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DEPARTMENT OF
WATER RESOURCES

THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 34-2459, 34-2460, 34-2461,
	)	34-2462, 34-10925
Case No. 39576	)	
	)	
	)	
	)	

JOINT REPLY BRIEF ON PERMISSIVE REVIEW

On *Permissive Review* from Special Master Bilyeu's
September 9, 2009 *Order on Motion to Set Aside Partial Decree*

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SCANNED

MAR - 2 2012

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. The Amended Claims Were Not Part of the Court’s Record.	3
II. This Court Must Apply Rule 60(a) the Same as Any Other Court in Idaho.	6
III. The Inclusion of the Maps Identifying the Island Wells is Not Conclusive of the Original Claimants’ Intent to Claim an Accomplished Transfer.	9
IV. The 1995 Conveyance Agreement Does Not Demonstrate An Intent to Claim an Accomplished Transfer.	11
V. Claimants’ Failure to Act Cannot be Overlooked.	13
CONCLUSION	15
CERTIFICATE OF SERVICE	16

SCANNED
MAR - 2 2012

TABLE OF AUTHORITIES

CASE LAW

<i>Albion-Idaho Land Co. v Adams</i> , 58 F. Supp. 579 (D. Idaho 1945)	8, 15
<i>Dursteler v. Dursteler</i> , 112 Idaho 594 (Ct. App. 1987).....	6
<i>Eby v. State</i> , 148 Idaho 731 (2010).....	7
<i>In re SRBA Case No. 39576</i> , 128 Idaho 246 (1995)	8
<i>McGrew v. McGrew</i> , 139 Idaho 551 (2003)	3, 4, 6
<i>Silsby v. Kepner</i> , 140 Idaho 410 (2004).....	5
<i>Thorn Creek Cattle Assoc., Inc. v. Bonz</i> , 122 Idaho 42 (1991)	6

CONSTITUTIONAL & STATUTORY MATERIAL

I.C. § 42-1409(1).....	4
I.C. § 42-1409(4).....	2, 3
I.C. § 42-1411(4).....	4
I.C. § 42-1420(1).....	5, 7
I.C. § 42-1425	12
I.C. § 42-1426(2)(b).....	2

RULES & REGULATIONS

Idaho Rule of Civil Procedure 1(a).....	5
<i>Walker v. Big Lost River Irr. Dist.</i> , 124 Idaho 78 (1993)	7

OTHER CITATIONS

Administrative Order #1 1(a).....	5
Administrative Order #1 1(b).....	8
Administrative Order #1 10(a).....	4
Administrative Order #1 3(b).....	3
Administrative Order #1 4	4

MAK - 2 2012

INTRODUCTION

Contrary to the assertions of the Claimants, the Objectors are not trying to “prevent Telford from having a full trial on the merits of their claims of an accomplished transfer on grounds of a procedural technicality.”¹ *Resp. Br.* at 15-16. That opportunity was provided – and rejected by both the Claimants and their attorney – nearly 20 years ago. Furthermore, the opportunity is still there for Telford to file a water right transfer application under the provisions of Idaho Code §42-222 to add the Island Wells as points of diversion for the 34-2359, 34-2460, 34-2461 and 34-2462 (the “Airport Licenses”).

The Claimants would have this Court believe that they are merely trying to correct an error that was a “function of the mechanical and colossal undertaking of adjudicating all of the rights in the Snake River Basin of Idaho.” *Id.* at 18. They advocate application of a relaxed standard under Rule 60(a) – one where a party can obtain relief merely by showing “internal inconsistencies” in one document that was not part of this Court’s official record at that time. They assert that the SRBA, as a court of unique jurisdiction, should be able to apply a liberal standard under Rule 60(a) – even if that standard would contradict the settled law on the matter.

In the end, however, their arguments fall short. Indeed, Claimants admit that their position is based on “presumptions” derived from information that Mr. Bell allegedly told Mr. Isom who then allegedly told Mr. Sorensen who then allegedly told Mr. Telford. *Id.* at 6 & 25.

They cannot point to any conclusive evidence of any intent to claim an accomplished transfer. They can only point to a map, attached to each amended claim for the Airport Licenses

¹ In truth, the changes that the Claimants seek to effectuate through their claims would significantly impact the Objectors’ water rights. *See 3rd Arrington Aff.* These impacts are real. This is not an attempt by the Claimants to circumvent the judicial process on a “procedural technicality.” Rather, that process ran to its conclusion in 1997. The Claimants’ attempt to resurrect this matter, based on information that was never part of the Court’s record prior to the original decree, should be rejected and their Rule 60(a) motion should be denied.

SCANNED

MAR - 2 2012

and the original claim for 34-10925, which identifies the Island Wells.² Yet, that same map was attached to the amended claim for the Claimants' surface water right – a right that has never been diverted from the Island Wells.

The Claimants resort to classifying compliance with Rule 60(a) as a “procedural technicality.” Yet, Claimants cannot point the Court to anywhere in the record considered by this Court in the 1990’s that contains the amended claims. *See Joint Opening Br.* Attachment. The claims were filed with the Department, as required by Idaho Code. I.C. § 42-1409(4) (“All claimants of water rights that are included in a general adjudication shall file **with the director** a notice of claim for all water rights.” (emphasis added)). They were not filed with the Court. In fact, they were not even submitted to the Court until 2008 as an attachment to an affidavit of counsel. As such, Rule 60(a), quite simply, does not apply.

Claimants seek to have this Court apply Rule 60(a) without any consideration of the circumstances or underlying facts, and this must not be condoned. Indeed, Claimants filed a 36 page brief with the Court and never once acknowledged that the Claimants were represented by very capable counsel (Mr. Foster) during the original SRBA process. When the facts are viewed in their entirety, Rule 60(a) should not be used to give the Claimants a second bite at the apple.

ARGUMENT

Claimants failed to respond to many of the arguments provided in the Objectors *Opening Brief on Permissive Review*. Those arguments will not be recounted here. Rather, Objectors will address the primary arguments propounded by the Claimants in their responsive briefing: (1) that the amended claim is part of the record; (2) that the SRBA Court should apply an extremely

² Claimants continue to ask this Court to set aside the partial decree issued for 34-10925 and add the Island Wells as points of diversion for that water right under the Accomplished Transfer Statute. *Resp. Br.* at 36. However, this is specifically prohibited by that very statute. I.C. § 42-1426(2)(b) (“This section is not applicable to any claim based upon an enlargement of use”). Therefore, this Court cannot grant the relief requested by Claimants in Subcase 34-10925.

SCANNED

MAR - 2 2012

liberal application of Rule 60(a); and (3) that the facts somehow support the contention that the original Claimants intended to claim an accomplished transfer.

I. The Amended Claims Were Not Part of the Court's Record.

Rule 60(a) only authorizes the Court to correct “clerical errors” in “judgments, orders or other parts of the record.” Idaho Courts have made clear that the “reference to ‘other parts of the record’ refers to the court’s record, *not to the records of another branch of government*” such as an administrative agency. *McGrew v. McGrew*, 139 Idaho 551, 561 (2003) (emphasis added).

