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23 UNITED STATES DISTRICT COURT

24 EASTERN DISTRICT OF CALIFORNIA

25 UNITED STATES OF AMERICA ,

26 Plaintiff,

27 v.

28 ROGER J. LAPANT, JR., *et al.*,

Defendants.

CASE NO. 2:16-CV-01498-KJM-DB

**NOTICE OF MOTION AND DEFENDANT
ROGER J. LAPANT'S MOTION FOR
SUMMARY JUDGMENT**

[Fed. R. Civ. P. 56]

Date: March 6, 2020

Time: 10:00 a.m.

Courtroom: 3

Judge: Hon. Kimberly J. Mueller

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE: On March 6, 2020, at 10:00 a.m., or as soon thereafter as may be heard, in Courtroom 3, 15th Floor of the United States District Court for the Eastern District of California, Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, California, 95814, Defendant Roger J. LaPant, Jr., dba J&J Farms, will, and hereby does, move this Court for an order of summary judgment.

Defendant Roger J. LaPant, Jr., dba J&J Farms, moves for summary judgment in his favor under Federal Rule of Civil Procedure 56. He is entitled to judgment as a matter of law because the government cannot prove two elements of its Clean Water Act claim against him: that he committed a “discharge” and the presence of “navigable waters.” He is also entitled to judgment as a matter of law because all of the actions alleged to violate the Clean Water Act were exempt from that Act’s permitting requirements, as normal farming and/or ranching activities under 33 U.S.C. § 1344(f)(1)(A). None of his normal farming and/or ranching activities were “recaptured” under 33 U.S.C. § 1344(f)(2).

The parties have met and conferred on this dispute by telephone conference and discussed thoroughly the substance of the motions so that the parties could narrow the scope of the motions and the issues raised therein. In addition, the parties were able to resolve certain procedural matters during the conference, and have exhausted all such “meet and confer” efforts. The present motion is based upon this notice; the accompanying memorandum; the Separate Statement of Undisputed Material Facts; the Declaration of Therese Y. Cannata; the Declaration of Roger J. LaPant, Jr.; the Declaration of Paul Squires; the pleadings, records and files in this action; and such further argument as may be presented to or at the time of the hearing on this motion.

//

1 Dated: December 20, 2019

Respectfully Submitted,

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17 UNITED STATES DISTRICT COURT

18 EASTERN DISTRICT OF CALIFORNIA

19
20 UNITED STATES OF AMERICA,

21 Plaintiff,

22 v.

23 ROGER J. LAPANT, JR., *et al.*,

24 Defendants.

Case No.: 2:16-cv-01498-KJM-DB

**BRIEF IN SUPPORT OF LAPANT
MOTION FOR SUMMARY JUDGMENT**

Hearing Date: March 6, 2020

Time: 10:00 a.m.

Location: Courtroom 3

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INTRODUCTION

Defendant Roger J. LaPant, Jr., dba J&J Farms, moves for summary judgment in his favor under Federal Rule of Civil Procedure 56. He is entitled to judgment as a matter of law because the government cannot prove two elements of its Clean Water Act claim against him: that he committed a “discharge” and the presence of “navigable waters.” He is also entitled to judgment as a matter of law because all of the actions alleged to violate the Clean Water Act were exempt from that Act’s permitting requirements, as normal farming and/or ranching activities under 33 U.S.C. § 1344(f)(1)(A). None of his normal farming or ranching activities were “recaptured” under 33 U.S.C. § 1344(f)(2).

SUMMARY OF FACTS

Jack LaPant¹ does not have a family history of farming. He decided in his early 20s that he wanted to become a farmer. He bought a ranch in 1974 in Big Valley in a remote area of Shasta County, moved his family there, and learned to make a living at it. 45 years later, he is still at it. In 1988 he moved down to Oroville, and over the years he has acquired and farmed and ranched various properties in the northern Sacramento Valley. Over his career he has mainly raised cattle, grazing his herds on pasture land and alternately using parts of that land to grow feed for them. When growing feed as part of his ranching operation, he normally plants wheat and occasionally other dry land crops (*i.e.*, crops that do not require irrigation), using cultivars that are bred for hay production. *See* accompanying Declaration of LaPant, ¶ 1-4.

Jack had also, by 2010, planted a modest acreage of orchards on some of his properties. He is self-taught as an orchardist, and at the time had only established a small number of acres at a time, in order to keep his capital expenditures within reason and to learn from the experience. LaPant Decl., ¶ 5.

For the moment we will leave Jack aside and review the ranching and farming history of the property at issue in this case. The property was approximately 2,000 acres, and sits on either side of a reach of Coyote Creek in Tehama County, south of Red Bluff. It is bounded on the North by Ohm Road, on the West by Paskenta Road, and the northern 1,500 acres of it are bounded on

¹ Defendant Roger J. LaPant, Jr., dba J&J Farms, goes by Jack LaPant.

1 the East by Rawson Road. The roughly 450 acres south of Coyote Creek is bounded on the very
2 South end by Dusty Road, and on the East by adjoining properties. LaPant Decl., ¶ 7.

3 Prior to 2006, the land was owned by Leland Hancock. During his tenure, it is undisputed
4 that large parts of the property north of Coyote Creek were actively farmed (*i.e.*, that crops were
5 grown). The land was tilled and crops grown at very least in 1966, 1973, 1979, 1981, 1984, and
6 1985. LaPant Decl., ¶ 7. And there is evidence of tillage in other recent years as well. *See*
7 accompanying Declaration of Therese Cannata, Exhibit E (transcript of deposition of Paul
8 Wisniewski) at 2:11-40:3.

9 From 1996-2001 and again in 2003-2005, Hancock received annual farm support payments
10 from the USDA. *See* accompanying Declaration of Paul Squires, Exhibit A (Squires Report) at 6.
11 These payments were authorized under prior legislation and were available based on the number
12 of acres historically farmed, whether or not it was farmed in the year the payment was received.
13 Squires Decl., ¶¶ 2-3. It is also evident that cattle were run on the property regularly prior to 2006,
14 as well as following.

15 Hancock died in 2006. The property then passed through a brief series of owners before
16 being on the market in 2010, at which point we rejoin Jack LaPant. LaPant Decl., ¶ 7.

17 In 2010 Jack had funds to reinvest from a recent property sale, and came across the property
18 which is the subject of this lawsuit. Property prices in the area were, in his experience, historically
19 low as a result of the recent collapse and sluggish recovery of the housing market, and this property
20 presented him with what he anticipated would be the opportunity of a lifetime: a 2,000 acre ranch
21 property at an affordable price. He hoped to buy and keep the property long term. LaPant Decl.,
22 ¶ 8.

23 He investigated the property very carefully. His investigation included consultation with
24 two agencies of the United States Department of Agriculture: the Farm Services Agency, which
25 maintains records of farm crop production and administers USDA farm benefit programs, and the
26 Natural Resources Conservation Service, which provides technical expertise and advice to farmers
27 on soils and wetland resources, and enforces the so-called Swampbuster program that regulates
28 farming in wetlands. LaPant Decl., ¶ 12.

1 Both of these offices told Jack specifically that he could grow wheat on the property, since
2 it had been previously farmed in wheat. The NRCS staff advised him that he could grow wheat on
3 the property as is, but that if he wanted to plant permanent crops on the property he should return
4 to NRCS to have the property studied further. Neither of these agencies told Jack to consult with
5 the Army Corps of Engineers (Army) before purchasing the property or growing wheat on it, and
6 staff at both agencies were unaware at the time of any need to consult with or obtain a permit from
7 the Army before growing wheat on the property. LaPant Decl., ¶¶ 13-15.

8 Jack decided to purchase the property. To do so he made a down payment to the seller and
9 signed a note to the seller for a substantial balloon payment due in March of 2012. Jack intended
10 to work with the community bank with which he had done business for decades to arrange
11 permanent financing after making the purchase. Jack completed the purchase of the property in
12 March of 2011. LaPant Decl., ¶¶ 19-20.

13 When Jack took title to the property in March of 2011, it had several hundred head of cattle
14 on it. LaPant Decl., ¶ 20.

15 Jack planted a wheat crop on roughly 900 acres of the property in 2011, doing almost all
16 of the work himself with his own equipment. He began the multi-step process in May of 2011 and
17 finished in December of that year: preparing the soil, fertilizing the soil, planting the seed, and
18 finally harrowing the field. Each of these steps was done with different farming tools pulled behind
19 his tractor. The tractors he used had 75-176 horse power. LaPant Decl., ¶¶ 21-22.

20 The primary tool in preparing the soil was a disc to till the soil surface to a depth of about
21 six inches. This allows rainfall to soak into the soil and hold in this six-inch zone near the surface,
22 and gives the soil adequate tilth for the wheat to grow and take root and access that water. LaPant
23 Decl., ¶ 22.a.

24 For the disc to work, the soil surface has to be soft enough for it to bite into. If the surface
25 is too hard, the disc will tend to slide over the surface without cutting into it. Where this condition
26 existed Jack had to open up the soil using a different tool in advance of the disc. LaPant Decl.,
27 ¶ 22.b.

28 ///

1 Following June 29, 2011, on a limited portion of the property, while the surface was too
2 hard to disc, Jack used a custom-made plowing tool to open the soil surface. The tool has two
3 shanks about 40 inches apart, and is shown in Exhibits J and K to LaPant Decl. LaPant Decl.,
4 ¶ 22.c. Following June 29, 2011, Jack only used the two-shank tool in the areas shown in Exhibits
5 J and K to LaPant Decl., to a depth of four to six inches. This depth was all that was necessary to
6 then use the disc in those locations. He worked north and south with this tool, in straight lines, and
7 never cut the soil surface with it in any seasonal drainages. He used the hydraulic equipment on
8 his tractor to raise the tool out of the ground when he drove the tractor through any seasonal
9 drainages. LaPant Decl., ¶ 22.c.

10 He first used this tool in the western portion of Zone 6 in early July, 2011. Once he had
11 loosened the soil with the two-shank tool in this portion of Zone 6, he went over the same area
12 with the disc. This mixed and turned the soil and smoothed out any North-South furrows left by
13 the two-shank tool. A July 2011 aerial photo shows the results of this work. It also shows that
14 drainages in Zone 6 have not been plowed. LaPant Decl., ¶ 22.d; Exhibit J (showing numbered zones).

15 Following this work in July in Zone 6, Jack used the two-shank tool at the same depth for
16 roughly two months first in the western portion of Zone 2 and then on the Western edge of the
17 property in Zones 1, 5, and 9, to continue loosening the soil surface before using the disc. He only
18 used the two-shank tool North-South (parallel to Paskenta Road), and continued to raise the tool
19 when traversing any seasonal drainages. The October 2011 aerial photo shows the North-South
20 furrows produced by the two-shank tool in Zones 1, 5, and 9 during this time. LaPant Decl., ¶ 22.e;
21 Exhibit K.

22 In early October, it rained enough to soften the soil surface so that the two-shank tool was
23 no longer necessary. At this point, Jack parked it near one of the power towers on the property,
24 where it stayed until he removed it from the property in March of 2012. LaPant Decl., ¶ 22.f.

25 To summarize the use of the two-shank tool: following June 29, 2011, Jack only used it on
26 55 acres, only used it to a depth of four-six inches, never made more than one pass with it, did not
27 use it in any seasonal drainages, and only ever used it in a North-South direction. Then, he disced
28 everywhere he had used the two-shank tool. LaPant Decl., ¶ 22.g; Exhibits J and K.

1 After it rained, Jack finished preparing the soil by discing in the areas generally shown on
 2 Exhibit H to LaPant Decl.² He generally used the disc North-South, and also avoided using it in
 3 seasonal drainages by “closing” the disc when passing through them.³ Jack finished discing
 4 sometime in December. By that time, it not having rained for a period of time, the soil surface got
 5 harder again and the disc was less and less effective. At this point Jack had disced approximately
 6 1,000 acres. Throughout, he disced to a depth of four-six inches. LaPant Decl., ¶ 22.h; Exhibit H.

7 Discing smoothed out any furrows left by the two-shank tool and the ground surface
 8 generally appeared as shown in Exhibit S to LaPant Decl. Throughout soil preparation, Jack
 9 followed the existing contour of the ground surface throughout the property. LaPant Decl., ¶ 22.i.

10 Following soil preparation, beginning in November 2011, Jack fertilized the soil using an
 11 aqueous ammonia rig. This equipment is pulled behind the tractor and injects liquid fertilizer into
 12 the soil. In addition to fertilizing, it further smooths the soil after discing. Jack finished fertilization
 13 in December 2011. As with the two-shank tool and the disc, Jack used the hydraulic equipment on
 14 the tractor to raise the ammonia rig when traversing any seasonal drainages. And as with the prior
 15 tools, he followed the existing contour of the ground. LaPant Decl., ¶ 22.j.

16 After fertilizing, Jack planted the wheat with a seed drill, which is pulled behind the tractor
 17 and pushes individual seeds a few inches into the ground to plant them. Jack started and completed
 18 planting in November-December of 2011. He planted approximately 900 acres, indicated on
 19 Exhibit R to LaPant Decl. As with discing and fertilizing, planting the seed had the additional
 20 effect of further smoothing out and firming up the surface of the soil. LaPant Decl., ¶ 21.k; Exhibit R.

21 Jack’s final step was to harrow the planting with a metal grid with 2 inch teeth on it. This
 22 is dragged behind the tractor over the planted seed to cover it. Jack started and completed this step
 23 in December 2011. LaPant Decl., ¶ 22.l.

24 Throughout Jack’s work on the property, from May through December of 2011, there was
 25 no standing, ponded, or flowing water anywhere that he worked. LaPant Decl., ¶ 23.

26 ///

27 _____
 28 ² He had already disced portions of Zones 2, 3, 5, and 6 in July.

³ This results in the disc generally rolling over the ground instead of cutting into it.

1 The wheat crop germinated, and emerged by early March, 2012. The growing plants,
2 especially their roots spreading out in the top four-six inches of soil, stabilized the soil during the
3 subsequent rainy season, minimizing any erosion of the tilled soil. LaPant Decl., ¶ 23.

4 The soil preparation (*i.e.* plowing) had important effects. First, it established adequate tilth
5 for the wheat seed to germinate and grow, and the roots to spread out. Second, it provided adequate
6 soil condition for rainfall to soak in and remain available for the plant roots. Wheat in particular is
7 highly efficient at using available soil moisture, and its roots spread broadly through the top layer
8 of soil. The wheat roots stabilize the soil and prevent it from eroding. As the wheat plants emerge
9 and grow above the ground they also stabilize the soil. LaPant Decl., ¶ 23.

10 Army employee Matt Kelley took several dozen photographs of Jack's wheat crop on three
11 dates in March 2012, which show the condition of the crop, the soil surface, the property, and
12 various aquatic features on the property at the time. *See* Exhibits S, S-1, and S-2 to LaPant Decl.
13 These photos show several important things. First, they confirm that the soil surface toward the
14 eastern part of the property where Jack disced but did not plant is not furrowed. Second, they show
15 that the areas of the property that Jack planted have a smooth soil surface. Third, they show several
16 aquatic features that are holding water, as well as seasonal drainages where water is flowing.
17 Fourth, they show no furrows in any aquatic features.

18 Jack's wheat crop was not incidental to any other activity. He grew the wheat for feed for
19 his cattle, intending to harvest it for hay in the summer of 2012, and then turn cattle out onto the
20 stubble. The advantage of wheat as a feed crop is that it does not need to be irrigated, and so it can
21 be produced at minimum cost. This was a common ranching practice for Jack, who frequently over
22 his farming career had grown wheat as cattle feed for his own herd, on property that he would
23 alternately graze and plant with wheat or other dry land feed crops. LaPant Decl., ¶ 24.

24 Jack also grew the wheat crop to demonstrate to his banker that the property would produce
25 a crop, to advance his effort to obtain permanent financing for the property from the bank. Jack
26 intended to hold the property long term, but was unable to obtain long term financing for it because
27 his bank failed during 2011. At this point Jack realized he was not going to be able to make the
28 balloon payment to the seller that would come due in March of 2012, and that he was going to

1 have to sell the property before the payment came due. LaPant Decl., ¶¶ 24-25.

2 It was only at this point that he engaged a broker to list the property for sale. During this
3 process, the broker advised him that most buyers would be interested in the property for its orchard
4 potential, and that he should have a preliminary delineation of wetlands on the property to share
5 with potential buyers. LaPant Decl., ¶¶ 25, 27-28.

6 Jack was urgently motivated to find a buyer because he was receiving frequent phone calls
7 from his seller, to whom the March 2012 balloon payment was owed, threatening to ruin Jack if
8 the payment were not made. At times these calls came in daily and more frequently. LaPant Decl.,
9 ¶ 25.

10 Jack never knew the eventual buyers of the property, Duarte Nursery, Inc., before they
11 expressed interest in the land. He never had any dealings with the entity to which Duarte Nursery
12 sold the portion of the land Jack had farmed, Goose Pond Ag. Jack had no knowledge of any of
13 their plans for the property when he farmed it himself. LaPant Decl., ¶ 29. When he began work
14 on his wheat crop he still expected to be able to arrange long term financing and keep the property.
15 His decision to grow the wheat crop, and his actions to do so, had no relation at all to subsequent
16 owners' eventual decisions to purchase the property or to take any action they eventually took on
17 the property. LaPant Decl., ¶ 29.

18 Nor did Jack have any concrete plans to plant orchards on the property. He expected that
19 he would eventually investigate where orchards could be planted on the property, as the NRCS
20 staff advised him to do. If feasible he anticipated that he would gradually develop orchards on the
21 parts of the property where the NRCS indicated it could be done. If he had been advised that he
22 could not plant orchards in the portion of the property where he grew wheat, he would have been
23 content with that. LaPant Decl., ¶ 29.

24 In April 2012 Jack completed the sale of the property to Duarte Nursery, Inc. Shortly after,
25 Duarte Nursery split the property and sold the portion north of Coyote Creek (containing the 900
26 acres on which Jack had grown his wheat crop) to Goose Pond Ag. LaPant Decl., ¶ 29.

27 In October, November, and December of 2012, Goose Pond Ag carried out a series of
28 heavy operations on the property over the top of most of Jack's work. Jack observed, among other

equipment used on the site, a large tractor pulling a large chisel plow or ripper array. LaPant Decl., ¶ 30, Exhibit U. The evidence is that Goose Pond and its contractors ripped much of the area that Jack planted, about a foot deep, and followed with a gang of box scrapers to cut and fill the site (*i.e.*, to loosen and remove soil from the high points and fill the low points with that soil). Goose Pond and its contractors also built a number of roads on the property and deep-ripped several acres of it near Paskenta Road. LaPant Decl., ¶ 30.

STANDARD OF REVIEW

A court must grant a motion for summary judgment in whole or in part, “if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). This is a “threshold inquiry” into whether a trial is necessary at all, that is, whether “any genuine factual issues . . . properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party bears the initial burden of “informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to “go beyond the pleadings” and “designate specific facts” in the record to show a trial is necessary. *Id.* at 324.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT REGULATE ANY VERNAL POOLS ON THE LAPANT PROPERTY BECAUSE NONE OF THEM DIRECTLY ABUT NAVIGABLE WATERS OF THE UNITED STATES OR THEIR RELATIVELY PERMANENT AND CONTINUOUSLY FLOWING TRIBUTARIES.

A. The *Rapanos* plurality opinion is the controlling Supreme Court interpretation of “navigable waters.”

The controlling Supreme Court authority on whether headwaters wetlands sitting in a farm field are federally protected “navigable waters” is *Rapanos v. United States*, 547 U.S. 715 (2006). But since *Rapanos* has no majority opinion, this Court must determine which opinion is the holding.

