

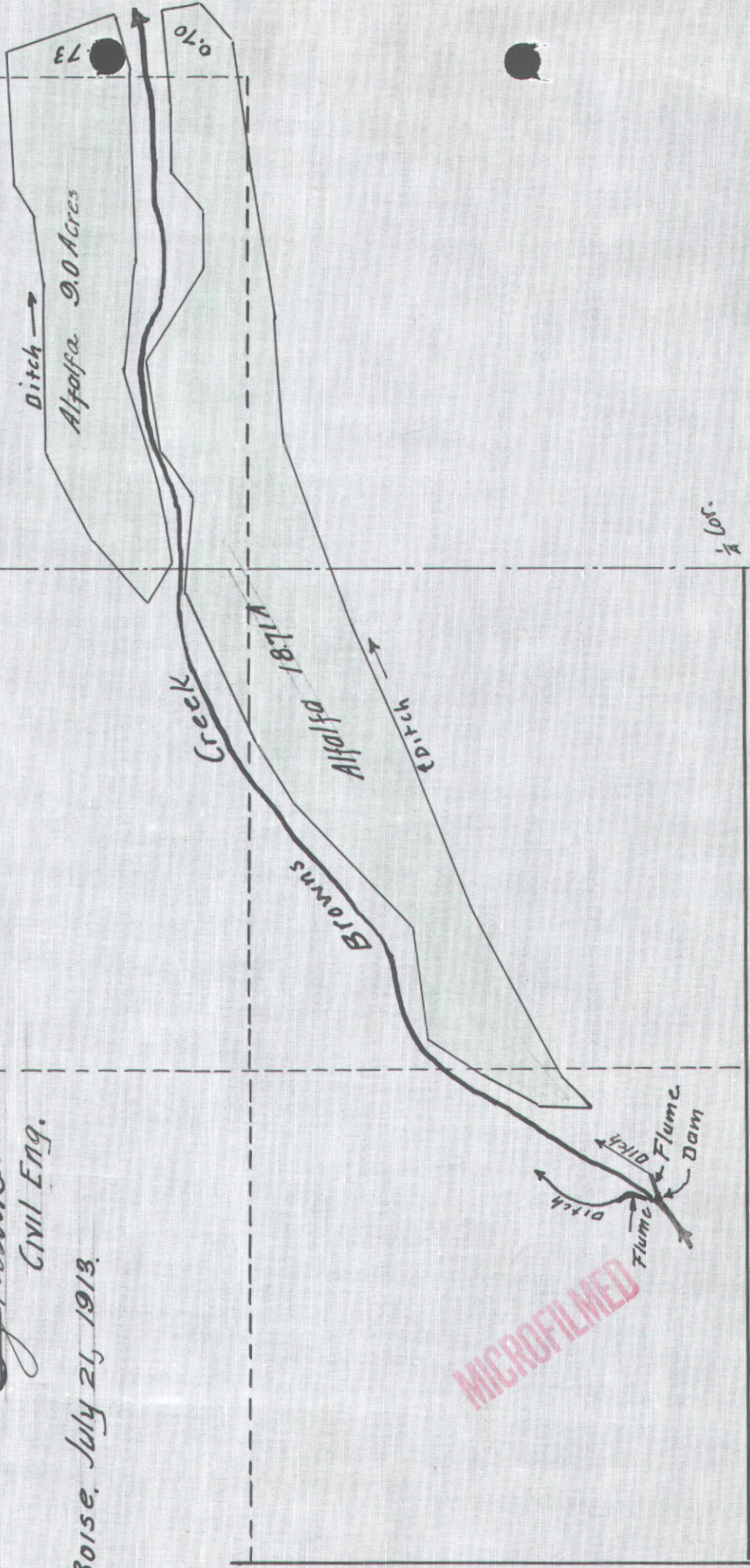
Investment #5

27

JAMES F. CAROTHERS
 T. 5 S. R. 1 W.
 Alfalfa Orchard &c 27.71
 Sage Brush 132.29
 Total, 160.00

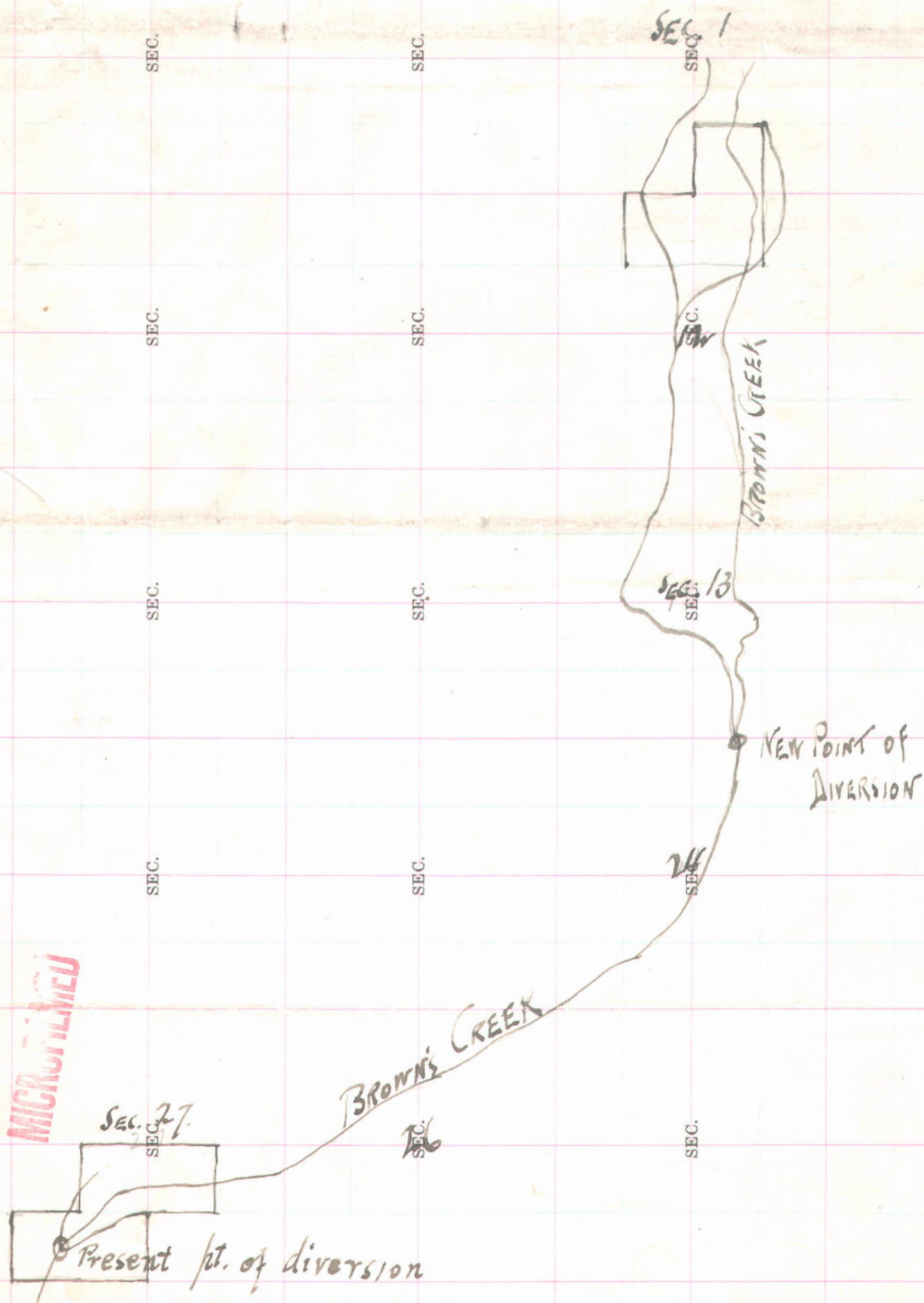
E. J. Frank
 Civil Eng.

Boise, July 26, 1913.



MICROFILMED

T.S.S., R. & W. B.M.



MICROFILMED

TRANSFER NO.	NAME	AMOUNT C.F.S.	BALANCE C.F.S.	RIGHT NO.
--------------	------	------------------	-------------------	--------------

	Carothers, J. F.	0.9		57-0072
304	Carothers, J. F.	0.4	0.5	57-0072A

R

E

F

S

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A

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SCANNED
OCT 22 2004

Exhibit "B".

Copy.

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
CERTIFICATE OF WATER RIGHT
Transferred Right No. 304.

This is to certify that J. F. Carothers, of Oreson, County of Owyhee, State of Idaho, has certain rights to the use of the waters of Brown's Creek, for irrigation and domestic purposes, and that said rights have been confirmed by decree of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, in the case of J. M. Neill, et al, plaintiffs, vs. Michael Hyde, et al, defendants, Charles P. McCarthy, District Judge, wherein the following water rights, in Water District #14B, were decreed to J. F. Carothers, to-wit:

0.9 second feet, with priority of October 1, 1901, for the irrigation of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 27, Twp. 5 S., R. 1 W., B.M.

1.871 second feet, with priority of April 1, 1904, for the irrigation of the S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 27, Twp. 5 S., R. 1 W., B.M.

That said decree has been entered in the records of the Department of Reclamation of the State of Idaho, at Boise, Idaho, in Volume 3 of Decrees, at page 940; that, upon the application of J. F. Carothers for a transfer of water right, made before the Commissioner of Reclamation of the State of Idaho, and the said application having been granted, the right to the use of 1.2 second feet of the waters of Brown's Creek, upon the lands above described, is hereby abandoned and a description of the lands to be irrigated under such right and to which the water right hereby confirmed shall by this certificate become appurtenant, for irrigation and domestic purposes, is shown in the following table, limited at any given time to an amount actually needed and beneficially used for such purposes and shall not exceed the following amounts, to-wit:

		0.4 sec.ft. dated October 1, 1901		0.8 " " " April 1, 1904				Totals
		NE $\frac{1}{4}$ SW $\frac{1}{4}$	NW $\frac{1}{4}$ SE $\frac{1}{4}$	NE $\frac{1}{4}$ SW $\frac{1}{4}$	NW $\frac{1}{4}$ SE $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
Twp.	Rge. Sec.	NE $\frac{1}{4}$ SW $\frac{1}{4}$	NW $\frac{1}{4}$ SE $\frac{1}{4}$	NE $\frac{1}{4}$ SW $\frac{1}{4}$	NW $\frac{1}{4}$ SE $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
5S	1W	1					40	40
		12	40	40				80

The right to the use of the waters aforesaid, hereby confirmed, is restricted to the lands hereinabove described, as provided by the laws of the State of Idaho.

WITNESS, The seal and signature of the Commissioner of Reclamation of the State of Idaho, affixed at Boise, Idaho, this 31st day of May, 1921.

W. G. SWENDBEN
Commissioner of Reclamation.

Recorded in Water Dist. #14B-
Conversion Point: NW $\frac{1}{4}$ NE $\frac{1}{4}$ -24-5S-1WBM

Exhibit "C".

Copy.

S T A T E O F I D A H O
DEPARTMENT OF RECLAMATION.

In the Matter of the Application of)
J. F. Carothers for a transfer of)
Water Right; Water District #14B.)

SUPPLEMENT TO CERTIFICATE
of WATER RIGHT #304.

Nothing in this certificate shall be construed as having any bearing whatever upon the right of the applicant, the petitioner herein, to convey water through the ditch of protestant, such right of way being a matter entirely out of the jurisdiction of this department..

Witness the seal and signature of the Commissioner of Reclamation of the State of Idaho, affixed at Boise, Idaho, this 6th day of June, 1921.

(SEAL)

W. G. SWENDSEN,
Commissioner of Reclamation.

By Geo. B. Archibald
Assistant.

RECEIVED
JUN 10 1921
BOISE

1261 28 11

RECEIVED

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE.

In the matter of the application
of James F. Carothers to have the
use of certain water which has here-
tofore been decreed to him to be used
upon certain lands in Owyhee County,
changed to other lands in said county,
which application was filed with the
Department of Reclamation on April 22,
1921.

NOTICE OF APPEAL.

William Koeppe,
Contestant.

To W. G. Swendsen, Commissioner of the Department of Reclamation
of the State of Idaho:

You are hereby notified that William Koeppe, feeling
himself aggrieved, does hereby appeal to the District Court of the
Third Judicial District of the State of Idaho, in and for the
County of Owyhee, from that certain order of the Commissioner
of Reclamation, bearing date the 31st day of May, 1921, and duly
entered of record in his said office on said date, wherein and
whereby said W. G. Swendsen, Commissioner of Reclamation, made an
order authorizing said applicant, J. F. Carothers, to change the
place of use of the waters described in said order from the
following described lands, to-wit: NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, Sec.
27, T. 5 S., R. 1 W. B. M., to the following described lands, to-wit:
SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 1, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 12, T. 5 S., R. 1 W. B. M.,
Owyhee County, State of Idaho, and wherein and whereby, under said
order, said J. F. Carothers was permitted to change the point of
diversion of said waters described in said order, and from the
whole thereof.

The within appeal is taken for the reasons and upon the
grounds set forth in that certain petition filed by appellant with
the Clerk of the Court of said District and County, as aforesaid, a
copy of which, marked Exhibit "A", is hereto attached, made a part
hereof and served herewith.

And you are hereby requested to furnish to the appellant herein, at once, a certified copy of the application for change of place of use by said J. F. Carothers, as aforesaid.

Dated this the 20th day of July, 1921.

ELDRIDGE & MORGAN
Attorneys for Appellant,
Residence, Boise, Idaho.

Service of the within and foregoing Notice of Appeal, together with copy of Petition attached thereto, acknowledged by receipt of copy thereof, this 22 day of July, 1921.

W B Swendsen
Commissioner of Reclamation.
By Georg Archibald
Deputy.

Edmund

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OUYHEE.

In the matter of the application
of James F. Carothers to have the
use of certain water which has here-
tofore been decreed to him to be used
upon certain lands in Owyhee County,
changed to other lands in said county,
which application was filed with the
Department of Reclamation on April 22,
1921.

PETITION.

William Koeppe,
Contestant.

Comes now the petitioner, William Koeppe, and for ground
of petition complains and alleges:

I.

That on the 31st day of May, 1921, W. G. Swendsen,
Commissioner of Reclamation of the State of Idaho, duly made his
certain order in the above entitled matter, wherein and whereby
the applicant J. F. Carothers was permitted to change the place of
use and point of diversion of those certain waters described in
said order from those certain lands described in said order to
those certain lands described in said order, a copy of said order
being marked Exhibit "A", is hereto attached and made a part hereof.

II.

That on the said date, the 31st day of March, 1921, said
Commissioner of Reclamation of the State of Idaho made his certain
certificate certifying to said change of use and said change of
said point of diversion of said waters, as aforesaid, a copy of
said certificate being marked Exhibit "B", is hereto attached and
made a part hereof.

III.

That on the 6th day of June, 1921, said Commissioner of
Reclamation made his certain supplement to said certificate, a
copy of which, being marked Exhibit "C", is hereto attached and

made a part hereof.

IV.

That your petitioner has been injured by said transfer of the place of use of said waters and by the change in the point of diversion, as provided for in said order, in the following particulars for the following reasons, to-wit:

That your petitioner is the owner of the north half of the southeast quarter and the south half of the northeast quarter of lot one, section one, township five south, range one west, Boise Meridian, Owyhee County, State of Idaho, together with a decreed water right for two hundred eighty eight inches of the waters of Brown's Creek of the priority of March 11, 1908, situated upon what is known as Brown's Creek; that the applicant, J. F. Carothers, is the owner of a tract of land situated upon Brown's Creek, consisting of approximately one hundred sixty acres of land, described as the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter and the south half of the southwest quarter of section twenty-seven, township five south, range one west, Boise Meridian, Owyhee County, State of Idaho, together with a decreed water right for said land of forty-five inches as of the date of October 1, 1901, ninety-three and fifty-five one-hundredths inches as of the date of April 1, 1904, located about four miles distant up said creek from the lands of your petitioner, as aforesaid;

That both of said tracts of land are watered from water rights belonging to said owners from said Brown's Creek; that said Brown's Creek runs through a narrow canyon, the waters thereof rising and sinking alternately in said creek;

That the water supply of said Brown's Creek is limited in large part to an early run-off in the spring of the year when a large quantity of water flows down said Brown's Creek, and if not used, empties into Snake River; that the lands described aforesaid and other lands situated upon Brown's Creek, require early irri-

gation, and that it is the custom, among irrigators along Brown's Creek, to use the waters of Brown's Creek as early as possible in the spring of the year, while the same are available, and that it is beneficial to use said water as early as possible in the spring, to the end that as much water as possible be stored within the lands situated along Brown's Creek.

That the said lands of said J. F. Carothers, situated upon Brown's Creek above the lands of your petitioner, as aforesaid, are of a sandy and gravelly nature, and are capable of retaining a large amount of moisture, and that if said waters from said Brown's Creek are placed upon said lands by means of irrigation in the early spring, and during the time waters are available from Brown's Creek for irrigation, said lands of said J. F. Carothers, as aforesaid, do retain and will retain a large quantity of said waters stored therein on account of and by reason of the irrigation of said lands, and from said storage of said waters a large amount of seepage and percolating waters would, in such event, find their way back into Brown's Creek and ultimately reach the point of diversion of the ditch belonging to your petitioner, from which said percolating waters could be carried to the lands of your petitioner for irrigation purposes; that if said lands of said J. F. Carothers, as aforesaid, be not irrigated, and the place of use of said waters be moved downstream a distance of approximately three and one-half miles to other lands, as provided may be done in said order, as aforesaid, all storage of waters in said lands and the seepage and percolating waters on account thereof would be lost, and your petitioner would lose all benefits from the use of said seepage and percolating waters from the irrigation of said upper lands by said J. F. Carothers;

That there is a greater quantity of water flowing down Brown's Creek at the point of diversion of the ditch from Brown's Creek, which is used and was used by said J. F. Carothers for the irrigation of said upper lands, than obtains at the point of diver-

sion in said Brown's Creek of the ditch from which your petitioner diverts water from Brown's Creek for the irrigation of his said land, as aforesaid; that is to say, that measurements taken during the month of June of 1921 showed three hundred inches of water flowing down Brown's Creek at the point of diversion of the ditch of said J. F. Carothers from which said upper lands are irrigated or could be irrigated, and that at the time said three hundred inches of water was flowing past the diversion point of said ditch, as aforesaid, only seventy-five inches was flowing down said Brown's Creek at the point of diversion of the ditch of your petitioner through which water is carried for the irrigation of the lands of your petitioner, and that a large amount of said three hundred inches of water flowing past the point of diversion of the ditch of said J. F. Carothers is lost in seepage between said diversion points, and that to permit the said J. F. Carothers to change his point of diversion would be to permit said J. F. Carothers to abandon a point of diversion where a greater quantity of water flows past his said diversion point and divert the same quantity of waters from the point of diversion of your petitioner where a much smaller quantity of water flows past said diversion point, and by so doing, your petitioner would be injured in that said J. F. Carothers would thus be enabled to use a prior appropriation for the purpose of taking water that otherwise belongs to your petitioner, and that otherwise would be available for diversion to your petitioner at his point of diversion on Brown's Creek; that is to say, that if said J. F. Carothers be not permitted to change his point of diversion, the decreed water rights of the said J. F. Carothers could be diverted at his point of diversion for said above described lands without diverting, at some seasons of the year, all of the waters flowing in Brown's Creek, but that if said change in the point of diversion be permitted, said J. F. Carothers would be enabled to divert all the waters of Brown's Creek at the point of diversion to which said waters had been changed, to the end that

your petitioner would be deprived entirely of the use of waters that otherwise would be available for diversion into his said ditch;

That the point of diversion at which your petitioner diverts water for his said land is indicated on the map forming a part of the application to change the point of diversion and place of use of said waters of said J. F. Carothers, as aforesaid; that your petitioner built a ditch at great labor and expense from said point of diversion, as aforesaid, down to said land, as aforesaid, from said Brown's Creek, and diverted water therefor; that said ditch was built a distance of approximately three miles through a rock formation at great labor and cost to your petitioner, as aforesaid, and that as shown by the decree of court in the case of J. M. Neil v. Mike Hyde, et al, in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, and applied said waters to a beneficial use, with the date of priority as of the year 1908, and during all of the time intervening between said date^{and} until recent date, your petitioner irrigated said land from said water supply and grew crops thereon, but that since said change in said point of diversion and said place of use by said J. F. Carothers, your petitioner is only able to secure a small amount of water during the early spring, due to said change in the place of use and said point of diversion by said J. F. Carothers, as aforesaid, and for the reasons heretofore set forth;

That there are no other lands irrigated and have been no other lands irrigated between said upper lands of said J. F. Carothers and said point of diversion of your petitioner herein, as aforesaid;

That there is no other source of water supply available for the irrigation of said lands of your petitioner; that unless your petitioner be granted relief from some source, his said lands, which have been set to alfalfa and which have grown crops thereon for many years, will be dried out, and said lands become ruined and

worthless, and that your petitioner will be driven from his said home, which he has acquired at great expense and much toil and labor.

