

07/01/2005

**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: 21-11165
NELDA STEWART MILLER
1993 S 675 E
BOUNTIFUL UT 84010
Telephone Number: (801)295-6117

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

The priority date is wrong.

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

The priority date should be April 1, 1893.

3. Give a brief explanation as to why you disagree with these portions:
See attached affidavit of Norman J. Miller.

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

DATE: Nov. 29, 2005

SIGNATURE: Ray W. Rigby

Please print your name: Ray W. Rigby, Attorney for Nelda Stewart Miller

IDWR Regional Office, 900 N Skyline Dr Ste A, Idaho Falls, ID 83402, 2085257161

RECEIVED

DEC 01 2005

Department of Water Resources
Eastern Region

~~**RECEIVED**~~

~~**NOV 28 2005**~~

Department of Water Resources
Eastern Region

KUD
12/11

AFFIDAVIT

State of IDAHO)
 ss.
County of Madison)

RE: SRBA Water Right Claim 21-11165

NORMAN J. MILLER, being first duly sworn, deposes and says:

1. That he resides at 1993 South 675 East, Bountiful, Utah 84010.
2. That he is the husband of NELDA STEWART MILLER and makes this affidavit in her behalf, because she is presently in an assisted living center and unable to make an affidavit, but your affiant is well familiar with the matters deposed about herein.
3. That the said NELDA STEWART MILLER (hereinafter called Nelda), by a series of gift deeds, on dates commencing in 1976 and fully conveying all interests in 1983, acquired ownership from her father and mother, Roy Stewart and Delila Stewart, of the following described property located in Fremont County, Idaho, to-wit:

Lots 1 and 2 and the Southeast Quarter of the Northwest Quarter
(SE1/4NW1/4) and the Northeast Quarter of the Southwest Quarter
(NE1/4SW1/4) of Section 14, Township 9 North, Range 42 East of the
Boise Meridian.
4. That said water right number 21-11165 pertains to the above described real property.
5. At the time Nelda received said property, your affiant inquired of Nelda's said

parents and other “old timers” living in the area about the water rights pertaining to said property, and was advised by several persons that said property received water rights acquired by the first people to occupy the property as homesteaders; and that said homesteaders and the homesteaders of the other properties adjoining or nearby said property went into possession of the properties in that area and used water thereon commencing in late 1800s, sometime in the 1880s-1890s.

6. The homesteader for Nelda’s property was William G. Hutchison, who received Homestead Receipt No. 656336 from the US Land Office on July 8, 1910, and a patent from the United States of America to said property on February 9, 1911. (A copy of said receipt and patent are labeled Exhibit A and are attached hereto and made a part hereof by reference.)

7. Said patent was issued pursuant to the provisions of the Act of Congress of May 20, 1862, “To Secure Homesteads to Actual Settlers on the Public Domain,” and the acts supplemental thereto. (A copy of said act is labeled Exhibit B and is attached hereto and made a part hereof by reference.)

8. The history of said Act of Congress reveals that it was very customary for people to go West and settle on the public lands without any authorization from public officials; and ultimately, with so much of the public lands being occupied by settlers without written authorization, Congress authorized the Federal Government to issue patents to those people who could establish proof that they had occupied the premises as homesteaders and used the properties for the intended purposes, which included agricultural purposes, and the use of the public water where necessary to utilize said land, upon obtaining a receipt from the US Land Office, a patent would be issued, as it was in this case.

9. The said Hutchisons had occupied and used the property above described, now owned by Nelda, for agricultural purposes and had applied water thereon from the two branches of Willow Creek, which flowed in a generally southerly direction along, beside, and upon Nelda's said property, but said water right had never been established of record .

A. In a similar situation, an action was filed in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Fremont, in June of 1977, involving Seelys and Egbert Farms, Inc., claiming water rights from the same Willow Creek tributaries, for use on lands adjacent to Nelda's lands. (A map showing the location of Willow Creek and its branches in said Section 14, Township 9 North, Range 42 E.B.M., is labeled Exhibit C.1 and another map of the same is labeled C.2 and are attached hereto and by reference made a part hereof.) (A plat, which plats out the land received by the Hutchisons by patent from the USA, and which shows the location of the lands granted water rights in the Seely and Egbert Farms case, and the lands granted the water rights by an amended order in said case, is labeled Exhibit D and is attached hereto and by reference made a part hereof.)

