

DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO

Case No. 80CW67, consolidated with Case Nos. 80CW456 and 84CW175

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

REGARDING THE APPLICATION OF POLE CREEK ASSOCIATES AND WINTER PARK ASSOCIATES

IN GRAND COUNTY, COLORADO

THIS MATTER has come before the Court upon the application of Pole Creek Associates and Winter Park Associates for water rights, change of water rights and for approval of an augmentation plan. The Court, having considered the pleadings, the stipulations of the parties, and the evidence presented, and being fully advised in the premises makes the following findings of fact:

FINDINGS OF FACT

1. Name and Address of Applicant.

Pole Creek Associates and Winter Park Associates c/o Chuck Anema, 1660 South Corona, Denver, Colorado 80210; telephone (303) 744-0688

2. History of Case. The Applicants are represented by Holly I. Holder. The applications as originally published in 1980 requested nontributary water from the wells. Rulings of the referee were entered finding that both wells are nontributary in 1985, which rulings were protested by the State Engineer. In 1985, the Applicants obtained an order awarding attorneys fees against the State Engineer in the amount of \$1,338.75. The cases were consolidated in 1986. On March 31, 1987, the Applicants signed a stipulation with the State Engineer that, among other things, waived the award for attorney fees, conceded that the subject ground water is tributary, and required the Applicants to seek a plan for augmentation. Due to the change in the law defining nontributary water in Senate Bill 5, and pursuant to the stipulation with the State Engineer, the application was amended on December 8, 1992 to provide that the water from the Troublesome formation to be withdrawn from the subject wells is tributary to the Fraser River or its tributaries and to request approval of an augmentation plan to provide for replacement of depletions from pumping of the wells with water from other sources.

Statements of opposition were filed by the State Engineer of Colorado and the Division Engineer of Water Division 5 (the "State"), the City and County of Denver, acting by and through its Board of Water Commissioners, Winter Park Recreational Association and Fraser Valley Metropolitan Recreation District. No other statements of opposition have been filed and the time for filing such statements has expired. All of the parties have stipulated to the entry of this decree.

3. Water rights and structures to be augmented.

A. Skigate Well.

- (1) Location: In the NW1/4 of the SW1/4 of Section 1, T. 1 S., R. 76 W. of the 6th P.M. at a point 2300 feet north of the south section line and 200 east of the west section line of said Section 1.
- (2) Depth: 600 feet.
- (3) Pumping Rate: 200 gpm (0.44 cfs).
- (4) Amount: Not to exceed 136.5 acre-feet per year.
- (5) Date of Appropriation: July 17, 1972.

B. PCA Well.

- (1) Location: In the NW1/4 SE1/4 of Section 9, T. 1 S., R. 76 W. of the 6th P.M., at a point 2090 feet north of the south section line and 1470 feet west of the east section line of said Section 9.
- (2) Depth: 800 feet.
- (3) Pumping Rate: 300 gpm.
- (4) Amount: Not to exceed 99 acre-feet per year.
- (5) Date of Appropriation: October 12, 1983.

4. Description of property to be served. The Applicants intend to develop 173.3 acres described as shown on attached Exhibit A located in Section 9, Township 1 South, Range 76 West (the "Subject Property") into residential units and a golf course. Sewage treatment will be provided by a central Wastewater treatment the discharges of which will be located on Pole Creek at a point approximately 1400 feet from the East Section line and 850 feet from the South Section line of Section 4, Township 1 South, Range 76 West.

5. Water rights to be used for augmentation.

A. Return flows after use, or reuse, or by direct discharge from the subject wells.

B. Releases from Pole Creek Meadows Reservoir No. 1.

- (1) Location: the right abutment is located in the NE1/4 of the SE1/4 of Section 2, T. 1 S., R. 76 W. of the 6th P.M. at a point whence the Southeast corner of said Section 2 bears S24°00'E 1,740 feet.

- (2) Use: Recreational, piscatorial, fire protection, augmentation.
- (3) Date of appropriation: August, 1972.
- (4) Capacity: 52.2 acre feet, storage of which PCA has rights to 37.52 acre feet per year.
- (5) Decree: Case No. 85CW148, October 30, 1985.

