

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NO. 31-11845**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
Donald V. Shaff, Adjudication Bureau Chief

May 24, 2006

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I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Bilyeu's December 8, 2005, *Amended Trial Scheduling Order*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase number 31-11845, setting forth the basis for the Department's recommendation for this water right. The Report was prepared under the supervision of Karl J. Dreher, Director and Donald V. Shaff, Adjudication Bureau Chief.

The following employees have knowledge of the information contained in the Report: Carter Fritschle, Section Manager, Technical Support Section of the Adjudication Section and Shelley Keen, Water Rights Supervisor of the Water Rights Section.

II. SUMMARY OF THE ISSUES

At issue is the Department's recommendation for a groundwater right currently owned by Idaho Properties, LLC ("Idaho Properties")¹. In its Director's Report for Late and Miscellaneous Claims for Irrigation and Other Uses filed on April 22, 2005, the Department recommended water right number 31-11845. This recommendation was based on Special Master Bilyeu's January 30, 2004 *Order Recommending Partial Decree be Set Aside* in subcase numbers 31-7311, 31-2357 and 31-2395 wherein it was recommended that for water right number 31-7311, the "other provisions necessary" clause relating to the uncultivated land be deleted and that IDWR file an Amended Director's Report addressing only the uncultivated land and that IDWR assign a new water right claim number to that portion of the claim. On March 15, 2004, Judge

¹ Ownership was changed from Ben Jernberg to Idaho Properties, LLC. See *Notice of Completed Administrative Proceeding* filed with the SRBA on February 13, 2006.

Melanson endorsed the recommendations of Special Master Bilyeu and issued an *Order Dismissing Motion to Set Aside Partial Decrees and Setting Aside Partial Decree and Issuing Partial Decree for Water Rights 31-02357, 31-02395 & 31-7311*. This Order provided that the *Motion to Set Aside Partial Decrees* for water right numbers 31-2357 and 31-2395 is dismissed with prejudice. Judge Melanson further ordered that the partial decree for water right number 31-7311 be set aside and an Amended Partial Decree for Water Right 31-7311 be decreed with the elements as set forth in the amended partial decree attached to the Order. It was further ordered that the Department file an Amended Director's Report addressing only the uncultivated land referred to previously in the Partial Decree for water right number 31-7311 under a new water right claim number; and that IDWR file an Amended Director's Report so that it may be included in the forthcoming Director's Report for Late Claims. Water right 31-11845 is the result of that order, and is the water right at issue. The water rights identified above, which belonged to Jernberg and subsequently Idaho Properties, have been partially decreed and are overlapping water rights that share common points of diversion with water right 31-11845.

As currently recommended, water right numbers 31-2395 and 31-11845 are limited to a total combined diversion rate of 6.48 cfs and a total combined annual diversion volume of 1,134 acre-feet per year and are limited to the irrigation of a combined total of 324 acres in a single irrigation season. The place of use for water right number 31-2395 is part of the 672.9 acres of uncultivated pasture land identified on the recommendation for claim number 31-11845.

Ben Jernberg (“Jernberg” or “Claimant”), the owner of the water right at that time, filed an Objection on May 19, 2005. The basis of the objection is disagreement with the quantity and rate elements of the recommendation. Jernberg alleges that the proper quantity for this water right is 8.83 cfs and the place of use should be 658 acres. The State of Idaho filed a Response to Objection on September 8, 2005 and is also a party to this subcase. From the Department’s perspective, there are two main issues involved in subcase 31-11845: 1) What is the amount of water that has been historically developed and beneficially applied to the place of use which was uncultivated pasture land? 2) How many acres have historically benefited from the diversion and distribution of water into the area of the uncultivated pasture land?

III. DISCUSSION

A great deal of discussion has occurred between the parties and IDWR staff in an attempt to resolve the issues contained in this subcase. The Department, Jernberg and the State of Idaho participated in a Mandatory Settlement Conference before Settlement Moderator Theodore Booth on November 29, 2005.² Discussions among the parties have continued subsequent to the Mandatory Settlement Conference. To date, no agreement has been reached to resolve the objection.

As described in the above summary, claim number 31-11845 is for the uncultivated portion of water right number 31-7311. Water right number 31-7311 is a licensed right. When licensing a water right, the Department has the statutory duty to carefully examine all evidence in relation to providing whether a water right has been

² Idaho Properties did not participate in the Mandatory Settlement Conference. Although they purchased the property from Jernberg on July 21, 2005, the Department was not aware of this change until after the Mandatory Settlement Conference. Thus, the NCAP changing ownership was not filed with the SRBA until February 13, 2006.

established. Idaho Code § 42-219 states that, “[The license] shall state ... the quantity of water, which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied.” Based on the evidence, the Department must make conclusions about whether the quantity of water has been beneficially applied. For water right 31-7311, based on the evidence before it and careful examination, the Department concluded that there was only enough proof to issue a license for 4.62 cfs with 367.5 acre-feet on a total of 461 acres. The Department made great efforts to provide Jernberg the opportunity to continue an historical practice of applying water to uncultivated pasture land even though he was not able to prove the extent of beneficial use that applying water to the desert-like pasture land provided.

A. Examination of the Extent of Beneficial Use Developed For the Place of Use for Claim Number 31-11845

1. Background of License 31-7311

There was extensive communication between the Claimant and IDWR during the licensing process as is evidenced by the certified copy of the license file made part of the record by *Order Regarding Objector; and Order Adding Documents to the Record* dated March 22, 2006. Jernberg filed an application for permit to use water with the Department on June 28, 1979. The permit lapsed on June 5, 1984, but was reinstated on August 21, 1984. Proof of Beneficial use was received by IDWR on August 2, 1984. On August 21, 1986, the Department conducted a beneficial use field exam. During this exam, the examiner noted, “two distinctly different irrigation uses were found.” See Memo to File from John Arambarri dated August 22, 1986, attached hereto as Attachment A and which is also contained in the license file. The examiner noted that the cropland and the pasture land should be licensed separately because the pasture

received less acre-feet per year than the grain crop and thus, the volume of water for the pasture land should be reduced accordingly.

Upon review of the examiner's notes, the Department requested information from Jernberg concerning the volume of water used on the uncultivated pasture land to assist with the evaluation of the extent of beneficial use for the property. Claimant Jernberg submitted information on instantaneous flow rates, which the Department concluded was not enough to determine the annual volume necessary for the water use. On July 6, 1995, Jernberg called the Department and asked whether or not the permit had reached licensing. In response, the Department wrote to Jernberg on July 31, 1995, advising that the water right had not been licensed because there were questions concerning how to quantify the beneficial use for the irrigation of hundreds of acres of uncultivated pasture. In the letter, (attached hereto as Attachment B and which is also contained in the license file) it stated that although there may be some benefit from applying water to the uncultivated pasture land, it was "not logical" that the volume of water required for that use is the same as that required to grow a cultivated crop. The Claimant was again requested to provide the total annual volume of water pumped from the wells, and which portion of that volume was historically applied to the 663 acres of uncultivated pasture. The letter specifically told Jernberg what information was necessary and how to supply that information to the Department.

On August 4, 1995, Jernberg called the Department to discuss his farming practices. That conversation was followed up with a letter from the Claimant to the Department. The Department could not confirm the amount of water applied to the desert-like pasture land, nor could the Department confirm the number of acres of pasture

land that actually benefited from irrigation water in any single year. Although there were some ditches that conveyed water in the area of the pasture land, the water use was so inefficient and the pattern of application so irregular that aerial photography did not show precisely which land received water and which did not. Thus, the department did not classify the use as irrigation because the use of water on the land could not be verified as beneficial use.

The Department considered many options to try to recognize Jernberg's application of water to the uncultivated pasture land. The notes in the file indicate that the Department considered splitting the water right into an A and B portion to account for the different volumes needed to irrigate the pasture land and cultivated cropland. The notes also indicate that the Department considered adding a condition on the water right for the uncultivated pasture land that stated if the Claimant wished to transfer this water use to cultivated irrigation, then the water right should be reduced to one-half prior to the transfer to cultivated land.

Because Jernberg did not provide satisfactory evidence to the Department regarding the extent of beneficial use of this property, the acres for the uncultivated portion of the place of use and a corresponding quantity were not included as elements of the water right. A memo to the file provides that the Claimant should be allowed to divert water on the uncultivated pasture land, but that a condition that guards against expansion should be included if the use of water from this land is ever converted to irrigation of a cultivated crop. Attached hereto as Attachment C, which is also contained in the license file.

Ultimately, the Department issued the license for irrigation of 461 acres with a 4.62 cfs diversion from groundwater with two conditions that would allow an additional 4.99 cfs to be diverted onto an additional 663 acres. These conditions were an attempt by the Department to recognize that the Claimant applies water to the pasture land, even though the Claimant was unable to prove the extent of beneficial use at the time of licensing. In the January 30, 2004, *Order Recommending Partial Decree be Set Aside* in subcase numbers 31-7311, 31-2357 and 31-2395, Special Master Bilyeu recommended that these conditions be deleted from water right number 31-7311. Water right number 31-7311 was decreed without the conditions referring to the uncultivated pasture land.

