

# MEMORANDUM

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JAN 22 2008  
DEPARTMENT OF  
WATER RESOURCES

Date: January 18, 2008  
From: Ernie Carlsen  
Water Resource Program Manager  
To: File

In mid December 2007 I received a request from Loy and Byron Pehrson to meet with them and discuss resolutions to a problem outlined by Nick Miller in his letter<sup>1</sup> dated December 12, 2007. The letter was mailed to the five water users with decreed water rights listing the Lower Burnett as a point of diversion. It notified them of the error in the legal description for this point of diversion and the importance of getting this corrected prior to the beginning of the 2008 irrigation season. On January 8, 2008, Tom Bassista, IDWR Stream Channel Specialist, and I met with Loy Pehrson, Byron Pehrson, Max Bingham, Doug Rosenkrance, Mike Dotzenrod and Bob Shaffer, Watermaster, on-site at the historic Lower Burnett diversion.

It was the consensus of those present that through the years several changes had been made in how and where water was diverted at the Lower Burnett. They stated an old abandoned concrete structure ("LB1"), is located about ¼ mile upstream from the concrete structure generally recognized as the Lower Burnett heading ("LB2"). They believed LB1 originally directed water into a channel where the present river channel exists. The Darlington Quadrangle topographic map<sup>2</sup> dated 1969 shows a diversion in S24 T06N R25E which corresponds to the location of LB1. The legal description for LB1 also corresponds with the decreed legal description for the Lower Burnett and seems to provide a basis for why the Water District 34 and the Big Lost River Irrigation District ("BLRID") recognized the NWNWNE S24 T06N R25E as the legal description and subsequently provided the legal description to IDWR in 1991 on a list of canals and legal descriptions<sup>3</sup> during claims review in the Snake River Basin Adjudication ("SRBA").

Though the topographic map shows a diversion at LB1 we were told LB2 was constructed in the 1930's. The structure at LB2 is located in the NENWNE S24 T06N R25E and is visible on aerial photographs taken between 1987 and 2004<sup>4,5,6</sup>. Initially LB2 was used to divert water into a bypass channel intended to convey water around a river reach with large transmission losses. On the upstream side of a concrete regulating structure in the bypass channel about 75 feet from the river was a ditch heading ("D1") used to deliver decreed rights. In order to get water into the bypass channel and D1 the water level in the river had to be raised about three feet. Placing planks across the river at LB2, which proved difficult and dangerous, did this. Unfortunately the concept of

<sup>1</sup> Letter addressed to John and Barbara Beller

<sup>2</sup> Darlington Quadrangle

<sup>3</sup> Attachment C Big Lost River and Tributary Points of Diversion

<sup>4</sup> 1987 Infrared Aerial Photograph

<sup>5</sup> 1992 Black and White Aerial Photograph

<sup>6</sup> 2004 True Color Aerial Photograph

## MEMORANDUM

using the bypass channel did not work. In the late 1960's, to reduce the difficulty in delivering the decreed rights, the heading for D1 was moved to the river on the upstream side of the bypass channel. This ditch heading ("D2") is easily identified on the 1987 infrared aerial photography. By the late 1980's only the Pehrsons were diverting water at D2. To deliver Pehrson's water rights without having to plank the river at LB2 the BLRID constructed a new head gate ("D3") a few hundred feet up stream and Pehrsons ceased using D2. The advantage of using D3 is sufficient water will go through the head gate with only a small cofferdam of large rock extending part way across the river. Like D2, D3 is also located in the NENWNE S24 T06N R25E. D3 can be seen on aerial photography taken in 1992 and 2004 but is not evident on the 1987 infrared aerial photography. In 1991, BLRID installed a new head gate at heading for D2, this is the diversion for everybody other than the Pehrsons with the Lower Burnett ditch as a decreed point of diversion. Decreed rights for BLRID are diverted at D2 and D3.

