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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI**

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Plaintiff,

v.

FLOYD JAMES WHITTAKER and JORDAN
WHITTAKER, as individuals; WHITTAKER
TWO DOT RANCH, LLC, an Idaho limited
liability company; and WHITTAKER TWO
DOT LAND, LLC, an Idaho limited liability
company,

Defendants.

Case No. CV30-22-0169

**DECLARATION OF
BRYCE A. CONTOR**

I, Bryce A. Contor, state that the following is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

1. I am over the age of eighteen (18) and am competent to testify to the matters contained herein.

2. Attached as **Exhibit 1** is a true and correct copy of a report I prepared entitled *Whittaker Measuring Device and Diversion Report* dated August 3, 2022.
3. In addition to the information in my report, I took a flow measurement at Point G (described and depicted in the report) on July 25, 2022. The measuring device is an 18-inch Cipolletti weir, which appeared level and plumb, with an adequate approach pool and approach velocity. The nappe was springing clear. I measured 0.34 ft of roll-up on a weir stick on the weir crest. Using Bureau of Reclamation tables, this indicates flow of 1.00 cfs.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct. Idaho R. Civ. P. 2.7; Idaho Code § 9-1406.

August 9, 2022



Bryce A. Contor

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2022, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated.

Document Served: DECLARATION OF BRYCE A. CONTOR

Attorneys and/or Individuals Served:

Garrick Baxter Lacey Rammell-O'Brien Mark Cecchini-Beaver Deputy Attorney General IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov lacey.rammell-obrien@idwr.idaho.gov mark.cecchini-beaver@idwr.idaho.gov	<input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> FedEx Delivery <input checked="" type="checkbox"/> iCourt
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Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for the Defendants



WHITTAKER MEASURING DEVICE AND DIVERSION REPORT

Prepared by Bryce Contor

August 3, 2022

Introduction

On July 25, 2022, I conducted field reconnaissance to evaluate the status of Whittaker measurement and control structures relative to an April 21, 2022 Cease and Desist letter from Rob Whitney of the Idaho Department of Water Resources (IDWR) Water Compliance Bureau, addressed to James Whittaker.

The Cease and Desist letter requires three actions:

- 1. Cease diverting the waters of Stroud Creek below the authorized diversion point for water rights 74-369, 74-1136, and 74-15788, near the Ericsson corral. The Department's field observations confirm that the Stroud Creek channel exists above and below the Whittaker in-channel headgate.*
- 2. Remove or modify the in-channel headgate noted in no. 1 above to allow all Stroud Creek water in excess of authorized diversions under water rights 74-369, 74-1136, and 74-15788, to flow downstream to the confluence with Lee Creek. An open-top check structure in Stroud Creek, designed to direct water through the new headgate on the existing ditch may be determined suitable.*
- 3. Install suitable headgates or controlling works and measuring devices at or near both diversion points authorized by water right 74-157. The WD74Z watermaster must have the ability to deliver spring waters, tributary to Lee Creek, downstream to satisfy senior water rights.*

The standards I used to evaluate current status relative to the Cease and Desist letter are a 2018 IDWR Final Order Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions in Administrative Basin 74 (Measurement Order) and attachments, the 1975 printing of the United States Department of the Interior Bureau of Reclamation Water Measurement Manual (WM Manual) and my nearly 25 years' experience as a practicing hydrologist, including my years of service as an IDWR Senior Water Resource Agent. In that capacity, I worked in the Water Measurement District program and in the Snake River Basin Adjudication.

The focus of this document is technical, though I necessarily will refer to advice of legal counsel where response depends on legal and policy positions implicit in the Cease and Desist letter. Observations will be presented first, from upstream to downstream. Following observations will be my assessment of the degree of compliance, or actions required to become compliant, with the requirements of the Cease and Desist letter.

Observations

In this report I primarily use my observations on July 25, 2022, supplemented by observations I made in 2020 and 2021, and material from my reports of those previous observations. My final observation uses data obtained from IDWR.

Attached Map 1 shows the locations where I made observations. Map 2 shows detail of the "Ericsson Corral" observations, Map 3 shows detail of the "Hilltop" observations, Map 4 shows detail of the "North Fence" observations, and Map 5 shows Point of Diversion (POD) data from IDWR.

Most photos were taken with a cellular telephone using an application that posts geographic information from the telephone's sensors. Experience has shown that the horizontal coordinates usually are reliable from this device but the azimuths of photo direction are not. All collected GPS points were indicated by the device to have approximate horizontal accuracy of 16 feet. GPS tracks generally should have similar horizontal accuracy. In the maps, features that don't include "GPS" in the name were set by reference to the aerial image and other GPS data.

Ericsson Corral Observations

Map 2 provides details of the area I observed in and near the Ericsson Corral.

- Line feature 1 is a channel that brings Stroud Creek from the south. Its location indicates that it must be the feature described in the Cease and Desist letter as *"the Stroud Creek channel [that] exists above... the Whittaker in-channel headgate."*
- Line feature 2 is a channel that appears to be human made (it is relatively straight, smaller than the channel upstream, and not located in the topographic low of the drainage) that conveys Stroud Creek water to the north from Point B, if not diverted at Point A. In 2020 I observed, photographed and reported head cutting occurring in this channel, suggesting that in the recent past it has at times conveyed substantially more water than historically.
- In 2020 I carefully explored the area beyond the north end of line feature 2 and confirmed that beyond that point there is no clearly defined channel. Rather, water spreads out and flows in a distributed fashion northward through heavy willow growth.
- Line feature 3 is a channel that appears human made, which conveys water from Point A over a Cipolletti weir at Point D to a pipeline inlet at Point E. Photo 1 shows the Cipolletti weir. The upstream pool was of adequate size and clean enough that the bottom suppression of the weir would be functional. It was acceptably level and the ditch configuration on the downstream was appropriate to avoid submergence and assure

adequate aeration of the nappe. Flow across the weir was 1.42 cfs, essentially the full flow of the creek on July 25.