///

1 Army regulations issued in 1986 defined “navigable waters” to include all non-navigable
2 tributaries to navigable-in-fact waters, and all wetlands “adjacent to” (meaning “bordering,
3 contiguous, or neighboring”) navigable-in-fact waters and their non-navigable tributaries.
4 33 C.F.R. § 328.3(a)(5) (1986 Tributary Subsection); *id.* at § 328.3(a)(7) (1986 Adjacent Wetland
5 Subsection); *see also id.* at § 328.3(c) (1987). In *Rapanos*, the Supreme Court invalidated the 1986
6 Tributary and Adjacent Wetlands Subsections, as beyond the scope of the statutory term
7 “navigable waters” and exceeding the Commerce Power.

8 The issue in *Rapanos* was how to interpret whether “navigable waters” include wetlands
9 that do not physically abut navigable-in-fact waterways. 547 U.S. at 728; *id.* at 759 (Kennedy, J.,
10 concurring). The judgment remanded the case because the lower courts had not properly
11 interpreted that term. *Id.* at 757. The five Justices supporting the judgment adopted two different
12 interpretations.

13 The plurality determined that the language, structure, and purpose of the Act all limit
14 federal authority over non-navigable tributaries to “relatively permanent, standing or continuously
15 flowing bodies of water” commonly recognized as “streams[,] . . . oceans, rivers, [and] lakes”
16 connected to traditional navigable waters. *Id.* at 739. The plurality limited wetlands to only those
17 physically abutting such waters, where wetland and water are “indistinguishable.” *Id.* at 755.

18 The plurality sharply critiqued “the breadth of the Corps’ determinations in the field” and
19 especially its continued reliance on an expansive interpretation of “adjacent” waters. *Id.* at 727. It
20 emphasized that the term “waters of the United States” did not include all “water of the United
21 States” but instead could only refer to “continuously present, fixed bodies of water.” *Id.* at 732-33.
22 The plurality explained that the definition of “waters of the United States” must be rooted in the
23 traditional understanding of “navigable waters.” *Id.* at 734. The plurality concluded that “only
24 those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’
25 in their own right, so that there is no clear demarcation between ‘waters and wetlands,’” are
26 regulated by the Act. *Id.* at 742.

27 Justice Kennedy joined in the judgment, but interpreted the Act more broadly: the
28 “significant nexus” test, under which the government can regulate a non-abutting wetland if it

significantly affects the physical, chemical, and biological integrity of a navigable-in-fact waterway. *Id.* at 759, 779 (Kennedy, J., concurring).

Justice Kennedy shared the plurality’s concern that an overly broad interpretation of the Act would read “navigable” out of the text, and disagreed that the Act covers “wetlands [that] lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” *Id.* at 778 (Kennedy, J., concurring). Instead, non-navigable waters must have a “significant nexus with navigable waters.” *Id.* at 779. Wetlands are regulable if “either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. This connection can’t be “speculative or insubstantial.” *Id.*

The Ninth Circuit Court previously held in *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), that Justice Kennedy’s concurrence is the holding of *Rapanos*. However, the subsequent intervening authority of *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), fatally undermines the results-based approach of *Healdsburg*, and establishes that the plurality is the holding.

1. Any District Court in this Circuit can hold that *Davis* fatally undermines *Healdsburg*.

District courts may reexamine circuit precedent in light of intervening en banc decisions of the Ninth Circuit. *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc) (Supreme Court decisions); *Overstreet v. United Brotherhood of Carpenters and Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005) (citation omitted) (en banc Ninth Circuit decisions)).

We hold that . . . where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.

Miller v. Gammie, 335 F.3d at 893. The issues decided by the higher court need not be identical to allow a district court to dispense with prior circuit authority. “Rather, the relevant court . . . must

1 have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the
2 cases are clearly irreconcilable.” *Id.* at 900.

3 In *Overstreet* the Ninth Circuit examined its prior holding in *Nelson v. Int’l Brotherhood*
4 *of Elec. Workers, Local Union No. 46, AFL-CIO*, 899 F.2d 1557 (9th Cir. 1990) (NLRB entitled
5 to injunction under Section 10(l) of the National Labor Relations Act under “reasonable cause”
6 standard), and concluded that a subsequent en banc decision of the Ninth Circuit interpreting a
7 different provision of the Act relating to injunctions, *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449,
8 455 (9th Cir. 1994) (en banc) (Section 10(j) of the Act requires the application of ordinary
9 standards for issuance of injunctions), had overruled the prior panel decision in *Nelson* as to
10 Section 10(l). *Overstreet*, 409 F.3d at 1204-05. In analyzing whether *Nelson*’s holding on Section
11 10(j) overruled *Miller*’s holding on Section 10(l), the Court focused on whether the reasoning of
12 the two cases regarding the standard was consistent, and decided that the later en banc decision
13 had undermined the reasoning of the earlier panel decision. *Overstreet*, 409 F.3d at 1205-06.

14 This Court must reassess *Healdsburg* under the en banc Ninth Circuit’s holding in *Davis*,
15 and should conclude that *Healdsburg* no longer controls, because the reasoning-based approach to
16 *Marks v. United States*, 430 U.S. 188 (1977), as required by *Davis*, is clearly irreconcilable with
17 and fatally undermines *Healdsburg*.

18 **2. This Court must apply *Rapanos* using the *Marks* framework as clarified**
19 **in *Davis*.**

20 *Marks* holds that “[w]hen a fragmented Court decides a case and no single rationale
21 explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as
22 that position taken by those Members who concurred in the judgments on the narrowest grounds.’”
23 *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

24 The Ninth Circuit recently provided definitive guidance for applying *Marks* in its 2016 en
25 banc decision in *Davis*, which examined a 4-1-4 split decision in *Freeman v. United States*, 564
26 U.S. 522 (2011). *Davis*, 825 F.3d at 1019. *Freeman* addressed whether a defendant who entered
27 into a plea agreement could take advantage of a sentence reduction under the Sentencing Reform
28 Act. *Davis*, 825 F.3d at 1019. Four Justices in the *Freeman* plurality held the defendant could

1 almost always take advantage of the sentence reduction, so long as the sentence imposed reflected
2 the Sentencing Guidelines then in effect. *Id.* Justice Sotomayor separately concurred, arguing that
3 a defendant could only take advantage of the sentence reduction when the plea agreement
4 incorporates or uses the Sentencing Guidelines. *Id.* at 1019-20. Four dissenting Justices would
5 have held a defendant relying on a plea agreement could never take advantage of the sentence
6 reduction under the Sentencing Reform Act. *Id.* at 1019. To determine the controlling *Freeman*
7 opinion, the Ninth Circuit started with *Marks*:

8 When a fragmented Court decides a case and no single rationale explaining the
9 result enjoys the assent of five Justices, the holding of the Court may be viewed as
10 that position taken by those Members who concurred in the judgments on the
11 narrowest grounds.

12 *Davis*, 825 F.3d at 1020 (quoting *Marks*, 430 U.S. at 193).

13 The *Davis* Court observed that after forty years, the courts are still struggling “to divine
14 what the Supreme Court meant by ‘the narrowest grounds,’” with two approaches emerging. *Id.*
15 (quoting *Marks*, 430 U.S. at 193). One is the reasoning-based approach, which seeks common
16 reasoning among the concurring opinions to see if one is a logical subset of the other, broader
17 opinion. *Id.* at 1021. “In essence, the narrowest opinion must represent a common denominator of
18 the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who
19 support the judgment.” *Id.* at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)
20 (en banc)). The other approach is results-based and defines “narrowest grounds” as “the rule that
21 ‘would necessarily produce results with which a majority of the Justices from the controlling case
22 would agree.’” *Id.* at 1021.

23 Of the two, *Davis* rejected the results-based approach and held that this Circuit is to use
24 the reasoning-based approach:

25 To foster clarity, we explicitly adopt the reasoning-based approach to applying
26 *Marks*. . . . A fractured Supreme Court decision should only bind the federal courts
27 of appeal when a majority of the Justices agree upon a single underlying rationale
28 and one opinion can reasonably be described as a logical subset of the other. When
29 no single rationale commands a majority of the Court, only the specific result is
30 binding on lower federal courts.

31 *Id.* at 1021-22.

1 Shortly after *Davis*, the Ninth Circuit Court held that only opinions supporting the
 2 judgment can be examined as potential logical subsets of each other in determining a holding of
 3 the Supreme Court under *Marks*. *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016)
 4 (“narrowest opinion must represent a common denominator of the Court’s reasoning; it must
 5 embody a position implicitly approved by at least five Justices *who support the judgment*”) (emphasis added) (quoting *Davis*, 825 F.3d at 1020)). So while a dissent may be useful in assessing
 6 the reasoning of the opinions supporting the judgment and identifying which is the logical subset
 7 of the other, a dissent itself cannot be either the broader or narrower opinion for determining the
 8 holding.

10 3. *Healdsburg* uses the now forbidden results-based approach.

11 *Healdsburg* summarily concludes that the *Rapanos* concurrence controls, with little
 12 discussion beyond a cursory citation to *Marks*: “Justice Kennedy, constituting the fifth vote for
 13 reversal, concurred only in the judgment” and, therefore, “provides the controlling rule of law.”
 14 *Healdsburg*, 496 F.3d at 999-1000 (quoting *Marks*, 430 U.S. at 193). This is well short of the
 15 *Marks* analysis required by *Davis*. See *Davis*, 825 F.3d at 1024 (dismissing other circuit authorities
 16 that “engage with *Marks* only superficially, quoting its language with no analysis”). *Healdsburg*
 17 gives no reason why it adopted the concurrence other than to cite *United States v. Gerke*
 18 *Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), itself a brief opinion concluding without
 19 substantive application of *Marks* that the concurrence controls.

20 Fatally for *Healdsburg*, it states that the “concurrence is the narrowest ground to which a
 21 majority of the Justices would assent if forced to choose in almost all cases.” 496 F.3d at 999. This
 22 is the results-based approach which *Davis* rejected. *Healdsburg* also relies on Justice Stevens’
 23 dissent in *Rapanos* to say that Justice Kennedy’s concurrence is a narrower subset of the dissent.
 24 496 F.3d at 999. But this is rejected by *Cardenas*. And *Cardenas*’ rejection of dissents for *Marks*
 25 analysis, following *Davis*, is further demonstration that the Ninth Circuit has moved on from the
 26 cursory and results-oriented *Marks* analysis used in *Healdsburg*.

27 Also fatally, *Healdsburg* relies almost exclusively on the Seventh Circuit’s decision in
 28 *Gerke*. That in turn explicitly uses the results-based approach in selecting the concurrence:

Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality)[.]

Gerke, 464 F.3d at 725 (emphasis in original).

Healdsburg is fatally undermined in two ways. It uses the results-based approach which *Davis* definitively rejects. And it uses the dissent as the broader opinion of which it concludes the concurrence is the narrower subset, in violation of *Cardenas*. *See also Gibson v. American Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014) (*Gerke* provides no authority for using dissenting opinions in *Marks* analysis). Under *Miller v. Gamie*, *Healdsburg* is no longer the law of this Circuit.

4. Under *Davis*, the *Rapanos* plurality is the narrowest ground for the decision and is the holding.

The key to the question “what is the narrowest opinion” in *Rapanos* is identifying what the judgment did. The Supreme Court remanded the case to the Sixth Circuit for further proceedings, after determining that the lower courts had not properly defined “navigable waters.” 547 U.S. at 757. The Court arrived at this judgment through two different interpretations of ‘navigable waters.’ So the “narrowest opinion” is the one with the narrowest meaning of “navigable waters.”

The plurality and concurrence show this. 547 U.S. at 729 (“In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute “waters of the United States” within the meaning of the Act.”); *id.* (addressing landowners’ contentions about the meaning of “navigable waters” and “waters of the United States”); *id.* at 739 (rejecting Army’s “expansive interpretation” as an “[im]permissible construction of the statute”) (quoting *Chevron v. N.R.D.C., Inc.*, 467 U.S. 837, 843 (1984)); *see also* 547 U.S. at 759 (Kennedy, J., concurring) (“These consolidated cases require the Court to decide whether the term ‘navigable waters’ in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact.”); *id.* at 759 (“The word ‘navigable’ in the Act must be given some effect.”).

1 And the judgment in *Rapanos* confirms that the only issue in the case is how to interpret
2 the Act. “We vacate the judgments of the Sixth Circuit . . . and remand both cases for further
3 proceedings.” 547 U.S. at 757. Both opinions which supported this judgment did so because of an
4 interpretation of the statute which differed from that applied by the Sixth Circuit. *Id.* (“Because
5 the Sixth Circuit applied the wrong standard to determine if these wetlands are covered ‘waters of
6 the United States’”); *id.* at 757 (Kennedy, J., concurring) (“navigable waters” must have
7 “significant nexus” to navigable in fact waters, supports remand “for proper consideration of the
8 nexus requirement”). The only direction that the Sixth Circuit got from the Supreme Court in its
9 further proceedings were the two opinions supporting remand, and the only legal rules on offer in
10 either of those opinions is the meaning of “navigable waters.” So which of these two opinions is a
11 logical subset of the other depends on how each interpreted the statute.

12 This accords with *Marks*, which applied the Supreme Court’s prior fractured decision in
13 *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *Marks*, 430 U.S. at 193-94 (discussing *Memoirs*,
14 383 U.S. 413). *Memoirs* was a split decision, with three Justices stating that the First Amendment
15 protected pornographic material unless it met three tests. 383 U.S. at 418. Two other Justices would
16 read the First Amendment more broadly to protect all obscene material without limit. *Id.* at 421,
17 424 (Black and Douglas, JJ., concurring). *Marks* says that the narrower reading of the applicable
18 constitutional provision controlled. Similarly, a reasoning-based approach to applying *Marks* to
19 *Rapanos* must look at how broadly or narrowly the two opinions supporting the judgment interpret
20 the applicable statutory provision.

21 In *Rapanos*, a fractured Supreme Court ruled that the term “navigable waters” in the Act
22 was narrower than agency regulations defining the term. 547 U.S. at 734 (“The plain language of
23 the statute simply does not authorize this ‘Land Is Waters’ approach to federal jurisdiction.”); *id.*
24 at 759 (Kennedy, J., concurring) (lower court did not apply proper standard to determine whether
25 wetlands not abutting navigable waters were jurisdictional). The Justices supporting the judgment
26 adopted concentric rationales for the judgment. The plurality interprets “navigable waters”
27 narrowly, while Justice Kennedy interprets it more broadly.

28 ///

1 The point of departure between them is the plurality's narrow reading of the term
 2 "significant nexus" (as describing only the type of physical intermingling that in *United States v.*
 3 *Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985), prevented a clear distinction between the
 4 waters and the wetlands) and Justice Kennedy's broad reading of it (as categorically encompassing
 5 *Riverside Bayview*-type wetlands, in accord with the plurality, and also including others on a case-
 6 by-case basis, with which the plurality disagreed). *Compare Rapanos*, 547 U.S. at 754-55
 7 (disagreement with Kennedy's broad reading of "significant nexus"), *with id.* at 774 (Kennedy, J.,
 8 concurring) (*Riverside Bayview*, *SWANCC* allow regulation of wetlands not physically abutting
 9 tributaries).

10 The plurality summed up this way:

11 [E]stablishing that wetlands . . . are covered by the Act requires two findings: first,
 12 that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively
 13 permanent body of water connected to traditional interstate navigable waters); and
 14 second, that the wetland has a continuous surface connection with that water,
 making it difficult to determine where the 'water' ends and the 'wetland' begins.

15 *Rapanos*, 547 U.S. at 742. "Body of water" is limited to lakes, streams, and rivers. *Id.* at 732-33.

16 Justice Kennedy agreed with important aspects of this. *Rapanos*, 547 U.S. at 759-60. "The
 17 plurality's opinion begins from a correct premise." That being, as *Riverside Bayview* holds, that
 18 the Act regulates "at least some waters that are not navigable in the traditional sense." *Rapanos*,
 19 547 U.S. at 767. But, "[f]rom this reasonable beginning the plurality proceeds to impose two
 20 limitations on the Act[.]" *Id.* at 768 (emphasis added). These "limitations" are the two elements of
 21 the plurality's rule: that "navigable waters" are only "relatively permanent, standing or flowing
 22 bodies of water" and that wetlands are only subject to the Act if they have a "continuous surface
 23 connection" to relatively permanent, standing, or flowing bodies of water. *Id.* at 768-69.

24 On relative permanence ("the plurality's first requirement," *id.* at 769), Justice Kennedy
 25 said the plurality's reading of *Riverside Bayview* was too narrow. *Rapanos*, 547 U.S. at 771. Justice
 26 Kennedy concluded that the Army could read "waters" more broadly to include "impermanent
 27 streams." *Id.* at 770.

28 ///

1 On “[t]he plurality’s second limitation,” Justice Kennedy disagreed that *Riverside Bayview*
2 limits regulated wetlands to just those which abut navigable waters so closely that they cannot be
3 distinguished, or even that there be a continuous surface connection, however close. *Rapanos*, 547
4 U.S. at 772-73. Justice Kennedy also disagreed with the plurality’s reading of *SWANCC* as
5 requiring a surface connection between wetlands and navigable waters. *Rapanos*, 547 U.S. at 774.
6 Justice Kennedy concluded that the Army’s broader definition of “adjacent” would be reasonable
7 if limited to those wetlands with a significant nexus. *Id.* at 775.

8 In short, Justice Kennedy’s view is that the plurality reads “navigable waters” in the statute,
9 the holding of *Riverside Bayview*, and the term “significant nexus” used in *Solid Waste Agency of*
10 *N. Cook Cty. v. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (*SWANCC*) too narrowly. By Justice
11 Kennedy’s own critique of the plurality, he thinks it narrower than his reasoning.

12 At the same time, he agrees that those waters the plurality generally considers “navigable”
13 are covered by the Act. Justice Kennedy reads the Act as applicable to both permanent and
14 “impermanent streams.” *Id.* at 770. So the relatively permanent tributaries which the plurality reads
15 the Act as covering are a logical subset of the broader category of both permanent and impermanent
16 streams which the concurrence recognizes.

17 Justice Kennedy also agreed with the plurality that wetlands which cannot easily be
18 distinguished from covered tributaries are categorically covered by the Act. *Id.* at 780. The
19 plurality would limit covered wetlands to this category, which is a subset of the broader group of
20 adjacent waters to which Justice Kennedy reasons the Act may apply on a case-by-case basis. And
21 Justice Kennedy’s reasoning as to directly abutting wetlands is that they categorically have the
22 “significant nexus” that his rule requires. *Id.* Both opinions categorically include this class of
23 wetlands.

24 The relatively permanent tributaries and directly abutting wetlands covered by the
25 plurality’s rule are a logical subset of Justice Kennedy’s broader reading of “navigable waters,”
26 and Justice Kennedy would generally see these waters as a subset of those his rule would include.

27 The concurrence does state that some waters meeting the plurality’s test might lack a
28 “significant nexus.” *Id.* at 776. But this is not a fair reading of the plurality. The plurality limits its

1 coverage of non-navigable tributaries to relatively permanent waters that can properly be described
 2 as lakes, rivers, and streams. *Id.* at 742. Justice Kennedy asserts that some of these waters might
 3 not have a significant nexus, without explaining how. *Id.* at 776-77 (Kennedy, J., concurring).

4 The concurrence never gives examples of relatively permanent tributaries that would not
 5 be covered by his rule, and misreads the plurality as applying the Act to “wetlands (however
 6 remote)” so long as there is a surface connection, however minor. *Id.* at 776. But the plurality is
 7 limited to those relatively permanent waters that would be called lakes, rivers, or streams “in
 8 normal parlance.” *Id.* at 742. One using “normal parlance” would not call a mere trickle a stream.

9 Nor does the plurality admit regulation of wetlands based on a mere surface connection,
 10 “however remote.” The plurality specifically rejects this. *Id.* at 742. Justice Kennedy’s misreading
 11 of the plurality’s reasoning cannot stand in for its actual reasoning. And that actual reasoning is a
 12 logical subset of Justice Kennedy’s.

13 The dissent also opines that “Justice Kennedy’s approach . . . treats more of the Nation’s
 14 waters as within the Corps’ jurisdiction” than the plurality, and that it would be a rare case when
 15 the plurality test is met and Justice Kennedy’s isn’t. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J.,
 16 dissenting). Nor is any example offered.

