IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT

****

No. 7394

FILED

SEP 20 1971

GRACE W. BELL
CLERK OF DIST. COURT

BY .....

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO THE WATERS OF SANTA ROSA CREEK (AKA THOMAS CREEK) AND ITS TRIBUTARIES IN HUMBOLDT COUNTY, STATE OF NEVADA.

FINDINGS OF FACT, CONCLUSIONS OF LAW
JUDGMENT AND DECREE

This matter came on regularly for hearing on the 3rd day of May, 1971, before the Honorable Llewellyn A. Young, District Judge of the above-entitled court presiding, the entire stream system being within Humboldt County, State of Nevada, and he being the Judge designated by NRS 533.165, to hear and having jurisdiction to hear the above-entitled matter, upon the State Engineer's determination of the relative rights of the petitioner and claimants to the use of the waters of the stream system of Santa Rosa Creek and tributaries, which Order of Determination and all related documentary evidence had been filed by the State Engineer. There being no exceptions to the Order of Determination filed/otherwise submitted to the Court at least 5 days prior to the date set for hearing as provided for under NRS 533.170 by the claimants or petitioner or any other person or persons, the matter was submitted to the Court for its decision.

Starr Hill, Jr., Surface Water Engineer and L. Edward Parmenter, Adjudication Engineer, appeared in the hearing and proceedings on behalf of the State of Nevada and the Office of the State Engineer. James A. Callahan, Esquire, appeared on behalf of claimant, Ether W. Westmoreland, who was also in attendance.

The record disclosed that the claimant had received a

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certified copy of the Court Order Setting Forth the Time and Place for Hearing on the Order of Determination.

The Surface Water Engineer thereupon, at the hearing, offered and there were received in evidence in support of the rights of the claimant, as set forth in the Order of Determination, verified affidavits, files and records of the State Engineer's Office respecting the rights of the claimant in and to the above-named stream system.

The Court, having duly considered the entire record, the evidence introduced and received directed that Findings of Fact, Conclusions of Law, and Judgment and Decree be entered accordingly.

FINDINGS OF FACT

I.

That on November 6, 1958, Ether W. Westmoreland, a water user on Santa Rosa Creek (also known as Thomas Creek) and its tributaries, filed with the State Engineer of the State of Nevada, a petition requesting the determination of the relative rights of the petitioner and other claimants to the waters of the aforementioned stream, situate in Humboldt County, State of Nevada.

That the State Engineer thereupon and in accordance with the provisions of NRS 533.090, made an investigation of all facts and conditions of and concerning the above-named stream system and its tributaries for the purpose of disclosing whether the determination of such rights was justified and filed his report thereon in the Office of the State Engineer of the State of Nevada. The report of the facts and conditions disclosed that a determination of the relative rights was justified, and the State Engineer made and entered his order on March 1, 1962, granting the petition for the determination of such relative rights in and to the waters of Santa Rosa Creek and its tributaries.

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That as a result of the State Engineer's investigation report, it was found that the waters of Santa Rosa Creek and its tributaries are being placed to beneficial use for irrigation, stock watering and domestic purposes as affirmed by Proof of Appropriation 01309, and Amended Proof of Appropriation 01313, filed in the Office of the State Engineer. Evidence contained in the title documents submitted by the claimant, relative to the land, indicates the present claimant and appropriator, Ether W. Westmoreland, is the successor in interest to vested rights initiated by his predecessors.

That on the 13th day of March 1962, and once each week for four succeeding weeks, the State Engineer did cause to be published a Notice of Order and Proceedings to Determine Water Rights in and to the waters of Santa Rosa Creek and tributaries in Humboldt County, State of Nevada, and that notice was duly given to all claimants as required by law. That on the 16th day of April, 1962, there was filed in the Office of the State Engineer an affidavit of the publisher of the Humboldt Star, exemplifying the Proof of Publication of the Notice of Order and Proceedings.