2. Analysis of Claim Number 31-11845

In accordance with the Court's order, the Department has put a great deal of effort in correctly identifying the uncultivated acreage and specifying an accurate quantity to reflect the historical practices of Jernberg.³ Generally, the annual diversion volume for a water right with irrigation as a purpose of use is determined by multiplying the number of irrigated acres by the annual diversion volume developed as a standard by IDWR for that particular area. For the area claimed under claim number 31-11845, the annual diversion volume per acre is 3.5 acre-feet. Thus, in order to confirm the diversion volume for claim number 31-11845, the number of irrigated acres must first be determined. Because the Department was not able to verify the number of irrigated acres on the uncultivated pasture land at the time of licensing, the Department did not

³ It is important to note, that claim number 31-11845 is a result of a licensed water right and that the extent of beneficial use on the property is as of the time proof was filed in 1984. Attached as Exhibits 7 and 8 to the State of Idaho's Brief in Opposition to Motion for Summary Judgment are true and correct copies of two NAPP imagery. If one compares the June 26, 1987 imagery to the July 23, 1987 imagery, one can see that development continued to occur on the southwestern portion of the property, through conversion of the land from uncultivated pasture land to what appears to be cultivated cropland after the field exam was conducted.

determine the volume or number of acres receiving a full supply of irrigation water in each irrigation season for that land. Furthermore, there were serious concerns that even if water could be applied to the uncultivated land, whether or not an actual beneficial use occurred.

When recommending claim number 31-11845, the first step, then, was to determine the number of irrigated acres located within the uncultivated pasture land referred to in the conditions of license number 31-7311.⁴

B. Number of Acres Irrigated Under Claim Number 31-11845

On March 3, 2005, Jernberg was provided with a map illustrating lands in the area of the 663 acres of uncultivated pasture in an effort to seek assistance from the claimant in determining the place of use for claim number 31-11845. The map identified land that appeared to the Department to be irrigated using 2004 NAIP imagery.⁵ If he disagreed with the depiction, the Claimant was asked to provide evidence showing what acres were irrigated within the claimed place of use within any single irrigation season under claim number 31-11845. *See* Letter dated March 3, 2005 to Roger Ling from Candice McHugh a true and correct copy of which is attached hereto as Attachment D.

Jernberg submitted a report dated March 22, 2005 titled *Analysis of Place of Use for Adjudication Recommendation A31-11845 (Jernberg)* prepared by Bryce Contor,

⁴ The Department restricted its examination of the place of use to that area that was defined as a part of the original field examination in accordance with the *Order Recommending Partial Decree Be Set Aside* dated January 30, 2004 by Special Master Bilyeu at 8, and the *Order Dismissing Motion to Set Aside Partial Decrees and Setting Aside Partial Decree and Issuing Partial Decree* dated March 15, 2004 by Judge Melanson at 2.

⁵ It should be noted that the 2004 imagery depicts a 169 acre field that appears to have been converted to cultivated cropland along the western portion of the 663 acres of uncultivated pasture land. However, approximately 30 acres of the 169 acre field is an enlargement outside of the 663 acres of uncultivated pasture land that was depicted in the 1986 licensing examination for permit no. 31-7311. *See* Footnote 4 *supra*.

Hydrologist ("Contor Report"). The Contor Report is attached hereto as Attachment E. On March 25, 2005, the Department received from Mr. Contor GPS Waypoints and Photos taken on March 22, 2005. This document is attached hereto as Attachment F. Mr. Contor opined that the 1986 Beneficial Use Field Exam correctly represents the irrigation in place at the time of commencement of the Snake River Basin Adjudication and that the field exam found a similar number of acres to his analysis of 1987 aerial photos.⁶ For illustrative purposes, the Department has attached hereto as Attachment G, the imagery and shape files of figures 1 and 2 of the Contor Report.⁷ The Department reviewed figures 1 and 2 of the Contor Report and his analysis of the place of use and determined that his analysis contained lands belonging to the Bureau of Land Management and to Jernberg's neighbors, as well as land owned by Jernberg but outside of the 663 acres of uncultivated pasture land.⁸ See Attachment G and overlays. Thus, Mr. Contor's conclusion on the number of irrigated acres is not entirely accurate or reliable.

The Department based its original recommendation for the number of irrigated acres for claim number 31-11845 on the file and imagery. However, to further evaluate whether or not that recommendation was correct, a field inspection was conducted on May 15, 2006 by the Department and the parties.

The field inspection that the Department and the parties attended on May 15, 2006, was an attempt to determine how many acres actually receive the benefit of

⁶ See Affidavit of Bryce A. Contor In Support of Motion for Summary Judgment filed with the SRBA on April 28, 2006.

⁷ Mr. Contor provided the shapes to Carter Fritschle.

⁸ See also Footnote 4 supra.

irrigation water within the 663 acres of uncultivated pasture land. Several pictures of the place of use were taken. True and correct copies of all of the photos taken are duplicated on the CD-ROM, which is include herewith as Attachment H and made a part hereof. Attachment H is presented in a PowerPoint format for ease of viewing and captioning. Also included in attachment H are two maps that show the locations of where the photos were taken. These photographs illustrate the uncultivated nature of the eastern portion of the 663 acres. Some of the photographs are attached to the Carter Fritschle Affidavit Dated May 19, 2006 filed as Exhibit 1 to the State of Idaho's Brief in Opposition to Motion for Summary Judgment.

The field inspection found that water enters the 663 acres of uncultivated pasture land in a main supply ditch near the northeast corner of the SE ¼ of the NW ¼ of Section 15, which is also the northeast corner of the 663 acres of uncultivated pasture land. Attached hereto as Attachment I is a Geographical Information System ("GIS") layout with 1987 NAPP imagery⁹. Attached hereto as Attachment J is a GIS layout with 2004 NAIP imagery.¹⁰ Attachments I and J are maps showing the place of use in question.

The ditch system in the eastern portion of the uncultivated pasture land appears to be designed to connect several depressions of various sizes that are naturally occurring topographic features of the land. By filling the ditches, and thus the depressions with water, the natural vegetation in the vicinity of the ditch or depression receives benefit from this application of water, primarily by sub-irrigation. However, the benefit appears to be limited to the immediate area around the ditch or depression and does not include the entire eastern portion of the property as shown in Exhibit C attached to Mr. Contor's

⁹ NAPP stands for National Aerial Photography Program.

¹⁰ NAIP stands for National Agriculture Imagery Program.

affidavit. The field inspection also led the Department to believe that much of the pasture land is at a little higher elevation than the ditches and thus, cannot be watered with the distribution system in place.

The main supply ditch also flows towards the western portion of the property to where a 169 acre field is located and is irrigated in a conventional manner with a head ditch supplying water to corrugated and "diked" fields

Two lateral ditches branch from the main supply ditch to convey water under the gravel road that traverses the 663 acres of uncultivated pasture land to the land north of the road. However, some of this land appears to receive wastewater from the irrigated croplands farther to the north, and it is difficult to determine exactly how many acres of uncultivated pasture land in this area benefit from the water delivered under this system.

The Department's earlier review of the aerial photography showed that approximately 324 acres could have irrigation water applied in the place of use for claim number 31-11845. This total number of acres was consistent with the fact that water right no. 31-2395 is also used on the uncultivated pasture land, and it was licensed for 324 acres. This conclusion was only strengthened by the recent field inspection, although some of the location of the land able to receive the benefit from the distribution system has been slightly altered. The Department concludes that the number of acres that physically receive irrigation water through the distribution system on the uncultivated pasture land within the place of use shown in the 1986 field exam is no more than 324.5 acres. The 324.5 acres include approximately 139 acres of cropland located in the western portion of the property. These 139 acres appear to have been converted from uncultivated pasture land to cropland use since 1986. This calculation of the total

number of irrigated acres within the uncultivated pasture land is based on shapefiles that were revised based on the May 15, 2006 field inspection. *See* Attachments I and J.

C. Recommendation

Ultimately, the Department stands by its original determination that the number of acres within the uncultivated pasture land is not the entire 663 acre place of use and is close to the 324 acres originally recommended. The original recommendation for claim number 31-11845 only provided additional diversion rate and no additional acres or diversion volume over what had been recommended for licensed right number 31-2395, because the number of acres irrigated within the place of use appeared to be covered entirely by that licensed water right. Thus, 31-11845 was recommended to bring the diversion rate to the standard 0.02 cfs per acre for the land covered by water right 31-2395.

The field inspection found 324.5 acres, which is only a slight change to the maximum number of acres within the uncultivated pasture land that received the benefit of irrigation in any given season. The appropriate volume for those acres would be 324.5 multiplied by 3.5 acre-feet per acre equaling a total annual volume of 1135.8.

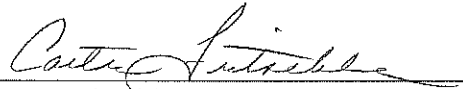
Finally, since the May 15, 2006 field inspection, the Department's concerns about the extent of beneficial use for the uncultivated pasture land has not been alleviated. Simply diverting water from the ground and putting it in ditches does not result in a beneficial use of the water. As the pictures on the CD-ROM attached hereto demonstrate, there is very little growth, if any, which occurs from any application of water on much of the pasture land. The 324.5 acres is a generous number of acres, given the very marginal beneficial use that is occurring on the property. Certainly, recommending the entire area

for the uncultivated pasture land that the Claimant alleges is irrigated (some of which appears to be up gradient from the distribution ditches) along with the volume associated with that acreage would be contrary to the evidence and would result in an unlawful enlargement of the water right as it was originally developed in the mid 1980s.

