



August 7, 2006

Barry Williams
1277 Mink Creek Road
Arbon, Idaho

Dear Mr. Williams:

On August 4, Rocky Mountain EnvironmentalSM examined the various field relationships between the pasture land along Bannock Creek and wells locally identified as the Ward Well and the Curry Well. Also present was Mr. Roger Warner, Idaho Department of Water Resources [IDWR].

As we understand the history of the valley, since as the early as the early 1900, cattle have watered from Bannock Creek, and grass has been grazed or harvested. Your right to water cattle is enumerated in water right numbers 29-13528.

As we discussed today, you (and your predecessors in title) have beneficially used water to raise pasture grass and alfalfa along Bannock Creek since the early 1900s, but now the volume of water in the creek has fallen. However, you never made application to Idaho Department of Water Resources [IDWR] for a right to use Bannock Creek for irrigation.

Idaho allocates the *right to use* both surface and groundwater water under the doctrine of "prior appropriation"¹ or "first in time, first in right." The basic principles of prior appropriation include^{2, 3}:

- a. Priority,
- b. Beneficial use,
- c. Duty of water,
- d. Requirement for diversion.
- e. Preference for type of beneficial use.

The oral history of the valley clearly suggests that you have used Bannock Creek Water since as early as about 1900 and that you have applied the water for beneficial use. I believe that our examination of your pasture on August 4th discovered a *constitutional* basis for claim for a water right for irrigation of your pasture along Bannock Creek.

The *constitutional* basis is really a common law or a "do-it-yourself" method to establish a water right. Prior to adoption of statutes governing the process of appropriation, the constitutional method was the only means of obtaining a right. In 1963, the legislature enacted laws essentially eliminating new constitutional claims for groundwater. After 1971, surface water could be appropriated only by application to the Department.⁴

On August 4, 2006, accompanied by Roger Warner, IDWR, we observed the remnants of a ditch through which water from Bannock Creek was diverted onto the pasture in Section 13. Refer to Photographs 1 and 2 below. Because the volume of water flowing in Bannock Creek has declined, the ditch at Bannock Creek is not obvious. However, farther north, the ditch has distinct sides and an obvious, elongated trace north into Section 13. Refer to the Map below.

The presence of this ditch demonstrates that, prior to 1971, irrigation water was, in fact, diverted onto the pasture in Section 13 (and flowed further north) for beneficial uses.

¹ Idaho Constitution, Art. XV, §3.

² Fereday, J. C., Meyer, C. H., and Creamer, J. C., 1998, Handbook on Idaho water law: A practical guide: Givens Pursley LLP, Boise, ID., 115 pp.

³ Fereday, J. J., C., Meyer, C. H., and Creamer, J. C., 2006, Water Law Handbook: The acquisition, use, transfer, administration, and management of water rights in Idaho: Givens Pursley LLP, Boise, ID., 193p.