- Line 2 and Line 3 are the only channels existing that could convey water away from locations A, B and C.



Photo 1. Cipolletti weir at Point D in Map 2. The camera was facing approximately south.

- Line feature 4 is an apparently human-made channel that conveys water to the northeast if the pipeline is not accepting water.
- At Point A I observed a green-painted steel control gate which I believe to be the "*authorized diversion point for water rights 74-369, 74-1136, and 74-15788, near the Ericsson corral,*" also described in the Cease and Desist letter as "*the new headgate on the existing ditch*" I will call it the "Green Headgate" in this report. It is shown on the right in Photo 2.
- At Point B is a steel, bottom-opening headgate set in a wood frame. It was closed and only a small amount of water was leaking past it. I believe it is the "*Whittaker in-channel headgate*" and "*in-channel headgate noted in no. 1 above*" referred to in the Cease and Desist letter. It is shown in the center in Photo 2. I am bent down pointing to a water mark on the wooden structure, about three inches above the top of the steel gate in its closed position. I refer to this as the "Check Structure" in this report.



Photo 2. Green Headgate (right) and Check Structure (center).

- Using a hand level, I confirmed that the maximum bank elevation at Point C was approximately 0.3 feet below the corresponding bank on the southeast side of the channel, and that the ground slopes up from the southeast side and down from the northeast side of the channel at Point C.
- At my request the operator closed the Green Headgate. I observed water bypass the Check Structure on the northwest side at the location labeled Point C in Map 2, as shown in Photo 3 and Photo 4. at the very right of Photo 4 the top of the steel gate can be seen, suggesting that had we waited longer, or at greater rates of flow, water also could flow over the top of the Check Structure in the closed position as well as bypass on the upstream side as observed.



Photo 3. Water bypassing the Check Structure. The camera was facing approximately east from near Point C.



Photo 4. Water bypassing the Check Structure. The camera was facing approximately west looking towards Point C on the opposite bank.

Hilltop Observations

Map 3 shows the locations of observations in the area I have called "Hilltop."

- The Line 4 feature is the same bypass ditch identified as "Line 4" in Map 2 and discussed above.
- Line 5 is a ditch from East Springs, one of the sources of Water Right 74-157. It extends farther to the southeast than I have drawn.
- Line 6 is a continuation of the ditch from East Springs that can convey its water northwest. It also conveys West Springs water to the north, along with bypass water from the Whittaker Diversion at times that the pipeline inlet is not accepting flow.
- Line 7 and Line 8 are ditches that can convey East Springs water or bypass to the northeast, which is the natural lay of the land in this vicinity. East Springs water was proceeding to the northeast via Line 7 on July 25, 2022. Line 7 is short and difficult to see, proceeding north from very near Point F.
- Line 9 is the collector ditch from the West Springs, which conveys water eastward. West Springs is the other source for Water Right 74-157. The GPS Track points show where I walked to observe the West Springs collector ditch. Though the downstream (north) side of this ditch is often described as a "berm," its top generally is 30 to 50 feet wide and it is more characteristic of the bank of a ditch that has been excavated.
- Point F is the location of a Cipolletti weir on the East Springs ditch. About 50 feet downstream the ditch had been blocked with dirt and the water in the ditch was backed up so that water would proceed northeast along Line 7. The weir was running submerged and not functional for flow-measurement purposes, as shown in Photo 5. We discussed maintenance that could make the weir functional. I was informed on August 3rd that the maintenance was successful. As seen in Photo 6, the nappe now springs free of the blade

and the weir is not submerged. On July 25 I saw that the approach pool and approach velocity were adequate and that the crest of the weir was adequately level.

- Point G is a properly-installed and functioning Cipolletti weir that can measure all water flowing north in the ditch marked as Line 6. Photo 7 shows that it is not submerged and that the nappe is fully aerated. at this location I did not see provision for water to go down the ridge to the west and enter the Stroud Creek drainage.
- Point H is the beginning (upstream end) of the West Springs collector ditch. Photo 8 is typical of the West Springs collector ditch.



Photo 5. East Springs weir, looking approximately east-southeast.



Photo 6. East Springs weir after maintenance. Photo provided by Jordan Whittaker, August 3, 2022.



Photo 7. Cipolletti weir at Point G. The camera is facing approximately east.



Photo 8. Looking approximately west, upstream along the West Springs collector ditch.

North Fence

The North Fence area is illustrated in Map 4.

- The Line 10 feature is a small channel. In 2021 I followed this channel upstream as approximately indicated by Line 10 to an area of diffuse springs at substantially greater elevation than the Stroud Creek channel and not connected to it.
- Also in 2021 I used a hand level and range pole to survey a cross section of the Stroud Creek drainage in the approximate vicinity of the southern extent of Map 4. I found that Stroud Creek unambiguously was flowing in the topographic low of the drainage and that there were no unused channels to the west that could have previously conveyed Stroud Creek on a path to the west of its current location. I did find a dry channel remnant to the east of the creek's current location.
- Line 11 marks the current location of Stroud Creek channel in the vicinity of the July 25 reconnaissance. The creek extends upstream and downstream beyond the lines indicated. In 2021 I confirmed with a hand level that Stroud Creek is in the topographic low point of the drainage at this cross section also.
- Line 12 marks the current location of Lee Creek. The part of the trace from Point L south I confirmed by walking the creek in 2021 with a GPS unit. Near the south end of the mapped part of the creek, the map does not adequately show that upstream from a distinct breakpoint location, the channel is much more sinuous as the stream comes in from the southwest. Below the breakpoint, the channel proceeds straight north and is held upslope on the side of the drainage by a berm a few feet high and a few feet wide.
- Line 13 marks the beginning of a ditch remnant that I followed north in 2021. Within the precision of georeferencing of a paper map, the 2021 GPS trace maps almost exactly along a ditch that was shown on a Lemhi Adjudication map that covers this area.