Decreed water rights historically recognized as being diverted at the Lower Burnett are being diverted at two locations, D2 and D3. Both have a legal description of NENWNE S24 T06N R25E. How the water users elect to correct the legal description for this point of diversion may depend on when D2 and D3 were established. The evidence and statements by those present at the meeting, clearly supports D2 being in existence prior to November 1987 and therefore qualifies under Idaho Code 42-1426 to be recognized as a valid point of diversion on an SRBA claim based on an accomplished change. However this is dependant on the water users successfully getting the SRBA Court to set aside the partial decrees for rights diverted through this heading and then accepting amended claims listing the correct legal description. Of course these individuals could also file transfer applications with IDWR to make this correction. Regrettably there is conflicting evidence on when the diversion at D3 was established. The Pehrsons have two written statements implying that D3 was in place prior to November 1987. However, as stated above the diversion at D3 does not appear on the 1987 infrared aerial photography. If sufficient evidence is not provided to show D3 was in place and being used in 1987 or earlier the only remedy for correcting the decreed rights of the Pehrsons and the BLRID is for each to file a transfer application with IDWR.

cc: Loy & Byron Pehrson  
Max Bingham  
Jack & Jean McAfee  
John & Barbara Beller  
Big Lost River Irrigation District  
Douglas Rosenkrance  
Water District 34  
Mike Dotzenrod  
Nick Miller



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: [www.idwr.idaho.gov](http://www.idwr.idaho.gov)

December 12, 2007

C. L. "BUTCH" OTTER  
Governor

DAVID R. TUTHILL, JR.  
Director

JOHN AND BARBARA BELLER  
3008 WILD ROSE  
IDAHO FALLS, ID 83402

**RE: DIVERSIONS FROM BIG LOST RIVER NEAR THE LOWER BURNETT**

Dear Mr. and Mrs. Beller:

Two water rights held in your names (34-282B and 34-856H) describe a point of diversion that is not consistent with the location at which the Water District 34 Watermaster delivers your water. You are required to take all necessary actions to bring your water rights and actual water use into conformity.

Water users that have been diverting water or rediverting stored water at the Low Burnett Ditch hold water rights that bear a condition naming the Lower Burnett as a point of diversion. However, these rights each describe a point of diversion (or rediversion of storage water) in the NW ¼ of the NW ¼ of the NE ¼ of Section 24, Township 6 North, Range 25 East (hereafter referred to as the NW tract), and do not describe a point of diversion in the NE ¼ of the NW ¼ of the NE ¼ of Section 24, Township 6 North, Range 25 East (hereafter referred to as the NE tract).

Aerial photographs of the area taken between 1987 and 2004 do not depict a diversion in the NW tract, but the Pehrson and Low Burnett ditches are depicted in the NE tract at least as early as 1992. This suggests that water rights describing a point of diversion in the NW tract may have been claimed incorrectly. Regardless of the circumstance that led to these rights being decreed as they were, diversion of water to the Pehrson or Low Burnett Ditches does not conform with the water rights as decreed.

IDWR recognizes that the current diversion of water from the Low Burnett and Pehrson Ditches has occurred for a number of years and may not be substantially different from what was occurring at the commencement of the SRBA. Nevertheless, it is in the best interest of everyone involved that the water rights and the water usage conform to one another. As such, IDWR will not immediately pursue enforcement actions, but you are required to bring your water rights and actual water use into conformity.

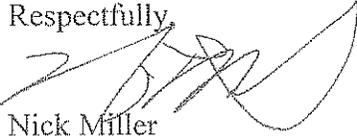
The point of diversion description on the partial decrees may only be changed through an application for transfer or by the SRBA court issuing an amended partial decree.

If, at the start of the 2008 irrigation season, you begin diverting from the Low Burnett and have not initiated efforts to address this issue, IDWR will pursue enforcement actions. Diversion of water not in conformance with a valid water right constitutes a violation of Idaho Code, Section 42-351. That statute provides the director discretion to issue a written Notice of Violation and Cease and Desist Order that can result in monetary civil penalties pursuant to Section 42-1701B, Idaho Code.