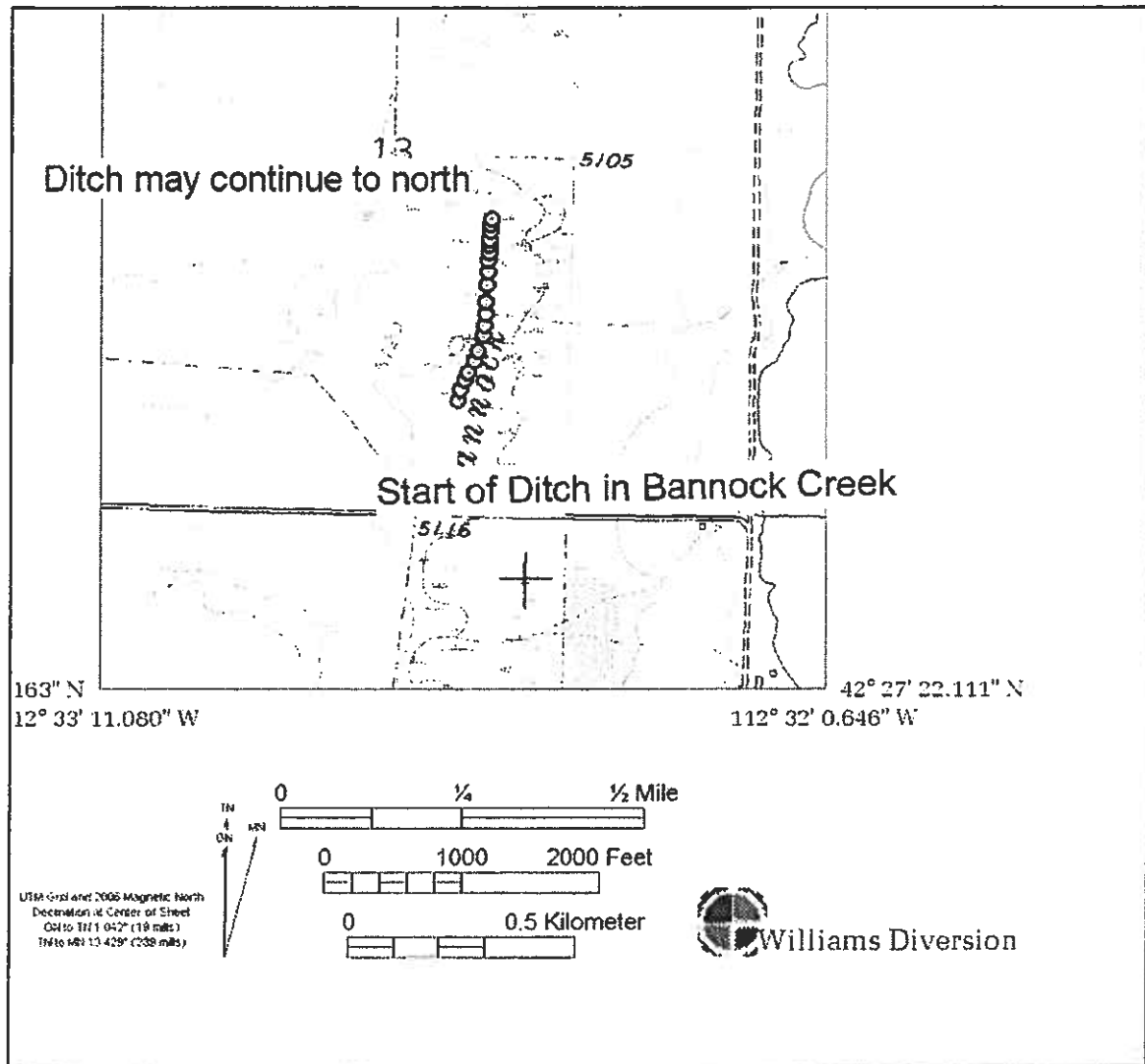
⁴ *ibid*, page 38.

Thank you for the opportunity to meet you and your mother, to examine your pasture, and to assist you in this process.