17 Following the reasoning based approach to applying *Marks*, as required under *Davis*, the
 18 proper reading of *Rapanos* is that the plurality opinion is a logical subset of Justice Kennedy’s
 19 reasoning, and on what “navigable waters” means, the plurality is the narrower opinion and is the
 20 holding.

21 **B. No valid regulation interprets “navigable waters” to include transient vernal**
 22 **pools in farm fields miles from the nearest navigable-in-fact river.**

23 The United States’ assertion that the vernal pools on Mr. LaPant’s ranch are “navigable
 24 water” relies on agency regulations extending Clean Water Act control over all tributaries and all
 25 bordering, contiguous, or neighboring wetlands. These are the 1986 Tributary and Adjacent
 26 Wetland Subsections discussed above—the same regulations that the Supreme Court invalidated
 27 in *Rapanos*.

28 ///

1 But the United States is barred by issue preclusion from asserting the validity of these
 2 Subsections against Mr. LaPant. Issue preclusion prevents a party from relitigating an issue
 3 decided in a previous action if four requirements are met:

4 (1) there was a full and fair opportunity to litigate the issue in the previous action;
 5 (2) the issue was actually litigated in that action; (3) the issue was lost as a result of
 6 a final judgment in that action; and (4) the person against whom collateral estoppel
 7 is asserted in the present action was a party or in privity with a party in the previous
 8 action.

9 *United States Internal Revenue Serv. v. Palmer (In re Palmer)*, 207 F.3d 566, 568 (9th Cir. 2000).
 10 Issue preclusion can be invoked by any third party against a party in privity to the parties in the
 11 prior decision. *Park Lake Resources Ltd. Liability Co. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1138
 (10th Cir. 2004) (citing cases). Issue preclusion applies in this case against the United States.

12 The issue in this case is identical to that in *Rapanos*: the Army's authority under the Clean
 13 Water Act to regulate activity in wetlands based on the 1986 Tributary and Adjacent Wetland
 14 Subsections. *Rapanos*, 547 U.S. at 724-25. *Rapanos* was adjudicated on the merits at the Supreme
 15 Court of the United States. Nothing could be more final in the federal courts. The United States
 16 was the respondent in *Rapanos*, and the Army was a party to *Carabell*, the *Rapanos* companion
 17 case. Federal agencies are in privity with the United States. *Sunshine Anthracite Coal Co. v.*
 18 *Adkins*, 310 U.S. 381, 402-03 (1940). Finally, the United States had a full and fair opportunity to
 19 litigate *Rapanos*. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331-32 (1979) (appeal to
 20 circuit court after trial before district court affords full and fair opportunity).

21 Mr. LaPant can invoke issue preclusion against the federal government in this case despite
 22 *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (nonmutual offensive issue preclusion does
 23 not run against the government in certain cases). In *Mendoza*, the Supreme Court decided that the
 24 United States could not be precluded from litigating a constitutional issue it had lost in a decision
 25 of the Northern District of California, which the government elected not to appeal. *Id.* at 157. The
 26 Supreme Court focused its analysis in *Mendoza* on the long standing practice of allowing important
 27 constitutional issues to percolate through the circuit courts before final resolution in the Supreme
 28 Court. *Id.* at 160. Estopping the government with unappealed district court decisions would prevent

1 this percolation. *Id.* The Court further emphasized the significance of the Solicitor General’s
2 discretion whether to appeal district court decisions, and which circuit court decisions to petition
3 to the Supreme Court. Precluding relitigation of issues based on district court decisions would
4 upend the Solicitor General’s decision making. *Id.* at 161.

5 None of these concerns apply to Supreme Court decisions, and *Mendoza* correspondingly
6 limits its holding to “relitigation of issues such as those involved in this case,” *id.* at 162, *i.e.*, issues
7 resolved by a lower court which could still be percolated through the courts of appeal and which
8 implicate the Solicitor General’s discretion in filing appeals and petitions for certiorari.

9 The United States is barred under issue preclusion from asserting or defending the validity
10 of the 1986 Tributary and Adjacent Wetlands Subsections. Without these Subdivisions, there are
11 no valid regulations to establish the Army’s regulatory authority over Mr. LaPant’s farm fields.

12 As a result, the only available tool to interpret whether transient vernal pools in a farm field
13 are “navigable waters” is the *Rapanos* plurality.

14 Applying the *Rapanos* plurality to the undisputed facts in this case, Mr. LaPant is entitled
15 to summary judgment because the United States cannot prove that any of the vernal pools on the
16 land that Mr. LaPant farmed, or the drainages that allegedly connect those vernal pools to Coyote
17 Creek, or even Coyote Creek, are “navigable waters.” Is undisputed that the vernal pools in
18 question do not have water in them for more than three months in any year. *See* Accompanying
19 Declaration of Therese Cannata, Exhibit C (transcript of deposition of Mark Rains) at 5:21; 8:21-
20 9:3. There was certainly no standing water in them during the eight months that Mr. LaPant was
21 farming in 2011 (May through December). LaPant Decl., ¶ 23. It is also undisputed that the
22 drainages that allegedly connect the vernal pools to Coyote Creek only flow in the range of 85
23 days per year. Cannata Decl., Exhibit B (transcript of deposition of Wade Nutter) at 2:17-23, 3:8-
24 14; Exhibit C (Rains trans.) at 2:17-9:3; Exhibit D (transcript of deposition of Peter Stokely) at
25 2:23-3:11. In addition, it is not even clear that Coyote Creek, or the drainages leading to it from
26 the property, flow continuously during the short portion of the year in which they do flow. Cannata
27 Decl., Exhibit D (Stokely trans.) at 3:1-11, 4:12 – 6:8.

28 ///

As a matter of law this fails to meet the minimum requirement set by the plurality for “continuously flowing streams” marked by the “ordinary presence of water.” *Rapanos*, 547 U.S. at 734; *id.* at 739; *see also id.* at 733-34, 736 (dismissing regulation of ephemeral and intermittent flows). While the plurality does allow for regulation of rivers and streams that are dry seasonally, 547 U.S. at 732, n.5, Coyote Creek and the drainages on the property fall well short of this standard. Coyote Creek is not seasonally dry, it is only seasonally wet. Nor is it close to the line where common sense would tell the difference. *Id.* Fewer than four months, in the case of Coyote Creek, is not “seasonally dry.” And 85 days, in the case of the drainages on the property (during which time they don’t even flow continuously) falls even farther short of the plurality standard. As a matter of law, neither Coyote Creek nor the drainages on the property are “navigable waters” under the Clean Water Act.

As a result, none of the vernal pools on the property are “navigable waters” either, as a matter of law. It is undisputed that none of the vernal pools on the property abut Coyote Creek. It is also undisputed that the only drainages which any of the vernal pools may abut are the intermittent and short term drainages on the property. As shown immediately above, none of these drainages can be regulated under the Act as a tributary. Therefore, none of vernal pools on the property can be regulated as “navigable waters.”

The United States cannot, as a matter of law, prove there are any “navigable waters” on the property. Unable to establish this required element, the United States’ claim fails and Mr. LaPant is entitled to summary judgment in his favor.

II. THE UNITED STATES CANNOT PROVE A “DISCHARGE” BECAUSE THE MERE MOVEMENT OF SOIL WITHIN “NAVIGABLE WATERS” IS NOT A “DISCHARGE OF A POLLUTANT.”

The Clean Water Act generally requires a permit for the discharge of pollutants into “navigable waters.” *See Rapanos*, 547 at 722-23. The Act defines “discharge of a pollutant” in relevant part as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A). Thus, the triggering of the Act’s permitting requirement—which Mr. LaPant is alleged to have violated—depends in part on whether the activity in question results in the “addition” of regulated material to a regulated water. *See L.A. Cty. Flood Control Dist. v.*

1 *Natural Resources Defense Council, Inc.*, 568 U.S. 78, 82-83 (2013).

2 Moving soil *within* vernal pools or other purported “navigable waters,” the extent
 3 Mr. LaPant’s normal farming activities may have done, cannot qualify as the “addition of any
 4 pollutant” because the soil was already present and remained there.⁴ *See Nat’l Wildlife Fed’n v.*
 5 *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (“[T]here can be no addition unless a
 6 source physically introduces a pollutant into water from the outside world.”) (internal quotation
 7 marks omitted). *Cf. Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 273 F.3d
 8 481, 492 (2d Cir. 2001) (“If one takes a ladle of soup from a pot, lifts it above the pot, and pours
 9 it back into the pot, one has not ‘added’ soup or anything else to the pot In requiring a permit
 10 for such a ‘discharge,’ the EPA might as easily require a permit for Niagara Falls.”), *quoted*
 11 *approvingly in S. Fla. Water Mgmt. Dist. v. Miccosukee Tr. of Indians*, 541 U.S. 95, 110 (2004).

12 To be sure, the Ninth Circuit has rejected the argument that the mere movement of material
 13 within a regulated water does not qualify as the addition of a pollutant. *Rybachek v. EPA*, 904 F.2d
 14 1276, 1285 (9th Cir. 1990); *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810,
 15 814-15 (9th Cir. 2001); *United States v. Moses*, 496 F.3d 984, 991-92 (9th Cir. 2007). But the court
 16 has done so in cases concerning discharges of material that has been removed, or treated or
 17 otherwise changed prior to its redeposit, or both. *See Nat’l Mining Ass’n v. U.S. Army Corps of*
 18 *Eng’rs*, 145 F.3d 1399, 1406 (D.C. Cir. 1998) (“*Rybachek* . . . identified the regulable discharge
 19 as the discrete act of dumping leftover material into the stream after it had been processed.”);
 20

21 ⁴ Even if Mr. LaPant were responsible for any “addition,” the Clean Water Act still would not
 22 reach his normal farming activities because the purported “addition”—unprocessed, natural soil—
 23 is not a “pollutant” under the Act. Such material is not “dredged spoil, incinerator residue, sewage,
 24 garbage, sewage sludge, munitions, chemical wastes, radioactive materials, heat, wrecked or
 25 discarded equipment, rock, sand, cellar dirt,” or “industrial or municipal waste.” 33 U.S.C.
 26 § 1362(6). Neither is it “biological material.” *See Ass’n to Protect Hammersley, Eld, & Totten*
 27 *Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002) (“‘[B]iological materials’
 28 means the waste product of a human or industrial process”). And far from being “solid waste,”
 “agricultural waste,” or any other kind of waste, soil is a critical component in the production of
 food and fiber. To the extent that *Borden Ranch Partnership v. U.S. Army Corps of Engineers*,
 261 F.3d 810, 814-15 (9th Cir. 2001), or other decision binding on this Court is to contrary,
 Mr. LaPant hereby reserves the right to seek reversal of any such decision before the en banc Ninth
 Circuit or the Supreme Court. *See infra* note 6.

1 *Borden Ranch*, 261 F.3d at 820 (describing the discharge as “soil [that] was wrenched up, moved
 2 around, and redeposited somewhere else,” and concluding that there was “no meaningful
 3 distinction between this activity and the activities at issue in *Rybachek*,” *id.* at 815); *Moses*, 496
 4 F.3d at 991 (describing the discharge as “disturbed and moved materials as well as log structures”).
 5 Here, however, Mr. LaPant’s normal farming activities neither removed material from any
 6 regulated feature⁵ nor processed any material prior to its placement in any regulated feature.⁶
 7 Because these activities did not result in the “addition” of any material to any waters, the Clean
 8 Water Act does not regulate them.

9 **III. MR. LAPANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW**
 10 **BECAUSE HIS NORMAL FARMING ACTIVITIES WERE EXEMPT FROM ARMY**
 11 **PERMITTING AND NOT “RECAPTURED.”**

12 33 U.S.C. § 1344(f)(1)(A) exempts “normal farming [] and ranching activities such as
 13 plowing, seeding, [and] cultivating, . . . for the production of food” from the Act’s dredge and fill
 14 permitting requirements, unless these actions fall under the “recapture” provision of 33 U.S.C.
 15 § 1344(f)(2). Mr. LaPant bears the burden of showing both that the normal farming and ranching
 16 exemption applies, and that the recapture provision does not. *United States v. Akers*, 785 F.2d 814,
 17 819 (9th Cir. 1986).

18 ///

19 ⁵ Even the complete removal of material from a regulated feature prior to its redeposit does not
 20 necessarily result in the addition of a pollutant to that feature. *Nat’l Mining Ass’n*, 145 F.3d at 1404
 21 (“[T]he straightforward statutory term ‘addition’ cannot reasonably be said to encompass the
 22 situation in which material is removed from the waters of the United States and a small portion of
 23 it happens to fall back.”).

24 ⁶ *Borden Ranch* is also distinguishable because it concerned four-to-seven-foot deep ripping,
 25 *Borden Ranch*, 261 F.3d at 812, 815, whereas Mr. LaPant never penetrated the site’s soil to a depth
 26 greater than six inches. Should, however, the Court determine that *Rybachek*, *Borden Ranch*, and
 27 *Moses* are not distinguishable, Mr. LaPant hereby reserves the right to seek reversal of those
 28 decisions before the en banc Ninth Circuit or the Supreme Court. *Cf. Borden Ranch*, 261 F.3d at
 819 (Gould, J., dissenting) (“I would follow and extend *National Mining Association* . . . and hold
 that the return of soil in place after deep plowing is not a ‘discharge of a pollutant.’”); *United States*
v. Wilson, 133 F.3d 251, 259-60 (4th Cir. 1997) (opinion of Niemeyer, J.) (adoption of the “mere
 movement” rule “would . . . flaunt the given definition of ‘discharge,’ [and] would . . . criminaliz[e]
 every artificial disturbance of the bottom of any polluted [waterbody] because the disturbance
 moved polluted material about,” a result that should only obtain if “Congress . . . redefine[s] the
 term ‘discharge’”).

1 **A. The provision for normal farming and ranching activities applies to**
 2 **Mr. LaPant’s wheat crop.**

3 **1. The plain text of the Clean Water Act clearly exempts Mr. LaPant’s**
 4 **plowing, seeding, and other normal farming and ranching activities from permitting, without**
 5 **regard to whether they took place on an established farm or ranch.**

6 The text of subdivision (f)(1)(A) lists a number of normal farming and ranching activities:
 7 “plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and
 8 forest products[.]” 33 U.S.C. § 1344(f)(1)(A). As described above in the Summary of Facts,
 9 Mr. LaPant’s actions on the property in 2011 clearly comprised plowing (with the two-shank tool
 10 and the disc), cultivating (with the fertilizer rig and the harrow), and seeding (with the seed drill).
 11 And he did these actions to produce food for his livestock (which in turn he produces to provide
 12 food for people). There are no other criteria in subdivision (f)(1)(A). On this basis, the exemption
 13 applies.

14 The United States will argue that its regulations add a requirement to the statute that limits
 15 the statute’s applicability in this case. Specifically, that 33 C.F.R. § 323.4(a)(1)(ii) imposes the
 16 additional criterion that normal farming and ranching activities are only exempt if they are “part
 17 of an ongoing (*i.e.* established) farming . . . or ranching operation[.]” This regulation violates the
 18 Clean Water Act, and is not eligible for *Chevron* deference.

19 Subdivision (f)(1)(A) has no temporal, spatial, or other qualifications in it. However,
 20 various other exemptions listed in subdivision (f)(1) do have such qualifications. Subdivision
 21 (f)(1)(B) exempts two categories of flood control activities: maintenance and reconstruction.
 22 33 U.S.C. § 1344(f)(1)(B). Both of these categories have explicit conditions. Only “currently
 23 serviceable structures” can be maintained without a permit. *Id.* And only “recently damaged parts”
 24 of “currently serviceable structures” can be reconstructed. *Id.* These criteria are temporal
 25 (“recently”) and conditional (“damaged” and “serviceable”). Subdivision (f)(1)(D) exempts
 26 construction of temporary sedimentation basins. 33 U.S.C. § 1344(f)(1)(D). This exemption has a
 27 location criterion (on construction sites) and an operational criterion: the construction may “not
 28 include placement of fill material into the navigable waters.” *Id.* Subdivision (f)(1)(E) exempts
 construction and maintenance of certain types of roads. 33 U.S.C. § 1344(f)(1)(E). This exemption

1 has several limiting criteria in it. Construction and maintenance are only exempt if done in
2 accordance an operational criterion: best management practices. *Id.* And then, the construction and
3 maintenance must avoid multiple environmental consequences. *Id.* (no impairment of flow and
4 circulation patterns or chemical and biological characteristics of navigable waters; no reduction of
5 reach of waters, minimize “any adverse effect on the aquatic environment.”).

6 Exemptions B (flood control), D (sedimentation ponds), and E (roads) impose several kinds
7 of conditions: temporal, conditional, operational, locational, and consequential. The farming and
8 ranching exemption has none of these types of limitations. Its only requirements are (1) a normal
9 farming or ranching activity, and (2) for the purpose of producing the goods listed in the
10 exemption. Where Congress uses limiting conditions in one portion of the Clean Water Act and
11 omits them from others that are nearby, the Supreme Court has recently concluded that the
12 omission is deliberate. *Nat’l Assoc. of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 631 (2018) (citing
13 *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language
14 in one section of a statute but omits it in another section of the same Act, it is generally presumed
15 that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). So, the
16 Act is clear that the normal farming and ranching exemption does not have temporal, locational,
17 or operational limits.

18 The Army’s regulation improperly imposes exactly those limits. Refusing the exemption
19 unless farming and ranching activities are part of an established farming or ranching operation
20 improperly imports temporal and locational criteria into the statute that Congress deliberately
21 excluded. *Nat’l Ass’n of Mfrs.*, 138 S. Ct. at 631. Further, the regulation qualifies the meaning of
22 “established” in terms of the effect of the otherwise exempt normal farming and ranching activity
23 on the “hydrological regime” of the farm or ranch. 33 C.F.R. § 323.4(a)(1)(ii). This adds either an
24 operational criterion or consequential criterion (or both). All of these additional regulatory limits
25 on Congress’ clear exemption for normal farming and ranching activities violate the statute and
26 the Supreme Court’s holding in *National Association of Manufacturers*.

27 Because the text of the statute clearly excludes the types of temporal, locational,
28 operational, and consequential criteria that the Army’s regulation adds, the regulation is not

entitled to deference. Under *Chevron*, a court may only grant deference to an agency interpretation of a statute *if* the court first finds that the statute is ambiguous. *Chevron*, 467 U.S. at 837. In determining whether a statute is ambiguous, the court must first look to the text of the statute itself. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (stating that when engaging in statutory analysis, “we start, of course, with the statutory text.”). Where the text is clear, as here, the analysis starts and ends with this step. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

Akers is not to the contrary on this point. While the Ninth Circuit gave effect to the limiting regulation in *Akers*, it never examined the text of the Act itself, whether the regulation was consistent with the statute, or whether the regulation was entitled to deference under the then-recent *Chevron* decision. *See Akers*, 785 F.2d at 819-823 (discussing regulations without *Chevron* analysis). Where a case does not address a legal issue raised in a lower court, that case is not precedent for that legal issue. *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”) quoted in *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007)).

Nor are *Akers* or *Borden Ranch* applicable to the facts of Mr. LaPant’s case. Each of those cases involved massive activity that radically altered the hydrology of the land involved. *Akers*, 785 F.2d at 816 (“extensive grading, levelling, drainage, and water diversion”); *id.* at 816-17 (miles of diking, 50-foot-wide ditch, roads blocking “several overflow channels of the Pit River.”); *Borden Ranch*, 261 F.3d at 815-816 (four-seven foot deep ripping penetrated restrictive layers and “radically altered the hydrological regime of the protected wetlands.”). Mr. LaPant did no such thing in this case. He kept to the existing contour of the land as he found it, avoided using the two-shank tool and disc in seasonal drainages, and tilled as shallowly as possible to still plant a wheat crop. His normal farming and ranching activities were exempt under 33 U.S.C. § 1344(f)(1)(A).

