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FILED
TWIN FALLS CO., IDAHO

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

Case No. 39576

) Subcase 43-10356
) (William D. Jones and Son)
)
) SPECIAL MASTER REPORT AND
) RECOMMENDATION RE: INTERIM
) ADMINISTRATION and ORDER
) SETTING DEADLINE TO FILE
) MOTIONS TO ALTER OR AMEND

FINDINGS OF FACT

Claim

William D. Jones and William D. Jones and Son, P.O. Box 152, Almo, Idaho 83312, filed a *Notice of Claim to a Water Right* on June 6, 1989, claiming 2 cfs from South Almo Creek and laterals to irrigate 73 acres in Cassia County from March 15 to November 15 with a priority date of April 30, 1879, based on beneficial use.

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 43* on September 28, 2001. The Director recommended the claim to William D. Jones and Son ("Jones and Son") for .56 cfs from Almo Creek ("also known as South Almo Creek") to irrigate 28 acres from April 1 to October 31 with a priority date of April 1, 1935, based on beneficial use.

Objections

Roscoe and Joyce Ward filed an *Objection* on January 31, 2002, alleging the water right should not exist. Nolan K. Branch, Clark W. Ward, Warr Brothers (Olene Warr) and Reid S. Stewart filed the same *Objection* on February 4, 2002, and Rodney Hall filed his *Objection* on

SPECIAL MASTER REPORT AND RECOMMENDATION RE: INTERIM ADMINISTRATION and ORDER SETTING DEADLINE TO FILE MOTIONS TO ALTER OR AMEND

February 7, 2002. On July 15, 2002, the Special Master entered an *Order Dismissing Objection* dismissing Reid S. Stewart's *Objection* based on his motion. Jones and Son did not object to the Director's recommendation.

Joint Motion for Interim Administration

On December 5, 2002, objectors Roscoe Ward, Nolan K. Branch, Rodney Hall and Olene Warr filed a *Joint Motion for Interim Administrative Order* seeking interim administration of 43-10356 "as part of Water District 43B and requiring the claimants [Jones and Son] to follow the laws of the State of Idaho and limiting the usage of this claim [43-10356] to that which has been recommended by the Department of Water Resources." On February 19, 2003, objectors Roscoe and Joyce Ward filed a *Certificate of Service* completing service of notice on all claimants of water from the Raft River and Almo Creek who might be adversely affected by the requested order of interim administration pursuant to I.C. § 42-1417 (2)(b).

IDWR Recommendation

On March 14, 2003, IDWR filed its *Recommendation for Interim Administration for Subcase No. 43-10356*. First, IDWR included 43-10356 within its general provision for "separate streams" and recommended 43-10356 as a separate water right from Raft River. That general provision reads:

The following water rights from the following sources of water in Basin 43 shall be administered separately from all other water rights in Basin 43 in accordance with the prior appropriation doctrine as established by Idaho law.

Next, IDWR recommended that claim 43-10356 be administered pursuant to the current *Director's Report*. That means that .56 cfs may be diverted at 2 points of diversion and applied to irrigate 28 acres. IDWR noted that Jones and Son recently changed its delivery system to include a concrete dam across the natural channel of Almo Creek and its pumping from the pool above that dam "may cause injury to senior Raft River water rights and may improperly impound unnamed springs that are tributary to Raft River."¹

¹ Figure 1 attached to IDWR's *Recommendation for Interim Administration for Subcase No. 43-10356* is a useful depiction of the facts reported by IDWR.

Therefore, the Department recommends that the claimant [Jones and Son] allow water to pass through the existing concrete structure [dam] The claimant may pump water further north of the concrete structure either directly from the ditch . . . or from a different holding pond, if such pond does not intercept springs that would be tributary to either Almo Creek or the Raft River [emphasis added].