That the State Engineer did cause to be published on the 8th day of August, 1963, and once each week for four succeeding weeks, a Notice of Order for Taking Proofs to Determine Water Rights, in and to the waters of Santa Rosa Creek and its tributaries in Humboldt County, State of Nevada, and that notice was duly given to all claimants as required by law. That on the 9th day of September, 1963, there was filed in the Office of the State Engineer, an affidavit of the publisher of the Winnemuccca Humboldt Star and Battle Mountain Scout, exemplifying the Proof of Publication of Notice of Order for Taking Proofs.

That three extensions of one year each and one for six

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months were granted to the claimant of Amended Proof 01313, in which to submit Proofs of Appropriation and supporting maps, the final closing date being July 6, 1967. Amended Proof 01313, was filed in the Office of the State Engineer on September 1, 1967, and the supporting map was filed September 5, 1967.

That the State Engineer, in accordance with NRS 533.140, did enter and file in the records of his office, on the 2nd day of December, 1970, an Abstract of Claims, a Preliminary Order of Determination and Notice and Order Fixing and Setting Time and Place of Inspection, stating when and where the evidence taken or filed with him and the proofs of claims were open to the inspection of all interested persons; and that notice thereof was duly given to all claimants as required by law.

That the State Engineer, in accordance with NRS 533.160, entered in the records of his office, on the 19th day of February, 1971, an Order of Determination defining the rights of the claimants and appropriators to the waters of Santa Rosa Creek and its tributaries and that notice thereof was duly given to all claimants as required by law.

That upon the filing of the certified copy of the Order of Determination and original evidence with the Clerk of the Court of Humboldt County, State of Nevada, the Court, at the request of the State Engineer, made and entered an Order on the 1st day of March, 1971, setting a time for the hearing of any exceptions to the Order of Determination on Monday the 3rd day of May, 1971, at 1:30 o'clock in the afternoon of said day, in the court room of the Court House at Winnemucca, Nevada; and that the Clerk of the Court did furnish the State Engineer with a certified copy thereof.

That the State Engineer, in accordance with NRS 533.165, gave notice to the claimants by service of a certified copy of the

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Court Order Setting Time for Hearing.

That on the 10th day of March, 1971, and once each week for four succeeding weeks, the State Engineer did cause to be published the Court Order Setting Time for Hearing, and that thereafter on the 19th day of April, 1971, there was filed in the Office of the State Engineer an affidavit of the publisher of the Humboldt County Bulletin, exemplifying the Proof of Publication of the Court Order Setting Time for Hearing.

That the Court finds that all and singular, the Proceedings, Orders and Notices required by Chapter 533 of NRS were duly had, made and given as required by law, and that all and singular the matters and things contained in the record were done performed, given and made in strict compliance with the statute, and that this court had and has jurisdiction to hear and determine this matter.

II.

The Court Further Finds: That Santa Rosa Creek and its tributaries are situated within Humboldt County, State of Nevada.

III.

The Court Further Finds: That the names of the claimants and appropriators, the source of the water supply, the period of use, the duty of water, the diversion of water and method of use, measurement of water, stock watering and domestic use, change of place of use, and the rights of appropriation of the water, all as set forth in the Order of Determination are true, proper and correct, and all and singular the same should be approved and confirmed.

I. PREFACE

On November 6, 1958, Ether W. Westmoreland, a water user on Santa Rosa Creek (also known as Thomas Creek) and its tributaries, filed with the State Engineer of the State of Nevada, a petition requesting the determination of the relative rights of the peti-

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tioner and other claimants to the waters of the afore-mentioned stream, situate in Humboldt County, State of Nevada.

A field investigation was made of Santa Rosa Creek on August 21, 1961, by Roland D. Westergard, then Hydraulic Engineer and Charles C. Armuth, Jr. then Hydraulic Engineer, both of the Division of Water Resources. They found that facts and conditions justified the granting of the petition and that proceedings should be initiated to proceed with such determination.