2. Mr. LaPant’s property was an established farm and/or ranch in 2011.

If the Court concludes that the Army’s limiting regulation applies, Mr. LaPant is still entitled to judgment because his property was an established farm and/or ranch in 2011.

///

1 The regulation defines “ongoing” to mean “established” and then qualifies “established”
2 in terms of the location’s “hydrological regime.” 33 C.F.R. § 323.4(a)(1)(ii). A farming and/or
3 ranching operation remains established unless “modifications to the hydrological regime are
4 necessary to resume operations.” *Id.* the regulations do not define “hydrologic regime.” The
5 ordinary dictionary definition of “regime” is “a system of rules or regulations.” Black’s Law
6 Dictionary, at 1448 (Rev. 4th Ed. 1968).

7 The proper interpretation of the regulation is thus that it addresses the systemic or high
8 level hydrology of a given location, as opposed to minor or even micro effects that occur only in
9 specific places. *See In re Carsten*, 211 B.R. 719, 734 (D. Mont. 1997) (citing *U.S. v. Nordic*
10 *Village, Inc.*, 503 U.S. 30, 35 (1992)) (interpreting “hydrological regime” to include minor impacts
11 on wetlands would render farm pond exemption “nugatory” and was therefore impermissible
12 reading of regulation); *id.* at 735 (applying *Akers* and concluding that “minor conversions of tiny
13 areas of wetlands to marginal drylands unequivocally did not alter the hydrological regime of the
14 slough, and cannot therefore be considered legally significant.”)

15 This is consistent with the deposition testimony of the government’s experts in this case,
16 who conceded that any time soil is plowed, there is at least some hydrological result. The tilth is
17 improved, which changes the amount of water that the soil will absorb and the amount and timing
18 of water that will run off. There is no way to plow without causing these effects, and in fact these
19 effects are one of the purposes of plowing. Cannata Decl., Exhibit A (transcript of deposition of
20 Gregory House) at 5:11-6:17. Reading “hydrological regime” to include such micro effects is not
21 only inconsistent with the dictionary definition of “regime” but it would make it impossible to ever
22 “resume operations” without “modifications to the hydrologic regime.”

23 *Akers* and *Borden Ranches* support this interpretation. As discussed above, those cases
24 involved a massive scale of earth movement, well beyond plowing, in the case of *Akers*, and deep
25 ripping to four to seven feet in *Borden Ranches*, resulting in the complete penetration of the
26 restrictive layers that establish the hydrology of vernal pools. It is this restrictive layer soil profile
27 that is the correct interpretation of “hydrologic regime” in this case, because it is what creates and
28 sustains the vernal pools. Plowing the surface does not modify this regime; only penetrating the

1 restrictive layers does.

2 This can be seen from the fact that the property was tilled and farmed a number of times in
3 the recent past, without ever preventing the re-emergence of the vernal pools. They can even be
4 seen through Mr. LaPant's growing or recently harvested wheat crop in July of 2012 (prior to
5 Goose Pond's actions on the property). LaPant Decl., Exhibit R. The vernal pools' obvious
6 presence in the July 2012 aerial photograph shows that Mr. LaPant did not modify the hydrologic
7 regime in order to grow his wheat crop. Mr. LaPant also kept to the existing contour of the land,
8 and did not use either of the plowing implements in any seasonal drainages, further establishing
9 that no modification to the hydrologic regime of the property was necessary to grow a winter wheat
10 crop.

11 **B. Mr. LaPant's wheat crop was not a new use and therefore did not trigger the**
12 **recapture provision.**

13 The recapture provision only applies where the exempt use is a "new use." 33 U.S.C.
14 § 1344(f)(2) ("bringing an area of the navigable waters into a use to which it was not previously
15 subject"); *see Akers*, 785 F.2d at 819-20 (property was previously disced and seeded for crops that
16 grew in wetlands, but new uses involved diking, draining, and levelling property to grow
17 exclusively upland crops); *Borden Ranch*, 261 F.3d at 815 (orchards and vineyards were a new
18 use of land previously used for ranching). A prior use need not have been of the same intensity as
19 the exempt activity, and need not have been routinely performed. *In re Carsten*, 211 B.R. at 735-
20 36 (previous "occasional" use of wetland area by horses and llamas for watering did not render
21 exempt stockpond, which livestock used for longer period of the year, a new use); *id.* at 736 (citing
22 *Nordic Village*, 503 U.S. at 35) (requiring close match between prior use and exempt activity
23 would render the exemption meaningless).

24 It is undisputed that Mr. LaPant's property had been previously used many times to grow
25 wheat. The Farm Services Agency told him so, based on their records. Payments were made to the
26 prior owner based on historical wheat growing. Mr. LaPant limited the crop he grew to the one
27 that had been grown in the past. And, the government's experts in this case conceded that growing
28 wheat and grazing cattle were uses to which the property had previously been put. The recapture

provision does not apply. Cannata Decl., Exhibit A (House trans.) at 2:22-3:16, 4:5-8.

Mr. LaPant's wheat crop was not incidental to any action that Goose Pond took on the property. Mr. LaPant had his crop in motion for months before he realized he would not be able to get permanent financing for the property and thus would not be able to retain it. He had no knowledge of or communications with Goose Pond while he was farming the property in 2011, and no coordination of any kind with them after selling the property in March of 2012.

Mr. LaPant is entitled to judgment as a matter of law because his normal farming activities were exempt, were part of an established farming and/or ranching operation, and were not a new use and therefore not recaptured.

CONCLUSION

The Court should grant Defendant LaPant's motion and award judgment in his favor.

DATED: December 20, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF IN SUPPORT OF LAPANT MOTION FOR SUMMARY JUDGMENT** has been served through the Court's CM/ECF system on all registered counsel this 20th day of December, 2019.

DATED: December 20, 2019.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ,

Plaintiff,

v.

ROGER J. LAPANT, JR. ET. AL,

Defendants.

CASE NO. 2:16-CV-01498-KJM-DB

**DECLARATION OF ROGER J. LAPANT
IN SUPPORT OF DEFENDANT ROGER J.
LAPANT'S MOTION FOR SUMMARY
JUDGMENT**

[Fed. R. Civ. P. 56]

1 I, ROGER J. LAPANT, JR., declare as follows:

2 1. I am a Defendant in the above-entitled action. I have personal knowledge of the
3 matters set forth in this declaration, and if called upon to testify, I could and would do so based
4 upon my own personal knowledge, and as to those matters stated upon information and belief, I
5 believe them to be true.
6

7 **PERSONAL BACKGROUND AND HISTORY AS A FARMER**

8 2. I am a resident of Butte County who lives in Durham, California. I am also a long-
9 time California farmer and rancher with decades of experience. I did not have a family history of
10 farming. I decided in my early 20s that I wanted to become a farmer. I have been a farmer full-
11 time since about January 1975. I often operate “doing business as” J&J Farms.
12

13 3. Prior to 1975, I worked for PG&E and lived in various locations, including
14 Antioch (1968), Brentwood (1969) and Benicia (1970-1975). In 1974, I bought a ranch in Big
15 Valley near Bieber, California (in a remote area of Lassen County), subsequently moved my
16 family there, and learned to make a living farming full time. 45 years later I am still farming. I
17 lived in Big Valley from 1975 to 1988. I then moved down to Oroville and lived there from
18 1988 to 2012. In 2012, I moved to my current residence in Durham, in Butte County. Over the
19 years, I have acquired and farmed and ranched various properties in the northern Sacramento
20 Valley.
21

22 4. My farming operations have involving the planting of various crops, including
23 dryland wheat, alfalfa, grains (rye, oats, barley), sunflowers, corn, almonds, walnuts, olives, and
24 Sudan grass (for grazing or haying purposes). I have also raised and ranched cattle since 1975
25 (up to 250 pairs of mothers and calves), often grazing my herds on pasture land and alternately
26 using parts of that land to grow feed for them. When growing feed as part of my ranching
27 operation, I normally plant wheat and occasionally other dry land crops (*i.e.*, crops that do not
28

1 require irrigation), using cultivars that are bred for hay production.

2 5. My farming activities are simply part of a family-run, small business operation,
3 though. I am not a big developer. For example, in addition to dryland crops, by 2010, I had also
4 planted (as a self-taught orchardist) a modest acreage of orchard on some of my properties;
5 however, at the time of purchasing the Property at issue in 2011, the biggest project that I had
6 ever planted in orchard was 10 to 12 acres. I would often only plant part of a property in
7 orchard, even if a piece of land had more acreage available for farming, because that was all that
8 I could afford at that time and in order to keep my capital expenditures within reason and to learn
9 from the experience.

10 6. Related to my farming experience, around 2002-2003, I helped form a mitigation
11 bank known as the Dove Ridge Mitigation Bank with two other partners. We all had different
12 responsibilities on the project. My responsibilities were managing the land (2,400 acres) and
13 physical management of the land regarding livestock on the property. I do not recall meeting
14 with anyone from the USACE at the time, nor was I familiar with USACE permits or the details
15 of the permitting process at that time.

18 **IDENTIFICATION AND INVESTIGATION OF THE PROPERTY AT ISSUE**

19 7. In September of 2010, I began conducting an evaluation of a property in Tehama
20 County, south of Red Bluff (the "Property"). The Property was about 1,965 acres, and sits on
21 either side of a reach of Coyote Creek. It is bounded on the North by Ohm Road, on the West by
22 Paskenta Road, and the northern 1500 acres of it are bound on the East by Rawson Road. The
23 roughly 450 acres south of Coyote Creek is bounded on the very South end by Dusty Road, and
24 on the East by adjoining properties. Terry Cheney, my real estate broker, first brought the
25 Property to my attention. Prior to 2007, the land was owned by Leeland Hancock. During his
26 tenure, large parts of the property north of Coyote Creek were actively farmed (*i.e.* crops were
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1 grown). The land was tilled and crops grown at the very least in 1966, 1973, 1979, 1981, 1984,
2 and 1985. Mr. Hancock was the owner of the Property until late 2006, at which point it then
3 passed through a brief series of owners before becoming available again on the market in 2010.

4 8. In 2010, when I came across the Property, property prices in the area were, in my
5 experience, historically low as a result of the recent collapse and sluggish recovery of the
6 housing market, and this Property presented me with what I anticipated would be the opportunity
7 of a lifetime: a 1,965 acre ranch property at an affordable price. I hoped to buy and keep the
8 Property long term. There were many potential uses that I could have made of the Property, and,
9 as noted, my intention was to buy the Property as a long-term investment originally (though I
10 knew that I would need to secure permanent financing eventually).

11 9. At the time, I saw the potential in the Property for various different projects, each
12 with certain pros and cons, and each with varying levels of investment and time needed. For
13 example, one scenario was to simply use the Property as a long-term cattle ranch. Another
14 scenario was to use it as a long-term cattle ranch, but also include a rotation of grain on the
15 Property that would provide hay for the cattle. Another future-looking scenario was to develop
16 the Property for some type of commercial or residential real estate. Another scenario was to
17 finish developing the four wells on the Property and to start farming with pivots (*i.e.*, a crop-
18 circle irrigation technique). Another scenario was to develop and plant the Property for orchards,
19 after going through the proper approval process with the government. Another scenario was to
20 sell parcels to fund projects (land already subdivided into 21 parcels).

21 10. At the time that I was considering buying the Property, my original short-term
22 intention for the Property was simply to run my cattle on half of the Property in the fall and
23 winter, and then to plant grain on the other half of the Property (thereby setting up a rotation
24 where the cattle could graze for part of the year, and have hay as feed from the grain hay during
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1 the rest of the year until it could rotate back). This is a common technique for ranchers and
2 farmers to use, and it was something that made economic sense for me at the time, given the
3 recent recession and the lack of available capital for any larger or more complex project.

4
5 11. With over 45 years of farming experience, I have developed a routine for property
6 evaluations and due diligence. I employed this careful due diligence investigation to the Property
7 at issue. One part of this due diligence involved conducting site visits of the Property, digging
8 test pits, and making observations of drainage in the pits. Digging test pits is a common practice
9 that experienced farmers (and others, such as developers) employ to review the soil profile of a
10 piece of property before they plant or decide to buy a piece of land. In total, I dug around 20
11 holes of between four to seven feet below the surface. For all of them, I never found a restrictive
12 hardpan layer that I have seen (and in fact have) on other properties that I have farmed and
13 owned. In total, prior to purchasing the Property, I estimate conducting a minimum of 10 site
14 visits to the Property to both dig test pits, take photographs, and just observe the land and water
15 flow of the Property. Unfortunately, the photographs that I took were on phones that have been
16 since been lost or destroyed during the normal course of using them during my farming activities.

17
18 12. Another part of my due diligence included consultation with two agencies of the
19 United States Department of Agriculture (“USDA”), which is the primary point of contact and
20 interface between farmers and the federal government. These agencies were 1) the Farm Services
21 Agency (“FSA”), which maintains records of farm crop production and administers USDA farm
22 benefit programs, and 2) the Natural Resources Conservation Service (“NRCS”), which provides
23 technical expertise and advice to farmers on soils and wetland resources, and enforces the so-
24 called Swampbuster program that regulates farming in wetlands. In total, I went to the federal
25 agencies of three counties (where the FSA and NRCS offices are located together): Tehama
26 County, Glenn County, and Butte County. I also requested and received documents from Tehama
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County FSA, as that is the county where the Property at issue is located. Ultimately, both of these agencies (the FSA and NRCS) indicated and told me that I could grow wheat on the Property, since it had been previously farmed in wheat. The NRCS staff advised me that I could grow wheat on the Property as is, but that if I wanted to plant permanent crops on the Property I should return to NRCS to have the Property studied further. Neither of these agencies told me to consult with the USACE before purchasing the Property or growing wheat on it, and staff at both agencies were unaware at the time of any need to consult with or obtain a permit from the USACE before growing wheat on the property.

13. Specifically, during my investigation of the Property, the FSA provided me with an “Abbreviated 156 Farm Record” (“Farm Record”) for the Property for the year 2010, which stated that it had a total of 1967.0 acres, of which the FSA designated 1863.6 acres “cropland.” It also listed the Property as “active” and noted that there was a 489.3-acre “wheat” allotment. The document also stated, under “Wetland Status,” that the “[t]ract contains a wetland or farmed wetland” (emphasis added). This was consistent with my understanding of the Property, as I had observed water and/or wetland features on the Property (such as Coyote Creek), and I also knew that the Property had a history of both farming and ranching activity. The term “farmed wetland,” to me at that time, meant land that contained wetlands, but where farming was authorized based on the land’s past historical farming use. This appeared to me entirely consistent with what all federal officials in the FSA and NRCS were telling me at the time, giving me permission to farm dryland wheat (consistent with the Property’s historical use), but stating that further authorization would be required for other more complex projects, such as planting orchards or developing the Property for residential housing.

14. In addition to the 2010 document, I also investigated further and received records from the FSA for the years 1991 to 1996, as those were the only ones provided and available to

1 me at the time. The records had stapled to them a map of the Property, which I would later find
2 out was an image from the mid-1980s (the image was not labeled or dated at the time), that led
3 me to believe that it corresponded to the FSA documents from the 1990s. This image clearly
4 showed evidence of historical farming activity on the Property, and because it was attached to the
5 1990s FSA documents, I believed that it corresponded to those documents and that the Property
6 was farmed in those years. The FSA Tehama office at that time also showed me records that the
7 prior Property owner was involved with various agricultural programs during the years 1990-
8 1995. Eventually I received records up through 2006, but the process took years and a FOIA
9 request to obtain those additional records. I also found that cattle had been grazed on the ranch
10 for at least the prior couple decades (1989-2011).

11
12 15. As part of further due diligence and investigatory efforts, I spoke with Larry
13 Branham, a senior official at the Tehama County NRCS, to ask him about farming the Property
14 into dryland wheat (as had been done in the past on the Property). Mr. Branham stated, “yes,” but
15 that if I decided do anything other than planting dryland wheat, that I would need to come back to
16 the NRCS and either they would study the farm for me or I could hire a private third party to do
17 the same. I asked the same question to officials from the Butte County and Glenn County NRCS
18 offices, and they all provided the same answer as Mr. Branham. The conclusion of each of these
19 federal officials at my local federal farming agencies – the only real and known interface that
20 farmers had with the federal government at the time – was that I had permission to grow wheat on
21 the Property without further permission or authorization needed. Nobody at any of these federal
22 offices ever suggested that I go to visit and inquire about the Property with the USACE, nor was
23 it their policy to do so at that time, particularly for matters such as the routine farming of dryland
24 wheat on a Property with a history of dryland wheat farming.
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1 16. Therefore, my understanding at that time, based on the available historical farming
2 records from local federal agencies and the word of relevant local federal officials, was that I
3 indeed had authorization to plant dryland wheat on the Property in 2011, which I ultimately did. I
4 understood, though, that if I were to seek to use the Property for other more extensive farming or
5 development activities, including planting orchards, that I would have to return to the FSA and
6 NRCS for further guidance and authorization. Moreover, if I had known about a delineation on
7 the Property at the time, I would have been content with using only certain pre-approved portions
8 of the Property for orchards (because, as mentioned, I had never done more than a dozen acres of
9 orchard at a time, and those pre-approved portions would have been more than enough for my
10 family-run operation).

11
12 17. In early February 2011, I contacted an environmental consulting company,
13 Tehama Environmental Solutions (“TES”), and its president, Jeff Souza, to inquire about the
14 Property and to gain more information. Shortly thereafter, on February 10, 2011, I entered into
15 an agreement with TES and Mr. Souza. The purpose of the agreement was to obtain information
16 about the feasibility of ultimately developing an agricultural operation and/or mitigation bank on
17 the Property. In the near-term, though, I communicated to Mr. Souza that my intention was to
18 merely run cattle on the Property and to possibly plant dryland wheat.

19
20 18. The subject of the 1994 delineation of the Property was never raised by Mr. Souza
21 at that time, though he did mention that he had worked with different clients on the Property
22 before and that a potential good use could be a mitigation bank. I was willing to do a mitigation
23 bank if Mr. Souza had told me that there was already a delineation on the Property. Mr. Souza,
24 however, never informed me of the existence of the 1994 delineation, nor did he provide me with
25 documentation identifying itself as (or in any way indicating that it constituted) the 1994
26 delineation. I never entered the Property with Mr. Souza at that time in February 2011 – we
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merely talked by my truck for about an hour on February 11, 2011 (right inside the gate to the Property, but not going onto it). Later that month, Mr. Souza sent me certain documents (6 large maps of portions of the Property that when put together constituted the entire Property, as well as a 1993 Tehama County environmental impact study). At the time, though, I had no idea what these map documents were from, let alone that the maps were part of a 1994 delineation of the Property. I also did not contact Mr. Souza further about the Property or about the documents he sent to me because based on my short time interacting with him regarding the Property, I was uncomfortable and uneasy about his professional ethics and did not wish to continue our professional relationship. The only other communication I received from Mr. Souza was an invoice in October 2011 (8 months later).

19. Overall, based on the assurances of local federal officials and information from the USDA, FSA, and NRCS, in addition to other significant and substantial efforts that I took to conduct due diligence on the Property, I decided that it was appropriate to move forward with the process of purchasing the Property.

THE PURCHASE AND FARMING OF THE PROPERTY

20. I purchased the Property and closed escrow in March 2011, purchasing the Property from Ethan Conrad. To do so, I made a down payment to Mr. Conrad and signed a note to him for a substantial balloon payment due in March of 2012. I intended to work with a community bank with which I had done business for decades to arrange permanent financing after making the purchase. Several hundred head of cattle were on the Property when I took title.