Finally, as to the objectors' request that claim 43-10356 be administered as part of Water District 43B (Raft River), IDWR noted the claim is currently considered to be within Water District 43D (Almo Creek): "The Department sees no reason that this should be changed at this time."

Pre-Hearing Agreement

Just before the hearing on the objectors' *Joint Motion for Interim Administrative Order*, Jones and Son filed its *Response to Reply to Memorandum in Opposition to Objectors' Joint Motion for Interim Administration Order*. It wrote: "Claimant Jones has no objection to an *Order for Interim Administration* being entered in accordance with the recommendation of IDWR for interim administration."

Hearing

A hearing on the objectors' *Joint Motion* was held at the SRBA Courthouse in Twin Falls, Idaho. Jason D. Walker appeared for claimant Jones and Son (William and Annalee Jones and their son, Rod Jones); objectors Roscoe and Joyce Ward, Nolan K. Branch, Rodney Hall and Olene Warr appeared *pro se*; and Candice M. McHugh appeared for IDWR, along with Vikie Hancock, senior water resources agent.

CONCLUSIONS OF LAW

***Prima Facie* Weight of IDWR Director's Recommendation**

Idaho Code § 42-1411 (4) states that, "Upon filing with the court, the director's report . . . shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law." That means the elements of water rights recommended in director's reports are presumed to be true unless disproved by some evidence to the contrary:

The Legislature's direction that the contents of the Director's report shall constitute prima facie evidence of some water right claims was a permissible exercise of the authority, recognized in I.R.E. 301, to create an evidentiary presumption. Unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the Director's report are established.

In Re SRBA Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995).

There is no reason to believe that IDWR's *Recommendation for Interim Administration for Subcase No. 43-10356* should be treated any differently than its *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 43*. In other words, both are entitled to prima facie weight by statute.

Witness Testimony

The objectors' main concerns with IDWR's *Recommendation for Interim Administration for Subcase No. 43-10356* had to do with the recommended source and the "separate streams" designation.² The objectors want to prevent Jones and Son from diverting spring water rising immediately upstream from its recently constructed cement dam in Almo Creek near the junction of Almo Creek and the Raft River. The objectors do not agree 43-10356 should be administered separately from the Raft River. They maintain that particular spring water is tributary to the Raft River from which they divert downstream below the junction. For that reason, they want 43-10356 administered as part of Water District 43B (Raft River) instead of Water District 43D (Almo Creek).

David Sundberg, water master for Water District 43B (Raft River), testified that much of the water impounded by Jones and Son's cement dam arises from springs immediately upstream from the dam. If the dam were not there, that water would flow down a short stretch of the natural channel of Almo Creek and join the Raft River. Mr. Sundberg thought Jones and Son's upper diversion point in § 30 (below the Knight diversion point, not marked on Figure 1) was no longer usable.³ Mr. Sundberg doubted that Jones and Son could keep water in the natural channel of Almo Creek at its lower diversion point in § 32 because of the greater depth of the

² Senior water resources agent Vikie Hancock testified that IDWR based its recommendation for "separate stream" designation of 43-10356 solely on the earlier "Jobe Adams Decree." It is not clear whether that decree binds IDWR and all the parties to this matter. Jones and Son based their claim for 43-10356 on beneficial use, not any decree.

³ William Jones agreed that the upper diversion point in § 30 is unusable without significant improvements. That suggests it has not been used for some time and may implicate partial forfeiture.

“lake ditch” (Jones Ditch) versus the natural channel – at least not without substantial improvements. Plus, he said there is currently no way to measure the flow of water being diverted from Almo Creek into the Jones Ditch; hence, there will be problems measuring and controlling Jones and Son’s recommended quantity of .56 cfs.

Perhaps because of the relatively flat gradient of the land, the witnesses had trouble differentiating between the natural channel of Almo Creek and developed land and ditches. In some portions, man-made ditches have become the “natural” channel of Almo Creek.

