

**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NOS. 75-14, 75-19D, 75-19H, 75-20 (now 75-14533 and
75-14534), 75-24 (now 75-14535 and 75-14536), 75-113A, 75-113B, 75-113C, 75-
10475, 75-11614, 75-14063, 75-14123, 75-14124, 75-14125, and 75-14267**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
David R. Tuthill, Jr., Director
Donald V. Shaff, Adjudication Bureau Chief

February 27, 2009

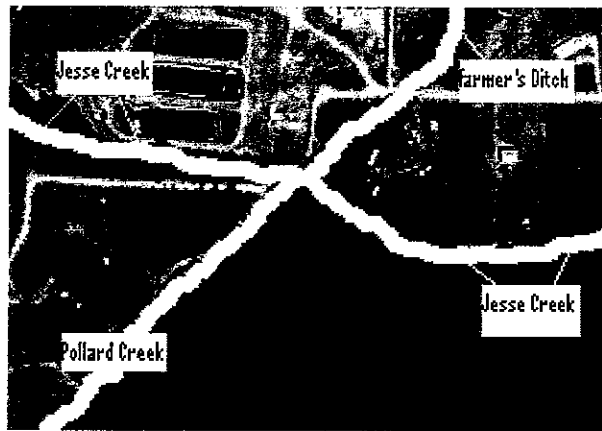
I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Dolan's December 17, 2008, *Order for 706 Report*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase numbers 75-14, 75-19D, 75-19H, 75-20 (now 75-14533 and 75-14534), 75-24 (now 75-14535 and 75-14536), 75-113A, 75-113B, 75-113C, 75-10475, 75-11614, 75-14063, 75-14123, 75-14124, 75-14125, and 75-14267; setting forth the basis for the Department's recommendation for the source and point of diversion elements of these water rights. This report was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employee has knowledge of the information contained in the Report: Monica Van Bussum, Senior Water Resource Agent, State Office in Boise ("Agent Van Bussum").

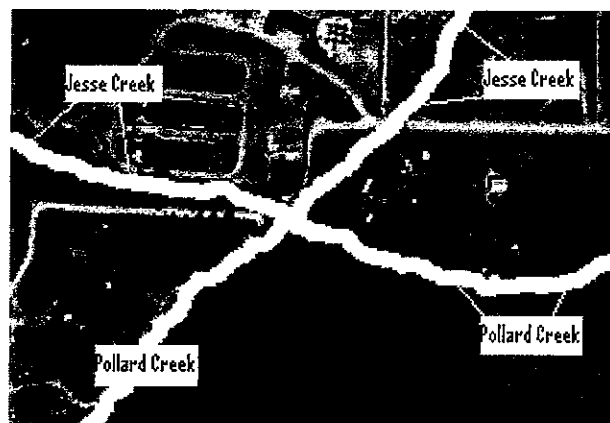
II. SUMMARY OF THE ISSUE

At issue is the Department's recommendation for the source and point of diversion elements for these water rights. In its Basin 75 Director's Report for Irrigation and Other Uses, filed with the SRBA District Court on January 11, 2007, the Department recommended the source and point of diversion elements for these rights according to common nomenclature. The recommendations are consistent with the Jesse Creek channel flowing eastward through town after its confluence with Pollard Canyon Creek, and Farmer's Ditch diverging from Jesse Creek just downstream of this confluence. Below is a basic map, created to aid the reader in understanding the Jesse Creek water system:



For the majority of these rights, Department recommended the source as Jesse Creek¹ and the points of diversion as the location where Farmer's Ditch intersect Jesse Creek.²

Robert Blackadar filed objections to most of the above rights. Mr. Blackadar disagrees with the way the source and points of diversion are described by the Department. Mr. Blackadar asserts that Farmer's Ditch is actually the historical conveyance of Jesse Creek and the channel running eastward through town is Pollard Canyon Creek. Below is a basic map which shows how Mr. Blackadar describes the system:



¹ The Department recommended the source as "Jessie Creek" for water right nos 75-11614 and 75-14267. This is a clerical error. The source should be "Jesse Creek." For water right no. 75-14, the Department recommended the source as "Jesse Creek." This also is an error. The point of diversion is located on Pollard Canyon Creek.

² The points of diversion for water right nos. 75-19D, 75-19H, 75-113A, 75-113B, 75-113C, 75-10475, 75-14123, 75-14124, 75-14125, 75-14533, 75-14534, 75-14535 and 75-14536 are currently recommended where Farmer's Ditch intersects Jesse Creek. The points of diversion for water right nos. 75-14 and 75-14063 are upstream from the confluence. The Department grouped 75-14 and 75-14063 with these other cases because if the court finds in favor of Mr. Blackadar, the description of the tributary for these two rights will need to be changed.

Mr. Blackadar claims because Farmer's Ditch is not really a ditch but the natural channel of Jesse Creek, the points of diversion for the water rights should be described further down the channel, where the water right holders divert from Farmer's Ditch.

The Department respectfully disagrees with Mr. Blackadar and maintains the Farmer's Ditch should not be recharacterized as the natural channel of Jesse Creek. Not only are the channel's characteristics those of a ditch, but the channel has long been maintained and managed as a ditch. Furthermore, to recharacterize the ditch as a natural channel would have negative implications for these water right holders under Idaho's Stream Channel Alteration Act, Idaho Code § 42-3801 et seq.