WHEREFORE, your petitioner prays that said order of said Reclamation Commissioner and said certificate aforesaid be reversed, vacated and held for naught, and that such other and further relief be granted to your petitioner as may appear just in the premises.

ELDRIDGE & MORGAN
Attorneys for Petitioner,
Residence, Boise, Idaho.

STATE OF IDAHO,)
) ss.
County of Ada.)

William Koepppe, being first duly sworn, deposes and says that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that he believes the facts stated in the petition to be true.

William Koepppe

Subscribed and sworn to before me, this the 21st
day of July, 1921.

(Seal)

Edman G. Barber
Notary Public for Idaho,
Residing at Boise, Idaho.

Exhibit "A".

Copy.

DEPARTMENT OF RECLAMATION
STATE OF IDAHO

IN RE APPLICATION FOR TRANSFER
J. F. CAROTHERS, CASE NO. 83
WATER DISTRICT 14-B

O R D E R

WHEREAS, under date of April 22, 1921, there was received in the Department of Reclamation, the application of J. F. Carothers for a transfer of 1.2 cubic feet per second of water from Brown's Creek, 0.4 cubic feet per second thereof being from the decree of Judge Chas. P. McCarthy of the Third Judicial District of the State of Idaho in and for Owyhee County, bearing priority date of October 1, 1901, and 0.8 cubic feet per second from the said decree bearing priority date of April 11, 1904, the said decree having been handed down under date of October 7, 1915, the said application for transfer praying that the foregoing quantity of water, to-wit: 1.2 cubic feet per second, be transferred from the following described lands; NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 27, T. 5 S., R. 1 W. B. M., to the following described lands; SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 1, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 12, T. 5 S. R. 1 W. B. M.; and,

WHEREAS, upon a consideration of the said application, the same is found to be improper form and accordingly, pursuant to the provisions of law and the orders and instructions from this Department, a public hearing was held at Boise, Idaho, May 16, 1921, at the hour of 10 A. M. Mountain Time, at which all persons were given an opportunity to present anything they may have bearing upon the said petition, the affidavit of publication of notice of such hearing being on file in the Department of Reclamation; and,

WHEREAS, upon a consideration of all the available data bearing upon the said application, together with the facts adduced at the hearing and particularly the showing made by the protestant in the said case, the following state of facts were found to exist:

1. That the protest against the granting of the said application is based upon the grounds that in the event of the granting of the said transfer, the protestant would be denied and deprived of the use of such portions of the water sought to be transferred as does under present existing conditions find its way back into the stream and thus becomes available for the use of the protestant.

2. That the protestant's position is not tenable owing to the fact that when stream flow is depleted to the extent where protestant could enjoy the use of said return flow if any there be, senior rights in and to the use of the water of said stream are, according to court decrees and orders, entitled to the entire stream flow, thus protestant under such conditions obtains no benefit therefrom.

3. That no one will be injured by the granting of the said transfer.

NOW, THEREFORE, it is hereby ordered that a certificate of transfer in proper form be executed and delivered to the said applicant, J. F. Carothers.

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed the seal of this Department, at Boise, Idaho, this 31st
day of May, 1921.

(SEAL)

W. G. SWENDSEN
Commissioner of Reclamation.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA.

(Removed from Gwyhee County.)

-----:-----

J. L. NEIL (successor to Thousand Springs Land
and Transportation Company, Limited, a corpora-
tion,

Plaintiff,

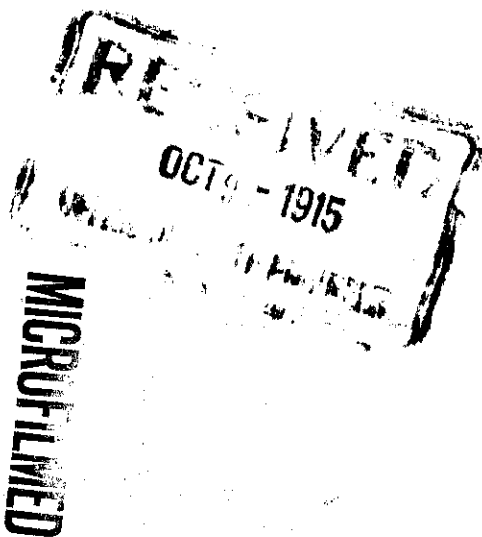
v.

MICHAEL HYDE, B. H. HYDE, AGRA LINEHAN (Suc-
cessor to Patrick Linehan), THOMAS PENROSE,
ELIZABETH JANE PENROSE, GEORGE ULRICH, J. L.
NEISS and JAMES TORRANCE, co-partners doing
business under the firm name and style of
NEISS & TORRANCE, ALVA REED and FRANK REED,
co-partners doing business under the firm
name and style of Reed Brothers, GEORGE JESS,
JAMES F. CAROTHERS, A. G. SOTHERN (Successor
to Vernon Poole), GEORGE H. LEWIS, VICTOR B.
AILEY (Successor to J. W. Rowzee), WILLIAM
LOHMEYER, ALBERT REEDMAN SCOTCHDOPE, THOMAS REIDEN-
SON, JOHN I. SULL, WILLIAM HALLINAN, PATRICK
HARTIGAN, ALEXANDER YOUNGIE, SLAKE RIVER IRRI-
GATION COMPANY, a corporation, and MURPHY
LAND & IRRIGATION COMPANY, LIMITED, a corpora-
tion, and A. E. Robinson, Receiver thereof,
Defendants.

-----:-----

DECREET

-----:-----



NAME OF PARTY OF WATER

PRIORITY OF APPROPRIATION

AMOUNT IN INCHES

DESCRIPTION OF LAND BY SURVIVOR OF EVIDENCE WATER IS AVERAGE

Michael Hyde

Pickett Creek

April 1, 1894

150

Sub. 100.00.00.

J. A. Bell

Catherine Creek

April 1, 1896

40
19
65
139

J. K. Bell

Catherine Creek

April 1, 1897

26
21
9
18
27
42
165

J. J. Colburn

Wart's Creek

April 1, 1901

196

Sub. 100.00.00.

James P. Carothers

Went's Creek

Oct. 1, 1901

45

Sub. 100.00.00.

George Jones

Wart's Creek

April 1, 1902

200

Sub. 100.00.00.

James J. Carothers

Went's Creek

April 1, 1904

George H. Harris

Wart's Creek

April 1, 1906

145

Sub. 100.00.00.

Elizabeth Jane

Went's Creek

April 1, 1908

120

Sub. 100.00.00.

James Lincoln

Went's Creek

April 1, 1907

86
80.90
86.90

Sub. 100.00.00.

MICROFILMED

DEPARTMENT OF RECLAMATION

STATE OF IDAHO

IN RE APPLICATION FOR TRANSFER
J. F. CAROTHERS, CASE NO. 83
WATER DISTRICT 14-B

ORDER

WHEREAS, under date of April 22, 1921, there was received in the Department of Reclamation, the application of J. F. Carothers for a transfer of 1.2 cubic feet per second of water from Brown's Creek, 0.4 cubic feet per second thereof being from the decree of Judge Chas. P. McCarthy of the Third Judicial District of the State of Idaho in and for Owyhee County, bearing priority date of October 1, 1901, and 0.8 cubic feet per second from the said decree bearing priority date of April 11, 1904, the said decree having been handed down under date of October 7, 1915, the said application for transfer praying that the foregoing quantity of water, to-wit: 1.2 cubic feet per second, be transferred from the following described lands: NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 27, T. 5 S., R. 1 W. B. M., to the following described lands: SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 1, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 12, T. 5 S. R. 1 W. B. M.; and,

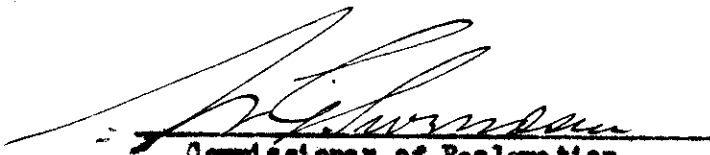
WHEREAS, upon a consideration of the said application, the same is found to be improper form and accordingly, pursuant to the provisions of law and the orders and instructions from this Department, a public hearing was held at Boise, Idaho, May 16, 1921, at the hour of 10 A. M. Mountain Time, at which all persons were given an opportunity to present anything they may have bearing upon the said petition, the affidavit of publication of notice of such hearing being on file in the Department of Reclamation; and,

WHEREAS, upon a consideration of all the available data bearing upon the said application, together with the facts adduced at the hearing and particularly the showing made by the protestant in the said case, the following state of facts were found to exist:

1. That the protest against the granting of the said application is based upon the grounds that in the event of the granting of the said transfer, the protestant would be denied and deprived of the use of such portions of the water sought to be transferred as does under present existing conditions find its way back into the stream and thus becomes available for the use of the protestant.
2. That the protestant's position is not tenable owing to the fact that when stream flow is depleted to the extent where protestant could enjoy the use of said return flow if any there be, senior rights in and to the use of the water of said stream are, according to court decrees and orders, entitled to the entire stream flow, thus protestant under such conditions obtains no benefit therefrom.
3. That no one will be injured by the granting of the said transfer.

NOW, THEREFORE, it is hereby ordered that a certificate of transfer in proper form be executed and delivered to the said applicant, J. F. Carothers.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Department, at Boise, Idaho, this 31st day of May, 1921.


Commissioner of Reclamation.

STATE OF IDAHO

DEPARTMENT OF RECLAMATION.

In the Matter of the Application of)
J. P. Carethers for a transfer of)
Water Right; Water District #143.)

SUPPLEMENT TO CERTIFICATE
of WATER RIGHT #504.

Nothing in this certificate shall be construed as having any bearing whatever upon the right of the applicant, the petitioner herein, to convey water through the ditch of protestant, such right of way being a matter entirely out of the jurisdiction of this department.

Witness the seal and signature of the Commissioner of Reclamation of the State of Idaho, affixed at Boise, Idaho, this 6th day of June, 1921.

W. G. SWENSON,

Commissioner of Reclamation.

By Geo B Archibald
Assistant.

RECORDED

DEPARTMENT OF RECLAMATION
OF THE
STATE OF IDAHO.

IN THE MATTER OF THE APPLICATION
OF JAMES F. CAROTHERS TO HAVE THE
USE OF CERTAIN WATER WHICH HAS HERE-
TOFORE BEEN DECREED TO HIM TO BE USED
UPON CERTAIN LANDS IN OWYHEE COUNTY,
CHANGED TO OTHER LANDS IN SAID COUNTY,
WHICH APPLICATION WAS FILED WITH THE
DEPARTMENT OF RECLAMATION ON APRIL,
22, 1921.

RECORD OF HEARING

UPON APPLICATION TO CONTEST
BY WILLIAM KOEPPE, Contestant.

WILLIAM KOEPPE,

Contestant.

In accordance with the published notice concerning the Application for Transfer of Water Right, made by J.F. Carothers, of Owyhee, Idaho, on April 22, 1921, a hearing was called at the office of the Department of Reclamation, in the Capitol Building, Boise, Idaho, at 10 A.M., on May 16, by George B. Archibald, Assistant Commissioner of Reclamation.

Application to Contest the said transfer was filed by William Koeppe, a copy of the said Application to Contest being attached hereto, marked Exhibit A.

The firm of Sullivan & Sullivan appeared as attorneys for the Contestant, William Koeppe, and the firm of Perky & Brink appeared for the Contestee, J. F. Carothers.

A copy of the Application to Contest, not having been previously served on the said J. F. Carothers, or his attorneys; Judge Perky for the Contestee, requested that an adjournment be taken in order that the said Application to Contest could be perused.

Wherefore, with the consent of the attorneys for the Contestant, an adjournment was taken until 1:30 P.M., on May 16, 1921.

Hearing resumed at Two P.M., May 16, 1921.

Mr. Sullivan offered certain papers to be used as evidence, to which Mr. Brink objected. A short discussion was entered into as to what procedure would be followed, and at the suggestion of Mr. Archibald, it was agreed that the proceedings would take the form of a land office hearing, both sides presenting their exhibits, etc., to be passed upon by the Commissioner of Reclamation.

The first paper examined being the Application to Contest.

Mr. Sullivan: Does the contestee admit the facts alleged in paragraph one.?

Mr. Brink: We admit them.

Q. Will you admit that the land which said Carothers is now irrigating with said water consists of about 27 acres?

A. We admit that.

Q. That said Browns Creeks runs through said irrigated land?

A. We admit that.

Q. That said Carothers is irrigating a narrow strip of land on each side of said creek and the waste and seepage from such irrigation flows back into the channel of said creek and increases the flow thereof, and this contestant has for a number of years last past received the benefit of such seepage and waste water, and it will be greatly to his injury if the said contestee is permitted to change the use of said water as prayed for in his application, since the contestant could receive no benefit whatever from the waste or seepage of such water, if such change of use is granted?

A. No, we will not admit that.

Mr. Sullivan: In regard to this allegation we have here, and desire to introduce in evidence, extracts from the testimony of four witnesses in the case of J.M.Neil vs. Mike Hyde, et al, in the District Court of the Third

Judicial District of Owyhee County, as follows:

C.J. Franklin, Civil Engineer, James F. Carothers, Robert Landor, and Findings # 2, and Findings # 4, of the Findings of Fact in said case of Neil vs. Hyde.

Mr. Brink wished to object to the introduction of this evidence on the ground that it had not been examined carefully.

Mr. Archibald suggested that the regular practice of the Land Office be followed, and that these papers be introduced as exhibits, with the record showing the objections interposed by the attorneys for the Contestee.

Mr. Brink suggested that the several documents be introduced separately, which was agreeable.

Mr. Sullivan: We first offer in evidence, extracts from the evidence given by C.J. Franklin, Civil Engineer, in the case of Niel vs. Hyde, et al, in the District Court of the Third Judicial District of Owyhee County.

Mr. Brink: We object upon the ground that the evidence is hearsay, upon the further ground that the said C.J. Franklin is not available at this hearing for cross-examination; for the further reason that the testimony of C.J. Franklin now offered does not purport to be with reference to the land of this applicant from which he desires to transfer the place of use of water in this proceeding, and for the reason that the portion of testimony for admission is a matter which has been adjudicated upon.

Mr. Sullivan: I introduce these in evidence, simply to show the condition of the land from which Mr. Carothers seeks to transfer this water, and to show the condition of the stream at the time this examination was made.

Mr. Archibald: When did Mr. Franklin make this examination?

Mr. Sullivan: In 1915.

Mr. Archibald: The evidence then, shows conditions at that time?

Mr. Sullivan: Yes, at that time.

This evidence accepted by Mr. Archibald and marked
Contestants Exhibit # 1.

Mr. Sullivan: We will next offer in evidence, extracts from the
testimony of James F. Carothers in the trial of Niel vs. Hyde.

Mr. Brink: I object to this on the grounds set forth in our
objection to the testimony of Mr. Franklin, upon the further ground
that this portion of the testimony does not purport to be the whole test-
imony of Mr. Carothers, in said former case and if offered at this time
is in that respect incomplete.

Mr. Sullivan: Is that all?

Mr. Brink: That is all.

Mr. Sullivan: We simply offer this evidence, because it gives Mr.
Carothers method of irrigating the lands that the water was decreed to
and in which he testified that he is only irrigating a narrow strip of
land on each side of the creek and that much of the water used in the
irrigation of this land flows back into the creek, and in effect increases
the flow of the creek.

Mr. Perky: That contradicts the findings.

Mr. Sullivan: Anything more?

Mr. Perky: That is all.

Paper accepted by Mr. Archibald, marked Contestants
Exhibit # 2.

Mr. Sullivan: The testimony of Robert Lendor a witness in the
case of Niel vs. Hyde will next be offered in evidence: The question
is:

"You only want to be understood as saying that if the water is

turned out on this land all surface water would flow back into the creek?"

Answer: "Yes, Sir."

Mr. Brink: We object upon all of the grounds set forth in the objection to the testimony of Mr. Franklin, and in addition thereto upon the ground that the testimony now offered is so fragmentary and incomplete that it is impractical and of no value in the matter now before us.

Mr. Sullivan: I simply offer this evidence, together with that of the others, to show that the valley through which Browns creek runs is very narrow and its grade is steep and requires a great deal of water to irrigate it. We offer this as contestants Exhibit # 3.

Mr. Brink: To which our objections are as we have stated?

Mr. Sullivan: Correct.

Evidence accepted by Mr. Archibald and marked
Contestants Exhibit # 3.

Mr. Sullivan: The following are extracts from Finding No. 2, f. 665, 666, and all of Finding No. 4, f. 668 of the Findings of Fact in said case of Neil v. Hyde, to-wit:

"The soil, watered from these streams, is a gravelly loam, having great porosity and on account of this fact and the heavy slope requires a great deal of water to successfully raise crops.

"The streams are small with small catchment areas, the run-off from precipitation and melting snow being quick and heavy due to the steep slopes and the barrenness of the watershed.

The water in all of the streams, on the average, flows in a considerable amount, commencing generally in April, rapidly decreases in June and almost completely ceases in July or August.

The crops raised are principally forage crops, although garden truck, berries and fruit are raised for family consumption. The surrounding country being public range, alfalfa for feeding stock is the principal agricultural product of the country.

Above the lands of plaintiff and defendant B.H. Hyde, the valleys are small, the ranches being generally a few hundred feet wide, commonly designated "Shoe String" ranches, parallel to the streams and extending in narrow strips along both sides."

Mr. Sullivan: We simply quote this to show just what conditions the court has found to exist.

Mr. Brink: We have no objection if you offer all of them.

Mr. Sullivan: This then, will be Exhibit # 4?

Mr. Archibald: Yes.

Evidence accepted by Mr. Archibald and Marked Contestants
Exhibit # 4.

Mr. Sullivan: We have here a copy of the plat of the land from which the Contestee seeks to transfer this water. It is a copy drawn by C.J. Franklin, Civil Engineer and indicates the 160 acres of land from which, as I understand it, Mr. Carothers seeks to transfer this 60 acres of water, or 1.4 second feet.

Mr. Brink: We have no objection to this being entered as an Exhibit.

Evidence accepted by Mr. Archibald and marked Contestants
Exhibit # 5.

Mr. Sullivan:--Continuing with paragraph # 2.