Propriety of IDWR’s Recommendation

The irrigation season for many water rights in the Almo Creek and the Raft River area began April 1; objector Nolan K. Branch’s irrigation season began March 15. Given the immediacy of this dilemma and the need for the water master to have some guidance to deliver water this season, the proper course is for the Court to order interim administration in accordance with IDWR’s *Recommendation for Interim Administration for Subcase No. 43-10356*. At this early stage in the proceedings, there is simply not enough time for IDWR and the Court to explore every fact to arrive at a decision. The subcase begs for more hydrologic and legal exploration. But in the meantime, the parties need water and the water master needs direction of how to deliver that water.

IDWR’s *Recommendation* is the best informed direction the Court can give the parties short of trial which is set for May 29, 2003. The real test in the short term is whether the water master can effectively carry an order of interim administration. Particularly, can the water master make certain that when Jones and Son pumps water north of the concrete dam, either directly from the ditch or from a different holding pond, “such pond does not intercept springs that would be tributary to either Almo Creek or the Raft River?” No easy task given the terrain.

There is no apparent reason why claim 43-10356 should not be administered in the interim as part of the Almo Creek Water District (Water District 43D), separately from the Raft River. The water master for Water District 43D will be required to perform a purely ministerial duty in accordance with the Court’s order of interim administration, limited by the elements recommended in the September 28, 2001 *Director’s Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 43*. A copy of the Director’s recommendation is attached hereto. Of course, the issues of source and separate streams will be addressed later at trial, along with

alleged unauthorized changes in the Jones and Son's diversion / delivery system and place of use.

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that the Presiding Judge enter an *Order for Interim Administration of Claim 43-10356* as recommended by IDWR in its *Recommendation for Interim Administration for Subcase No. 43-10356*.

ORDER SETTING DEADLINE TO FILE MOTIONS TO ALTER OR AMEND

In order ensure timely resolution of this matter, given the recent beginning of the irrigation season in the Almo Creek and Raft River area,

THEREFORE, IT IS ORDERED that all claimants of water from the Raft River and Almo Creek who might be adversely affected by the requested order of interim administration and who disagree with this *Special Master Report and Recommendation Re: Interim Administration* shall file with the SRBA Court a motion to alter or amend **no later than Thursday, April 17, 2003.**

DATED April 3, 2003.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER REPORT AND RECOMMENDATION RE: INTERIM ADMINISTRATION & ORDER SETTING DEADLINE was mailed on April 03, 2003, with sufficient first-class postage to the following:

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**RECOMMENDATION OF
THE IDAHO DEPARTMENT OF WATER RESOURCES
FOR INTERIM ADMINISTRATION
FOR SUBCASE NO. 43-10356**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
David R. Tuthill Jr., Adjudication Bureau Chief

March 14, 2003

INTRODUCTION

The Director of the Idaho Department of Water Resources ("IDWR" or "The Department") submits this recommendation for interim administration regarding sub-case No. 43-10356 in accordance with Order Setting Dates dated February 11, 2003, which requests that "IDWR shall prepare and file with the SRBA Court no later than Friday, March 14, 2003, a *Recommendation For Interim Administration* setting forth how it recommends claim 43-10356 be administered in accordance with the *Director's Reports for Irrigation and Other, "Reporting Area 7, IDWR Basin 43."* This report was prepared under the supervision of Karl J. Dreher, Director, and David R. Tuthill, Jr., Adjudication Bureau Chief for IDWR.

PROCEDURAL BACKGROUND

Water Right Claim No. 43-10356 was reported in IDWR's September, 2001, *Director's Report for Irrigation and Other Water Rights, Reporting Area 7, IDWR Basin 43*. Water Right No. 43-10356 is owned by William D. Jones and Son ("Jones and Son"). Several objections were filed to this water right. The objections specifically stated that no such water right exists. On March 14, 2002, claimant Jones prepared responses to those objections. On December 5, 2002, a Joint Motion for Interim Administrative Order was filed by the objectors. A hearing on that Motion has been set for March 20, 2003.