III. BACKGROUND

75-14 et al. were claimed for irrigation use from Jesse Creek and/or Pollard Canyon Creek. Pollard Canyon Creek is also commonly known simply as Pollard Creek. The rights were reported on January 11, 2007, in the Director's Report for Irrigation and Other Uses, Reporting Area 23, IDWR Basin 75. Robert Blackadar filed objections to 75-14, 75-19D, 75-19H, 75-20, 75-24, 75-113A, 75-113B, 75-113C and 75-14124.³

In his objection to 75-14, Mr. Blackadar provided an alternate legal description for the point of diversion. For his reason supporting his objection, Mr. Blackadar wrote, "The only source from which this water right can be diverted is Pollard Creek." In all his other objections, Mr. Blackadar also provided an alternate legal description for the point of diversion and wrote, given the priority date, "this water right had to be delivered by way of a natural stream known as

³ 75-10475, 75-11614, 75-14063, 75-14123, 75-14125 and 75-14267 were subsequently identified as uncontested overlaps. On September 23, 2008, a Notice of Completed Administrative Proceeding was filed by IDWR splitting water right 75-20 into 75-14533 and 75-14534 and splitting 75-24 into 75-14535 and 75-14536.

Jesse Creek. This description refers to the point where the water right is diverted from Jesse Creek.”

IV. DISCUSSION

1. Maps of Jesse Creek

Normally, when there is a dispute over the name of a source, maps help resolve the dispute. In this case, however, confusion is fueled by maps of the area. There are multiple maps supporting the nomenclature of Farmer’s Ditch:

- 1892 BLM plat map (approved accepted August 8, 1892; attached as Attachment A)
- A subdivision plat for the Salmon area (in Mr. Blackadar’s possession)
- A map compiled by H.S. Meekham in 1909, although the label is Jessie Creek (close-up is attached as Attachment B; full size is at IDWR in SRBA claim file 75-19H).

However, there are other maps suggesting Farmer’s Ditch is Jesse Creek:

- A 1919 BLM plat showing Jesse Creek running through the SE corner of Section 36, T22N, R21E, B.M. This is a small corner on the lower right of the 1919 plat (attached as Attachment C).
- 1951, 1978 and 1989 USGS topographic maps (in Mr. Blackadar’s possession)
- 1983 Salmon National Forest status and encumbrance (in Mr. Blackadar’s possession).
- Salmon Creek map from *Lewis and Clark Trail Maps: A Cartographic Reconstruction* by Martin Plamondon (attached as Attachment D)

- 2004 Salmon/Moose Proposed Roads – This is a GIS; the base topographic map was not cited (in Mr. Blackadar’s possession).
- 2008 Lemhi County school district (in Mr. Blackadar’s possession).

While this last group of maps do show Farmer’s Ditch as Jesse Creek, it is likely the later-in-time maps simply relied upon earlier maps for their base information.⁴

Because of the differences in the maps, the best understanding of the system comes from an examination of the actual physical topography and a discussion of historic water delivery.

2. Topography of Jesse Creek System

Agent Van Bussum visited the confluence of Jesse Creek and Pollard Canyon Creek multiple times. On those site visits, Agent Van Bussum confirmed Pollard Canyon Creek and Jesse Creek currently commingle. At this confluence, a deep channel continues down-gradient eastward and runs through town and another channel turns left (north) and runs along the same elevation. This second channel is what is commonly known as Farmer’s Ditch.

Stream channel is defined in Idaho Code § 42-3802 as “[a] natural watercourse with defined streambed and streambanks, which confines and conducts the continuous flow of water.” The deep channel running through town bears the hallmarks of this definition. The second channel (Farmer’s Ditch) appears to have been created to carry water, is manipulated by a diversion structure and does not reflect a natural channel or the topography of the area. Stream channels rarely make left turns when there is a down-gradient path available. It is the opinion of Agent Van Bussum that Farmer’s Ditch has very few characteristics of a natural channel.

⁴ The 1983, 2004 and 2008 maps probably used one of the earlier USGS topographic maps as a base map. The 1978 and 1989 USGS topographic maps probably used the 1951 USGS topographic map as a base map. The Lewis and Clark cartographic reconstruction also uses a USGS topographic map as its base. Therefore, the 1951 map is potentially the only original among them and the separation of the two systems was compounded with each subsequent map using the same topographic base. The 1919 BLM plat appears to be an anomaly based on other maps of that time period, and is such a small part of the plat itself it could easily have been overlooked by the cartographer.

Others have visited the site and reached the same conclusion as Agent Van Bussum. Attached as Attachment E is a copy of a memo from Mr. Tom Bassista, a Stream Protection Specialist for the Department. After visiting the site, Mr. Bassista concluded “[t]he channel heading off Jesse Creek at the Farmers Market [sic] POD should not be considered a natural stream channel but should be considered an irrigation ditch or canal.” Attached as Attachment 6 is a memo by Ms. Betsy Rieffenberger, Forest Hydrologist for the United States Forest Service. As she explains in her memo, the current USGS topographic map suggests that Jesse and Pollard Creek do not intersect and Farmer’s Ditch is Jesse Creek. Ms. Rieffenberger visited the site multiple times and agrees that Jesse Creek and Pollard Creek do in fact intersect. She agrees the diversion at the confluence of Jesse and Pollard Creek (what she identifies as appearing on the latest USGS maps as Jesse Creek) “[i]s a perched channel that has been bermed to keep the water in the channel. If the water breached this channel, it would flow south... .” Ms. Rieffenberger concludes “[t]he stream reach from the diversion structure to the road crossing is not a natural channel.”

