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Attorneys for Petitioner CS Property Development LLC

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF CITY OF BOISE
WATER RIGHT Nos. 63-3013, 63-3014, 63-
7005B, 63-7042B, 63-7047, 63-7053, 63-
7055A, 63-7055C, 63-7055D, 63-7064A, 63-
7064B, 63-7078B, 63-7755B, 63-8130B, 63-
8435, 63-9243, 63-9359, 63-12461 and 63-
12470

**PETITION FOR
PARTIAL FORFEITURE**

COME NOW, CS Property Development LLC (“CS Property” or “Petitioner”), by and through its attorney of record Barker Rosholt & Simpson, LLP, pursuant to Idaho Code § 42-222(2) and IDAPA 37.01.01.02.14, 37.01.01.101, and 37.01.01.152, and hereby petitions the Idaho Department of Water Resources to clarify and declare that Water Right Nos. 63-3013, 63-3014, 63-7005B, 63-7042B, 63-7047, 63-7053, 63-7055A, 63-7055C, 63-7055D, 63-7064A, 63-7064B, 63-7078B, 63-7755B, 63-8130B, 63-8435, 63-9243, 63-9359, 63-12461 and 63-12470 (collectively, the “Water Rights”) have been partially forfeited.

INTRODUCTION

The City of Boise (“Boise” or the “City”) owns all of the above-listed, nineteen (19) groundwater rights. The Water Rights share a common place of use, 4,225 acres in Township 1 North, Range 1 East, Boise Meridian on a farm known as the Twenty Mile South Farm, *see*

Exhibit A (a representative map showing the shared place of use of the Water Rights, hereinafter “Twenty Mile South Farm”), and which authorizes irrigation, stockwater, domestic, and industrial uses. These water rights are not authorized for municipal use. Each of the Water Rights contains the same condition, “X35”:

Rights 63-3013, 63-3014, 63-7005B, 63-7042B, 63-7047, 63-7053, 63-7055A, 63-7055C, 63-7055D, 63-7064A, 63-7064B, 63-7078B, 63-7755B, 63-8130B, 63-8435, 63-9243, 63-9359, 63-12461 and 63-12470 when combined shall not exceed a total diversion rate of 60.87 cfs, and a total annual maximum diversion volume of 16,808.1 af for the irrigation of 3,646 acres, industrial, stockwater and domestic uses.

(emphasis added). Thus, the Water Rights entitle the City of Boise to irrigate 3,646 acres within a permissible place of use on the 4,225 acre Twenty Mile South Farm.

Petitioner has an interest in the groundwater resources in and around the Twenty Mile South Farm based upon CS Property’s own groundwater irrigation operations to the north of the Twenty Mile South Farm. The City has asserted that CS Property’s water right applications may injure the City’s water rights for the Twenty Mile South Farm. However, the City has not provided CS Property with information about its water use so that CS Property can adequately evaluate the City’s claims of possible injury. Accordingly, Petitioner, has analyzed the City’s irrigation practices on the Twenty Mile South Farm property over the preceding five years. *See Exhibit B.* To carry out this analysis, Petitioner digitized the City’s fields located on the Twenty Mile South Farm and calculated the number of acres irrigated on each field since and including 2017. Petitioner used aerial photography and infrared imagery from May and July of each year to confirm where irrigation was taking place. Petitioner used pivot numbering conventions received from information requested from the City’s GIS department.

Petitioner’s analysis concluded that, over the past five irrigation seasons, the City irrigates, at most, only 3,298.7 acres of the 3,646 acres it is authorized under the 19 combined

water rights to irrigate on the Twenty Mile South Farm. The City therefore, has failed to irrigate 347.3 acres that are authorized to be irrigated under its combined Water Rights for at least the last five years.

ARGUMENT

Based on its failure to irrigate the land authorized to be irrigated for five consecutive years, the City has partially forfeited its right to irrigate 347.3 acres under its Water Rights. Idaho Code § 42-222(2) provides that “rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated.” The Idaho Department of Water Resources (the “Department”) and the Idaho Supreme Court recognize partial forfeiture of a water right. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 734, 947 P.2d 400, 407 (1997) (The Supreme Court accorded deference to IDWR’s interpretation of statute recognizing the partial forfeiture of a water right for partial nonuse).

