

11/06/2003

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 23-11160
NAME AND ADDRESS: STEPHEN J MC GRATH
PO BOX 50731
IDAHO FALLS ID 83405-0731
SOURCE: UNNAMED SLOUGH TRIBUTARY: RAINEY CREEK
QUANTITY: 0.000 CFS
10.800 AFY
PRIORITY DATE: 04/01/1957
POINT OF DIVERSION:
T01N R44E S8 SESWNW Within BONNEVILLE County
PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
RECREATION	01/01 12/31	10.80 AFY

PLACE OF USE: RECREATION Within BONNEVILLE County
T01N R44E S08 SENW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: Beneficial Use
SOURCE IS ALSO KNOWN AS MILLERS SLOUGH.

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A23-11160
Date Received: 12/16/1997
Receipt No: E02381⁵
Received By: JA

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: STEPHEN J MC GRATH
Address: PO BOX 50731
IDAHO FALLS ID

208-524-0731

83405-0731

2. Date of Priority: APR 1, 1940

3. Source: RAINEY CREEK

Trib. to: SNAKE RIVER

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
01N	44E	8	SE	SW	NW		BONNEVILLE

5. Description of diverting works:

CONCRETE BASE AND WINGS WITH CENTER PIER (APPROXIMATELY 65" HIGH)

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION	04/01	10/31	1.000		
RECREATION	01/01	12/31	1.000		

7. Total Quantity Appropriated is:

2.000 C.F.S. (and/or)

A.F.A.

8. Total consumptive use is

Acre Feet Per Annum.

9. Non-irrigation uses:

FISH & WATERFOWL PROPAGATION, HABITAT ENHANCEMENT, HUNT/FISHING

10. Place of Use:

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
01N	44E	8	SW	NW		IRR	40.0
			SE	NW		IRR	40.0

A231160



10. Place of Use: Continued

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
						Section Acres	80.0
						Total Acres	80.0

11. Place of use in counties: BONNEVILLE

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:

A23-00019D, A23-00020B, A23-00093B, A23-00047D

14. Remarks:

15. Basis of Claim: BENEFICIAL USE

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): _____ Date: _____

_____ Date: _____

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number 423-11160Date Received 12-15-97Receipt Number EO23815

NOTICE OF CLAIM
TO A

WATER RIGHT

ACQUIRED UNDER STATE LAW

RECEIVED

NOV 4 1997

Department of Water Resources
Eastern Region

Please type or print clearly

1. Name of Claimant (s) Stephen J. McGrath

Phone (208) 524-0731

Mailing Address P. O. Box 50731, Idaho Falls, ID

Zip 83405-0731

2. Date of Priority (Only one (1) per claim) April 1, 1940

3. Source of water supply (a) Rainey Creek

which is tributary to (b) Snake River

4. a. Location of existing point of diversion is: Township 01N Range 44E Section 8,

SE 1/4 of SW 1/4 of NW 1/4, Govt. Lot, E.B.M., County of Bonneville

Additional points of diversion if any: _____

b. If instream flow, beginning point of claimed instream flow is:

Township _____ Range _____ Section _____, 1/4 of _____ 1/4,

Govt. Lot _____ B.M., County of _____

ending point is: Township _____ Range _____ Section _____, 1/4 of _____ 1/4 of

_____ 1/4, Govt. Lot _____ B.M., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc),

6. Water is claimed for the following purposes:

(both dates are inclusive)

(cfs)

(acre feet)

For recreational purposes from 01/01 to 12/31 amount 1 cfs or _____

For irrigation purposes from 04/01 to 10/31 amount 1 cfs or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 2 cfs (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is 75 acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.) Fish and waterfowl propogation, wildlife enhancement and habitat, recreational hunting and fishing.

10. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RNG	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	
1N	44E	8							40	40									
1N	44E	8																	
1N	44E	8																	

Total number of acres irrigated 80

11. In which county (ies) are lands listed above as place of use located? Bonneville

12. Do you own the property listed above as place of use? Yes X No _____ See attached
If your answer is No, describe in Remarks below the authority you have to claim this water right. copy of Deed.

13. Describe any other water rights used at the same place and for the same purposes as described above.
See attached list of water rights. or None ()