- Point J marks where a two-track road crosses the spring-fed channel mapped as Line 10. On July 25, as well as during my 2021 observations, it was conveying just enough water to have a little bit of water visible among the rocks of the crossing.
- Point K is where the two-track road crosses Stroud Creek. There used to be a culvert at this location. Photo 9 shows where I measured flow at 0.9 cfs plus or minus 25 percent using a velocity-head rod.



Photo 9. Looking west at Stroud Creek. Water is flowing from left to right.

- Point L is a culvert where the road crosses Lee Creek. I did not measure flow in Lee Creek.

Mapping of Water-right Points of Diversion

The context of the third requirement of the Cease and Desist letter was that *"the watermaster must have the ability to deliver spring waters, tributary to Lee Creek, downstream to satisfy senior water rights."* From prior conversation with legal counsel, I was interested in a reported POD much farther north (downstream) on Lee Creek, possibly in the name of Beyeler Ranches. Using a GIS database of PODs from IDWR, Map 6 was generated using all PODs with "Lee Creek" as the source and "74" as the Basin number. Surprised at the lack of PODs farther downstream, I also queried IDWR's online Water Rights Search tool for Lee Creek rights, confirming the mapping result.

Assessment of Compliance

Each requirement is discussed in turn, in context of my field observations and consultation with legal counsel.

Requirement 1.

Cease diverting the waters of Stroud Creek below the authorized diversion point for water rights 74-369, 74-1136, and 74-15788, near the Ericsson corral...

Because all the water in Stroud Creek at Point A on Map 2 was diverted through the Green Headgate, I conclude that on July 25 this condition was met.

In a general sense, only two channels exist downstream of this point; the channel marked Line 2 on Map 2, and the channel marked Line 3. Line 3 is a ditch from the Whittaker Diversion to the Whittaker Places of Use (POUs) and is authorized under the water rights listed, as delivered by the watermaster. Therefore, this requirement must refer to water that remains in the channel marked Line 2.

In a prior report I called the channel marked as Line 2 a "private ditch," and legal counsel informs me that in the appeal involving IDWR to Judge Wildman, Hearing Officer Cefalo's designation of this channel as the a private ditch system (the "Whittaker ditch system" (*Order Denying Petitions for Reconsideration* at 5)) was not pursued on appeal by Whittaker and the District Court did not otherwise reverse this determination. Accordingly, the legal designation of this channel as a private ditch is the current authoritative designation. However, it is the only feature I observed that could be what IDWR in the Cease and Desist letter now calls "*the Stroud Creek channel [that] exists... below the Whittaker in-channel headgate.*"

If Line 2 is "*the Stroud Creek channel*", as alleged in the Cease and Desist letter, then all water bypassing the Green Headgate would be compliant, in a general sense. If Line 2 is a "private ditch," then water bypassing the Green Headgate could be considered "diverted" for the few hundred feet that the channel exists, but the channel does not connect to the Whittaker ditch or pipeline system; rather, it conveys water to an area with no distinct channel where it spreads out among willows and other vegetation.

Regardless of the legal status of Line 2 as either a channel of Stroud Creek or a private ditch, I see no ability for Whittaker to divert water "below the authorized diversion point," and conclude that the current configuration is compliant with Requirement 1.

Requirement 2

Remove or modify the in-channel headgate noted in no. 1 above to allow all Stroud Creek water in excess of authorized diversions under water rights 74-369, 74-1136, and 74-15788, to flow downstream to the confluence with Lee Creek. An open-top check structure in Stroud Creek, designed to direct water through the new headgate on the existing ditch may be determined suitable.

This requirement has a specific physical requirement, to "*remove or modify*" the headgate, with the refinement that "*an open-top check structure... may be determined suitable.*" The feature of an open-top check structure that appears relevant in this context is that regardless of authorized flow through the Green Headgate, all excess flows in Stroud Creek at this point should bypass

into the channel marked Line 2. As confirmed by my observations when the Green Headgate was closed, the current configuration meets this requirement.

Requirement 2 is odd in its wording because it requires a result that cannot be achieved by any modification of the structures in the Ericsson Corral: "[A]llow all [excess] Stroud Creek water... to flow downstream to the confluence with Lee Creek." There is no physical ability to deliver Stroud Creek water from this point to Lee Creek, and it appears that this requirement combined with Requirement 3 may be intended to achieve an omitted goal which I will discuss later as "Implicit Requirement 4." I conclude that Requirement 2 as written cannot be achieved by any action at the Ericsson Corral and therefore that Whittaker is not nor can be in compliance.

Requirement 3

Install suitable headgates or controlling works and measuring devices at or near both diversion points authorized by water right 74-157. The WD74Z watermaster must have the ability to deliver spring waters, tributary to Lee Creek, downstream to satisfy senior water rights.

This requirement has two parts; "*headgates or controlling works,*" and "*measuring devices.*"

The measuring-device requirement is met for the West Springs Ditch; the weir I observed at Point G in Map 3 is adequate and functional to measure the sum of flows from West Springs. If the system is operated so that East Springs water reaches this location via Line 5 and Line 6 from Point F, then flows at Point F can be subtracted. This could leave unaccounted any contributions from the Green Headgate that might reach Point G via the Line 4 ditch. If it is acceptable to consider that at times, overflow from the Whittaker pipeline intake at Point E may erroneously be attributed to West Springs, then the requirement is met. If this conservative, potential overestimate is not acceptable, a Cipolletti weir in the Line 6 ditch, somewhere downstream of the confluence with Line 4 and upstream of the West Springs contribution, would meet the requirement. If fall in this section of ditch is inadequate for a Cipolletti weir, a submerged orifice could be used. A submerged orifice has the advantage of being able to measure flow with low head loss and on low-gradient channels. Its disadvantages are: 1) Upstream and downstream readings must be taken to calculate a head difference that is small relative to precision of measurements, increasing opportunities for mistakes and errors and reducing precision; 2) The controlling structure is submerged and therefore prone to plugging and fouling with foreign matter; 3) The controlling structure is difficult to see and therefore problems can go undetected.

The Cipolletti weir on the East Springs ditch at Point F was submerged on July 25th and did not meet the requirement. As seen in Photo 6, I am informed that subsequent maintenance has made this weir functional and compliant.