“The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.” Idaho Code § 42-222(2); *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 387-88, 647 P.2d 1256, 1259-60 (1982) (“If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters”). The analysis provided in Exhibit B unambiguously shows that, for at least the past five years, Boise has only irrigated 3,298.7 acres of the 3,646 acres it is entitled to irrigate on the Twenty Mile South Farm. Consequently, the City has forfeited its right to irrigate 347.3 acres under the combined use condition contained in its Water Rights.

Pursuant to Idaho Code § 42-222(3), the Department is authorized to extend the forfeiture period up to an additional five years, upon proper showing of “good cause and sufficient reason for nonapplication to beneficial use.” The applicant however, must submit the application for extension to the Department before the end of the original five-year period. *See* Idaho Code § 42-222(4). While Idaho statutes allow for an extension to the five-year forfeiture period, such a request must be made before the five-year period of nonuse, and there is no record that the City has sought an extension of time to put its water rights to beneficial use. The evidence presented herein shows that Boise has not irrigated 347.3 of its decreed acres at the Twenty Mile South Farm for at least five years; as such, the time to request an extended forfeiture period has passed.

The analysis of available groundwater supply in the area that CS Property conducted through Brockway Engineering for its water right application (63-35094) supports the conclusion that there is, and has been, a sufficient groundwater supply to provide water to the 347.3 acres of land that has not been irrigated by the City. Likewise the Director’s determination that the ground water management area in Southeast Boise need not be extended to the area of the Twenty Mile South Farm also demonstrates that the water supply is not approaching a critical groundwater condition. *See* Idaho Code § 42-233b.

The Department’s procedural rules define a petition as, *inter alia*, a pleading requesting “the clarification, declaration or construction of a person’s rights or obligations under law administered by the agency. . . or to otherwise request the agency take action that will result in the issuance of an order.” IDAPA 37.01.01.02.14; *see also* Idaho Code § 67-5240 (defining contested case as a proceeding leading to an order). Here, CS Property is a petitioner as it seeks “to clarify or have the agency declare. . . a person’s rights or obligations.” IDAPA 37.01.01.152. Specifically, Petitioner requests that the Department initiate a contested case proceeding to

clarify the extent of the City's combined Water Rights, and declare or issue an order that the maximum acre limit under those rights be reduced by 347.3 acres as a result of the City's partial forfeiture. Under the rules of procedure, contested cases are conducted as formal or informal proceedings. IDAPA 37.01.01.100. The Department has the authority to proceed directly to formal proceeding rather than relay on informal. IDAPA 37.01.01.100.03. Given the importance of this issue and the expected reluctance of the City to accept the fact that its water rights have been lost to forfeiture, Petitioner requests the Department initiate the contested case and move to the formal proceedings to clarify and determine the scope of the City's rights under the Combined Water Rights.

CONCLUSION

This petition provides clear and convincing evidence that the City of Boise has forfeited its rights to 347.3 acres of its combined Water Right Nos. 63-3013, 63-3014, 63-7005B, 63-7042B, 63-7047, 63-7053, 63-7055A, 63-7055C, 63-7055D, 63-7064A, 63-7064B, 63-7078B, 63-7755B, 63-8130B, 63-8435, 63-9243, 63-9359, 63-12461 and 63-12470. As such, Petitioner asks the Department to initiate a contested case and move to formal proceedings pursuant to IDAPA 37.01.01.101 to amend the City's decreed water rights to represent this forfeiture and to decrease the City's combined Water Rights.

DATED this 4th day of October, 2022.