B. It is important to note that in said case the Court acknowledges that water from said creek flowed into a pond or reservoir on the North Fork of the Snake River, created by the Utah Power and Light Company when it built a dam across said river, below the confluence of said river and the

branches of said Willow Creek, and the rights to use said water extended to the right to withdraw the water from said pond or reservoir by pumps.

10. The Stewarts, used pumps and a sprinkler system for the irrigation of the Hutchison lands described in Exhibit A from the pond or reservoir on the river created by the Utah Power and Light, and this use has continued at all times thereafter, including the present time, thus continuing the water right the Hutchisons commenced on the Hutchison lands described in said Exhibit A.

11. On April 3, 1989, Nelda Stewart Miller, with the help of Dennis M. Dunn of the Idaho Department of Water Resources, Eastern Region Office at Idaho Falls, filed with the said department Notice of Claim to a Water Right (claim number A21-11165), claiming the use of 3.26 cfs of water for the irrigation of the lands described in Exhibit A herein. Unaware, at that time, of the history of the water right, and advising said IDWR representative that the water was applied to said lands by means of a electric pump and mainline installed in 1949, in Henry's Fork of the Snake River, said IDWR representative used the date of April 1, 1949 as the date of priority of said water right. However, that date is in error because it did not reflect the use of the water directly out of the said branches of Willow Creek by the said Hutchisons and their successors in interest down through subsequent owners of said property, including the said Stewarts, who commenced the irrigation of said lands by the use of said irrigation pumps directly out of the UP&L pond or reservoir.

12. The best proof of the use of said water and the priority date thereof are as follows:

A. The said Seely and Egbert Farms case, which was actually tried by the Court, wherein witnesses testified and other evidence introduced, and upon which the Court granted a priority date of 1893, and involved the lands adjacent to Nelda's lands, described in Exhibit A above, but neither Nelda or her properties or her predecessors in title were parties to or involved in said case, even though their lands are adjacent and partially surrounded by the said Seely lands, and involved rights initiated by homesteaders on their lands like the homesteaders on Nelda's lands. In this case, the attorney for IDWR participated and witnesses were called and testified.

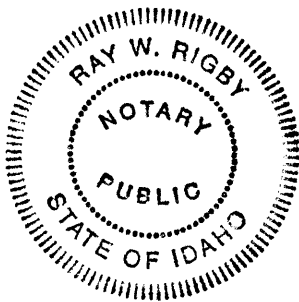
B. The patent issued to Nelda's predecessors in title, the Hutchisons, authorized pursuant to said Hutchisons qualifying under the said Federal Act, was based on prior occupation and use of the premises for the minimum period of five years (and the receipt, which was issued on July 8, 1910, would indicate that the Hutchisons had been in occupation since, at the minimum, July of 1905, but could very well have been many years prior thereto, even to the year of 1893, as was found to be the case in the said Seely and Egbert Farms case.

13. This water right no. 21-11165 should be corrected to state the priority date as being April 1, 1893, and recommended to the Court in all other particulars as stated, with said April 1, 1893, priority date.

Dated this 23 day of November, 2005.

Norman Miller
NORMAN MILLER

Subscribed and Sworn to before me this 28th day of November, 2005.



Ray W. Rigby
A Notary Public for Idaho
Residing At: Rexburg, ID
My Commission Expires: 03-12-2011

Blackfoot 02697

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 WILLIAM G. HUTCHISON has been established and duly consummated, in conformity to law, for the Lots One and Two, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section Fourteen in Township Nine North of Range Forty-two East of the Boise Meridian, Idaho, containing One hundred sixty-three and twenty hundredths 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 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, William H. Taft 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 Ninth day of February in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and Thirty-fifth.

By the President Wm. H. Taft,

(SEAL)

By M. P. LeRoy, Secretary.

John O'Connell,

Acting Recorder of the General Land Office

Recorded: Patent Number 177107

Filed for record at the request of O. O. Skalet Mar. 23rd, 1911 at 1:35 P.M.

A. M. Carter, Recorder.

CERTIFICATE.

HOMESTEAD.