I conclude that for West Springs, the measurement requirement is met or could be met, depending on the acceptability of conservative imprecision at times of bypass flows from the Whittaker pipeline system. I conclude that East Springs device is in compliance as of August 3rd, 2022.

The controlling-works requirement is more problematic.

Both springs are actually complexes of diffuse seepage into human-made collector ditches, with numerous small discrete springs also contributing flows. Infrastructure to stop the flow of a discrete spring would be difficult to conceive, and infrastructure to stop the flow of diffuse seepage would be very difficult to conceive. The remaining option then would be to provide some kind of bypass or spill that would let the water leave the collection ditch and go to some other location.

Based on walking the entire East Springs collection ditch as I have previously reported, East Springs is not topographically upgradient of Lee Creek nor could it be tributary to Lee Creek if not diverted. Physically, it would not be difficult to construct a bypass near Point F in Map 3 that would let East Springs flow exit the Whittaker ditch system and proceed east-northeast in the general vicinity of where the flows would accrue had East Springs never been developed, but these flows could not reach Lee Creek. I conclude that East Springs is not compliant, nor is it possible to be compliant, with a requirement that East Springs not be diverted but instead be allowed to be tributary to Lee Creek.

The topography is such that West Springs water could be bypassed or spilled to become tributary to Lee Creek, but infrastructure to do this does not exist. I conclude that West Springs is not compliant but physically could be with construction of a bypass structure near and upstream of the existing weir at Point G in Map 3.

Summary of Formal Requirements

To summarize my findings regarding the three formal requirements:

- Requirement 1 was met on July 25, and it generally is met by existing infrastructure. The administrative interpretation of exactly how it is met depends on the legal status of the channel marked Line 2 in Map 2.
- The first part of Requirement 2 is to modify infrastructure to achieve the functional ability for all flow not diverted by the Whittaker Diversion to pass downstream of the control works located in the Ericsson Corral. I conclude that the existing infrastructure functionally meets this part of the requirement.
- The second part of Requirement 2 is that the modification allow Stroud Creek water to flow to Lee Creek. This requirement cannot be achieved by modification of infrastructure at the Ericsson Corral.
- The first part of Requirement 3 relates to measurement devices for East Springs and West Springs. The East Springs device was not compliant on July 25 but is compliant as of August 3. The West Springs device is compliant if an occasional over-estimate of flow is acceptable. If not, an additional structure on the channel marked Line 6 in Map 3 would allow full compliance.
- The second part of Requirement 3 is for the physical ability to not divert spring water but instead deliver it to Lee Creek. The requirement is not met for East Springs nor is it physically possible. It is not met for West Springs but physically could be.

Implicit Requirement 4

It appears that an implicit goal of the Cease and Desist letter is to obviate the effect of the West Springs Ditch in its current physical configuration. Legal counsel indicates that through the Lemhi County District Court lawsuit associated with the Cease and Desist letter, IDWR mandates both Stroud Creek water not diverted at the Green Headgate and any East Springs water not delivered to Whittaker to proceed beyond or outside of this ditch to the Stroud Creek drainage to the north, where eventually it would become tributary to Lee Creek. Legal counsel informs me that the original agreement summarized in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956) allows for the West Springs Ditch to “capture of all the waters of [Stroud Creek] found flowing in the Creek at the place where, pursuant to the contract respondents constructed said dam below appellants’ newly designated upstream point of diversion, and such waters so captured by respondents included the water of the West Springs.” *Memorandum Decision and Order* at 6. In other words, the agreement authorized capture of both West Springs water and excess Stroud Creek water not diverted at the Green Headgate. The alterations to the flow of Stroud Creek and the effects of these alterations were upheld by Judge Wildman, and that “Whittaker should not be required to restore the original flow of Stroud Creek, thereby causing significant disruption to a system that has been in place since 1932 based on the agreement of the McConnells’ predecessors.” *Id.* at 9. Further, Judge Wildman determined “[t]hat the McConnells’ use of the Kauer Ditch ceased in 2014 was not the result of any action taken by Whittaker.” *Id.* at 6-7. Based on these legal authorities, legal counsel informs me that there does not appear to be any legal requirement to spill Stroud Creek water not diverted at the Green Headgate from the West Springs Ditch to proceed down the Stroud Creek drainage.

Until 2014, the function of the West Springs Ditch operated in conjunction with the Kauer Ditch, but that ditch's functionality is no longer available without an approved transfer to restore the Kauer Ditch as an authorized point of diversion to McConnell’s water rights.

The technical component of reviewing this implicit goal is to understand the administrative effect it would have in delivering water “downstream to the confluence with Lee Creek” to “to satisfy senior water rights.” The administrative effect on individual PODs of changing the historical function falls into the following categories:

- Not below the West Springs Ditch: Changing the function would not benefit such PODs.
- Below the West Springs Ditch:
 - Relative to water right 74-157:
 - Junior to or subordinated to water right 74-157. Changing the function would not benefit such PODs.
 - Senior to water right 74-157 and not subordinated. Changing the function could benefit such PODs if not otherwise satisfied by Lee Creek and/or gains to Stroud Creek below the West Springs Ditch.
 - Relative to Stroud Creek PODs or its Tributaries:
 - Junior to Stroud Creek PODs that are above the West Springs Ditch: Changing the function would not benefit such PODs.

- Senior to Stroud Creek PODs above the West Springs Ditch: Changing the function could benefit such PODs if not otherwise satisfied by Lee Creek and gains to Stroud Creek below the West Springs Ditch.

For consideration of effects relative to 74-157, Table 1 summarizes the Lee Creek water rights whose PODs are shown in Map 6, and provides location, seniority and subordination status relative to the West Springs Ditch and 74-157.