Will you admit that the Creek runs through a narrow canal from the foot of Carothers land to Koeppe's dam and headgate, and that no other water is taken out between the Koeppe headgate and Carothers headgate?

Mr. Brink: We will admit these facts, with the understanding that we can object if they become material.

Mr. Sullivan: I suppose you will admit that Mr. Carothers states that one inch of water is required to irrigate the land to which he desires such water transferred?

Mr. Brink: At least one inch.

Mr. Sullivan: You admit that he states that it requires one inch to the acre- at least one inch to the acre as you wish to put it. Will you admit that Mr. Carothers gets more than one inch in the case of Niel vs. Hyde?

Mr. Brink: We will admit that the right exists, with the understanding that it is the last priority on the creek and does not allow of water and does not furnish water to Mr. Carothers because of the priorities ahead of it.

Mr. Sullivan: I desire to read into the record a part of the testimony in that case.

Conversation had here as to the procedure to be followed, because no checking up was had by attorneys for contestee on this testimony.

Mr. Sullivan: I only wish to refer to two decrees contained in this testimony.

Mr. Brink: We do not object.

Mr. Sullivan: James Carothers, Browns Creek, October 1, 1901, 45 inches, for the Northeast Quarter of the Southwest Quarter, the Northwest Quarter of the Southeast Quarter, Section 27, Township 5 South, Range 1 West.

Next entry: James Carothers, Browns Creek, April 1, 1904, South Half of the Southwest Quarter, Northeast Quarter of the Southwest Quarter, Northwest Quarter of the Southeast Quarter, Section 27, Township 5 South, Range 1 West--93.55

Mr. Sullivan: Referring to Application to transfer:
The point I want to make is, from which one of these rights does he seek to transfer 60 inches or 1.2 second feet, from the latest right or the oldest right? How do you take that Mr. Archibald?

Mr. Archibald: I would take it, all of the oldest right, or .9 second feet, and enough of the later right to make 1.2 second feet.

Mr. Brink: Now Mr. Archibald, Mr. Caruthers states that when he filed this application he understood that inasmuch as there were no intervening rights, it made no difference, and he would not have to designate for that reason what the exact area on either side of the creek that it is desired to

take the water from.

Mr. Archibald: What is your understanding of the matter Mr. Carothers and what do you actually desire to do?

Mr. Carothers: I am not prepared to say except to say that roughly I desire to take water from both sides of the creek and in that way to take in porportion from the two priorities, that would be ~~one~~-third transferred from the oldest and two thirds from the later priority.

Mr. Archibald: I don't see as it makes much difference which side of the creek it is taken from but there is a possibility of the amount from each priority making a difference. For that reason it is possibly desirable to know exactly the portion of each right to be transferred.

Mr. Sullivan: It would make a difference with my client, if the plan is to keep enough water up there to irrigate all the land that water is decreed to. It presents another proposition.

Mr. Brink: My clients decrees are both prior to Mr. Koeppe's.

Mr. Archibald: I think it is only reasonable that we know how much water from each right he wishes to transfer.

Mr. Brink: That can be ascertained within a reasonable length of time.

Mr. Archibald: We should know that now before we complete the hearing.

Mr. Brink: We take it then that the application should be made for a change of four-tenths of a cubic foot from the priority of October 1, 1901, and eight tenths of a cubic foot from the priority of April 1, 1904.

Mr. Sullivan: Four tenths of the appropriation of 1901 for the 80 acre tract up there that it was decreed to, would leave the balance of the other for the entire 160.

Mr. Brink: Just a moment Judge.

Mr. Brink: (After consulting Contestee's Engineer) Leave it as stated.

Mr. Sullivan now offered to submit in evidence as an Exhibit a copy of a certain deed or agreement conveying to Mr. Carothers an interest in the Koeppe ditch.

Mr. Brink: That deed was only given to correct a former deed was it not?

Mr. Sullivan: I believe that to be correct.

After a discussion between attorneys for contestant and contestee,
Mr. Sullivan withdraws the deed as an exhibit.

Mr. Koeppe sworn in by Mr. Archibald.

Direct examination by Mr. Sullivan.

Q. What is your name?

A. William Koeppe.

Q. Where do you reside?

A. Oreana.

Q. Oreana, Idaho?

A. Yes Sir.

Q. Are you the contestant in this matter?

A. I am.

Q. Mr. Koeppe, are you acquainted with what is known as the ranch of
Mr. Carothers from which he seeks to transfer a part of his water from
other lands?

A. Yes sir.

Q. What is the character of that land?

A. Well it is very gravelly.

Mr. Brink: We wish to make an objection in the record to
testimony on the character of the soil and the lay
of the land in so far as it refers to the Findings of
Fact heretofore referred to in our objection to
Mr. Franklins testimony.

Q. How far is Mr. Carothers land from the point where you take your water
out?

A. About two miles.

Q. Are there any diversions between these two pieces of land?

A. No, sir.

Q. What if you have observed is the effect of Mr. Carothers irrigating his

land upon the quantity of water that you receive at the head of your ditch?

Mr. Brink: We object to that on the ground that the District Court in its Findings of Fact in the case of Niel vs. Hyde heretofore referred to adjudicated the fact of the return flow between the various ranches on this creek.

Q. What I want to get at is, does it diminish the flow?

A. Diminished it somewhat, but it is seepage.

Q. For how many years have you been getting the benefit of that return flow?

A. I don't remember, but it has been a long time.

Q. How many would you think?

A. About eight or nine years.

Q. And now I will inquire in regard to the creek bed below your dam. In the ordinary season how far does the water flow below your dam before it sinks?

A. It depends on the season, sometimes it goes clear through.

Q. When does it go clear through?

A. In flood times.

Q. In the ordinary season how far below your dam before the water entirely sinks in the bed of your stream?

A. One half to one mile below.

Q. How late in the season, average season, does the water flow one-half to one mile below before it sinks?

A. Sometimes two or three months something like that.

Q. What are those months?

A. That is pretty hard to state.

Q. It is owing to the season then, whether you have a cold spring or not?

A. Sure.

Q. What effect will it have on your water right and the irrigation of your land if this water is transferred?

A. Why, if the water is transferred, Mr. Carothers in the first place would have a prior right in my ditch which would give him the benefit of my water.

Q. That would seriously affect you?

A. Certainly, I wouldn't have any water, he would be getting the water instead of me.

Q. You think that under the present water right that he has, and by flowing water through your ditch, the Koeppe ditch, you have the first right, and if he is permitted to transfer his water and flow it through that ditch he would have the prior right?

A. Most certainly

Q. You constructed that ditch?

A. I personally and my brother.

Q. He was the party that Mr. Carothers purchased from?

A. Yes sir.

Q. And he was decreed a right to 122 inches through that ditch?

A. Yes, I think so.

Q. That is how you understand it?

A. Yes sir.

Q. Now, what effect would it have on you, if Mr. Carothers is permitted to flow this water through that ditch, would it injure you or not?

A. The effect would be to shut me out.

Q. He would have the prior right?

A. Yes sir.

Q. And as it stands now, you have it?

A. Yes sir.

Q. If Mr. Carothers is permitted to change the place of use

referred to here, you would get no benefit whatever from the waste water?

A. No.

Q. He would run all that water through the ditch that you and your brother constructed, and where would it drain to?

A. To his other ditch.

Q. He has a ditch below it?

A. Yes, he would be using water three times, water up above, seepage water, through my ditch, and waste water, something like perpetual motion.

Q. Under the conditions as they now exist you get the benefit of part of the seepage water in the creek from his appropriation above yours?

A. Well, I get all of the benefit when the water don't go through.

Q. If he is permitted to make a change in his place of use you would be injured by his taking the water and irrigating the land that he purchased from your brother and the seepage water in the creek would flow into his ditch instead of coming to you?

A. Most certainly

Q. You say that he would get the use of it three times, get the use of it for where he has been decreed five inches, then if he was permitted the use of your ditch and your brothers, he would get the benefit for your brothers land and would also get the benefit of any waste water draining on the land below?

A. Certainly.

Q. You think you would be injured then?

A. It stands to reason that I would be injured.

Q. You would get no benefit of the waste?

A. Priority is all there is.

Q. You refer to a priority in your ditch?

A. Well I have the first water right in that ditch.

Q. And if he is permitted to change, it will interfere with your first right?

A. Yes, he will get the water instead of me.

Mr. Archibald, in other words there is not enough for both of you?

A. That is it.

Q. Flood water makes no difference?

A. Low is when it counts, I think I explained myself thoroughly, any body can see that when the water gets low you get water you wouldn't get any other way.

Q. In regard to this return water, does that get into the stream in the locality where it is now used by Mr. Garothers, or does it show up some distance below?

A. It begins to show in the middle of the ranch.

Q. Are there any losses in the stream between his land and your point of diversion?

A. Not a great deal.

Q. Can you give me an idea how this effects your allotment?

A. I could not say, it makes no difference, so much of that water belongs to me.

Mr. Sullivan: I think that is all.

Cross examination by Mr. Brink.

Q. When did you build this ditch?

A. In 1908.

Q. What month?

A. In July.

Q. At that time how much land did you have that you intended to irrigate with that ditch?

A. All I have now.

Q. Do you use that ditch for your lower ranch?

A. No.

Q. You intended to irrigate just what you do now?

A. Yes sir.

Q. That is the desert entry, how many acres below the ditch?

A. 100 acres.

Q. Your brother Hermann Koeppel assisted you in constructing the ditch?

A. Yes he did.

Q. In that way he got a proportionate interest in the ditch, but you claimed a priority in the use of the water and not of the ditch, you do not put any special value on the ditch Mr. Koeppe?

A. I understand a priority is a water right and not in the ditch.

Q. You and your brother were one-half owners of the ditch?

A. I don't know about that.

Q. Approximately that is what you consider?

A. We both made use of the ditch if that is what you mean.

Q. Since Mr. Garothers occupied the place he has helped enlarge it?

A. Very little.

Q. How much?

A. I can't tell you, speaking of expense.

Q. Did he furnish material or at other times contribute to the maintenance in years past?

A. This Spring he notified me that I would have to clean the ditch myself, that he couldn't afford it.

Q. When did he say that?

A. I don't know, but he did say it, it was when I was working on the ditch.

Q. Your theory in regard to this water is, that when the water sinks below the dam you are entitled to all water that comes to your ditch?

A. Yes sir.

Q. And that was what you claimed last year in connection with the Brown case, and that the priority of Mr. Patrick Hardiman below Miels ranch are all ahead of your priority, which together aggregate about 800 inches.

Mr. Sullivan objects here on the ground that the question is immaterial and irrelevant.

Q. At what times are there 800 inches available for those priorities?

A. It is pretty hard to tell, I can't state any facts concerning that.

Q. In ordinary years is there 638 inches available in the ditch where

Mr. Brown gets his water from?

A. No.

Q. At any time thereafter during the season is that much water delivered? Say in the case of a cloud-burst or something of that sort?

A. Yes sir.

Q. You made a statement to Mr. Brown last year did you not that because the water sank below the dam all water available therefrom, you had a right to use on your land?

A. Well, the water has always been delivered to me that way until last year.

Q. But that is the claim you made isn't it.

Mr. Sullivan objects to this question as irrelevant and immaterial.

Q. If Mr. Brown is entitled to 638 inches at the Catherine Creek Diversion, of which 136 inches goes on the land above, all of Browns Creek is delivered to the dam below Mr. Browns place, and is prior to the priorities of yourself as well as Mr. Carothers?

A. Well, if Mr. Brown can tell the water master to shut the water off, I would like to know it.

Q. Perhaps Mr. Brown did not tell him that way, but if Mr. Brown is entitled to 638 inches at his Catherine Creek Diversion and you are not permitted to divert water at the dam, which will interfere with the diversion of this water, then you are not injured by any use which is made of this return flow from Mr. Carothers ranch?

A. Well, the idea is that, if he were shut off I would be shut off also and if he were permitted to use this water, I would be permitted to use mine.

Q. Well, it is a fact that Mr. Brown could interfere as he did last year and could stop your taking this water that you say comes down from Mr. Carothers place, and could stop Mr. Carothers doing the same as far as you know, so you are not injured by a change in place of use by

Carothers. Unless Mr. Brown concedes to you that right you are not to interfere with the use of that water, isn't that the situation?

A. Well if Mr. Carothers had a water right Brown could do that, but under the conditions as they are now Carothers could not use that water through my ditch, he is not using Browns water but mine, whenever Mr. Carothers uses water through that ditch it takes my water.

Q. And last year you did not get that return flow because Mr. Brown brought proceedings to stop it?

A. Yes sir. Mr. Carothers was also stopped, through what authority I don't know.

Mr. Brink: I think that is all.

Mr. Sullivan: There is a report hereby Mr. Myron Swendsen, showing measurements upon these ditches that I would like to offer in evidence. I expected Mr. Swendsen to be here at this time.

Mr. Brink: That is not the Chief?

Mr. Sullivan: No.

Mr. Brink: We object to this for the reason that it deprives us of the right to cross-examine.

Mr. Archibald accepts papers, marks it Exhibit # 6.

Mr. Brink: I understand that if the Department is not fully satisfied as to the evidence submitted at this hearing, it will itself send out men to make an investigation of this matter.

Mr. Archibald: Yes, if this Department is unable to make a decision from this hearing and from the records submitted, an examination will be made from this office.

Mr. Brink: That is all.

Mr. Brink: We offer in evidence as Contestees Exhibit # 1, a copy of the Findings of Fact in the case of Niel vs. Hyde, except that the tables of the priorities is omitted, it being extremely difficult of copying, and we would refer to the Certified Copy of the Decree in that case which is on file in this office.

Mr. Sullivan: I have no objection, I suppose you have perused it carefully for errors.

Mr. Brink: If any are found we will be glad to cooperate with you in getting them corrected.

Record accepted and marked Contestees Exhibit # 1.

Mr. Brink: We offer in evidence the following extracts from the Judgment in the case of Niel vs. Hyde.

J. M. Niel

Catherine Creek Oct 1, 1869 66 Inches SE $\frac{1}{4}$ SE $\frac{1}{4}$ 29
(Below Browns Creek)
36 " SE $\frac{1}{4}$ SE $\frac{1}{4}$ 29

(Clerical error found here,
it must be a different 40)

42	"	NE $\frac{1}{4}$ SE $\frac{1}{4}$	29
72	"	NW $\frac{1}{4}$ SE $\frac{1}{4}$	28
114	"	NE $\frac{1}{4}$ SE $\frac{1}{4}$	28
6	"	NW $\frac{1}{4}$ SE $\frac{1}{4}$	28
24	"	SE $\frac{1}{4}$ SE $\frac{1}{4}$	28
42	"	SW $\frac{1}{4}$ SE $\frac{1}{4}$	28
Total	492	"	All in Twp. 4 S, R 1 East.

J. M. NIEL

Catherine Creek April 5, 1879 24 " SE $\frac{1}{4}$ SW $\frac{1}{4}$ 28
(Below Browns Creek) 99 " SW $\frac{1}{4}$ SE $\frac{1}{4}$
51 " NW $\frac{1}{4}$ SE $\frac{1}{4}$
36 " NE $\frac{1}{4}$ SE $\frac{1}{4}$
210 " All in Twp. 4 S, R 1 East

J. M. Niel

Catherine Creek Jan. 8, 1884 15 " SW $\frac{1}{4}$ NW $\frac{1}{4}$ 28
(Below Browns Creek) 9 " SE $\frac{1}{4}$ NW $\frac{1}{4}$
24 " All in Twp. 4S, R 1 East

J. M. Niel

Browns Creek March 16, 1884 78 " Lot 4 31
9 " SE $\frac{1}{4}$ SW $\frac{1}{4}$
81 " NW $\frac{1}{4}$ SW $\frac{1}{4}$
168 " All in Twp. 4S, R 1 East

James F. Carrothers Browns Creek Oct 1, 1901 195 inches ~~N₁ SE₁~~ 18 5S 1 W
~~SW₁~~ 18

James F. Carrothers " " April 1, 1904 93.55 " ~~SE₁~~ SW₁
~~NE₁~~ SW₁ NW₁ SW₁ 27 5S 1 W.

William Koeppe " " March 11, 1908 57.60 ~~N₁ SE₁~~ 1 5S 1 W 57.60
~~SE₁~~ NW₁
Lot 1

which amount is found to have been beneficially applied in accordance with the terms of the State Engineers Permit No. 3547, and the Court further decrees that said defendant, William Koeppe, is entitled to a total of 150 inches under said Permit, conditional upon his compliance with the terms thereof.

William Koeppe Browns Creek July 19, 1908 34.86 ~~N₁ SE₁~~ 31 4S 1 E 34.86

which amount is found to have been beneficially applied in accordance with the terms of State Engineers Permit No. 3522, and the Court further decrees that defendant, William Koeppe, is entitled to a total of 50 inches under said permit, conditional upon his compliance with the terms thereof.

Mr. Brink: It is stipulated that all of the priority of William Koeppe of Browns Creek as modified, dated March 11, 1908 allows 288 inches for the ~~N₁ SE₁~~, ~~SE₁ NE₁~~, Lot 1, Section 1, Township 5 South, Range 1 West, subject to the compliance with the permit under which the same is held; that the priority of Wm. Koeppe on Browns Creek as modified for the ~~N₁ SE₁~~, Section 1, Township 4 South, Range 1 West allows him 174.30 inches as of July 4, 1908, conditional upon his compliance with the terms of the permit under which said water was appropriated; and that the priority of Albert Hermann Koeppe on Browns Creek for the ~~SW₁ SE₁~~ Section 1, and the ~~NW₁ NE₁~~ Section 12, the ~~NE₁ NW₁~~ Section 12, Township 5 South, Range 1 West, as modified was for 122.9 inches as of August 25, 1908, conditional upon his compliance with the permit under which said water was appropriated.

Mr. Brink: We also offer in evidence, the Supplemental Proceedings in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, transferred from Owyhee County) J. M. Niel, Plaintiff, vs. Mike Hyde, William Koeppe and others, defendant; said Supplemental Proceedings being at the instigation of George F. Brown and James E. Murphy, a co-partnership as Brown & Murphy, successors in interest to J.M.Niel, vs. Warren G. Swendsen

Commissioner of Reclamation, of the State of Idaho, S. T. Baer, Deputy Commissioner of Reclamation, and Leonard Aldrich, Water Master on Catherine Creek and its tributaries.

Mr. Sullivan objects on the ground that they have not been examined and are therefore subject to errors.

Paper accepted and marked Contestees Exhibit # 2.

Mr. Brink: Said evidence including the Order to Show Cause, Answer, Demurrer to Answer and Motion to Strike therefrom, Stipulation, and the Order of the Court upon that proceeding.

Mr. Brink: You will admit that Brown and Murphy succeeded to the right of J.M.Niel, in and to the waters of Brown Creek?

Mr. Sullivan: I don't know about that, I have just come into the case very recently.

Mr. Koeppe agrees to this statement.

Mr. Brink: It is stipulated that George F. Brown and James E. Murphy succeeded to all of the interest of J.M.Niel to the lands and water rights mentioned in the extracts from the judgment which have been introduced in the evidence of Contestees.

Mr. Sullivan: If that is true, we are willing to admit it, we can't help it. Who is Mr. Murphy?

Mr. Brink: Mr. Murphy isn't here, however, the gentleman in the corner is Mr. Brown.

Mr. Brink: We will next examine Mr. Carothers.

Mr. Carothers sworn by Mr. Archibald.