21. Shortly after purchasing the Property, I prepared portions of the Property for wheat hay planting using normal tillage equipment. A graphic depicting the chronology of my equipment use on the Property is attached hereto as **Exhibit A**. True and correct copies of aerial photographs from July 2011, October 2011, and July 2012, are attached hereto as **Exhibits B** to

D. I started moving my farming equipment onto the Property in May 2011. Specifically, I used the following equipment at the following locations and time periods:

a. **570 Case backhoe**

i. Location: This piece of equipment was used in various places on the property to dig approximately 20 test pits. It was also used on Rawson Road to load trash collected from the property into a trash bin.

ii. Time Period: This piece of equipment was used in approximately March 2011 to dig test pits and from approximately January 2012 to March 2012 to load trash.

iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit E**.

b. **John Deere 8440 tractor, model year 1979, 175 horsepower**

i. Equipment Attachments: This tractor was sometimes used with a 14-foot John Deere mud chisel with a three-point hitch, an 8-foot shop-made two shank chisel with a three-point hitch, and/or a 12-foot offset disc.

ii. Location: This piece of equipment began to have mechanical problems, and therefore it was not used across the entire portion of the property that was planted. I do not recall exactly where on the Property this piece of equipment was used, but estimate that this tractor was not used east of roughly the midline of zones 3, 7, and 11 (“Zone” or “zones” refers to the zones depicted in **Exhibits B to D**).

iii. Time Period: This piece of equipment was used from approximately April 2011 through July 2011.

iv. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of

the Property from July 2011, is attached as **Exhibit F**.

c. **14-foot John Deere mud chisel with a three-point hitch**

i. Location: This equipment was used in zones 2 (eastern portion), 3 (western portion), and 7 & 11 (along the line bisecting zones 7 and 11 generally from northwest to southeast). This equipment was used to a depth of generally 4 to 6 inches. This equipment was raised when crossing seasonal creeks that were evident. This equipment was not used east of the line extending from Ohm Road to the interior road north of Coyote Creek referenced above, and not used in any area that was not planted. This equipment was also stored on the Site.

ii. Time Period: This piece of equipment was used for two or three days in approximately late May through early June of 2011, and not after June 29, 2011. This equipment was never used for more than one pass in any location.

iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit G**.

d. **12-foot offset disc**

i. Location: This equipment was generally used across the entire portion of the property that was planted, with the exception that this equipment was closed (so that it did not cut into the soil) when crossing seasonal creeks that were evident.

ii. Time Period: This piece of equipment was used from approximately May 2011 to December 2011. In certain areas, it was not used after June 29, 2011, including at least the rectangular area parallel to Ohm Road depicted in zones 2 and 3, the northwest corner of zone 7, and the northeast corner of zone 6, and possibly other areas.

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- iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit H**.
 - e. **4960 John Deere tractor, model year 1992, 176 horsepower**
 - i. Equipment Attachments: This tractor was sometimes used with a 24-foot spike tooth harrow and/or a 24-foot Aqua fertilizer chisel and/or a 12 foot offset disc. This tractor may also have been used with a 14-foot John Deere mud chisel with a three-point hitch, and/or an 8-foot shop-made two shank chisel with a three-point hitch, but I do not recall with certainty.
 - ii. Location: This piece of equipment was used across the entire portion of the property that was planted, and the portion of the property that was disced but not planted in zones 4, 8, and 13.
 - iii. Time Period: This piece of equipment was used from approximately July 2011 to December 2011.
 - iv. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit I**.
 - f. **8-foot two shank chisel**
 - i. Location: This equipment was used in zones 2 (western portion), 6 (western portion exclusive of “tributary 2b,” and north of “tributary 2” and “tributary 2a”), 1 (western portion), 5 (western portion), and 9 (western portion). This equipment was used to a depth of generally 4 to 6 inches. This equipment was raised when crossing seasonal creeks that were evident, including but not limited to “tributary 2a.” This equipment was not used in zone 10, or east of zones 2, 6, and 10, and

was not used in any area that was not planted. This equipment was only used on approximately 55 acres of the Property.

ii. Time Period: This piece of equipment was used periodically during the time period of early July to early October 2011.

iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto true and correct copies of aerial images of the Property from July 2011 and October 2011, is attached as **Exhibits J and K**.

g. **5220 John Deere tractor, model year 2003, 75 horsepower**

i. Equipment Attachments: This tractor was sometimes used with a 14-foot International Harvester grain drill and/or a 24-foot spike tooth harrow.

ii. Location: This piece of equipment was used across the entire portion of the property that was planted.

iii. Time Period: This piece of equipment was used from approximately November 2011 to December 2011.

iv. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit L**.

h. **24-foot Aqua fertilizer chisel**

i. Location: This piece of equipment was used across the entire portion of the property that was planted, with the exception that this equipment was raised when crossing seasonal creeks that were evident. The 24-foot Aqua fertilizer chisel was set to be injected two inches into the ground.

ii. Time Period: This piece of equipment was used from approximately November 2011 to December 2011.

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iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit M**.

i. **14-foot International Harvester grain drill**

i. Location: This piece of equipment was used across the entire portion of the property that was planted.

ii. Time Period: This piece of equipment was used from approximately November 2011 to December 2011.

iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit N**.

j. **24-foot spike tooth harrow**

i. Location: This piece of equipment was used across the entire portion of the property that was planted.

ii. Time Period: This piece of equipment was used from approximately November 2011 to December 2011.

iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit O**.

k. **Honda Rancher Four Wheeler with six by six trailer**

i. Location: This equipment was used to gather trash from various places around the Property and haul it to the trash bin on Rawson Road.

ii. Time Period: This piece of equipment was used in approximately December 2011 to March 2012.

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iii. Exhibit: A true and correct depiction of where this piece of equipment was used on the Property, superimposed onto a true and correct copy of an aerial image of the Property from July 2011, is attached as **Exhibit P**.

22. In sum, I planted a wheat crop on roughly 900 acres of the Property in 2011, doing almost all of the work myself with my own equipment. Graphics depicting the overall planting area (with planting completed by January 2012), superimposed onto true and correct copies of aerial images of the Property from July 2011 and July 2012, are attached hereto as **Exhibits Q** and **R**. I began the multi-step process in May of 2011 and finished in December of that year: preparing the soil, fertilizing the soil, planting the seed, and finally harrowing the field. Each of these steps was done with different farming tools pulled behind my tractor. The tractors I used had about 75-176 horse power. Photographs of my actual tractors are depicted in **Exhibits F, I, and L**.

a. The primary tool I used in preparing the soil was a disc to till the soil surface to a depth of about 6 inches. This allows rainfall to soak into the soil and hold in this six inch zone near the surface, and gives the soil adequate tilth for the wheat to grow and take root and access that water.

b. For the disc to work, the soil surface has to be soft enough for it to bite into. If the surface is too hard, the disc will tend to slide over the surface without cutting into it. Where this condition existed, I had to open up the soil using a different tool in advance of the disc.

c. Following June 29, 2011, on a limited portion of the property, while the surface was too hard to disc, I used a custom-made plowing tool to open the soil surface. The tool has two shanks about 40 inches apart, and is shown in **Exhibits J** and **K**. Following June 29, 2011, I only used the two-shank tool in the areas shown on **Exhibits J** and **K**, to a depth of four to six inches. This depth was all that was necessary to then use the disc in those locations. I worked north and

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1 south with this tool, in straight lines, and never cut the soil surface with it in any seasonal
 2 drainages. I used the hydraulic equipment on my tractor to raise the tool out of the ground when I
 3 drove the tractor through any seasonal drainages.

4 d. I first used this tool in the western portion of Zone 6 in early July 2011. Once I had
 5 loosened the soil with the two-shank tool in this portion of Zone 6, I went over the same area with
 6 the disc. This mixed and turned the soil and smoothed out any north south furrows left by the
 7 two-shank tool. The aerial photo from July 2011 shows the results of this work. It also shows that
 8 drainages in Zone 6 have not been plowed. **Exhibit J.**

9 e. Following this work in July in Zone 6, I used the two-shank tool at the same depth
 10 for roughly two months first in the western portion of Zone 2 and then on the western edge of the
 11 property in Zones 1, 5, and 9, to continue loosening the soil surface before using the disc. I only
 12 used the two-shank tool north-south (parallel to Paskenta Road), and continued to raise the tool
 13 when traversing any seasonal drainages. The October 2011 aerial photo shows the north-south
 14 furrows produced by the two-shank tool in Zones 1, 5, and 9 during this time. **Exhibit K.**

15 f. In early October, it rained enough to soften the soil surface so that the two-shank
 16 tool was no longer necessary. At this point, I parked it near one of the power towers on the
 17 Property, where it stayed until I removed it from the Property in March of 2012.

18 g. To summarize the use of the two-shank tool: following June 29, 2011, I only used
 19 it in the indicated areas on **Exhibits J and K**, only used it to a depth of 4 - 6 inches, never made
 20 more than one pass with it, did not use it in any seasonal drainages, and only ever used it in a
 21 North-South direction. Then, I disced everywhere I had used the two-shank tool.

22 h. After it rained, I finished preparing the soil by discing in the areas generally shown
 23 on **Exhibit H**. I had already disced portions of Zones 2, 3, 5, and 6 in July. I generally used the
 24 disc North-South, and I also avoided using it in seasonal drainages by “closing” the disc when
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1 passing through them (which results in the disc generally rolling over the ground instead of
2 cutting into it). I finished discing sometime in December. By that time, it not having rained for a
3 period of time, the soil surface got harder again and the disc was less and less effective. At this
4 point, I had disced approximately 1,000 acres. Throughout, I disced to a depth of 4 to 6 inches.

5
6 i. Discing smoothed out any furrows left by the two-shank tool, and the ground
7 surface generally appeared as shown in **Exhibit S** (which I am informed is a photo that Mr.
8 Matthew Kelley took from Ohm Road on the eastern end of the tilled area). I am also informed
9 that **Exhibit S-1** (showing the wheat growing in north-south rows) and **Exhibit S-2** (showing the
10 wheat growing and an aquatic feature holding water during the rainy season) are also photos that
11 Mr. Kelley took around that same time of the Property. Throughout soil preparation, I followed
12 the existing contour of the ground surface throughout the property.

13
14 j. Following soil preparation, beginning in November 2011, I fertilized the soil using
15 an aqueous ammonia rig. This equipment is pulled behind the tractor and injects liquid fertilizer
16 into the soil. In addition to fertilizing, it further smooths the soil after discing. I finished
17 fertilization in December 2011. As with the two-shank tool and the disc, I used the hydraulic
18 equipment on the tractor to raise the ammonia rig when traversing any seasonal drainages. And as
19 with the prior tools, I followed the existing contour of the ground.

20
21 k. After fertilizing, I planted the wheat with a seed drill, which is pulled behind the
22 tractor and pushes individual seeds a few inches into the ground to plant them. I started the
23 planting in November 2011 and completed planting in December 2011. I planted approximately
24 900 acres, indicated on **Exhibit R**. As with discing and fertilizing, planting the seed had the
25 additional effect of further smoothing out and firming up the surface of the soil.

26
27 l. My final step in the planting process was to harrow the planting with a metal grid
28 with short (2 inch) teeth on it. This is dragged behind the tractor over the planted seed to cover it.

1 I started this step in November 2011 and completed it in December 2011.

2 m. The dryland wheat planting was fully completed by December 2011. I then
3 immediately went to the FSA office and reported that I had finished planting the wheat crop, and
4 the FSA generated a report documenting that fact (LAPANT000090). A graphic depicting the
5 overall planting area on the Property as reflected in the FSA report is attached hereto as **Exhibit**
6 **T**.
7

8 23. Throughout my work on the Property, from May through December of 2011, there
9 was no standing, ponded, or flowing water anywhere that I worked. The wheat crop germinated,
10 and emerged by early March 2012. The growing plants, especially their roots spreading out in the
11 top 4 to 6 inches of soil, stabilized the soil during the subsequent rainy season, minimizing any
12 erosion of the tilled soil. The soil preparation (*i.e.*, plowing) also had important effects. First, it
13 established adequate tilth for the wheat seed to germinate and grow, and the roots to spread out.
14 Second, it provided adequate soil condition for rainfall to soak in and remain available for the
15 plant roots. Wheat in particular is highly efficient at using available soil moisture, and its roots
16 spread broadly through the top layer of soil. The wheat roots stabilize the soil and prevent it from
17 eroding. As the wheat plants emerge and grow above the ground they also stabilize the soil.
18

19 24. As explained, my agricultural activities on the Property were essentially identical
20 to those performed on the Property by previous owners in (at least) 1966, 1973, 1979, 1981, 1984,
21 and 1985 – that is, discing, shallow chiseling, and harrowing to prepare surface soils to plant
22 grain seed. My agricultural activity was thus by no means a “first time” agricultural use of the
23 Property and was in fact a use to which the Property was previously subject at various points
24 throughout its history. Moreover, the wheat hay crop planted was not incidental to any other
25 activity. I grew the wheat hay for feed for my cattle, intending to harvest it for hay in the summer
26 of 2012, and then turn cattle out onto the stubble. The advantage of wheat hay as a feed crop is
27
28

1 that it does not need to be irrigated, so it can be produced at minimum cost. This was a common
 2 ranching practice for me, as I have frequently grown wheat hay as cattle feed for my own herd, on
 3 property that I would alternately graze and plant with wheat hay or other dry land feed crops. I
 4 also grew the wheat hay crop to demonstrate to a bank that the Property would produce a crop, to
 5 advance my effort to obtain permanent financing for the Property from the bank. Unfortunately,
 6 this plan did not materialize.
 7

8 **THE SALE OF THE PROPERTY AND SUBSEQUENT EVENTS**

9 25. As mentioned, I originally intended to hold the Property long term. However, in
 10 the fall of 2011, I was unable to obtain permanent financing for the Property after a community
 11 bank (Butte Community Bank) failed. I had been their customer for approximately 20 years (as
 12 an agricultural borrower). I explored other financing options, but nothing else was available. At
 13 this point, I realized that I was not going to be able to make the balloon payment to the Property's
 14 prior owner and seller (Ethan Conrad) that would come due in March of 2012, and that I was
 15 going to have to sell the Property before the payment came due. I was also getting frequent – at
 16 times daily – calls and pressure from Mr. Conrad to pay the March 2012 balloon payment on the
 17 Property, threatening to ruin me if payment was not made. At the time, I did not have the
 18 financial resources or capital to keep the Property, though I surely would have kept it had I been
 19 able to obtain permanent financing. Therefore, I determined that my only real viable course of
 20 action was to sell the Property. It was only at this point, that I engaged a broker to list the
 21 Property for sale. During this process, my broker advised me that most buyers would be interested
 22 in the Property for its orchard potential, and that I should have a preliminary delineation of
 23 wetlands on the Property to share with potential buyers.
 24

26 26. In October 2011, after hearing that the Property was potentially for sale, John
 27 Duarte (owner of Duarte Nursery, Inc.) became interested in purchasing the Property. I gave Mr.
 28

1 Duarte permission to enter to the Property for the purposes of conducting an investigation into the
2 soils and other relevant matters prior to a potential sale. My recollection is that Mr. Duarte was
3 satisfied with the inspection and had a positive response to the Property, though I was not
4 personally present for the inspection itself.

5
6 27. By December 2011, the dryland wheat crop was in the soil and the farming process
7 of planting it was completed. Based on the need to sell the Property, though, and based on the
8 fact that dryland wheat farming was not going to be very profitable for potential buyers interested
9 in the Property, I knew that I would likely have to have an environmental company find out
10 whether the Property could be used for anything other than dryland farming before I could sell the
11 Property to a buyer. The potential buyers that were expressing interest in the Property at the time
12 were not interested in running livestock or planting dryland wheat. Therefore, based on what I
13 had heard from the federal agencies that I interfaced with (*i.e.*, the FSA and NRCS) and based on
14 the need to satisfy to the loan on the Property, I knew that I needed to have the land studied as
15 soon as possible.
16

17 28. I first became aware of NorthStar Environmental Services (“NorthStar”) in
18 December 2011, at which time I had a preliminary meeting with them at their office in Chico,
19 California. NorthStar completed its draft delineation in February 2012. I was then told that they
20 would take the draft delineation and present it to the NRCS first, and then subsequently to the
21 USACE for ultimate approval. On March 14, 2012, I received a document from Christy Dawson
22 of NorthStar stating that in order for NorthStar to submit a request for “verification” to the
23 government, I needed to sign with permission for them to do so. I forwarded Ms. Dawson’s
24 email to Mr. Duarte, who then requested that I sign the form and obtain the verification. I then
25 signed the document and authorized NorthStar to submit the draft delineation to the NRCS. It
26 was not until a year later that I found out that Mr. Duarte had requested that the draft delineation
27
28

1 be pulled and no longer submitted for verification by the government.

2 29. In April 2012, I sold the entire property (*i.e.*, all 1,965 acres) to Duarte Nursery,
3 Inc. (owned by John Duarte). I found out subsequently that Mr. Duarte later sold a large portion
4 of the Property (the 1500 acres of land above Coyote Creek) to Goose Pond Ag, Inc. (“Goose
5 Pond”) and Farmland Management Services (“FMS”) in the fall of 2012. I never knew Mr.
6 Duarte or Duarte Nursery, Inc. prior to Mr. Duarte expressing interest in the land, nor had I had
7 any dealings with the entity (*i.e.*, Goose Pond) to which Mr. Duarte sold the portion of the land I
8 had farmed. I also had no knowledge of any of their plans for the Property when I farmed it
9 myself. I began work on my wheat crop while I still expected to be able to arrange long term
10 financing and to keep the Property. My decision to grow the wheat hay crop, and my actions to do
11 so, had no relation at all to subsequent owners’ eventual decisions to purchase the Property or to
12 take any action they eventually took on the Property. Nor did I have any concrete plans to plant
13 orchards on the property. I expected that I would eventually investigate where orchards could be
14 planted on the Property, as the NRCS staff advised me to do. If feasible, I anticipated that I would
15 gradually develop orchards on the parts of the Property where the NRCS indicated it could be
16 done. However, if I had been advised that I could not plant orchards in the portion of the Property
17 where I grew wheat, I would have been content with that.

20 30. In October, November, and December of 2012, Goose Pond carried out a series of
21 heavy operations on the Property over the top of most of my work. I observed, among other
22 equipment used on the Property, a large tractor pulling a large chisel plow or ripper array. An
23 image of the closest depiction that I could find to the actual ripper used, is attached hereto as
24 **Exhibit U**. Goose Pond and its contractors ripped much of the area that I planted, about a foot
25 deep, and followed with a gang of box scrapers to cut and fill the Property (*i.e.*, to loosen and
26 remove soil from the high points and fill the low points with that soil). Goose Pond and its
27
28

1 contractors also built a number of roads on the Property and deep ripped several acres of it near
2 Paskenta Road.

3 31. On January 19, 2013, the Government sent me a cease-and-desist letter, though I
4 did not ultimately receive it until a couple weeks later.

5 32. On June 30, 2016, the Government filed a civil enforcement action against me for
6 allegedly discharging pollutants into U.S. waters without authorization, in violation of the Clean
7 Water Act. The lawsuit has been going on for three and a half years now. I've been waiting that
8 long to be able to tell my story.