Water Right	Priority	Owner	Div. Rate (cfs)	Not Subordinated to 74-157	Downstream of West Springs Ditch	Senior to 74-157
74-10554	1876-06-01	USA	0.02	x		x
74-1136	1912-06-28	F JAMES WHITTAKER	2.00	x		x
74-14451	1934-06-28	USA	0.02	x	x	
74-15200	1990-05-08	HARVEY E PETERSON	0.26	x	x	
74-15201	1990-05-08	STEVEN L JOHNSON	0.34	x	x	
74-1831	1912-06-28	STEVEN L JOHNSON	0.24	x	x	x
74-361	1883-05-12	BRUCE MC CONNELL	1.20		x	x
74-362	1906-05-01	BRUCE MC CONNELL	4.10		x	x
74-363	1883-05-12	BRUCE MC CONNELL	1.00		x	x
74-364	1900-06-01	BRUCE MC CONNELL	1.30		x	x
74-365	1883-05-12	BRUCE MC CONNELL	1.20		x	x
74-367	1883-05-12	BRUCE MC CONNELL	0.60		x	x
74-368	1909-11-05	BRUCE MC CONNELL	5.80		x	x
74-369	1883-05-12	F JAMES WHITTAKER	2.40	x		x
74-370	1883-05-12	ROSALIE ERICSSON	4.00	x		x
74-7274	1989-12-08	EDDIE R PETERSON	0.07	x		
74-949	1918-12-05	STEVEN L JOHNSON	0.04	x	x	

The subordination markings in Table 1 are tentative, based on advice from legal counsel that when the POD that has access to Stroud Creek water is approved for those rights, it most likely will include subordination to 74-157 based on Judge Wildman's *Memorandum Decision and Order*. The other determinations in Table 1 are not tentative.

Pale highlighting marks a characteristic that by itself would suggest benefit from a change to the function of the West Springs Ditch, relative to right 74-157. To benefit from the change, a right

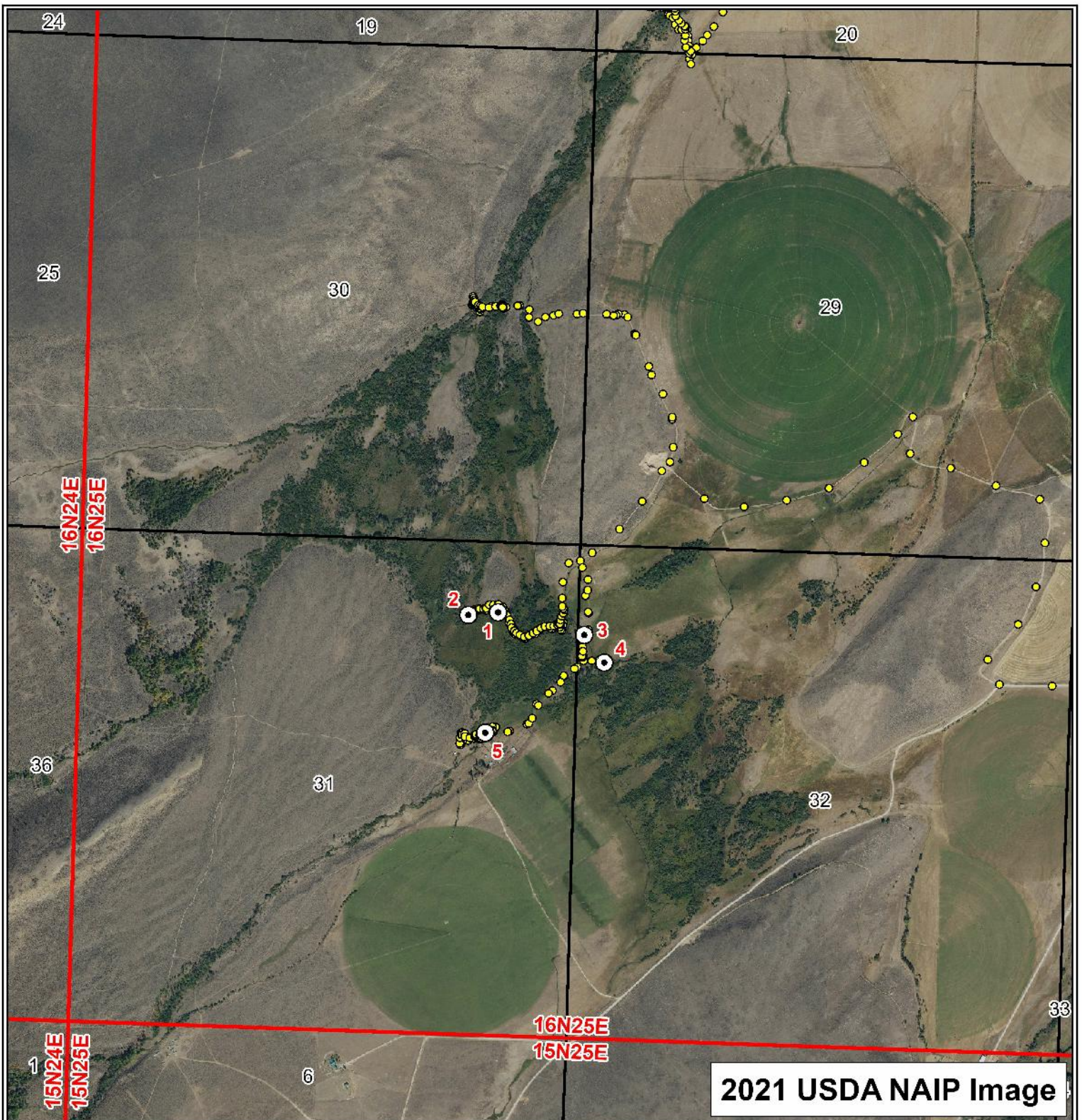
needs to have all three characteristics; seniority alone, for instance, would not indicate a benefit from a change if the POD were not below the West Springs Ditch. One POD (74-1831), in bold, italic font and highlighted in a bright color, meets all three criteria and theoretically would be in a position to benefit from a change in function at West Springs. However, the reach gains I observed on July 25 are nearly four times the quantity of water needed to satisfy this right at face value. Reducing my measurement by 25 percent to account for imprecision in my reconnaissance-level measurement indicates that reach gains still are more than three times the quantity needed to satisfy this right. To be clear, legal counsel indicates the historic *Whittaker v. Kauer* agreement should not be disregarded. But even if the agreement were disregarded, I conclude that relative to 74-157 or 74-1831, there is no practical need to alter the functionality of the West Springs Ditch in order to "*deliver spring waters... to satisfy senior water rights.*" Though there is no need to alter the West Springs Ditch for this purpose, physically it could be done by a bypass structure that could pass water west and then north from upstream of Point G in Map 3.