Claimants assert that “the document that initiated the action in the first place” is the “claim and any amendments thereto.” *Resp. Br.* at 15. Therefore, according to the Claimants, the amended claims are automatically a part of the Court’s record. Claimants are wrong and the governing statutes and this Court’s procedures contradict this claim. In the SRBA, notices of claim are not part of the Court’s record. The statutes specifically provide that parties “shall file *with the director* a notice of claim for all water rights.” I.C. § 42-1409(4) (emphasis added). Filing a claim with the Department does not mean that the claim or any amendments thereto will be part of the record with the SRBA Court. Administrative Order #1 3(b) makes it evident that a document must be “received by the Clerk of the SRBA Court” before it will be “deemed ‘filed.’” There is no evidence that the amended claims were ever “received” by the clerk of the SRBA Court prior to the 2008 affidavit of counsel.

The litigation process of the SRBA does not begin until the Director files a Director’s Report, as required by I.C. § 42-1411(4) (“The director shall file the director’s report with the district court, *and the director’s report shall be a part of the record*”) (emphasis added). Prior to that time, there is nothing in this Court’s record pertaining to the water rights listed in the Director’s Report. Once the Director’s Report is filed, the clock starts running as to deadlines

for Objections and Responses. Indeed, “a subcase file” is not even opened in the Court until “the first objection to a recommendation or abstract is filed.” Administrative Order #1 10(a).³

Just because the standard notice of claim form (prepared by the Department and not this Court) has the Court’s caption does not make it a part of the Court’s record.⁴ The documents are filed with the Department and, in this case, were not submitted to the Court prior to 2008 – attached to counsel’s affidavit submitted in support of Claimants’ motion to set aside the partial decrees.

Claimants cannot point to any law supporting their assertion that the amended claims are part of the Court’s record. They cannot show that this Court considered the amended claims in entering the partial decrees for the Airport Licenses. The notion that a document filed with an administrative agency – but not the Court – should be considered a part of the Court’s record is not supported by law and, in fact, is contrary to the cases cited by Claimants. *McGrew, supra* (“reference to ‘other parts of the record’ refers to the court’s record, not to the records of another branch of government”). The Claimants have not and cannot point to any error or mistake made by the Department in its recommendations for the Airport Licenses filed with this Court in 1992. Nor can they identify any subsequent mistake in the respective partial decrees entered in 1997 for the uncontested recommendations for the Airport Licenses.

Objector’s call for an application of Rule 60(a) that complies with the Rule’s plain language is not a “procedural technicality.” *Resp. Br.* at 16. It is the Rule. These proceedings are “governed by the Idaho Rules of Civil Procedure.” Administrative Order #1 1(a). The Civil Rules are provided to govern judicial proceedings so that those proceedings can result in a “just,

³ The rule further provides that “all subsequent filings for that water right, including objections and responses, will be docketed under that subcase.” Administrative Order #1 10(a).

⁴ Indeed, the Court’s rules do not even recognize the Notice of Claim form as a “Standard Pleading Form.” Administrative Order #1 4. Instead, it is simply a “standard notice of claim form” prepared by the Department for use by claimants in filing their claims with the Department. I.C. § 42-1409(1).

SCANNED
MAR - 2 2012

speedy and inexpensive determination of every action and proceeding.” Rule 1(a).

Disagreement with the requirements or the process does not justify casting off the requirements of the Rule as mere “technicalities.” The Rules must be followed.

Furthermore, setting aside a partial decree is a significant request. The partial decrees for the Airport Licenses each included a Rule 54(b) certification – making them final and binding determinations of the elements of each water right. *See* I.C. § 42-1420(1). The Court should not undermine the finality of the partial decrees based on alleged errors in documents that are not within the Court’s record.

The cases cited by Claimants further support the contention that this Court cannot amend a decree based on alleged “errors” in documents that are not part of the Court’s record. In *Silsby v. Kepner*, 140 Idaho 410, 411 (2004), the Court refused to apply Rule 60(a) where the lower court had not intended to provide a tax offset in the decree. In that case, the wife’s divorce petition failed to include any tax offset and the husband failed to appear and argue he was entitled to the offset. Such an “error” by the district court was considered a “legal error” that was not correctible under Rule 60(a). In *McGrew, supra*, the Court refused to apply 60(a) where the alleged error was based on documents found in the records of the Department of Health and Welfare – not the Court.

In *Thorn Creek Cattle Assoc., Inc. v. Bonz*, 122 Idaho 42 (1991), the Court applied Rule 60(a) to correct a legal description where the amended complaint, summary judgment order and decree of foreclosure all contained the correct legal description. Likewise, in *Dursteler v. Dursteler*, 112 Idaho 594 (Ct. App. 1987), the Court of Appeals applied the Rule to correct a clerical error where the original judgment, which was thereafter remanded to the district court for “adjustment,” did provide for post-judgment interest, but the subsequent final judgment did not.

According to the Court, there was an inconsistency in the record that justified application of Rule 60(a).⁵

Each of these cases confirms that the Court's authority to apply Rule 60(a) is contingent on the alleged "clerical error" being part of the record before the Court. Since the amended claims were not part of the Court's record when it issued the 1997 partial decrees, Rule 60(a) does not apply and this Court does not have the authority to correct, much less set aside, the partial decrees.

II. This Court Must Apply Rule 60(a) the Same as Any Other Court in Idaho.

In her *Order Granting Motion for Permissive Review*, at 5, the Special Master concludes that the "SRBA Court has utilized Rule 60(a) somewhat more broadly than other District Courts." The Claimants cling to this statement, asserting that since the "SRBA is [a] unique legal proceeding," *Resp. Br.* at 16, the Court should apply Rule 60(a) more broadly than other courts, *id.* at 24-25; *id.* at 29 (asserting that the SRBA has implemented a "broader interpretation and application of Rule 60(a) than has been articulated by Idaho's non-SRBA courts"). As such, according to Claimants, "the need for Rule 60(a) is not based on who to blame for this inaction, but the need to make the correction and get the matter correct based upon the record." *Id.* at 28. In the end, they attempt to create a new standard under Rule 60(a) – allowing application of Rule 60(a) whenever there are so-called "internal inconsistencies" in the documents. *Id.* at 6.⁶

The conclusion by the Special Master and Claimants that this Court can act outside of Rule 60(a) and the cases interpreting that Rule is a fundamental error that must be corrected by

⁵ It should be emphasized that the *Dursteler* appellants filed a motion under Rule 60(a) within 36 days of the date the revised judgment was issued, which is in stark contrast to the more than 11 years that expired between the partial decrees for the Airport Licenses issued in 1997 and the Claimants Motion to Set Aside Partial Decrees filed in 2008.

⁶ Ironically, Claimants assert that, "if followed through to its logical end, [the Objectors'] narrow interpretation of Rule 60(a) would effectively render it a nullity." *Resp. Br.* at 25. The Objectors briefing belies this rhetoric. However, allowing application of Rule 60(a) based on mere "internal inconsistencies" would significantly devalue the binding nature of the partial decrees. *See* I.C. § 42-1420(1) (decree is "conclusive as to the nature and extent of all water rights").

SCANNED

MAR - 2 2012

the Court. The SRBA Court is a district court – just like any other district court, *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81 (1993) (SRBA is a “separate division of the district courts”), and is therefore bound to follow prior precedent, *see Eby v. State*, 148 Idaho 731, 736 n.3 (2010) (“The trial courts of Idaho are bound by the rules of law announced by this state’s appellate courts”). The Court’s unique focus on water rights adjudication does not give rise to any special treatment or application of the Civil Rules. *Id.*⁷ Nor does the size of the SRBA, or its “mechanical and colossal undertaking of adjudicating all of the rights in the Snake River Basin of Idaho,” *Resp. Br.* at 18, justify application outside of the plain language of the Rule. Indeed, while the Supreme Court has confirmed that the SRBA is a division of the Fifth Judicial District, *Walker, supra*, it has not given the SRBA Court any authority to construe the rules more broadly than other courts.