Direct examination by Mr. Brink:

Q. The ranch now operated by you, is the one for which water was formerly owned by Herman Koeppe?

A. Yes sir.

Q. And in the water suit of Niel vs. Hyde he was awarded the last appropriation on that ditch?

A. Yes sir.

Q. And ahead of that appropriation there was 688 inches, and also 168 inches awarded to the land of Wm. Koeppe, both ahead of the land you occupy, the land you took over from Hermann Koeppe?

A. Yes.

Q. The water rights of William Koeppe are prior to the water rights that were decreed for the Hermann Koeppe Ranch?

A. Yes.

Q. Are you familiar with the amount of water that the Herman Koeppe ranch receives out of that decreed right? If so, state what?

A. I know that during the last five or six years that there has not been enough water to cover any of the decrees, and that all the water gotten has been through rotation between Brown, myself and Koeppe.

Q. Under the decree then, it is only in very rare occasions that you have received the water?

A. In case of high water and floods I would get some.

Cross examination by Mr. Sullivan:

Q. Mr. Carothers, do you remember when I was out at the ranch last March?

A. I remember.

Q. You were irrigating the Hermann Koeppe ranch?

A. Yes sir.

Q. What water was that?

A. We were rotating, I went up there in the morning and turned one-half into my ditch, I considered I had as much right to take it as he did.

Q. You remember Mr. Swendsen measuring the water?

A. I was there when he said he couldn't measure the water.

Q. Did he say that?

A. He said that he couldn't measure it at that time because the measuring devices weren't in and he didn't know how to measure it at that time.

Q. He makes a report as follows:

"Koepppe-Carothers ditch at diversion 249 inches. Same ditch at a point just above the first diversion therefrom 186 inches. Same ditch at a point just below Carothers diversion 67 inches. Which indicate that Carothers was using 109 inches, Koepppe 67 inches, and a loss of 63 inches.

Carothers lower ditch was diverting 135 inches, ~~part~~ of which was made up by inflow from waste water from the lands of Carothers above the ditch."

You had the entire flow at that time?

A. But it was waste.

Q. Now then, you state in your Application that if this change is granted part of this land will go back to desert character, do you intend to let 27 acres go back to its desert character?

A. I intend to drop out that much, it is no profit to me to irrigate it so early in the season and if the water is changed I can use it to better advantage.

Q. If this water is diverted now and you are permitted to take it to the Herman Koepppe ranch, is there any waste that Koepppe would get, won't it be impossible for him to get waste water if this change is made?

A. I don't want to keep him from having water, but the Germans would be out of luck, that's all.

Mr. Sullivan: That is all.

Time. 5:00 P.M.,

DEPARTMENT OF RECLAMATION
OF THE
STATE OF IDAHO.

IN THE MATTER OF THE APPLICATION
OF JAMES F. CAROTHERS TO HAVE THE
USE OF CERTAIN WATER WHICH HAS HERE-
TOFORE BEEN DECREED TO HIM TO BE USED
UPON CERTAIN LANDS IN OWYHEE COUNTY,
CHANGED TO OTHER LANDS IN SAID COUNTY,
WHICH APPLICATION WAS FILED WITH THE
DEPARTMENT OF RECLAMATION ON APRIL,
22, 1921.

RECORD OF HEARING

UPON APPLICATION TO CONTEST
BY WILLIAM KOEPPE, Contestant.

WILLIAM KOEPPE,

Contestant.

In accordance with the published notice concerning the Application for Transfer of Water Right, made by J.F. Carothers, of ~~Brink~~, Idaho, on April 22, 1921, a hearing was called at the office of the Department of Reclamation, in the Capitol Building, Boise, Idaho, at 10 A.M., on May 16, by George B. Archibald, Assistant Commissioner of Reclamation.

Application to Contest the said transfer was filed by William Koeppe, a copy of the said Application to Contest being attached hereto, marked Exhibit A.

The firm of Sullivan & Sullivan appeared as attorneys for the Contestant, William Koeppe, and the firm of Perky & Brink appeared for the Contestee, J.F. Carothers.

A copy of the Application to Contest, not having been previously served on the said J.F. Carothers, or his attorneys; Judge Perky for the Contestee, requested that an adjournment be taken in order that the said Application to Contest could be perused.

Wherefore, with the consent of the attorneys for the Contestant, an adjournment was taken until 1:30 P.M., on May 16, 1921.

Hearing resumed at Two P.M., May 16, 1921.

Mr. Sullivan offered certain papers to be used as evidence, to which Mr. Brink objected. A short discussion was entered into as to what procedure would be followed, and at the suggestion of Mr. Archibald, it was agreed that the proceedings would take the form of a land office hearing, both sides presenting their exhibits, etc., to be passed upon by the Commissioner of Reclamation.

The first paper examined being the Application to Contest.

Mr. Sullivan: Does the contestee admit the facts alleged in paragraph one?

Mr. Brink: We admit them.

Q. Will you admit that the land which said Carothers is now irrigating with said water consists of about 27 acres?

A. We admit that.

Q. That said Browns Creeks runs through said irrigated land?

A. We admit that.

Q. That said Carothers is irrigating a narrow strip of land on each side of said creek and the waste and seepage from such irrigation flows back into the channel of said creek and increases the flow thereof, and this contestant has for a number of years last past received the benefit of such seepage and waste water, and it will be greatly to his injury if the said contestee is permitted to change the use of said water as prayed for in his application, since the contestant could receive no benefit whatever from the waste or seepage of such water, if such change of use is granted?

A. No, we will not admit that.

Mr. Sullivan: In regard to this allegation we have here, and desire to introduce in evidence, extracts from the testimony of four witnesses in the case of J.M.Neil vs. Mike Hyde, et al, in the District Court of the Third

Judicial District of Owyhee County, as follows:

C.J. Franklin, Civil Engineer, James F. Carothers, Robert Lander, and Findings # 2, and Findings # 4, of the Findings of Fact in said case of Heil vs. Hyde.

Mr. Brink wished to object to the introduction of this evidence on the ground that it had not been examined carefully.

Mr. Archibald suggested that the regular practice of the Land Office be followed, and that these papers be introduced as exhibits, with the record showing the objections interposed by the attorneys for the Contestee.

Mr. Brink suggested that the several documents be introduced separately, which was agreeable..

Mr. Sullivan: We first offer in evidence, extracts from the evidence given by C.J. Franklin, Civil Engineer, in the case of Heil vs. Hyde, et al, in the District Court of the Third Judicial District of Owyhee County.

Mr. Brink: We object upon the ground that the evidence is hearsay, upon the further ground that the said C.J. Franklin is not available at this hearing for cross-examination; for the further reason that the testimony of C.J. Franklin now offered does not purport to be with reference to the land of this applicant from which he desires to transfer the place of use of water in this proceeding, and for the reason that the portion of testimony for admission is a matter which has been adjudicated upon.

Mr. Sullivan: I introduce these in evidence, simply to show the condition of the land from which Mr. Carothers seeks to transfer this water, and to show the condition of the stream at the time this examination was made.

Mr. Archibald: When did Mr. Franklin make this examination?

Mr. Sullivan: In 1915.

Mr. Archibald: The evidence then, shows conditions at that time?

Mr. Sullivan: Yes, at that time.

This evidence accepted by Mr. Archibald and marked
Contestants Exhibit # 1.

Mr. Sullivan: We will next offer in evidence, extracts from the testimony of James F. Carothers in the trial of Niel vs. Hyde.

Mr. Brink: I object to this on the grounds set forth in our objection to the testimony of Mr. Franklin, upon the further ground that this portion of the testimony does not purport to be the whole testimony of Mr. Carothers, in said former case and if offered at this time is in that respect incomplete.

Mr. Sullivan: Is that all?

Mr. Brink: That is all.

Mr. Sullivan: We simply offer this evidence, because it gives Mr. Carothers method of irrigating the lands that the water was decreed to and in which he testified that he is only irrigating a narrow strip of land on each side of the creek and that much of the water used in the irrigation of this land flows back into the creek, and in effect increases the flow of the creek.

Mr. Perky: That contradicts the findings.

Mr. Sullivan: Anything more?

Mr. Perky: That is all.

Paper accepted by Mr. Archibald, marked Contestants
Exhibit # 2.

Mr. Sullivan: The testimony of Robert Landor a witness in the case of Niel vs. Hyde will next be offered in evidence: The question is:

"You only want to be understood as saying that if the water is

turned out on this land all surface water would flow back into the creek?"

Answer: "Yes, Sir."

Mr. Brink: We object upon all of the grounds set forth in the objection to the testimony of Mr. Franklin, and in addition thereto upon the ground that the testimony now offered is so fragmentary and incomplete that it is impractical and of no value in the matter now before us.

Mr. Sullivan: I simply offer this evidence, together with that of the others, to show that the valley through which Browns creek runs is very narrow and its grade is steep and requires a great deal of water to irrigate it. We offer this as contestants Exhibit # 3.

Mr. Brink: To which our objections are as we have stated?

Mr. Sullivan: Correct.

Evidence accepted by Mr. Archibald and marked
Contestants Exhibit # 3.

Mr. Sullivan: The following are extracts from Finding No. 2, f. 665, 666, and all of Finding No. 4, f. 668 of the Findings of Fact in said case of Neil v. Hyde, to-wit:

"The soil, watered from these streams, is a gravelly loam, having great porosity and on account of this fact and the heavy slope requires a great deal of water to successfully raise crops.

"The streams are small with small catchment areas, the run-off from precipitation and melting snow being quick and heavy due to the steep slopes and the barrenness of the watershed.

The water in all of the streams, on the average, flows in a considerable amount, commencing generally in April, rapidly decreases in June and almost completely ceases in July or August.

The crops raised are principally forage crops, although garden truck, berries and fruit are raised for family consumption. The surrounding country being public range, alfalfa for feeding stock is the principal agricultural product of the country.

Above the lands of plaintiff and defendant B.H. Hyde, the valleys are small, the ranches being generally a few hundred feet wide, commonly designated "Shoe String" ranches, parallel to the streams and extending in narrow strips along both sides."

Mr. Sullivan: We simply quote this to show just what conditions the court has found to exist.

Mr. Brink: We have no objection if you offer all of them.

Mr. Sullivan: This then, will be Exhibit # 4?

Mr. Archibald: Yes.

Evidence accepted by Mr. Archibald and Marked Contestants
Exhibit # 4.

Mr. Sullivan: We have here a copy of the plat of the land from which the Contestee seeks to transfer this water. It is a copy drawn by C.J. Franklin, Civil Engineer and indicates the 160 acres of land from which, as I understand it, Mr. Carothers seeks to transfer this 60 acres of water, or 1.4 second feet.

Mr. Brink: We have no objection to this being entered as an Exhibit.

Evidence accepted by Mr. Archibald and marked Contestants
Exhibit # 5.

Mr. Sullivan:—Continuing with paragraph # 2.

Will you admit that the Creek runs through a narrow canal from the foot of Carothers land to Koeppe's dam and headgate, and that no other water is taken out between the Koeppe headgate and Carothers headgate?

Mr. Brink: We will admit these facts, with the understanding that we can object if they become material.

Mr. Sullivan: I suppose you will admit that Mr. Carothers states that one inch of water is required to irrigate the land to which he desires such water transferred?

Mr. Brink: At least one inch.

Carothers. Unless Mr. Brown concedes to you that right you are not to interfere with the use of that water, isn't that the situation?

A. Well if Mr. Carothers had a water right Brown could do that, but under the conditions as they are now Carothers could not use that water through my ditch, he is not using Browns water but mine, whenever Mr. Carothers uses water through that ditch it takes my water.

Q. And last year you did not get that return flow because Mr. Brown brought proceedings to stop it?

A. Yes sir. Mr. Carothers was also stopped, through what authority I don't know.

Mr. Brink: I think that is all.

Mr. Sullivan: There is a report here by Mr. Myron Swendsen, showing measurements upon these ditches that I would like to offer in evidence. I expected Mr. Swendsen to be here at this time.

Mr. Brink: That is not the Chief?

Mr. Sullivan: No.

Mr. Brink: We object to this for the reason that it deprives us of the right to cross-examine.

Mr. Archibald accepts papers, marks it Exhibit # 6.

Mr. Brink: I understand that if the Department is not fully satisfied as to the evidence submitted at this hearing, it will itself send out men to make an investigation of this matter.

Mr. Archibald: Yes, if this Department is unable to make a decision from this hearing and from the records submitted, an examination will be made from this office.

Mr. Brink: That is all.

Mr. Brink: We offer in evidence as Contestees Exhibit # 1, a copy of the Findings of Fact in the case of Niel vs. Hyde, except that the tables of the priorities is omitted, it being extremely difficult of copying, and we would refer to the Certified Copy of the Decree in that case which is on file in this office.

Mr. Sullivan: I have no objection, I suppose you have perused it carefully for errors.

Mr. Brink: If any are found we will be glad to cooperate with you in getting them corrected.

Record accepted and marked Contestees Exhibit # 1.

Mr. Brink: We offer in evidence the following extracts from the Judgment in the case of Niel vs. Hyde.

J. M. Niel	Catherine Creek (Below Browns Creek)	Oct 1, 1869	66 Inches	SE $\frac{1}{4}$	SE $\frac{1}{4}$	29
			36 "	SE $\frac{1}{4}$	SE $\frac{1}{4}$	29
	(Clerical error found here, it must be a different 40)					

42	"	NE $\frac{1}{4}$	SE $\frac{1}{4}$	29
72	"	NW $\frac{1}{4}$	SW $\frac{1}{4}$	28
114	"	NE $\frac{1}{4}$	SW $\frac{1}{4}$	28
6	"	NW $\frac{1}{4}$	SW $\frac{1}{4}$	28
24	"	SE $\frac{1}{4}$	SW $\frac{1}{4}$	28
42	"	SW $\frac{1}{4}$	SW $\frac{1}{4}$	28

Total 402 " All in Twp. 4 S, R 1 East.

J. M. NIEL	Catherine Creek (Below Browns Creek)	April 5, 1879	24 "	SE $\frac{1}{4}$	SW $\frac{1}{4}$	28
			99 "	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
			51 "	NW $\frac{1}{4}$	SE $\frac{1}{4}$	
			36 "	NE $\frac{1}{4}$	SE $\frac{1}{4}$	
			210 "	All in Twp. 4 S, R 1 East		

J. M. Niel	Catherine Creek (Below Browns Creek)	Jan. 8, 1884	15 "	SW $\frac{1}{4}$	NW $\frac{1}{4}$	28
			9 "	SE $\frac{1}{4}$	NW $\frac{1}{4}$	
			24 "	All in Twp. 4S, R 1 East		

J. M. Niel	Browns Creek	March 16, 1884	78 "	Lot 4	51
			9 "	SE $\frac{1}{4}$	SW $\frac{1}{4}$
			81 "	NE $\frac{1}{4}$	SW $\frac{1}{4}$
			168 "	All in Twp. 4S, R 1 East	

James F. Carrothers Browns Creek Oct 1, 1901 195 Inches N $\frac{1}{2}$ SE $\frac{1}{4}$ 18 58 1 W
N $\frac{1}{2}$ SW $\frac{1}{4}$ 18

James F. Carrothers " " April 1, 1904 93.55 " S $\frac{1}{2}$ SE $\frac{1}{4}$
NE $\frac{1}{4}$ SW $\frac{1}{4}$
NW $\frac{1}{4}$ SW $\frac{1}{4}$ 27 58 1 W.

William Koeppe " " March 11, 1908 57.60 N $\frac{1}{2}$ SE $\frac{1}{4}$ 1 58 1 W 57.60
S $\frac{1}{2}$ NE $\frac{1}{4}$
Lot 1

which amount is found to have been beneficially applied in accordance with the terms of the State Engineers Permit No. 3547, and the Court further decrees that said defendant, William Koeppe, is entitled to a total of 150 inches under said Permit, conditional upon his compliance with the terms thereof.

William Koeppe Browns Creek July 19, 1908 34.86 N $\frac{1}{2}$ SE $\frac{1}{4}$ 31 48 1 E 34.86

which amount is found to have been beneficially applied in accordance with the terms of State Engineers Permit No. 3522, and the Court further decrees that defendant, William Koeppe, is entitled to a total of 50 inches under said permit, conditional upon his compliance with the terms thereof.

Mr. Brink: It is stipulated that all of the priority of William Koeppe of Browns Creek as modified, dated March 11, 1908 allows 268 inches for the N $\frac{1}{2}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, Lot 1, Section 1, Township 5 South, Range 1 West, subject to the compliance with the permit under which the same is held; that the priority of Wm. Koeppe on Browns Creek as modified for the N $\frac{1}{2}$ SE $\frac{1}{4}$, Section 1, Township 4 South, Range 1 West allows him 174.30 inches as of July 4, 1908, conditional upon his compliance with the terms of the permit under which said water was appropriated; and that the priority of Albert Hermann Koeppe on Browns Creek for the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 1, and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 12, the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 12, Township 5 South, Range 1 West, as modified was for 122.9 inches as of August 25, 1908, conditional upon his compliance with the permit under which said water was appropriated.

Mr. Brink: We also offer in evidence, the Supplemental Proceedings in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, transferred from Owyhee County) J. M. Niel, Plaintiff, vs. Mike Hyde, William Koeppe and others, defendant; said Supplemental Proceedings being at the instigation of George F. Brown and James E. Murphy, a co-partnership as Brown & Murphy, successors in interest to J.M.Niel, vs. Warren G. Swendsen

Commissioner of Reclamation, of the State of Idaho, S. T. Baer, Deputy Commissioner of Reclamation, and Leonard Aldrich, Water Master on Catherine Creek and its tributaries.

Mr. Sullivan objects on the ground that they have not been examined and are therefore subject to errors.

Paper accepted and marked Contestees Exhibit # 2.

Mr. Brink: Said evidence including the Order to Show Cause, Answer, Demurrer to Answer and Motion to Strike therefrom, Stipulation, and the Order of the Court upon that proceeding.

Mr. Brink: You will admit that Brown and Murphy succeeded to the right of J.M.Niel, in and to the waters of Brown Creek?

Mr. Sullivan: I don't know about that, I have just come into the case very recently.

Mr. Koeppe agrees to this statement.

Mr. Brink: It is stipulated that George F. Brown and James E. Murphy succeeded to all of the interest of J.M.Niel to the lands and water rights mentioned in the extracts from the judgment which have been introduced in the evidence of Contestees.

Mr. Sullivan: If that is true, we are willing to admit it, we can't help it. Who is Mr. Murphy?

Mr. Brink: Mr. Murphy isn't here, however, the gentleman in the corner is Mr. Brown.

Mr. Brink: We will next examine Mr. Carothers.

Mr. Carothers sworn by Mr. Archibald.

Direct examination by Mr. Brink:

Q. The ranch now operated by you, is the one for which water was formerly owned by Herman Koeppe?

A. Yes sir.

Q. And in the water suit of Niel vs. Hyde he was awarded the last appropriation on that ditch?

A. Yes sir.

Mr. Sullivan: You admit that he states that it requires one inch to the acre-- at least one inch to the acre as you wish to put it. Will you admit that Mr. Carothers gets more than one inch in the case of Niel vs. Hyde?

Mr. Brink: We will admit that the right exists, with the understanding that it is the last priority on the creek and does not allow of water and does not furnish water to Mr. Carothers because of the priorities ahead of it.

Mr. Sullivan: I desire to read into the record a part of the testimony in that case.

Conversation had here as to the procedure to be followed, because no checking up was had by attorneys for contestee on this testimony.

Mr. Sullivan: I only wish to refer to two decrees contained in this testimony.

Mr. Brink: We do not object.

Mr. Sullivan: James Carothers, Browns Creek, October 1, 1901, 45 inches, for the Northeast Quarter of the Southwest Quarter, the Northwest Quarter of the Southeast Quarter, Section 27, Township 5 South, Range 1 West.