If this case goes to trial, the Department recommends the Court conduct a site visit as part of the trial and view the confluence and Farmer’s Ditch channel first hand.

3. Water Delivery

There are three decrees that, as a whole, are called the “Jesse Creek decrees.” These are known as the *E.T. Andrews and W.S. Andrews v. John Martin Decree* (1893), the *George G. Miller v. Ernest Long Decree* (1925) and the *Ada P. Pope v. Ernest Long Decree* (1939). The decreed places of use (POUs) for these decrees cover a large area, including the area where Farmer’s Ditch is located. Agent Van Bussum discussed water delivery history with past and current Jesse Creek water masters Mickey Verbeck, Harry Shanafelt and Paul Stokes. Jesse Creek has a

history, as told by water masters who have served in the last 25 years, of water delivery as a single system with Pollard Canyon Creek tributary to Jesse Creek and the Jesse Creek channel running eastward through town to join the Salmon River in downtown Salmon. All three water masters indicate the channel running northward has historically been administered as Farmer's Ditch, and not a natural channel.

Even if we assume for a moment Mr. Blackadar is correct and Farmer's Ditch was the natural channel of Jesse Creek at some point (which the Department strongly doubts), the channel has long been treated and managed as a ditch and has long lost any resemblance to a natural channel. The water users on Farmer's Ditch and the past water masters of Water District 75-A have long considered the diversion structure in Jesse Creek near the confluence as the point of diversion for these water rights and Farmer's Ditch as the ditch that gets the water to their property. The Department sees no reason to change this.

4. Practical Implications

Changing the recommended points of diversion for these water rights and recharacterizing Farmer's Ditch as a natural channel would have significant implications for the water users on Farmers Ditch. Idaho Code § 42-3803(a) provides, "No person shall engage in any project or activities which will alter a stream channel without first applying to and receiving a permit therefore from the director." The term "alter" is defined very broadly in Idaho Code and includes obstructing a channel and modifying the direction of water flow of a stream. *See* Idaho Code § 42-2803(b). Thus, if the ditch were characterized as a natural stream channel, water users who insert structures into the channel to divert water (such as a canvas dam) would need to apply for permits to place their diversion structures into the stream channel. Because of the broad definition of alter, a water user would also need to get a permit to conduct even regular maintenance on the channel. In short,

activities not currently regulated would become subject to regulation and require a permit from the Idaho Department of Water Resources.

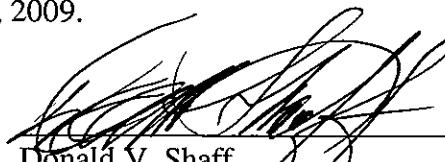
V. CONCLUSION

There is significant evidence Pollard Canyon Creek is a natural tributary of Jesse Creek, and the Farmer's Ditch is diverted from the Jesse Creek channel. The Department recommends 75-19D, 75-19H, 75-113A, 75-113B, 75-113C, 75-10475, 75-11614, 75-14063, 75-14123, 75-14124, 75-14125, 75-14267, 75-14533, 75-14534, 75-14535 and 75-14536 be decreed with a source of Jesse Creek tributary to the Salmon River. The Department would change its recommendation and suggest 75-14 and 75-14063 be decreed with a source of Pollard Canyon Creek tributary to Jesse Creek.

The Department recommends those properties with rights from the Farmer's Ditch by describing the point where the Farmer's Ditch is diverted from Jesse Creek in SWNW Section 1, T21N, R21E. Those rights are identified as 75-19D, 75-19H, 75-113A, 75-113B, 75-113C, 75-10475, 75-14123, 75-14124, 75-14125, 75-14533, 75-14534, 75-14535 and 75-14536.

The Department recommends 75-11614 and 75-14267 be decreed with a source of Jesse Creek tributary to the Salmon River; they were originally recommended with a source of Jessie Creek tributary to the Salmon River.

Submitted this 27th day of February, 2009.


Donald V. Shaff
Adjudication Bureau Chief
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 27 day of February.

Document Served: Supplemental Director's Report Regarding Subcase Nos. 75-14, 75-19D, 75-19H, 75-20 (now 75-14533 and 75-14534), 75-24 (now 75-14535 and 75-14536), 75-113A, 75-113B, 75-113C, 75-10475, 75-11614, 75-14063, 75-14123, 75-14124, 75-14125, and 75-14267

Persons Served:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

2. Copies to:

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LEONARD SKUNBERG
BOX 101
SALMON, ID 83467