BARKER ROSHOLT & SIMPSON LLP

/s/ Albert P. Barker

Albert P. Barker

Attorneys for CS Property Development LLC

Total est. Field Acres = 3,298.7

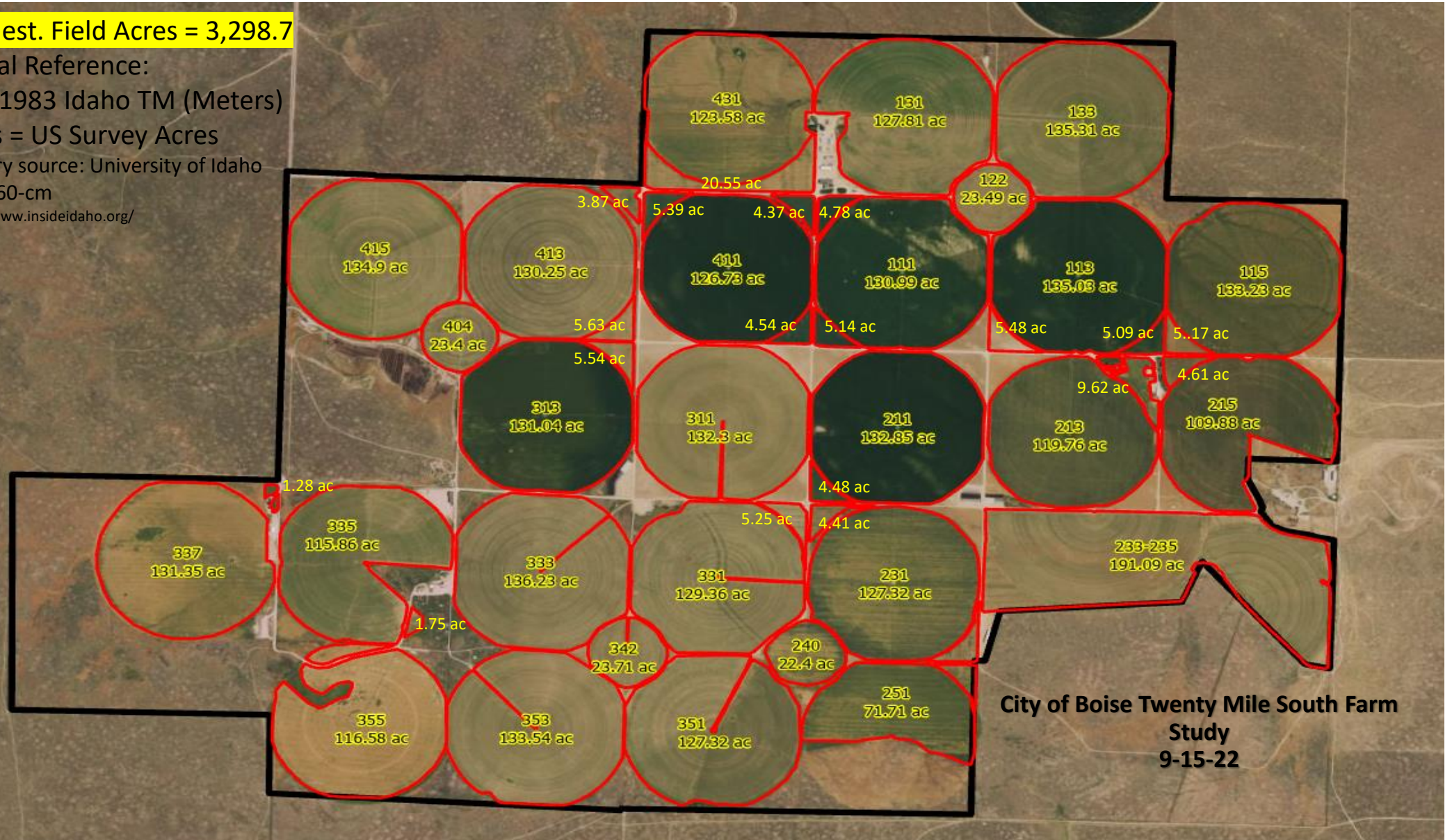
Spatial Reference:

NAD 1983 Idaho TM (Meters)

