



September 22, 2009

Jerry Rigby
Rigby, Thatcher, Andrus, Rigby & Moeller, Chartered
25 North 2nd East
Rexburg, ID 83440

Dear Mr. Rigby:

Re: The Felton Heltsley Ditch, North Fork, Idaho

I am writing at the request of my associate Roger Warner to comment on the nature and origin of the Felton Heltsley Ditch and on the regulatory status of that ditch pursuant to Section 404 of the Clean Water Act. My comments are based on a review of the project file including the 2004 and 2006 aerial photographs of the region, on personal knowledge of the North Fork area, and finally on my eighteen years of experience dealing with Corps Engineers regulation of waters and wetlands in Idaho.

The Felton Heltsley ditch arises from a natural spring on foothills bordering an expanse of meadow between the North Fork of the Salmon River and the toe of the Bitterroot Mountain Range. Flow from the subject spring goes into a relatively straight channel that follows the base of the mountains for a distance of approximately one-half mile to the southwest, at which point the channel joins the North Fork. The channel is lined by relatively mature cottonwoods and willows, which give the impression that the channel emanating from the subject spring is natural in origin.

From a review of the aerial photography and from personal knowledge of farming and grazing practices, it would be my best professional opinion that the channel from the subject spring is largely, if not completely man-made. It was a common practice for early settlers to divert braided channels that flowed across riparian terraces into man made channels bordering the terraces. The riparian terraces were then leveled so that this land could more easily be farmed, hayed, and/or irrigated. Even though the ground surface was transformed, the signature of braided channels is often still visible on aerial photographs, and this appears to be the case on the riparian terrace between the existing channel and the North Fork. It is my opinion that water from the subject spring originally flowed southeast directly toward the North Fork via a network of shallow braided channels.

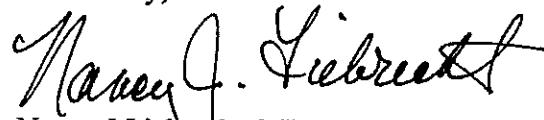
Mature vegetation (trees and tall shrubs) may give an impression that the existing channel is natural, but native black cottonwoods and willows are very fast-growing and will easily reach maturity in 40 to 50 years. Under optimum conditions a cottonwood may grow 4 to 5 feet a year and may attain in 2 years a height of 30 feet and a diameter of nearly 5 inches. It is probable that the existing mature woody riparian plant community colonized the ditch corridor after the channel was dug by early settlers.

Even though my best professional opinion is that the Felton Heltsley Ditch is a man-made feature constructed to facilitate farming and irrigation practices, the ditch probably is still subject to federal wetlands regulation by the Corps of Engineers. The Corps can and does regulate irrigation ditches in the State of Idaho. Pursuant to the Talent Irrigation Case in the Ninth Circuit Court of Appeals, the Corps took jurisdiction over irrigation canals and ditches throughout Washington, Oregon, and Idaho about eight years ago.

Typically customary maintenance activities in irrigation ditches do not require a Corps permit, but the Corps has the option of requiring federal permits for activities in irrigation ditches that deviate from or exceed historic maintenance practices. When a project is of sufficient scale that it will change the existing character of a particular ditch, we typically advise our clients to contact the Corps of Engineers to ascertain the regulatory status of the ditch and to determine whether the proposed activity might require a permit. The Corps is the entity that makes the final decision about regulatory matters, but in our experience, customary and historic maintenance practices are exempt from permitting. Activities that change the reach and flow of a ditch and/or require the placement of fill may require a permit. It is particularly important to make these inquiries to the Corps when a proposed activity in a ditch may affect a river that is habitat for endangered fish—such as the North Fork.

If you have any questions regarding the matters described in this letter, please do not hesitate to contact me.

Yours truly,



Nancy J Liebrecht, MLA
Environmental Planner
Wetland Scientist