IV. CONCLUSION

The Departments' recommendation of Jernberg's water right is based on historical evidence of beneficial use and reasonable conclusions were drawn from the evidence presented to the Department.

Submitted this 24th day of May, 2006



Carter Fritschle
Section Manager
Technical Support Section of the
Adjudication Bureau, IDWR

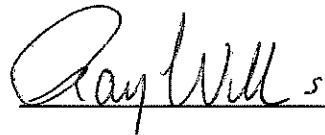
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 25th day of May, 2006.

Document Served: **SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
WATER RIGHT NUMBER 31-11845**

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

Roger Ling
Michael Tribe
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350



Index of Attachments

A	Memorandum to File from John Arambarri dated 8/22/1986
B	Letter dated 7/31/1995 to Jernberg from Keen
C	Memorandum dated 7/23/1997 to Water Right File from Keen
D	Letter dated 3/3/2005 to Ling from McHugh
E	Analysis of Place of use for Adjudication Recommendation A31-11845 (Jernberg) by Contor dated 3/22/2005
F	GPS Waypoints and Photos taken by Contor on 3/22/2005
G	Contor Imagery & Shapefiles of Figures 1 & 2 of Contor Report
H	CD-Rom Containing Photos Taken on May 15, 2006
I	GIS Layout with 1987 NAPP Imagery
J	GIS Layout with 2004 NAIP Imagery

ATTACHMENT A

31-7311

8-22-86

From John Arambari
To File 31-7311

RECEIVED

OCT 9 1986

Subj Place of Use

Department of Water Resources

Two distinctly different irrigation uses were found. One use was for the irrigation of a grain crop; the other being irrigation for enhancement of natural vegetation used as cattle pasture (see photos).

I feel that possibly the crop land and pasture land should be licensed separately. It was obvious that the pasture needs and receives less acre feet per annum than the grain crop, and I recommend the licensing volume be reduced accordingly for the pasture land.

The grain crop is outlined in solid yellow on the ~~area~~ aerial photo, while the pasture is outlined in red dashed lines.

MICROFILMED
SEP 10 1987

ATTACHMENT B



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

July 31, 1995

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

BEN W JERNBERG
PO BOX 1442
BILLINGS MT 59103

RE: Water Right No. 31-07311

Dear Mr. Jernberg:

I am writing in response to your inquiry about Water Right No. 31-07311. Your right has not been licensed because we are still trying to quantify the beneficial use you receive from irrigating hundreds of acres of uncultivated pasture. The annual diversion volume authorized on most licensed irrigation rights in Idaho is based on the requirements of cultivated crops. While you may get some benefit from applying water to uncultivated pasture land, it is not logical that the volume of water required is the same as that required to grow marketable crops.

In the interest of obtaining your license, you may be able to help us with the information we need. We need to know the total annual volume (in acre-feet or gallons) of water pumped from your two wells and the portion of that volume (in acre-feet or gallons) applied to the 663 acres of uncultivated pasture. If you are unable to determine exact volumes, we could possibly use information on the portion of the total flow rate (cfs, gallons per minute, or inches) diverted to the pasture and how many hours or days the flow is diverted to the pasture land each growing season. We would prefer information showing volumes prior to 1984, but any figures after that year would be helpful as well.

If you have any questions, please contact me at 208-327-7946 in Boise.

Sincerely,

Shelley Walter Keen
Water Rights Supervisor

SWK

MICROFILMED

SEP 10 1997

~ Celebrating Our Centennial Year of Service to Idaho 1895-1995 ~

ATTACHMENT C

MEMORANDUM

DATE: July 23, 1997

TO: Water Right File 31-07311

FROM: Shelley W. Keen *SWK*

RE: Conditions of Approval

When licensing right 31-07311, please include the following conditions of approval, which are intended to:

1. Authorize Mr. Jernberg's historical practice of diverting water onto uncultivated pasture in order to foster growth of native forage plants.
2. Guard against water use expansion via the conversion of the pasture use to the irrigation of a more consumptive cultivated crop.

Water diverted under this right, and an additional ^{4.99}~~7.93~~ cfs of ground water diverted from the points of diversion described above, may also be diverted onto 663 acres of uncultivated pasture located in Sections 15, 16, 21, and 22 of Township 7 North, Range 34 East, B. M., but the right to this additional use is not an appurtenance of the land upon which it occurs.

Any transfer of this right changing the place of use or nature of use of the right shall require that a proportional share of the irrigation occurring on the land described as the place of use under this right shall be discontinued. In addition, the entire additional use of water upon uncultivated pasture shall be permanently discontinued.

MICROFILMED

SEP 10 1997

ATTACHMENT D



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 3, 2005

Roger D. Ling
Ling, Robinson & Walker
615 "H" Street
P.O. Box 396
Rupert, ID 83350-0396

RE: *Subcase No. 31-11845 (Jernberg)*

Dear Roger:

Enclosed is a map showing the place of use that the Department has identified for the above referenced subcase. The portion outlined in yellow identifies where water appears to have been applied to the uncultivated acreage using 2004 imagery. The total acres equals 183 acres. If you disagree with this depiction, please provide evidence showing what acres were irrigated within the claimed permissible place of use within any single irrigation season under this water right.

It is the Department's intent to report this water right in the late claim report. The late claim report is expected to be filed with the SRBA District Court within the next few weeks. Please provide the requested information by March 15, 2005. If proof of irrigation on different or additional acres is not received by that date, the Department intends to recommend this water right for the lands depicted on the enclosed map.

If you should have any questions or comments, please do not hesitate to contact me at (208) 287-4810.

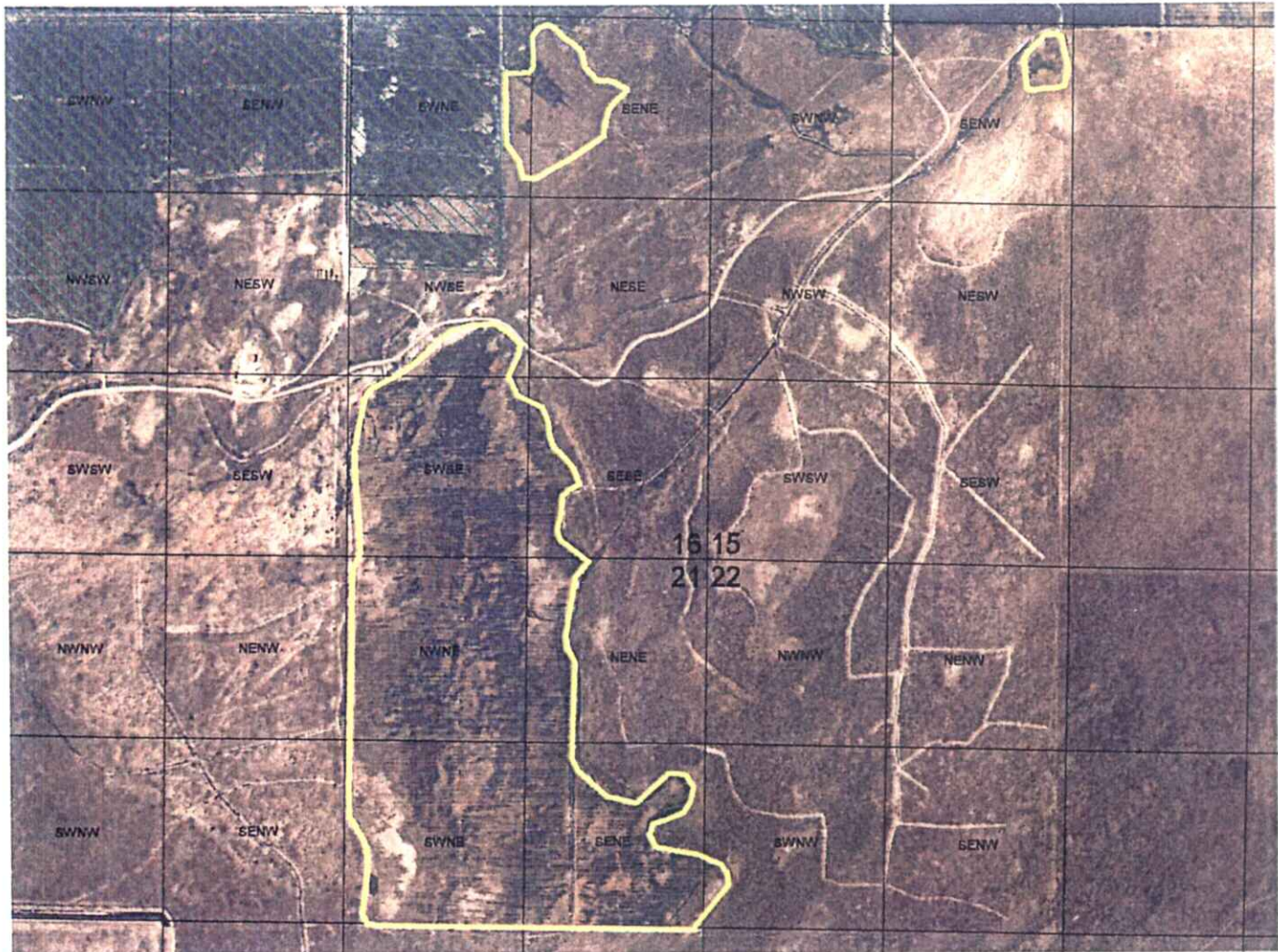
Very Truly Yours,


Candice M. McHugh
Deputy Attorney General, IDWR

Enclosure

cc: Donald Shaff
Carter Fritschle

31-11845



700 0 700 1400 2100 2800 3500 Feet

T07N R34E S15 S16 S21 & S22

37-7311 POU

Map prepared by: Carter Fritschle
Date prepared: 03/02/05
NAIP photography 2004
Idaho Department of Water Resources