GARY D POWER
TAMARA POWER
1503 OLD LEESBURG RD
SALMON, ID 83467-5035

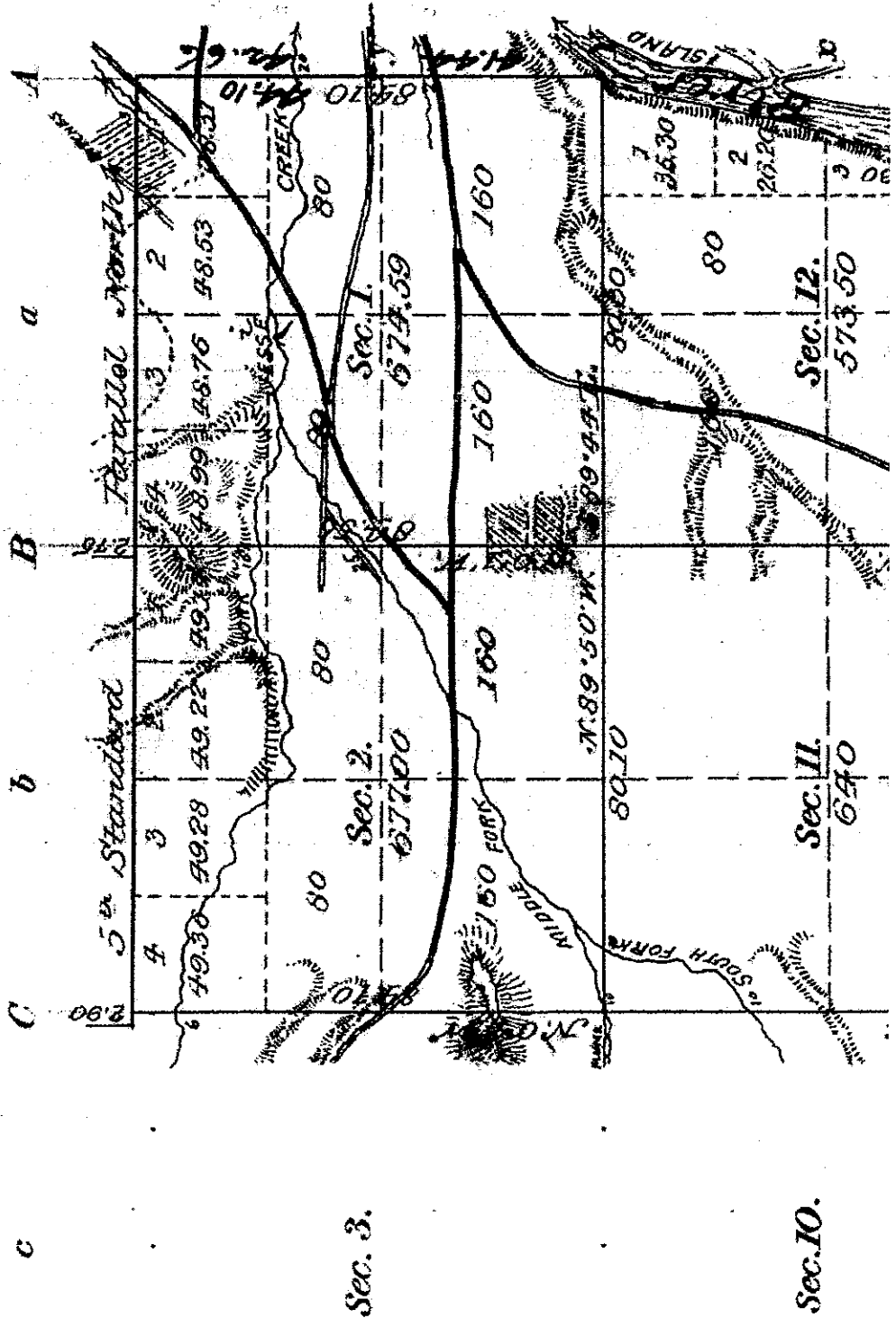
ELMA I PETRICK
1903 ROOSEVELT
SALMON, ID 83467

A handwritten signature in black ink, appearing to read "Camille Mitchell". The signature is fluid and cursive, with the first name "Camille" and the last name "Mitchell" clearly distinguishable.