Next entry: James Carothers, Browns Creek, April 1, 1904, South Half of the Southwest Quarter, Northeast Quarter of the Southwest Quarter, Northwest Quarter of the Southeast Quarter, Section 27, Township 5 South, Range 1 West--93.55

Mr. Sullivan: Referring to Application to transfer:
The point I want to make is, from which one of these rights does he seek to transfer 60 inches or 1.2 second feet, from the latest right or the oldest right? How do you take that Mr. Archibald?

Mr. Archibald: I would take it, all of the oldest right, or .9 second feet, and enough of the later right to make 1.2 second feet.

Mr. Brink: Now Mr. Archibald, Mr. Caruthers states that when he filed this application he understood that inasmuch as there were no intervening rights, it made no difference, and he would not have to designate for that reason what the exact area on either side of the creek that it is desired to

take the water from.

Mr. Archibald: What is your understanding of the matter Mr. Carothers and what do you actually desire to do?

Mr. Carothers: I am not prepared to say except to say that roughly I desire to take water from both sides of the creek and in that way to take in porportion from the two priorities, that would be one-third transferred from the oldest and two thirds from the later priority.

Mr. Archibald: I don't see as it makes much difference which side of the creek it is taken from but there is a possibility of the amount from each priority making a difference. For that reason it is possibly desirable to know exactly the portion of each right to be transferred.

Mr. Sullivan: It would make a difference with my client, if the plan is to keep enough water up there to irrigate all the land that water is decreed to. It presents another proposition.

Mr. Brink: My clients decrees are both prior to Mr. Koeppe's.

Mr. Archibald: I think it is only reasonable that we know how much water from each right he wishes to transfer.

Mr. Brink: That can be ascertained within a reasonable length of time.

Mr. Archibald: We should know that now before we complete the hearing.

Mr. Brink: We take it then that the application should be made for a change of four-tenths of a cubic foot from the priority of October 1, 1901, and eight tenths of a cubic foot from the priority of April 1, 1904.

Mr. Sullivan: Four tenths of the appropriation of 1901 for the 80 acre tract up there that it was decreed to, would leave the balance of the other for the entire 160.

Mr. Brink: Just a moment Judge.

Mr. Brink: (After consulting Contestees Engineer) Leave it as stated.

Mr. Sullivan now offered to submit in evidence as an Exhibit a copy of a certain deed or agreement conveying to Mr. Carothers an interest in the Koeppe ditch.

Mr. Brink: That deed was only given to correct a former deed was it not?

Mr. Sullivan: I believe that to be correct.

After a discussion between attorneys for contestant and contestee,
Mr. Sullivan withdraws the deed as an exhibit.

Mr. Koeppe sworn in by Mr. Archibald.

Direct examination by Mr. Sullivan.

Q. What is your name?

A. William Koeppe.

Q. Where do you reside?

A. Oresana.

Q. Oresana, Idaho?

A. Yes Sir.

Q. Are you the contestant in this matter?

A. I am.

Q. Mr. Koeppe, are you acquainted with what is known as the ranch of
Mr. Carothers from which he seeks to transfer a part of his water from
other lands?

A. Yes sir.

Q. What is the character of that land?

A. Well it is very gravelly.

Mr. Brink: We wish to make an objection in the record to
testimony on the character of the soil and the lay
of the land in so far as it refers to the Findings of
Fact heretofore referred to in our objection to
Mr. Franklins testimony.

Q. How far is Mr. Carothers land from the point where you take your water
out?

A. About two miles.

Q. Are there any diversions between these two pieces of land?

A. No, sir.

Q. What if you have observed is the effect of Mr. Carothers irrigating his

land upon the quantity of water that you receive at the head of your ditch?

Mr. Brink: We object to that on the ground that the District Court in its Findings of Fact in the case of Niel vs. Hyde heretofore referred to adjudicated the fact of the return flow between the various ranches on this creek.

Q. What I want to get at is, does it diminish the flow?

A. Diminished it somewhat, but it is seepage.

Q. For how many years have you been getting the benefit of that return flow?

A. I don't remember, but it has been a long time.

Q. How many would you think?

A. About eight or nine years.

Q. And now I will inquire in regard to the creek bed below your dam.

In the ordinary season how far does the water flow below your dam before it sinks?

A. It depends on the season, sometimes it goes clear through.

Q. When does it go clear through?

A. In flood times.

Q. In the ordinary season how far below your dam before the water entirely sinks in the bed of your stream?

A. One half to one mile below.

Q. How late in the season, average season, does the water flow one-half to one mile below before it sinks?

A. Sometimes two or three months something like that.

Q. What are those months?

A. That is pretty hard to state.

Q. It is owing to the season then, whether you have a cold spring or not?

A. Sure.

Q. What effect will it have on your water right and the irrigation of your land if this water is transferred?

A. Why, if the water is transferred, Mr. Carothers in the first place would have a prior right in my ditch which would give him the benefit of my water.

Q. That would seriously affect you?

A. Certainly, I wouldn't have any water, he would be getting the water instead of me.

Q. You think that under the present water right that he has, and by flowing water through your ditch, the Koeppe ditch, you have the first right, and if he is permitted to transfer his water and flow it through that ditch he would have the prior right?

A. Most certainly

Q. You constructed that ditch?

A. I personally and my brother.

Q. He was the party that Mr. Carothers purchased from?

A. Yes sir.

Q. And he was decreed a right to 122 inches through that ditch?

A. Yes, I think so.

Q. That is how you understand it?

A. Yes sir.

Q. Now, what effect would it have on you, if Mr. Carothers is permitted to flow this water through that ditch, would it injure you or not?

A. The effect would be to shut me out.

Q. He would have the prior right?

A. Yes sir.

Q. And as it stands now, you have it?

A. Yes sir.

Q. If Mr. Carothers is permitted to change the place of use

referred to here, you would get no benefit whatever from the waste water?

A. No.

Q. He would run all that water through the ditch that you and your brother constructed, and where would it drain to?

A. To his other ditch.

Q. He has a ditch below it?

A. Yes, he would be using water three times, water up above, seepage water, through my ditch, and waste water, something like perpetual motion.

Q. Under the conditions as they now exist you get the benefit of part of the seepage water in the creek from his appropriation above yours?

A. Well, I get all of the benefit when the water don't go through.

Q. If he is permitted to make a change in his place of use you would be injured by his taking the water and irrigating the land that he purchased from your brother and the seepage water in the creek would flow into his ditch instead of coming to you?

A. Most certainly

Q. You say that he would get the use of it three times, get the use of it for where he has been decreed five inches, then if he was permitted the use of your ditch and your brothers, he would get the benefit for your brothers land and would also get the benefit of any waste water draining on the land below?

A. Certainly.

Q. You think you would be injured then?

A. It stands to reason that I would be injured.

Q. You would get no benefit of the waste?

A. Priority is all there is.

Q. You refer to a priority in your ditch?

A. Well I have the first water right in that ditch.

Q. And if he is permitted to change, it will interfere with your first right?

A. Yes, he will get the water instead of me.

Mr. Archibald, in other words there is not enough for both of you?

A. That is it.

Q. Flood water makes no difference?

A. Low is when it counts, I think I explained myself thoroughly, any body can see that when the water gets low you get water you wouldn't get any other way.

Q. In regard to this return water, does that get into the stream in the locality where it is now used by Mr. Carothers, or does it show up some distance below?

A. It begins to show in the middle of the ranch.

Q. Are there any losses in the stream between his land and your point of diversion?

A. Not a great deal.

Q. Can you give me an idea how this effects your allotment?

A. I could not say, it makes no difference, so much of that water belongs to me.

Mr. Sullivan: I think that is all.

Cross examination by Mr. Brink.

Q. When did you build this ditch?

A. In 1906.

Q. What month?

A. In July.

Q. At that time how much land did you have that you intended to irrigate with that ditch?

A. All I have now.

Q. Do you use that ditch for your lower ranch?

A. No.

Q. You intended to irrigate just what you do now?

A. Yes sir.

Q. That is the desert entry, how many acres below the ditch?

A. 100 acres.

Q. Your brother Hermann Koeppel assisted you in constructing the ditch?

A. Yes he did.

Q. In that way he got a porportionate interest in the ditch, but you claimed a priority in the use of the water and not of the ditch, you do not put any special value on the ditch Mr. Koeppe?

A. I understand a priority is a water right and not in the ditch.

Q. You and your brother were one-half owners of the ditch?

A. I don't know about that.

Q. Approximately that is what you consider?

A. We both made use of the ditch if that is what you mean.

Q. Since Mr. Carothers occupied the place he has helped enlarge it?

A. Very little.

Q. How much?

A. I can't tell you, speaking of expense.

Q. Did he furnish material or at other times contribute to the maintenance in years past?

A. This Spring he notified me that I would have to clean the ditch myself, that he couldn't afford it.

Q. When did he say that?

A. I don't know, but he did say it, it was when I was working on the ditch.

Q. Your theory in regard to this water is, that when the water sinks below the dam you are entitled to all water that comes to your ditch?

A. Yes sir.

Q. And that was what you claimed last year in connection with the Brown case, and that the priority of Mr. Patrick Hardiman below Niels ranch are all ahead of your priority, which together aggregate about 800 inches.

Mr. Sullivan objects here on the ground that the question is immaterial and irrelevant.

Q. At what times are there 800 inches available for those priorities?

A. It is pretty hard to tell, I can't state any facts concerning that.

Q. In ordinary years is there 636 inches available in the ditch where

Mr. Brown gets his water from?

A. No.

Q. At any time thereafter during the season is that much water delivered? Say in the case of a cloud-burst or something of that sort?

A. Yes sir.

Q. You made a statement to Mr. Brown last year did you not that because the water sank below the dam all water available therefrom, you had a right to use on your land?

A. Well, the water has always been delivered to me that way until last year.

Q. But that is the claim you made isn't it.

Mr. Sullivan objects to this question as irrelevant and immaterial.

Q. If Mr. Brown is entitled to 638 inches at the Catherine Creek Diversion, of which 136 inches goes on the land above, all of Browns Creek is delivered to the dam below Mr. Browns place, and is prior to the priorities of yourself as well as Mr. Carothers?

A. Well, if Mr. Brown can tell the water master to shut the water off, I would like to know it.

Q. Perhaps Mr. Brown did not tell him that way, but if Mr. Brown is entitled to 638 inches at his Catherine Creek Diversion and you are not permitted to divert water at the dam, which will interfere with the diversion of this water, then you are not injured by any use which is made of this return flow from Mr. Carothers ranch?

A. Well, the idea is that, if he were shut off I would be shut off also and if he were permitted to use this water, I would be permitted to use mine.

Q. Well, it is a fact that Mr. Brown could interfere as he did last year and could stop your taking this water that you say comes down from Mr. Carothers place, and could stop Mr. Carothers doing the same as far as you know, so you are not injured by a change in place of use by

Q. And ahead of that appropriation there was 668 inches, and also 168 inches awarded to the land of Wm. Koeppe, both ahead of the land you occupy, the land you took over from Hermann Koeppe?

A. Yes.

Q. The water rights of William Koeppe are prior to the water rights that were decreed for the Hermann Koeppe Ranch?

A. Yes.

Q. Are you familiar with the amount of water that the Herman Koeppe ranch receives out of that decreed right? If so, state what?

A. I know that during the last five or six years that there has not been enough water to cover any of the decrees, and that all the water gotten has been through rotation between Brown, myself and Koeppe.

Q. Under the decrees then, it is only in very rare occasions that you have received the water?

A. In case of high water and floods I would get some.

Cross examination by Mr. Sullivan:

Q. Mr. Carothers, do you remember when I was out at the ranch last March?

A. I remember.

Q. You were irrigating the Hermann Koeppe ranch?

A. Yes sir.

Q. What water was that?

A. We were rotating, I went up there in the morning and turned one-half into my ditch, I considered I had as much right to take it as he did.

Q. You remember Mr. Swendsen measuring the water?

A. I was there when he said he couldn't measure the water.

Q. Did he say that?

A. He said that he couldn't measure it at that time because the measuring devices weren't in and he didn't know how to measure it at that time.

Q. He makes a report as follows:

"Koeppé-Carothers ditch at diversion 249 inches. Same ditch at a point just above the first diversion therefrom 184 inches. Same ditch at a point just below Carothers diversion 67 inches. Which indicate that Carothers was using 109 inches, Koeppé 67 inches, and a loss of 63 inches.

Carothers lower ditch was diverting 135 inches, -part of which was made up by inflow from waste water from the lands of Carothers above the ditch."

You had the entire flow at that time?

A. But it was waste.

Q. Now then, you state in your Application that if this change is granted part of this land will go back to desert character, do you intend to let 27 acres go back to its desert character?

A. I intend to drop out that much, it is no profit to me to irrigate it so early in the season and if the water is changed I can use it to better advantage.

Q. If this water is diverted now and you are permitted to take it to the Herman Koeppé ranch, is there any waste that Koeppé would get, won't it be impossible for him to get waste water if this change is made?

A. I don't want to keep him from having water, but the Germans would be out of luck, that's all.

Mr. Sullivan: That is all.

Time. 5:00 P.M.,

Continuation of Report # 6

R E P O R T
ON THE DISTRIBUTION OF THE WATERS
OF BROWNS CREEK
OHYEE COUNTY
IDAHO.

March 8, 1921.

By Myron Swendsen

RECEIVED

MYRON SWENDSEN
CIVIL, HYDRO-ELECTRIC AND IRRIGATION
ENGINEER
502 PINNEY BUILDING
BOISE, IDAHO.

Browns Creek is a small tributary of Catherine Traversing a portion of Ohyhee County, flowing in a north-Easterly direction.

The irrigated area from it might be divided into two parts, one the lands contiguous to the upper reaches of the creek and the other the lands contiguous to the lower reaches. The two areas being separated by a flow of lava through which the creek flows in a deep narrow canyon.

The upper area is served by water of an early date of priority. The lower area by three rights of a later date and one of an early date of priority.

In the distribution of the waters serving the lower areas on the creek, considerable difficulty has been encountered caused, partly by the users not having regulating devices at the head of their ditches, partly from the absence of a proper division device on the Carrother and Koeppe ditch to make equitable division of the water between these two parties. The matter has also been further aggravated by the fact that the creek traverses a porous sedimentary formation through which considerable loss is sustained and some time is required for the creek to return to normal flow after a change in regulation is made. The matter of regulation and distribution of the waters is also made more difficult by the fact that one of the older rights on the creek is diverted on the lower

reaches of the creek, and due to the variable loss at different flow of the creek some time is required to get proper regulation.

The order of diversion with respect to priority are as follows;

Upper diversion being a party ditch serving Wm. Koeppe and James Carrothers. Koeppe's priority being March 11 1908 for 288 inches and Carrothers being Aug 25, 1908 for 122.95 inches. Following down the creek the next diversion is that of James F. Carrothers with a priority of March 16, 1885 for 168 inches, the next being Wm. Koeppe with a priority of July 19, 1908 for 174.3 inches

At the time of my visit to the ground on March 7th 1921 I found water in the various ditches in the amounts as follows;

Koeppe-Carrothers ditch at diversion 249 inches. Same ditch at a point just above the first diversion therefrom 186 inches. Same ditch at a point just below Carrothers diversions 67 inches. Which indicate that Carrothers was using 109 inches, Koeppe 67 inches and a loss of 63 inches. ✓

✓ Carrothers lower ditch was diverting 135 inches part of which was made up by inflow from waste water from the lands of Carrothers above the ditch.

Some water was passing the Carrothers lower diversion for the lower Koeppe right but none was reaching his point of diversion.

From my observation, I should judge that there was ample water in the creek to supply the two oldest rights, namely, Wm. Koeppe 288 inches and Carrothers 168 inches,

and possibly some for the Wm. Koeppe right of July 19, 1908.

RECOMMENDATIONS

1. That proper measuring and regulating devices be installed at the head of each ditch. This in some cases will require the construction of a dam or check in the creek that will be of a permanent nature.

2. That the watermaster for the stream start work at the earliest possible date.

3. In the case of the Koeppe-Carrothers ditch, a suitable device for dividing the waters between these two parties should be constructed, then in the event of further dispute between these two parties as to the division of the waters in this ditch, a watermaster for this ditch should be appointed. The services of such watermaster need not incur much expense as only a very small portion of his time will be required. It may be possible to get the services of the watermaster for the stream at a small additional expense to administer the water of this ditch.

4. That strict compliance with the terms of the decree be had with respect to points of diversion of the various rights.

DITCH CAPACITIES.

All ditches on the creek for the lands in the lower reaches have ample capacities for the amounts decreed to them with the exception of the Carrothers ditch for waters of the 1885 right, which ditch in the upper reaches will not carry to exceed 100 inches, without overflowing its banks and spreading over a large area of

the gravelly creek bottom and wasting into the deep porous soil.

At any event some action should be taken immediately looking to an equitable division of these waters, as much of the lands are dependent upon the early spring flood, due to low flow of the summer season, and at the present time with no watermaster on the stream the water is being turned in and out of the various diversions so often that the greater part of it is utalized in losses in the creek bed.

Respectfully submitted by

Myron S. Swenson
Civil Engineer

DEPARTMENT OF RECLAMATION OF THE STATE OF IDAHO.

IN THE MATTER OF THE APPLICATION
OF JAMES F. CAROTHERS TO HAVE THE
USE OF CERTAIN WATER WHICH HAS HERE-
TOFORE BEEN DECREED TO HIM TO BE USED
UPON CERTAIN LANDS IN OWEHEE COUNTY,
CHANGED TO OTHER LANDS IN SAID COUNTY,
WHICH APPLICATION WAS FILED WITH THE
DEPARTMENT OF RECLAMATION ON APRIL,
22, 1921.

APPLICATION TO CONTEST.

WILLIAM KOEPPE.

Contestant.

William Koeppe, hereinafter referred to as Contestant, a resident of Owyhee County, Idaho, hereby enters his protest against the application of said James F. Carothers, hereinafter referred to as Contestee, to transfer the use of certain water to other lands described in said application, for the following reasons, to-wit:

I.

That the contestant is the owner of the North Half of the Southeast Quarter of Section 31, Township 4 South Range 1 East, B.M., situated in Owyhee County, Idaho, and is also the owner of the North Half of the Southeast Quarter and the South Half of the Northeast Quarter, and Lot One in Section 1, Township 5 South Range 1 West, B.M., and alleges that there was decreed to him, in the case of J. M. Neal v. Mike Hyde, et al., by the District Court of the Third Judicial District in and for said County, 174.30 inches of water, dated July 19th, 1908, which water was decreed to him for use on the first above described tract of land, and that in the same action there was decreed to him for the last described tract of land 288 inches of water, dated from March 11th, 1908, all of which water for both tracts of land were decreed from Brown's Creek, in said County; that said lands are situated about four miles below the lands owned by said Carothers, and from which he seeks to have the use of said water changed.

II.

That the land which said Carothers is now irrigating with said water consists of about 27 acres, and said Brown's Creek runs through said irrigated land; that said Carothers is irrigating a narrow strip of land on each side of said creek and the waste and seepage from such irrigation flows back into the channel of said creek and increases the flow thereof, and this contestant has for a number of years last past received the benefit of such seepage and waste water, and it will be greatly to his injury if the said contestee is permitted to change the use of said water as prayed for in his application, since the contestant could receive no benefit whatever from the waste or seepage of such water, if such change of use is granted.

III.

Contestee states in his said application that one inch of water is required to irrigate the land to which he desires such water transferred. Contestant alleges that under and by virtue of said decree there was decreed to said land 122.95 inches, and if it requires only one inch to the acre to irrigate such land, contestee has more than one inch to the acre already decreed to said land.