DISCUSSION

The Director's Report recommended Water Right 43-10356 with a priority date of April 1, 1935, from the source Almo Creek, tributary to Raft River, with a quantity of 0.56 cfs. The place of use for the water right is limited to 28 total acres. As Figure 1 attached hereto indicates, this water right is located at the very end of Almo Creek and is the last water right on that stream

right before Almo Creek allegedly joins Raft River. As Figure 2 depicts, Almo Creek is shown on the U.S. Geological Survey quadrangle map to be tributary to the Raft River in this area.¹

The Department included 43-10356 on its general provision for separate streams and listed this water right as being separate. That recommendation specifically states:

The following water rights from the following sources of water in Basin 43 shall be administered separately from all other water rights in Basin 43 in accordance with the prior appropriation doctrine as established by Idaho law.

The Joint Motion for Interim Administrative Order requests that water right No. 43-10356 be delivered as part of Water District 43B, the Raft River Water District.

Idaho Code § 42-1417(1)(a) says that the District Court may permit the distribution of water "in accordance with the Director's Report or as modified by the court's order." The Department's recommendation for the delivery of water right No. 43-10356 for the 2003 irrigation season is as follows.

In order to appropriately account for and limit the water right as it has been recommended in the SRBA and to avoid possible injury to senior Raft River water rights, water right No. 43-10356 should be administered pursuant to the current Director's Report. This means that 0.56 cfs of water may be diverted at the points of diversion described in Township 15 South, Range 25 East, Section 30 SESESE or in Section 32 NESENE and applied to 28 acres located in Township 15 South, Range 25 East, Section 32 SENE and SWNW. The Department is aware that the claimant of water right 43-10356 has in recent years changed his delivery system to include a concrete structure located across the alleged natural channel of Almo Creek in Section 32 NESWSE. (See Figure 1.) The Department has determined that pumping from that position may cause injury to senior Raft River water rights and may improperly impound

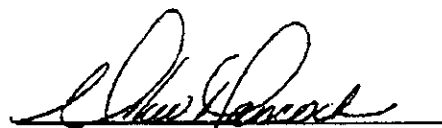
¹ Figure 2 is a map prepared by IDWR using information from the U.S. Geological Survey. The letter attached to Figure 2 explains that Almo Creek is properly identified on Figure 2 by IDWR.

unnamed springs that are tributary to Raft River. Therefore, the Department recommends that the claimant allow water to pass through the existing concrete structure located in Section 32 NESWSE. The claimant may pump water further North of the concrete structure either directly from the ditch as depicted on Figure 1 or from a different holding pond, if such pond does not intercept springs that would be tributary to either Almo Creek or the Raft River.

At this time, there is an active water district distributing water on Almo Creek, Water District 43D. A copy of the Order creating this water district is provided as Attachment 1. Water right No. 43-10356 is currently considered to be within the Almo Creek Water District. The Department sees no reason that this should be changed at this time. A trial in this matter is scheduled to begin May 29, 2003 and will address whether the water right exists at all and if so, whether it is properly included to be administered separately. If Jones and Son are limited to what was recommended in the Director's Report for water right No. 43-10356, 0.56 cfs to be delivered onto its property from Almo Creek, any other issues regarding whether the water right exists or whether it was properly included on the Separate Streams General Provision hinges on the Court's determination of its existence and its source. These fact specific, hotly disputed issues would be better addressed at trial.

In conclusion, the Department recommends that the water right be administered as part of the Almo Creek Water District, Water District No. 43D, and as a separate water right from Raft River limited by the elements as described in the current Director's Report.

Submitted this 14th day of March, 2003.