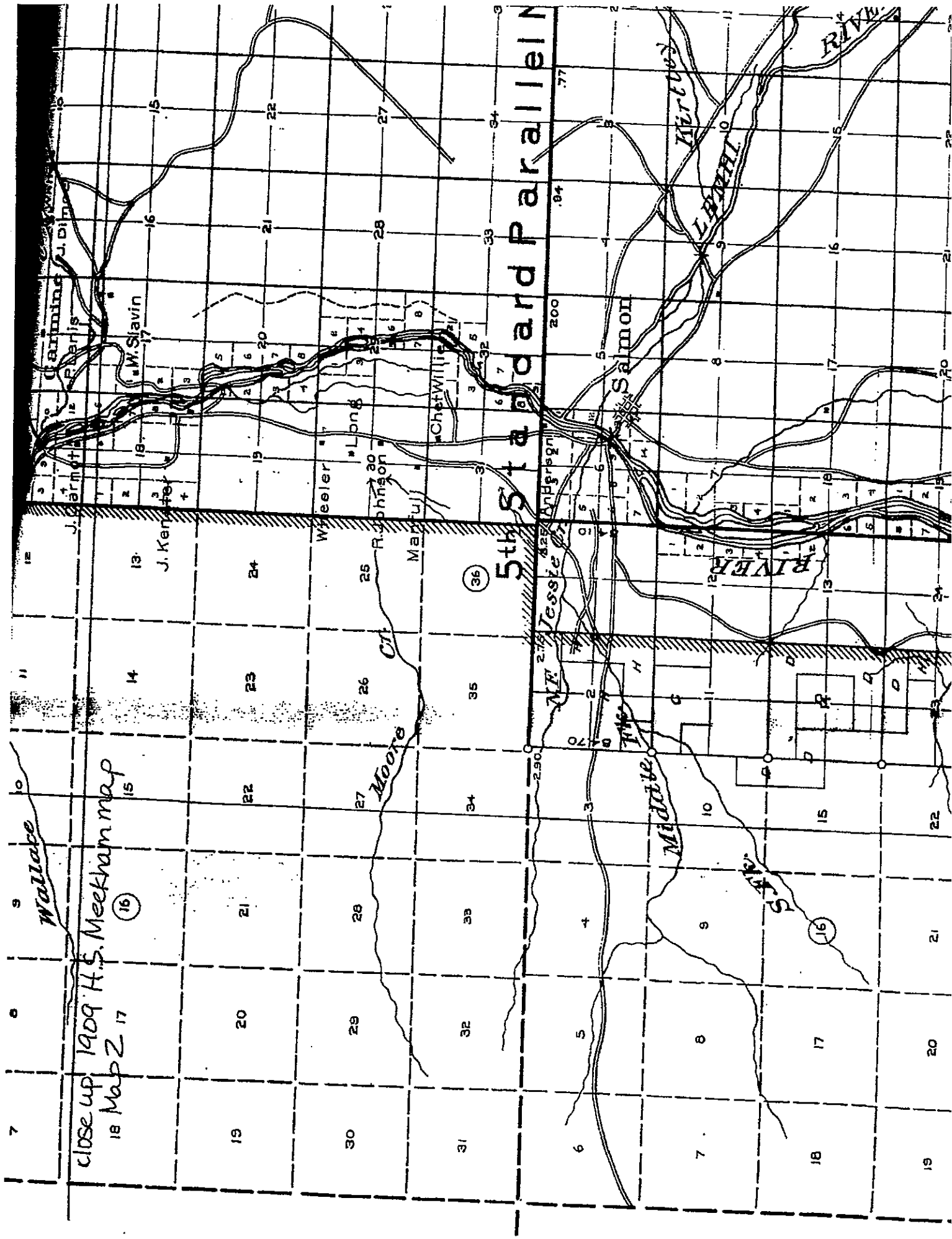
Idaho Department of Water Resources

ATTACHMENT A

of the Boise Meridian



ATTACHMENT B



close up 1909 H.S. Meekham map
18 Map 2 17

5th Standard Parallel

Wallace

Moore Cr.