On March 1, 1962, the State Engineer entered an Order granting the petition and made proper arrangements to proceed with the determination of the relative rights of the water users in accordance with NRS 533.090.

On August 2, 1963, the State Engineer entered a Notice of Order for Taking Proofs to Determine Water Rights.

II. CLAIMANTS

The investigation disclosed that the waters of Santa Rosa Creek and its tributaries are being placed to beneficial use for irrigation, stock watering and domestic purposes on lands of Ether W. Westmoreland, as affirmed by Proof of Appropriation 01309, and Amended Proof of Appropriation 01313, filed in the Office of the State Engineer. Evidence contained in the title documents submitted by the claimant, relative to the land, indicates the present claimants and appropriators, Ether W. Westmoreland, and Elaine Westmoreland are successors in interest to vested rights initiated by their predecessors.

Records filed in the Office of the State Engineer indicate Ether W. and Elaine Westmoreland are owners of record of Proof of Appropriation 0745, filed October 11, 1909, claiming a vested right to the use of water from Santa Rosa Creek. The claim was not substantiated by an investigation of the records or by conclusive

evidence submitted by the claimants. The claim under Proof 0745 has not been established, therefore, it will not be entered in the Decree.

Proof of Appropriation 01313 was filed in the Office of the State Engineer in 1914 and the supporting map was filed in 1911. The 1911 survey was done in considerable detail and its accuracy has been attested to by a 1967 survey. Acreages of harvest and diversified pasture as determined in the Decree have been calculated from the the 1911 plat because of its accuracy, detail and the date when culture was observed.

Three extensions of one year each and one for six months were granted to the claimant of Amended Proof 01313, in which to submit Proof of Appropriation and supporting maps, the final closing date being July 6, 1967. Amended Proof 01313 was filed in the Office of the State Engineer on September 1, 1967, and the supporting map was filed September 5, 1967.

The acreage north of Santa Rosa Creek in the NW¼ SW¼ Section 16, T. 35 N., R. 38 E., M.D.B.&M., is 8.7 acres greater on the plat of Amended Proof 01313, filed in 1967, than the plat of Proof 01313 filed in 1911. Since an acreage cannot be expanded after 1905 to claim a greater vested right, the plat supporting Proof 01313, filed in 1911, was used for calculating acreages for vested rights north of Santa Rosa Creek in the Decree.

Amended Proof 01313 and supporting plat depict acreages south of Santa Rosa Creek as all being diversified pasture. The plat of Proof 01313, filed in 1911, shows some harvest crop acreage south of Santa Rosa Creek. This indicates that harvest acreages south of Santa Rosa Creek have through the intervening years reverted to brush and grass from their harvest nature in 1911 and the Decree regards these acreages as diversified pasture. The

acreages determined by the Decree south of Santa Rosa Creek for diversified pasture were calculated from the plat of Proof 01313 filed in 1911.

The acreages from Amended Proof 01313 and supporting map were not used in computing acreages for vested water rights in the Decree; however, Amended Proof 01313 and supporting map were used in determining the type of culture south of Santa Rosa Creek.

III. SOURCE

Santa Rosa Creek is situated entirely within Humboldt County, approximately five miles south of Winnemucca, Nevada. The stream is comprised of two main tributaries, North Fork and South Fork, which head on the western slope of the Sonoma Range. The headwaters of the two forks consist of numerous small springs which continue to flow during extremely dry years. The stream is also fed by numerous small canyons during the early spring and when flash rain storms occur. The confluence of the two main tributaries is located approximately one mile above the mouth of the canyon and the stream flows in a westerly direction from that point for a distance of approximately five miles into Grass Valley.

IV. PERIOD OF USE

The irrigation season shall begin on March 1, and shall extend through October 31 of each year.