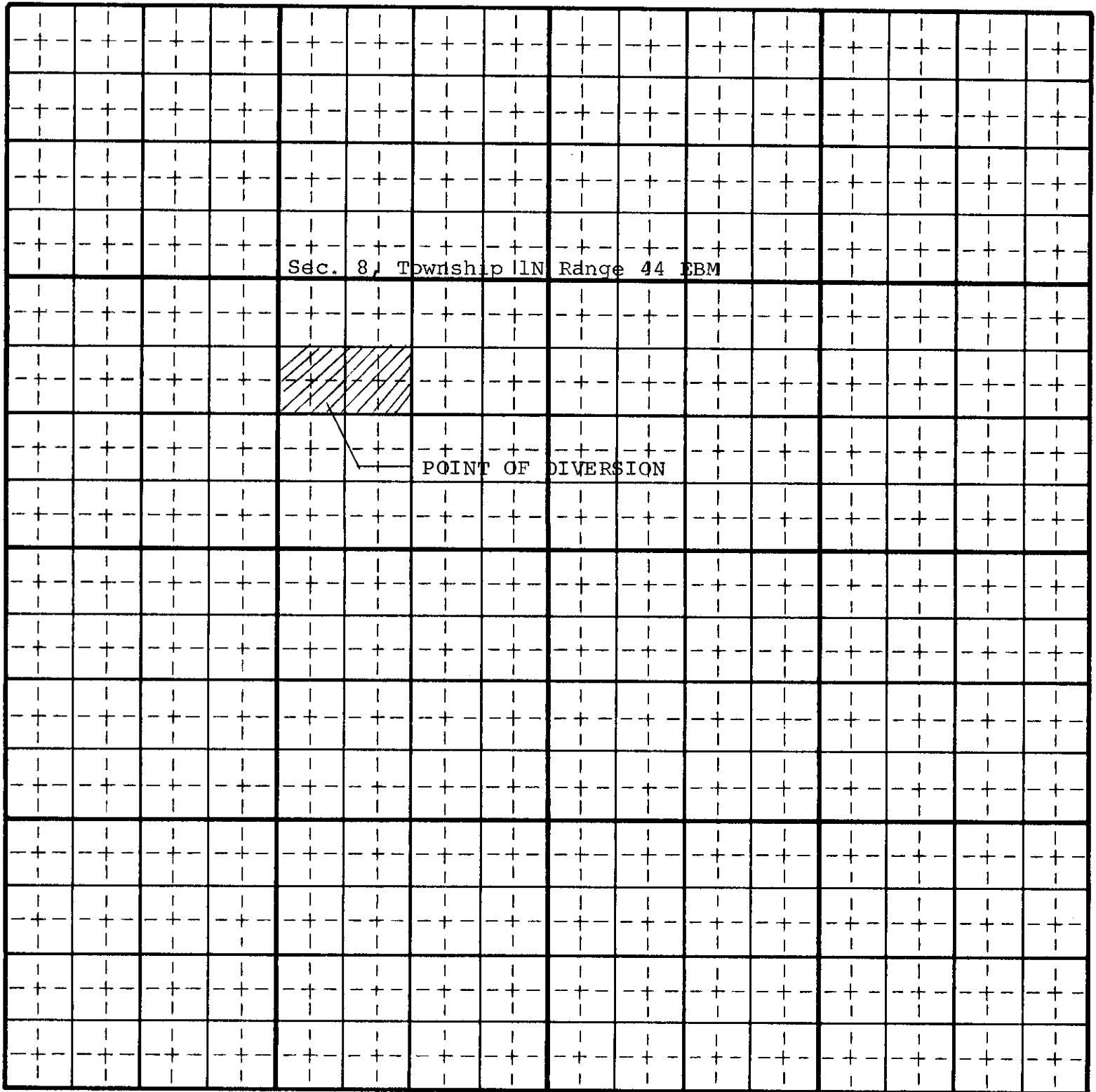
14. Remarks:

Last Name McGrath Ident No. _____

Copies: White -State, Yellow-Claimant

Map of Project: show clearly the point of diversion, place of use, section number, township, and range number.

Scale: 2 inches equals 1 mile



See attached plat and photos.

Last Name McGrath Ident No. _____

Copies: White-State, Yellow-Claimant

15. Basis of Claim (check one) Beneficial Use X Posted Notice _____ License _____ Permit _____
Decree _____ * See attached Supreme Court Decision.
If applicable provide IDWR Water Right Number _____
Court _____ Case Number 9229 Decree Date June 12, 1963
Plaintiff vs Defendant Thomas M. Weeks, et al. vs. Archie McKay

16. Signature (s)
(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled
"How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do X do not _____
wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments 5

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true
and correct.

Signature of Claimant (s) [Signature]

Date July 9, 1997

Date _____

For Organizations: I do solemnly swear or affirm that I am _____

Title _____

of _____, that I have signed the foregoing
Organization

document in the space below as _____ of _____

Title

Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____

Title and Organization _____

Date _____

State of Idaho/or _____)
County of Bonneville) SS.

Subscribed and sworn (or affirmed) before me this 9th day of July 19 97

SEAL

Notary Public [Signature]

Residing at Idaho Falls, Idaho

My Commission Expires 4/11/99

Please Print Name

17. Notice of Appearance:

Notice is hereby given that I, _____ will be acting as attorney at law on behalf
of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above
should be mailed to me at the address listed below.