The Claimants assert that the SRBA Court should apply Rule 60(a) more liberally to ensure that the Court fulfills its “intent of simply getting it right.” *Resp. Br.* at 25. This is not a standard under Rule 60(a). Indeed, in *Silsby, supra*, the Court refused to apply Rule 60(a) even though the requested amendment was necessary to make the decree conform to the law.⁸ Likewise, in *Albion-Idaho Land Co. v Adams*, 58 F. Supp. 579 (D. Idaho 1945), the court refused to apply Rule 60(a) in the face of what the court called a “serious” error. This Court has no authority to expand the application of Rule 60(a) beyond these bounds.

⁷ The SRBA was authorized to supplement the Civil Rules and did so by issuing Administrative Order #1. *In re SRBA Case No. 39576*, 128 Idaho 246, 251 (1995) (after commencement of the SRBA, the Supreme Court granted the district court “the authority and power to modify the procedure for making service of pleadings, motions, notices of hearing and other documents and the procedure of giving notice of hearings and trials before the court or any masters appointed by the court”); *see also* Administrative Order #1. To the extent that the application of the Civil Rules has been “supplemented,” they must be referenced in Administrative Order #1. *See* Administrative Order #1 1(b) (“These procedures supplement the [Civil Rules] and any other applicable laws or orders of this court only to the extent necessary to allow for the fair and expeditious resolution of all claims or issues in the SRBA”). Importantly, the SRBA Court did not supplement any of the law or procedures relating to Rule 60(a).

⁸ The law required an offset of tax benefits in a divorce decree. *Silsby, supra*. However, since it was not requested by either party, the lower court failed to include the offset. *Id.* Still, the Court refused to apply Rule 60(a) to correct the alleged oversight.

Claimants cite to the proceedings in several subcases in an attempt to support their theory that this Court should apply a more liberal application of Rule 60(a). *Resp. Br.* at 27-31. These subcases are inapposite. Indeed, the Special Master confirmed, application of Rule 60(a) has “rarely been challenged in the SRBA.” *Order Granting Motion for Permissive Review* at 5. Furthermore, in the subcases cited by Claimants, Rule 60(a) was applied to correct the legal description of the place of use, 21-7295, 21-7296, 22-13212 & 22-13503, or to add a tributary to the partial decree, 74-381B & 37-22567. None of these cases sought to add points of diversion that were 10 miles away from the original points of diversion based on legal theories (i.e. accomplished transfer) that were never asserted in the original claims. As such, they are simply not applicable here.⁹

In the end, Claimants are left to guess why objections were not filed and why Mr. Foster, the Claimants’ attorney, failed to recommend that an objection be filed. They must convince the Court to apply a liberal standard because they cannot meet the standard applied by all other Idaho courts. Indeed, Claimants admit that their case is based on a presumption. *Resp. Br.* at 25 (“we can only presume” that the reason the original Claimant failed to object “was because he was aged and because he was in the process of selling his farm”). The Court should not grant the extreme remedy of setting a partial decree based on what “we can only presume.” Indeed, as explained in the *Joint Opening Brief*, at 21-23, there are several explanations for the original Claimants’ failure to act.

⁹ Claimants also cite to this Court’s *Order Amending Irrigation Period of Use Element in Partial Decree & Incorporating Into Partial Decree and Express Statement Regarding General Provisions, Nonc Pro Tunc*, December 14, 2001, as support for their theory that this Court should more liberally apply Rule 60(a). Notwithstanding the lack of any support in the record, they conclude that “Rule 60(a) was clearly the vehicle that allowed this order to be entered.” The Objectors will not get into a battle of conjecture as to what authority the Court might or might not have used to enter that order. Suffice it to say, however, the facts are different. That order simply corrected the period of use and did not add points of diversion 10 miles away based on new legal theories.

SCANNED

MAR - 2 2012

Furthermore, the assertion that the failure to act was simply a matter of an “aged” man “in the process of selling his farm,” *Resp. Br.* at 25, is illogical and overlooks one vital fact. First, it makes no sense that a farmer trying to sell his farm would overlook the ongoing SRBA process which would define his water rights. Indeed, the value of the farm is directly tied to the water associated with that farm. It is illogical, therefore, to conclude that a farmer that had been on the property since at least the 1970’s would ignore the adjudication process because he was trying to sell the property. Furthermore, if the use of the Island Wells to divert water under the Airport Licenses was crucial to the operation of Claimants’ farm, then Mr. Bell merely had to review one element (the point of diversion) on just one of the recommendations and then partial decrees for the Airport Licenses to catch this “mistake.”

Second, the Claimants were represented by Mr. Foster at the time. Mr. Foster drafted the amended claims. *Memorandum of Authority Regarding Motion to Set Aside Partial Decrees*, at 3 (Apr. 8, 2009) (“On October 30, 1990, amended claims were filed by Willard Bell of Crater Farms, Inc. *which were prepared by Kent W. Foster of Holden, Kidwell, Hahn & Crapo, PLLC* (emphasis added). Mr. Foster received notice of the recommendations. *2nd McDonald Aff.* Ex. B. And Mr. Foster, likewise, failed to file an objection on behalf of his clients.

This Court must apply Rule 60(a) in the same manner as other courts. In this case, the attempt to set aside a partial decree based on an alleged error in an extra record document in order to assert new legal theories and add new points of diversion 10 miles away should not be accepted. Claimants’ Rule 60(a) motion should be denied.

III. The Inclusion of the Maps Identifying the Island Wells is Not Conclusive of the Original Claimants’ Intent to Claim an Accomplished Transfer.

As stated above, the amended claims were not part of the Court’s record prior to the 2008 affidavit of counsel and, therefore, cannot be used to support the Claimants’ Rule 60(a) motion.

Claimants argue otherwise, asserting that the Court must examine “evidence in support of the need [to correct an error] . . . that must pass through the court’s appointed expert and gatekeeper, IDWR.” *Resp. Br.* at 17. If, *arguendo*, Claimants are correct, then the Court should examine all evidence in the Department’s records relating to the alleged “clerical error.”

In their *Joint Opening Brief*, at 16-21, the Objectors discuss the Claimants’ amended notices of claim for Water Rights Nos. 34-2459, 34-2460, 34-2461, and 34-2462 and the original Notice of Claim 34-10925. Each of these documents were prepared by Mr. Foster, signed by Mr. Bell and then submitted to the Department under Mr. Foster’s cover letter dated November 14, 1990. *2nd McDonald Aff.* at Ex. A.

Claimants have repeatedly emphasized that, by including the same two maps depicting the locations of the points of diversion with all of the claims filed by Mr. Foster on November 14, 1990, the intent of Mr. Bell to claim an accomplished transfer is clear. According to Claimants, since one of these maps only identifies the locations of the two Island Wells there should be no question about Mr. Bell’s and Mr. Foster’s intent to claim the Island Wells as points of diversion for the Airport Licenses under Idaho Code §42-1416A then in effect. *Resp. Br.* at 32-33.