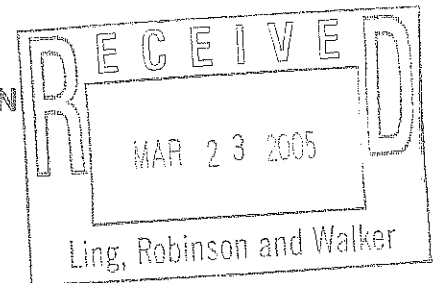


ATTACHMENT E

Water Resources & Services
P.O. Box 94
Idaho, ID 83427
208-681-9100

ANALYSIS OF PLACE OF USE
FOR ADJUDICATION RECOMMENDATION
A31-11845 (Jernberg)

March 22, 2005



BACKGROUND

In 2003, I performed an analysis of the "equivalent beneficial use" represented by the application of water to "663 acres of uncultivated pasture" identified in condition/remark two of water right 31-7311, which has since been renumbered A31-11845. Last year I measured the discharge of the Jernberg wells, prior to the failure of one of the pumps, and confirmed that the historical pumping capacity was still in place and in use.

In 2005, the Office of the Attorney General notified Mr. Jernberg that IDWR had identified 183 acres where "water appears to have been applied to the uncultivated acreage using 2004 imagery." It appears that IDWR proposes to use this analysis to represent the equivalent irrigation for the application of water to 663 acres authorized by license 31-7311.

Because one of the pumps failed early in 2004, and because 2004 was a drought year with reduced well yields, Mr. Jernberg believes that a 2004 aerial photograph is inadequate to represent the historical practice authorized under license 31-7311 and claimed in the adjudication. This preliminary report is prepared at his request and attempts to answer the following questions:

1. Did the 1986 IDWR field exam correctly represent the irrigation in place at the time of the commencement of the Adjudication?
2. Did the 1997 license correctly represent the application of water that was in place at the time of the commencement?
3. Did IDWR's analysis of 2004 aerial photos correctly represent the irrigation that was occurring in 2004?
4. Are the 2004 aerial photos representative of the irrigation that was in place at the time of the commencement of the Adjudication?

To answer these questions I have reviewed the licensing exam and documents in the license file, 1987 aerial photographs, Water Measurement District records, my 2003 analysis, and a 2004 aerial photo from Inside Idaho Internet site (my copy of IDWR's photo analysis was illegible). I also

contacted USDA Farm Service Agency but was told that no records were available describing irrigated pasturelands.

LICENSE EXAM REPORT (1986)

A memo dated 22 August 1986 from IDWR field examiner John Arambari, obtained from license file 31-7311, states

"Two distinctly different irrigation uses were found. One use was for the irrigation of a grain crop; the other being irrigated for the enhancement of natural vegetation used as cattle pasture..."

The examiner found a total of 1124 acres for these two uses. In a 1994 memo in the licensing file, this is partitioned to 461 acres of crop irrigation and 663 acres of "natural pasture."

JERNBERG RESPONSES TO IDWR INQUIRIES (1989, 1995)

As part of the licensing process, IDWR requested historical water use information from Jernberg. IDWR did not ask about irrigated acreage, so Jernberg only responded with pumping data. The May 2003 analysis shows that the pumping reported by Jernberg is adequate to support the acreage found by the IDWR field examiner.

AERIAL PHOTO 1987

Based on a 1987 aerial photograph downloaded from IDWR's Internet site, I found approximately 545 acres of irrigated crop land, 318 acres of "robust" irrigated pasture, and 235 acres of "marginal" irrigated pasture, for a total of 1,098 acres. This analysis is illustrated in Figure 1 and Figure 2.

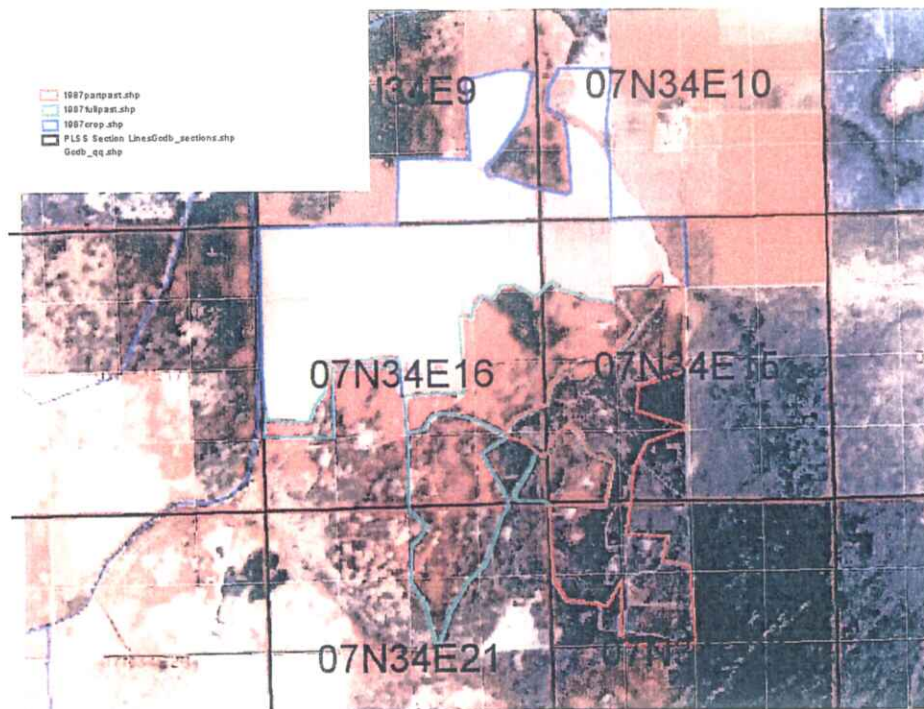


Figure 2. Cropland and pasture irrigation, 1987 aerial photograph.

LICENSE 31-7311 (1997)

The license issued in 1997 authorizes application of water to 1124 acres, 461 acres of irrigated cropland and 663 acres of "uncultivated pasture."

WATER MEASUREMENT DISTRICT DATA (1997/1998)

Water Measurement Districts were not charged with identifying place of use, but the reported volume was found in the May 2003 analysis to be adequate to support the acreage found by the field examiner.

OBSERVATIONS 1997 - 1999

During 1997, 1998 and 1999 I frequently traveled the road that divides the upper and lower place of use, and often observed a strong stream of water in the ditch that serves the south place of use identified as "uncultivated pasture."

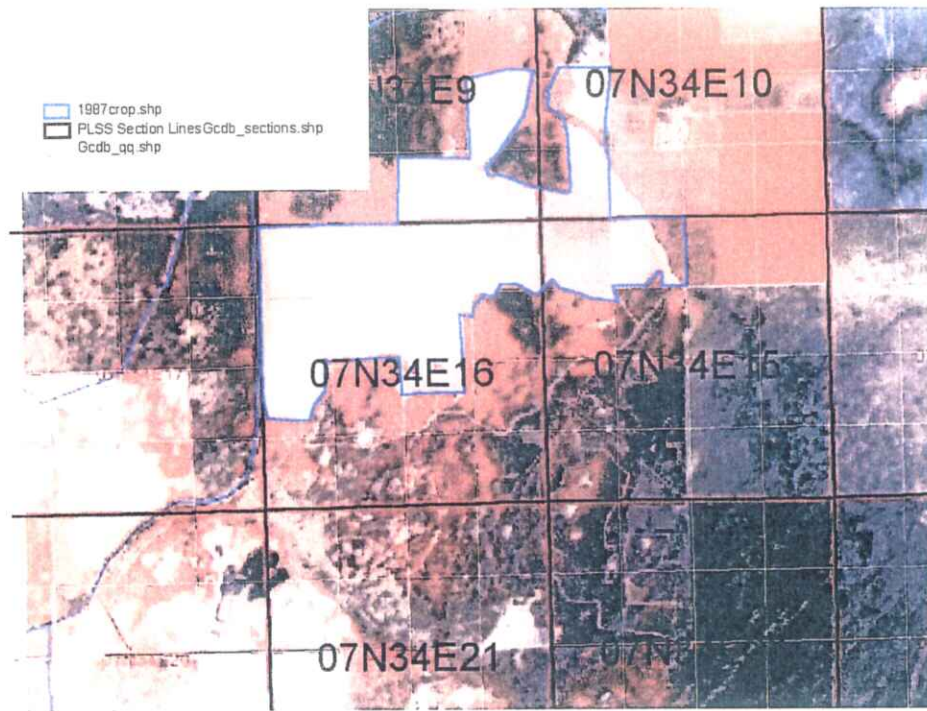


Figure 1. Cropland irrigation, 1987 aerial photograph.