Signature _____

Address _____

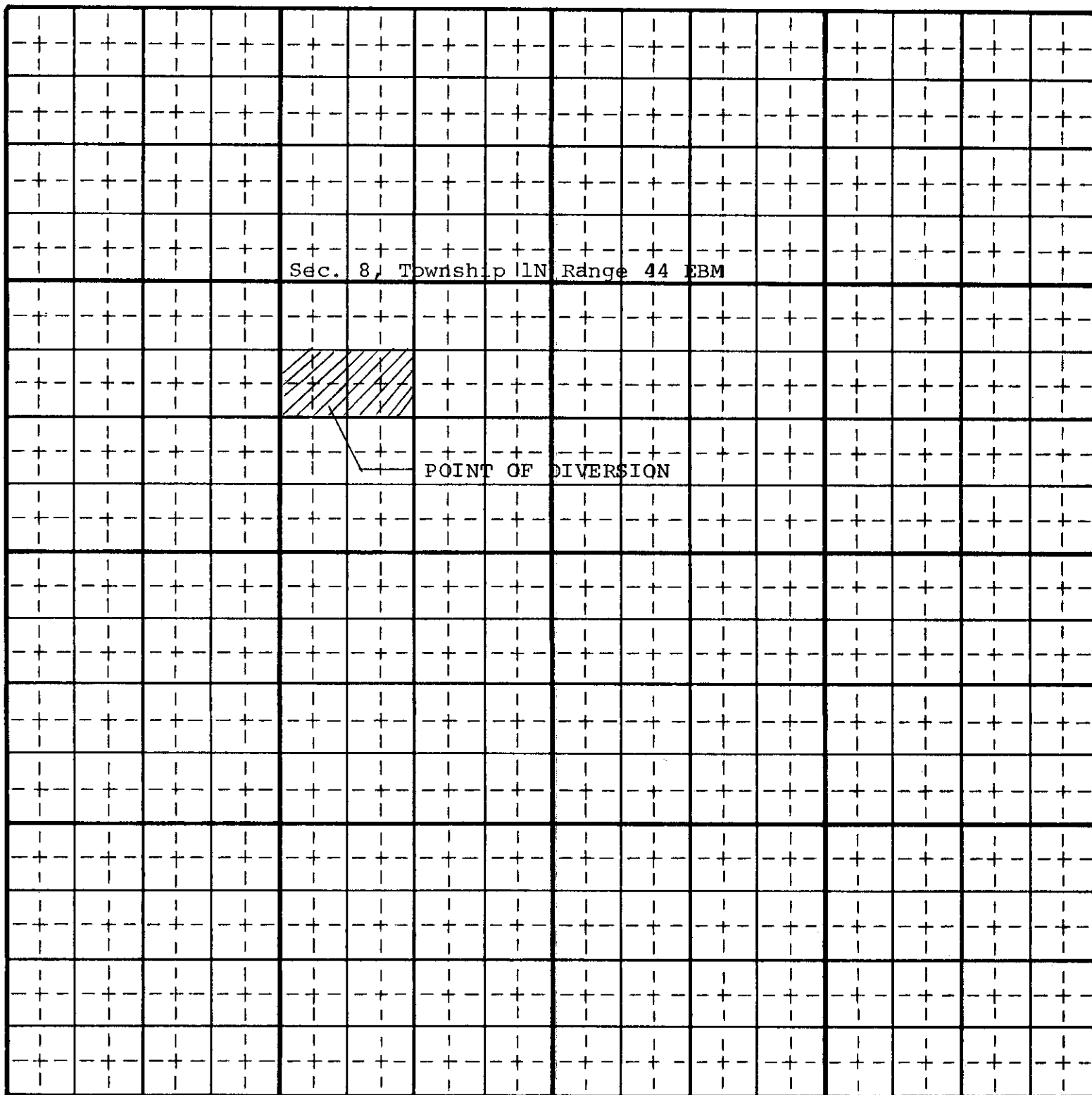
Date _____

Last Name McGrath Ident. Number _____

Copies White-State, Yellow-Claimant

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Scale: 2 inches equals 1 mile



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Last Name McGrath Ident No. _____

Copies: White-State, Yellow-Claimant

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Decree _____ * See attached Supreme Court Decision.

If applicable provide IDWR Water Right Number _____

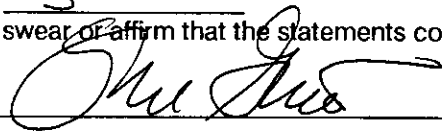
Court _____ Case Number 9229 Decree Date June 12, 1963
Plaintiff vs Defendant Thomas M. Weeks, et al. vs. Archie McKay

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Signature of Claimant (s) 

Date July 9, 1997

Date _____

For Organizations: I do solemnly swear or affirm that I am _____

Title _____

of _____, that I have signed the foregoing

Organization

document in the space below as _____

Title

of _____

Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____

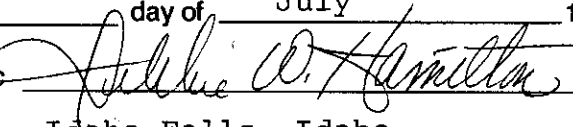
Title and Organization _____

Date _____

State of Idaho/or _____)
County of Bonneville) SS.

Subscribed and sworn (or affirmed) before me this 9th day of July 19 97

SEAL

Notary Public 

Residing at Idaho Falls, Idaho

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of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above
should be mailed to me at the address listed below.

Signature _____

Address _____

Date _____

Last Name McGrath Ident. Number _____

Copies White-State, Yellow-Claimant

11/06/2003

**NOTICE OF ERROR
REPLY**

Please type or print clearly, fill out this form completely and mail.

Return this reply form to IDWR by the deadline date printed below if you want IDWR to change your recommendation or you want to let IDWR know that you agree with its recommendation.

YOUR DEADLINE FOR RETURNING A NOTICE OF ERROR REPLY IS:

Water right number: 23-11160

STEPHEN J MC GRATH

PO BOX 50731

IDAHO FALLS ID 83405-0731

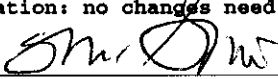
Telephone Number: (208)524-0731

1. Describe the portion of the proposed recommendation with which you disagree (e.g. priority date, period of use, source):

2. Describe the changes you wish to make in the proposed recommendation:

3. Give a brief explanation as to why you disagree with these portions:

4 I AGREE with this proposed recommendation: no changes need to be made.

DATE: 3/23/04 SIGNATURE: 

Please print your name: Stephen J. McGrath

IDWR Regional Office,

RECEIVED

APR 01 2004

Department of Water Resources
Eastern Region

11/06/2003

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 23-11160

NAME AND ADDRESS: STEPHEN J MC GRATH
PO BOX 50731
IDAHO FALLS ID 83405-0731

SOURCE: UNNAMED SLOUGH

TRIBUTARY: RAINEY CREEK

QUANTITY: 0.000 CFS
10.80 AFY

PRIORITY DATE: 04/01/1957

POINT OF DIVERSION:
T01N R44E S8 SESWNW Within BONNEVILLE County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
RECREATION	01/01 12/31	10.80 AFY

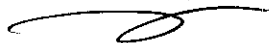
PLACE OF USE: RECREATION Within BONNEVILLE County
T01N R44E S08 SENW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use
SOURCE IS ALSO KNOWN AS MILLERS SLOUGH.

Contacts Data Entry Form

23-11160


Owner Type	Full Name	Address	City	State	Zip	Phone
------------	-----------	---------	------	-------	-----	-------

Current Owner STEVE MCGNATH

Name connector: and ____, or ____, and/or ____

Current Owner _____

Current Owner _____

Representing Attorney: _____ Phone Number: _____

Accompanied By: _____ Phone Number: _____

Relationship to Claimant: _____

Date of Field Exam: _____ Time: _____

Directions to Property (if different from above) and/or update owner information:

CLAIMED AS B.U.

WHAT IS CLAIMED AS PDD IS THE CHECK ON LAINOV CK

WHICH IS USED TO BACK WATER INTO MINUTE SURFACE.

THERE IS ACTUALLY NO DIVERSION FOR IRRIGATION.

THE IRRIGATION PORTION, AT-LEAST, IS DISALLOWED.

