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AUG 31 2009

DEPARTMENT OF
WATER RESOURCES

**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 No.: 2-103

MOTION TO FILE LATE OBJECTION

Black Mesa Farms LLC ("Black Mesa Farms" or "Black Mesa"), by and through its counsel Givens Pursley LLP, hereby move this Court for leave to file a late objection in the above-referenced subcase. A copy of the Standard Form 1 Objection is attached.

In subcases where partial decrees have not been entered, a motion to file a late objection may be granted upon a showing of good cause pursuant to Idaho Rule of Civil Procedure 55(c) (which deals with setting aside the entry of a default). *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcases 65-7267 *et al.*, slip op. at 6 (January 31, 2001). The Rule 55(c) good cause standard takes into account the following factors:

- (1) whether the default was willful;
- (2) whether setting aside the judgment would prejudice the opponent; and
- (3) whether a meritorious position has been presented.

Id. at 7 (citing *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (1993)).

Black Mesa can show good cause for this Court to grant this Motion. First, Black Mesa's failure to file an objection before the objection deadline was not willful. Black Mesa only recently retained counsel to review its SRBA claims. Counsel has identified several issues with a Special Master Recommendation for Partial Decree issued in this subcase, namely: (1) there should not be a remark limiting this right's diversion rate to 90.24 cfs combined with other rights; (2) there should be a remark noting that Black Mesa's are the only water rights historically beneficially used on lands in Section 12, T6S, R12E; and (3) the priority date was incorrectly claimed and should be February 25, 1963. Black Mesa did not realize these issues existed until counsel's review of the Special Master Recommendation in this subcase and partial decrees and recommendations in similarly situated and related subcases.

Second, an order granting this Motion will not disrupt proceedings or prejudice other parties because there are no other parties to this subcase. Indeed, failure to grant this Motion will prejudice Black Mesa because, without further action, its water right will be decreed with elements and remarks (or lack thereof) that will prejudice it relative to similarly situated and related water rights.

Third, Black Mesa can show that this water right should be decreed differently than the Special Master Recommendation shows. As mentioned, without further action, its water right will be decreed with a combined use limit that should not exist, without a remark clarifying that its water rights are the only water rights historically beneficially used on Section 12 lands, and with an incorrect priority date. In the first place, other rights listed in the recommended remark stating this limitation have not been decreed or recommended for partial decree with such a remark. *See, e.g., Subcase Nos. 2-2209E, 2-10187, 2-10189, 2-10209, 2-10337, 2-10338.* Also, this remark presumably derives from a one-time measurement of diversions from a shared point

of diversion at the time of licensing of 2-2209. That measurement was made to confirm whether the pumping station had the capacity to deliver water diverted pursuant to the permit that ultimately was licensed as water right 2-2209, which it did. There is no indication in the Beneficial use field exam that the measured 90.24 cfs flow was the maximum capacity of the pumping station, or that it was taken at a time when other water rights may have been diverted (or not) through the pump or that it described a limit on the quantity of water that would be authorized to be diverted through the facility. Finally, the remark is an inappropriate limitation on right 2-103 under this Court's holding in *Order on Challenge of Facility Volume Issue and Additional Evidence Issue*, Subcase Nos. 36-02708 et al (December 29, 1999). In addition, it will not assist in administration for the rights listed in the remark to be decreed inconsistently (i.e. some with, some without the remark). Accordingly, the remark should not be included in this right's partial decree.

In addition, because other claimants' rights have been decreed or recommended for partial decree with places of use that include lands in Section 12. *See, e.g., Subcase Nos. 2-10189, 2-10337*. Black Mesa owns all of Section 12. Its rights (2-103 and 2-2209B) are used to irrigate 1068 acres, including 614 acres in Section 12. The necessary remark will alert IDWR that Black Mesa's rights and others that have been decreed or recommended with a place of use in Section 12 are not "stacked" rights or otherwise supplemental to, or limited by, the other rights.