C. Pearl Ditch and Rich Ditch.

(1) Pearl Ditch

- (a) Decreed location: Headgate located on the North bank of Pole Creek at a point whence the Southeast corner of Section 10, T. 1 S., R. 76 W. of the 6th P.M., bears N35° 15'W, 1311 feet.
- (b) Use: Irrigation.
- (c) Date of appropriation: May 18, 1891.
- (d) Flow Rate: PCA owns 1.445 cfs of the 2.0 cfs. 1.445 cfs is the subject of this case.
- (e) Decree: Civil Action No. 112 in District Court of Grand County entered August 11, 1906.

(2) Rich Ditch

- (a) Decreed location: Headgate located on the West bank of Crooked Creek at a point whence the Northeast corner of Section 4, T. 1 S., R. 76 W. of the 6th P.M., bears N15°E, 2600 feet.
- (b) Use: Irrigation.
- (c) Date of appropriation: May 5, 1892.
- (d) Flow Rate: PCA owns 0.891 cfs of the 3.75 cfs. 0.891 cfs is the subject of this case.
- (e) Decree: Civil Action No. 183 in District Court of Grand County, entered August 3, 1911.

In addition, by stipulation and agreement with the State, the Applicants have agreed to store and release into Pole Creek one acre foot of water upstream from the proposed development, from a location acceptable to the State. At the present time, the Applicants

intend to seek a contract for storage in Snow Mountain Reservoir #1 or #2, which are located generally in Section 7 of T1S, R76W, 6th P.M., or Section 12, T1S, R77W, 6th P.M., Grand County, Colorado.

6. Consumptive use of the Rich and Pearl Ditches. The Applicants own 23.76% (0.891 cfs out of a total of 3.75 cfs) and 72.25% (1.445 cfs out of a total of 2.0 cfs) of the Rich and Pearl Ditches, respectively. Applicants' share of the Pearl Ditch was used to historically irrigate 26.73 acres and the Applicants' share of the Rich Ditch (23.76%) was used to irrigate 33.98 acres. The Court finds that the historic annual consumptive use associated with the Applicants' use of the Pearl and Rich ditches is 20.05 acre-feet and 30.58 acre-feet, respectively. The area historically irrigated by the Applicants' ownership of the subject water rights is delineated on the attached map labeled Exhibit B.

7. Description of Operation of Plan for Augmentation. Depletions caused by the pumping and subsequent use of the subject wells shall be calculated as a percentage of total volume pumped. For the first 100 years of operation of the wells, the follow percentages shall be multiplied by the volumes pumped to compute the stream depletion.

Year	Above Pole Creek Development %	Below Pole Creek Development %	Total %
0 - 10	0.04	0.36	0.4
11 - 20	0.23	2.37	2.6
21 - 30	0.46	4.74	5.2
31 - 40	0.71	7.29	8.0
41 - 50	0.93	9.57	10.5
51 - 60	1.20	12.30	13.5
61 - 70	1.43	14.67	16.1
71 - 80	1.63	16.67	18.3
81 - 90	1.82	18.68	20.5
91 - 100	2.0	20.50	22.5

Augmentation water for out-of-priority depletions above the Pole Creek development shall be released from Snow Mountain Reservoir. Augmentation water for out-of-priority depletions below the Pole Creek development shall be released from Pole Creek Meadows Reservoir No. 1, by direct flow from the historic consumptive use associated with the Rich and Pearl Ditches, or by return flows that Applicants have maintained dominion and control over.

As it becomes necessary to replace depletions with the historic consumptive use of the subject ditches, the Applicants shall permanently cease irrigating all or a portion of the area associated with the Applicants' ownership of the Rich and Pearl Ditches. That area is delineated on Exhibit B. The land removed from irrigation shall be monumented on the ground and delineated on a map to the satisfaction of the Division Engineer.

For each acre of land permanently removed from irrigation, the Applicants shall be credited with 0.90 and 0.75 acre-feet per acre for the Rich and Pearl Ditches, respectively, subject to the following limitations.

1. The maximum consumptive use diversion rate shall not exceed 40% of the applicant's ownership of the subject water rights, provided the water is physically and legally available.
2. The Applicants shall maintain headgates, measuring devices, and by-pass structures to verify physical availability for the Rich and Pearl Ditches to the satisfaction of the Division Engineer.

For each acre removed from irrigation, the Applicants ownership of allowable ditch diversions shall be reduced by dividing the number of acres removed by the Applicants' total irrigated acres, which are 33.98 acres and 26.73 acres for the Rich and Pearl Ditches, respectively, and multiplied by the Applicants' ownership flow rate of the ditches. The Applicant shall be allowed to convey the consumptive use flow rates of the ditches to the Pole Creek Meadow Reservoir No. 1.