Reviewer: _____

Date: _____

Priority Date Data Entry Form

Claim Number: _____

Water Right Priority Date: _____ Water Right Basis: _____

Claimed Priority Date: 4/1/1940 Claimed Basis: BURecommended Priority Date: 4/1/1957 Recommended Basis: BU☐ Use Claimed Priority Date and Basis as Recommended Priority Date and Basis

Document the evidence submitted/reviewed for the priority date claimed, include your analysis of the evidence:

SUPREME COURT DECISION, JUNE 12, 1963, DISCUSSES
CONSTRUCTION OF A DAM IN 1957... SO USED AS
RECOMMENDED PRIORITY DATE. SEE 23-11213 FOR COURT'S
DECISION
NO EVIDENCE TO SUPPORT 1940.

Reviewer: _____

Date: _____

Point of Diversion and Source Data Entry Form

Claim Number: _____

Water Right Point of Diversion: T____, R____, Sec.____,____,____,____. County: _____

Source: _____ Tributary: _____

Claimed Point of Diversion: T____, R____, Sec.____,____,____,____. County: _____

Source: _____ Tributary: _____

Recommended Point of Diversion: T____, R____, Sec.____,____,____,____. County: _____

Source: _____ Tributary: _____

____ Use Claimed POD and Source as Recommended POD and Source

Twp	Rge	Sec	Gov Lot	QQQ of QQ of Q	County	Source	
IN	44E	8		SES WNW	BONN.	SLOUGH	TRIB TO: RAINY CK
GPS Coordinates: _____							
GPS Coordinates: _____							
GPS Coordinates: _____							
GPS Coordinates: _____							
GPS Coordinates: _____							
GPS Coordinates: _____							
GPS Coordinates: _____							
GPS Coordinates: _____							

Other rights from this POD? _____

Document how the POD and Source were verified and/or Pump and Motor data:

SLOUGH AKA 'MILLOT'S SLOUGH' FOD BY SPRINGS.

ROMANA
B01

Transfers Changing POD _____

Reviewer: _____

Date: _____

Place Of Use Data Entry Form

Claim Number: _____

_____ Use Claimed POU as Recommended POU

Claimed Place of Use

Twp	Rge	Sec	QQ	Q	County	Lot Num	Acres	Purpose of Use

Total Acres _____

Recommended Place of Use

Twp	Rge	Sec	QQ	Q	County	Lot Num	Acres	Purpose of Use
IN	44E	6	SENN		BONN.			RECREATION STORAGE
			SWNN					"

Total Acres _____

Document how the POU was verified:

IRRIG IS DISALLOWED - NO IRRIG PRACTICE. NO DIVERSION FROM SLEUGH - ALTHOUGH LATERAL PERCOLATION IS A BENEFIT OF STORED WATERS

Transfers Changing POU _____

Reviewer: _____

Date: _____

Period of Use and Quantity Data Entry Form

Claim Number: _____

☐ Use Claimed Period of Use and Quantity as Recommended Period of Use and Quantity

Water Right Period of Use and Diversion Rate

Water Use	Start	End	Rate	Volume

Overall Diversion Rate _____

Overall Diversion Volume _____

Claimed Period of Use and Diversion Rate

Water Use	Start	End	Rate	Volume
IRRIG				
RECREATION				

Overall Diversion Rate _____

Overall Diversion Volume _____

Recommended Period of Use and Diversion Rate

Water Use	Start	End	Rate	Volume
RECREATION STORAGE	1/1	12/31	0	10 ³

Overall Diversion Rate _____

Overall Diversion Volume _____

Document how the Period of Use and/or Diversion Rate were verified:

SLOUGH ON CLAIMANT'S PROPERTY IS 6⁵ AC
 COURT DECISION ALLOWS 20" BEHIND DAM.
 $\therefore 6⁵ AC \times 167' (20") = 10³ AFA$

Q RATE IS NOT CONSIDERED

COMBINED USE REMARKS 2/23-11/213

Reviewer: _____

Date: _____

WARRANTY DEED

THIS INDENTURE, Made this 23 day of May, 1996, by and between RUDD MANAGEMENT CORPORATION, of 725 S. Woodruff, Idaho Falls, Idaho 83403, of the County of Bonneville, State of Idaho, the party of the first part, and STEPHEN J. McGRATH, a married person dealing with his sole and separate property, of 9382 South 1st East, Idaho Falls, Idaho 83404, of the County of Bonneville, State of Idaho, the parties of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00), lawful money of the United States of America, and other good and valuable consideration, to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part and to his heirs and assigns forever, the following described real estate, situate in the County of Bonneville, State of Idaho, to-wit:

The S 1/2 of the NW 1/4 of Section 8, Township 1 North, Range 44 East of the Boise Meridian, Bonneville County, Idaho according to the recorded plat thereof.

TOGETHER WITH all water and water rights, ditch and ditch rights, (including 2.0 C.F.S. in the Upper Rainey Creek tributary to the Snake River) located on or used in connection with said property.

SUBJECT TO all existing patent reservations, easements, rights-of-way, protective covenants, zoning ordinances, applicable building codes, laws and regulations.

TOGETHER, With all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property as well in law as in equity, of the said party of the first part.

TO HAVE AND TO HOLD, All and singular, the above mentioned and described premises, together with the appurtenances, unto the party of the second part, and to his heirs and assigns forever. And the said parties of the first part, and its heirs, the said premises in the quiet and peaceable possession of the said party of the second part, and his heirs and assigns against the said party of the first part and its heirs and against all and every person and persons, whomsoever lawfully claiming or to claim the same, shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said party of the first part has hereunto set its hand and seal the day and year first above written.