September 1st, 1910

IT IS HEREBY CERTIFIED that, pursuant to the provisions of Section 2291, Revised Statutes of the United States, has made payment in full for the E $\frac{1}{2}$ NW $\frac{1}{4}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ Section 33 Township 9 North, Range 44 East, Boise Meridian, Idaho, containing 160 acres.

NOW THEREFORE, BE IT KNOWN that, on presentation of this Certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said Fred L. Owens shall be entitled to receive a Patent for the lot above described.

Henry W. Kiefer, Register.

Filed for record at the request of W. L. Robinson at 10-30 A. M. Oct. 28th 1910

I. N. Corey, Recorder

No. 34294.

HOMESTEAD. Receipt No. 656336

DEPARTMENT OF THE INTERIOR,

UNITED STATES LAND OFFICE,

Blackfoot, Idaho

July 8th, 1910

IT IS HEREBY CERTIFIED THAT, pursuant to the provisions of Section No. 2291, Revised Statutes of the United States, William G. Hutchison, Ashton, Idaho has made payment in full for Lots 1 & 2; SE $\frac{1}{4}$ NW $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section No. 14, in Township No. 9 North, of Range No. 42 East of the Boise Principal Meridian Idaho, containing 163.20 acres.

Now, Therefore, be it known, That on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said William G. Hutchison shall be entitled to a patent for the tract of land above described.

Henry W. Kiefer, Register

Filed for record at the request of W. L. Robibson at 11-30 A. M. Oct. 28th, 1910

I. N. Corey, Recorder

By Rose D. Miller, Deputy

Repeal of inconsistent laws.

SEC. 20. *And be it further enacted*, That all acts and parts of acts heretofore passed, which are inconsistent with any of the provisions of this act, are, for the purposes of this act, hereby repealed, so far as the same are inconsistent herewith.

APPROVED, May 17, 1862.

May 20, 1862.

CHAP. LXXV. — *An Act to secure Homesteads to actual Settlers on the Public Domain.*

Certain persons may enter certain quantities of certain unappropriated public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preëmption claim, or which may, at the time the application is made, be subject to preëmption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided*, That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Such persons to make affidavit.

Contents of affidavit.

SEC. 2. *And be it further enacted*, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however*, That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided, further*, That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell

Certificates and patents, when to issue and upon what proof.

Affidavit.

Provision in case of death of applicant, &c.

THIRTY-SEVENTH CONGRESS. SESS. II. CH. 75. 1862.

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said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

SEC. 3. *And be it further enacted*, That the register of the land office shall note all such applications on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded. Record of applications to be made.

SEC. 4. *And be it further enacted*, That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor. Such lands not to be subject to prior debts.

SEC. 5. *And be it further enacted*, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government. When lands thus entered revert to government.