Vikie Hancock
Senior Water Resources Agent, IDWR

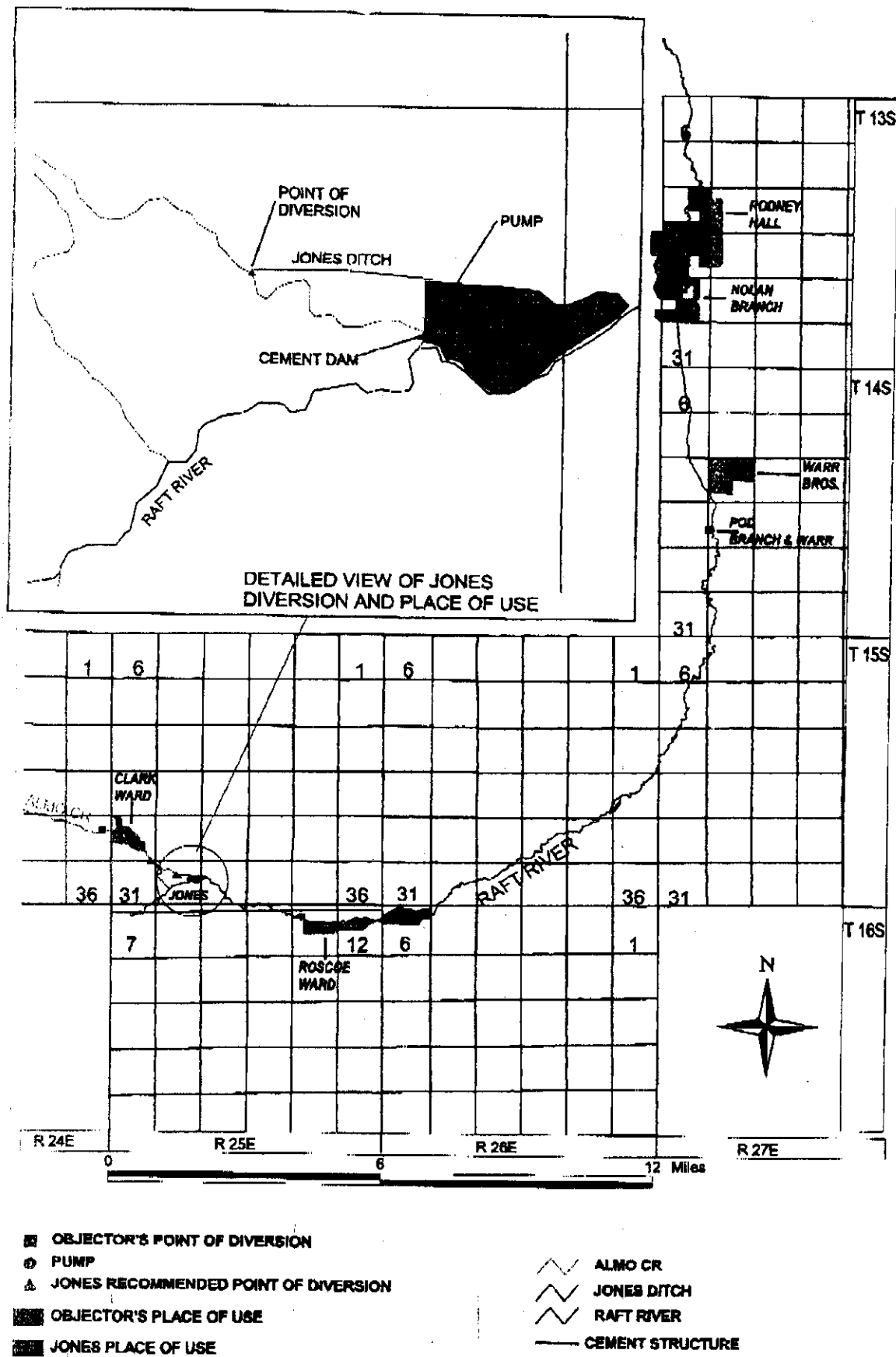