John and Barbara Beller  
December 12, 2007  
Page 2 of 2

If you have any questions concerning this matter, please contact me at (208) 287-4956. Please note that a similar letter is being sent to the other water right holders that divert from the Low Burnett.

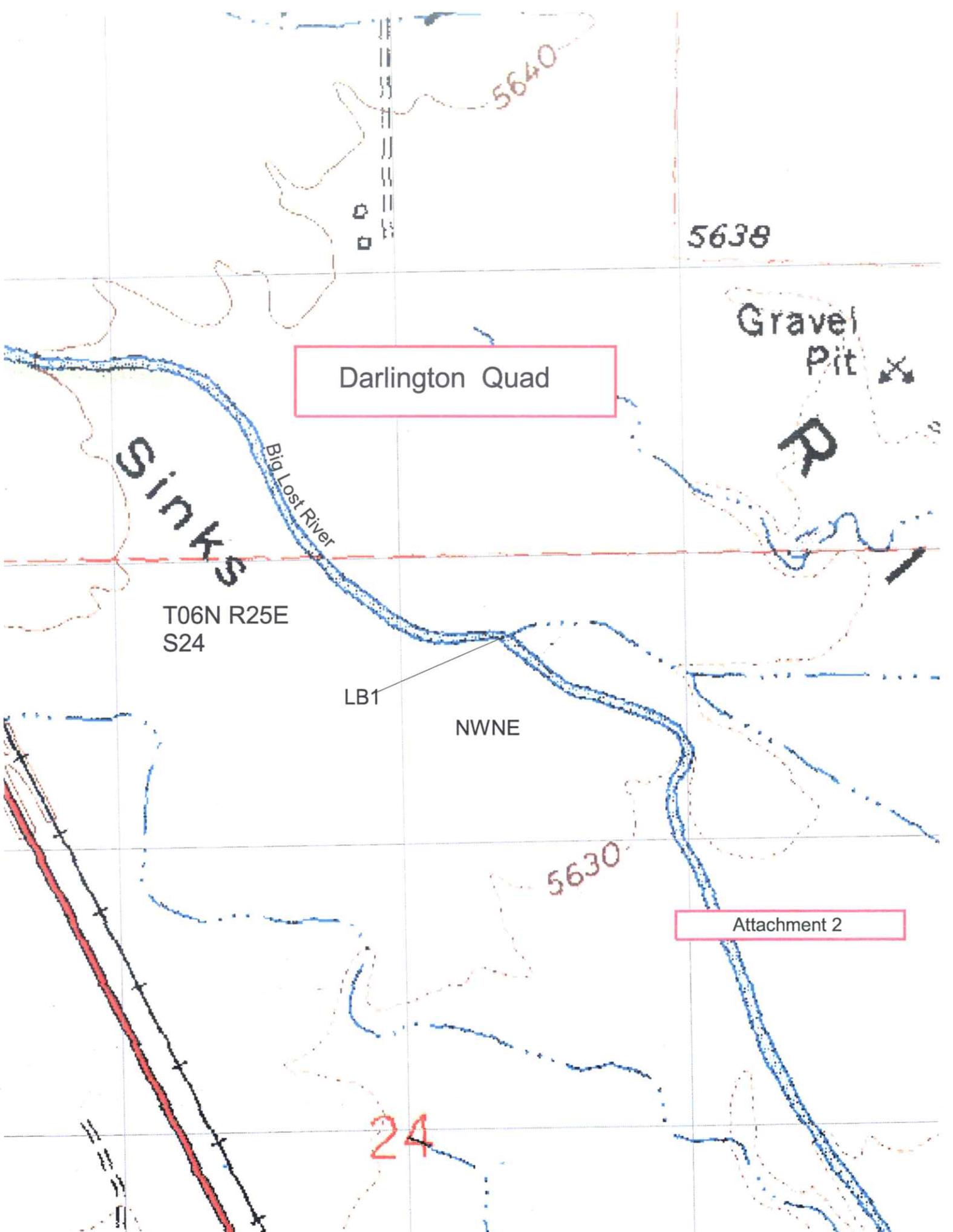
Respectfully,



Nick Miller  
Water Distribution Section  
IDWR

cc:  
BOB SHAFFER – WD34 WATER MASTER - PO BOX 53, MACKAY, ID 83251-0053  
BIG LOST RIVER IRRIGATION DISTRICT – 101 S MAIN AVE MACKAY, ID 83251  
IDWR EASTERN REGION