AERIAL PHOTOGRAPH (2004)

The faxed copy of the photograph received by Water Resources Field Services was not legible. My analysis of a different 2004 photo indicates that 690 acres of land were irrigated in 2004, as illustrated in Figure 3.

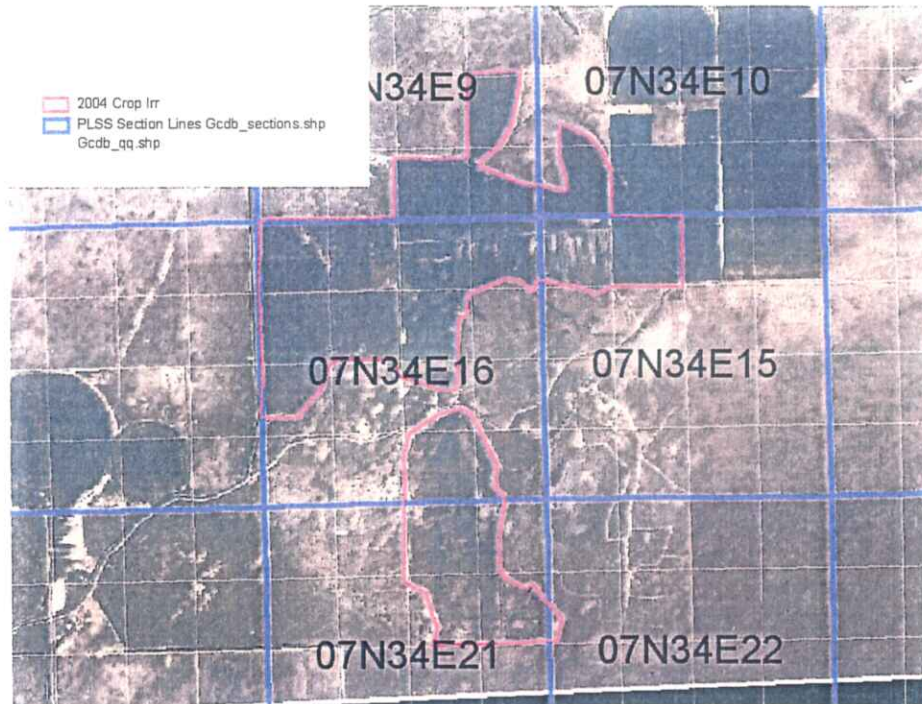


Figure 1. Apparent 2004 Irrigation within claimed quarter-quarter sections.

FIELD INSPECTION

Today I walked the place of use in the south half of Section 16, and in all of Sections 15, 21 and 22. Photographs and a map of GPS readings will be provided in a follow-up document, when photo processing is complete. In general I found that:

1. The field examiner's finding that cropland was irrigated more intensively than pastureland seems reasonable.

2. All the cropland appears to have been irrigated in 2004. The cropland is all in alfalfa hay, rather than in small grain as it was in 1986.
3. The field examiner's finding of 1124 acres of irrigation and my 1987 photo-analysis finding of about 1100 acres are reasonable. Because the examiner was actually on the ground while irrigation was occurring, I have more confidence in his results than in mine.
4. All of the lands that I identified as "irrigated" in the 2004 image are crop acres. Additional pasture lands in the S1/2 of the NW 1/4 of Section 15 and in the NW 1/4 of the SE 1/4 of Section 16 may also have been irrigated in 2004.
5. Other pasturelands do not appear to have been irrigated in 2004. I could not tell exactly when the pasturelands were most recently irrigated, but it is likely that irrigation has continued well past the commencement of the adjudication, filing claims, and issuing of a water-right license.

CONCLUSIONS

Based on the analysis and inspection described above, I find the following answers to the questions posed at the beginning:

1. Did the 1986 IDWR field exam correctly represent the irrigation in place at the time of the commencement of the Adjudication?

The 1986 field exam found a similar number of acres to my analysis of 1987 aerial photos, found similar pumping rates to my 2004 measurements, and was consistent with field inspection. Nothing was found that would contradict the 1986 IDWR finding of 1124 acres of irrigation. My photo analysis and field inspection found more crop acres and fewer pasture acres than reported by IDWR.

2. Did the 1997 license correctly represent the application of water that was in place at the time of the commencement?

I am not qualified to comment on the wording of the license, but the factual description of application of water to 1124 acres is consistent with my findings. Again, however, I found more crop acres (545 vs. 461 in the 1987 aerial photo, 690 vs. 461 in the 2004 aerial photo) than indicated by the license.

3. Did IDWR's analysis of 2004 aerial photos correctly represent the irrigation that was occurring in 2004?

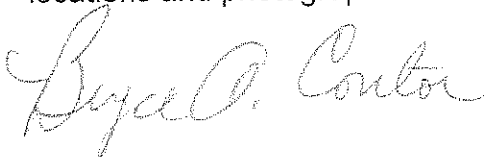
IDWR found about 45 fewer acres of irrigation than I found (about 7% difference). However, IDWR identified 183 acres as "uncultivated land," while my field inspection showed that all the lands that I identified as irrigated are cultivated alfalfa hay. In addition, my field inspection suggested that an additional 80 to 120 acres of pasture may have been irrigated in 2004.

4. Are the 2004 aerial photos representative of the irrigation that was in place at the time of the commencement of the Adjudication?

Because the IDWR field exam and the 1987 aerial photo are within one year of the commencement of the Adjudication, they are likely to be more representative of the water use to be determined in the Adjudication than a photo taken 17 years later. The 1986 IDWR field exam was based on actual field inspection while irrigation was occurring. The 1997 license confirms the water use found in the field exam. Water Measurement District data and Mr. Jernberg's responses to IDWR inquiries confirm pumping volumes consistent with the field examiner's findings. Further, 2004 was an atypical year, due to the drought and due to the failure of one of the pumps.

I conclude that the analysis of 2004 aerial photos is not an adequate representation of conditions at the commencement of the Adjudication, and that the 1986 IDWR field exam is an adequate representation of Adjudication water use.

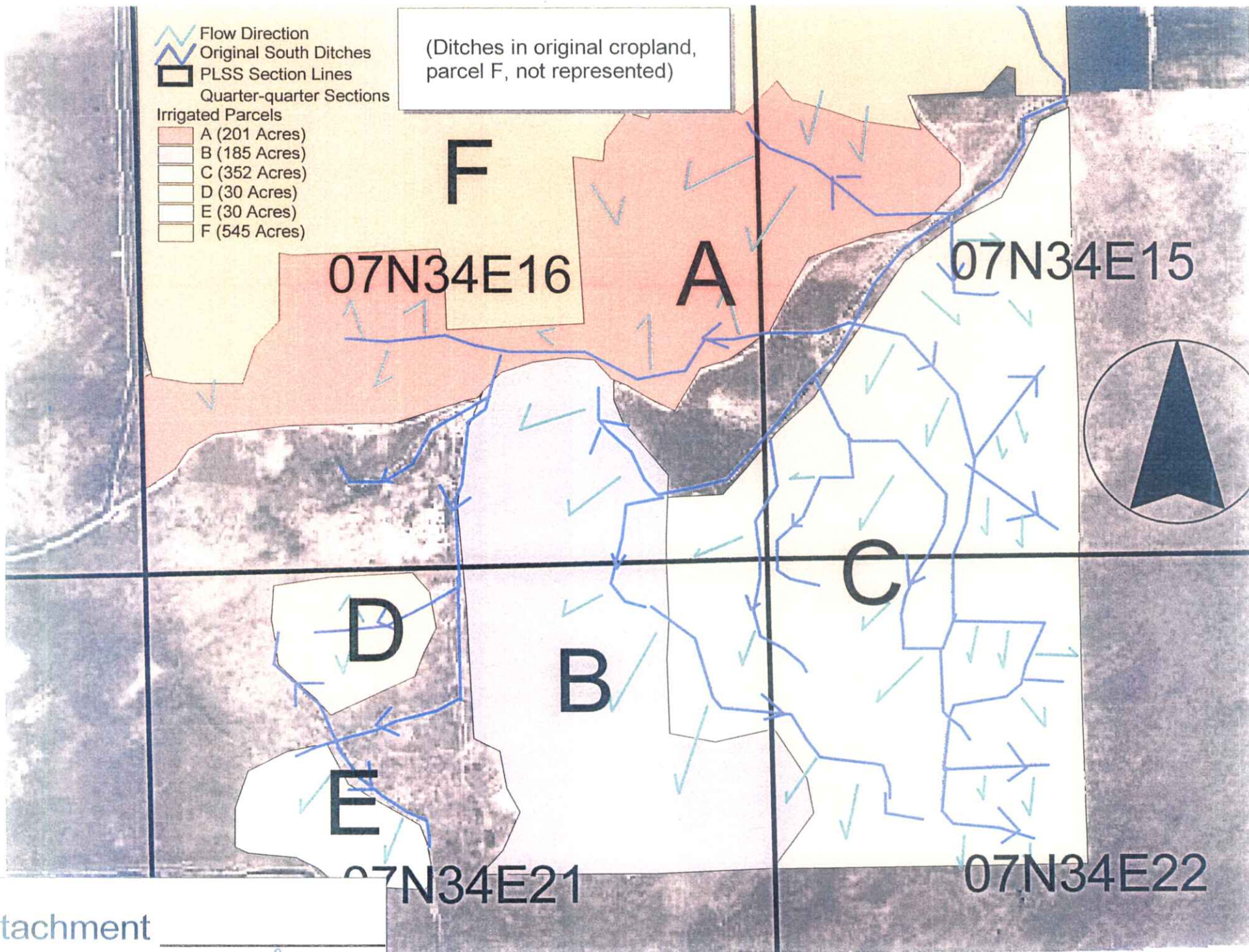
Please feel free to call if you have questions. I will FAX and overnight express this report and mail a follow-up document with a map of GPS locations and photographs. You may reach me at 208 681 9100.