Yet, what Claimants have failed to point out is that this same map is attached to the amended notices of claim for water rights 34-7037, then a permit for diversion of water from only the Island Wells, and 34-7138, a surface water right diverted out of the Big Lost River.¹⁰

It is undisputed that water right 34-7138 is not and never has been diverted out of the Island Wells. Yet, a map identifying the wells was included with the amended claim. It is also undisputed that 34-7037 is not and never has been diverted out of the Airport Wells, yet a map identifying those wells as points of diversion was included with the amended claim. This

¹⁰ Copies of the amended claims for these two rights are attached hereto for the Court’s convenience.

evidence “passed through the court’s appointed expert and gatekeeper, IDWR” at the same time as the Amended Claims for the Airport Licenses and the new expansion claim. Under Claimants’ arguments for liberal construction of Rule 60(a) and consistent with “the SRBA’s often-stated intent of simply getting it right,” it would also have to be considered part of the “record” in these proceedings.¹¹ It appears, therefore, that the only “error” in this matter was the attachment of the map identifying the Island Wells to the amended claims for the Airport Licenses and the surface water right 34-7138. This “error” was then “corrected” by the Department in 1992 when it filed the recommendations for these water rights omitting the Island Wells as points of diversion.

Indeed, it then becomes evident that Mr. Bell and Mr. Foster did not intend to claim the Island Wells as additional points of diversion for the Airport Licenses under an accomplished transfer theory. Therefore, there is no “clerical error” for this Court to correct.

IV. The 1995 Conveyance Agreement Does Not Demonstrate An Intent to Claim an Accomplished Transfer.

Claimants point the Court to the 1995 *Water Pumping & Transport Agreement* with the Big Lost Irrigation District (“BLRID”) as evidence of some intent to claim an accomplished transfer. *Resp. Br.* at 32. However, in making this argument, the Claimants overlook several important facts. As such, this argument fails for a number of reasons. First, the 1995 agreement does not provide any evidence that Mr. Bell had completed an accomplished transfer prior to 1987. 2nd *Harris Aff.* Ex. G; *see also* I.C. § 42-1425 (accomplished transfer must be completed

¹¹ The Partial Decrees for 34-2459, 34-2460, 34-2461, 34-2462 and 34-10295, which are the specific subject of these proceedings, all include combined diversion volume and combined place of use remarks that include 34-7138 in those limitations. Mr. Isom specifically identified 34-7138 in Exhibit A to his Affidavit which was filed in these proceedings on March 24, 2009 and November 4, 2010. A copy of the License for 34-7138 is attached as Exhibit F to the *Second Affidavit of Attorney Robert L. Harris*, also filed November 4, 2010 in these proceedings. Mr. Harris makes specific reference to 34-7138 on p.9 of his *Memorandum in Support of Motion for Summary Judgment*, also filed herein on November 4, 2010. The current record in these proceedings is thus replete with references to 34-7138 so it is entirely consistent with Claimants’ assertion that the “record” to be examined under their Rule 60(a) motion should include the Amended Notice of Claim for that water right.

SCANNED

MAR - 2 2012

prior to commencement of the SRBA). It merely provides the Claimants with authority to deliver up to 1000 inches through the system beginning in 1995.

It is true that there were prior conveyance agreements. The use of BLRID conveyance systems to deliver water to the Claimants' place of use began in the 1970's. Agreements in 1974, 1978, 1979 and 1980 show that the Claimants entered into agreements with BLRID to convey as much as 1000 inches through the Munsey Canal. *Arrington Aff.* Exs. A-D.

Importantly, none of these agreements can be used as evidence of an accomplished transfer. Each of these agreements identifies the same two points of diversion from which ground water was authorized to be diverted into the Munsey Canal. *Id.* These authorized points of diversion are listed as follows:

E ½ SW, S23, T3N, R26
SESW, NESE, S33, T5, R26

Id. These points of diversion are not the Island Wells.

It is not surprising that the conveyance agreement would not include the Island Wells – because they were not drilled until after the agreements were entered. Indeed, the first well was drilled in 1976 – two years after the first conveyance agreement. *Arrington Aff.* Ex. E at 3-4. The second well was not drilled until May, 1982 – two years after the 1980 agreement. *Id.* According to the beneficial use exam for water right 34-7037, which was completed in 1985, the wells had a combined capacity of 24.66 cfs (12.62 cfs from one well and 12.04 cfs from the other). *Arrington Aff.* Ex. F at 7. In other words, prior to 1982, the Claimants only had capacity to divert up to 600 inches (12 cfs) from the Island Wells. This is the diversion rate for water right 34-7037, which was licensed at the Island Wells.

The BLRID conveyance agreement did not identify the Island Wells until 1995. As originally drafted and executed, the 1995 agreement only allowed for the diversion of 600 inches

(12 cfs) – which is equal to the diversion rate of water right 34-7037. *Harris 2nd Aff.* Ex. G. On January 12, 1998, after the partial decrees had been issued in the SRBA, the BLRID acting office manager, Rita M. Lundy, sent Crater Farms, a letter indicating that, although the agreement allowed for the conveyance of 600 inches, the BLRID had approved a diversion of 1000 inches based on the existence of water right 34-7138. *Arrington Aff.* Ex. H. She indicated that the agreement would be amended to recognize this water right. *Id.*¹² Again, water right 34-7138 is a surface water right and is not diverted through the Island Wells. *Harris 2nd Aff.* Ex. F.

Noticeably, the Claimants fail to mention the letter from BLRID in making their argument that the 1995 agreement somehow evidences intent to claim an accomplished transfer in the SRBA. *Resp. Br.* at 32.

V. Claimants' Failure to Act Cannot be Overlooked.

The Claimants would have this Court overlook their actions and inactions and simply grant their motion. *Resp. Br.* at 28 (“the need for Rule 60(a) is not based on who to blame for their inaction, but the need to make the correction and get the matter correct based upon the record”). They contend that any consideration of the inactions of the Claimants and their attorney would “effectively render [Rule 60(a)] a nullity” because “in every instance where Rule 60(a) is applied, the argument could be made that the persons asserting the clerical error should have caught the error.” *Id.* at 25. Idaho law does not support this *laissez-faire* approach to the application of Rule 60(a).

In *Albion-Idaho Land Co. v Adams*, 58 F. Supp. 579 (D. Idaho 1945), a case cited by the Objectors but overlooked by the Claimants, the Court refused to apply Rule 60(a) to amend a water right decree even though the Court considered the error to be “serious.” *Id.* at 580. That

¹² In addition, a copy of this same letter and the amended page referenced therein is attached to this reply for the Court's convenience. The copy of the 1995 agreement provided by Isom is not the amended page referenced in this letter. *See Harris 2nd Aff.* Ex. G. SCANNED

MAR - 2 2012

error resulted in an irrigation right being decreed with a season of use from October 1 through October 31 – rather than April 1 through October 31 as the water right had been decreed in a previous matter.

In refusing to apply Rule 60(a), the Court recognized that there must be “freedom from fault and negligence on the part of one seeking such relief.”

Although there are exceptions to the rule, ***freedom from fault and negligence on the part of one seeking such relief is essential***, and in the light of the facts here the motion to correct this error cannot be sustained. Clearly this Court should have been advised of the error so that it could have been corrected long before this time. It is well established as a principle of equity that ***a party seeking relief in a matter like this must use due diligence in asserting his right, and that negligence and laches in this regard are equally effectual bars to relief, and this is especially so if the correction would be harmful to intervening rights***. The authorities are uniform in so holding.

There is no evidence that either Crane or Booth was hindered in any way from discovering the mistake and it will be presumed that Booth knew what he was buying and of what the water right consisted at the time the deed was issued to him. There was nothing to hinder Booth at the time from finding out. He was at least carelessly inattentive to what he was buying unless he knew the contents of the decree. He had legal notice of its contents and there is no reasonable showing why both Crane and Booth have slept on their rights for so many years while other rights have intervened by purchase of land and water, not only by the parties appearing here and objecting to the correction of the decree who are injured if the decree is corrected, but no doubt where there are over four hundred other rights, other parties have purchased land and water over the last sixteen years who could claim injury by having the decree corrected.