Middle

S. Fork

River

L. Fork

River

J. Carney

W. Slavin

J. Kerney

Wheeler

Long

R. Johnson

Manly

Chetwill

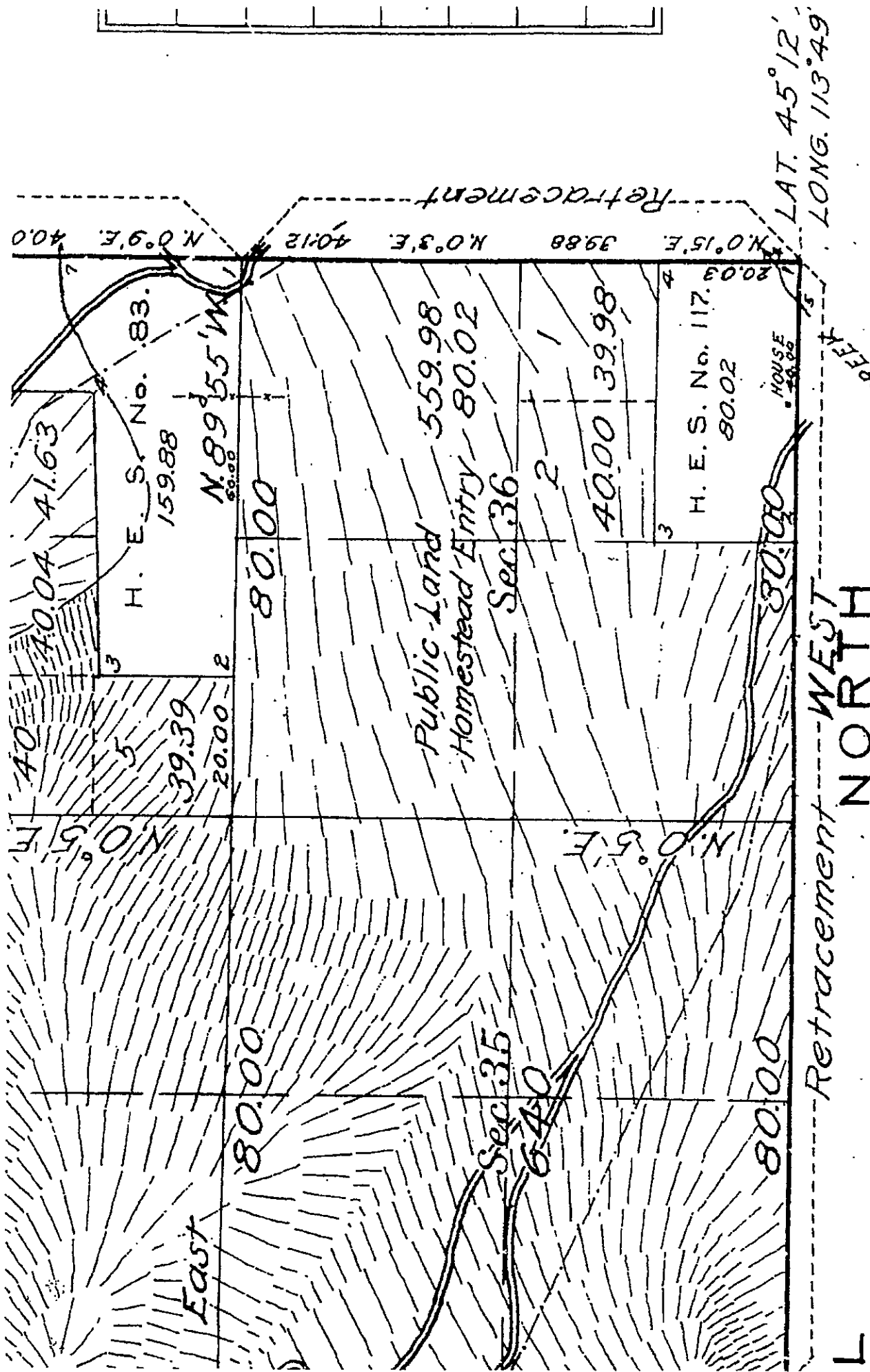
Jesse

Salmon

16

36

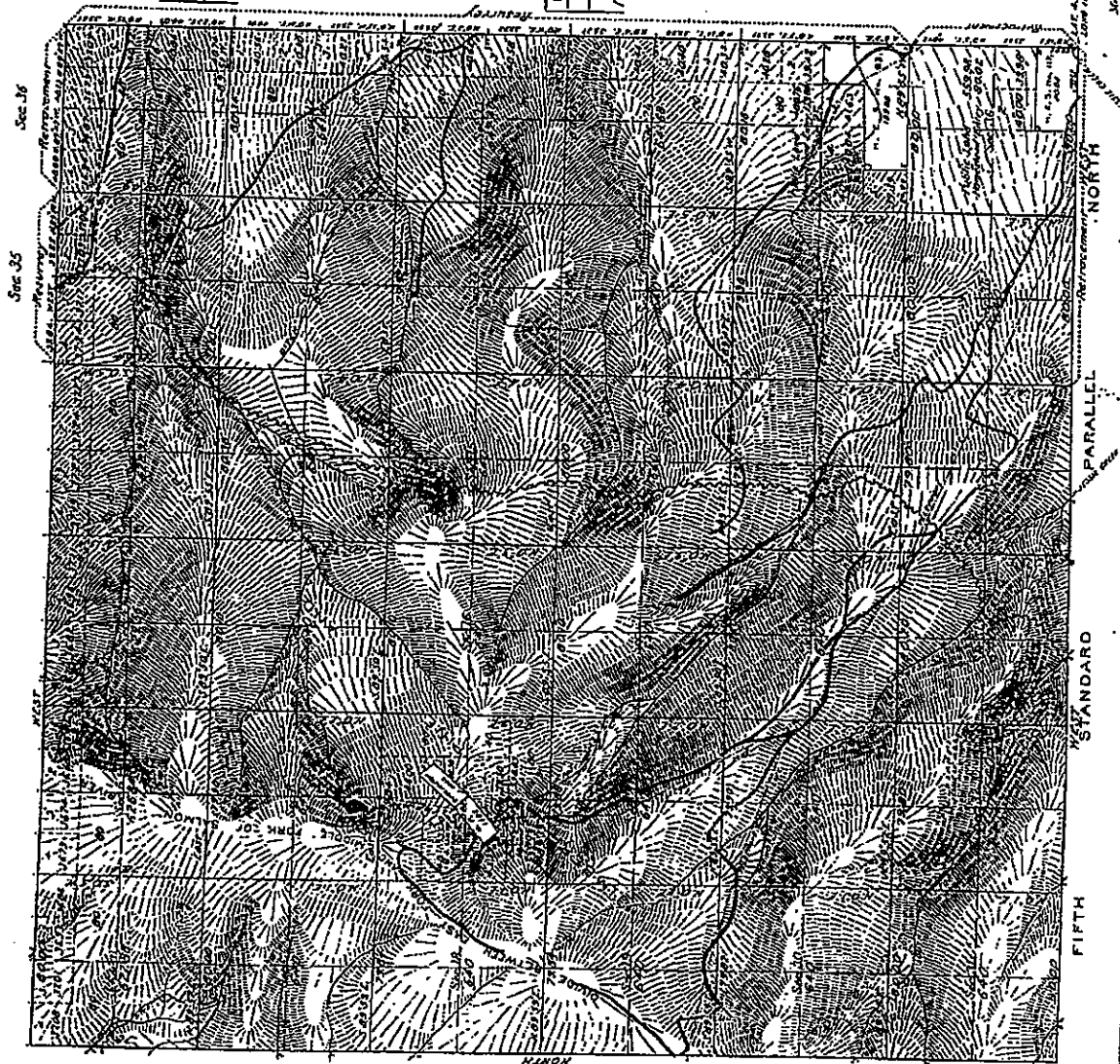
ATTACHMENT C



Mean N

UNCLASSIFIED.
Accepted December 28, 1970

Township No. 22 North, Range No. 21 East of the Boise Meridian, Idaho.