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BIG LOST RIVER AND TRIBUTARY  
 LIST OF DIVERSIONS

ATTACHMENT  
 C

RECEIVED

JAN 18 1991

Department of Water Resources  
 Eastern District Office

DIVERSION	TRACT	SEC.	TN.	RNG.	COMMENTS
<del>3 &amp; 1</del>	SE NW SE	14	6N	25E	25-50 %
ALDER CREEK	SW SE NW	13	6N	24E	25-50 %
ALDER CREEK	NW NE SE	14	6N	24E	25-50 %
ALDER CREEK	NW SW SE	14	6N	24E	
ANDERSEN DITCH	SW SW NW	15	8N	21E	25-50 %
ANGELO	NE NE SW	10	6N	25E	25-40 %
ARCO (EAST)	NW NW NW	26	4N	26E	25-70 %
B & J	NW SE NW	32	6N	26E	25-70 %
BACK CHANNEL	SW NE NE	05	8N	22E	30-70 %
BECK & EVANS	SW SE SW	11	6N	25E	(SAME AS MC GOWN)
BURNETT	SE NW NW	34	7N	24E	30-70 %
CHILLY CANAL	NE NW NW	12	8N	21E	30-60 %
DARLINGTON	NW SW NE	33	7N	24E	30-50 %
EASTSIDE	NW SE SE	04	5N	26E	
FERRIS SLOUGH	**** TRANSFERED TO THE ARCO DIVERSION *****				
HANRAHAN	NW SE NE	21	5N	25E	20-50 %
HARRIS VAUGHT	SE NW NW	34	7N	24E	30-70 %
INGRAM DITCH	NE NE SE	01	8N	21E	30-70 %
ISLAND	NW SE SE	04	5N	26E	(SAME AS EASTSIDE CANAL)
LONGHURST	SE SW SE	32	9N	22E	30-50 %
LOWER BURNETT	NW NW NE	24	6N	26E	25E NO USE
LOWER CEDAR CK.	SW NW SW	02	7N	24E	NO USE
MARGARET TAYLOR	SW NE SW	20	7N	24E	NO USE
MC GOWN	SW SE SW	11	6N	25E	(SAME AS BECK)
MC LOUGHLIN	NE NW SE	12	3N	26E	30-50 %
MIDDLE	NW NW NW	26	4N	26E	(SAME AS ARCO)
MILLER	NE NE SW	01	3N	26E	30-50 %
MOORE	NW SE SE	04	5N	26E	25-60 %
MUNSEY (WEST)	NW NW NW	26	4N	26E	(SAME AS ARCO) 30-50 %
NEILSEN DITCH	NE SW NW	15	8N	21E	30-60 %
PASS CREEK	SW NW NE	23	7N	25E	30-40 %
SHARP	NW NW SE	12	7N	23E	20-50 %
STREETER	SE SW NE	18	7N	24E	30-60 %
SUTTER	SW NE SE	06	6N	25E	20-50 %
SWAUGER	SW NE SW	20	7N	24E	20-50 %
VANOUS	**** NOT USED ANY LONGER, NOW THROUGH DARLINGTON ****				
WESTSIDE	NW SE SE	04	5N	24E	(SAME AS MOORE)

Average year shrink: 20 to 25% depending on moisture  
 good year 25 to 30% " "  
 drought year 40 to 75%

a lot depends on how much water is delivered, and how much moisture in the air. Generally there is always at least 20% canal shrink, even on a very good year to allow for evaporation, percolation etc. A lot also depends on which canal it is - some canals shrink more than others (see above).