Id. at 581-82 (emphasis added).

The *Albion* case is directly on point here. Claimants cannot show that their failure to act in a timely fashion is anything other than careless inattentiveness. They cannot explain why they “slept on their rights for so many years,” when the law required them to act during the initial SRBA proceedings in the mid-1990’s.

Considering the Claimants’ inactions does not render Rule 60(a) a nullity. Quite the contrary, it is required by law and provides necessary assurance that that parties seeking to take

advantage of the extraordinary remedy of setting aside a judgment are free from fault and negligence. *Albion, supra*.

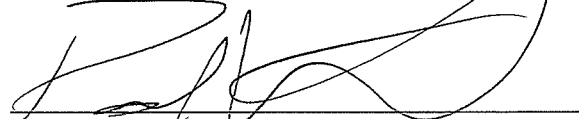
CONCLUSION

This Court does not have the authority to amend a decree based on Rule 60(a) where the only alleged “clerical error” is found in a document that was not part of the Court’s record. The SRBA Court is bound to apply Rule 60(a), as that rule has been interpreted by the Idaho Supreme Court. Both the Rule and Case law require that the “clerical error” be in the Court’s record.

Furthermore, even if the Court considers the amended claims to be a part of the Court’s Record, the Claimants cannot meet their burden under Rule 60(a). Accordingly, the Court should deny the Claimants’ motion to set aside.

DATED this 29th day of February, 2012.

BARKER ROSHOLT & SIMPSON LLP

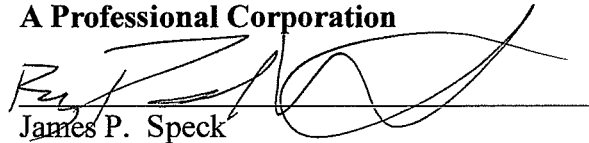


Travis L. Thompson

Paul L. Arrington

*Attorneys for Doug Schureman, Tyler Felton &
Jim Huelsman*

**SPECK & AANESTAD,
A Professional Corporation**



James P. Speck

Attorneys for Darrell McDonald & Norm Sowards

SCANNED

MAR - 2 2012

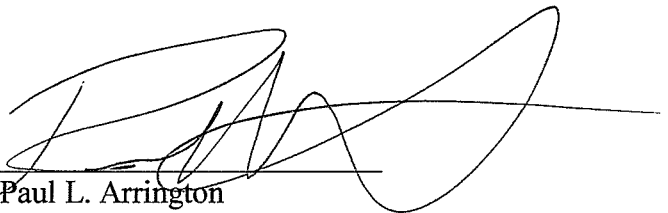
CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of February, 2012, I served a true and correct copy of the foregoing document on the persons listed below, via first class mail, postage prepaid:

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Robert L. Harris
P.O. Box 50130
Idaho Falls, ID 83405

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318-0248



Paul L. Arrington

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576
Ident. Number A34-07138
Date Received _____
Receipt Number _____

AMENDED
NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

RECEIVED
NOV 12 1990

Department of Water Resources
Eastern District Office

1. Name of Claimant(s) Crater Farms, Inc. Phone (208) 527-8903
Mailing Address P.O. Box 91, Arco, Idaho Zip 83213
2. Date of Priority (Only (1) per claim) May 5, 1976
3. Source of water supply (a) Big Lost River
which is tributary to (b) _____
- 4.a. Location of existing
point of diversion is: Township 4N. Range 26E. Section 26,
1/4 of NW 1/4 of NW, Govt. Lot, _____ B.M., County of Butte
Additional points of diversion if any: _____
- b. If instream flow, beginning point of claimed instream flow is:
Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4,
Govt. Lot _____ B.M., County of _____
ending point is: Township _____ Range _____ Section _____, _____ 1/4 of
_____ 1/4 of _____ 1/4 Govt. Lot _____ B.M., County of _____
5. Description of existing diversion works (Dams, Reservoirs, Ditches,
Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any
changes or enlargements in use, the dimensions of the diversion works as
constructed and as enlarged and the depth of each well. _____
Munsey Headgate to ditch.

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MICROFILMED

DEC 02 1992

6. Water is claimed for the following purposes:

(Both dates are inclusive) (cfs) (acre feet)

For Irrigation purposes from 04/01 to 11/01 amount 16.0 or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 15.5 (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is 2700 acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.)

10. Description of place of use:

- If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
- If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instruction for standard symbols.

TWP:RNG:SEC:	NE1/4	:	NW1/4	:	SW1/4	:	SE1/4	:TLS
:	:NE 'NW 'SW 'SE	:	:NE 'NW 'SW 'SE	:	:NE 'NW 'SW 'SE	:	:NE 'NW 'SW 'SE	:
3N:26E: 14:	' ' ' ':	:	39' 39' 40' 40:	:	40' 40' 40' 40:	:	' ' ' ':	:318
:	: 15: 39' 40' 40' 40:	:	40' 40' 40' 40:	:	40' 40' 40' 40:	:	40' 40' 40' 40:	:639
:	: 16: 40' 40' 40' 40:	:	' ' ' ':	:	' ' ' ':	:	40' 40' 40' 40:	:320
:	: 22: 40' 40' 40' 40:	:	40' 40' 40' 40:	:	' ' ' ':	:	' ' ' ':	:320
:	: 23: ' ' ' ':	:	40' 40' 40' 40:	:	40' ' ' ':	:	33: 39' 40' 40' 40:	:392
:	: ' ' ' ':	:	' ' ' ':	:	' ' ' ':	:	' ' ' ':	:

Total number of acres irrigated 1989

11. In which county(ies) are lands listed above as place of use located?
Butte

12. Do you own the property listed above as place of use? Yes X No _____
If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above.

34-2459, 34-2460, 34-2461, 34-2462, 34-7037 and expansion of groundwater rights. or None ()

14. Remarks:

Rediversion from Munsey Ditch: NW SE SE, (2 points),
Section 2; SW SW NW, (2 points) Section 13; SE SE NE Section 15;
SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range
26 East.

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MAR - 2 2012

MICROFILMED

DEC 02 1992

Last Name Crater Farms, Inc. Ident. Number A34-07138

15. Basis of Claim (Check one) Beneficial Use _____ Posted Notice _____
Permit X Decree _____ License _____

If applicable provide IDWR Water Right Number 34-7138
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments 2

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s) _____ Date _____

For Organizations: I do solemnly swear or affirm that I am President of Crater Farms, Inc., that I have signed the
Title Organization

foregoing document in the space below as President
Title

of Crater Farms, Inc. and that the statements contained in the
Organization

foregoing document are true and correct.

Signature of Authorized Agent

Willard O. Bell
WILLARD O. BELL

Title and Organization President, Crater Farms, Inc. Date _____

State of Idaho/or _____)
County of Twin Falls) SS.

Subscribed and sworn (or affirmed) before me this 30th day of October, 1990.

