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Department of Water Resources

Flying Resort Ranches, Inc.
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Attorney for Claimant

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	)	
	)	MEMORANDUM RE: DATE OF
	)	FIRST USE
	)	Subcase No. 77-04086
Case No. 39576	)	
	)	
	)	

This Memorandum is submitted on behalf of Flying Resort Ranches, Inc., in response to the Department's letter of June 6, 2005, requesting documentation of the date of first use or priority date. The purpose of this Memorandum is to respond to this request.

INTRODUCTION

Flying Resort Ranches, Inc., an Idaho corporation, owns a ranch, commonly known as the Flying B Ranch, located on the Middle Fork of the Salmon River in Valley County that is legally described as:

Lots 6 and 7, the Southeast Quarter of the Southwest Quarter of Section 22; Township 19 North, Range 14 East Boise Meridian; and Lots 2, 3, 6,

and 7, and the West half of the Northwest Quarter of Section 27;
Township 19 North, Range 14 East Boise Meridian.

Flying Resort Ranches, filed notice of its claim on May 17, 1988 in the SRBA. This filing gave notice of water rights used for power, domestic and irrigation purposes on the Flying B Ranch. The water is diverted from Brush Creek, a tributary of the Middle Fork of the Salmon River, for use on the Flying B Ranch. This Notice proposed a priority date of June 30, 1958. This date is the correct date for the water diverted for power and domestic purposes as discussed below. However, as discussed below, the priority date for the irrigation diversion should relate back to the actual diversion before 1920.

WATER USED FOR POWER AND DOMESTIC PURPOSES

On January 23, 1958, the U.S. Forest Service issued a Special Use Permit to the Flying B Ranch for the purpose of constructing approximately 2,000 feet of pipeline for a dam site located on Brush Creek to the Flying B Ranch. The purpose of the permit was to construct and maintain a water transmission line in connection with a privately owned hydroelectric plant. Attached as Exhibit A is a copy of the Special Use Permit.

The pipeline was constructed and water was diverted from a dam constructed on Brush Creek to a hydroelectric plant located on private property now owned by Flying Resort Ranches, Inc. In turn, the hydroelectric plant generates electricity for the ranch. In addition, water is diverted from this pipeline for domestic purposes. To the best of our client's knowledge, the pipeline was constructed and the water was diverted and applied to a beneficial use in 1958. However, Flying Resort Ranches, Inc., did not purchase the property until 1961 and so its officers and shareholders do not have actual knowledge of the status of matters in 1958.

The pipeline was in place and water was being diverted when the corporation

acquired the property in 1961. Attached is the Affidavit of Dan Hawarth, as Exhibit B. He was one of the incorporators of Flying Resort Ranches, Inc. In 1961, he inspected the ranch in connection with the purchase of the ranch. He states in his affidavit that the hydroelectric plant and the pipeline were in place and water was being diverted at the time of the purchase in 1961 and that the water has been used each year there after.

IRRIGATION WATER

Albert Kurry first acquired the Flying B Ranch property by patents issued by the U.S. Government. Johnny Carrey and Cort Connelly, in their book, The Middle Fork Guide, published in 1992, state that Albert Kurry acquired title to 160 acres in 1920 under the Desert Land Entry Act and that he acquired title to another 160 acres in 1926. Enclosed is Exhibit C, an excerpt from Carrey and Conley, The Middle Fork Guide, 3rd edition, 1992. The undersigned have not been able to obtain documentation of these dates. Enclosed as Exhibits D and E are copies of two grants from the U.S. Government to Albert Kurry for the Flying B Ranch property, both dated 1927.

According to Carrey and Conley, the Kurry brothers maintained a herd of 300 cows on the ranch in the winter of 1919. In 1923, a newspaper article reports that the Kurry brothers grew fruits and vegetables on the ranch. Other owners of the ranch, such as George Crandall, raised cattle on the property. Also, Dan Haworth states in his affidavit, that water was being diverted from Brush Creek for irrigation purposes, when the Flying Resort Ranches, purchased the property in 1961 and has been diverted each year for irrigation purposes since then.

The point of diversion for the irrigation water has been changed to the pipeline intake, described above, sometime after the construction of the pipeline.