80%  
 1/1  
 + W

Aerial Photo 1987

Big Lost River

T06N R25E  
S24

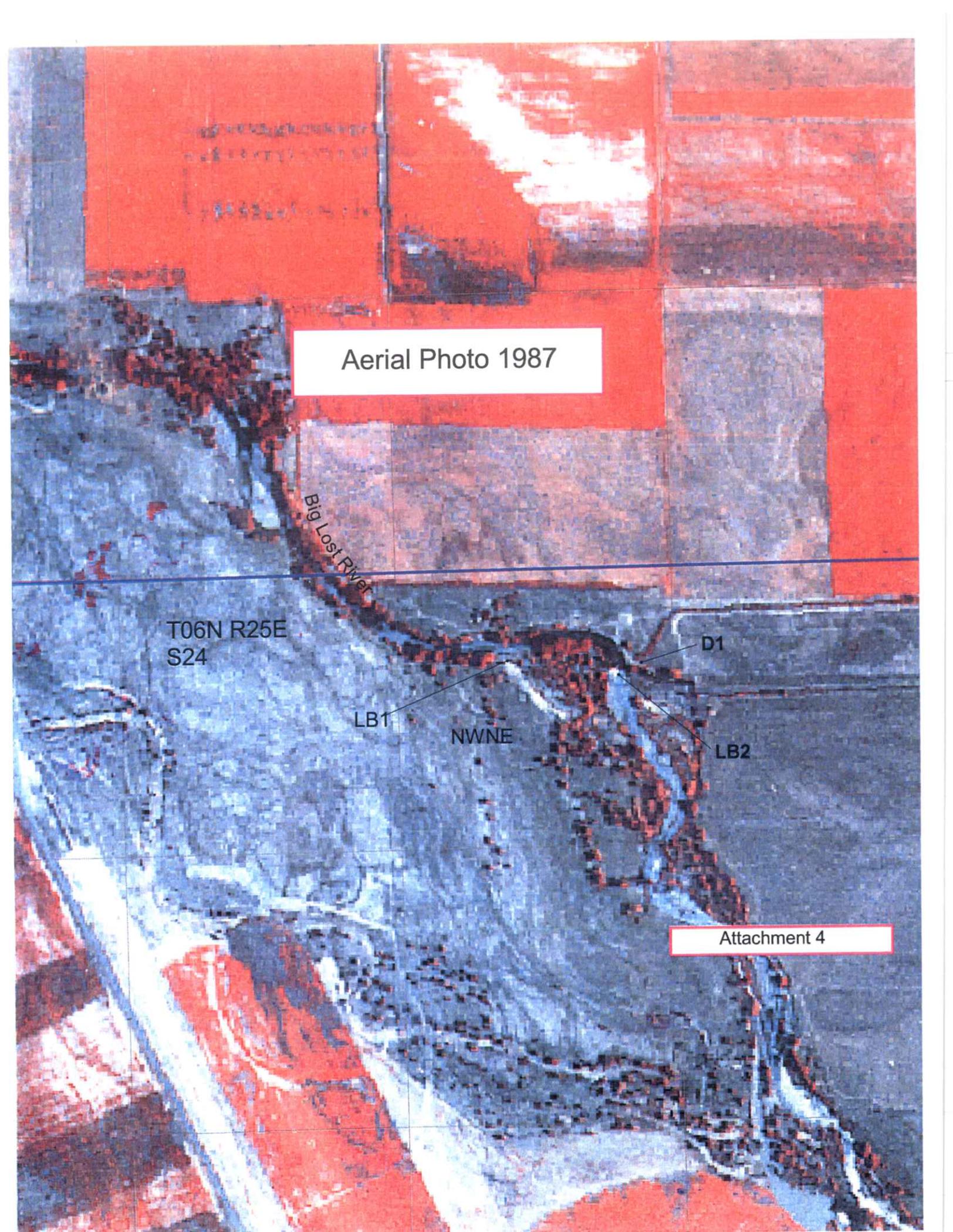
LB1

NWNE

D1

LB2

Attachment 4



Aerial Photo 1992