V. DUTY OF WATER

The seasonal duty of water on lands irrigated from Santa Rosa Creek and its tributaries is herein fixed and shall not exceed:

Class A----Harvest Crop----------4.0 ac.ft./ac./season

Class C----Div. Pasture----------1.0 ac.ft./ac/season

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VI. DIVERSION OF WATER AND METHOD OF USE

The claimants shall have the right to divert 2½ cubic feet per second of water per 100 acres of land irrigated, but not to exceed the seasonal duty as established herein.

The claimants or their successors in interest will not be required to take or use the amount of water allotted to them in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits, with the approval of the water commissioner and subject to the control and direction of the State Engineer.

VII. MEASUREMENT OF WATER

All measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as is practicable; the location if not selected by the State Engineer, to be approved by him. Each water user shall install and maintain at his own expense, substantial and easily operated regulating headgates and measuring devices in his ditch or ditches or channel. Due allowance for losses in ditches will be made by the State Engineer in case it becomes necessary.

Priorities are fixed by years and where the years are the same, the priorities are equal.

VIII. STOCK WATERING AND DOMESTIC

The right to divert and use the water for stock watering and domestic purposes shall be continued by the claimants named herein or their successors in interest at any time during the year, and such diversions shall be according to the dates of priority of the claimants and limited to the quantity of water reasonably necessary for such use.

The amount of water diverted for irrigation purposes shall

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not be increased by any amount to be used for stock and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stock watering and domestic purposes.

IX. CHANGE OF PLACE OF USE

All water allotted in the Decree shall be appurtenant to the place of use designated herein. Any water user desiring to change the point of diversion, manner of use or place of use of the waters allotted herein, must make application to the State Engineer for permission to make the change pursuant to NRS 533.345.

X. RIGHTS OF APPROPRIATION

From the Order of Determination and the evidence, both oral and documentary, submitted in support thereof, the Court finds that the name of the claimant and appropriator of the waters of Santa Rosa Creek and its tributaries, the source of the water supply, the means of diversion, the points of diversion for beneficial use, the period of use, the years of priority, the cultural acreages, the places of use, the legal subdivisions, sections, townships, ranges and the duty of water, are as listed, stated and set forth.

CONCLUSIONS OF LAW

From the evidence presented and received in this matter, and from the foregoing FINDINGS OF FACT, the Court makes the following CONCLUSIONS OF LAW:

I.

That the State Engineer has the right, authority and jurisdiction pursuant to Chapter 533 of NRS to make the investigation made by him, receive the proofs and maps, enter and file in his office the original Order of Determination and file a certified copy thereof in this Court, and to determine the relative rights of claimants and appropriators in and to the waters of Santa Rosa

Creek and its tributaries in Humboldt County, State of Nevada; that the State Engineer duly made all orders necessary and proper in connection therewith and entered the same in his office as required by Chapter 533 of NRS; that each and every notice required by law to be given herein to the claimants and appropriators was duly served, by the State Engineer in the manner and within the time required by Statute, and that the notices contained all of the statements required by law, and that the claimants and appropriators of the waters of the above-named stream system and its tributaries duly received the information and notices as required by law.

II.

That the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, had and has jurisdiction to hear and try this matter, and has jurisdiction to find, make and enter the foregoing Findings of Fact and these Conclusions of Law, and enter its Decree herein.

III.

That Ether W. and Elaine Westmoreland are the only claimants who were and are now the appropriators and users of the waters of Santa Rosa Creek and its tributaries on the date the Order of Determination was filed with the Clerk of the Court, and on the date of the trial and hearing of this matter.

IV.

That the irrigation season shall begin on March 1st and shall extend through October 31st of each year.

V.

That the seasonal duty of water on lands irrigated from Santa Rosa Creek and its tributaries is herein fixed and shall not exceed:

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Class A----Harvest Crop----------4.0 ac.ft./ac./season
Class C----Diversified Pasture---1.0 ac.ft./ac./season

VI.

That claimants shall have the right to divert 2½ cubic-feet per second of water per 100 acres of land irrigated, but not to exceed the seasonal duty as established herein.