Return flows from the subject wells as metered by direct discharge from the wastewater treatment plant into Pole Creek may be utilized to replace depletions or for reuse purposes, along with any other return flows approved by the State Engineer pursuant to Para 8(E), herein.

Water stored in Pole Creek Meadows Reservoir No. 1 and Snow Mountain Reservoir under the Applicants ownership shall be charged, if applicable, with evaporation losses when out-of-priority at the rate schedule below:

<u>Month</u>	<u>Evaporation Rate</u> (feet)
July	0.40
August	0.38
September	0.31
October	0.21
Total	1.30

CONCLUSIONS OF LAW

8. The Water Court has jurisdiction over this proceeding pursuant to §§ 37-92-302, 37-92-304(6) and 37-92-305, C.R.S. This Court concludes as a matter of law that the application herein is one contemplated by law.

9. No owners of, or persons entitled to use water under a vested water right or decreed conditional water right will be injuriously affected by the operation of the plan for augmentation decreed herein.

JUDGMENT AND DECREE

The Findings of Fact and Conclusions of Law set forth above are hereby incorporated into the terms of this Decree as if the same were fully set forth herein.

10. Full and adequate notice of the application was given and the Court has jurisdiction over the subject matter, and over the parties whether they have appeared or not.

11. The withdrawal of ground water through the Skigate Well and the PCA Well will continue to deplete stream flows long after pumping from those wells has ceased. Consequently, Applicants hereby dedicate and the Court hereby decrees Applicants ownership portion of the water rights associated with the Pearl and Rich Ditches described in Paragraph 5 above to this Plan for Augmentation. Applicants shall retain ownership, control, and the right to use their portion of the Pearl and Rich Ditch water rights together with the herein decreed Plan for Augmentation, which means that they shall not sell, convey, encumber, or take any other action that would result in the separation of the Pearl and Rich Ditch water rights from this Plan for Augmentation. Furthermore, in order to provide notice to all potential purchasers of the terms and conditions of this decree, within ten (10) days of the date when this Findings of Fact, Conclusions of Law, Judgment and Decree is signed by the Court, Applicants shall record it with the Clerk and Recorder for Grand County, Colorado. This provision shall be binding on all successors-in-interest to the Applicants, including any homeowner association or similar common interest ownership entity that may be a beneficiary of this Plan for Augmentation.

12. Administration of Plan for Augmentation.

A. Reporting Frequency. Applicants shall report on accounting forms suitable to the Division Engineer for Water Division 5 all accounting necessary for the administration of this plan.

B. Meters. The Applicants shall install all meters and other measuring devices as required by the Division Engineer for the administration of this decree.

C. Curtailment. Pursuant to 37-92-305(8), C.R.S., the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

D. Delayed Implementation. Applicants shall not withdraw any water from the Skigate Well or the PCA Well until they have (i) secured the annual legal right to store no less than one (1) acre foot of water for release year round into Pole Creek as provided in Paragraph 5(C) above, and (ii) submitted adequate documentation of such legal right to the State Engineer. In the event that

such storage right is ever denied, lost, abandoned, or otherwise unavailable, Applicants shall immediately cease using all water withdrawn from the Skigate Well and the PCA Well for any uses other than in-house domestic until such right is restored.

E. Except for sewerer return flows that can be quantified by a measuring device, Applicants shall not use or reuse any portion of its return flows until the State Engineer has issued a written statement finding that the Applicants have demonstrated to the satisfaction of the State Engineer the exercise of dominion and control over such return flows. If the State Engineer declines to issue such a written statement when requested by the Applicants, then the Applicants may petition the Court for such a finding. Applicants shall provide written notice of the petition to the parties herein, and shall also pay for the water clerk to provide notice of the petition to the general public similar to that given a regular water court application pursuant to §37-92-302(3), C.R.S. Any person may participate in the proceedings concerning Applicants' petition, and the Applicants shall bear the burden of proof.

F. Due to the filing of the subject amended application involving a new source of water in 1992 and the republication of the same, Applicants' two wells are to be administered with a 1992 filing or adjudication date. Applicants agree to the administration of their water rights decreed herein as junior in priority to, and agree not to exercise or precipitate a call to the extent it would curtail Winter Park Recreational Association's water rights decreed, or to be decreed in Case Nos. 91CW240, 92CW319, 92CW332 and 92CW333.