RUDD MANAGEMENT CORPORATION

By: Robert D. Osell

Its: Vice - President

Att #1

STATE OF IDAHO)
County of Bonneville) ss.
MADISON

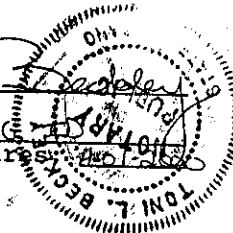
On this 23 day of MAY, 1996, before me, the undersigned, a Notary Public in and for said State, personally appeared ROBERT S. DAREU, known to me to be the VIC. PRESIDENT of RUDD MANAGEMENT CORPORATION, the corporation whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same on behalf of the corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC

Residence: REXBURG

My Commission Expires: NOV 1997



921447

BONNEVILLE COUNTY
RECORDER

'96 MAY 28 PM 4 44

INSTRUMENT NO.	921447
DATE	5-28-96
INST. CODE	205
FICHE NO.	11455-39
FEE	600
STATE OF IDAHO) COUNTY OF BONNEVILLE) ss	
I hereby certify that the within instrument was recorded.	
Ronald Longmore, County Recorder	
By	<i>[Signature]</i> Deputy
Requested of	<i>McGraw-Baker-Marcotz</i>

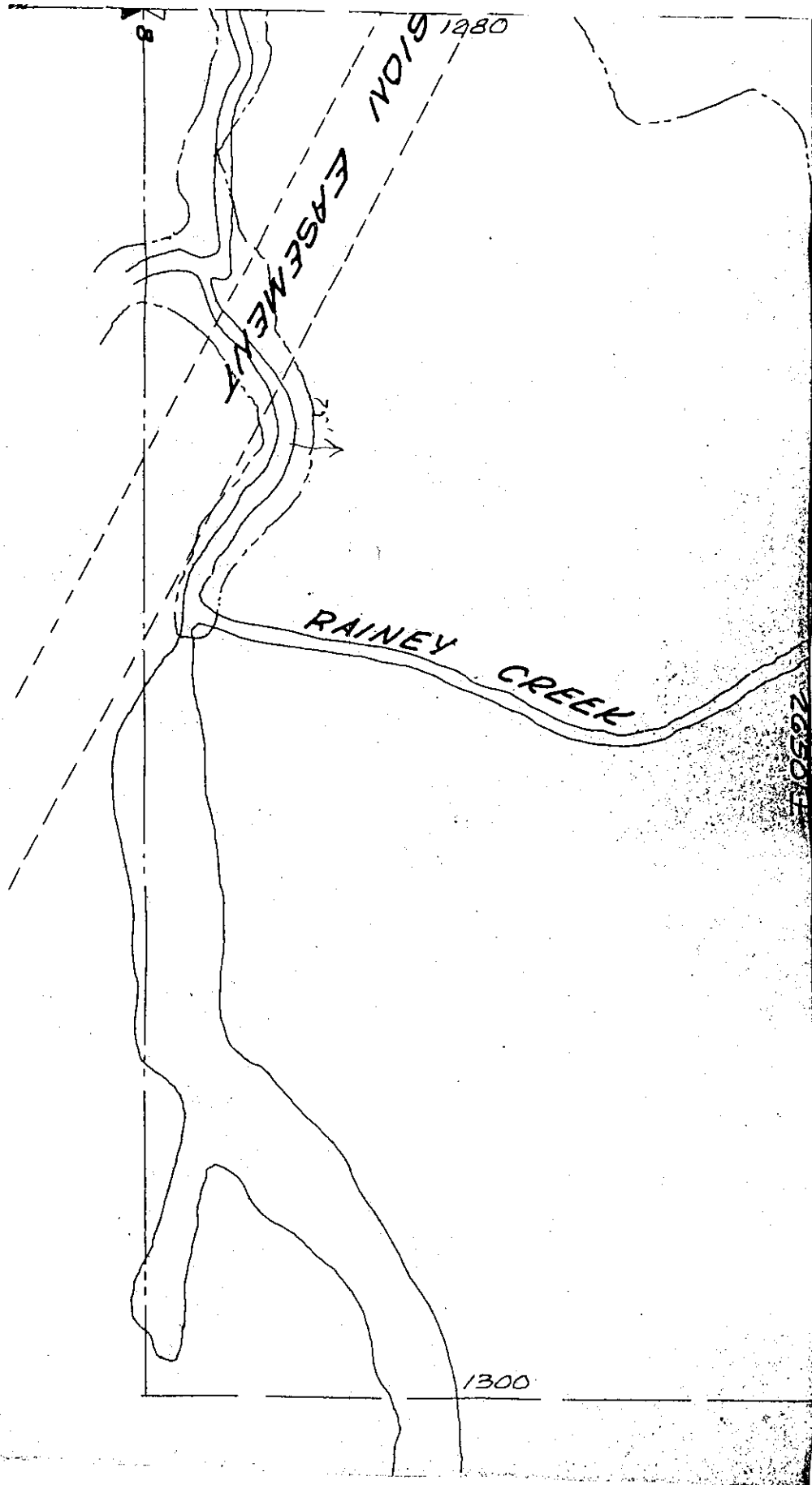
13. Describe any other water rights used at the same place and for the same purposes as described above.

A23-00019D, 45 acres, .33 cfs

A23-00020B, 45 acres, .33 cfs

A23-00093B, 45 acres, 1.00 cfs

A23-00047D, 45 acres, .32 cfs



AH⁴3



↓
N

Att #4

tion in granting to appellant two weeks visitation with the children, away from the home of respondent, provided that she does not remove the children from the State of Idaho and the jurisdiction of the district court. We find no merit in such assignment.

[10] Appellant assigns error of the trial court in not allowing her extended rights of visitation with the children away from respondent's home; she contends that a period of two weeks is of insufficient duration to serve the welfare and best interests of the children. Appellant also asserts insufficiency of the evidence to show that removal from the State of Idaho and jurisdiction of the trial court would be contrary to the best interests and welfare of the children. We deem this subject matter to have been adequately dealt with in the previous discussion contained herein. In regard to the right decreed to appellant of the two weeks period of visitation with the children during summer vacations, away from respondent's home, suffice it to say that under the existing circumstances of the parties, we hold that the trial court did not abuse its discretion in the premises. Such assignments are not meritorious.

[11] Lastly, appellant assigns error of the trial court in allowing her only \$250.00 for travel expenses for the period of child visitation during each summer vacation; and assigns further error in that the trial court made no award to her for maintenance of the children while they are away from respondent's home. Again, we are constrained to the view that under the evidence and all the facts and circumstances shown in this proceeding, that the trial court did not abuse its discretion, and that therefore such assignments are lacking in merit.