Acres = US Survey Acres

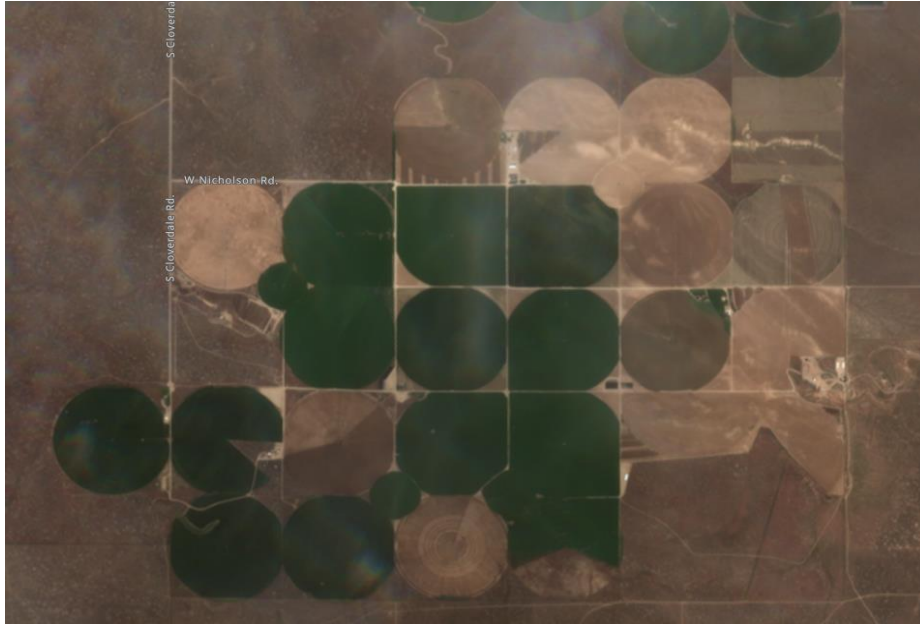
Imagery source: University of Idaho
2019, 60-cm