13. The Applicants may withdraw the groundwater herein through the wells listed above at the locations listed above and in the average annual amounts and at the estimated average rates of flow specified therefor, subject to the limitations herein and the retained jurisdiction by this Court. Under no circumstances shall Applicants withdraw more than 136.5 acre feet annually from the Skigate well and 99 acre feet annually from the PCA well, for the purposes described in this plan for augmentation.

14. Applicants have complied with all requirements and met all standards and burdens of proof, including but not limited to §§ 37-90-137, 37-92-302, 37-92-304(6), and 37-92-305, C.R.S., to adjudicate their plan for augmentation, and are therefore entitled to a decree confirming and approving their plan for augmentation as described in the findings of fact.

15. The proposed plan for augmentation as described in the findings of fact, is hereby approved, confirmed and adjudicated, including and subject to the terms and conditions specified in the foregoing findings of fact.

16. No owners of, or person entitled to use water under a vested water right or decreed conditional water right will be injured or injuriously affected by the operation of the plan for augmentation as decreed herein.

17. Continuing Jurisdiction.

A. Pursuant to § 37-92-304(6), C.R.S., the Court shall retain jurisdiction over the Plan for Augmentation decreed herein for reconsideration of the question whether the provisions of this decree

are sufficient to prevent injury to vested water rights of others. The Court shall also have jurisdiction for the purpose of determining compliance with the terms of the augmentation plan.

B. The amount of replacement water available under this Plan for Augmentation is expected to be adequate to satisfy the stream depletions that are anticipated to result from the pumping of Skigate Well and PCA Well only if those wells are pumped for a period of one hundred (100) years or less. If the wells are pumped longer than one hundred (100) years, then additional augmentation water will probably be necessary. Therefore, if any amount of water is still being pumped from either of the wells listed herein after one hundred (100) years from the date of this decree, a rebuttable presumption shall exist that the now-decreed amount of replacement water available under this Plan for Augmentation is inadequate, and that vested water rights owned by others are being and will continue to be injured unless additional replacement water is made available.

C. Any person may invoke the Court's retained jurisdiction by filing a verified petition with the Court. That petition shall set forth with particularity the factual basis upon which the requested reconsideration is premised, together with proposed decretal language to effect the petition. The person lodging the petition shall have the burden of going forward to establish prima facie facts alleged in the petition, except as otherwise provided for herein. If the Court finds those facts to be established, Applicants (or their successors-in-interest) shall thereupon have the burden of proof to show that no owners of or persons entitled to use water under a vested water right will be injuriously affected by the operation of the Plan for Augmentation decreed herein.

ENTERED this 27th day of June, 1994

BY THE COURT:

Thomas W. Ossola

Thomas W. Ossola
Water Judge
Water Division 5
Colorado

Copy of the foregoing mailed to all
Counsel of record
Water Referee
Div. Engineer and
State Engineer
Date 6-27-94

Tony Bailey
Deputy Chm. Water Div. No. 5

Hilder
Cameron
Tricker
Johnson
Buckman 8

THE FOREGOING IS HEREBY APPROVED AS TO CONTENT AND FORM AND APPROVED FOR ENTRY BY THE WATER JUDGE.

FOR THE STATE AND DIVISION ENGINEERS FOR THE APPLICANT

HOLLY I. HOLDER, P.C.