PATENTED MINERAL CLAIMS		
No.	Name	Area, acres Location
1602	Burlington	20.53 In sec. 17
.	U P	20.53

See 7

Mineral indications were specially noted in sections 14 and 17; stamp-mills are located in each of these sections.

8/225

PATENTED HOMESTEAD ENTRY SURVEYS.		
No.	Area in acres	Location
83	159.88	Ar. sec. 28
17	800.7	" " 16

Sec. 19

Sec 30

Army in Africa	
Public Land	22895.11
Indian Reservations	
Indian Allotments	
Mineral Claims	51.11
Water Surface	
Homestead Entries	2139.90
Total Acres	22976.12

46 41 20 120
Nucleo del Chirina fu un boato
Nean Magnifico Previsione, per secondo.

The above map of Township No. 22 North, Range No. 21 East, of the Babine-Northern, Idaho, is strictly conformable to the field notes of the survey thereof in file in this office, which have been examined and approved.

Edward Heddell
Surveyor General.

Surveys Indicated	By Whom Surveyed	Orange		Amount of Survey		When Surveyed	
		To	Date	Ac.	Sq. Rods	By	When Surveyed
Hand L. Boundary Act	B. M. Pelham	1023	June 11, 1919	2	0 13	July 14, 1919	July 30, 1919
" " " " " "	" " "	"	"	5	77 73	"	"
" " " " " "	" " "	"	"	5	78 17	"	"
H. and H. Boundary	" " "	"	"	2	0 00	"	"
Standard Amplett. Act	H. G. Boreddy	"	"	1	0 00	July 14	"
" " " " " "	" " "	"	"	2	0 00	"	"
" " " " " "	" " "	"	"	29	72 35	"	"
Subdivisions	" " "	"	"	0	51 28	"	"
Conservation	" " "	"	"	"	"	"	"

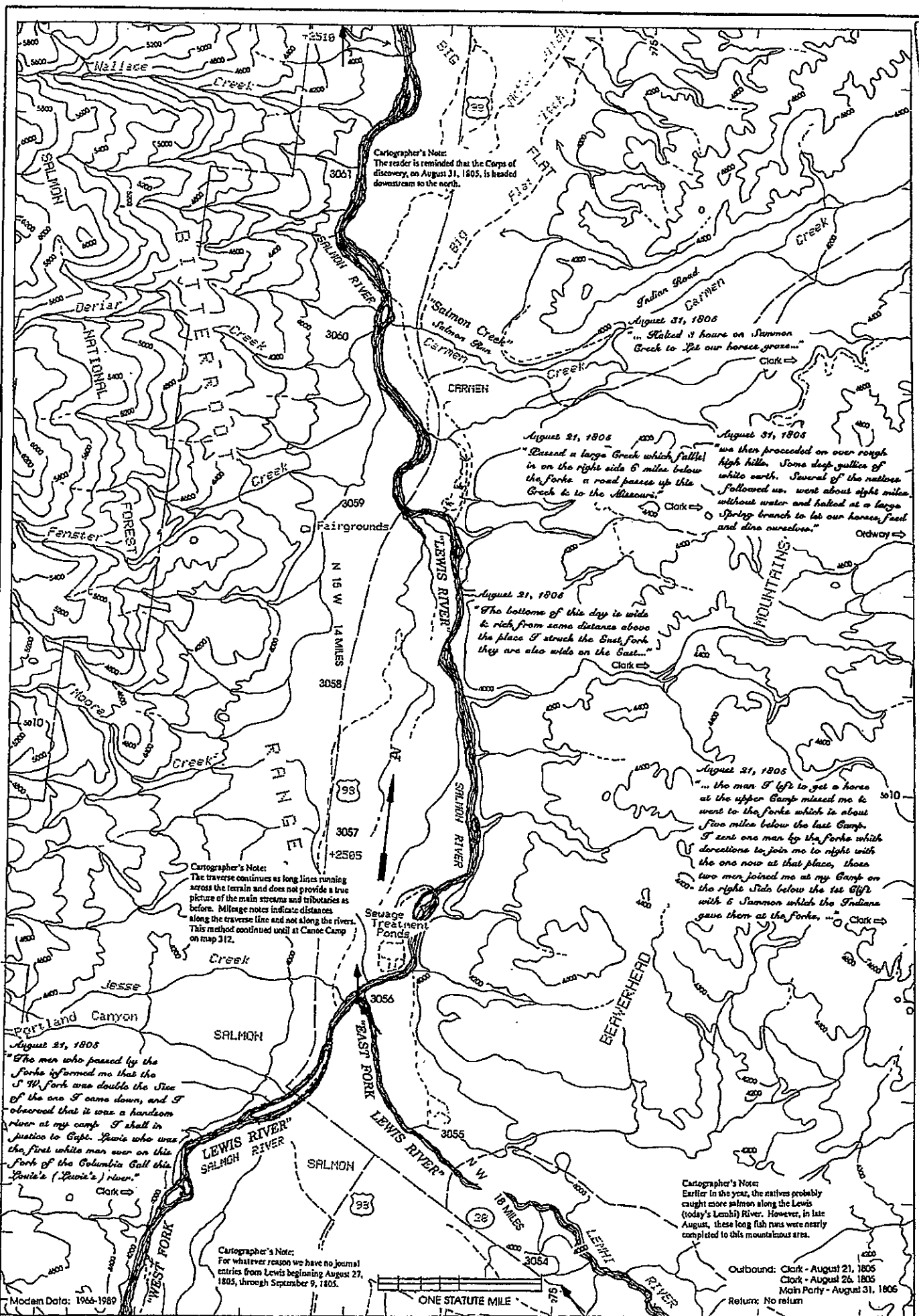
ATTACHMENT D

UTM Zone 12 Map 4
Map number 2-77

Salmon Creek

Explorations of Lewis & Clark 1804-1806

map title cut off
Explorations of Lewis & Clark 1804-1806



ATTACHMENT E



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A • Idaho Falls, Idaho 83402-1718

