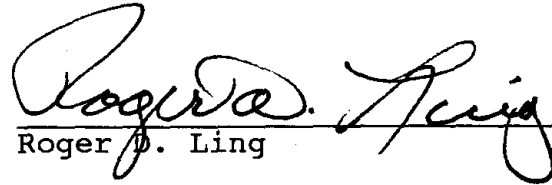
CERTIFICATE OF MAILING

- 1 -

1
2
3 United States Department of Justice
4 Environment & Natural Resources Division
5 550 West Fort Street, MSC 033
6 Boise, Idaho 83724

7 by depositing copies thereof in the United States mail, postage
8 prepaid, in envelopes addressed to said parties at the foregoing
9 addresses.
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Roger D. Ling

CERTIFICATE OF MAILING

- 2 -