<https://www.insideidaho.org/>



Twenty Mile South Farm from 2017-2022

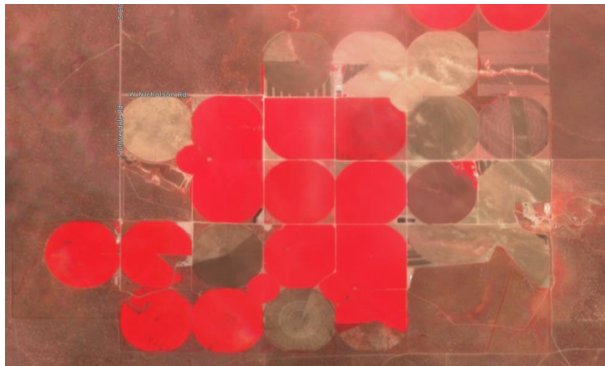
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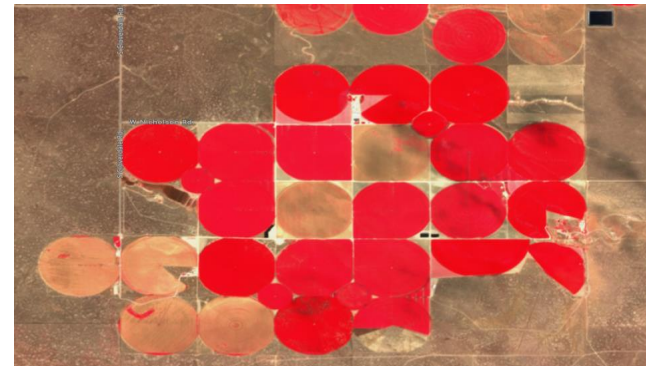
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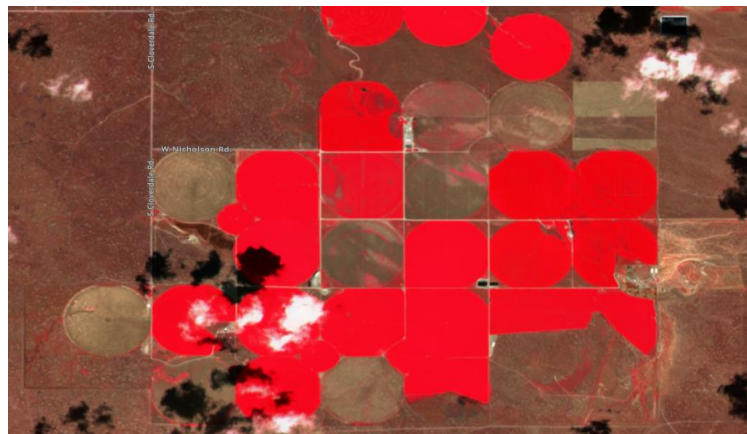