9 I declare under penalty of perjury under the laws of the State of California and the United
10 States that the foregoing is true and correct, except as to matters stated on information and belief
11 and as to those matters, I believe them to be true.
12

13 Executed this 20 day of Dec 2019 at Durham, California.
14

15
16
17 
18 ROGER LAPANT
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Equipment Use Chronology

Case 2:16-cv-01498-KJM-DB Document 113-3 Filed 12/20/19 Page 2 of 2

March 2011-March 2012

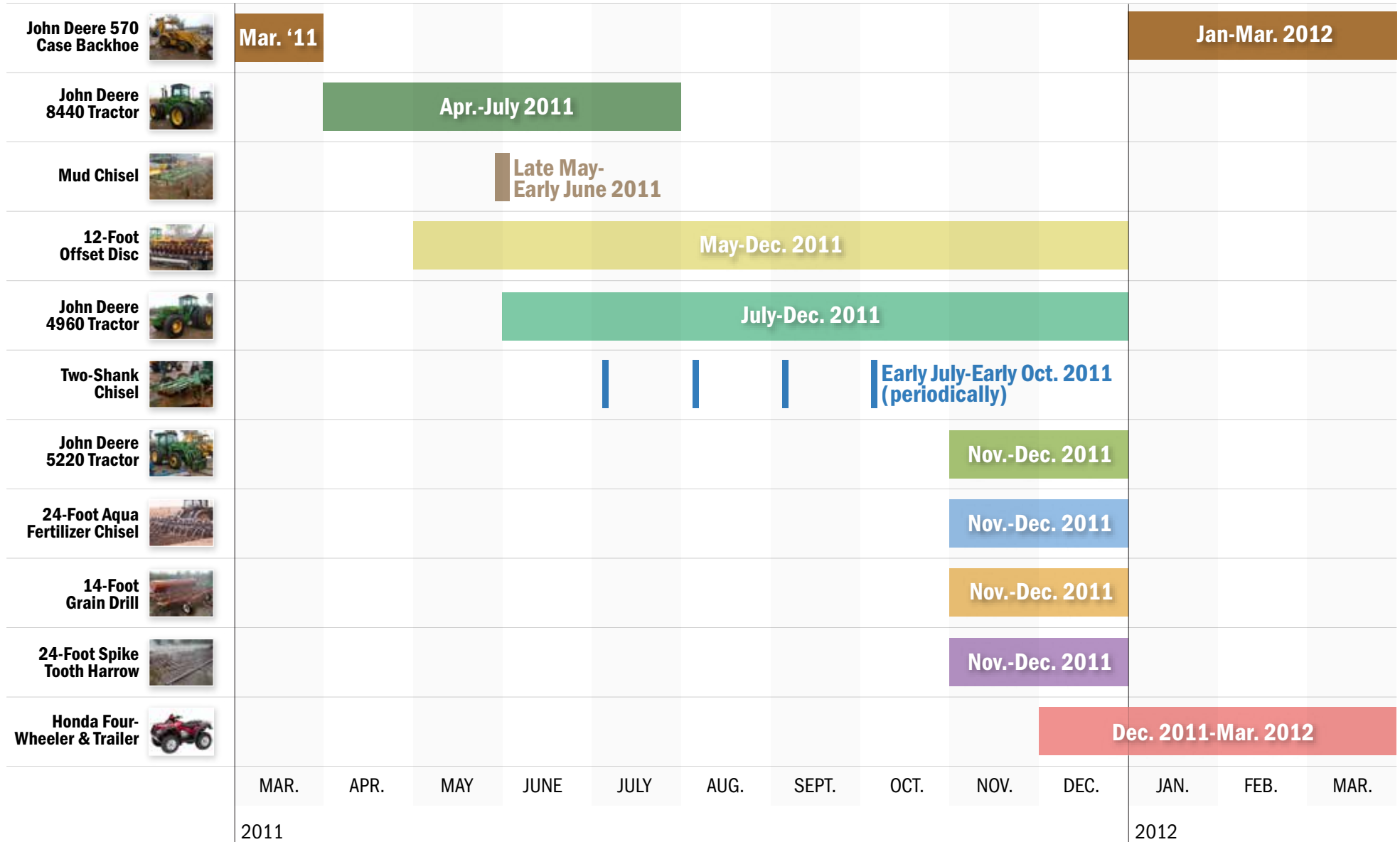
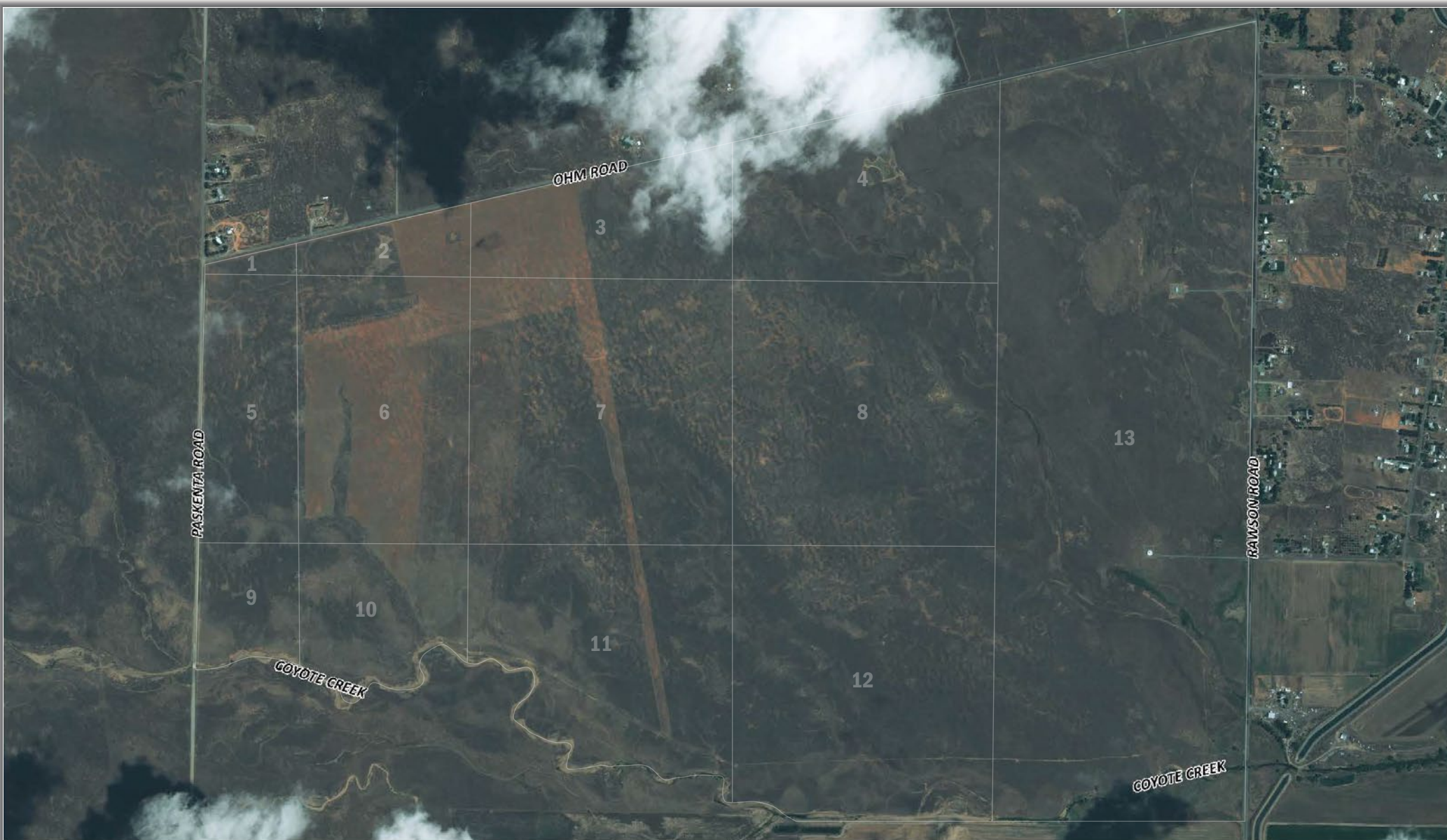


EXHIBIT B

The Property

July 2011

Case 2:16-cv-01498-KJM-DB Document 113-4 Filed 12/20/19 Page 2 of 2



7/17/2011 Plain Imagery

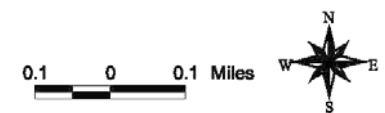


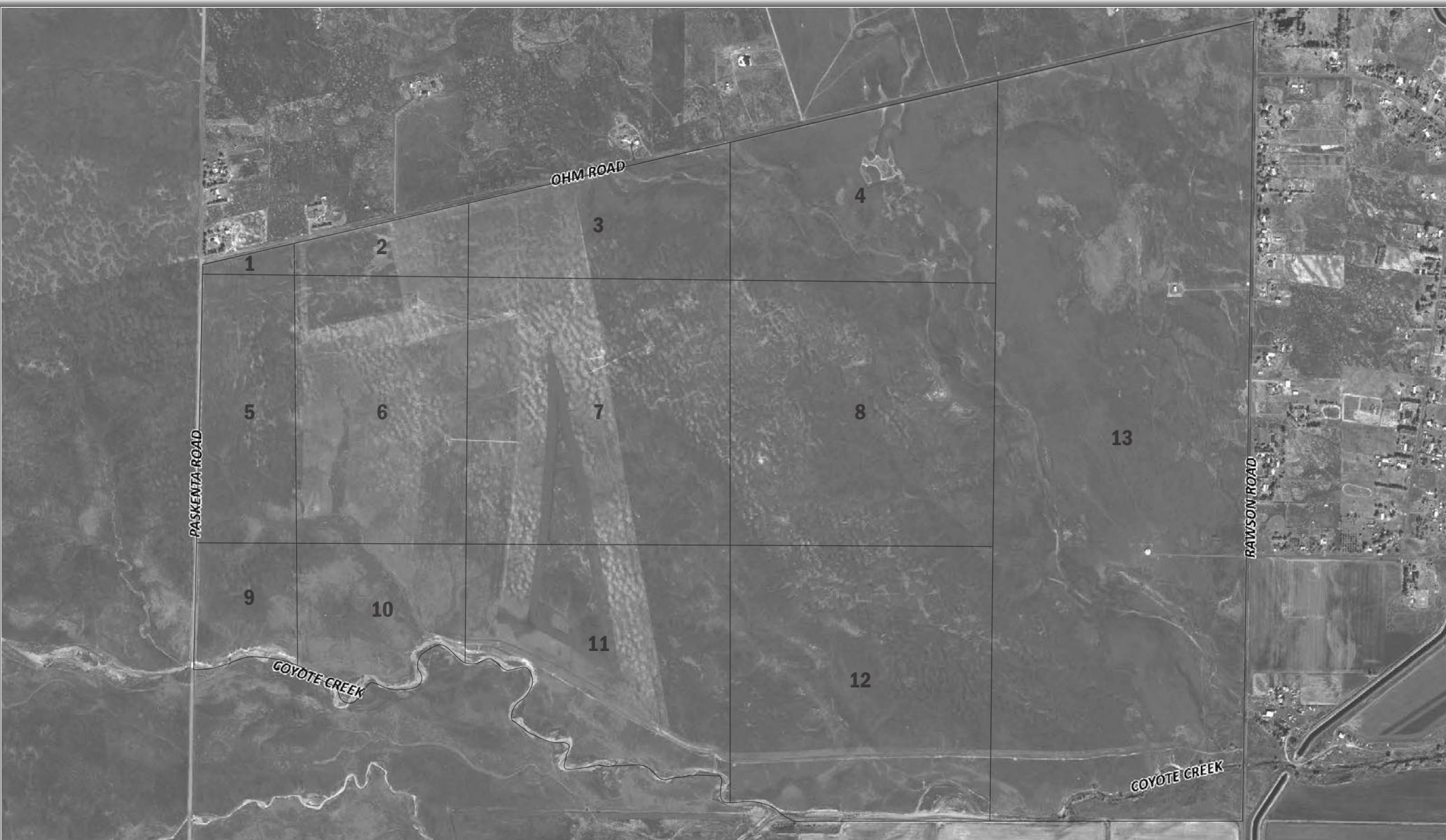
Exhibit 3.8-30

EXHIBIT C

The Property

October 2011

Case 2:16-cv-01498-KJM-DB Document 113-5 Filed 12/20/19 Page 2 of 2



10/8/2011 Plain Imagery

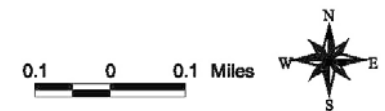


Exhibit 3.8-31

EXHIBIT D

The Property

July 2012

Case 2:16-cv-01498-KJM-DB Document 113-6 Filed 12/20/19 Page 2 of 2



7/3/2012 Plain Imagery



Exhibit 3.8-32

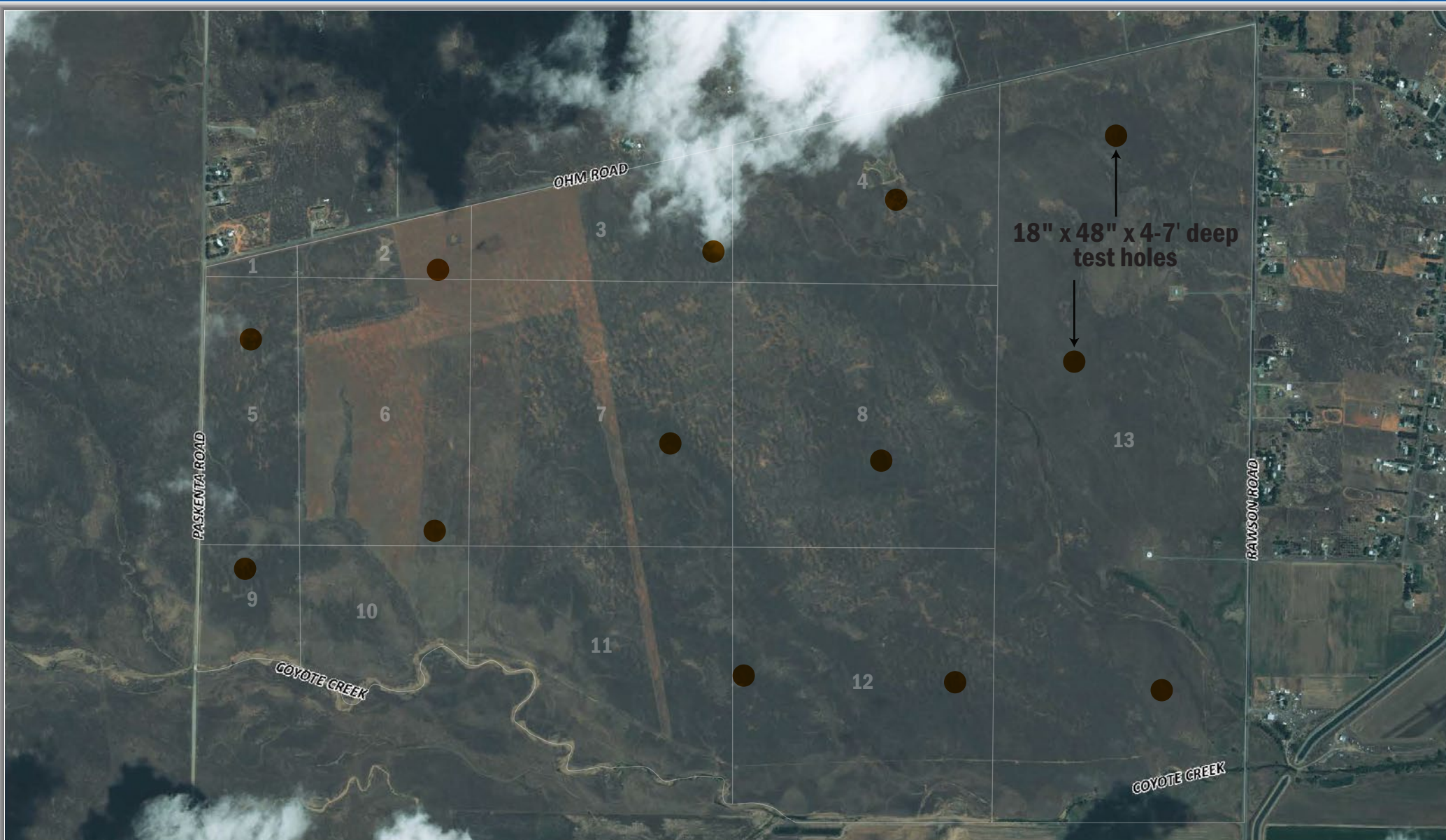
EXHIBIT E



John Deere 570 Case Backhoe

Case 2:16-cv-01498-KJM-DB Document 113-7 Filed 12/20/19 Page 2 of 2

Used March 2011, January-March 2012 (Trash Hauling)



John
Deere
570 Case
Backhoe

7/17/2011 Plain Imagery

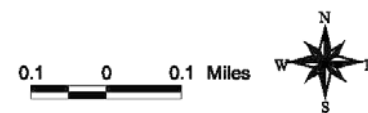


Exhibit 3.8-30

EXHIBIT F



John Deere 8440 Tractor, 1979 – 175HP

Case 2:16-cv-01498-KJM-DB Document 115-8 Filed 12/20/19 Page 2 of 2

Used April - July 2011



John
Deere
8440
Tractor

7/17/2011 Plain Imagery

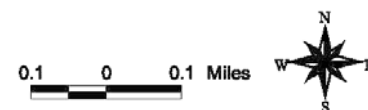


Exhibit 3.8-30

EXHIBIT G



Mud Chisel

Case 2:16-cv-01498-KJM-DB Document 113-9 Filed 12/20/19 Page 2 of 2

Used Late May - Early June 2011 (For 2-3 Days)