I acknowledge that in addition, restoration of the function of the Kauer Ditch could benefit downstream users by giving physical access to flows of Stroud Creek and its tributaries that are not diverted in seniority above the West Springs Ditch. I am informed that Whittaker is not opposed to restoration of the Kauer Ditch functionality.

Signature



Bryce A. Contor
Principal Hydrologist



- Waypoints
- GPS Track
- ▭ Township
- ▭ Section

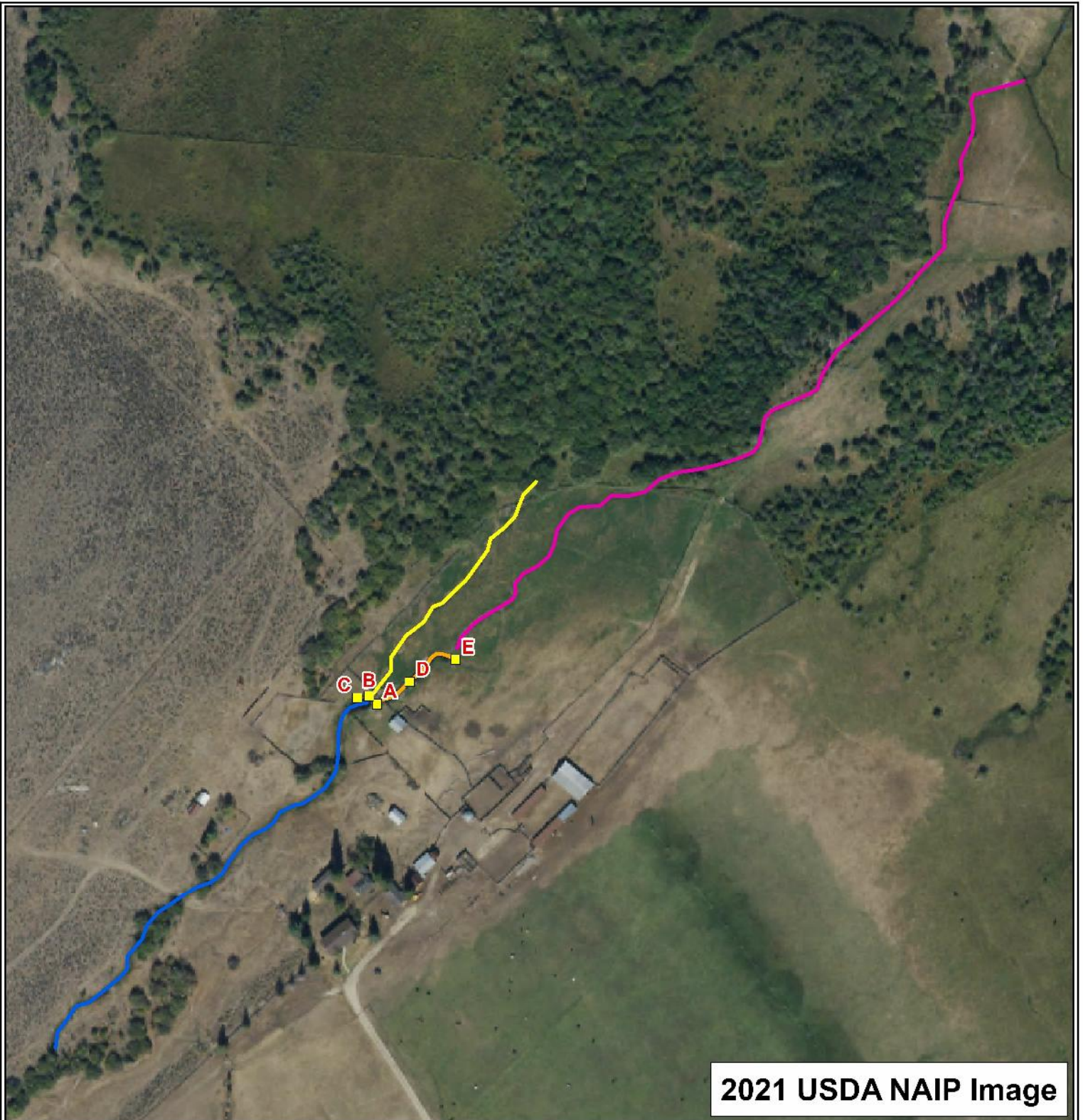


0 1 Miles