Judgment and decree affirmed. No costs allowed.

KNUDSON, C. J., and McQUADE, McFADDEN and TAYLOR, JJ., concur.

Thomas M. WEEKS, Arvey A. Weeks, and
Ivan R. Weeks, Plaintiffs-Respondents,
v.

Archie McKAY, Defendant-Appellant.
No. 9229.

Supreme Court of Idaho.
June 12, 1963.

Suit by downstream owners to enjoin upstream owner from maintaining dam. The District Court of the Ninth Judicial District, Bonneville County, Faber F. Tway, J., enjoined maintenance of dam more than 20 inches above concrete base, and upstream owner appealed. The Supreme Court, Knudson, C. J., held that if upstream owner maintained dam at height which would permit same amount of water to escape from lake and proceed down creek to downstream owners' diversion point as would have escaped if channel had remained undisturbed, upstream owner would not be responsible for water flowing in quantity less than that to which downstream owners were entitled during any period of the year.

Remanded with instructions to amend findings, conclusions, and judgment in accordance with opinion.

1. Waters and Water Courses §63

Evidence supported finding that upstream owner sued by downstream owners for injunction against maintenance of dam had employed construction company to clean out outlet and that as a result, mouth of lake was lowered 8 inches, as claimed by company's owner.

2. Waters and Water Courses §63

Finding was not erroneous that dam constructed by upstream owner sued by downstream owners for injunction against maintenance of water dam was 44 to 48 inches in height above concrete footing of dam, as testified to by deputy water master.

3. Waters and Water Courses §63

Evidence supported findings that downstream owners suing upstream owner to en-

join maintenance of water dam did not get natural flow of water or storage water and that conduct or actions of upstream owner who had dam built interfered with natural flow of the water.

Waters and Water Courses §51

Downstream owners had no right to more water than normally and naturally flowed from lake in its natural state unaffected by artificial changes in depth and width of channel and outlet of lake.

Waters and Water Courses §79

One who undertakes to change natural channel of stream or increases or diminishes flow of stream must exercise care and take such precautions as to prevent injury to others.

Waters and Water Courses §53

If upstream owner maintained dam at height which would permit same amount of water to escape from lake and proceed down creek to downstream owners' diversion point as would have escaped if channel had remained undisturbed by construction of dam, upstream owner would not be responsible for water flowing in quantity less than that to which downstream owners were entitled during any period of the year.

Waters and Water Courses §63

Downstream owners who sued upstream owner to enjoin maintenance of dam only to preserve their water rights were entitled only to judgment which would enjoin interference with and would protect their rights, and downstream owners were not entitled to enjoin maintenance of dam at height lower than that which would interfere with their rights or privileges relating to water.

O. R. Baum, Ben Peterson, Ruby Y. Brown, Robert W. Bennett, Pocatello, for appellant.

Albaugh, Bloem, Smith & Pike, Idaho Falls, for respondents.

KNUDSON, Chief Justice.

Rainey Creek, in the spring of the year and during other high water periods, is a continuous stream flowing across appellant's land, but during the summer season is usually divided into two streams, viz.: Upper Rainey Creek and Lower Rainey Creek. The water of Upper Rainey Creek usually sinks and disappears before getting to the 9½ acre lake which is fed by springs and constitutes the headwaters of Lower Rainey Creek. Said lake is also fed by a slough with a surface area of about 2.8 acres which is a short distance upstream. A substantial part of the 9½ acre lake is situate on appellant's land and the 2.8 acre slough is on land owned by persons who are not parties to this action.

Respondents are property owners downstream from appellant's land and they are the owners of a decreed water right of 160 inches (3.2 C.F.S.) in the waters of Lower Rainey Creek with a priority of June 1, 1893 which is appurtenant to their land as described in paragraph 1 of respondents' complaint. The point of diversion of such water is a little over a quarter of a mile downstream from the 9½ acre lake. Respondents also have certain rights to water stored in Palisades Reservoir which is at times delivered to them via Rainey Creek.

During the fall of 1957 appellant employed one Lloyd Rush to do excavation work in Rainey Creek. Appellant admits that he employed Mr. Rush of the Rush Construction Company to perform excavation work in Upper Rainey Creek, but denies that such employment included excavation at the lake outlet or in Lower Rainey Creek.

After the excavation had been completed appellant constructed a headgate or dam approximately 12 feet long across the channel of Lower Rainey Creek just below the outlet from the lake. Said dam has a concrete base with a center pier and ends approximately 64 inches high and is so constructed that the elevation of water behind the dam may be regulated by planks which may be inserted in or removed from

slots made in the center pier and ends of the dam.

This action was commenced by respondents seeking an injunction against appellant and all persons acting for or in aid of him, restraining them from maintaining and using said dam. From a judgment in favor of respondents this appeal has been taken.

[1] Appellant contends that the court erred in finding that appellant employed the Rush Construction Company to clean out the outlet of the lake and that by reason thereof the mouth of the lake was lowered 8 inches. Although appellant denied that he employed said company to clean out the outlet, Mr. Rush testified that he was given specific instructions by appellant to do so and that he removed such amount of material from the outlet as lowered it 8 inches to a foot in depth and widened it six or eight feet. The finding complained of is supported by competent evidence.

[2] Under assignment of error No. III it is claimed that the court erred in finding that the dam constructed by appellant was 44 to 48 inches in height above the concrete footing of the dam. In this connection David Peterson, a deputy watermaster, testified as follows:

"Q. What did you find about the height of that dam; that is to say, the number of planks in it?

"A. Well, the first time I went over there there was three 12-inch planks, one-foot planks, and three two by fours in the spillway.

"Q. There was three two by fours and three 12-inch?

"A. That's right.

"Q. And was the water backed up to the top of those planks?

"A. Yes.

"Q. That would be four feet? That dam, then, was four feet high, is that right? That would look about the right height to you there? I mean, that's about what it was?

"A. That's exactly what it was."

The court did not err in making the finding complained of.