CONCLUSION

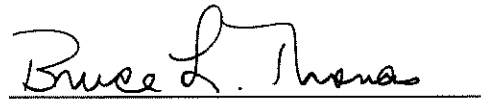
In summary, Flying Resort Ranches, Inc. requests the following priority dates:

Diversion for power and domestic purposes—1958
Diversion for irrigation purposes—1920, or earlier

Flying Resort Ranches, Inc., understands that other elements of the claim will be verified by a field examination. Therefore, these elements have not been addressed in this Memorandum. Flying Resort Ranches, Inc., reserves the right to submit additional material, including but not limited to documents about the original homestead patents.

Dated: August 28, 2005.

Respectfully Submitted:


Bruce L. Thomas

Attachments: Exhibit A, Special Use Permit.
Exhibit B Affidavit of Dan Hawarth.
Exhibit C an excerpt from Carrey and Conley, The Middle Fork Guide, 3rd edition, 1992
Exhibit D grant from the U.S. Government to Albert Kurry
Exhibit E grant from the U.S. Government to Albert Kurry

Case Designations

U

USFS - Salmon
Flying B Ranch
Water Transmission
1/28/58



SPECIAL USE PERMIT

Salmon National Forest.

Permission is hereby granted to Flying B Ranch

of Box 1221 Boise, Idaho

hereinafter called the permittee, to use, subject to the conditions set out below, the following-described lands or improvements:

Approximately 2,000 ft., of pipeline, first 1,200 ft from damsite will be 26" dia., steel pipe, next 1,200 ft., of 24" pipe and remainder of 22" pipe to power plant. Pipe to be underground except for 400' take off from the dam.

This permit covers _____ acres and/or .38 miles for the purpose of:

Maintaining a water transmission line in connection with a privately owned hydroelectric plant.

The exercise of any of the privileges granted in this permit constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall deposit with the Regional Fiscal Agent, Forest Service, _____, a check, draft, or money order made payable to the Treasurer of the United States in the sum of FIVE, Under Reg. U-11 dollars (\$ _____) for the period from _____, 19____, to _____, 19____, and thereafter annually on _____, _____, _____

_____ dollars (\$ _____). The charges for this use may be readjusted from time to time to place this permit on a basis consistent with the charge to other permittees for like privileges.

EXHIBIT A

2. Construction or occupancy and use under this permit shall begin within immediately months, and construction, if any, shall be completed within three months, from the date of the permit. This use shall be actually exercised at least 360 days each year, unless otherwise authorized in writing.

3. Development plans; lay-out plans; construction, reconstruction, or alteration of improvements; or revision of lay-out or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Merchantable timber cut must be paid for by the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements; this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee, and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the forest supervisor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may not be sublet by the permittee to third parties without the prior written approval of the forest supervisor and the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provision thereof, the preceding printed clauses will control.

17. This permit is subject to the conditions set forth above and to conditions 18 below

18 attached hereto and made a part of this permit.

Date January 23, 1958

[Signature]
(Signature of issuing officer)
Acting Forest Supervisor
(Title)

18. The permit confers no rights upon the permittee for use of water involved.

AFFIDAVIT OF DAN HOWARTH

STATE OF IDAHO)
) SS
County of Ada)

I, Dan Howarth, depose and say as follows:

1. I was one of the incorporators of Flying Resort Ranches, Inc. This corporation was formed on March 6, 1961. I have served as president and as a director of this corporation.

2. In 1961, Flying Resort Ranches, Inc. purchased the Flying B Ranch, located on the Middle Fork of the Salmon River in Valley County, Idaho.

3. At the time of the purchase, the ranch was served by a hydroelectric generating plant. A dam across Brush Creek diverted water into a pipeline. In turn, the pipeline carried the water to the hydroelectric plant.

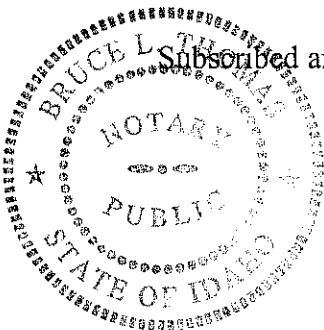
4. The power plant and pipeline have been in use almost continuously every year since the purchase of the ranch. Water has been diverted into the pipeline every year since the purchase.

