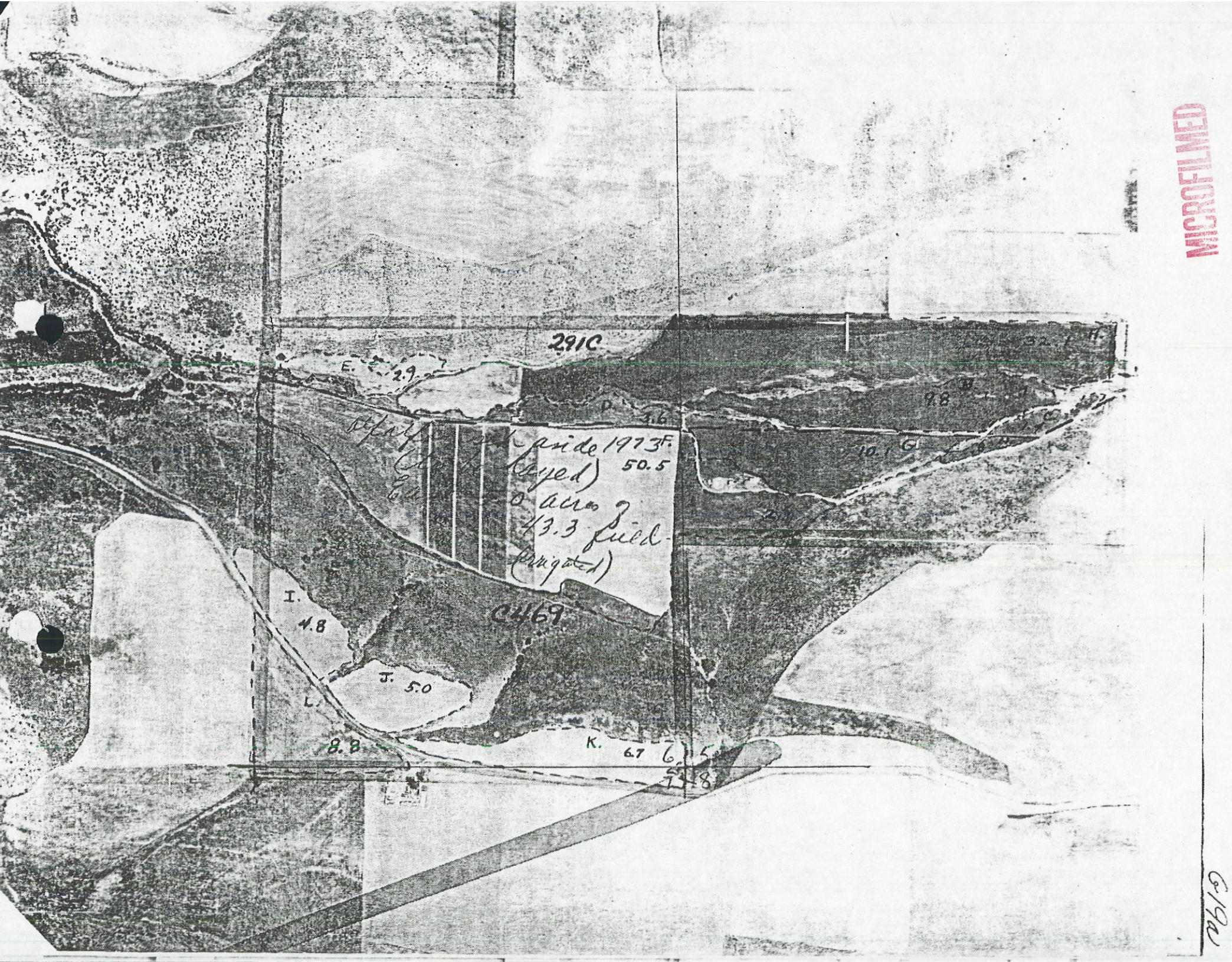


UNCLASSIFIED



C19a

Reference -
See trans. file 11-0548
/#2094 for correspondence
pertaining to trans.
11-0553/2094

MICROFILMED

TRANSFER NO.	NAME	AMOUNT C.F.S.	BALANCE C.F.S.	RIGHT NO.
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2094	Merlin R. Smith	1.00	0	11-0553
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MONITOR

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR

TRANSFER NO. 11-0548/11-0551/11-0553

IN THE NAME OF MERLIN R. SMITH

MEMORANDUM DECISION

AND ORDER

Application for transfer was filed by Merlin R. Smith to change the points of diversion of water rights bearing Nos. 11-0548, 11-0551 and 11-0553. On May 24, 1978, a hearing of protests against the application was held before the Director of the Department of Water Resources.