Bryce A. Contor
Hydrologist

- Flow Direction
Original South Ditches
PLSS Section Lines
Quarter-quarter Sections
- Irrigated Parcels
- A (201 Acres)
 - B (185 Acres)
 - C (352 Acres)
 - D (30 Acres)
 - E (30 Acres)
 - F (545 Acres)

(Ditches in original cropland, parcel F, not represented)



Attachment

Signature *by Bryce Contor*

ATTACHMENT F



Photo 19. Looking north at split in ditch from Waypoint 50.



Photo 20. Looking south-southwest from Waypoint 51.



Photo 17. Looking east from Waypoint 48.



Photo 18. Looking west from Waypoint 49.



Photo 15. Looking northwest at alfalfa field from Waypoint 47.

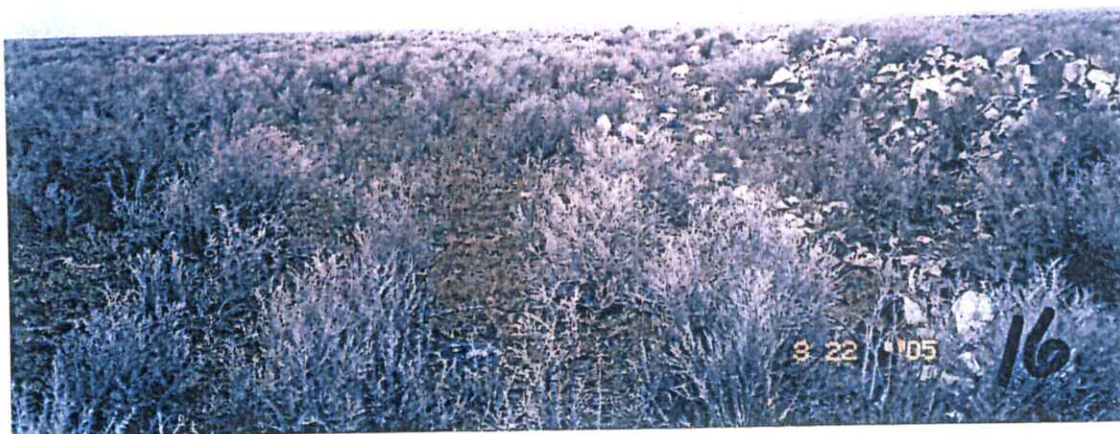


Photo 16. Looking north along rock ditch from Waypoint 48.



Photo 13. Looking north at the southwest corner of the alfalfa field from a point east of Waypoint 45.

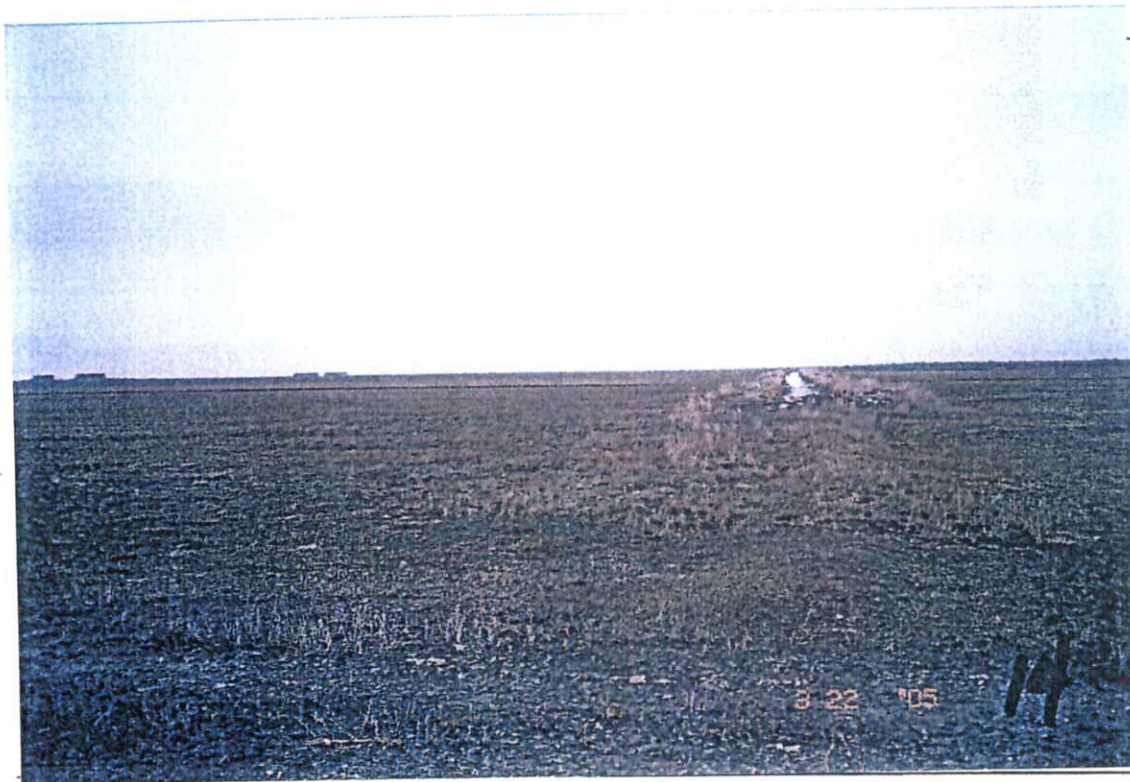


Photo 14. Looking north at alfalfa field from Waypoint ~~47~~. 46



Photo 11. Looking south from Waypoint 44.



Photo 12. Looking east from Waypoint 44.



Photo 9. Looking south from Waypoint 42.



Photo 10. Looking east from Waypoint 42. Another ditch is located about 150 ft. south of this location.

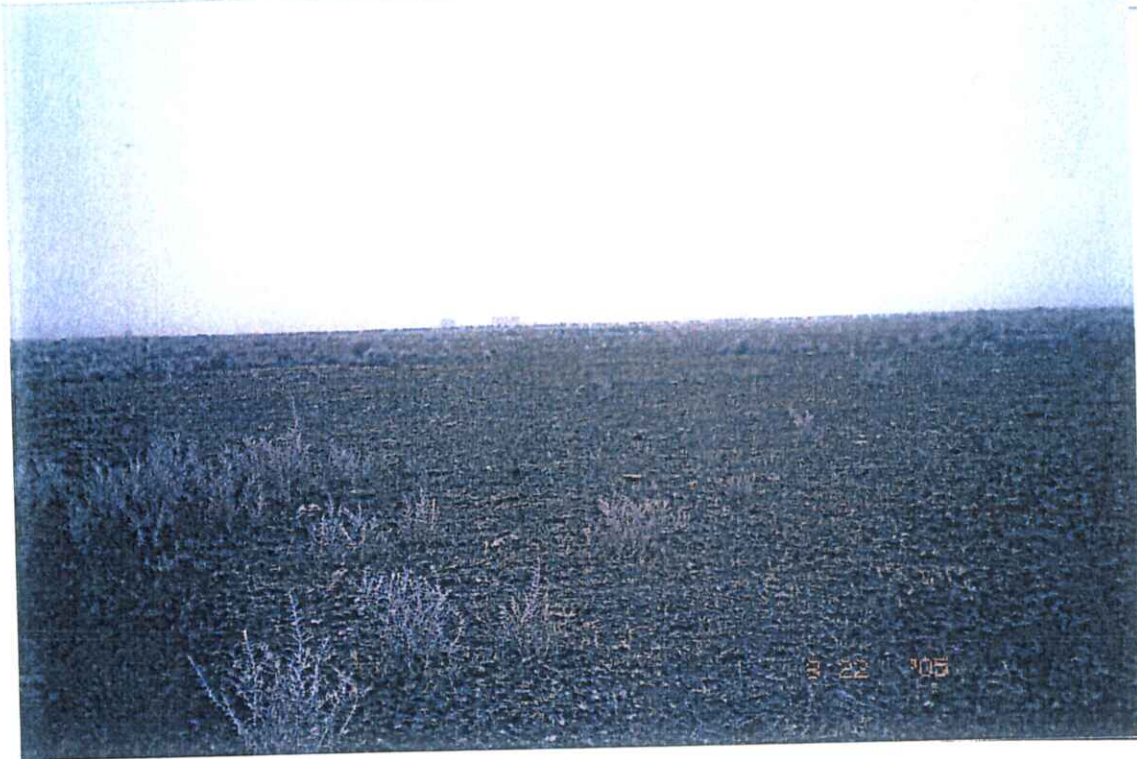


Photo 7. Looking north from Waypoint 42.