5. Water is diverted from the pipeline for use in the domestic water system of the ranch.

6. At the time of the purchase in 1961, the pastures located on the ranch property were irrigated with water diverted from Brush Creek. Water has been diverted each year from Brush Creek since the purchase.

DATED this ^{4th} 28 day of July, 2005.

Dan Howarth
DAN HOWARTH



Subscribed and sworn to before me this ^{4th} 28 day of July, 2005.

Bruce L. Thomas
NOTARY FOR THE STATE OF IDAHO
Residing at: Boise, ID
My Commission Expires: 10/24/06

THE MIDDLE FORK

■ A GUIDE ■

JOHNNY CARREY & CORT CONLEY

Third Edition

Backeddy Books
P O. Box 301
Cambridge, Idaho 83610

1992

EXHIBIT C

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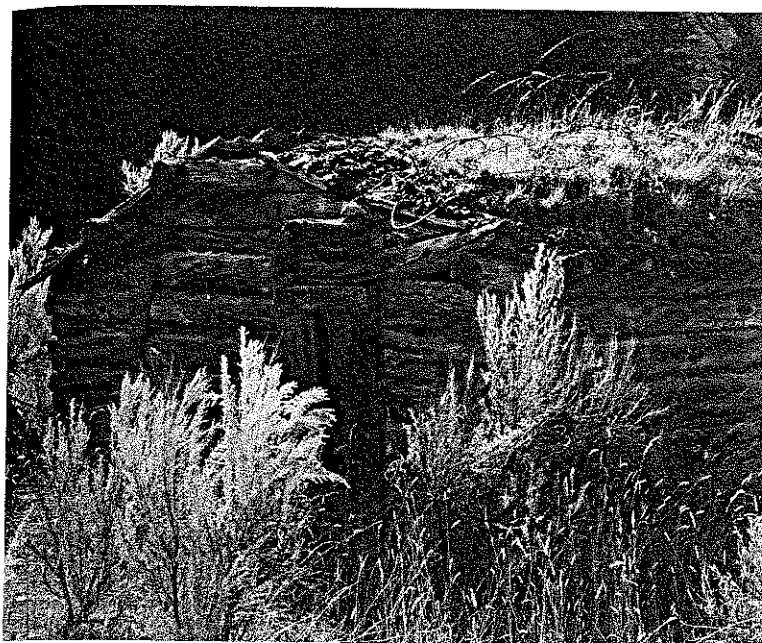
Christiana, Norway, in 1890.
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sometime before 1917—a
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own the Mormon Ranch since
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ery two to three months.
en a caretaker for Bernston.
an administrative site for the
tent.



Beagle brothers
used this shed as a
chicken coop.
Warm Springs
Creek was
diverted through
the floor of the
nearby spring
house.

**MILE 67 Brush Creek-Flying B
Ranch, or Flying Resort Ranches** on the left.

When Captain Bernard's soldiers arrived in 1879, the
Sheepeater Indians had six large lodges at this location.
Miners erected a log cabin on the place some time afterward.

In 1900 two brothers were living at Brush Creek when
the Laing family came through (see Mile 68.3). They later
sold their squatters' rights to Albert Kurry.

Kurry was one of three brothers who came into the Middle
Fork country with horses in 1912, having heard about the
area from Cougar Dave Lewis (see Mile 78.2), whom they
had met at Pittsburg Landing on the Snake River. Kurry's
parents homesteaded Kurry Creek in Hells Canyon.

Albert Kurry was married; his wife Lulu was a school
teacher and musician. Henry Kurry was a bachelor. At times
the brothers kept their cattle together; later Henry moved
his stock over to the Mormon Ranch. They had a cable-
basket for crossing the river.

In April, 1919, the brothers drove a herd of 100 cows from Salmon down to Brush Creek. They went into the winter of 1919 with 300 head. By the following April, they had only thirty left. In June Lulu died at the ranch; her last request was to be buried in Boise. They packed her body by horse twenty miles up Camas Creek to Meyers Cove. Then Charley Sherman hauled her non-stop with a team and wagon sixty miles to Salmon. Packed in ice, she was taken by train almost 600 miles to Boise.