Merlin R. and Earlene M. Smith were present and represented by LaMonte Jones, Attorney at Law from Pocatello, Idaho. Don W. Gilbert was present and represented by Randall Budge, Attorney at Law from Soda Springs, Idaho.

The application for transfer was filed to change points of diversion listed in the case of Utah Power & Light Company v. The Last Chance Canal Company, commonly known as the Dietrich Decree. The points of diversion historically used by the applicants and their predecessors in interest are different from the diversion points listed in the Dietrich Decree for the rights of the predecessors in interest. Merlin R. Smith filed his application for transfer to change the points of diversion listed in the Dietrich Decree to points of diversion other than those points historically used by him or his predecessors in interest.

A protest was filed by Don W. Gilbert against the application for transfer. Don W. Gilbert holds rights with a priority of May 1, 1900, which were originally decreed under the Dietrich Decree to George M. and Mary E. Smith. The points of diversion historically used by Don W. Gilbert are located on Birch Creek and Densmore Creek upstream from the point of diversion historically used by Merlin R. Smith, which was located below the confluence of Birch and Densmore Creeks. Merlin R. Smith is the successor in interest to water rights originally decreed to William Larkins and Dora Larkins in the Dietrich Decree for water in Densmore, Birch, and Beaver Dam Creeks in the

11-0548/11-0551/11-0553

amount of 3.7 cfs with a priority of May 1, 1882. In 1973, Smith moved his point of diversion upstream by installing a pipeline approximately one-half mile above the confluence of Birch and Densmore Creeks. Prior to that time, the water in Birch and Densmore Creeks had frequently failed to reach the point of diversion historically used by Smith, below the confluence of Birch and Densmore Creeks. When water was unable to reach Smith, it became available upstream to fill the 1900 right held by Don W. Gilbert.

Prior to the filing of this application, the Sixth Judicial District Court and the Supreme Court have considered the rights of Don Gilbert and Merlin Smith to the water from Birch Creek and Densmore Creek. At the time of the decisions by both of the courts, Don Gilbert claimed the points of diversion that had been historically used by him and his predecessors in interest. Merlin Smith claimed two new points of diversion upstream from those listed in the Dietrich Decree or those historically used by him or his predecessors in interest.

An issue to be decided in this matter is the effect of the decisions upon Merlin Smith's new points of diversion. The district court concluded, in Civil Case No. 2164, that Merlin R. Smith was entitled to the points of diversion as they ". . . existed at the time of trial.". The decision of the district court was appealed by Don W. Gilbert to the Idaho Supreme Court. In Gilbert v. Smith, 97 Id. 735, 552 P 2d 1220 (1976), the Supreme Court affirmed the decision of the district court and reaffirmed the rights as set forth in the Dietrich Decree.

The Supreme Court considered the issue of enlargement of the original right by a change in Merlin R. Smith's point of diversion in that it declared that no enlargement would occur because the district court reaffirmed the Dietrich Decree and the rights thereunder. By affirming the decision of the district court, the Supreme Court reaffirmed the Dietrich Decree and the rights thereunder to avoid an enlargement of the original right, and thus limited the right to the

quantity of water set forth under the Dietrich Decree.

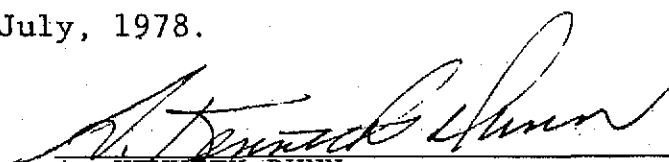
Consistent with the Supreme Court's decision, the change in point of diversion by Merlin R. Smith is approved for the amount of water that applicant has historically been able to divert under the Dietrich Decree, thus avoiding an enlargement of the original right. The new points of diversion are located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 6, Township 11S, Range 40E, B.M., Caribou County (Densmore Creek) and in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 6, Township 11S, Range 40E, B.M. (Birch Creek).