FIGURE 1

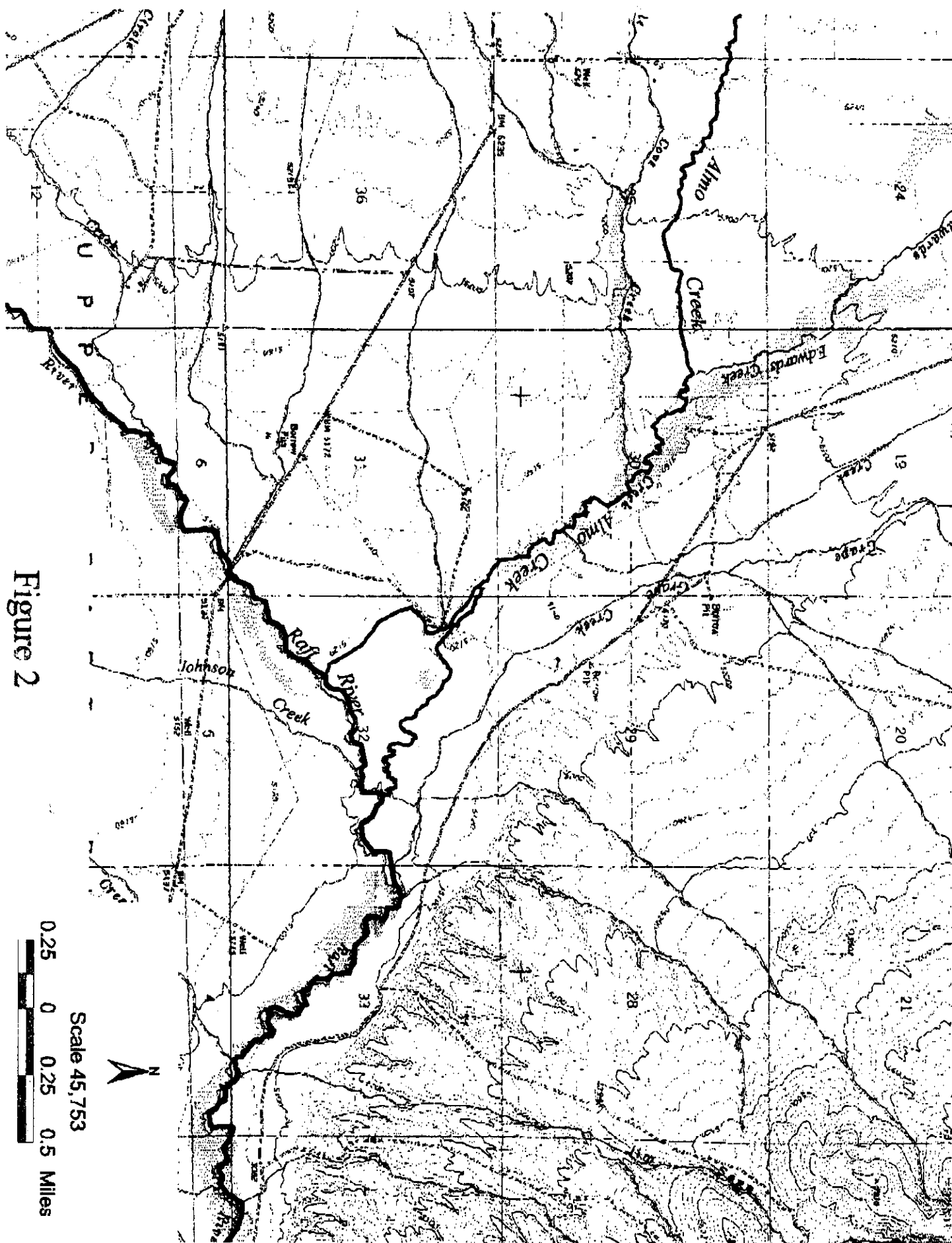


Figure 2