And, regarding the priority date, there is substantial evidence that this water right is entitled to and should have been claimed with a priority date of February 25, 1963. A Beneficial Use Examiner's Report for right number 2-2209, a copy of which obtained from IDWR's water right file for 2-2209 is attached hereto as Exhibit A, shows that lands in Section 14 were irrigated

under that right at the time of its beneficial use field exam. Section 14, however, was not included in the license for 2-2209. The claim for right 2-103 was intended to cover those Section 14 lands that were developed but not licensed in 2-2209. However, for reasons unknown, this right was not claimed with same priority date (February 25, 1963) as 2-2209. Obviously, it should have been since the Section 14 lands found to be irrigated under 2-2209 during that right's beneficial use field exam. Black Mesa also has filed a Motion to File Amended Notice of Claim to correct the priority date.

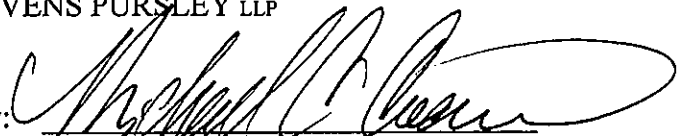
For the foregoing reasons, Black Mesa respectfully request that this Court grant this Motion.

DATED this 28th day of August, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By:



Michael C. Creamer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2009, the foregoing was filed, served, or copied as follows:

ORIGINAL FILED

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

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IDWR Document Depository
PO Box 83720
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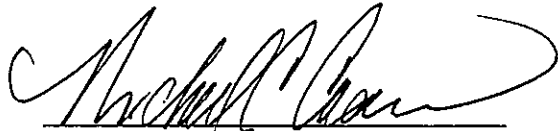
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☐ Facsimile
☐ E-mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

☒ U. S. Mail
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☐ E-mail

United States Department of Justice
Environment & Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

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☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail


Michael C. Creamer

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
BOISE, IDAHO
REPORT OF EXAMINER

02-2209

Permit No. 30990

This proof is for Completion of Works & Beneficial Use In Water District No. _____

1. Name of applicant Cottonwood Canal Company
2. Source of water supply: Snake River
3. Location of point of diversion: Is in the Lot 6 of Section 9
T. 6 S. R. 11 E.B.M. County of Elmore
4. Describe works as they exist, giving dimensions and capacities of same:
SUMMARY: 9-600 HP ELEC VERT TURBINE PUMPS - FROM THE SNAKE RIVER - THROUGH A 44" PENSTOCK APPROX 1/4 MILE & ABOUT 150' - THROUGH 9-100 HP ELECTRIC CENTRIFUGAL BOOSTER PUMPS - 44" PENSTOCK - 3/4 MILE TO THE #1 SUB MAIN LINE BOOSTERS - 44" - THROUGH 6 OTHER SUB LINE DIVERSIONS. AT VARIOUS INTERVALS - SPRINKLER SYSTEM. (NOTE DETAILS)
5. Water is used for: Irrigation
6. State whether or not water has been turned into works of diversion: Yes
7. List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact number of acres under cultivation in each forty-acre tract. (Describe manner and place of use if other than irrigation):
SE 1/4 SE 1/4, W 1/4 SE 1/4, E 1/4 SW 1/4, SW 1/4 SW 1/4 Sec. 1., SE 1/4 SE 1/4 Sec. 2., E 1/4, E 1/4 NW 1/4, SW 1/4 Sec. 11., All of Sec. 12., E 1/4, NW 1/4, N 1/4 SW 1/4, Sec. 13., NE 1/4, N 1/4 SE 1/4, N 1/4 NW 1/4, SE 1/4 NW 1/4, NE 1/4 SW 1/4 Sec. 14., NE 1/4, N 1/4 SE 1/4, Sec. 24., Twp. 6 S., Rge. 10 E., Lot 7 (SW 1/4 SW 1/4), Sec. 6., All of Sec. 7., N 1/4, SW 1/4, W 1/4 SE 1/4, NE 1/4 SE 1/4 Sec. 18., Lots 2 (SW 1/4 NW 1/4), 3 (NW 1/4 SW 1/4) E 1/4 SW 1/4, SE 1/4, Sec. 19., W 1/4 NW 1/4, NW 1/4 SW 1/4, Sec. 17., W 1/4 SW 1/4, Sec. 20., Twp. 6 S., Rge. 11 EBM Making a total of 4480 acres. 3120

(Submit map on attached plat, showing location and details of above description.)