ORDER

IT IS, THEREFORE, ORDERED and application for transfer 11-0548/11-0551/11-0553 is hereby approved subject to the following conditions:

- (1) Water may be diverted at the new point of diversion on Densmore Creek only during the times of the irrigation season when water would reach the historic point of diversion located near the line common to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 6, Township 11S, Range 40E, B.M., in usable quantities. The Department of Water Resources will determine by appropriate flow measurement when water may no longer be diverted at the new point of diversion.
- (2) Water may be diverted at the new point of diversion on Birch Creek whenever it is available at that point of diversion during the irrigation season. However, when water is also diverted at the new point of diversion on Densmore Creek, the amount of water that can be diverted from Densmore Creek must be reduced by the amount of water available at the point of diversion on Birch Creek.
- (3) Subject to the control of the Watermaster of Water District No. 11, Bear River.
- (4) A measuring device(s) of a type approved by the Department of Water Resources shall be permanently installed and maintained on the pipeline(s) at a location(s) acceptable to the Watermaster.

DATED this 28 day of July, 1978.


A. KENNETH DUNN
Deputy Director

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT **APPROVED**
To Change the Point of Diversion and/or the Place of Use

Name of applicant Merlin R. Smith Phone 427-6326Post office address RFD #1, Box 113, Grace, Idaho 83241**A. DESCRIPTION OF RIGHT AS RECORDED**

1. Right evidenced by:

a. Decree to William Larkins & Dora Larkinsin case of Utah Power & Light Co. (Name) vs Last Chance Canal Co.dated July 14, 1920 in Eastern District county of Bear Lake, Caribou
(Name of court) Franklin

b. License No. _____ issued by the Idaho Department of Water Resources

c. Claim No. _____ on file with the Idaho Department of Water Resources

2. If applicant is not the original holder of this right, explain how it was acquired and attach a copy of the deed or other evidence of ownership of the land to which the right is appurtenant _____

3. Source of water #240 Densmore Cr. tributary to Bear River
#243 Beaver Dam Creek tributary to Densmore Creek4. Date of priority #245 Birch Creek
May 1, 1882 Densmore Creek

5. Water is used for the following purposes:

240 amount 1.40 for irrigation purposes from Apr. 1 to Nov. 1243 amount 1.30 for " purposes from " to "245 amount 1.00 for " purposes from " to "

(month/day - both dates inclusive)

6. Total amount of water under right: a. 3.70 cubic feet per secondb. _____ &/or
acre feet per annum7. Location of original point of diversion is SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 6Township 11S Range 40E, B.M., in Caribou (240) CountyAdditional points of diversion, if any 243 P.D. not decreed; No. 245 W $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 6, T. 11S.
R. 40E

8. Lands irrigated or place of use:

TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
240=	11S	40E	6	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	70
243=	11S	40E	5								X								-
			6												X	X	X	X	65
245	11S	40E	5								X								
			6												X	X	X	X	50

Total number of acres to be irrigated _____

MICROFILMED

B. DESCRIPTION OF PORTION OF RIGHT FOR WHICH THE CHANGE IS REQUESTED (If the entire right is requested changed, omit part B)

1. Amount of water: a. _____ cubic feet per second
&/or
b. _____ acre feet per annum
2. Point of diversion _____ ¼ _____ ¼, Section _____ Township _____
Range _____, B.M., _____ County _____
Additional points _____
3. Place of use:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

C. DESCRIPTION OF RIGHT OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Change in point of diversion
- a. Amount of water to be diverted 3.70 c.f.s. &/or _____ acre feet
- b. Point(s) of diversion SW ¼ NW ¼, Section 6 Township 11S
Range 40E, B.M., Caribou County Densmore Ck.
Additional points NE¼SW¼, Sec. 6, T. 11S, R. 40E, B.M. (Birch Creek)
- c. Description of diverting works headworks, pipelines and gravity sprinklers
- d. Describe the reasons for applying for a change in the point(s) of diversion _____
conversion of irrigation system to gravity sprinklers