7/17/2011 Plain Imagery

Mud
Chisel

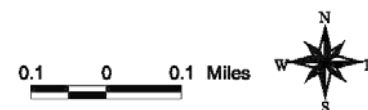


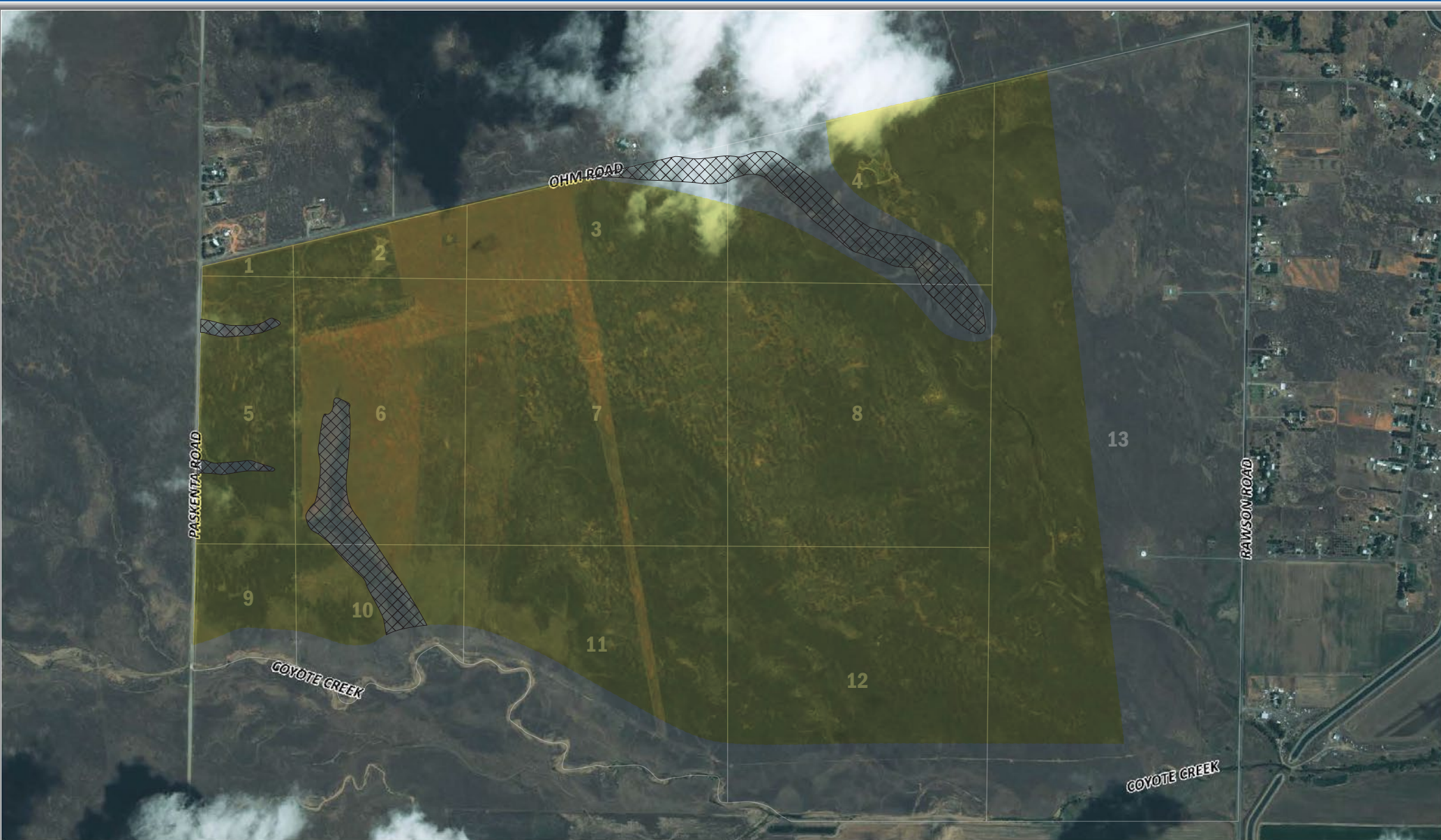
Exhibit 3.8-30

EXHIBIT H



12-Foot Offset Disc Used May - December 2011

Case 2:16-cv-01498-KJM-DB Document 113-10 Filed 12/20/19 Page 2 of 2



7/17/2011 Plain Imagery

12-Foot
Offset
Disc

Closed
Position

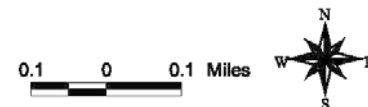


Exhibit 3.8-30

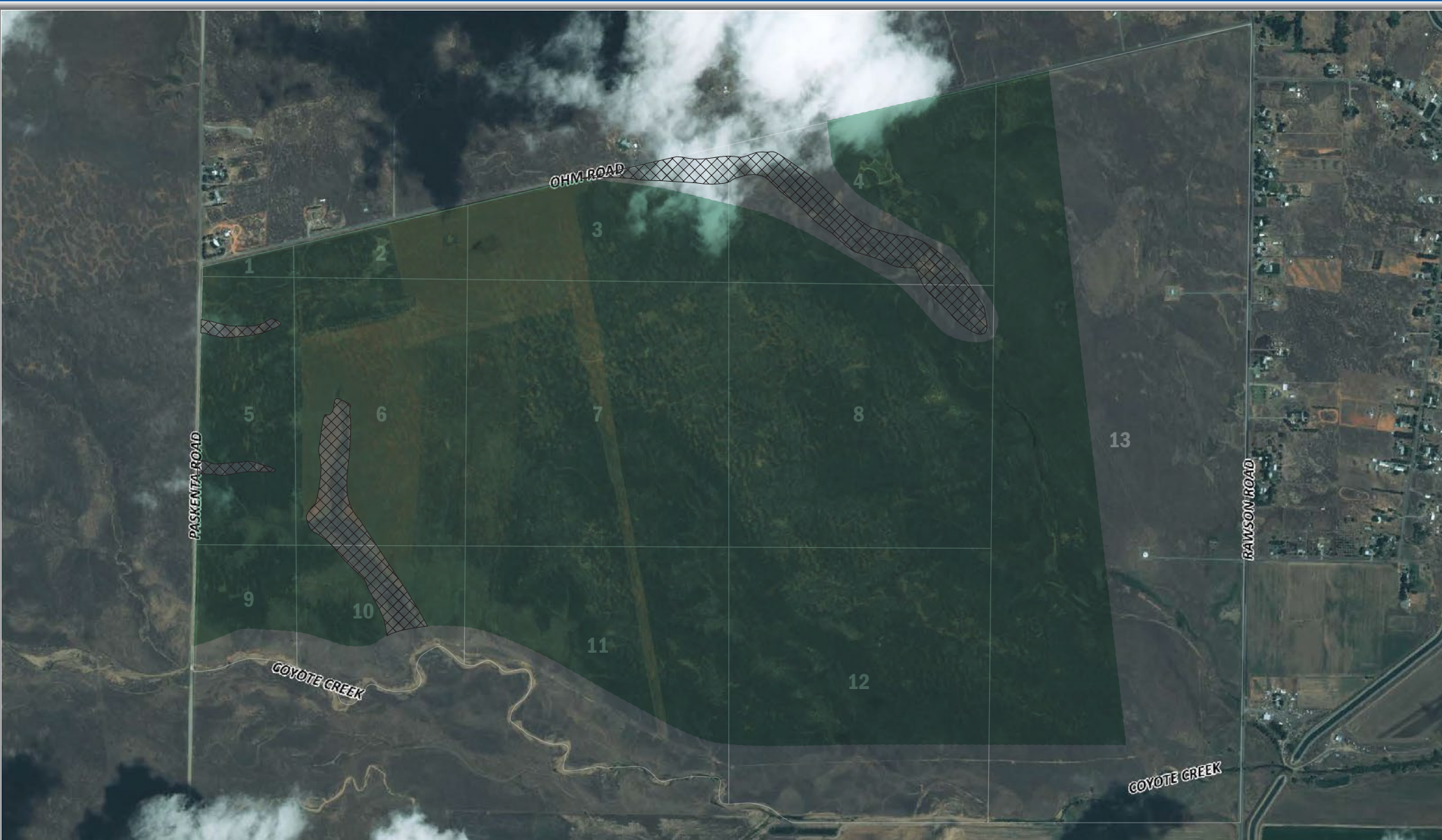
EXHIBIT I



John Deere 4960 Tractor, 1992 – 176HP

Case 2:16-cv-01498-KJM-DB Document 113-11 Filed 12/20/19 Page 2 of 2

Used July - December 2011



John
Deere
4960
Tractor



7/17/2011 Plain Imagery

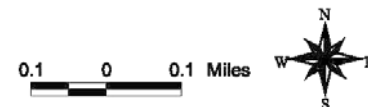


Exhibit 3.8-30

EXHIBIT J



8-Foot Two-Shank Chisel

Case 2:16-cv-01498-KJM-DB Document 113-12 Filed 12/20/19 Page 2 of 2

Used Early July - Early October 2011 (Periodically)



8-Foot
Two Shank
Ripper

7/17/2011 Plain Imagery

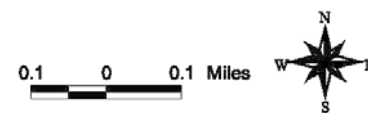


Exhibit 3.8-30

EXHIBIT K



8-Foot Two-Shank Chisel

Case 2:16-cv-01498-KJM-DB Document 113-13 Filed 12/20/19 Page 2 of 2

Used Early July - Early October 2011 (Periodically)