That the claimants or their successors in interest will not be required to take or use the amount of water allotted to them in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits with the approval of the Water Commissioner and subject to the control and direction of the State Engineer.

VII.

That all measurements of amounts of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as is practicable; that the location if not selected by the State Engineer, is to be approved by him. That the water users shall install and maintain at their own expense, substantial and easily operated regulating headgates and measuring devices in their ditch or ditches or channels. That due allowance for losses in ditches will be made by the State Engineer in case it becomes necessary.

That priorities are fixed by years and where the years are the same, the priorities are equal.

VIII.

That the right to the diversion and use of water for stock watering and domestic purposes is to be continued by the claimants named herein or their successors in interest at any time during the year and such diversions shall be according to the dates of priority of the claimant and limited to the quantity of water reasonably

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necessary for such use.

That the amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stock watering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stock watering and domestic purposes.

IX.

That all water allotted in the Decree shall be appurtenant to the place of use designated herein. Any water user desiring to change the point of diversion, manner of use or place of use of the waters allotted herein must make application to the State Engineer for permission to make the change pursuant to NRS 533.345.

X.

That from the Order of Determination and the evidence both oral and documentary, submitted in support thereof, the Court finds that the names of the claimants and appropriators of the waters of Santa Rosa Creek and its tributaries, the source of the water supply, the means of diversion, the points of diversion for beneficial use, the period of use, the years of priority, the cultural acreages, the places of use, the legal subdivisions,sections, townships, ranges and the duty of water, are as listed, stated and set forth.

XI.

That the Order of Determination made, filed and caused to be entered of record in this matter by the State Engineer, should be affirmed.

JUDGMENT AND DECREE

THEREFORE, BY REASON OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREIN BEFORE SET FORTH, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT AS FOLLOWS:

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I.

That the State Engineer made all necessary and proper orders as required by law, and that each and every notice required by law was duly given to the claimants and appropriators; that the claimants and appropriators had full opportunity to appear and be heard in objection to and file exceptions to the Order of Determination; that the claimant and appropriator is the only claimant and appropriator of the waters of Santa Rosa Creek and its tributaries and this Decree determines the limit and extent of all vested water rights on the source.

That the Court has full and complete jurisdiction to hear, try and determine this matter and to make and enter herein, this Decree.

II.

That the flow of water from Santa Rosa Creek and its tributaries is being placed to beneficial use by Ether W. and Elaine Westmoreland for irrigation, stock watering and domestic purposes.

III.

That the irrigation season shall begin on March 1st and shall extend through October 31st of each year.

IV.

That the seasonal duty of water on lands irrigated from Santa Rosa Creek and its tributaries is herein fixed and shall not exceed:

Class A----Harvest Crop----------4.0 ac.ft./ac./season
Class C----Diversified Pasture---1.0 ac.ft./ac./season

V.

That the claimants shall have the right to divert 2½ cubic-feet per second of water per 100 acres of land irrigated, but not to exceed the seasonal duty as established herein.

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That the claimants or their successors in interest will not be required to take or use the amount of water allotted to them in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits with the approval of the Water Commissioner, and subject to the control and direction of the State Engineer.

VI.

That all measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated, or as near thereto as is practicable; the location if not selected by the State Engineer, to be approved by him. That the water users shall install and maintain at their own expense, substantial and easily operated regulating head gates and measuring devices in their ditch or ditches or channel. That due allowance for losses in ditches will be made by the State Engineer in case it becomes necessary.

That priorities are fixed by years and where the years are the same, the priorities are equal.

VII.

That the right to the diversion and use of water for stock watering and domestic purposes shall be continued by the claimants named herein or their successors in interest at any time during the year, and such diversions shall be according to the dates of priority of the claimants and limited to the quantity of water reasonably necessary for such use.

That the amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stock watering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stock watering and domestic purposes.

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VIII.