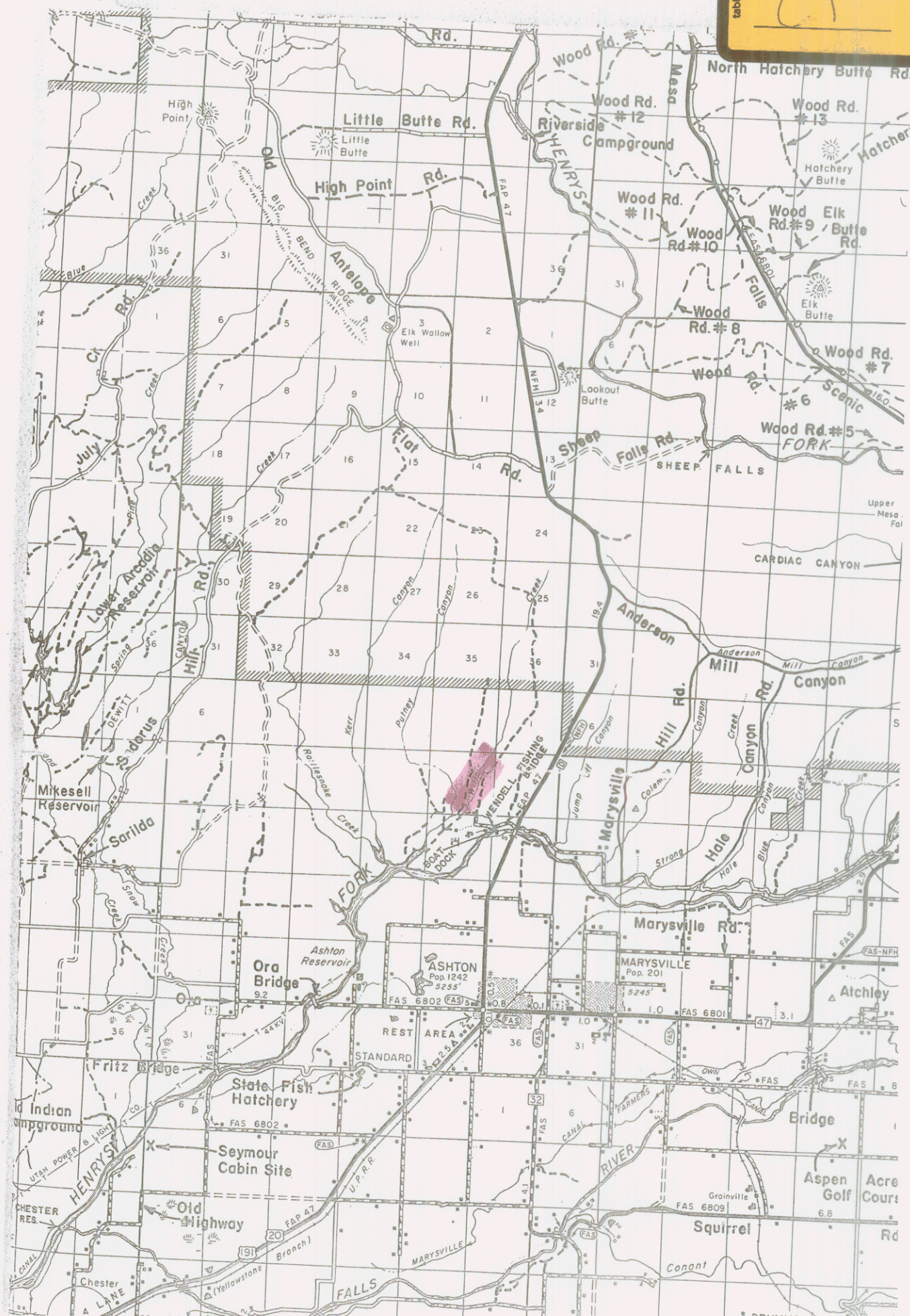
SEC. 6. *And be it further enacted*, That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the maximum of compensation now prescribed by law for any register or receiver: *Provided*, That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing preemption rights: *And provided, further*, That all persons who may have filed their applications for a preemption right prior to the passage of this act, shall be entitled to all privileges of this act: *Provided, further*, That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years. Not over one quarter section can be thus acquired. Rules and regulations of Land Office. Fees of registers and receivers, when to be paid. Existing preemption rights not impaired.