IV.

Contestant alleges that said contestee is the owner of only a one half interest in the land to which he has made application to have his said water transferred.

V.

That if said application is granted it will greatly injure and damage the contestant if the contestee is permitted to convey said water through the said Koeppel ditch.

VI.

That on account of the injury that contestant will sustain if said application is granted, the contestant hereby protests against the transfer of the use of said water, and asks that said application be denied.

William Koeppel
CONTESTANT.

Sullivan & Sullivan
HIS ATTORNEYS.
Residence Boise, Idaho

Contestee Exhibit # 1

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

FINDINGS OF FACT.

This suit was originally commenced in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, by the Thousand Springs Land & Development Company, Limited, a corporation, and transferred by consent of the parties to Ada County. J. M. Neil, as successor in interest to the original plaintiff, was made plaintiff in its stead.

The Snake River Irrigation Company was originally a party defendant, having made its appearance by demurrer to the complaint but took no further part in the proceedings.

George Ulrich, a party defendant, made his appearance by answer and cross-complaint, but abandoned his claim and offered no proof thereon although he, himself, appeared as a witness in the case.

The Defendant, Murphy Land & Irrigation Company entered its appearance by A. E. Robinson, its receiver, by demurrer, which demurrer was by the court over-ruled. The company through its receiver refused to plead further and its and his default, for failure to answer, was thereupon duly entered.

In addition to the defendants sued in the original complaint, who appeared in person or by their successors in interest, other parties were brought into, or voluntarily entered the case, as follows:

William Hardiman and Patrick Hardiman were made parties defendant at the request of the principal defendants, represented by Messrs. Hawley, Puckett & Hawley, with the consent of the plaintiff. A disclaimer was filed by William Hardiman.

John I. Stull, Thomas Henderson and Alexander Younie, voluntarily submitted themselves to the jurisdiction of the court, and, by consent of the parties and the orders of the court, were made parties defendant and permitted to file answers and cross-complaints herein.

The cause came on regularly to be heard on the 2d day of December, 1913, before the court, without a jury; upon the plaintiff's amended complaint and the answers and cross-complaints of the various defendants (each and every of the allegations of each and every of the several cross-complaints of the several defendants, by stipulation of the parties, being deemed denied for the purposes of the suit); Messrs. N. M. Ruick (now deceased) and B. W. Oppenheim, appearing as attorneys for the plaintiff, and Messrs. Hawley, Puckett & Hawley, D. A. Dunning, and J. J. McCue and J. C. Johnston, appearing as attorneys for various defendants and cross-complainants;

Whereupon, witnesses on behalf of said plaintiff and the several defendants were sworn and examined and documentary evidence introduced, and the cause having been argued, both orally and by written briefs, the same was submitted to the court for decision, and the court now being fully advised in the premises, files findings of fact and conclusions of law herein, as follows:

THE SUBJECT MATTER.

I.

This suit is to determine the relative rights of various parties to the action to the use of waters of Catherine Creek, and to its tributaries, Brown's, Hart's and Pickett Creeks, which latter is subdivided near its head, one branch being known as Bates Creek. Brown's, Hart's, Pickett and Bates Creeks head in the Owyhee Mountains west of Oreana, in Owyhee ~~Mountain~~ County, and run in a general northeasterly

direction. Pickett and Hart's Creeks unite at a point in Section 30, Township 4 South, Range 1 East, just east of the Boise Meridian, line, forming Catherine Creek, which thence flows in an easterly direction; Brown's Creek unites with Catherine Creek about a mile and a quarter below, near the middle of Section 29, Township 4 South, Range 1 East; Catherine Creek is itself a tributary of Castle Creek (a tributary of Snake River), flowing into the latter near its mouth.

GENERAL CHARACTERISTICS OF LANDS AND SOURCES OF
WATER SUPPLY.

II.

The streams above mentioned are fed from the northerly slope of the Owyhee Mountains, the water shed tributary to the streams is mostly low in elevation and bare of any saving growth of timber, there being some timber on the lower slopes of the mountains, but this is sparse and scrubby, and also some brush in the gulches and canyons.

The watershed is quite steep and rugged, having a fall of 80 to 100 feet to the mile and steeper as one ascends to the mountains, and is cut with deep canyons and gulches.

The formation is basaltic in the lower slopes in the section immediately surrounding the town of Oreana, which is located on plaintiff's lands, and granitic higher up. The basaltic formation of the Snake River desert changing to the granitic, metal-bearing formation of the Owyhee mountains, the dividing line being plainly marked as one ascends to the lands lying highest upon these streams.

The soil, watered from these streams, is a gravelly loam, having great porosity and on account of this fact and the heavy slope requires a great deal of water to successfully raise crops.

The streams are small with small catchment areas, the run-off from precipitation and melting snow being quick

and heavy due to the steep slopes and the barrenness of the watershed.

The water in all of the streams, on the average, flows in a considerable amount, commencing generally in April, rapidly decreases in June and almost completely ceases in July or August.

The crops raised are principally forage crops, although garden truck, berries and fruit are raised for family consumption. The surrounding country being public range, alfalfa for feeding stock is the principal agricultural product of the country.

3.

All of the lands mentioned in the pleadings herein and involved in this controversy and for which water is demanded for irrigating purposes are situate in the small valleys through which said streams run, and constitute a part of the great Snake River Valley.

The lands of the plaintiff are more extensive than those of all of the defendants combined and are situated on and along Catherine Creek, commencing at the confluence of Hart's and Pickett Creeks; where the valley widens out. Brown's Creek flows into Catherine Creek upon the lands of the plaintiff. The lands of B. H. Hyde, one of the defendants, are also situated in the lower valley, adjoining the lands of the plaintiff.

4.

Above the lands of plaintiff and defendant B. H. Hyde, the valleys are small, the ranches being generally a few hundred feet wide, commonly designated "Shoe string" ranches, parallel to the streams and extending in narrow strips along both sides.

5.

The land along the streams involved was first settled in 1864 and 1865, since which time additional settlers have

come in from time to time and the area under cultivation has been gradually increased. At first little more was done, by way of irrigation, than to increase the growth of the natural grasses of the country for the purpose of raising hay and furnishing winter pasture for stock, -- stock raising upon the nearby public range being the principal industry of the country. Some market gardening was done in the early days for the purpose of supplying the mining camps around Silver City, and some grain was also raised.

6.

All of the lands described in the pleadings herein are arid in character and require the artificial application of water thereon in order to raise crops of any kind, and profitably and successfully to cultivate the same.

7.

Excepting the waters of Catherine Creek and its tributaries, there is no water available for the irrigation of said lands.

THE ISSUE.

8.

The evidence shows that with respect to all of the lands in question in this suit, irrigation has been continuous from the various dates of the first reclamation of the several tracts down to the present time. It appears from the evidence that the first diversions of the parties were gradually increased, and the enlargement of the use is so imperceptible that it is impossible to fix a time when the various appropriations began to interfere with each other. The quantity of water flowing in the several streams varied from year to year, depending upon the snow fall in the mountains, and several witnesses testified to the complete absence of water for irrigation during one or two seasons. While the evidence shows

that irrigation may not have been carried on each and every year in the same amount, the beneficial use of the water has been reasonably constant up to the present time, with no intention to discontinue definitely the use thereof. No distinction as to the right of present use, except that of priority, is found among the various tracts of land involved in the suit.

DUTY OF WATER.

9.

The lands of the plaintiff require three inches of water per acre, continuous flow, measured under a four-inch pressure, for their proper irrigation and cultivation. The lands of each and every of the defendants and cross-complainants require, for their proper irrigation and cultivation, five inches per acre, continuous flow, under a four-inch pressure, fifty inches of water, under a four-inch pressure, being the equivalent of one cubic foot per second, as prescribed by the law of Idaho.

Defendants William Koeppe, Albert Herman Koeppe, Thomas Henderson and John I. Stull have pleaded, introduced in evidence and relied upon applications, permits, certificates and licenses of the State Engineer of the State of Idaho, and as to such defendants the duty of water, as fixed in the said respective applications, permits, certificates and licenses, is accepted by the Court as the duty of water for the lands of said defendants, respectively, and the said defendants were estopped, by their reliance upon the said applications, permits, certificates and licenses, respectively, and their pleading of the same, from asserting or demanding a different duty of water.

PRIORITIES AND AMOUNTS.

10.

The plaintiff and the several defendants and cross-complainants, claimants to the use of the water involved in

this action, are the owners, in the possession and entitled to the possession of the several tracts of land after the name of each, respectively, in the following table. The acreage of each tract under irrigation is also found, as shown in said table. For the irrigation of the said tracts of land and for domestic use, and the watering of live stock, the said parties and their grantors and predecessors in interest (the original appropriator being indicated for convenience of reference), by means of dams and ditches of sufficient size and capacity, appropriated on the dates set opposite their names, out of the waters of Catherine Creek or its tributaries, the respective amounts of water set opposite each name, as indicated in the following table:

RIGHTS APPURTENANT.

11.

The waters of the several creeks above mentioned in the amounts and as of the times hereinbefore found have been diverted for and used upon the subdivisions of land set opposite each diversion respectively, for the purpose of irrigating the same. The said diversion and use are necessary for the purpose of irrigating and cultivating the land the the growing crops thereon and the right to the use thereof is appurtenant to the said respective tracts of land.

BENEFICIAL USE.

12.

Each and all of the parties hereto referred to in Finding No. 10 and their predecessors in interest, during the irrigating season of each year since the several dates of appropriation of the several streams referred to, has and have beneficially used the said water upon said lands for the irrigation and cultivation thereof.

FINDINGS CONCERNING CERTAIN PARTIES.

13.

The defendants, Murphy Land and Irrigation Company, Limited, A. E. Robinson, as Receiver thereof, Snake River Irrigation Company, George Ulrich, and William Hardiman, were not, at the commencement of this action, and are not now, the owners or users of any of the waters of Catherine Creek or its tributaries, or entitled to the use thereof.

14.

The defendants, Alva Read and Frank Read, were at the commencement of this suit, and ever since have been and now are, copartners, doing business under the firm name and style of Read Brothers.

15.

The defendants, James E. Neiss and James Torrance,

were at the commencement of this suit, and ever since have been and now are, copartners, doing business under the firm name and style of Neiss and Torrance.

FINDINGS CONCERNING AFFIRMATIVE DEFENSES.

16.

The lands of the plaintiff are exceptionally valuable for stock raising purposes, and now are, and during all of the time since the settlement thereof, have been largely used as a stock ranch and for stock raising purposes and for the growing of crops and pasture necessary for such purposes.

The evidence shows that, in addition to the use of the waters of the several streams appropriated by the plaintiff and his predecessors in interest and by certain of the defendants, for the cultivation of his and their said lands and the growing of crops thereon, the plaintiff, and his predecessors in interest and certain of the defendants, including the defendant Patrick Hardiman, beneficially applied said waters to portions of said lands for the purpose of enhancing their value and use as pasture, and the court finds that such use was and is a beneficial use of the said waters.

Each and all of the so-called springs, the waters of which are claimed by the several defendants and cross-complainants, are either tributaries and feeders of the creeks aforesaid or are a part of the flow of said creeks, the flow of the waters of said creeks being at certain places partially underground and coming to the surfact again in those places where the bedrock under said streams is near the surface of the bed thereof. None of the defendants and cross-complainants is entitled to the waters of any spring or so-called spring, referred to in the pleadings or evidence as distinguished from the flow of the creeks themselves.

Neither the plaintiff nor his predecessors in interest abandoned the use of the waters of said creeks nor discontinued their use for such length of time as to constitute an abandonment or forfeiture thereof.

The appropriation and diversion by defendants and cross-complainants of the waters of said creeks above the lands of the plaintiff diminishes the flow thereof and does not increase the flow of the waters of said creeks during the latter part of the irrigating season nor extend the time during which water flows down said streams..

The defendants and cross-complainants have not, neither has any of them, been in the continuous adverse possession and use of the waters of any of said creeks to the exclusion of the plaintiff from the possession and use thereof at any time or for any period.

PRIOR ADJUDICATION.

17.

The decree heretofore entered on the 16th day of April, 1898, in the District Court of the Third Judicial District of the State of Idaho in and for Owyhee County, in Judgment Book 4, at pages 223 and 227, inclusive, in the case of Micheal Hyde, plaintiff, v. William Hardiman and Patrick Hardiman, defendants, is valid and binding, upon the parties thereto and their privies and successors in interest, anything in the foregoing findings to the contrary notwithstanding.

The plaintiff herein, J. M. Neil, is the successor in interest of Michael Hyde, plaintiff in said former adjudication, and the defendant herein, Patrick Hardiman, is the same person named as defendant in said former adjudication and also the successor in interest of the other defendant therein, William Hardiman.

The rights sued upon the causes of action in said

former adjudication and in this suit are identical, as between the plaintiff, J. M. Neil, and the defendant, Patrick Hardiman.

Said decree has no relation to the other parties to this suit and is not binding upon them.

By said decree it is provided:

"It is ordered, adjudged and decreed that the plaintiff (Michael Hyde, predecessor of the plaintiff herein, J. M. Neil) have by reason of an appropriation, diversion and beneficial use, made subsequent to that of the said defendants, to the amount hereinafter specified, the right to divert and use three hundred and seventy inches measured under a four inch pressure of the waters of those certain streams described in plaintiff's complaint and known as Pickett and Catherine Creeks and their tributaries for domestic purposes, the watering of live stock, and for the purpose of irrigating the lands above described.

"That the defendants (predecessors of Patrick Hardiman, defendant herein) have by reason of an appropriation, diversion and beneficial use, prior to that of the plaintiff, the right to divert and use to the extent of their needs for domestic purposes, the watering of live stock and for irrigating the lands described in their said answer and in said action, twenty-seven (27) inches, measured under a four inch pressure of the waters of said creeks, And in making said appropriation and use they shall have the right to turn in and through their said ditches (for the purpose of getting a flow) described in their said answer ninety (90) inches of the water of said streams, provided, that at the point where said Pickett Creek leaves the defendants' said lands, the volume of said stream shall be as great as it was at the point or points where the defendants may make said diversion at the time and

times of said diversion less twenty-seven (27) inches of water, which the defendants are entitled to use, as aforesaid, it being decreed, in other words, and it being the meaning of this decree that all the water turned through said ditches is to be returned to said creek or creeks without diminution except the twenty-seven inches to which the defendants are entitled as aforesaid. And the said defendants ~~are~~ shall not detain said amount turned into said ditches in excess of the said twenty-seven (27) inches so as to in any way interfere with the plaintiff's free use of his full appropriation."

The waters decreed in said former adjudication are not in addition to the appropriations hereinbefore in these findings awarded, but are the same appropriations, though this court finds such appropriations to be of different dates and dif- different amounts. The reaffirmance of said former decree is not to be construed as a double or additional appropriation.

In order to effect an equitable distribution of the waters of Pickett Creek between the plaintiff, J. M. Neil (as successor to Michael Hyde, plaintiff in said former adjudication) and the defendant, Patrick Hardiman (successor to defendants in said former adjudication), and the owners and users of the waters of said stream, defendants herein, the court finds that it will be necessary for the said appropriations to be distributed as follows: Out of any waters of the said streams to which either J. M. Neil or Patrick Hardiman are entitled by virtue of the decree herein, there shall first be distributed to said Patrick Hardiman 27 inches, with the right to flow 90 inches through his ditches to secure the same, in accordance with the terms of said former decree, and then out of the remaining rights to which either of said parties shall be entitled, there shall be distributed to plaintiff,

J. M. Neil, the 270 inches of the waters of Pickett and Catherine Creeks decreed in said former suit; thereafter any other waters of said streams to which said parties may be entitled shall be distributed in accordance with the priorities awarded by the decree herein.

CONCLUSIONS OF LAW.

And from the foregoing facts, the court finds the following conclusions of law:

1.

The plaintiff and the several defendants and cross-complainants herein named are entitled to a judgment and decree, respectively, for a right to use of the waters of Catherine Creek and its tributaries, situated in Owyhee County, State of Idaho, to the extent of their needs for irrigation and domestic use and the watering of live stock upon the lands described after each appropriation, respectively, the number of inches of water (Measured under a four inch pressure) set opposite each name, as set forth in the table in the Tenth Finding of Fact above, each fifty inches thereof to be equivalent to a flow of one cubic foot per second, as prescribed by the law of Idaho, the priorities of said appropriations to date from the times stated in said table in connection with each appropriation, respectively.

2.

The decree heretofore entered on the 16th day of April, 1898, in the District Court of the Third Judicial District of the State of Idaho in and for Owyhee County, in Judgment Book 4, at pages 223 and 227, inclusive, in the case of Michael Hyde, Plaintiff, v. William Hardiman and Patrick Hardiman, defendants, is valid and binding upon the plaintiff herein, J. M. Neil, as successor in interest of Michael Hyde, plaintiff in said former adjudication, and upon the defendant

herein, Patrick Hardiman, who is the same person named as defendant in said former adjudication and also the successor in interest of the other defendant therein, William Hardiman.

Said former decree has no relation to the other parties to this suit and is not binding upon them.

Under and by virtue of said former decree, Patrick Hardiman, defendant herein, is entitled to divert and use to the extent of his needs for domestic purposes, the watering of live stock and for irrigating the lands hereinbefore described, 27 inches, measured under a four-inch pressure, of the waters of Pickett Creek, which right is prior to the right of the plaintiff, J. M. Neil. In the making of his said appropriation, the defendant, Patrick Hardiman, has the right to turn in and through his ditches (for the purpose of getting a flow) 90 inches of the waters of said stream, provided he returns to the said creek, without diminution all of said flow, except the 27 inches to which he is entitled. The plaintiff, J. M. Neil, is entitled, under said former decree, to divert and use to the extent of his needs for domestic purposes, the watering of live stock and for irrigating the lands hereinbefore described, 370 inches, measured under a four-inch pressure, of the waters of Pickett and Catherine Creek.

The waters decreed in said former adjudication are not in addition to the appropriations awarded in this suit, but are the same appropriations, though this court finds such appropriations to be of different dates and for different amounts. The reaffirmance of said former decree is not to be construed as an award of a double or additional appropriation. And, in order to effect an equitable distribution of the waters of Pickett Creek as between the plaintiff, J. M. Neil (as successor to Michael Hyde, plaintiff in said former adjudication) and defendant, Patrick Hardiman (successor to defendants in said former adjudication) and the other owners and users of the waters of said stream, defendants herein, it shall be decreed

that out of any waters of the said stream to which either the said J. M. Neil or the said Patrick Hardiman are entitled by virtue of this decree, there shall first be distributed to said Patrick Hardiman the 27 inches of water, with the right to flow 90 inches through his ditches to secure the same, in accordance with the terms of said former decree, and then out of the remaining rights to which either of said parties shall be entitled hereunder, there shall be distributed to plaintiff, J. M. Neil, the 370 inches of the waters of Catherine and Pickett Creek decreed to his predecessor in said former suit; and that thereafter any other waters of said stream to which said parties may be entitled shall be distributed in accordance with the priorities awarded in the decree herein.

3.

The parties hereto should place at their respective points of diversion the means for measuring the amount of water to be diverted under the provisions of the decree to be entered herein.

4.

The several parties to this action whose rights to the use of the waters of said streams are of even date, are entitled, whenever the amount of water flowing in the channel of said streams is insufficient in quantity to supply all of said parties with the amounts herein awarded, to share in the use of the available supply in the proportion that the several quantities awarded as of the same date, bear to the total available supply for said rights, but subject to the right of prior appropriators.

5.