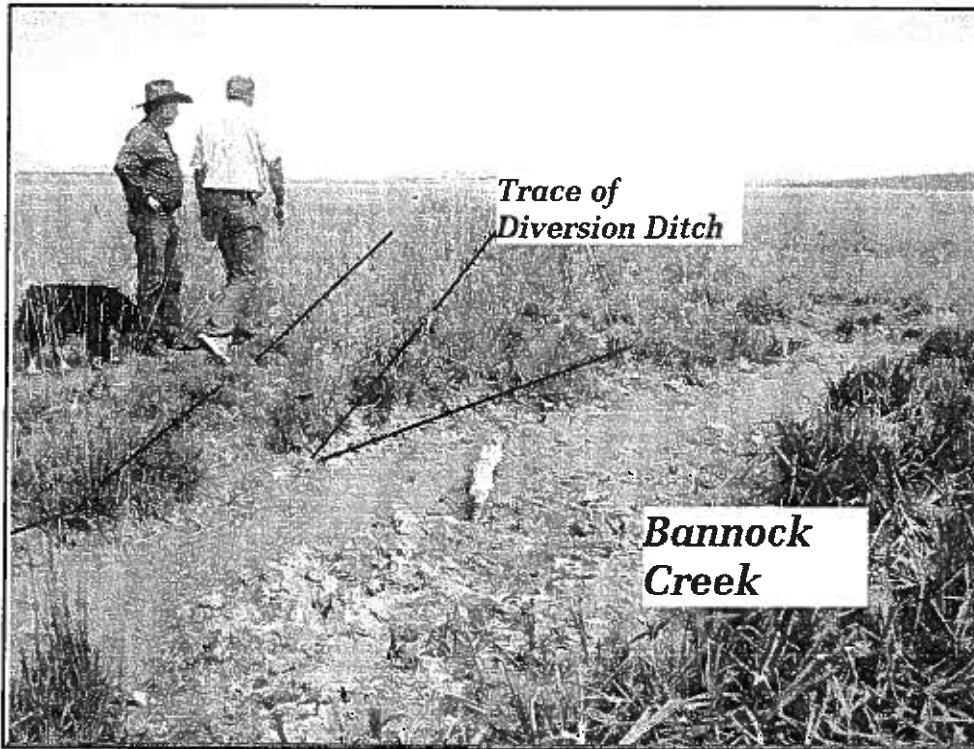
Sincerely,

A handwritten signature in black ink that reads "Jim". The letters are stylized and cursive.

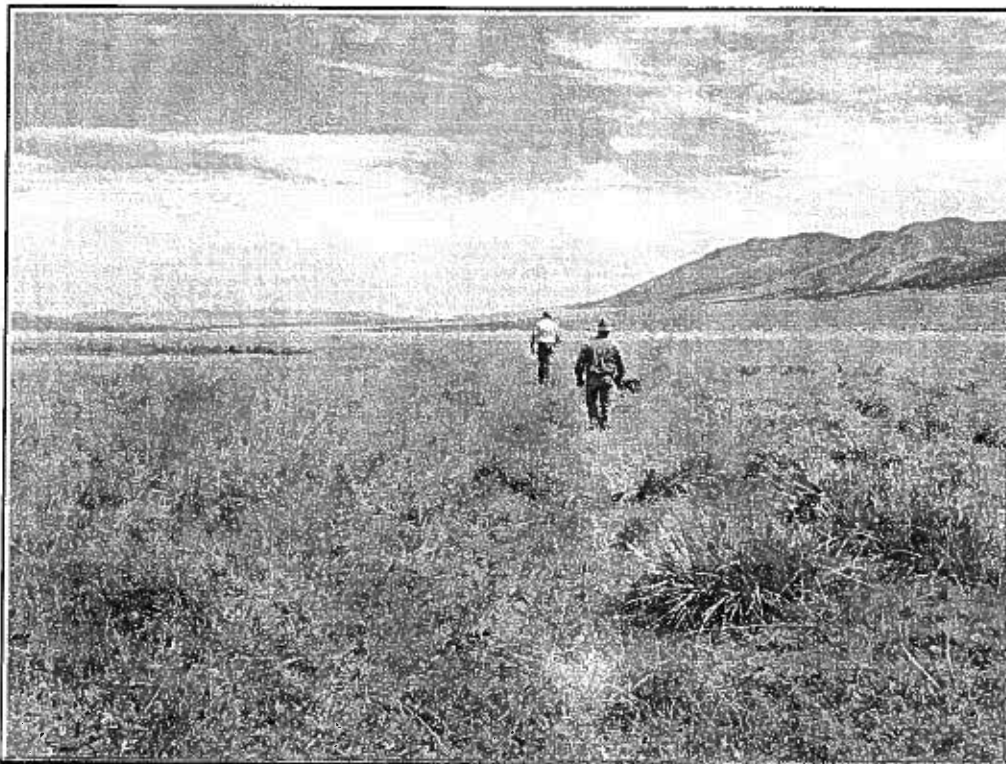
James D. Rush, PG
Vice President



Map 1 Trace of diversion ditch from Bannock Creek.



Photograph 1 Location of diversion point where water from Bannock Creek was diverted into the pasture. Note Bannock Creek is dry.



Photograph 2 Although faint, the ditch can be followed north into Section 13 about $\frac{1}{2}$ mi.