Big Lost River

T06N R25E  
S24

LB1

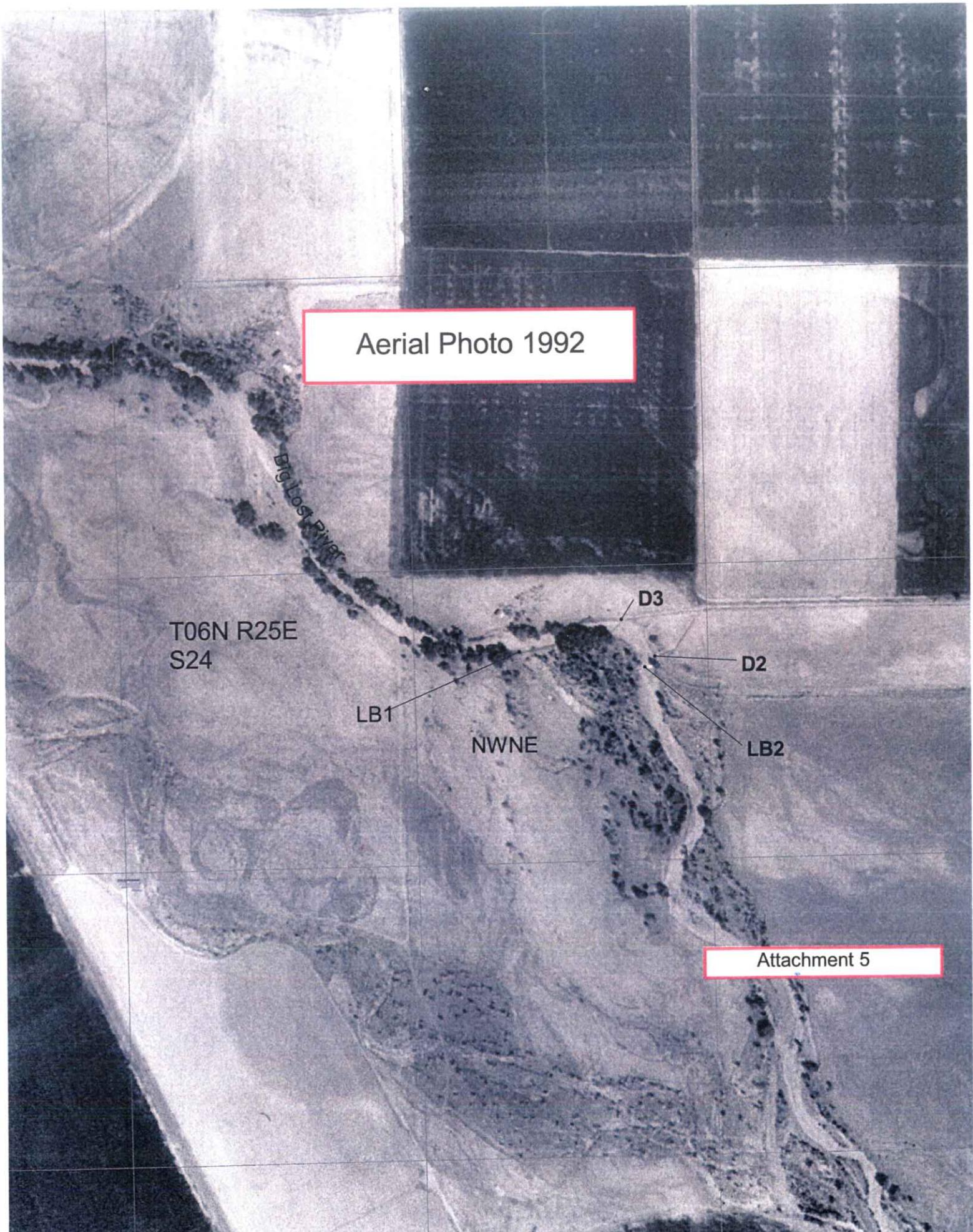
NWNE

D3

D2

LB2

Attachment 5



Aerial Photo 2004

Big Lost River

T06N R25E  
S24