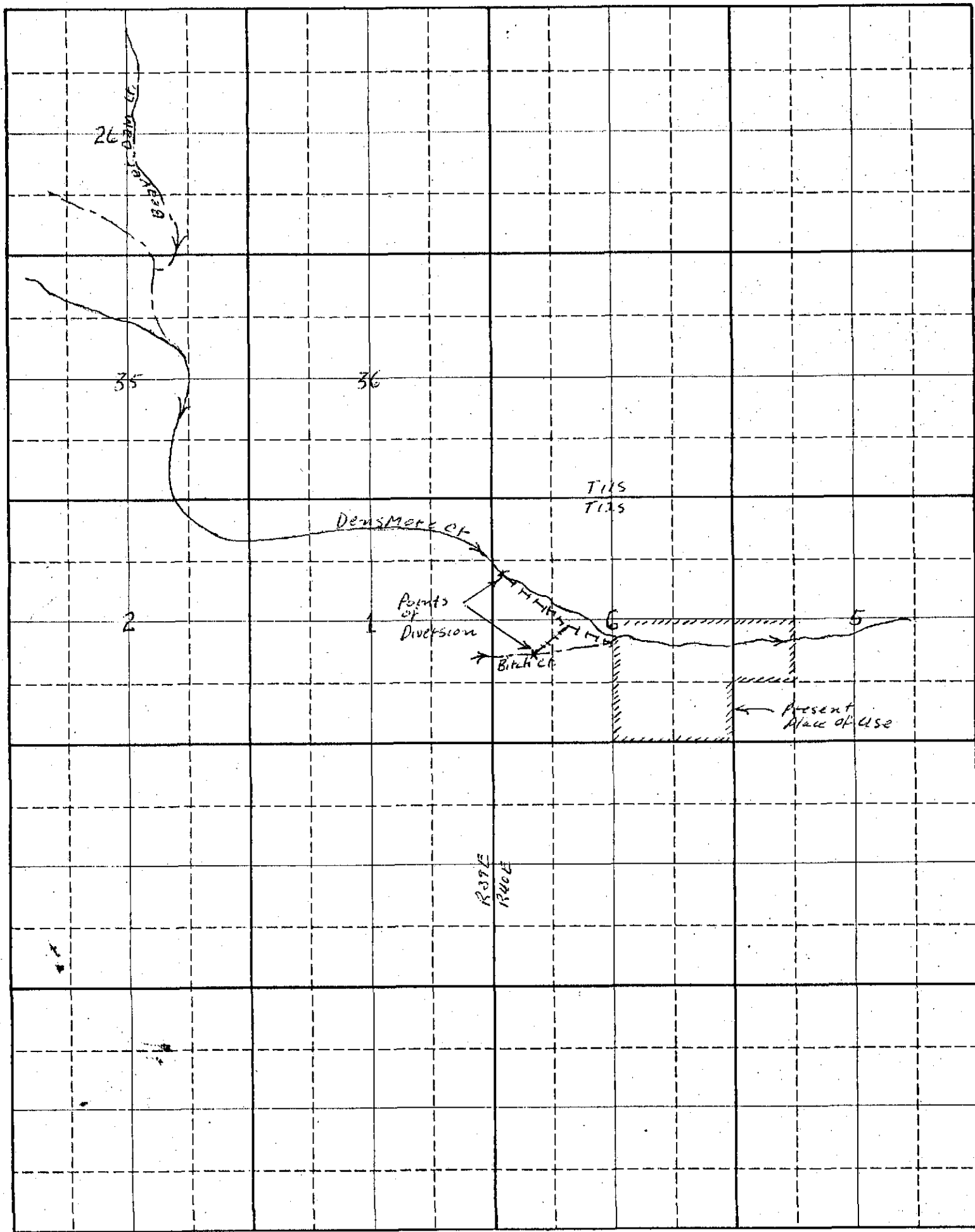
2. Change in place of use NO CHANGE

- a. Describe the lands or place of use to which the right will be transferred:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

Total number of acres to be irrigated _____

- b. Draw a map indicating the new point(s) of diversion and/or the new land to be irrigated. Show clearly the land involved by section, township and range number.



SCALE: 2 inches equal 1 mile. Draw plan in ink.

3. Remarks

I hereby assert that no one will be injured by such change and the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

Michio R. Smith
(Signature of applicant)

Subscribed and sworn to before me this 29th day of April, 19 77

Loris O. Holman
(Notary public)

My commission expires MAY 21, 1979

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 11-0548/0551/0553 and said application is hereby APPROVED

1. Approval of said application is subject to the following limitations and conditions:
PURSUANT TO MEMORANDUM DECISION AND ORDER OF THIS DATE.