Each and every party hereto, his agents, attorneys, employees, privies and successors in interest, shall be enjoined and restrained from interfering, in any manner, with the rights of prior appropriators of the waters of Catherine Creek and its tributaries, as awarded in the decree herein, and from obstructing

using and wasting the waters of said streams to the injury of such prior appropriators.

6.

Each party shall pay his own costs and disbursements herein.

Let judgment be entered accordingly.

Dated Oct. 7 1915.

Charles F. McCarthy

District Judge;

(ENDORSED):

Filed October 7th 1915

at 2:10 o'clock P.M.

Stephen Utter

Clerk

By Thos E. Powell

Deputy Clerk.

Contestant's Exhibit No 2

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA.
(Transferred from Owyhee County.)

J. M. NEIL,

Plaintiff,

v.

MIKE HYDE, WILLIAM KOPPE
and others,

Defendants.

GEORGE F. BROWN and
JAMES E. MURPHY, a co-
partnership as Brown &
Murphy, successors in
interest to J. M. Neil,

Plaintiffs in
this supplemen-
tal proceeding,

v.

WARREN G. SWENDSEN, Commis-
sioner of Reclamation of
the State of Idaho, S. T.
BAER, Deputy Commissioner
of Reclamation, and LEONARD
ALDRICH, Water Master on
Catherine Creek and its
tributaries,

Defendants in
this supplemen-
tal proceeding.

APPLICATION FOR ORDER IN AID OF
THE ENFORCEMENT OF THE JUDGMENT.

STATE OF IDAHO)

County of Ada)

ss.

George F. Brown, being first duly sworn, deposes and says:

1.

On the 7th day of October, 1915, there was entered in the
above entitled court in the above entitled action wherein J. M.
Neil was plaintiff and Mike Hyde, William Koppe and others were

defendants a decree adjudicating the respective priorities to the use of the waters of Catherine Creek and its tributaries including Brown's Creek in Owyhee County, State of Idaho, by which among other things the said plaintiff, J. M. Neil, was awarded certain rights to the use of the waters of Catherine and Brown's Creeks as follows, to-wit:

Out of Catherine Creek below Brown's Creek as of date October 1, 1869, 402 inches.

Out of Catherine Creek below Brown's Creek as of date April 5, 1879, 210 inches.

Out of Catherine Creek below Brown's Creek as of date January 8, 1884, 24 inches.

Out of Brown's Creek as of date March 16, 1885, 168 inches.

All of which allotments of water were prior in time to the allotments to any of the other users of Brown's Creek.

That the Supreme Court of the State of Idaho thereafter affirmed the said decree. That the files in said action and the decree entered therein are matters of record in this court and reference is hereby made to the judgment roll in said action and affiant prays that the same may be considered by the court in this proceeding the same as if fully set forth herein.

A certified copy of said decree was by the clerk of said court duly filed as required by law in the office of the state engineer of the State of Idaho and is now on file in the department of reclamation of the State of Idaho, the successor to the duties of the said state engineer.

2.

That the complainants in this proceeding, that is to say, George F. Brown, the affiant, and James E. Murphy, are a copartnership under the firm name and style of Brown & Murphy, and by

proper conveyances from the said J. M. Neil are the owners of the water rights hereinbefore particularly set out.

3.

That the defendant in this proceeding, Warren C. Swendsen, is the duly appointed, qualified and acting commissioner of reclamation of the State of Idaho and as such the head of the department of reclamation. That the defendant, S. T. Baer, is the duly appointed, qualified and acting deputy commissioner of reclamation of the State of Idaho. That such officers are the officers required by law to execute the laws relative to the distribution of water in accordance with rights of prior appropriation and to supervise the distribution of water by the various water masters of the state. That the defendant, Leonard Aldrich, is the duly elected, qualified and acting water master upon Catherine Creek and its tributaries in Owyhee County, State of Idaho. That each and all of said defendants are required by law to distribute the water of Catherine Creek and its tributaries, including Brown's Creek, in accordance with the provisions of the decree hereinbefore referred to.

4.

That on the 29th day of April, 1920, the defendant Leonard Aldrich as water master aforesaid, acting under instructions from the department of reclamation of the State of Idaho and in violation of the decree aforesaid distributed the water of Brown's Creek to which these petitioners are entitled by right of priority to other allottees thereof whose rights are subsequent to the priorities of these complainants, thus depriving these complainants of the use of any of the waters of Brown's Creek. That thereafter and on or about the 4th day of May, 1920, the defendant, S.T.

Baer, assuming to act in his official capacity as deputy commissioner of reclamation, and the said Leonard Aldrich as water master of Catherine's Creek and its tributaries, one or both of them, but with the knowledge of both, did again in violation of the decree entered in the suit above referred to and in violation of their statutory duty to distribute the waters of said stream in accordance with the decree of this court distribute the water of Brown's Creek so decreed to the plaintiff in said suit to subsequent allottees of said water and deprive these complainants thereof. This affiant is informed by the said defendant, Leonard Aldrich, and believes and therefore states that the said defendant, S. T. Baer, acting in his official capacity aforesaid further instructed the said Leonard Aldrich as water master hereafter not to distribute the waters of Brown's Creek in accordance with the provisions of said decree but to distribute the same to other parties to said suit who by said decree were awarded priorities thereto as of later dates than the plaintiffs. Your affiant therefore states that the defendants in this supplemental proceeding will continue to deprive these plaintiffs of the waters of Brown's Creek to which they are entitled by decree of this court until this court by proper order enforces obedience by said defendants to the provisions of said decree.

WHEREFORE affiant on behalf of the copartnership aforesaid petitions your honorable court to issue an order returnable forthwith requiring the defendants in this proceeding as the officers required by law to enforce said decree to show cause before this

court why they should not be punished for a contempt of said court in disobeying the decree thereof.

Geo. F. Brown

Subscribed and sworn to before me this 6th day of May, 1920.

Jay M. Parrish

Notary Public in and for the
State of Idaho, Residing at
Boise, Ada County therein.

(SEAL)

OPPENHEIM & LAMPERT
Attorneys for Plaintiffs in
Supplemental Proceeding,
Residence, Boise, Idaho.

Filed May 6, 1920.

(Same Title of Court and Cause):

ORDER TO SHOW CAUSE.

Upon reading and filing the affidavit of George F. Brown charging and showing that Warren G. Swendsen, Commissioner of Reclamation of the State of Idaho, S. T. Baer, Deputy Commissioner of Reclamation of the State of Idaho, and Leonard Aldrich, Water Master of Catherine Creek and its tributaries in Owyhee County, Idaho the officers required by law to execute the laws relative to the distribution of water in accordance with the right of prior appropriation, are distributing the waters of Catherine Creek and its tributary Brown's Creek in Owyhee County, State of Idaho, in violation of the decree of this court heretofore, to wit, on October 7, 1915, entered herein, in an action wherein J. M. Neil was plaintiff and Mike Hyde, William Korppe and others were defendants:

IT IS ORDERED That the said Warren G. Swendsen and S. T. Baer and Leonard Aldrich show cause before this court at the court

room thereof in Boise, Idaho, on the 17th day of May, 1920, at 10 o'clock, a.m. why they should not be punished for a contempt of said court for such disobedience.

AND IT IS FURTHER ORDERED that this order be served on the said Warren G. Swendsen, S. T. Baer and Leonard Aldrich by delivering to them personally a copy thereof with a copy of said affidavit of George F. Brown thereto attached at least 5 days before the date of the hearing of said order to show cause.

Dated this 6th day of May, 1920.

Charles P. McCarthy

District Judge.

(Same Title of Court and Cause):

ANSWER.

Comes now the defendants W. G. Swendsen, Commissioner of Reclamation, State of Idaho, and S. T. Baer, Deputy Commissioner of Reclamation, in their own behalf and not otherwise, in response to the order of this court made and entered on the 6th day of May 1920, in the above entitled cause, and show as cause why they should not be punished for a contempt of this court in relation to the matters and things set forth and referred to in said order as follows, to-wit:

I.

These defendants and each of them deny that they have violated the decree heretofore made and entered in said cause, at any time, and deny that they or either of them, have deprived complainants, or any of them, of the use of any of the waters of Brown Creek at any time.

II.

Further, defendants say that the matters and facts set forth

in the verified application of George F. Brown on file herein, does not state facts sufficient to constitute a cause of action against these defendants, or either of them, nor facts sufficient to show defendants, or either of them, guilty of any contempt of this court whatsoever.

III.

Further answering in said matter, these defendants and each of them allege that the point at which Brown & Murphy, a co-partnership, divert the water of Brown Creek awarded to them by the decree above referred to, is some distance below the point at which William Koppe diverts the waters of said Creek for his use; that while the complainants Brown & Murphy, a co-partnership, are entitled under the terms of said decree to a priority of right over the said William Koppe, the channel of said Creek is of such character between the said two diversion points that it is only when the water in said Creek is running at a high stage that it does not sink between the same and become lost; that at the time or times mentioned in the application herein the water of the creek was at such a low stage that if the entire volume were allowed to flow past William Koppe's diversion point, none of the same reached the diversion point of said Brown & Murphy and therefore, unless the same was turned out to William Koppe at his point of diversion, same became utterly lost by sinking and could be applied to no beneficial or economical use whatever; That for said reasons defendants did order said waters be delivered to said William Koppe at his said point of diversion; that defendants and each of them, disavow and disclaim any intent to show any contempt or discourtesy for this court^{but} were actuated in their said actions solely by reason of the fact that they considered it their duty as executive officers of the State of Idaho under the circumstances hereinbefore set forth, to distribute said waters as they did for the

purpose of preventing waste and applying the same to economical and beneficial use for the best interest of the State of Idaho.

Attorney General, State of Idaho.

First Assistant.

Both residing at Boise, Idaho.
ATTORNEYS FOR DEFENDANTS.

S T A T E O F I D A H O }
COUNTY OF ADA } ss.

S. T. Baer, being first duly sworn deposes and says that he is one of the defendants above named; that he has read the above and foregoing answer and knows the contents thereof and believes the facts therein contained to true.

Subscribed and sworn to before me this 18th day of May, 1920.

Notary Public.

(Same Title of Court and Cause):

DEMURRER TO ANSWER AND MOTION
TO STRIKE THEREFROM.

COME NOW the plaintiffs in this supplemental proceeding and demur to paragraph number III of the answer herein upon the ground that the same does not constitute nor tend to constitute a defense to the complaint herein.

The plaintiffs move to strike paragraph III of the said answer and particularly that portion thereof reading as follows:

"The channel of said creek is of such character between the said two diversion points that

it is only when the water in said creek is running at a high stage that it does not sink between the same and become lost; that at the time or times mentioned in the application herein the water of the creek was at such a low stage that if the entire volume were allowed to flow past William Koeppe's diversion point none of the same reached the diversion point of said Brown & Murphy and therefore unless the same was turned out to William Koeppe at his point of diversion same became utterly lost by sinking and could be applied to no beneficial or economical use whatever."

And also such additional allegations in said paragraph III as are dependent upon said allegation for the reason that the exact question of fact so alleged was in issue in the main suit of Neil v. Hyde and was therein adjudicated in favor of the plaintiff, J. M. Neil, to whom the plaintiffs in this supplemental proceedings are successors; and the said allegations do not constitute nor tend to constitute a defense in this proceeding.

Oppenheim & Lampert

Residence, Boise, Idaho,
Attorneys for Plaintiffs in
this supplemental proceeding.

(Same Title of Court and Cause):

STIPULATION.

It is hereby stipulated by and between counsel for respective parties in this supplemental proceeding that the denial contained in paragraph I of the answer that the defendants or either of them have deprived complainants or any of them of the use of any of the waters of Brown's creek at any time is a conclusion

predicated upon the facts alleged in paragraph III of the answer and that should the court grant plaintiff's motion to strike the said paragraph III from the answer the said allegation in paragraph I raises no question of fact.

OPPENHEIM & LAMPERT

Residence, Boise, Idaho,
Attorneys for Plaintiffs in
this supplemental proceeding.

Attorney General of the State
of Idaho.

First Assistant to Attorney
General.

Residing at Boise, Idaho,
Attorneys for Defendants.

(Same Title of Court and Cause):

ORDER.

Coming on to be heard the above entitled matter, on the application of Brown and Murphy, plaintiffs in this supplemental proceeding, for an order in aid of the enforcement of the judgment, on the answer of Swendsen, Baer and Aldrich, plaintiffs in this supplemental proceeding, on the order to show cause, and on the stipulation of the parties, the cause being submitted to the court for decision on said pleadings and files without the introduction of evidence, the court finds that the defendants and each of them did on April 29, 1920, with knowledge of the decree of the above entitled court entered in the above entitled action on October 7, 1915, violate said decree by distributing the waters of Brown's Creek covered and awarded by said decree

in a manner contrary to and in violation of the provisions of said decree, said act being committed in aid of and in the interest of one William Koppe, a party to said action, and in violation of the rights of Brown and Murphy, plaintiffs in this supplemental proceeding, and successors in interest of J. M. Neil, the plaintiff in the original action. The court does not find, however, that in committing said act the defendants or either of them were actuated by any intent or desire to show contempt or discourtesy for this court, and finds that they were acting under a mistaken idea of the law and their duty. The court concludes that Warren G. Swendsen, S. T. Baer and Leonard Aldrich, defendants in this supplemental proceeding, are and each of them is guilty of contempt of this court, and its judgment, by reason of said act. It not appearing, however, that said defendants or either of them were actuated by an intent to show contempt of this court or its judgment, but rather by a mistaken idea of the effect of the judgment of the law, and of their duty, the court concludes that they be not punished in this matter by fine or imprisonments.

Charles P. McCarthy

Filed October 9, 1920
Book "R" of Judgments, page 376.

August 30, 1921

Re:
Application for Transfer ✓
J. H. Carothers, Applicant,
Case No. 83, Water District 14 B
Appeal from Decision.

Hon. Roy L. Black,
Attorney General for Idaho,
Boise, Idaho

Dear Sir:

For your information there is inclosed herewith copy of summons and complaint in the case of William Koeppe, Plaintiff vs. W. G. Swendsen, Commissioner of Reclamation, and J. F. Carothers, Defendants, the said action being in effect an appeal from the decision of this department in granting a certificate of transfer of a certain water right on Brown's Creek, Owyhee County, to which you will find attached a copy of the order of the department and a copy of the certificate issued thereunder from which the appeal is taken.

I don't know what if any, appearances may be necessary on the part of the state. The fact is, the state is not the real party in interest, as I see the matter, but that the defendant, J. F. Carothers, who was the applicant for transfer of this case, is the real party in interest.

I have not notified Mr. Carothers of this appeal, he being a party to the action. I take it that he has been served with the summons and copy of complaint. At this writing I am not advised as to who his attorney is.

Please acknowledge receipt of the foregoing so that our records will show their disposition.

Very truly yours,

Commissioner of Reclamation

WGS:P

RECEIVED

SCANNED
OCT 22 2004

Certified copy of Carothers application for
transfer secured by Wm. Koeppe, July 21, 1921.

July 25, 1921.

Re: Transfer Case No. 83.
Water District 14B.

Mr. Jas. F. Carothers,
Oreana, Idaho.

Dear Sir:

You are advised that under date of July 22, 1921, Wm. Koeppe, through his attorneys, Eldridge and Morgan, filed notice of an appeal from the decision of this Department in the above stated transfer application, the said appeal being taken pursuant to the provisions of the statutes, in the District Court of the Third Judicial District in and for Owyhee County.

You are further hereby notified that the State, not being the real party in interest will make no appearance in this matter, but that any protection that is afforded your rights or interests in this action must necessarily be had through yourself or your attorney.

Very truly yours,

WCS:MB

Commissioner of Reclamation.

Card 1



Handwritten notes and markings, including several vertical lines and illegible scribbles, located in the lower-left quadrant of the page.

MICROFILMED
with film
from
film

June 7, 1921.

Re: Cert. Trans. 304. J. F. Carothers.

Messrs. Sullivan & Sullivan,
Attorneys at law,
Boise, Idaho.

Gentlemen:-

Am enclosing herewith supplement to Certificate of Transfer
of Water Right issued to Mr. J.F. Carothers.

Very truly yours,

W. G. SWENDSEN,

Commissioner of Reclamation.

By _____
Chief Clerk.

S-



June 7, 1921.

Re Cert. Trans. No.304.

Mr. J. F. Carothers,
Oreana, Idaho.

Dear Sir:-

Am enclosing herewith supplement to certificate of transfer
issued you May 31st.

Very truly yours,

W. G. SWENDSEN,

Commissioner of Reclamation.

By _____
Chief Clerk.

S

RECORDED

PETERSON & COFFIN
LAWYERS
CARLSON BUILDING

J.H. PETERSON
T.C. COFFIN

POCATELLO, IDAHO

June 1, 1921.

Mrs. Clara Brown,
Chief Clerk-Reclamation Department,
Capitol Building,
Boise, Idaho.

Dear Mrs. Brown:

In preparing Order and Certificate of Transfer, in the case of the person whose name I do not recall, but which Order and Certificate were signed by me yesterday, I neglected to incorporate a statement as follows, which I wish you would, if the same has not already been sent out, put in:

"Nothing in this certificate shall be construed as having any bearing whatever upon the right of the applicant, the petitioner herein, to convey water through the ditch of protestant, such right of way matter being entirely out of the jurisdiction of this department".

If the certificate has been sent out and the order entered of record, write the petitioner, giving him the foregoing Notice, and send a copy thereof to Judge Sullivan.

Very truly yours,


COMMISSIONER OF RECLAMATION

WGS-BEP

Dictated by Mr. Swendsen, but signed in his absence by Miss Peterson.

RECEIVED
JUN 1 1921
IDAHO DEPT OF RECLAMATION

April 28, 1921.

Publisher The Nugget,
Bruneau, Idaho,

Dear Sir:—

Am enclosing herewith notice of transfer of water right which please publish once a week for two consecutive issues of your paper, the expense of such publication to be paid by Mr. J. F. Carethers, of Oreana, to whom proof of publication should be sent prior to the date of the hearing.

Very truly yours,

W. G. SWENDSON,

Commissioner of Reclamation.

N-

By _____
Chief Clerk

APR 29 1921

KIRTLAND I. PERKY

D. E. BRINCK

LAW OFFICES OF
PERKY & BRINCK
MECARTY BUILDING
BOISE, IDAHO

Boise, Idaho,
April 26, 1921.

Commissioner of Reclamation,
City.

Dear Sir:-

At the request of James F. Carothers, we enclose
herein his application for a change of place of use of water,
with corrections as we understand you required.

If anything further is desired, will you please advise
us?

Very truly yours,

PERKY & BRINCK

By 

DEB' CV

Encl.

Notice of Proposed Transfer of Water Right

Notice is hereby given that.....J. P. Carothers.....of Oreana
Idaho.....,has applied to the Commissioner of Reclamation of the State of Idaho
 for a certificate authorizing him to transfer the use of 1.2 second feet
 of the water of Brown's Creek,
 from the land upon which it is now used, i. e. NE¹SW¹ & NW¹SE¹ Sec. 27, T. 5 S., R. 1 W., B.M.
SW¹SW¹, NE¹SW¹ & NW¹SE¹ Sec. 27 T. 5 S. R. 1 W., B.M.
 to the following described tract.....SW¹SE¹ Sec. 1, NW¹NE¹ & NE¹NW¹ Sec. 12, T. 5 S., R. 1 W., B.M.

And that on the 16th day of May, A. D. 19121, at 10 A.M., at the Department of Reclamation, Capitol Building, Boise, Idaho.
 before the Commissioner of Reclamation, or his authorized agent, the opportunity will be given to any and
 all persons to appear and present for his consideration any reason or reasons why a certificate should
 not be issued authorizing such transfer.