Notary Public
Residing at _____
My Commission Expires 1995

17. Notice of Appearance:

Notice is hereby given that I, Kent W. Foster will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature Kent W. Foster
Address P.O. Box 50130, Idaho Falls, Idaho 83405
Date 11/6/90

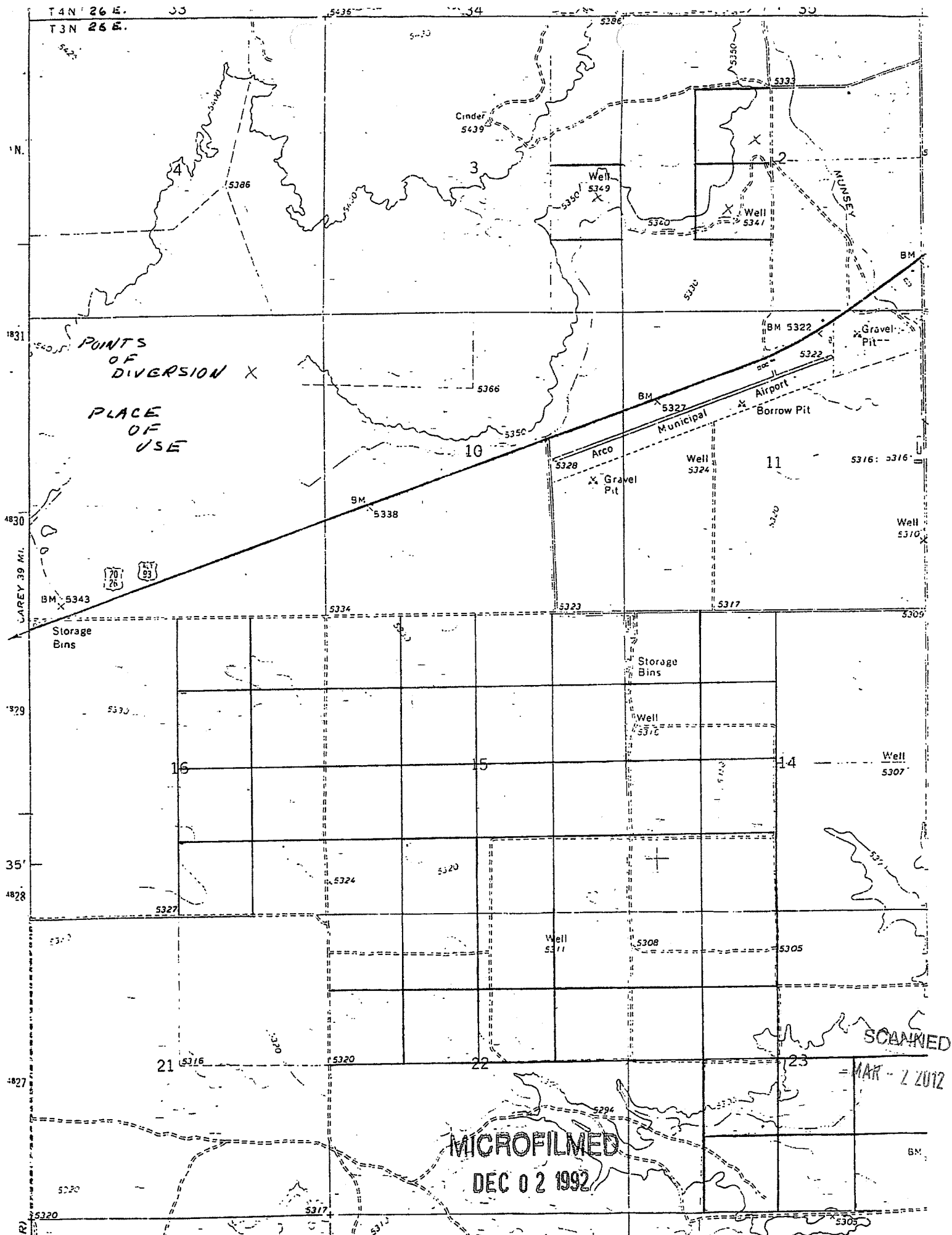
Last Name Crater Farms, Inc. Ident. Number A34-07138

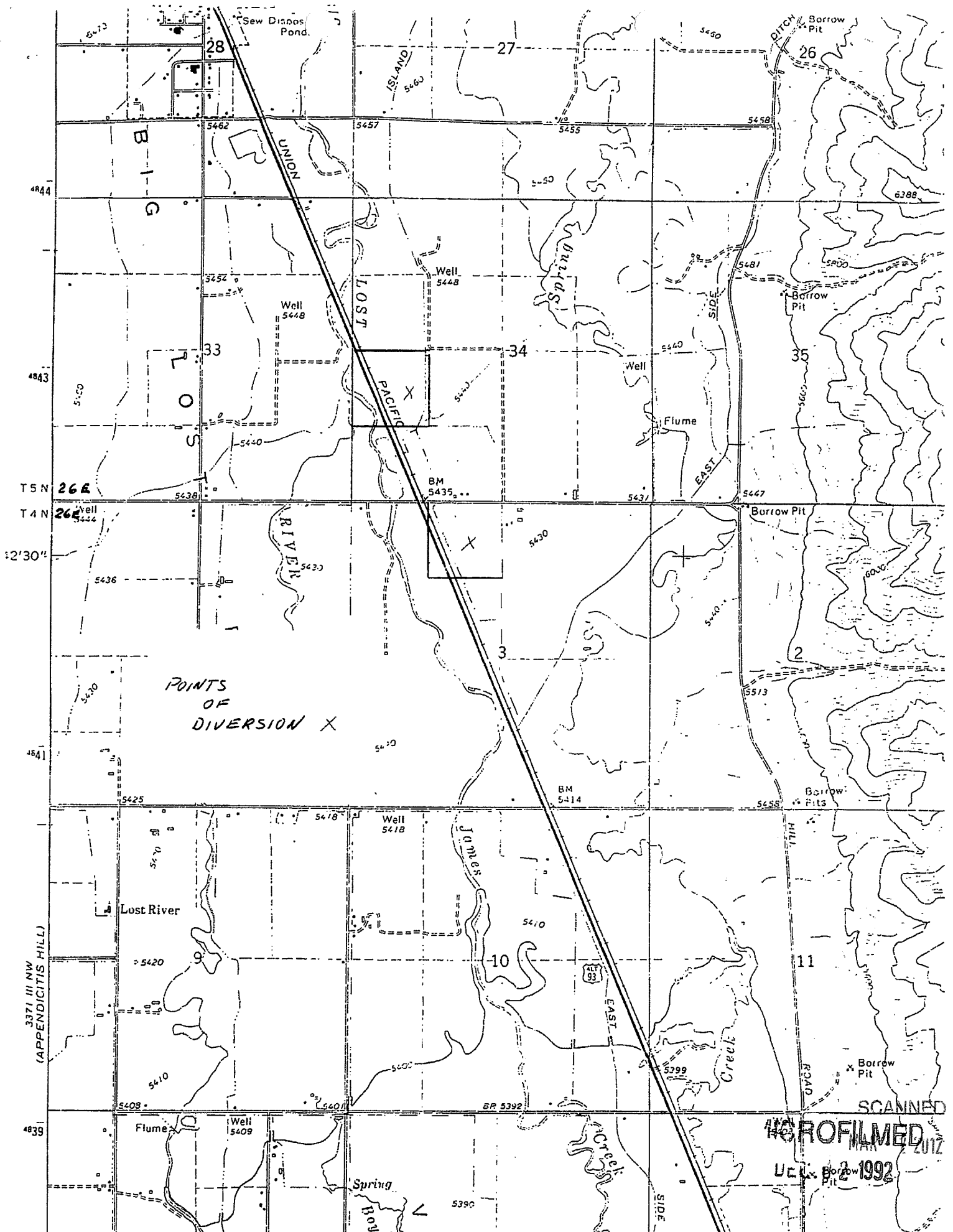
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MAR - 2 2012