[3] Appellant's contention that "there is no evidence in the record that the conduct or actions of the appellant interfered with the natural flow of the water" in Lower Rainey Creek is clearly without merit. The contention that the court erred in finding that during 1961 respondents failed to get their natural flow water or storage water is also without merit.

Considerable of appellant's brief is devoted to discussing statements or findings of the court relative to the claimed rights of appellant to the waters in the lake. In this regard the court found that the waters in said lake are public waters of the State of Idaho and any right which appellant has as a riparian owner or proprietor therein or thereto is subject and inferior to the rights and claims of respondents. Appellant concedes that any right which he has to the water of said lake are inferior to the decreed rights of respondents to 160 inches of said water, plus such storage rights as they may have acquired. Consequently it is unnecessary to a determination of the issue in this case to define what rights, if any, appellant has to such water.

[4] Appellant further argues that respondents do not have a right to any more water than normally and naturally flows from said lake in its natural state unaffected by artificial changes in the depth and width of the channel and outlet of the lake. There is merit to such contention. However, artificial changes in the channel and outlet of the lake have been made in this case and such changes have brought about this suit.

The trial court found that by reason of the installation of the dam by appellant the respondents were unable to obtain for the irrigation of their lands, a large portion of the natural flow water to which they were entitled under their decreed right, and were unable to obtain or use the exchange water from the Palisades Reservoir. Such find-

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ings are adequately supported by competent evidence.

[5] One who undertakes to change the natural channel of a stream or by means of dams or otherwise increases or diminishes the flow of a stream must exercise care in so doing and take such precautions as to prevent injury to others. *Mashburn v. St. Joe Improvement Co.*, 19 Idaho 30, 113 P. 92, 35 L.R.A.,N.S., 824; *Smith v. Big Lost River Irrigation District*, 83 Idaho 374, 364 P.2d 146. The generally accepted rule is stated in 56 Am.Jur., 505, Waters, § 14, as follows:

"It is established, however, that the ordinary or natural course of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Accordingly, one who changes the course of a stream must do so in such manner as not to injure, or unduly interfere with the rights of, the adjoining proprietor, either above or below, or on the opposite side of the stream. * * *

It is further stated in 56 Am.Jur. 510, Waters, § 18, that:

"* * * a riparian proprietor has the right, inseparably annexed to the soil, to have the water of a stream flow to and from his land as it has been wont to flow, so far as is consistent with the right of other owners to make a reasonable use of such water. It follows that the obstruction of the natural flow of a stream is always done at the risk of being answerable in damages to him who sustains a loss thereby. Without the consent of the other proprietors who may be affected by his operations, an upper proprietor has no right unreasonably to interrupt or retard the natural flow of the water, to the injury of the lower owners, * * *

Appellant complains of the following finding of fact:

"That the top of the concrete base or footings of the said dam is twelve (12)

inches below the level of the existing channel of Lower Rainey Creek; that the present level of the channel of Lower Rainey Creek at said dam is eight (8) inches lower than it was before same was dredged and deepened by defendant and his agents; * * *

Appellant argues that the court's conclusion that the channel at the dam is only 8 inches lower than it was before it was dredged and deepened by appellant and his agents, is but an arbitrary conclusion of the court. It is true appellant and some witnesses testified that the bed had been lowered more than 8 inches, however, among others, the man who did the work testified that he lowered the outlet of the lake between 8 and 12 inches, and the court was justified in accepting his estimate.

Appellant strenuously complains concerning the language used in the last portion of said finding No. XV, which is substantially the same as is used in a portion of the last paragraph of the judgment. The language referred to is as follows:

"* * * that planks or boards may be installed and maintained in said dam on top of said concrete base or footing to a height of twenty (20) inches, and no more."

Appellant argues that this language, in effect, increased respondents' rights, whereas, the court should not have restricted appellant from maintaining the lake at a higher level so long as it does not interfere with respondents' rights. We do not agree with appellant's claimed effect of the judgment, however there is some justification for complaint regarding the language used:

[6] This action was commenced seeking an order enjoining and restraining appellant from interfering with the natural flow of Lower Rainey Creek to respondents' damage; its objective is to preserve respondents' water rights. The trial court found that if the dam in controversy is maintained at a height of 20 inches above the concrete base or footing of the dam, it will permit the same amount of water to

escape from the lake and proceed down Lower Rainey Creek to respondent's diversion point as would occur if its channel had remained undisturbed. Under such condition it will not be appellant's responsibility, if, during any period of the year, the amount of water flowing from the lake is less than the quantity to which respondents are entitled.

[7] Appellant acknowledges that he has in the past received benefits resulting from the percolation of water from the lake sub-irrigating approximately 70 acres of his land and also that the level of the lake affects the amount of sub-irrigation his land receives. Appellant further acknowledges that he has no decreed right to the water in the lake here involved and from the record before us it appears that appellant enjoys only the rights or privileges of a riparian owner. However, since the issue here presented, and the relief hereby sought, involves only the preservation of respondents' rights, we are of the view that so long as the provisions of the judgment properly enjoin appellant from in any manner interfering with, and adequately protects, respondents' rights such judgment would be proper. We conclude that the last paragraph of the judgment should be amended to read:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, his agents, servants, employees and all others acting in aid or assistance of him be hereby perpetually enjoined during the irrigation season of each year from maintaining said dam at a height more than twenty (20) inches above the concrete base or footing of said dam if and when any additional height would interfere in any respect with plaintiffs' rights or privileges relative to the water of Rainey Creek or the Palisades Reservoir or the prior rights of others. In the event of a violation of the foregoing order by defendant or any person acting in aid or assistance of him, he may thereafter be perpetually enjoined

from, at any time, maintaining said dam at a height in excess of 20 inches above the concrete base thereof. Plaintiffs shall have judgment for their costs in the amount of _____ DOLLARS."

We have examined the remaining assignments of error and find no error that would justify a reversal of the judgment in this case.

The cause is remanded with instructions to the trial court to amend its findings of fact, conclusions of law and judgment in accordance with the views herein expressed. Costs to respondents.