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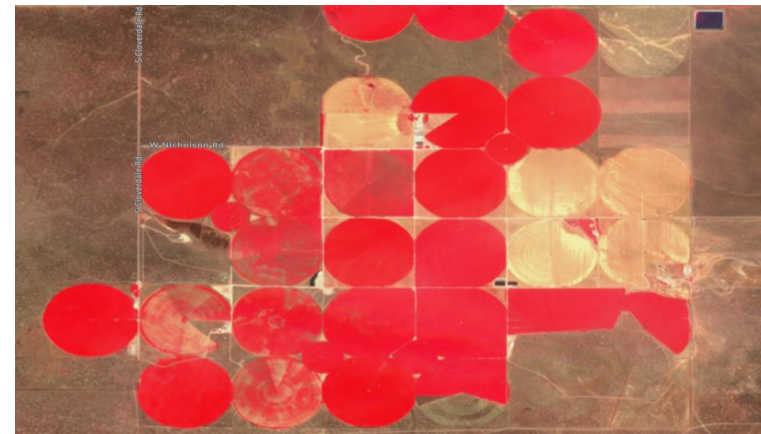
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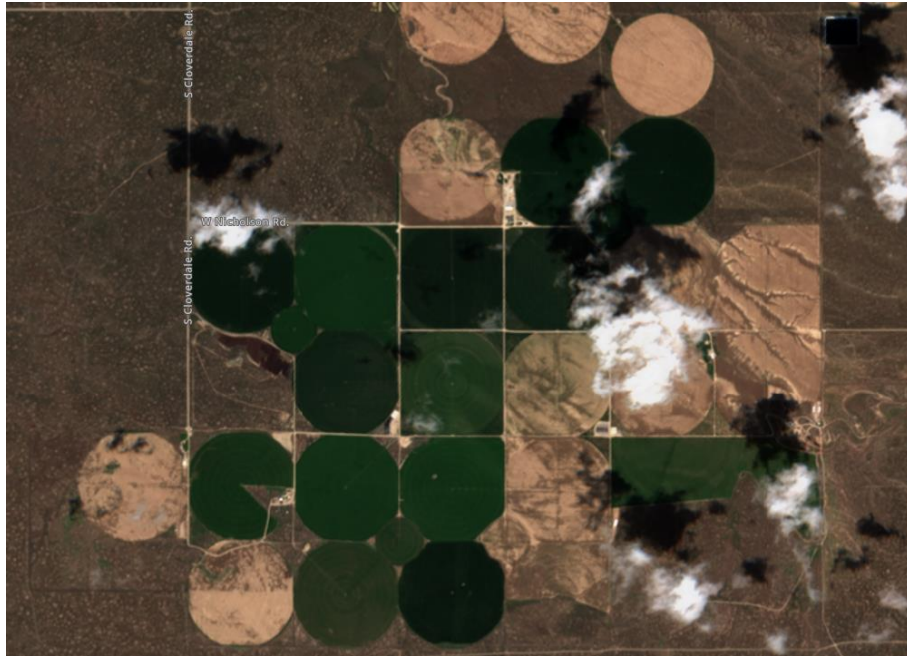
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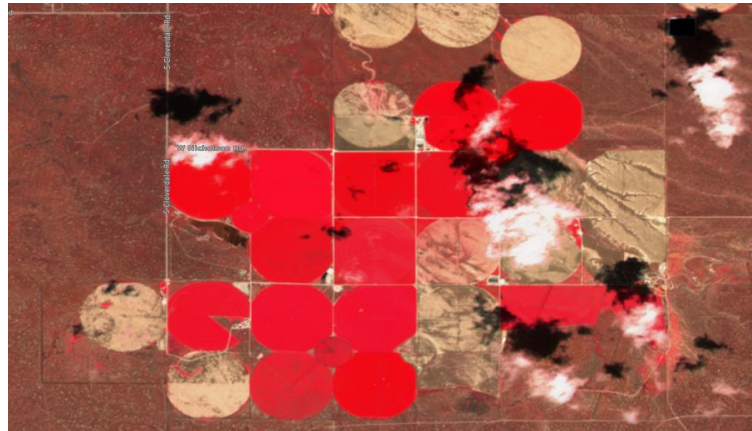
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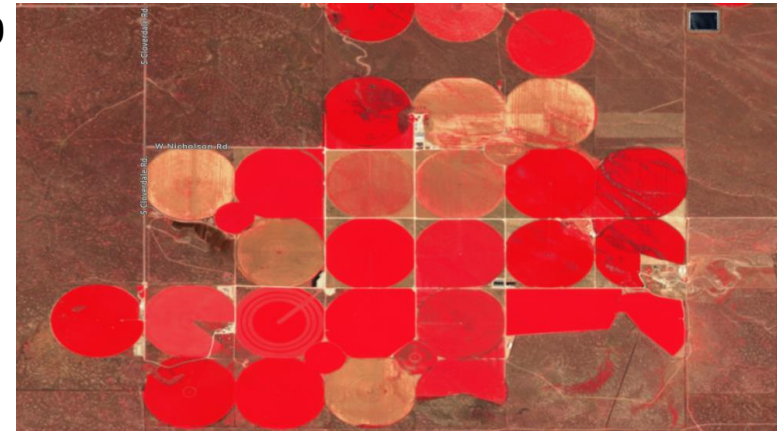