2. Denial of said application is for the following reasons: _____

Witness my hand this 28 day of July, 19 78

Stewart A. Holman
DEPUTY DIRECTOR

FOR DEPARTMENT USE ONLY

Received by CW Date 4-29-77

Protest filed by Don W. Whit

Prelim. check by LF Fee 30.00

Receipted by CW Date 4-29-77

Published in Cypress Valley Sun # 6585
Preston Citizen
News Examined

Copies of protest forwarded by CW

Pub. dates May 19 + 26, 1977

Hearing held by _____ Date _____

Watermaster recommendation requested on 5-25-77

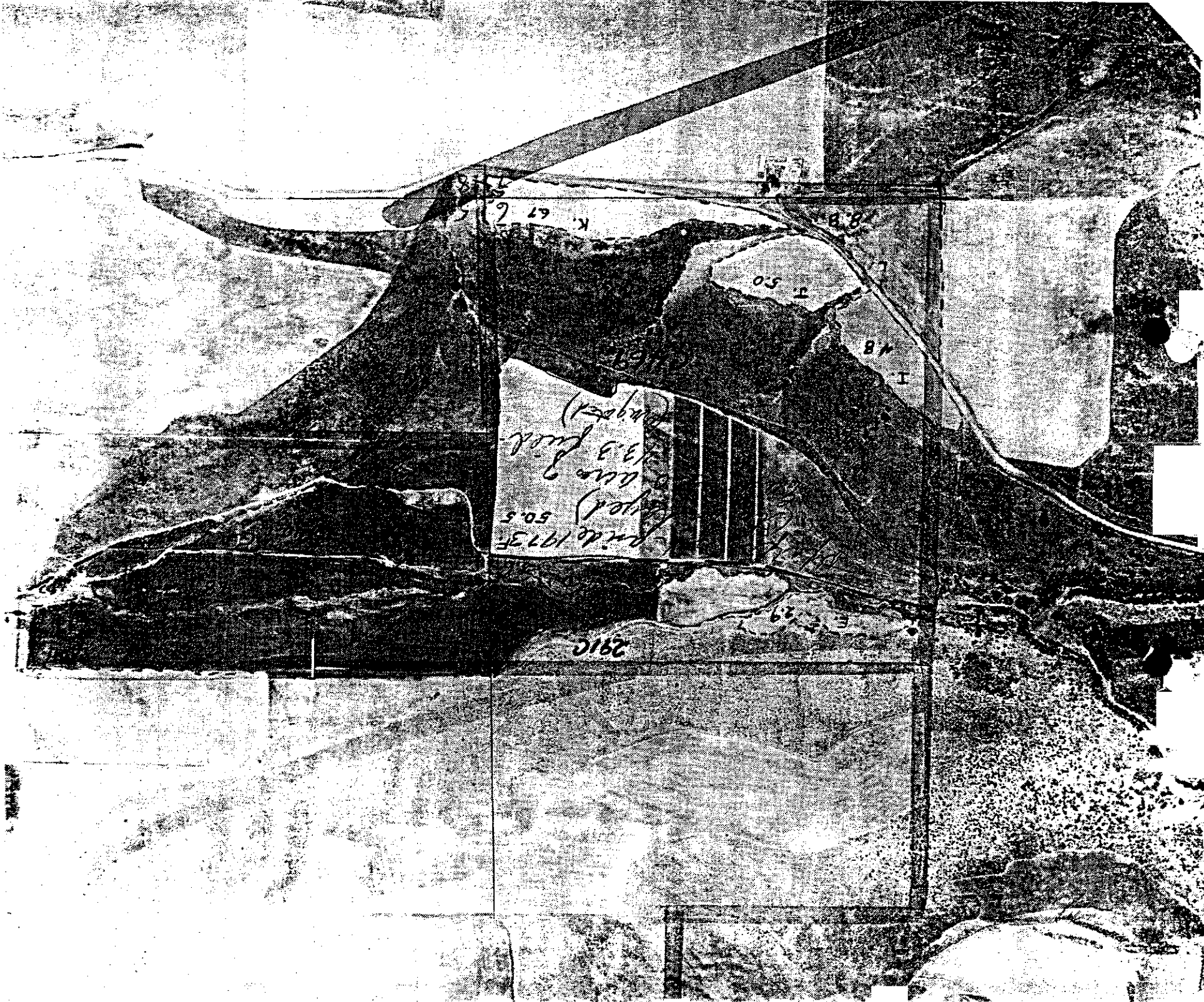
Recommended for approval denial

WD # 11 rec'd. 5-31-77

by EMC

Russell Staker

6/9a



UNCLASSIFIED

In Equity No. 203

**In the District Court of the United States
for the District of Idaho, Eastern Division**

UTAH POWER & LIGHT COMPANY, a Corporation, *Plaintiff*,

vs.