After the funeral, Albert returned to the Middle Fork, bringing his brother Henry along.

The Middle Fork survey had been completed in 1917, and Albert had filed on 160 acres under desert land entry and acquired title in 1920. The brothers labored hard to rebuild their cattle herd. A 1923 copy of the Salmon newspaper reported that "the Kurry brothers grow nectarines, peaches, plums, apples, dewberries, raspberries, strawberries—the cellar so full of fruit and vegetables hardly room to enter it." In 1926 Albert obtained title to an additional 160 acres. The same year, he sold his cattle to Chuck Davis and Bill Foss, but Henry stayed on at Brush Creek a while longer.

George Crandall and his wife bought Brush Creek to raise cattle. Mrs. Crandall was about twenty years older than George and had the purchase money. The Crandalls had carpeted floors and a big gramophone, but it was a lonely life for her—she might see two or three women in a year. In sixteen years she never left the place. In 1936 when the Hatch-Swain-Frazier trip came through, Mrs. Crandall took Frank Swain aside and asked him, "Tell me, do they really have talking picture shows?"

George toiled hard. He fenced the place, cutting thousands of poles up in Deer Heaven. But they never realized much money from their livestock business.

Finally the Crandalls sold and moved to Phoenix, Arizona. George was apparently murdered for the money that he inherited from his wife. His body was never found.



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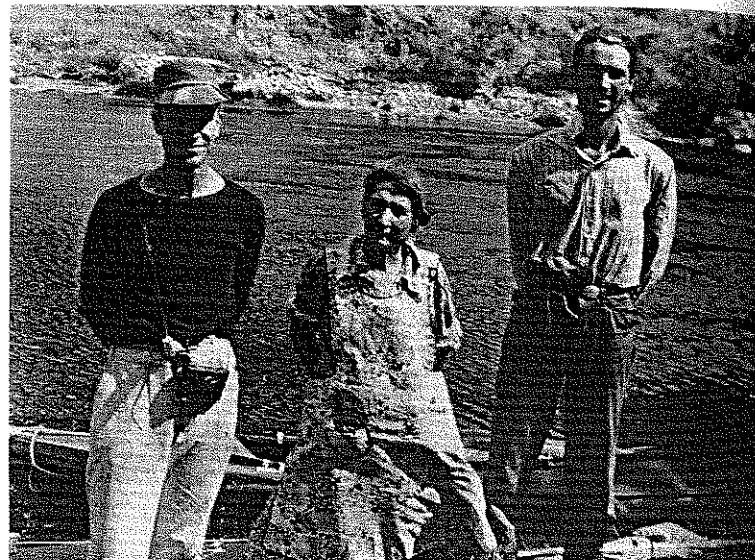


George and "Ma"
 Crandall, Brush
 Creek, visited by
 1936 Hatch trip.



Albert Kurry
 photographed at
 Whitebird, Idaho,
 1912. He was the
 first rancher at
 Brush Creek.

"Zee" Grant (left),
Ma Crandall, and
Colman Nimick,
1940.



A. A. Bennett bought the ranch from the Crandalls and converted it to the Flying B Ranch with the intention of making it into a guest and hunting operation similar to what it is today.

Bennett was one of the legendary Idaho backcountry pilots. He had flown for six years in Alaska, making him one of the earliest bush pilots there. In the early 1930s Bennett Air Transport planes carried mail, equipment, and passengers to the remote mining communities of Stibnite, Yellow Pine, Atlanta, Deadwood, Knox, and Warren. During winter, 1932, when Yellow Pine lost its fuel oil because a snow-covered pipeline broke, Bennett's Zenith cabin biplanes and Stearman hauled 12,000 gallons in thirty-gallon drums in less than a month!

From 1932 to 1934, Bennett was a partner with the famous Bob Johnson, as they flew mountain mail and freight contracts from Boise. He had flown with Johnson in Missoula before starting Bennett Air.

In 1940 Bennett had 1941-1942 he served as 1944, after he bought B that he was flying in a b pieces, of course.