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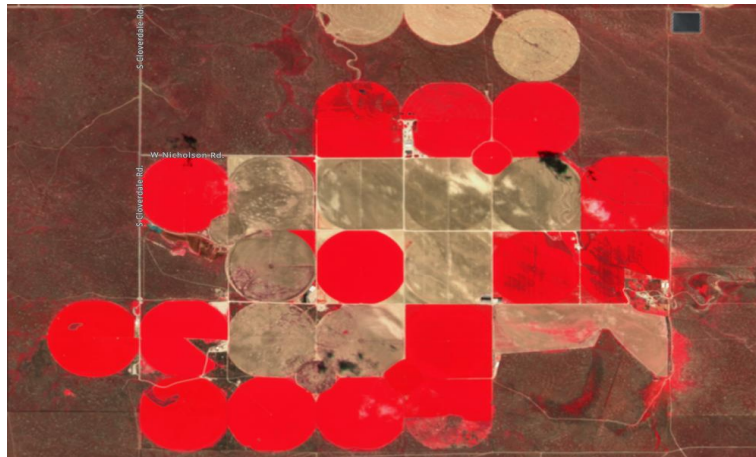
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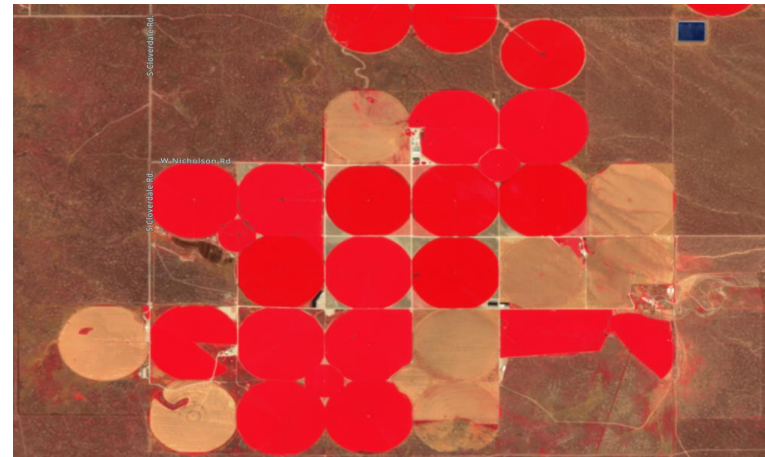
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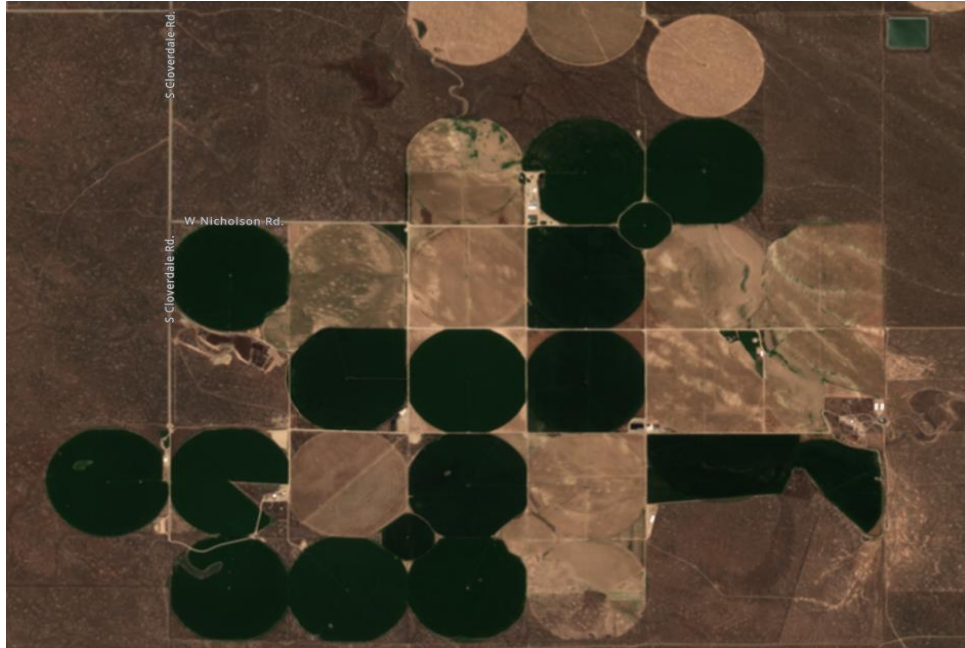
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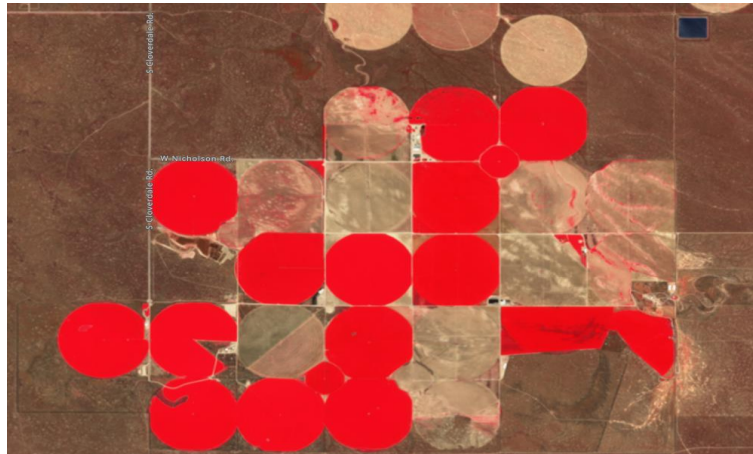