The Last Chance Canal Company, Limited; The Tanner Canal Company, Limited; The Central Canal Company, The North Extension Canal Company, Limited; West Branch Canal Company, Limited; The Turner Canal Company, Limited; The East Branch Canal Company, The Bench Canal, and Budge Land & Live Stock Company, Limited, corporations; W. H. Larkins, Jas. Ellsmore, Geo. Hogan, Lewis S. Pond and Alex Harris as Trustees of the Gentile Valley Irrigation Company, Limited, late a corporation; The Thatcher Irrigation Company, Limited, a corporation; Nathan D. Thatcher, J. A. Folkman, Milton Robbins and Geo. M. Smith, as Trustees of Thatcher Canal & Power Company, Limited, late a corporation; Nelson Ditch Company, a corporation; A. J. Nielson, B. R. Meek, Henry McCuen, C. S. Burton and Eli Fosgreen, as Trustees of Riverdale-Preston Irrigation Company, late a corporation; The Riverdale Irrigating Company, Nielson-Meek Company and West Cache Irrigation Company, corporations; E. P. Johnson, Albert Johnson, Hyrum Johnson, Geo. D. Anderson, Joseph T. Pond, Frank W. Harris, A. C. Bosen, Hyrum J. Smith, John E. Hill, Melvin Green, Robert L. Smith, Charles Westerburg, Peter Westerburg and David P. Evans.

Horace Howard, Henry Rhinehart, Harvey W. Higley, James Monroe (or Munro), Nellie Simmons, John Baird, William Monroe (or Munro), Orrin Monroe (or Munro), Charles Monroe (or Munro), Charles Foster, Hyrum Foster, Mary Baird, John Woodall (or J. D. Woodall), George Ellis, Skinner Irrigation Company, a corporation; Heber Crane, Fred Bartschi, Charles Bartschi, David Chugg, Phillip Chugg, Fred Stauffer, William Williams, Sr. (or William Morgan Williams), William Williams, Jr. (or William Mormon Williams), Oliver Williams, E. M. Lindsay, Georgetown Irrigation Company, a corporation, and Thomas Freeman.

DATE OF
PRIORITY

AMOUNT IN
SECOND FEET

POINT OF DIVERSION AND
PLACE OF USE

ter of Section 5, Township 11 South, Range
40 East, B. M.

- 11 0552
244. *Grover C. Hogan, substituted for
Alex M. Christensen:*
1882—May 1 1.9 c.f.s.

For the irrigation of 95 acres of land in
the South half of the Northeast quarter of
Section 6; the South half of the Northwest
quarter, and the Northwest quarter of the
Northeast quarter of Section 5, Township
11 South, Range 40 East, and the South-
west quarter of the Southeast quarter of
Section 32, Township 10 South, Range 40
East.

BIRCH CREEK

A tributary to Densmore Creek.

- 11 0553
245. *William Larkins and Dora Larkins:*
1882—May 1 1.0 c.f.s.

To be diverted from said creek through a
ditch diverting therefrom in the West half
of the Southeast quarter of Section 6,
Township 11 South, Range 40 East, for the
irrigation of 50 acres of land in the South-
east quarter of Section 6, and the North-
west quarter of the Southwest quarter of
Section 5, said Township and Range.

- 11 0554
246. *George M. Smith and Mary E.
Smith:*
1900—May 1 0.8 c.f.s.

To be diverted from said creek in the
Northeast quarter of the Northwest quar-
ter of Section 2, Township 11 South, Range
39 East, B. M., for the irrigation of 40 acres
of land in the Southeast quarter of Section
1, Township 11 South, Range 39 East, B. M.

DRY CREEK

247. *Omitted.*

248. *Omitted.*

- 11 0555
249. *Walter Hogan:*
1904—May 1 3.0 c.f.s.

To be diverted through a ditch diverting
about a quarter of a mile Northwesterly
from the Southwest corner of Lot 4, Sec-
tion 7, Township 11 South, Range 40 East,
B. M., for the irrigation of 150 acres in Lot
4 of Section 7 and Lot 1 of Section 18,
Township 11 South, Range 40 East, B. M.
Also the Southeast quarter of the South-