Photo 8. Looking west from Waypoint 42.



Photo 5. Looking southwest from Waypoint 40.



Photo 6. Looking west southwest from Waypoint 41.



Photo 3. Looking south from Waypoint 38.



Photo 4. Looking east from Waypoint 38.

II. Photos



Photo 1: Looking south from Waypoint 37



Photo 2. Looking SE at cropland from Waypoint 37.

Water Resources Field Services

P.O. Box 84

Iona, ID 83427

208-681-9100

RECEIVED

MAR 25 2005

Ben Jernberg, A31-11845

GPS Waypoints and Photos taken 22 March 2005

Ben Jernberg and

I. Location Map

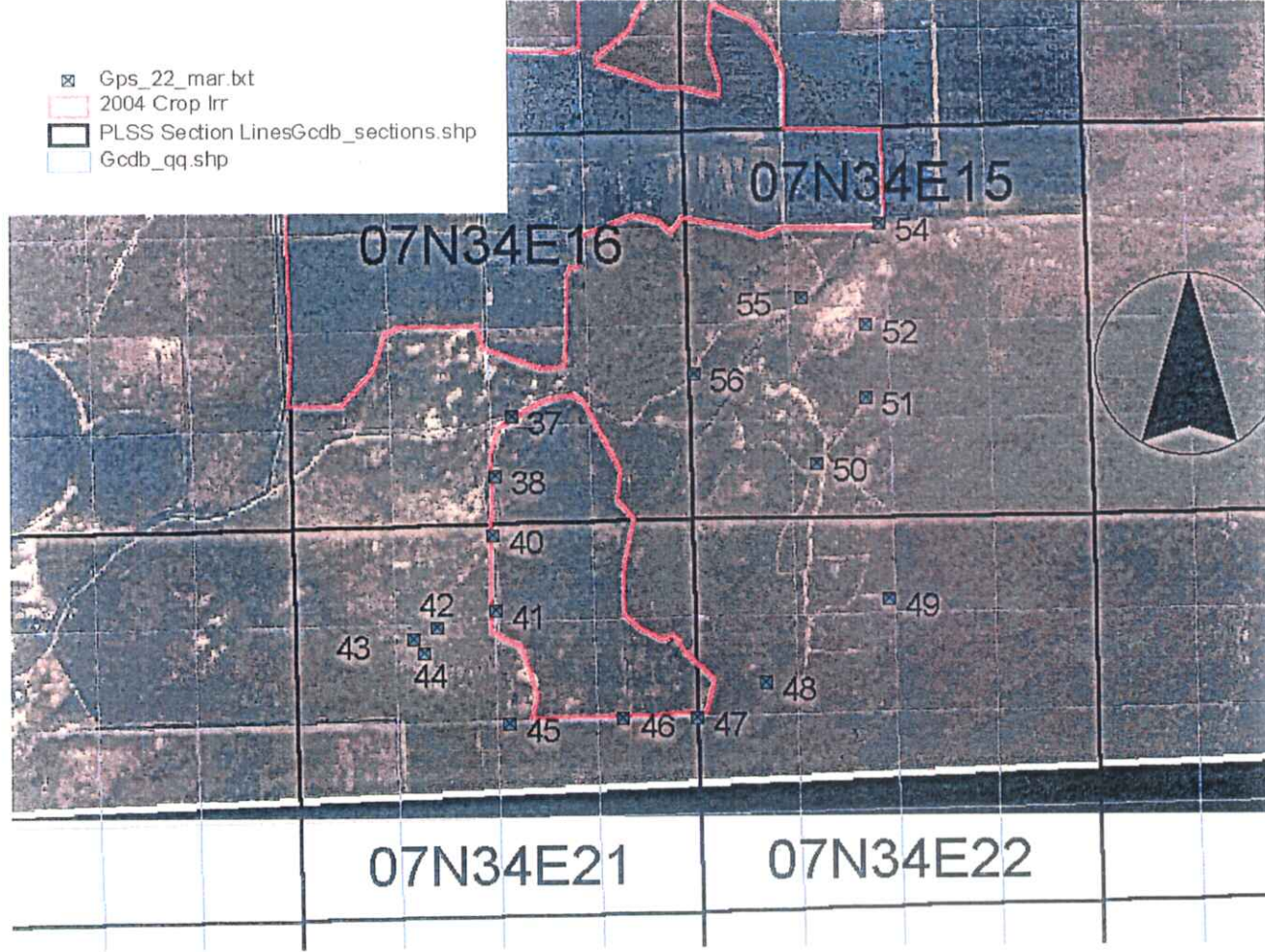




Photo 21. Looking north from Waypoint 52.



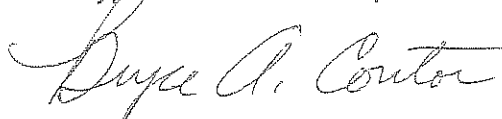
Photo 22. Looking southwest from Waypoint 54. This is where the main ditch crosses under the road. It appears that water flowed here in the late summer or fall of 2004.

III. Description of Waypoints without Photos

Waypoint 43. The ditch splits at this location, continuing west but with laterals to the north and to the southeast.

Waypoint 55. The ditch branches at this location, with the main ditch continuing southwest along the south side of the road and a lateral crossing under the road to the northwest.

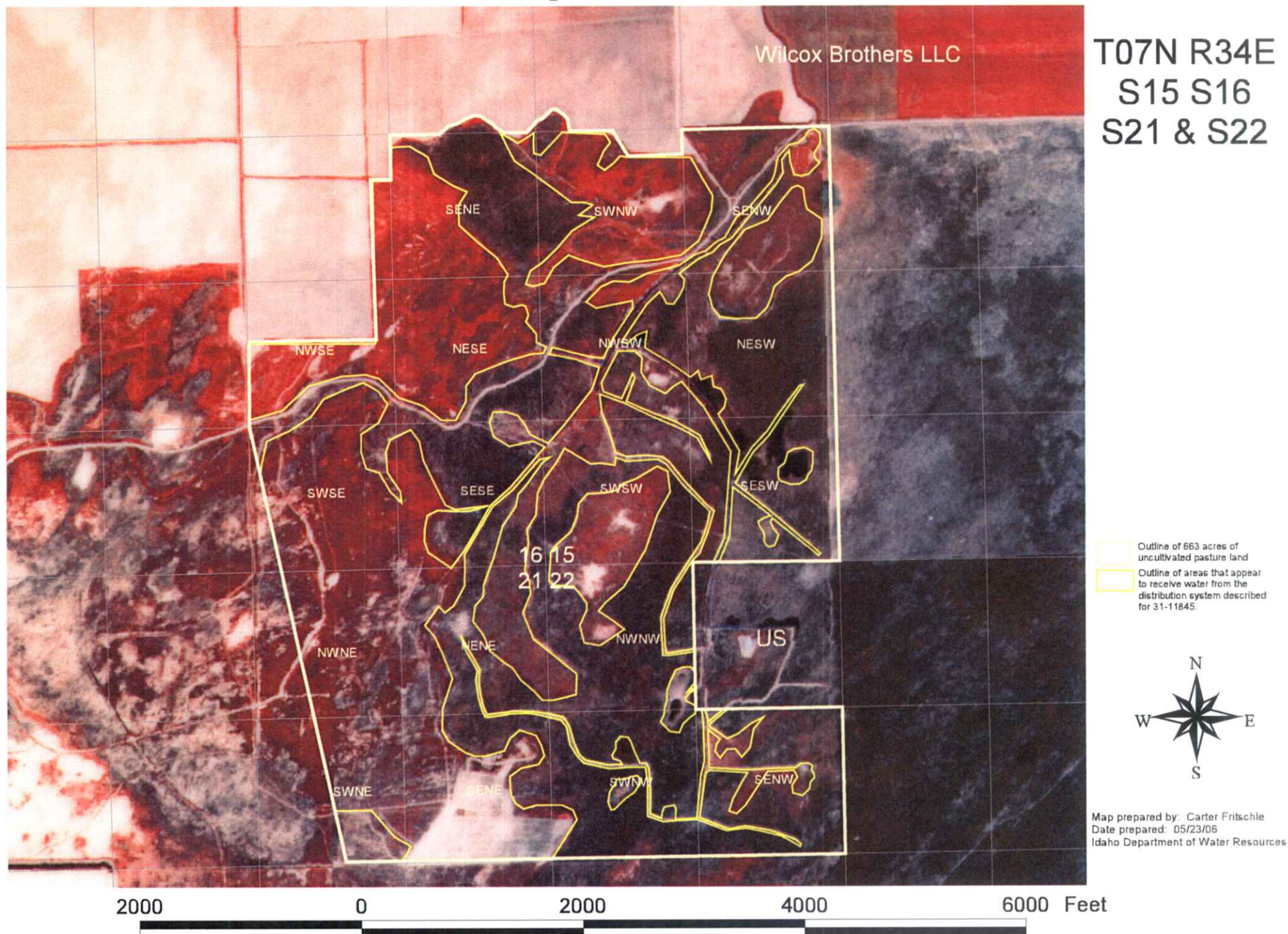
Waypoint 56. A lateral passes under the road to the northwest at this location.