Map 1: Overview of Obs. Locations

Project #: 20-0111
 Drawn by: AD
 Date: 7/29/2022





2021 USDA NAIP Image

- Map 2 Points
- Map 2 Lines
- 1
- 2
- 3
- 4

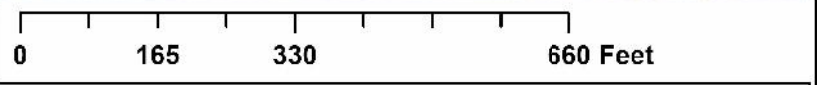
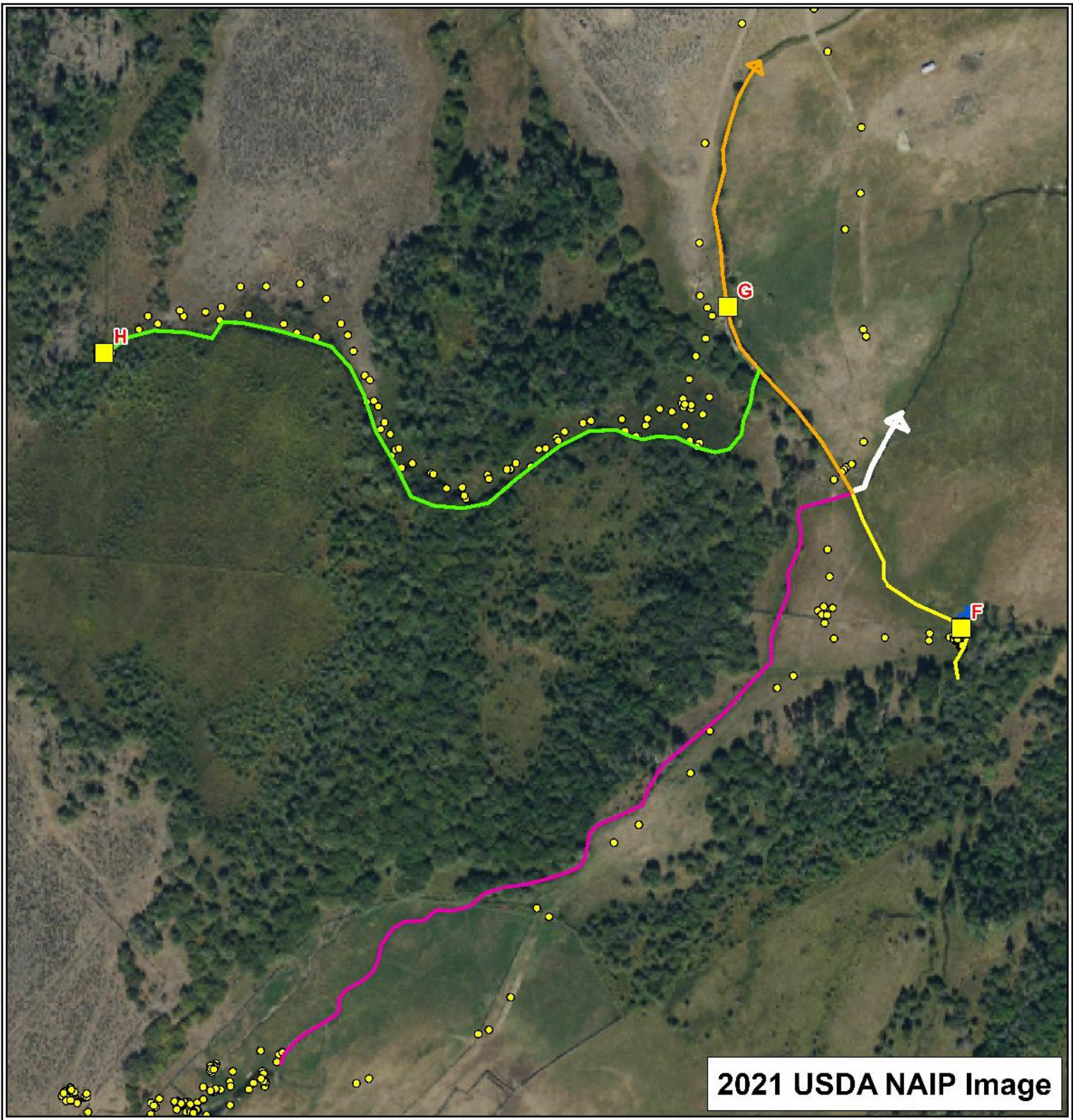
0 165 330 660 Feet

Map 2: Detail of Ericsson Corral Obs.



Project #: 20-0111
 Drawn by: AD
 Date: 7/26/2022





Map 3: Detail of Hilltop Obs.

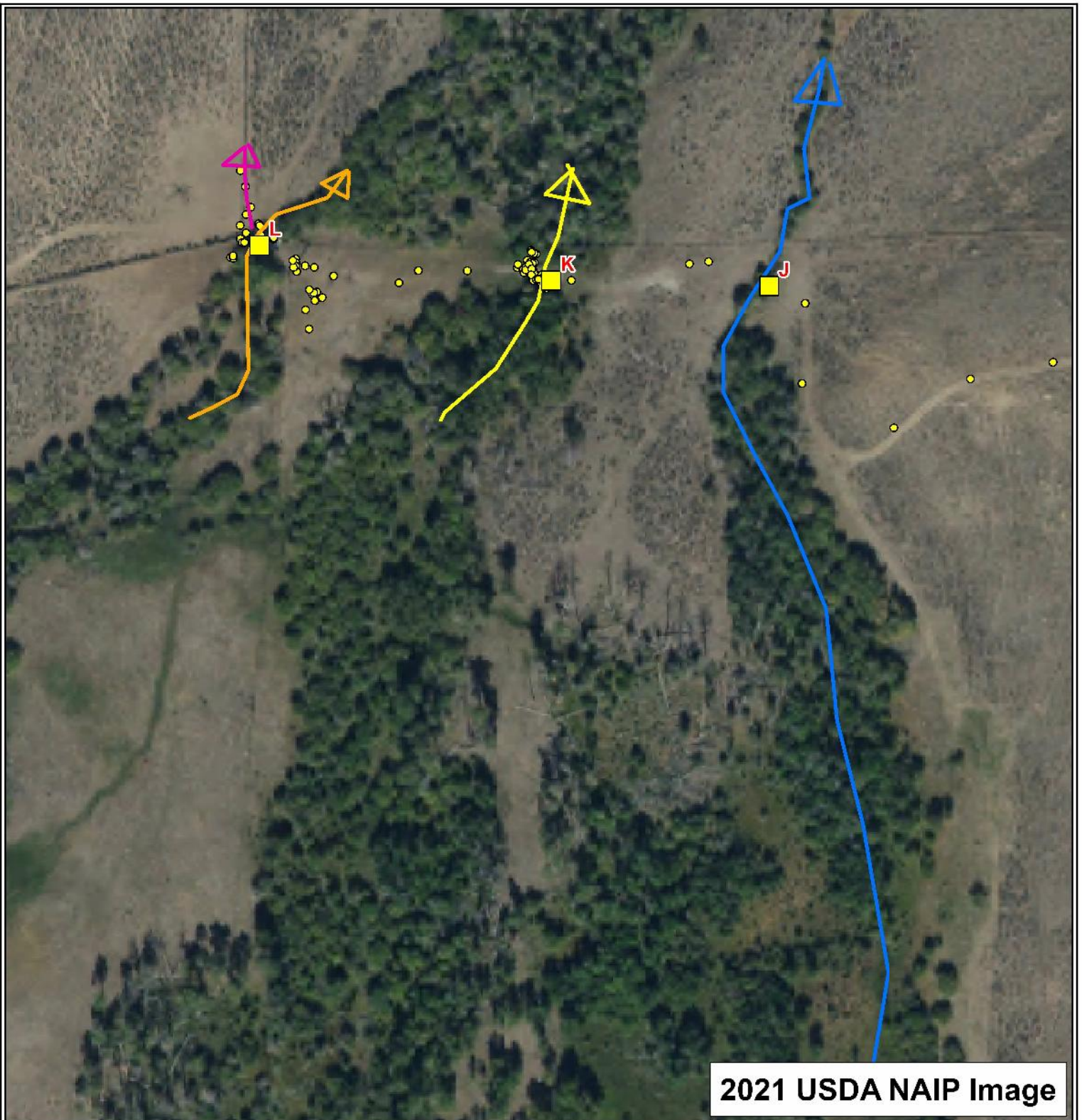
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- GPS Track
- Map 3 Points