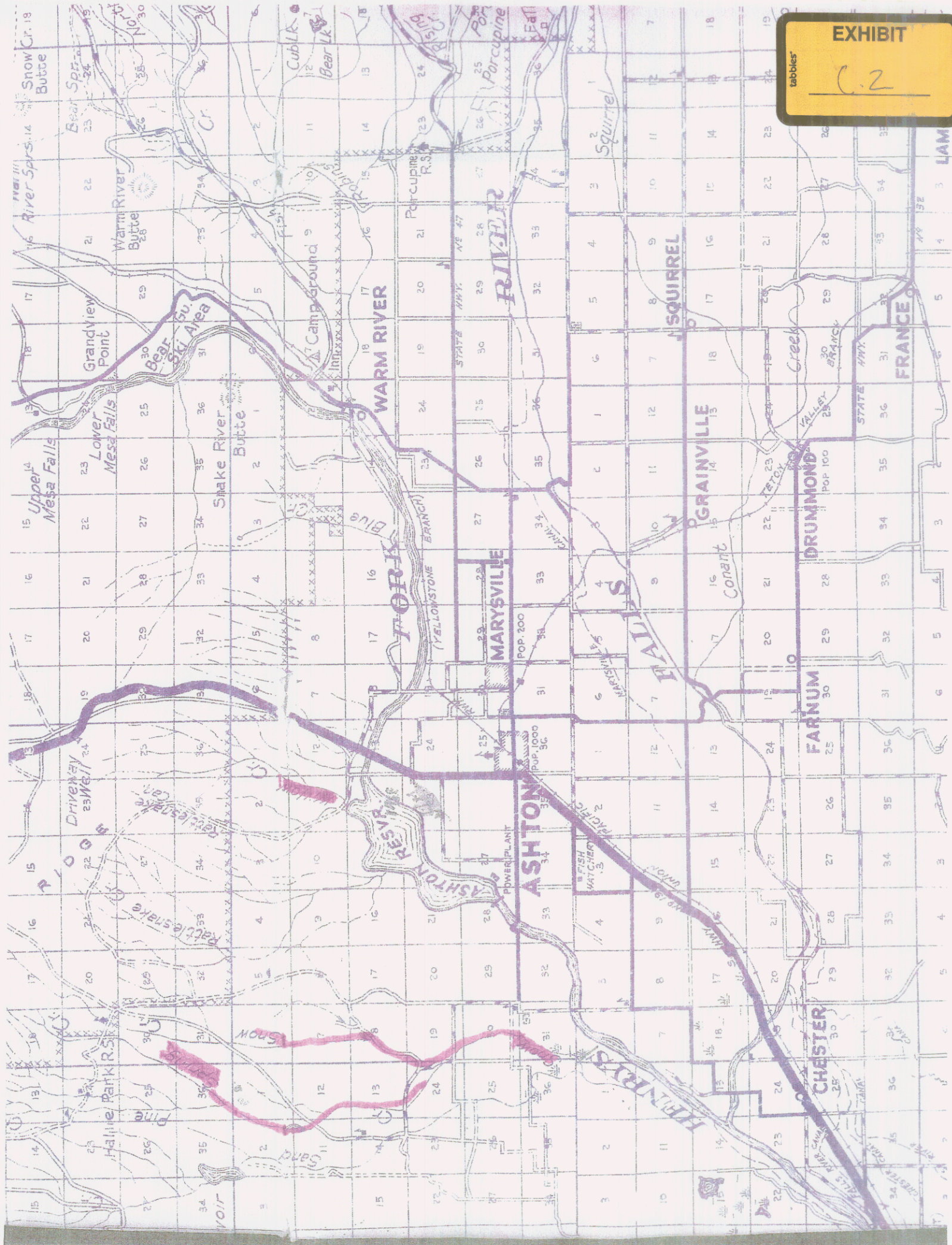
SEC. 7. *And be it further enacted*, That the fifth section of the act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the third of March, in the year eighteen hundred and fifty-seven, shall extend to all oaths, affirmations, and affidavits, required or authorized by this act. Punishment for false swearing under this act. 1857, ch. 116, § 5. Vol. xi. p. 250.

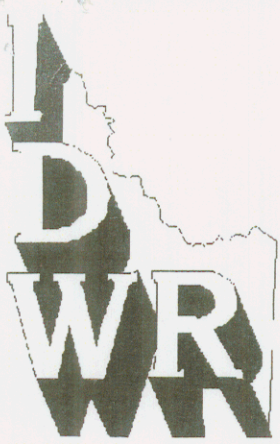
SEC. 8. *And be it further enacted*, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preemption rights. Applicant may have the land upon paying minimum price, &c., before the five years expire.

APPROVED, May 20, 1862.