8. What large stream would the water here appropriated finally reach? _____

Remarks: MR RUP NGCUMB, MRS PHYLLIS BUTTERFIELD, & THE ANDERSONS BROS WERE CONTACTED DESIGN CAPACITY - 40,500 gpm - 90.21 cfs

This examination was made on the _____ day of _____, 19____

EXHIBIT

A

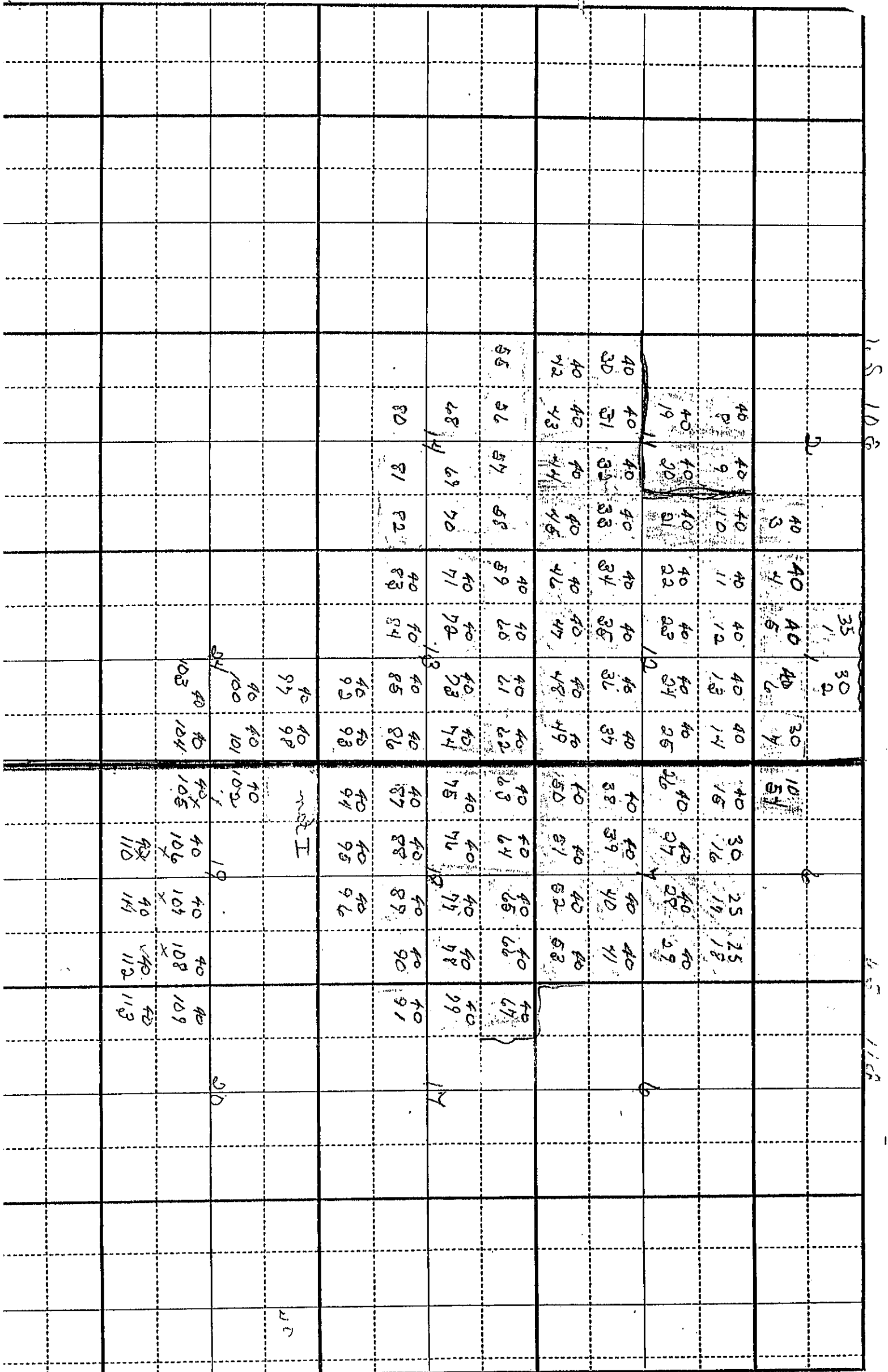
(Signed) _____

Examiner.