W. G. Swendsen,

Commissioner of Reclamation

C. J. Franklin, Civil Engineer, who measured the ditches on Brown's Creek in Owyhee County, in 1913, and prepared plats of the land and ditches, and made a report thereof, which were introduced in evidence at the trial of the case of J. M. Neal v. Mike Hyde, et al., in the District Court of the Third Judicial District of Owyhee County, testified, among other things, as follows:

At f. 1951, Reporter's Transcript in said case:

Q. What is the soil embraced in these farms or ranches?

A. It is a gravelly, sandy soil, a sandy loam.

Q. How is it about being porous?

A. It has considerable porosity, in a good many instances, underlaid with strata of gravel or sand, as shown by the cutting on the creek banks.

Q. What does this necessitate, so far as the use of water is concerned?

A. It would, with the slope, require a considerable amount of water for irrigation.

At f. 1953:

Q. How would it be so far as a large per cent. of the run-off reaching the streams themselves instead of being absorbed by the soil?

A. Where the ground isn't obstructed by timber and a heavy growth of vegetation, the water gets away faster--more of it reaches the streams than otherwise would.

Q. What is the general character of the crops raised in that vicinity, so far as your observation extends?

A. They raise alfalfa, grain and some orchards and gardens; a general production of farm crops, principally, however, being forage crops and grain; the gardens and orchards were small; I don't think there are any commercial orchards in that community at all.

Q. Simply for family consumption?

A. Yes.

Q. How are the valleys embraced in the area involved, as to whether large or small?

A. They are small.

Q. When speaking of their being small, how would you describe their width, so far as irrigable land is concerned?

A. Very narrow. I think the description that would fit most of them would be to call them shoe-string ranches, if you may use the expression; they are very narrow and long.

Q. The farming section necessarily would be a narrow strip, as a usual thing along the side?

A. Yes.

James F. Carothers, the party who makes the application in this matter, also testified in said Neal-Hyde case, and among other things he testified that he was acquainted with William Koeppe, the contestee, and had been acquainted with his land on Brown's creek for a number of years. His testimony begins at f. 3112 of the Reporter's Transcript in said case. He testified that he had resided on said Brown's creek since 1901; that he examined the flow of water in said creek for a great many years.

F. 3125.

Q. You have examined the flow of Brown's creek for a good many years, haven't you?

A. Yes sir.

Q. Based upon your observation I will ask you to state whether or not in your opinion that water which flows through the canyon at the point where Albert and William Koeppe divert water into their ditch would in low water season, normal flow of Brown's creek, reach any point of diversion on the Neil ranch?

A. I don't think it does. *I don't think it does. 3139*

F. 3140.

Q. Just give some other time that you have observed the creek and that the flow of the water did not go through?

A. I have also saw the water sinking below the canyon about where Koeppe took his first ditch out; it may have run a little below it, but I saw the water taken out in his ditch there and carried down towards the Neil ranch a mile and a half I think any way below where the water was flowing in the creek; after it sank in the creek it could be carried a mile and a half farther on and turned loose that much closer to Mr. Neil. This is one reason I conclude that it is an advantage to him to bring this water out in the ditch. The evaporation is so much less after it is taken out of the creek bed. You can run it over many rows of alfalfa, irrigate quite a strip of land and turn it back into the creek, the waste into the creek. The evaporation is so hot in the canyon.

F. 3151.

Q. You think if they take out the Neil waters that will benefit Mr. Neil?

A. Yes, sir, I think the further they carry the water on the surface towards the Neil ranch the more it will help him. I have experimented with that same thing on my own field.

F. 3159.

Q. Then you are reducing thereby the quantity of water that is below in the channel of the creek at that point where you turn it out, don't you?

A. No, I don't think so not only since ~~*****~~ As I say before, when this surface water doesn't flow through I do not consider that by taking it out and carrying it into a ditch and carrying it closer to a man's ranch--that that is injuring the man's flow of water a particle.

F. 3161.

F. 3161.

Q. You dont let up at all?

A. I am using water on my field, and the land is rather steep and bed rock at the lower end of the field and it apparently seems to be as much water going at the lower end of the field, raising and running there as there is above.

Q. You simply want to use the water there regardless of any rights of the Neil ranch at all.

A. I have turned the water loose to see if Mr. Koppe could recover any better amount of water and Koppe told me he couldnt.

F. 3162.

Q. Do you think that hardly fair?--

A. The water in my field runs into the channel of the creek as long as I am irrigating.

F. 3163:

Q. Taking water out of the creek would help dry up the channel, wouldnt it?

A. Yes, if you did not irrigate the land close to the creek, a long strip along there may be 150 or 200 yards or longer the rows are, and it runs right back into the creek after you take it out.

See

Robert Landor was a witness in said case, and testified at f. 2111 as follows:

Q. When Governor Hawley asked you whether the water could escape or not you did not pretend to say whether it could escape underground or not?

A. Well, the way I understood the question it would drain from the ground into the channel.

P.2112.

Q. You only want to be understood as saying that if the water is turned out on this land all surface water would flow back into the creek.

A. Yes sir.

The following are extracts from Finding No. 2, f.665, 666, and all of Finding No. 4, f. 668 of the Findings of Fact in said case of Neil v. Hyde, to-wit:

"The soil, watered from these streams, is a gravelly loam, having great porosity and on account of this fact and the heavy slope requires a great deal of water to successfully raise crops.

The streams are small with small catchment areas, the run-off from precipitation and melting snow being quick and heavy due to the steep slopes and the barrenness of the watershed.

The water in all of the streams, on the average, flows in a considerable amount, commencing generally in April, rapidly decreases in June and almost completely ceases in July or August.

The crops raised are principally forage crops, although garden truck, berries and fruit are raised for family consumption. The surrounding country being public range, alfalfa for feeding stock is the principal agricultural product of the country.

Above the lands of plaintiff and defendant B. H. Hyde, the valleys are small, the ranches being generally a few hundred feet wide, commonly designated "Shoe String" ranches, parallel to the streams and extending in narrow strips along both sides."

RECEIVED

APR 22 1921

Application for Transfer of Water Right

DEPARTMENT OF RECLAMATION

STATE OF IDAHO,

County of Owyhee } ss.

J. F. Carothers, being first duly sworn, deposes and says:
That his name is J. F. Carothers; that he is of lawful age, a citizen of the United States and of the State of Idaho, and that his postoffice address is Crema, Idaho.

That he is the owner and using a certain water right, bearing date of priority of apl 1, 1904 for (1) 1.9 cubic feet per second of the waters of Brown's Creek County of Owyhee, State of Idaho, decreed to J. F. Carothers by decree of Judge, Chas. P. McCarthy of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, in the case of J. M. Neill et al vs. Michael Hyde et al, said decree bearing date of Oct 7, 1915 (or obtained by virtue of License No. _____, issued by the State Engineer of the State of Idaho, dated _____, 19____, bearing date of priority of _____, 19____)

for the purpose of irrigating the following described lands situate, lying and being in Water District No. 14B in the County of Owyhee and State of Idaho, to-wit:

- (1) NW 1/4, NE 1/4, Sec 27, T 5S, R 1W, B. M.
(2) SW 1/4, NE 1/4, NW 1/4, Sec 27, T 5S, R 1W, B. M.

_____ and is the person (or representative of the corporation) to whom such right so issued, or has become the owner thereof in the following manner, i. e. _____

as per abstract of title of said water right hereto attached and made a part of this statement:

That said waters are now diverted from said stream in the SW 1/4 SW 1/4 of Section 27, Township 5S, Range 1W, B. M., and conducted to the above described lands through Carothers ditch as per map herewith and of this affidavit made a part;

That affiant and petitioner desires to abandon the use of 1.2 cubic feet per second of said water upon the above described land, and to convey and use same upon the following tract, situate, lying and being in the County of Owyhee and State of Idaho, to-wit:

- (3) SW 1/4 Sec 1, NW 1/4, NE 1/4 Sec 12, T 5S, R 1W, B. M.

That his reasons for desiring to make such transfer are as follows: ~~Don't require water in present place of use and wants to use it in new place.~~
Can use the water to better advantage in new place of use above specified

That he intends to divert and convey said 1.2 second feet of water to the tract of land last above described in the following manner, to-wit: In a ditch

built by Wm Koeppe + Alf Koeppe for the
irrigation of the land the said water is to
be transferred to

as set forth upon the map herewith; and that no one will be injured by such transfer.

WHEREFOR, Affiant and Petitioner prays that the Commissioner of Reclamation of the State of Idaho issue to him the proper certificate authorizing such transfer, in accordance with the provisions of Section 5582 of the Idaho Compiled Statutes.

Subscribed and sworn to before me this

J. F. Coarath
16th day of April
Applicant.

A. D. 19 21

H. E. Brink

APPLICANT WILL ANSWER THE FOLLOWING QUESTIONS:

From what stream is the water diverted? Brown's Creek

Where is the diversion point located? SW⁴ SW⁴ Sec. 27 T. 5 S. R. 1 W. B. M.

Through what ditch is it now conducted? Carothers ditch

How much land is now irrigated by the water sought to be transferred? 27 acres

Give the description: along the Creek on both sides in NW⁴ NE⁴
NE⁴ NW⁴ SE⁴ SW⁴ and SW⁴ SW⁴ Sec 27 T. 5 S. R. 1 W.

What is the total amount of water in inches, or second feet, dedicated to said land? 2.771 sec ft.

What kind of crops are being raised? Alfalfa

How much water per acre is now required to irrigate said land? 5 inches per acre

What will be the effect on the land now irrigated, if the use of water on it is discontinued? Part
will go back to desert character.

Give location of new point of diversion, if change is to be made. NW⁴ NE⁴ Sec 24 T. 5 S. R. 1 W. B. M.

Through what ditch will it be conducted after transfer? Koeppe ditch, Permit No. 3940.

How much water will be required per acre to irrigate the land to which this water is transferred?

one inch per acre

Do you claim any other water right for the land from which you seek to abandon the use of this water?

If so, give amount, date and source.

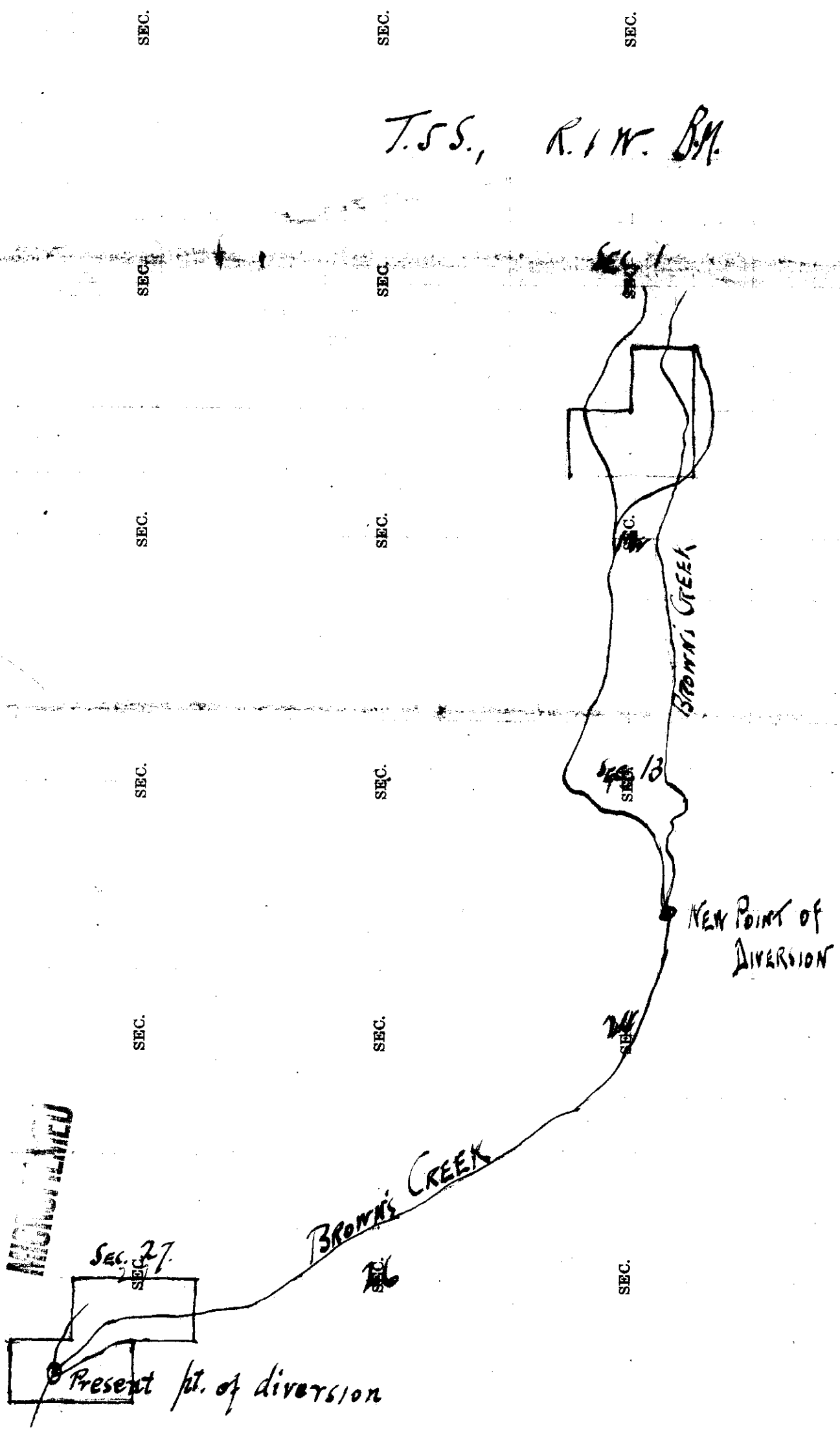
Is there now any other water right for the land to which you seek to make this transfer? If so, give amount, date and source. 2.4 sec ft decreed

Signed

J. F. Coarath
Applicant.

Name of Applicant JAMES F. CROTHERS

T. 5 S., R. 1 W. B. M.



STATE OF IDAHO,

County of

Owyhee

ss.

Thomas Henderson

and

G. F. Brown

being first duly sworn, each for himself, and not one for the other, deposes and says: That he is a citizen of the United States and of the State of Idaho, residing at Castle Creek & Creana that he is a user of water from Brown Creek, in Water District No. 14B County of Owyhee, State of Idaho; that he has read or heard read the foregoing affidavit and petition of J. F. Carothers and is familiar with its allegations and with the water right and lands therein mentioned and described and is not in any way interested in either, nor in any way related to said petitioner; that the statements and allegations therein made are true of his own knowledge; and that no one will be injured by the granting of the certificate authorizing the transfer therein petitioned.

Thomas Henderson

G. F. Brown

Subscribed and sworn to before me this

20th

day of

April

A. D. 1921

Martha Henderson

Notary Public Castle Creek Idaho

STATE OF IDAHO,

County of

Owyhee

ss.

I, Leonard Ubrich

Watermaster of

Creana

Water District No. 14B, County of Owyhee, State of Idaho, whose postoffice address is Creana Idaho, have read or heard read the foregoing affidavit and petition of J. F. Carothers, and, of my own knowledge, believe the same to be true as to all matters therein alleged, and that no one will be injured by the transfer prayed to be authorized; and I hereby endorse my approval of said petition, and request that the Commissioner of Reclamation issue the certificate of transfer as petitioned; or (do not approve of the issuance of the certificate of transfer prayed for) for the following reasons:

Watermaster, Dist. No. 14B

Leonard Ubrich

Dated at

Creana

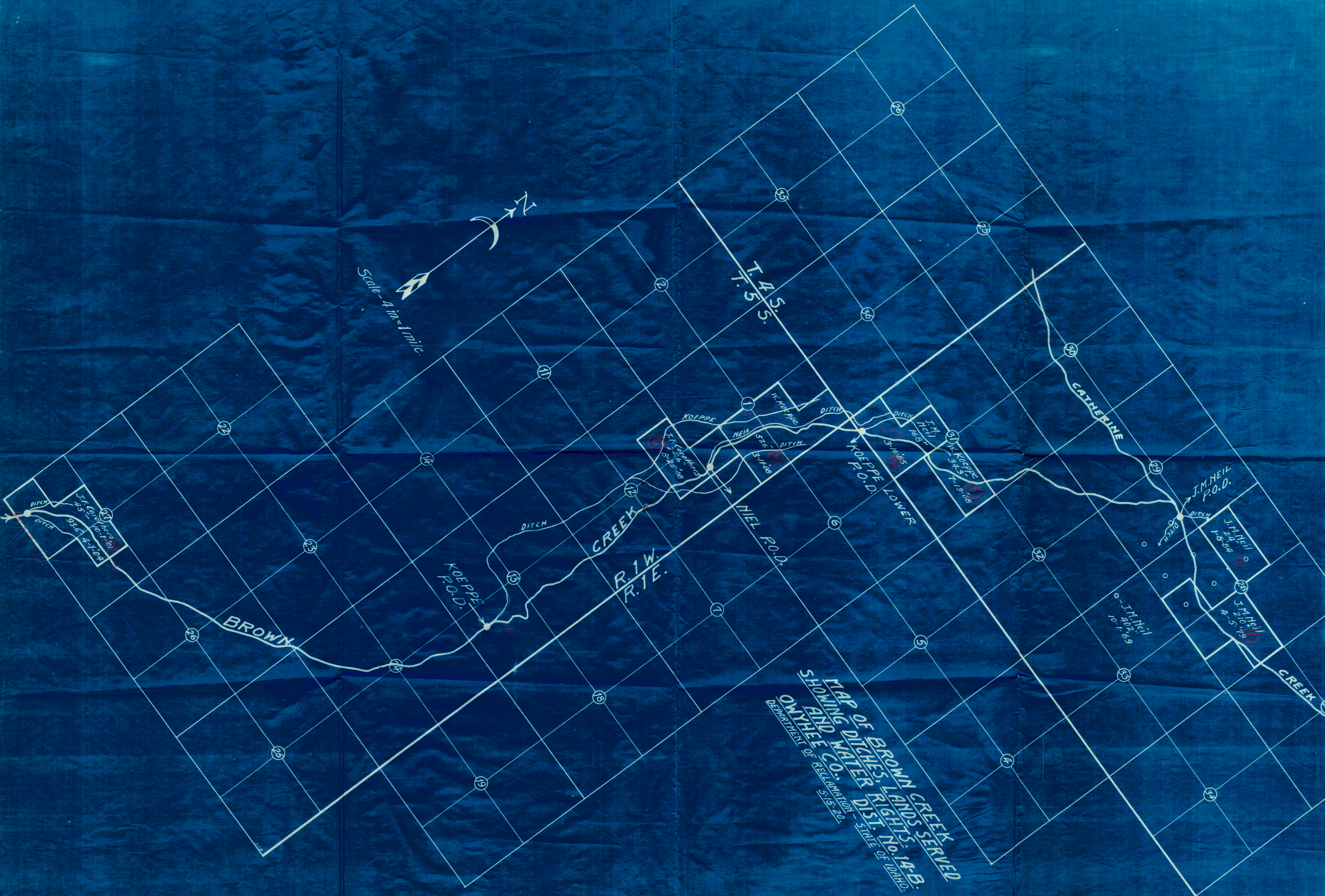
, Idaho, this

20th

day of

April

, 1921



Scale - 4 in = 1 mile

MAP OF BROWN CREEK SERVED
SHOWING WATER RIGHTS, DIST. No. 14-B.
OWYHEE & CO.
DEPARTMENT OF RECLAMATION - 5-15-20
STATE OF IDAHO