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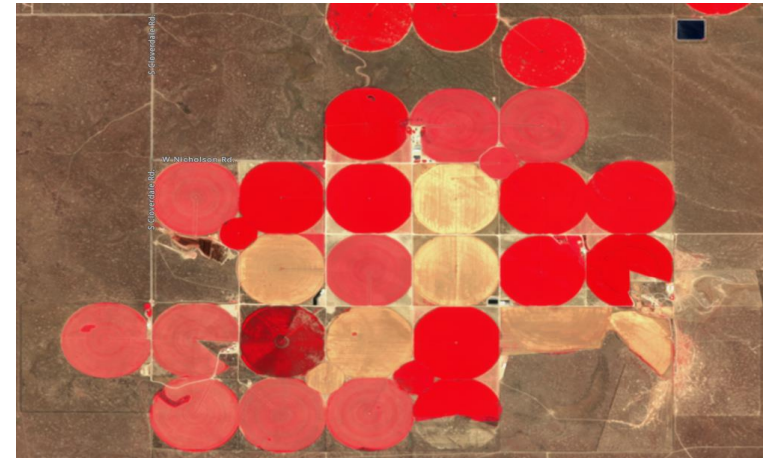
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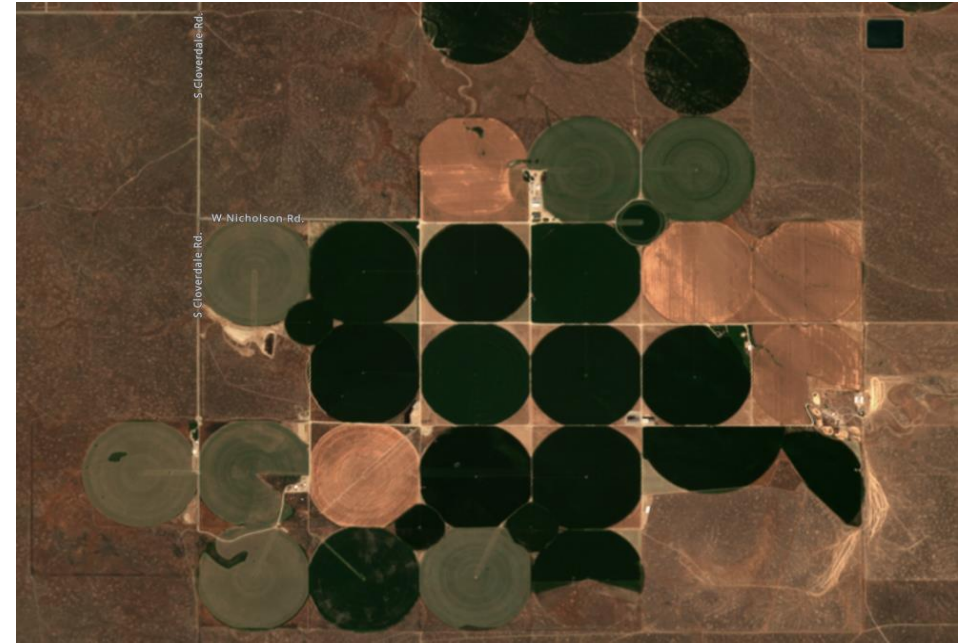
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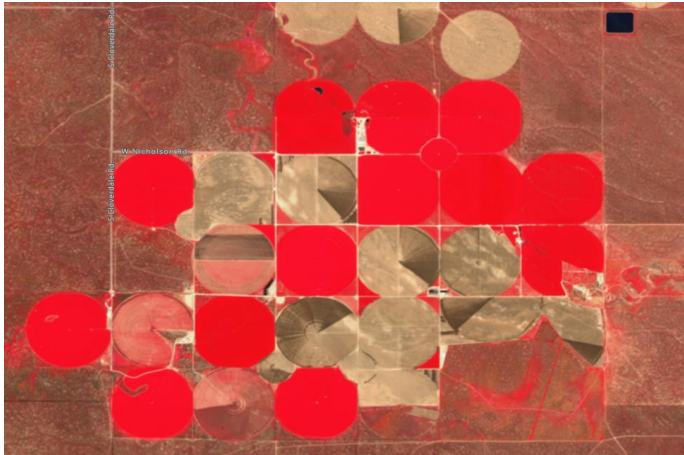
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