McQUADE, McFADDEN, TAYLOR
and SMITH, JJ., concur.



Dearold FOSTER, Plaintiff-Appellant,
v.
Frank H. THOMAS, Defendant-Respondent.
No. 9289.

Supreme Court of Idaho.
June 7, 1963.

Action for personal injuries and property damage resulting from intersectional collision between defendant's westbound automobile which was coming from a stop sign and plaintiff's motorbike which was proceeding south on a highway to the right of a southbound automobile as they approached the intersection. The District Court, Ninth Judicial District, Bonneville County, Henry S. Martin, J., after jury verdict and entry of judgment for plaintiff, granted defendant's motion for an order setting aside the verdict and directing entry of judgment in favor of the defendant. The plaintiff appealed. The Supreme Court, Knudson, C. J., held that questions as to defendant's neg-

Log for claim 23-11160

Spatial Dynamics BTD

6/15/01

TR	SEC	QQ	Acres Claimed	Acres Found	COMMENT
01n44e	8	SWNW	40	39	
01n44e	8	SENW	40	33	
Totals:			80	72	

65
78

T1N, R44E

23-11213

23-11160

Miller's Slough

Dam

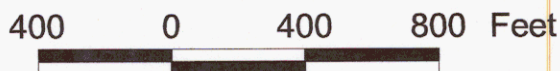
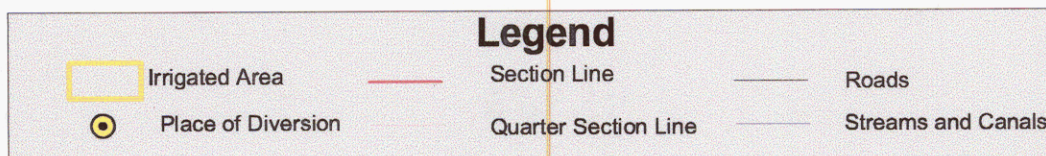
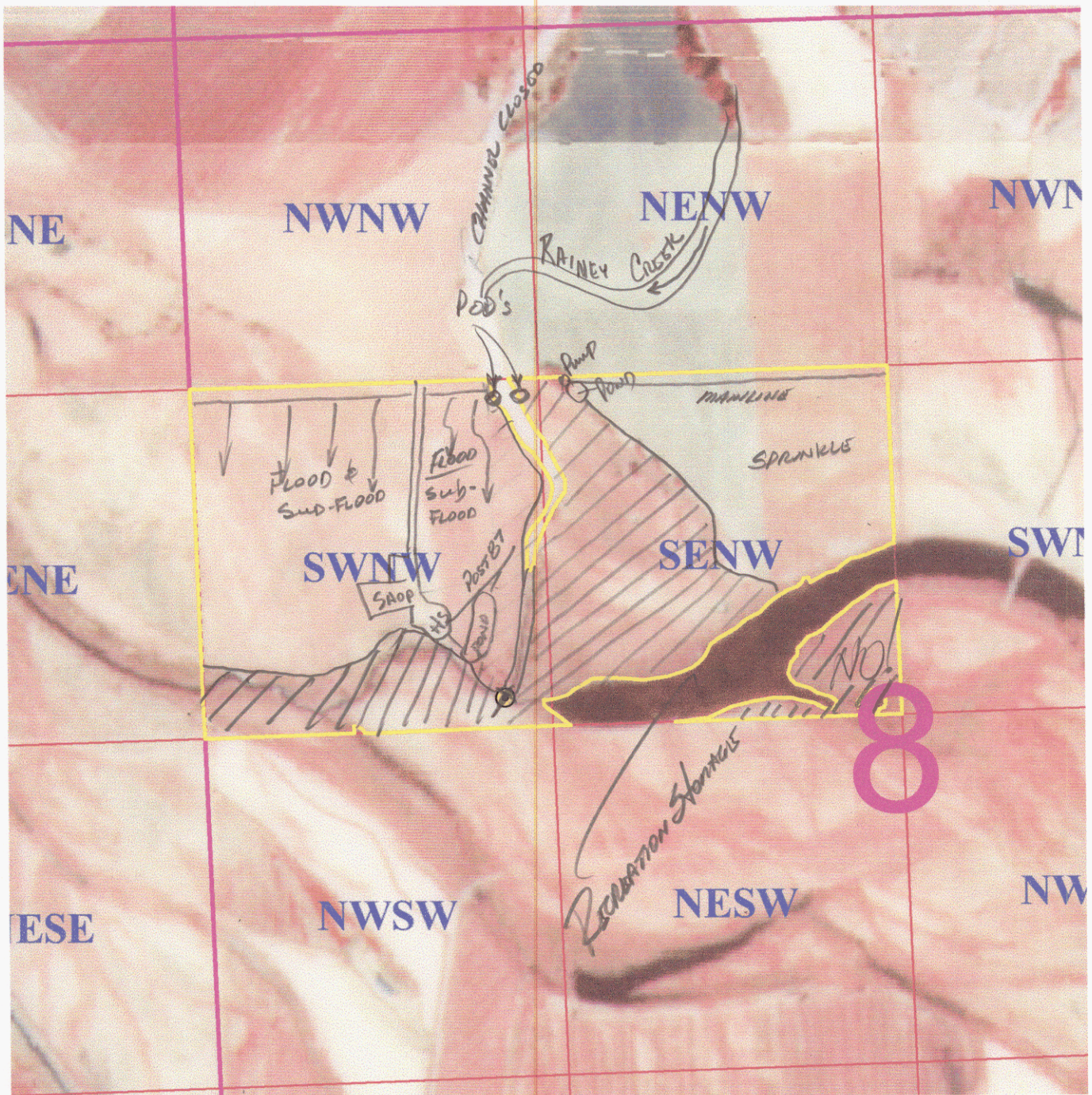
Creek

Rainey

26

Water Right Claim Number 23-11160
Township, 1N44E

06/15/2001



SPATIAL
DYNAMICS

9/29/03
SBR