Map 3 Lines

- 4
- 5
- 6
- 7
- 8
- 9



2021 USDA NAIP Image

- GPS Track
 - Map 4 Points
- Map 4 Lines
- 10
 - 11
 - 12
 - 13

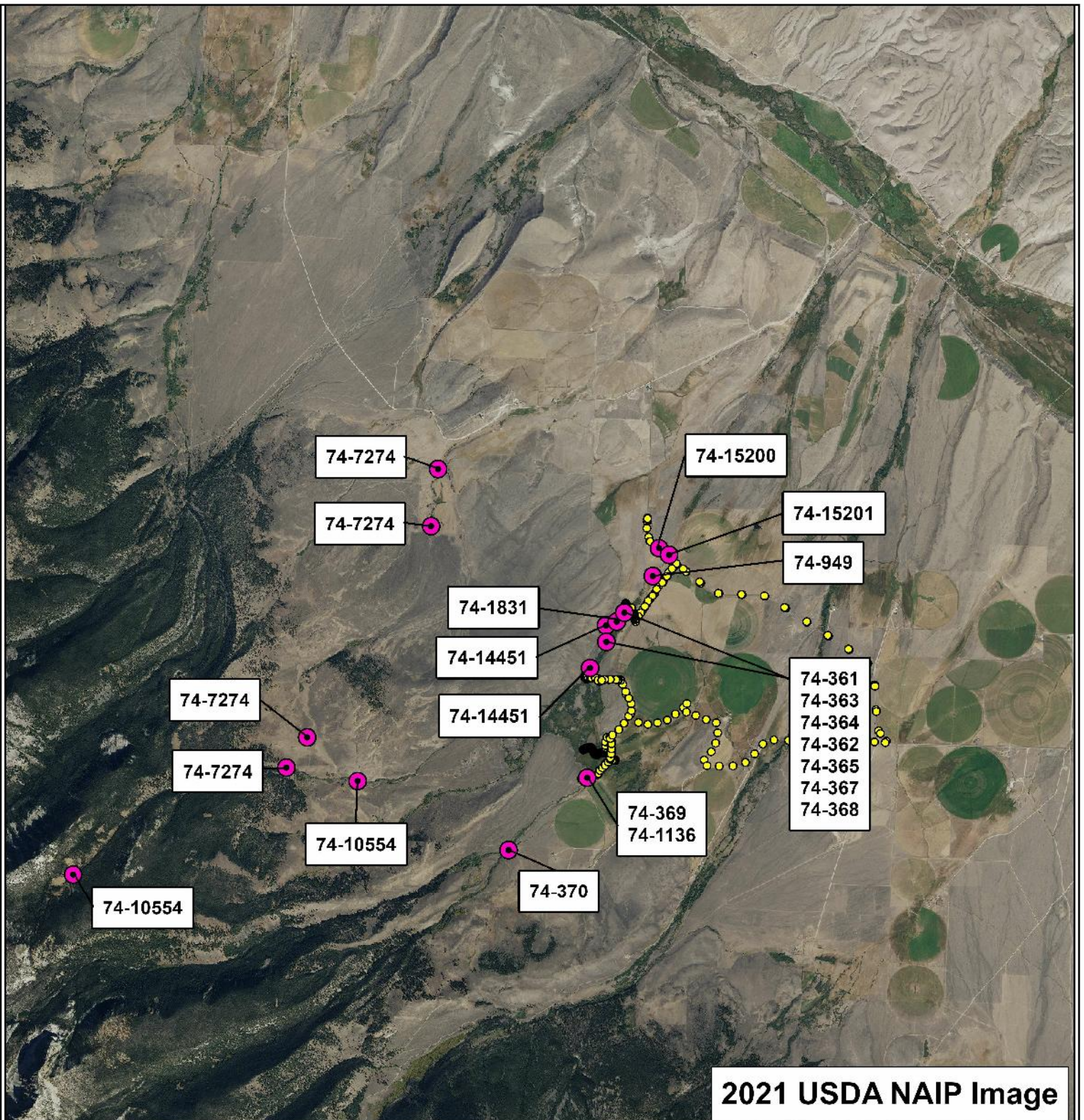
0 165 330 Feet

Map 4: Detail of North Fence Obs.

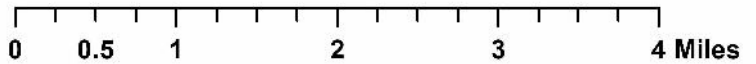


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- GPS Track
- Lee Creek POD



Map 5: Lee Creek Points of Diversion



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