Bryce A. Contor
Hydrologist

ATTACHMENT G

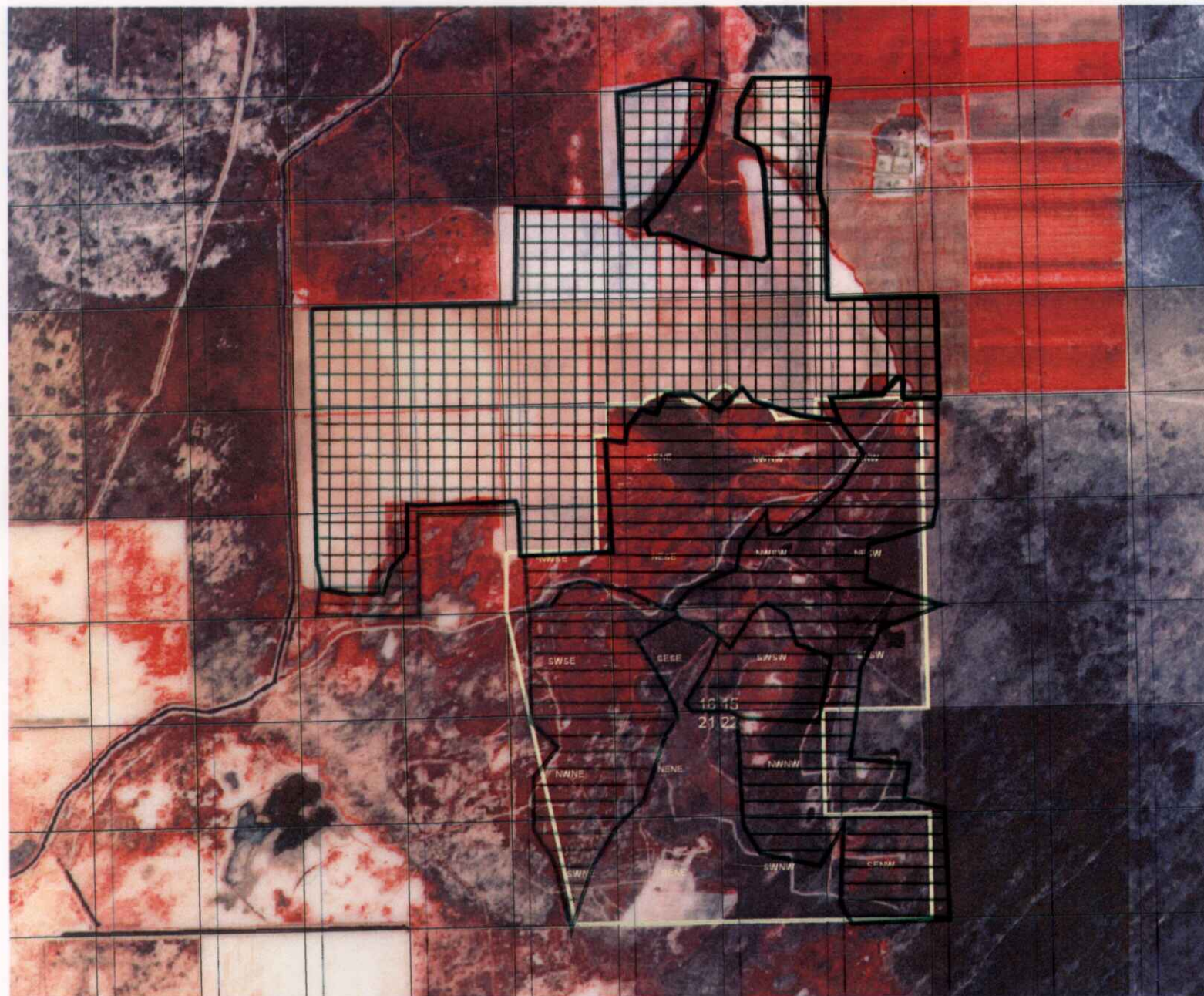
1987 NAPP with May 15, 2006 Field Findings



ATTACHMENT H

ATTACHMENT I

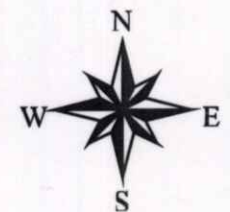
1987 NAPP with 663 Acres of Uncultivated Pasture Outlined



Cropland identified
as irrigated in Figure 1
of report dated
March 22, 2005.

Cropland and pasture
identified as irrigated in
Figure 2 of report dated
March 22, 2005.

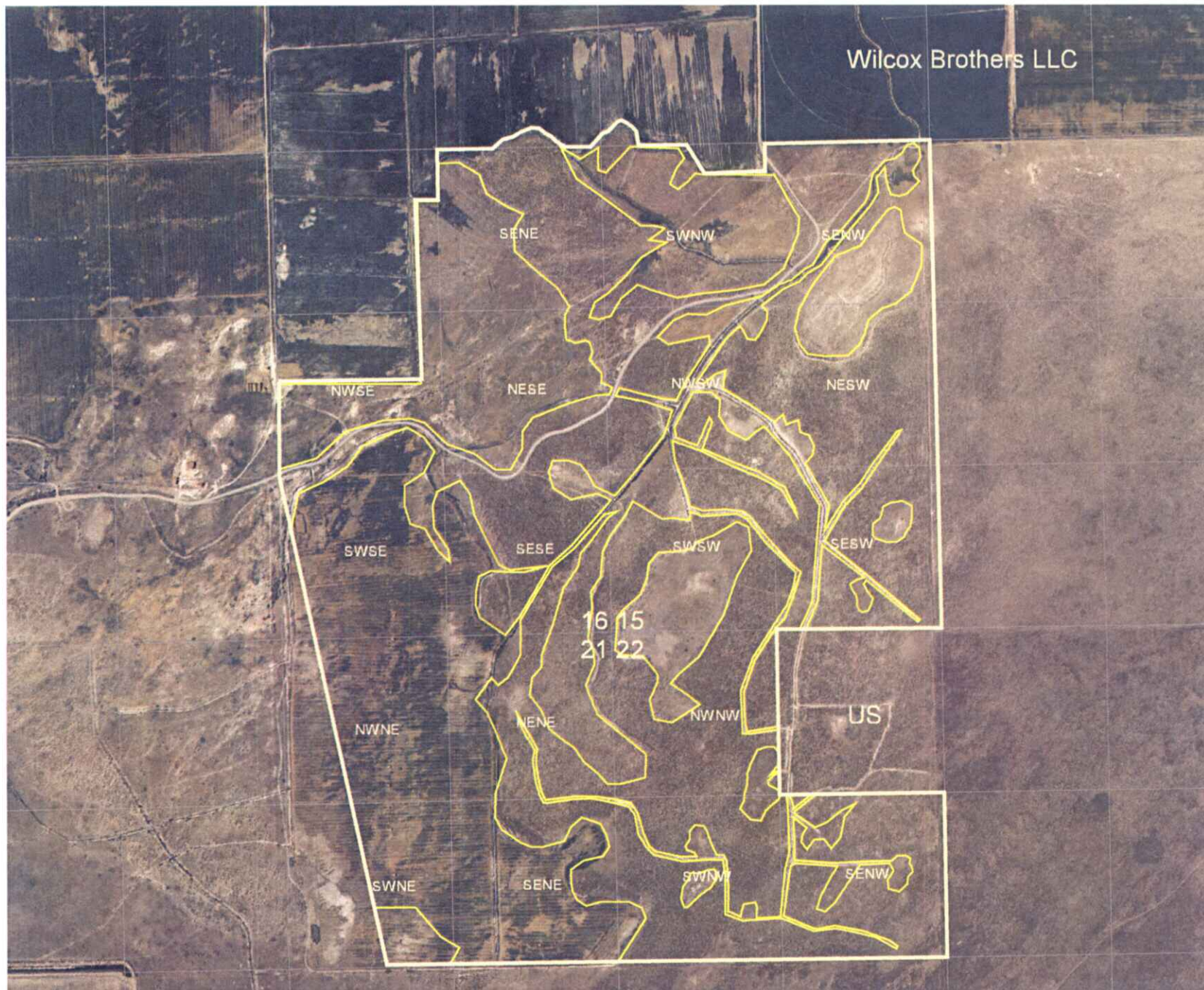
T07N R34E



2000 0 2000 4000 6000 8000 10000 Feet

ATTACHMENT J

2004 NAIP with May 15, 2006 Field Findings



Wilcox Brothers LLC

T07N R34E
S15 S16
S21 & S22

- Outline of 663 acres of uncultivated pasture land
- Outline of areas that appear to receive water from the distribution system described for 31-11845.



Map prepared by: Carter Fritschle
Date prepared: 05/23/06
Idaho Department of Water Resources

2000 0 2000 4000 6000 Feet