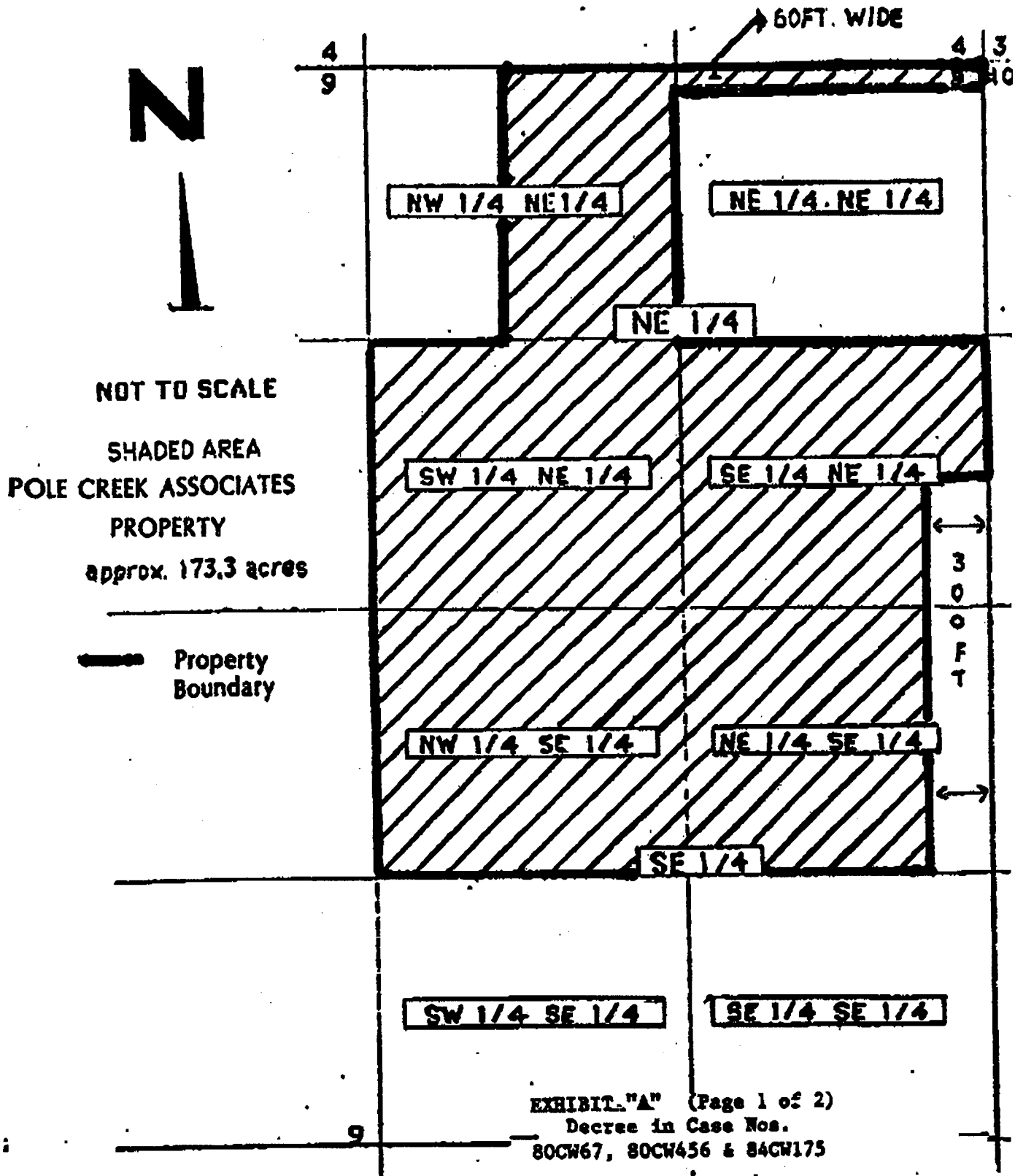
By Bradley W. Cameron
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By Holly Holder
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Attorney for Applicant

Attorney for the State and
Division Engineer

SECTION 9, TOWNSHIP 1 SOUTH, RANGE 76 W, 6th P.M.



1-25-94

John Water Consultants Inc.

1565 Gilman Street

LAW OFFICES

No. 6451 P. 17/37

Oct. 21 2003 11:54AM

PROPERTY LEGAL DESCRIPTION

SECTION 9, TOWNSHIP 1 SOUTH, RANGE 76 WEST 6TH P.M.