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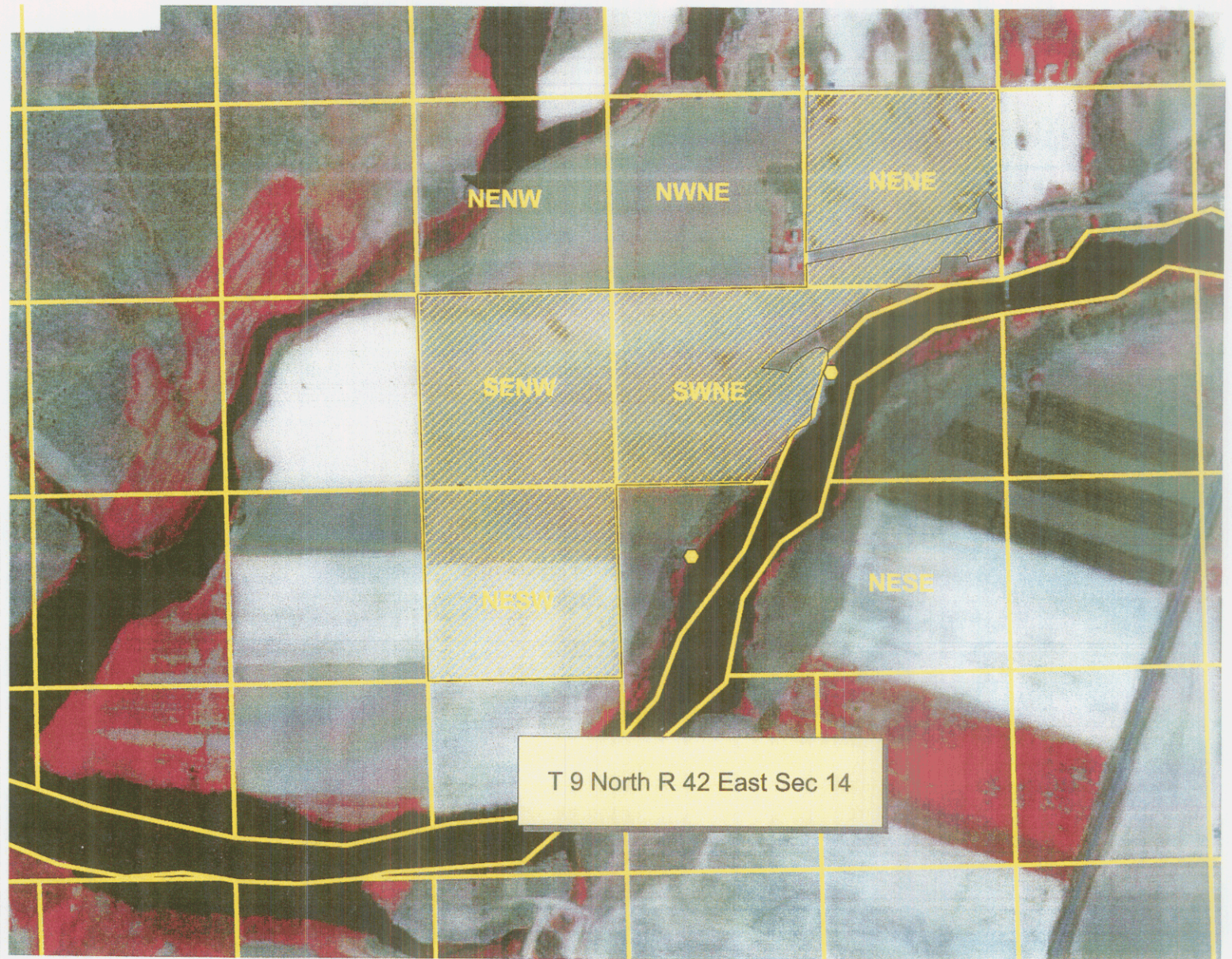




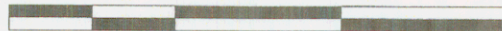
State of Idaho
Department of Water Resources
Eastern Region



Claim Number(s): 21-11165



900 0 900 1800 Feet



- Place of Use
- Points of diversion
- Quarter Quarter

GIS Place of Use Illustration
1987/1988 NAPP photography
Prepared by T. Galbraith
Date: June 2005



Law Offices

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November 29, 2005

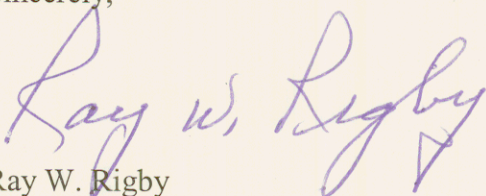
Ernest Carlson
Water Rights Supervisor
Idaho Department of Water
Resources
Water District No. 1
900 N. Skyline, Ste. A
Idaho Falls, ID 83402

Re: Nelda Stewart Miller Water Right # 21-11165

Dear Ernie:

I enclose herewith Notice of Error, which I have signed as attorney for the claimant, Nelda Stewart Miller. Attached to that notice is an Affidavit made by Nelda's husband, Norman J. Miller. I have done considerable research on this water right and submit that the priority date should be corrected for the reasons stated in said affidavit and the exhibits attached thereto. If you have questions or wish to discuss the matter further with me, please don't hesitate to call.

Sincerely,


Ray W. Rigby

RWR/sje
Enclosures

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