LB1

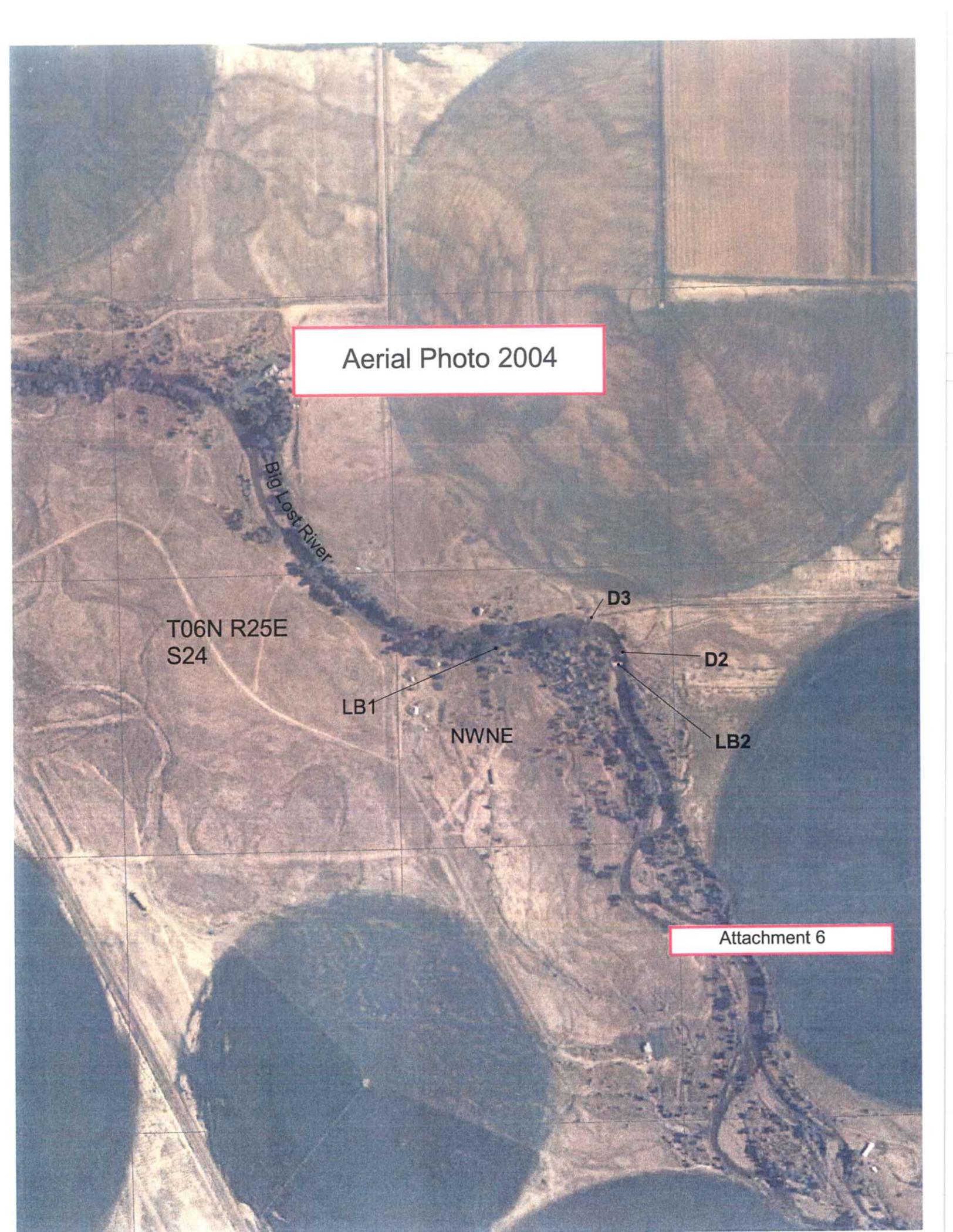
NWNE

D3

D2

LB2

Attachment 6



Aerial Photo 2004

Big Lost River

T06N R25E  
S24

LB1

NWNE

D3

D2

LB2

Attachment 6