That all water allotted in this Decree shall be appurtenant to the place of use designated herein. That any water user desiring to change the point of diversion, manner of use or place of use of the waters allotted herein must make application to the State Engineer for permission to make the change pursuant to NRS 533.345.

IX.

That the name of the claimant and appropriator of the waters of Santa Rosa Creek and its tributaries, the source of the water supply, the means of diversion, the points of diversion for beneficial use, the period of use, the years of priority, the cultural acreages, the places of use, the legal subdivisions, sections, townships, ranges and duty of water are hereby adjudged as follows:

Proof No. : 01309

Claimants : Ether W. and Elaine Westmoreland

Source : Santa Rosa Creek (aka Thomas Creek) & Tributaries

Use : Irrigation, stock watering and domestic

Means of Diversion: Dam and Ditches

Point of Diversion:

NE¼ NW¼ Section 25, T. 35 N., R. 37 E., M.D.B.&M.

CULTURAL ACREAGE			LOCATION				DUTY OF WATER	
PRIORITY	HARVEST	DIVERSIFIED PASTURE	SUBD.	SEC.	T.N.	R.E.	C.F.S.	AC.FT.
1886	13.0	27.0	SE¼NE¼	26	35	37	1.000	79.0
1886		37.7	SW¼NE¼	26	35	37	.943	37.7
1886	8.0	30.9	NW¼SE¼	26	35	37	.972	62.9
1886	36.0	4.0	NE¼SE¼	26	35	37	1.000	148.0
1886	17.0		SE¼SE¼	26	35	37	.425	68.0
1886	23.0	16.4	SW¼SE¼	26	35	37	.985	108.4
TOTAL	97.0	116.0					5.325	504.0

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Proof No. : Amended 01313

Claimant : Ether W. and Elaine Westmoreland

Source: : Santa Rosa Creek (aka Thomas Creek) & Tributaries

Use : Irrigation, stock watering and domestic

Means of Diversion: Dams and Ditches

Points of Diversion:

1. Ditch No. 1, in the SE¼ SW¼ Section 15, T. 35 N., R. 38 E., M.D.B.&M., or at a point from which the NW corner of Section 22, T. 35 N., R. 38 E., M.D.B.&M., bears S. 89° 58' W., a distance of 2130 feet.

2. Ditch No. 2, in the SE¼ SE¼ Section 16, T. 35 N., R. 38 E., M.D.B.&M., or at a point from which the NE corner of Section 21, T. 35 N., R. 38 E.,M.D.B.&M., bears S. 22° 50' E., a distance of 410 feet.

3. Ditch No. 3, in the SW¼ SW¼ Section 15, T. 35 N., R. 38 E., M.D.B.&M., or at a point from which the SE corner of Section 16, T. 35 N., R. 38 E., M.D.B.&M., bears S. 74° 40' W., a distance of 410 feet.

	CULTURAL ACREAGE			LOCATION				DUTY OF WATER	
PRIORITY	HARVEST	DIVERSIFIED PASTURE		SUBD.	SEC.	T.N.	R.E.	C.F.S.	AC.FT.
1864	11.38	6.69	NW¼SW¼		16	35	38	0.451	52.21
1864		3.97	SW¼SW¼		16	35	38	0.099	3.97
1864	30.97	4.86	NE¼SW¼		16	35	38	0.896	128.74
1864	1.10	31.98	SE¼SW¼		16	35	38	0.827	36.38
1864	14.59		NW¼SE¼		16	35	38	0.365	58.36
1864	8.07	18.28	SW¼SE¼		16	35	38	0.659	50.56
1864	0.81		NE¼SE¼		16	35	38	0.020	3.24
1864	20.58	5.61	SE¼SE¼		16	35	38	0.655	87.93
	87.50	71.39						3.972	421.39

DONE IN OPEN COURT THIS 24th DAY OF August A.D. 1971

Llewellyn A. Young
District Judge

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