Approximately 150 using it as a vacation sp upkeep. It is operated ir (fifty air-miles northwe once owned by movie a The two operations we Resort Ranches, but th river people—the histo Fork is still known as tl

MILE 67.1 Berna

The cables for this Bob Johnson of Johnso the time. According to 1,800 pounds and had the plane. Johnson ma warmed up by the time however, and he had t aged the undercarriage suspended briefly.



In 1940 Bennett had a flying school in Salmon. Then in 1941-1942 he served as state Director of Aeronautics. By 1944, after he bought Brush Creek, a newspaper reported that he was flying in a bull rake, bulldozer, and sawmill—in pieces, of course.

Approximately 150 families own shares in the Flying B, using it as a vacation spot and donating their labor for its upkeep. It is operated in conjunction with the Root Ranch (fifty air-miles northwest of the river, homesteaded in 1919), once owned by movie actor Wallace Beery.

The two operations were consolidated under the name Flying Resort Ranches, but the name has never taken hold with river people—the historic spot on the banks of the Middle Fork is still known as the Flying B.

MILE 67.1 Bernard Bridge

The cables for this bridge were flown in from McCall by Bob Johnson of Johnson Flying Service. No airstrip existed at the time. According to Bill Sullivan, the cables weighed 1,800 pounds and had to be wrapped around the outside of the plane. Johnson made it with the first load. The day had warmed up by the time he arrived with the second load, however, and he had to come in under full power. He damaged the undercarriage of his plane and had his license suspended briefly.

27-19-14

87

INSTRUMENT NUMBER 11280.

Blackfoot 038791

4--1003

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Blackfoot, Idaho, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Albert Kurry has been established and duly consummated, in conformity to law, for the Lots three, six and seven and the west half of the northwest quarter of Section twenty-seven in Township nineteen north of Range fourteen east of the Boise Meridian, Idaho, containing one hundred sixty-four acres and nineteen hundredths of an acre, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Calvin Coolidge,

President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.
GIVEN under my hand, at the City of Washington, the TWELFTH day of APRIL in the year of our Lord one thousand nine hundred and TWENTY-SIX and of the Independence of the United States the one hundred and FIFTIETH

(SEAL OF GENERAL)
(LAND OFFICE)

By the President: Calvin Coolidge

RECORDED: Patent Number 977611

By Ada Braddock Assistant, Secretary.

M. P. LeRoy
Recorder of the General Land Office.STATE OF IDAHO, }
County of Valley. } ss.

I hereby certify that this instrument was filed for record at the request of Pioneer Bank & Trust Company at no minutes past 9 o'clock A.M., this 22nd day of April, 1927, in my office and duly recorded in Book 1 of Patents at Page 87.

Forest E. Robb
Ex-Officio Recorder.By *Ewen E. McLeod*
Deputy

Fees, \$1.00

COMPARED
INDEXEDEXHIBIT D

86

4-22-27

27-19-14

INSTRUMENT NO. 11279.

Blackfoot 038790

4--1028

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Blackfoot, Idaho, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant Albert A. Kurry according to the provisions of the Act of Congress approved March 3, 1877, entitled "An Act to provide for the sale of desert lands in certain States and Territories," as amended by the Act of March 3, 1891, for the Lots six and seven and the southeast quarter of the southwest quarter of Section twenty-two and the Lot two of Section twenty-seven in Township nineteen-north of Range fourteen east of the Boise Meridian, Idaho, containing one hundred forty five acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Calvin Coolidge,

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the FOURTH day of MARCH in the year of our Lord one thousand nine hundred and TWENTY-SEVEN and of the Independence of the United States the one hundred and FIFTY-FIRST.

(SEAL OF GENERAL LAND OFFICE)

By the President: Calvin Coolidge

By Viola B. Pugh, Secretary

John O'Connell

RECORDED: Patent Number 996989

Acting Recorder of the General Land Office

STATE OF IDAHO,)
) ss.
County of Valley.)

I hereby certify that this instrument was filed for record at the request of Pioneer Bank & Trust Company at no minutes past 9 o'clock A.M., this 22nd day of April 1927 in my office and duly recorded in Book 3 of Patents at Page 86.

Forest E. Robb
Ex-Officio Recorder

Fees, \$1.00

By *John E. McLeod*
Deputy

COMPARER

INDEXED

EXHIBIT E