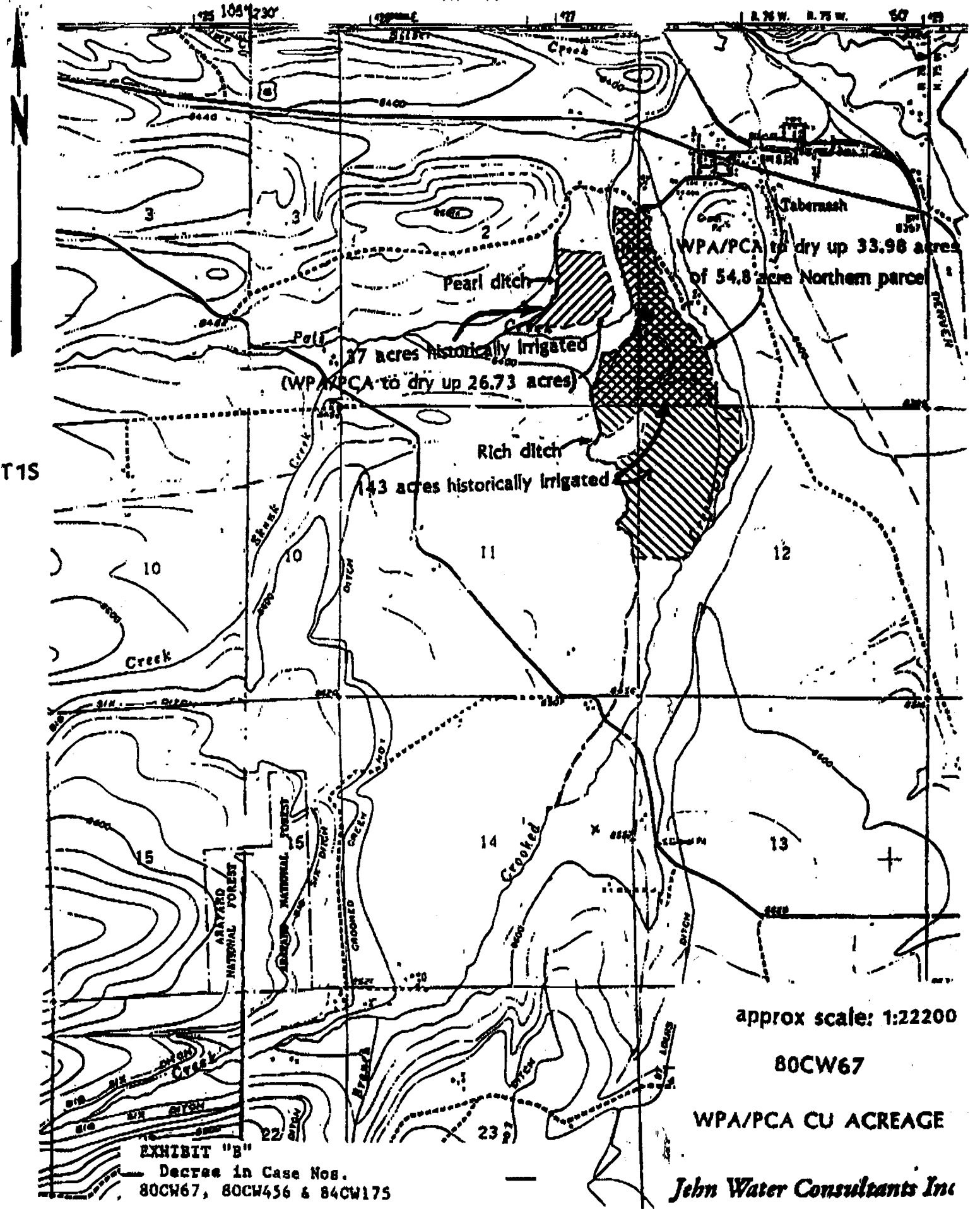
GRAND COUNTY

EAST 1/2 N.W. 1/4 N.E. 1/4	---	20.0 ACRES
EAST 1/2 E. 1/2 W. 1/2 N.W. 1/4 N.E. 1/4	---	5.0 ACRES
NORTH 1/2 S.W. 1/4 N.E. 1/4	---	20.0 ACRES
NORTH 1/2 S.E. 1/4 N.E. 1/4	---	20.0 ACRES
SOUTH 1/2 S.W. 1/4 N.E. 1/4	---	20.0 ACRES
SOUTH 1/2 S.E. 1/4 N.E. 1/4 EXCEPT THE EAST 300ft.	---	15.5 ACRES
NORTH 1/2 S.E. 1/4 EXCEPT THE EAST 300ft.	---	71.0 ACRES
NORTH 60ft. OF THE N.E. 1/4 N.E. 1/4	---	1.8 ACRES

TOTAL ACREAGE IS APPROXIMATELY 173.3 ACRES.

**EXHIBIT "A" (Page 2 of 2)
— Decree in Case Nos.
80CW67, 80CW456 & 84CW174**

11/11/10



T15

approx scale: 1:22200

80CW67

WPA/PCA CU ACREAGE

John Water Consultants Inc

EXHIBIT "B"
 Decree in Case Nos.
 80CW67, 80CW456 & 84CW175