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DEC 02 1992





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MAR - 2 2012

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number A34-07037

Date Received _____

Receipt Number _____

AMENDED
NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

RECEIVED
NOV 14 1990

Department of Water Resources
Eastern District Office

1. Name of Claimant(s) Crater Farms, Inc. Phone (208) 527-8903

Mailing Address P.O. Box 91, Arco, Idaho Zip 83213

2. Date of Priority (Only (1) per claim) May 4, 1973

3. Source of water supply (a) Groundwater

which is tributary to (b) _____

4.a. Location of existing

point of diversion is: Township 5N. Range 26E. Section 34,

1/4 of NW 1/4 of SW, Govt. Lot, _____ B.M., County of Butte

Additional points of diversion if any: T.4N, R.26E, S.3, NE1/4 NW1/4.

b. If instream flow, beginning point of claimed instream flow is:

Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4,

Govt. Lot _____ B.M., County of _____

ending point is: Township _____ Range _____ Section _____, _____ 1/4 of

_____ 1/4 of _____ 1/4 Govt. Lot _____ B.M., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well. _____

Wells open discharge to Munsey Ditch--pump mainline to sprinklers.

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MAR - 2 2012
DEC 01 1992

6. Water is claimed for the following purposes:

(Both dates are inclusive) (cfs) (acre feet)

For Irrigation purposes from 04/01 to 11/01 amount 12.0 or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 12.0 (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is 2088 acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.)

10. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instruction for standard symbols.

TWP:RNG:SEC:	NE1/4	:	NW1/4	:	SW1/4	:	SE1/4	:	TL
:	:NE 'NW 'SW 'SE	:	:NE 'NW 'SW 'SE	:	:NE 'NW 'SW 'SE	:	:NE 'NW 'SW 'SE	:	:
3N:26E: 14:	' ' ' ':	:	39' 39' 40' 40:	:	40' 40' 40' 40:	:	' ' ' ':	:	318
:	: 15: 39' 40' 40' 40:	:	40' 40' 40' 40:	:	40' 40' 40' 40:	:	40' 40' 40' 40:	:	639
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:	: 23: ' ' ' ':	:	40' 40' 40' 40:	:	40' ' ' ':	:	33: 39' 40' 40' 40:	:	392
:	: ' ' ' ':	:	' ' ' ':	:	' ' ' ':	:	' ' ' ':	:	:

Total number of acres irrigated 1989

11. In which county(ies) are lands listed above as place of use located?
Butte

12. Do you own the property listed above as place of use? Yes X No _____
If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above.

34-2459, 34-2460, 34-2461, 34-2462, 34-7138 and expansion of groundwater rights. or None ()

14. Remarks:

Rediversion from Munsey Ditch: NW SE SE, (2 points),
Section 2; SW SW NW, (2 points) Section 13; SE SE NE Section 15;
SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range
26 East.

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Last Name Crater Farms, Inc. Ident. Number A34-07037 DEC 01 1992

15. Basis of Claim (Check one) Beneficial Use _____ Posted Notice _____
Permit X Decree _____ License _____

If applicable provide IDWR Water Right Number 34-7037
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments 2

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s) _____ Date _____

For Organizations: I do solemnly swear or affirm that I am President of Crater Farms, Inc., that I have signed the
Title Organization

foregoing document in the space below as President
Title

of Crater Farms, Inc. and that the statements contained in the
Organization

foregoing document are true and correct.

Signature of Authorized Agent Willard O. Bell

WILLARD O. BELL

Title and Organization President, Crater Farms, Inc. Date _____

State of Idaho/or _____)
County of Twin Falls) SS.

Subscribed and sworn (or affirmed) before me this 30th day
of October, 1990.

Notary Public [Signature]

Residing at [Signature]

My Commission Expires 1995

17. Notice of Appearance:

Notice is hereby given that I, Kent W. Foster will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

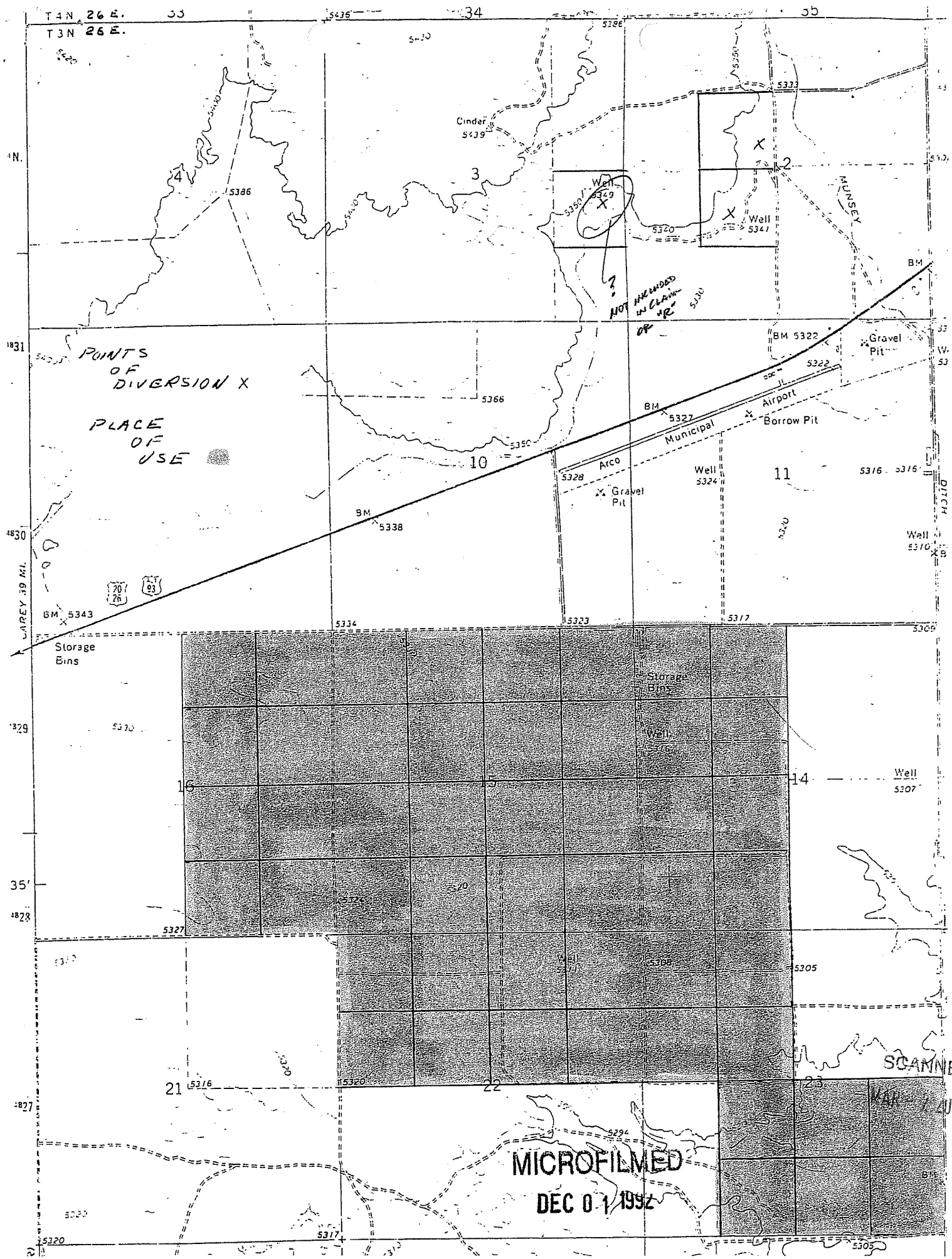
Signature Kent W. Foster
Address P.O. Box 50130, Idaho Falls, Idaho 83405
Date 11/6/90