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EASTERN REGION

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

RECEIVED

DEC 24 2008

DEPARTMENT OF
WATER RESOURCES

MEMORANDUM

December 18, 2008

TO: Monica Van Bussum

FROM: Tom Bassista, ^{TBB} Stream Protection Specialist, Eastern Regional Office

RE: Jesse Creek Stream Channel and Farmers Market Point of Diversion

This memorandum is in reference to our site visit made to Jesse Creek and the Farmers Market Point of Diversion (POD) near Salmon, Idaho on October 1st, 2008. The purpose of the site visit was to assess whether the channel heading off Jesse Creek at the Farmers Market POD should be considered a jurisdictional channel under Idaho Stream Protection Act (Idaho Code Section 42-3802). The definition of stream channel means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water. It is my opinion that the channel heading off Jesse Creek at the Farmers Market POD should not be considered a natural steam channel but should be considered an irrigation ditch or canal. The reasoning for my opinion is that it appears that the channel coming off of Jesse Creek at the Farmers Market POD was created to carry water, it is manipulated by a diversion structure, and it does not reflect a natural water course based on the topography of the area. I recommend the following:

1. Keep the Farmers Market POD as the legal POD to be consistent with historic irrigation use on the Farmers Market Canal.
2. Maintain the Jesse Creek channel as the natural watercourse which would carry most of the spring run off flow into the Salmon River.
3. Because Jesse Creek has a direct connection to the Salmon River I recommend only the legal amount of water be diverted through the Farmers Market diversion structure with all non allocated water going into Jesse Creek.

Please contact me if you have any questions or concerns.

Signature

ATTACHMENT F

Jesse Creek/Pollard Canyon Creek Confluence Area

This memo serves to document two field trips that I have taken to review the area of the Jesse Creek/Pollard Creek confluence and a review of what is currently mapped as Jesse Creek below the City of Salmon water treatment plant.

Since the Salmon-Challis National Forest took the lead on watershed delineation for the Middle Salmon-Panther Subbasin, the Forest Service has an interest in the correct representation of the streams and watershed boundaries in the Jesse and Pollard Canyon drainages.

I have conducted several field reviews of this area one with Bob Blackadar, local citizen and irrigator, on December 7, 2007 and one with Monica Van Bussum, Senior Water Resource Agent from Idaho Department of Water Resources, on August 29, 2008.

Current topographic maps depict Pollard Canyon and Jesse Creek as separate channels that do not intersect but come close in the SWNW of Section 1 just below the water treatment plant. In reality these streams intersect at a diversion structure located below the road that goes to the Forest Service storage area located south of the water treatment plant. At this structure water can be diverted into what is mapped as Jesse Creek or into Pollard Canyon Creek.

A debate is currently underway in the Snake River Adjudication as to whether the stream course that is mapped as Jesse Creek is a natural channel or an irrigation ditch. From the Roosevelt Street stream crossing downstream the channel is located in a topographic low and appears to be a natural channel, though highly modified as it flows through the residential areas on the upper bar. However, from the diversion structure at the Jesse/Pollard confluence to the Roosevelt Street crossing the channel that is mapped as Jesse Creek is a perched channel that has been bermed to keep the water in the channel. If the water breached this channel it would flow south towards what is mapped as Pollard Canyon Creek.

This stream reach from the diversion structure to the road crossing is not a natural channel. However, remnants of a natural channel can be observed below the existing water treatment plant. It is possible that the natural Jesse Creek channel was moved to the south to its current location when the water treatment plant was constructed.

I have lived and worked as a hydrologist in the Salmon, Idaho area since 1977. Until recent maps were produced the stream channel flowing down the bar hill into the Salmon River adjacent to the Idaho Adventures office has been known as Jesse Creek. Locals still call this channel Jesse Creek. Old maps have variously called both Pollard Canyon and Jesse Creek as forks of Jesse Creek, or called the southern stream Pollard Canyon down to the confluence with Jesse Creek then Jesse Creek below that point. Recent maps

have shown the northern channel as Jesse Creek and the southern channel as Pollard Canyon Creek all the way to the Salmon River.

An overview of the confluence area shows evidence of debris berms and various active and inactive channels, particularly along Pollard Canyon Creek above the confluence. It is probable that over geologic time these streams have connected and disconnected with flood events and the deposition of bedload associated with the flood events. Currently these streams are connected at the diversion structure though it is probable that Jesse Creek was moved to its current location south of the water treatment plant during plant construction. The current topographic maps incorrectly depict the location of these streams in this area.

Betsy Rieffenberger
Forest Hydrologist
Salmon-Challis National Forest

September 3, 2008