Subcase 2-103

Waters to File Lake District

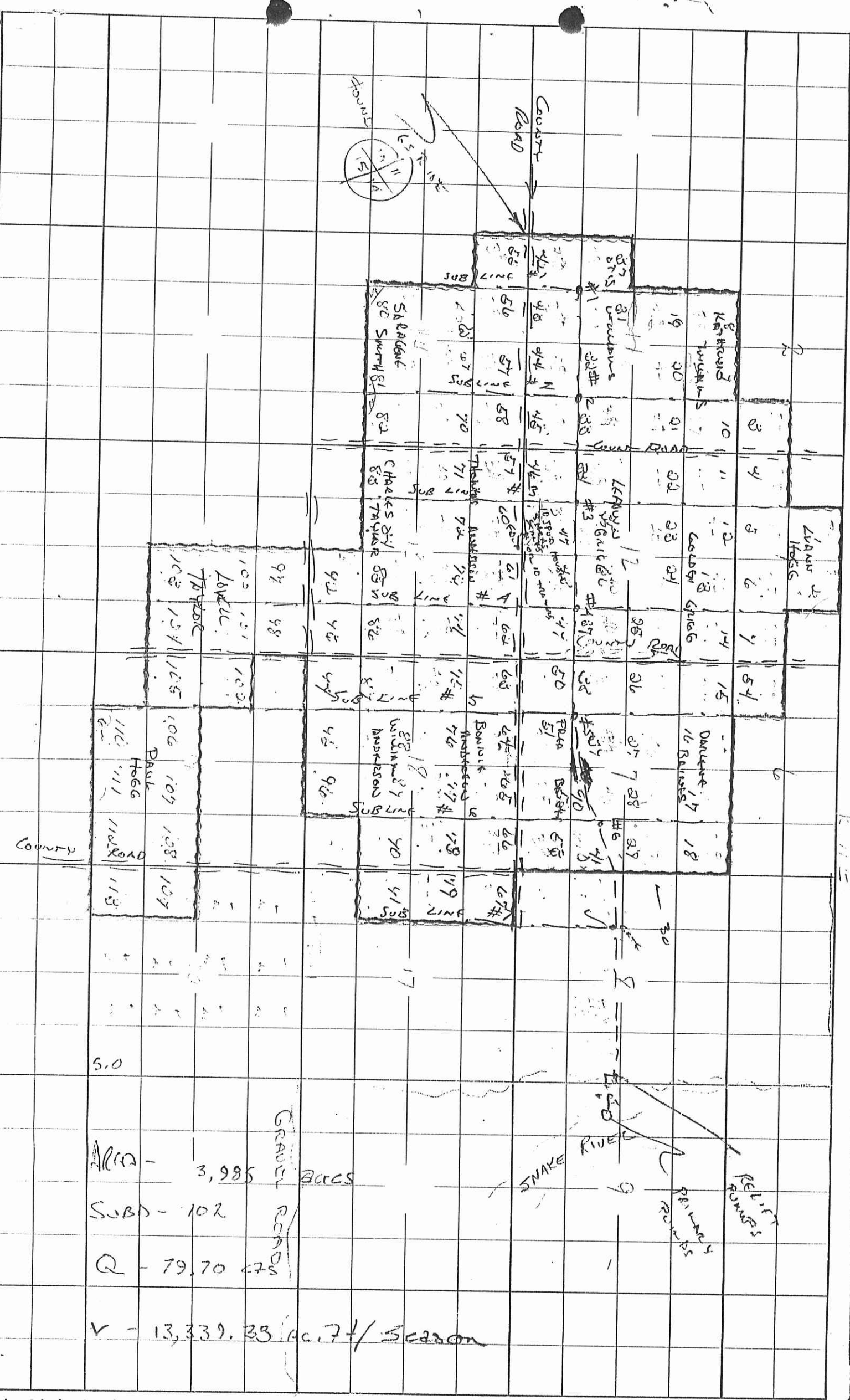
By D. clay

Form

SCALE: 2 Inches Equal 1 Mile. Draw Plan In Ink.

50990
...2209

Black Mesa District Explorer T C S O F " I O



Scale: 2 Inches Equals 1 Mile. Draw Map In Ink.