SCANNED

MICROFILMED 2 2012

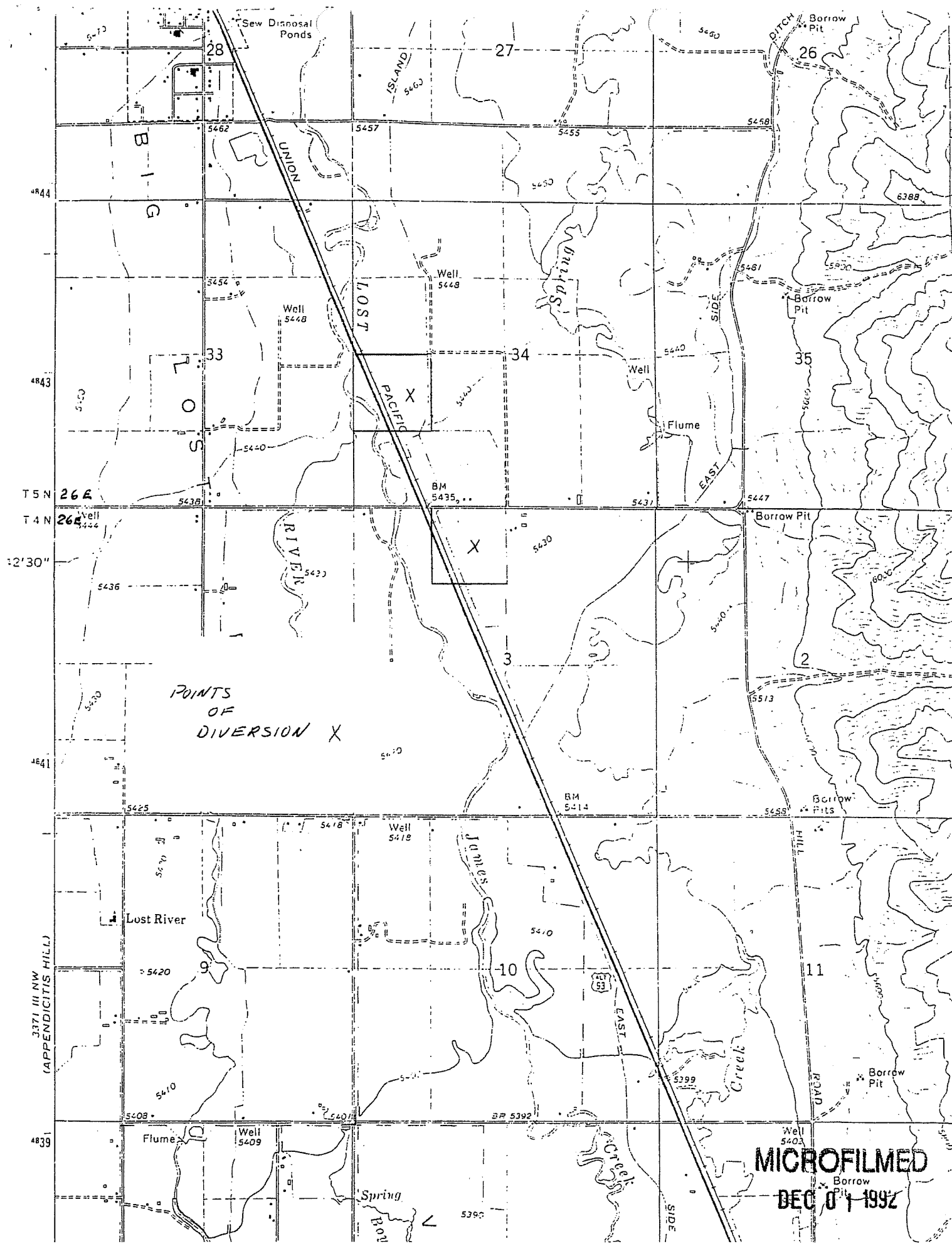
DEC 01 1992

Last Name Crater Farms, Inc. Ident. Number A34-07037



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MAR 1 2012

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DEC 01 1992



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MAR - 2 2012

Big Lost River Irrigation District
P.O. Box 205
Mackay, Idaho 83251

January 12, 1998

Mr. Willard O. Bell
Crater Farms
P.O. Box 91
Arco, Id. 82131

Dear Willard :

You may wish to come to the next regular Board meeting because of the following:
In reviewing your 20 year transport agreement, prior to filing, I noticed that the IDWR license was for only 600 inches, whereas the Board approved 1000 inches on that document. To correct this I have re-typed the first page of this transport agreement noting that you have another license #-34-07138 for 16 CFS or another 800 inches. Although the original pumping agreement for this water was not found, I did find the first page, copy attached (which I know was approved in 1980). The corrected copy will be presented to the Board of Directors at the next regular meeting for approval on the 3rd of February starting at 1 P.M.

Would you please review this corrected first page and advise if it meets with your approval ?

In the minutes of 1981 you were given permission to use the agreement for the Island, eastside, Arco and the Munsey Canal, whereas the Transport Agreement only lists the Island and Munsey. Did you wish to have the other canals included now also ?

Yours truly,


Rita M. Lundy
Acting Office Mgr.

CC: Lynn Rothwell, Chairman

SCANNED

MAR - 2 2012

M00029

*Corrected copy*WATER PUMPING AND TRANSPORT AGREEMENT

THIS AGREEMENT, made and entered into this 5th day of December, 1997, by and between Crater Farms and Willard O. Bell, hereinafter referred to as "Landowner" of Arco, County of Butte State of Idaho and Big Lost River Irrigation District, an irrigation district duly organized under the laws of State of Idaho, hereinafter referred to as "District", with its principal office in Mackay, Custer County, State of Idaho.

W I T N E S S E T H:

WHEREAS, Landowner is the owner of certain real property located outside the boundaries of the District, described as follows, to-wit:

TOWNSHIP	RANGE	SECTION	1/4 OF 1/4	LOT	USE	ACRES
3N	26E	14	W2			320
		15	all			640
		16	E2			320
		22	N2			320

Containing 1980 irrigable acres; and,

23 NW4, SE4, E2SW4 400
 WHEREAS, landowner has certain groundwater/surface water rights appurtenant to the above-described real property, which rights are described as follows, to-wit:

License No.: 34-07037 and 34-07138
 Date of Priority: 5/4/73 5/5/76
 Point of Diversion: 4/26/36 4/26/3 5/26/34
 Rate of Diversion: 12 CFS 16 CFS

Acres irrigable under said right: 1980 1664

WHEREAS, Landowner desires the District to transport water diverted under the above-described right through an existing canal of District for use on the lands of Landowner above-described; and,

WHEREAS, the District is the owner of a canal known as the Island/Munsey Canal, being a part of the facilities of the District used for the delivery of decreed flows of Big Lost River of Landowners and storage water of the District for the irrigation of lands within the District; and,

WHEREAS, the District has, from time to time, additional capacity within said canal that could be used for the delivery of water to landowners outside of the District; and,

WHEREAS, the District has, from time to time, the delivery of water to landowners outside of the District; and,

WHEREAS, Landowner desires the District to transport water diverted

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MAR - 2 2012