8-Foot
Two Shank
Ripper

10/8/2011 Plain Imagery

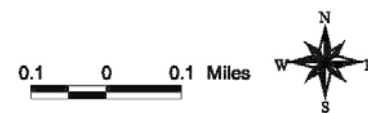


Exhibit 3.8-31

EXHIBIT L



John Deere 5220 Tractor, 2003 – 75HP

Case 2:16-cv-01498-KJM-DB Document 113-14 Filed 12/20/19 Page 2 of 2

Used November-December 2011



7/17/2011 Plain Imagery

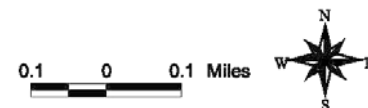


Exhibit 3.8-30

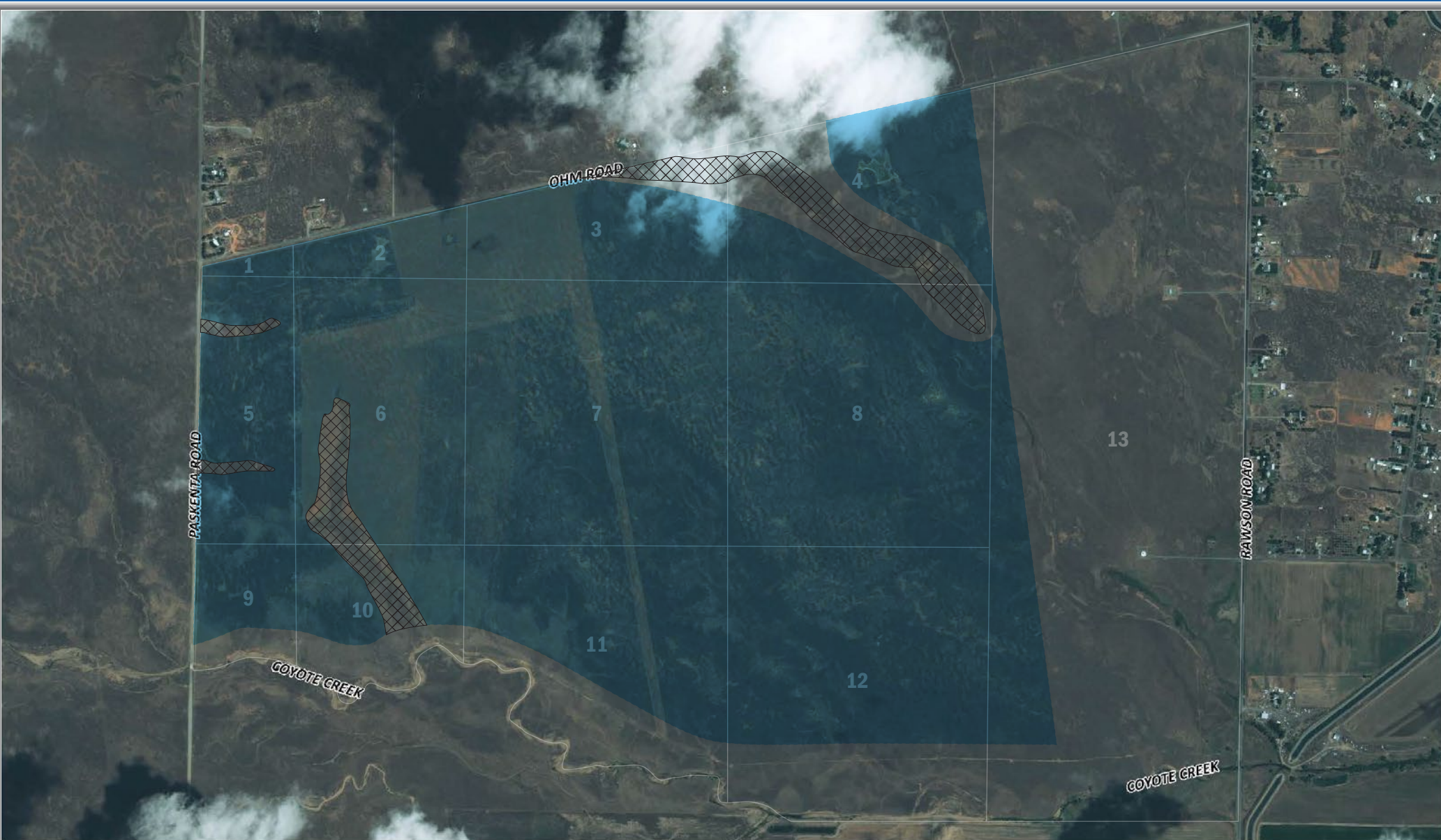
EXHIBIT M



24-Foot Aqua Fertilizer Chisel

Used November-December 2011

Case 2:16-cv-01498-KJM-DB Document 113-15 Filed 12/20/19 Page 2 of 2



24-Foot
Aqua
Fertilizer
Chisel



7/17/2011 Plain Imagery

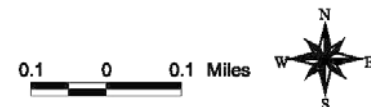


Exhibit 3.8-30

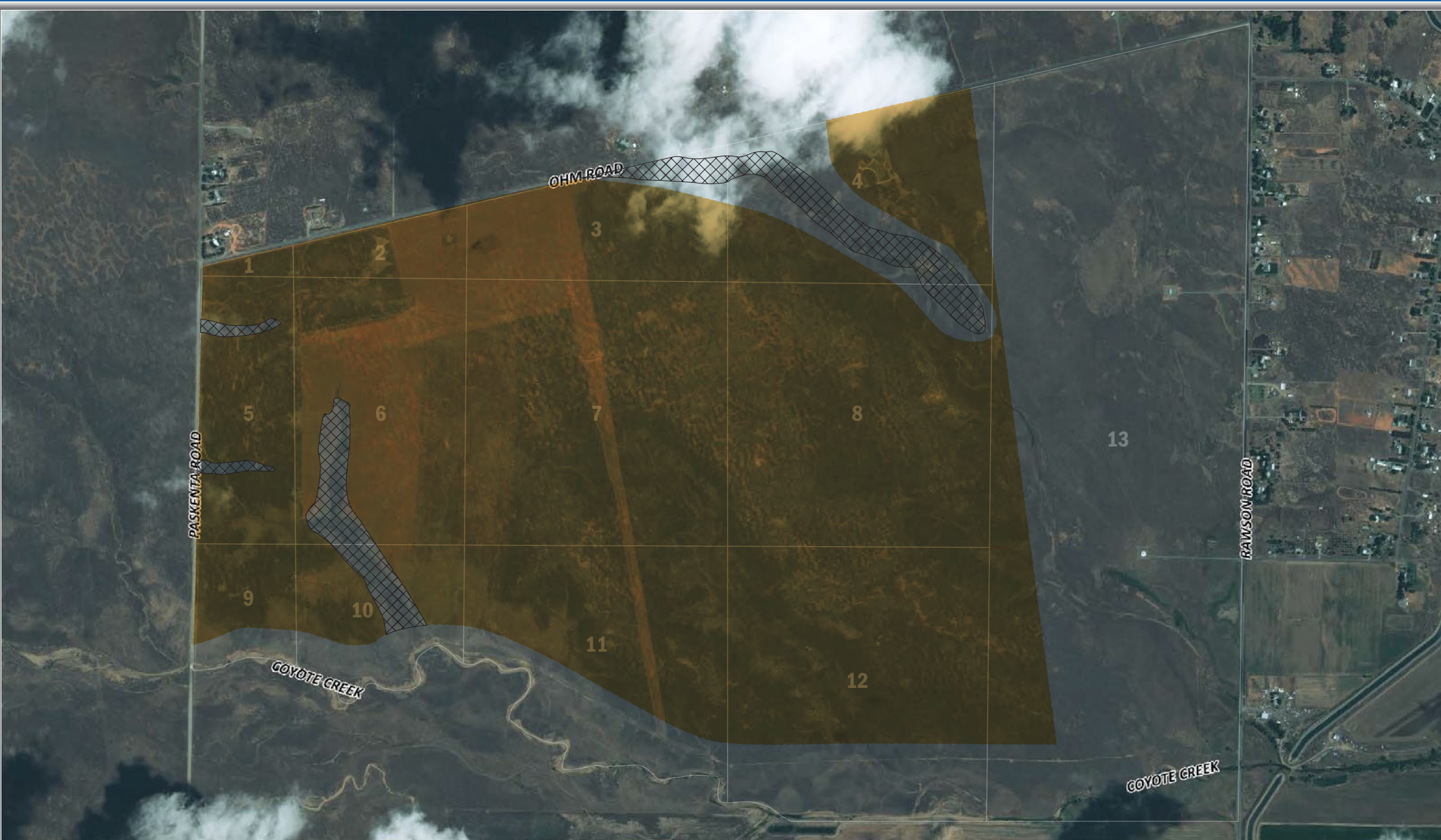
EXHIBIT N



14-Foot International Harvester Grain Drill

Case 2:16-cv-01498-KJM-DB Document 113-16 Filed 12/20/19 Page 2 of 2

Used November-December 2011



14-Foot
Grain
Drill

Closed
Position

7/17/2011 Plain Imagery

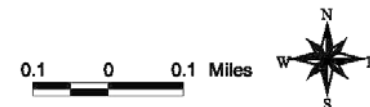


Exhibit 3.8-30

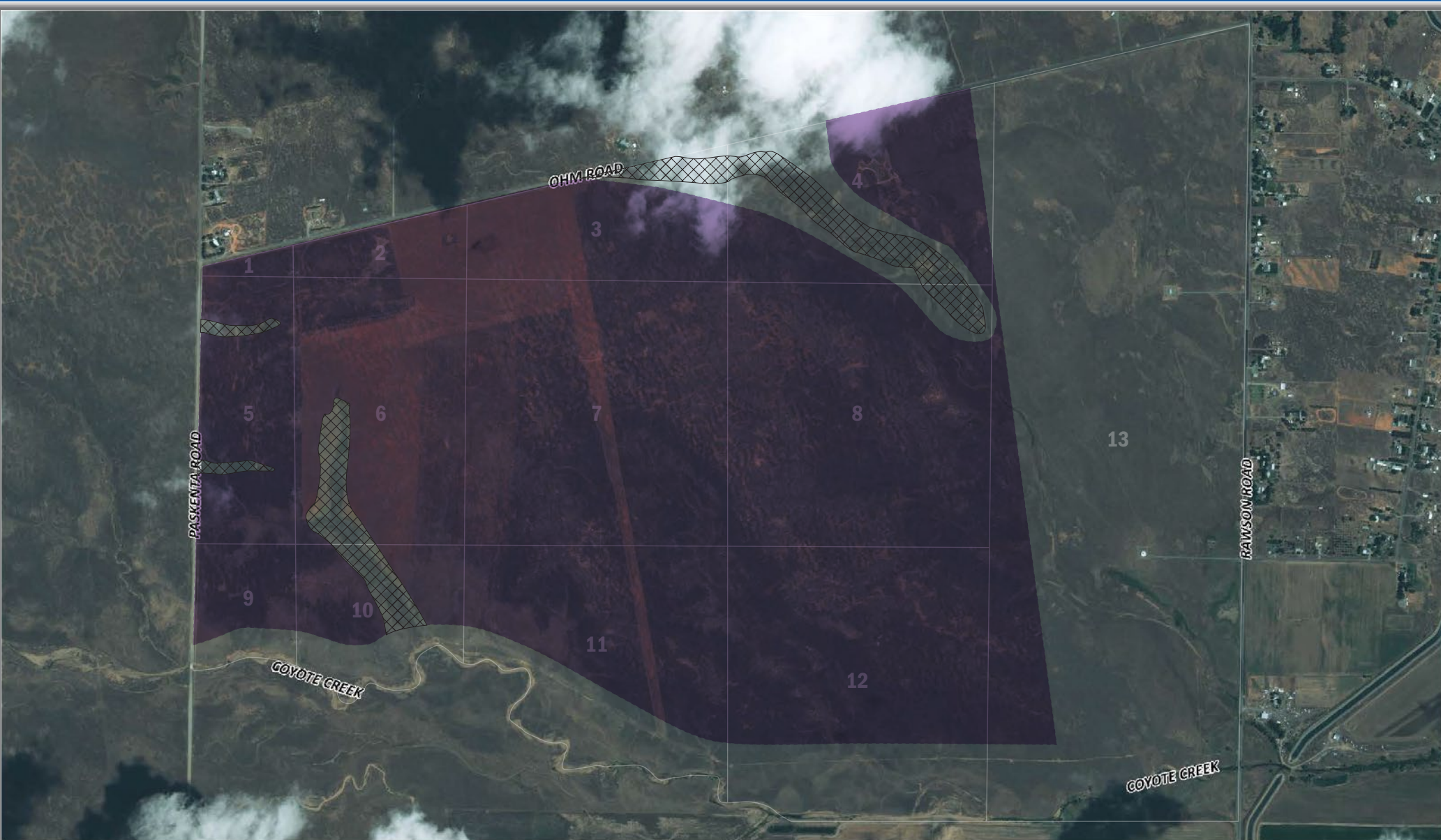
EXHIBIT O



24-Foot Spike Tooth Harrow

Used November-December 2011

Case 2:16-cv-01498-KJM-DB Document 113-17 Filed 12/20/19 Page 2 of 2



24-Foot
Spike
Tooth
Harrow



7/17/2011 Plain Imagery

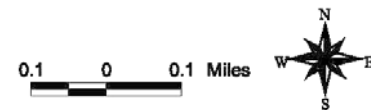


Exhibit 3.8-30

EXHIBIT P



Honda 4-Wheeler and Trailer

Used December 2011 - March 2012

Case 2:16-cv-01498-KJM-DB Document 113-18 Filed 12/20/19 Page 2 of 2



7/17/2011 Plain Imagery

Honda
4-Wheeler

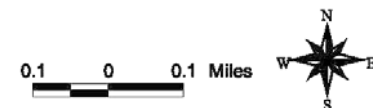


Exhibit 3.8-30

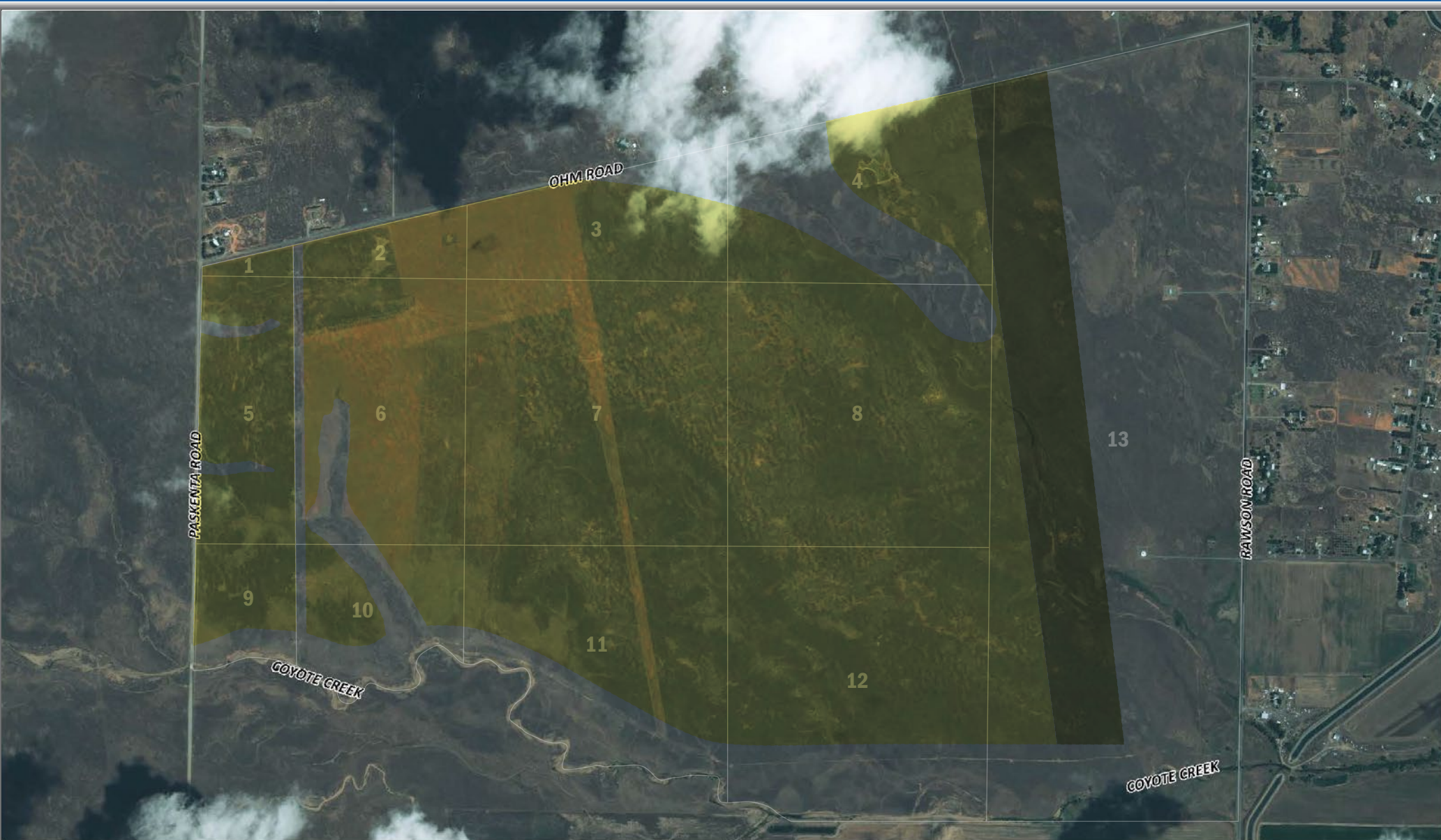
EXHIBIT Q



Overall Planting Area

Case 2:16-cv-01498-KJM-DB Document 113-19 Filed 12/20/19 Page 2 of 2

January 5, 2012



**Planted
2-Pass
(12-Foot
Disc)**

**Not Planted
1-Pass
(12-Foot
Disc)**

7/17/2011 Plain Imagery

0.1 0 0.1 Miles



Exhibit 3.8-30

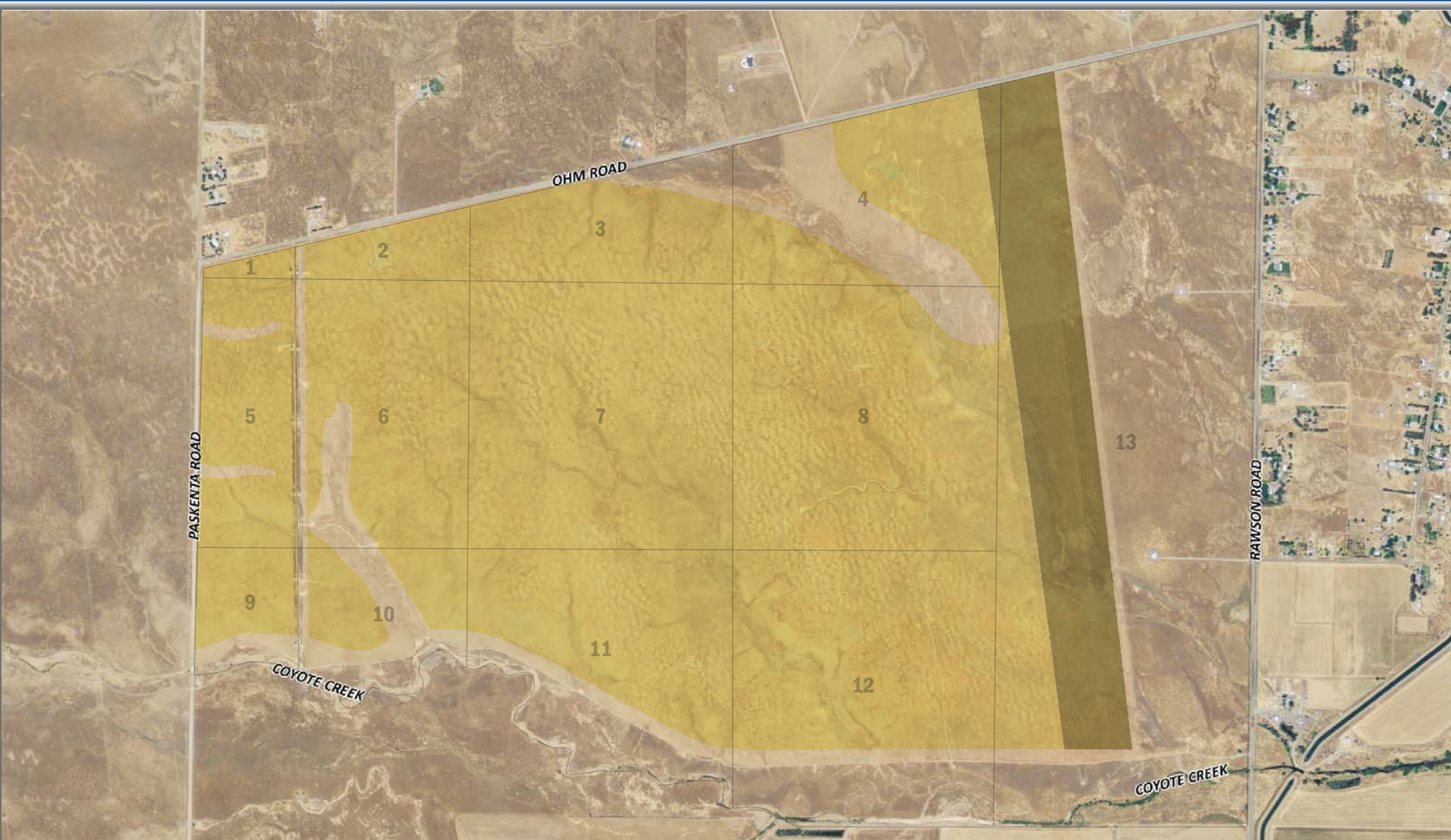
EXHIBIT R



Overall Planting Area

Case 2:16-cv-01498-KJM-DB Document 113-20 Filed 12/20/19 Page 2 of 2

January 5, 2012



**Planted
2-Pass
(12-Foot
Disc)**

**Not Planted
1-Pass
(12-Foot
Disc)**

7/3/2012 Plain Imagery

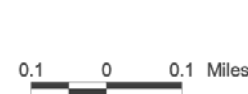


Exhibit 3.8-32

EXHIBIT S



EXHIBIT S-1



EXHIBIT S-2



EXHIBIT T

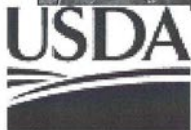
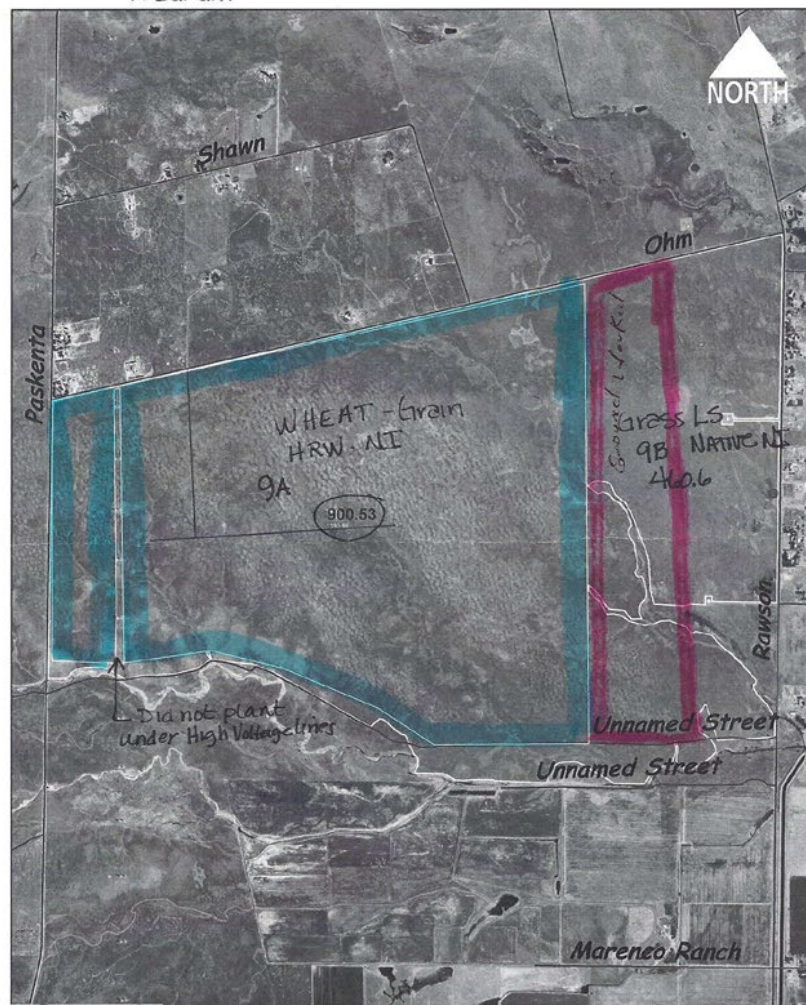


Overall Planting Area – U.S. FSA Report

Case 2:16-cv-01498-KJM-DB Document 113-24 Filed 12/20/19 Page 2 of 2

January 5, 2012

Title:
Farm 3931
R LaPant



Prepared by FSA
Donna McKenna

Date: January 05, 2012

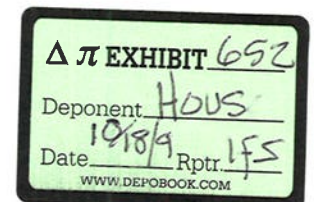
LAPANT 000090

Disclaimer: Wetland identifiers do not represent the size, shape or specific determination of the area. Refer to your original determination (CPA-026 and attached maps) for exact wetland boundaries and determinations, or contact NRCS.

Planted
2-Pass
(12-Foot
Disc)

Not Planted
1-Pass
(12-Foot
Disc)

EXHIBIT U



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19 Telephone: (415) 409-8900
20 Facsimile: (415) 409-8904
21 *Attorneys for Defendant,*
22 *Roger J. LaPant, Jr., dba J&J Farms*

23 UNITED STATES DISTRICT COURT
24 EASTERN DISTRICT OF CALIFORNIA

25 UNITED STATES OF AMERICA ,
26
27 Plaintiff,
28
29 v.
30
31 ROGER J. LAPANT, JR., *et al.*,
32
33 Defendants.

CASE NO. 2:16-CV-01498-KJM-DB

**DECLARATION OF THERESE Y.
CANNATA IN SUPPORT OF
DEFENDANT ROGER J. LAPANT'S
MOTION FOR SUMMARY JUDGMENT**

[Fed. R. Civ. P. 56]

I, THERESE Y. CANNATA, declare as follows:

1. I am an attorney admitted to practice before the courts of the State of California and the U.S. District Court, Eastern District of California. I am a member of the law firm of Cannata, O'Toole, Fickes & Olson, LLP and counsel of record for defendant Roger J. LaPant, Jr. ("Defendant" or "Mr. LaPant") in the above-entitled action. I have personal knowledge of the matters set forth in this declaration, and if called upon to testify, I could and would do so based upon my own personal knowledge, and as to those matters stated upon information and belief, I believe them to be true.

Deposition Excerpts

2. Attached hereto as **Exhibit A** is a true and correct copy of excerpts of the deposition transcript of Gregory House, dated October 18, 2019 (pages 162:11 – 163:17, 153:22 – 154:16, 156:5 – 8).

3. Attached hereto as **Exhibit B** is a true and correct copy of excerpts of the deposition transcript of Dr. Wade Nutter, dated May 24, 2018 (pages 88:17-23, 90:8-14).

4. Attached hereto as **Exhibit C** is a true and correct copy of excerpts of the deposition transcript of Mark Rains, dated October 11, 2019 (pages 83:21, 80:17-87:3).

5. Attached hereto as **Exhibit D** is a true and correct copy of excerpts of the deposition transcript of Peter Stokely, dated October 10, 2019 (pages 85:23-86:11, 87:12 – 89:8).

6. Attached hereto as **Exhibit E** is a true and correct copy of excerpts of the deposition transcript of Paul Wisniewski, dated October 22, 2019 (pages 275:14-313:1).

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct, except as to matters stated on information and belief and as to those matters, I believe them to be true.

Executed this 20th day of December 2019 at San Francisco, California.



THERESE Y. CANNATA

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ATTORNEYS AT LAW
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TEL: 415.409.8900 – FAX: 415.409.8904

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs-)
)
 ROGER J. LAPANT, JR., et al,)
)
 Defendants.)
 _____)

**CERTIFIED
TRANSCRIPT**

No. 2:16-CV-01498-
KJM-DB

Deposition of

GREGORY HOUSE

Friday, October 18, 2019

Reported By: LORRAINE F. SPENCER, CSR #10006

1 they do it, is that the discing of the soil in this
2 case actually creates a barrier to evaporation. So
3 it's not a complete barrier, but it's a partial barrier
4 to evaporation. And that's why in a fallow rotation
5 for wheat farmers will do that.

6 BY MR. FRANCOIS:

7 Q. How does it -- what is the mechanism of the
8 barrier evaporation?

9 A. It's basically just physical. Water
10 evaporates -- there's capillary action in soils. Water
11 will go up soil channels. It will go up capillary
12 channels to the surface and then evaporate out. If you
13 disc it, you have basically destroyed those capillary
14 channels for the distance that you have disced the
15 ground. So, like, if you have disced it four inches,
16 then you'll have destroyed those capillaries at four
17 inches below the soil, and then it's much more
18 difficult for -- you might say physically just doesn't
19 happen as much. There's not as much evaporation. It's
20 just a practice that farmers have to conserve soil
21 moisture.

22 Q. Before Mr. LaPant's work on the property in
23 2011, your opinion is that it had not been tilled or
24 cultivated since sometime in the 1980s; correct?

25 A. Correct.

1 Q. Okay. Had it been grazed during that
2 interval?

3 A. I believe so. At least it was leased for
4 cattle.

5 Q. Okay. Do you have any information on how
6 regularly it was grazed?

7 A. No.

8 Q. Okay. Would you expect using the same
9 methodology -- strike that.

10 Would you describe it, prior to Mr. LaPant's
11 work on it, as rangeland?

12 A. Yes.

13 Q. Okay. We spoke earlier about beef cattle
14 producers at times growing their own feed. Would you
15 say that's a normal ranging practice?

16 A. Okay. I'll go along with that.

17 Q. Okay. Would you -- in your subsequent report,
18 responding to Paul Squires, you argue -- I'm not trying
19 to characterize it, but you argue that this site is
20 not, when Mr. LaPant took possession of it, an
21 established or ongoing farm.

22 A. Yes.

23 Q. Okay. Would you agree that it was at least an
24 established or ongoing ranch?

25 MR. DO: Objection. Form. Vague.

1 Q. Okay. Is it fair to say you have not been
2 asked to form an opinion by the government in this case
3 whether it's an ongoing ranch?

4 A. I have not.

5 Q. Okay. Would you agree that farming is a use
6 to which the property was previously put at least
7 sometime in the past?

8 A. Yes.

9 Q. Let's jump forward to page 34. This is in
10 Section 7 of your report, Economic Analysis.

11 A. Yes.

12 Q. So at the top of page 34 is Table 7.2. And it
13 shows yield and tons per acre of wheat in Tehama
14 County, price per ton, gross income per acre. And I
15 think that we actually had some questions about this
16 previously; right?

17 A. Yes.

18 Q. Okay. The table shows from 2009 to 2013
19 generally an upward trend in the price per ton;
20 correct?

21 A. Yes.

22 Q. Do you have any understanding of why that
23 upward trend existed then?

24 A. I don't have any really specific -- anything
25 specifically to say about that other than it looks like

1 Q. Section 8.1.2. Then you got subparagraph 1
2 and 2 there. 1, "The soil surface and soil profile
3 were disturbed to approximately 18 inches or less." Is
4 it correct that you don't know how much less?

5 MR. DO: Objection. Form.

6 THE WITNESS: How much less. I think I would
7 say 12 inches.

8 BY MR. FRANCOIS:

9 Q. That's based on your soil pit observations?

10 A. Yes.

11 Q. And then the next subparagraph, 2, "During the
12 discing and harrowing, and to a lesser extent the
13 chiseling, the loosened surface soil was inevitably
14 moved into the shallow pit depressions." I kind of
15 want to ask you about this word "inevitably." The
16 nature of both discing and harrowing is always going to
17 move loosened soil surface horizontally; correct?

18 A. Yes.

19 Q. Okay. So that's baked into what you are
20 doing.

21 A. Yes.

22 Q. Okay.

23 A. It's the physical process.

24 Q. Yeah. And, I mean, is that even -- is it fair
25 to say that's the point of discing and harrowing?

1 A. One of them.

2 Q. Okay. So if you -- well, this seems like an
3 absurd question. Is there any kind of tillage that
4 doesn't move the soil surface horizontally at least
5 some amount?

6 MR. DO: Objection to the extent it's an
7 absurd question, but objection to form.

8 THE WITNESS: Tillage basically means moving
9 soil and moving dirt.

10 BY MR. FRANCOIS:

11 Q. And tillage is also -- well, I mean, isn't it
12 correct that the reason you are doing that is always
13 tied up with the hydrology of the soil?

14 MR. DO: Objection. Overbroad.

15 THE WITNESS: That's one of the things you do
16 is to make the water -- make more pores, space for
17 water, but also to oxygenate the soil. And to some
18 extent and many farmers depend on this for the
19 decomposition of plant material that's on the surface
20 as a -- for a number of reasons. One is to get rid of
21 it. That's what you see in California so much in
22 irrigated agricultural is they want to get rid of what
23 we call "trash." It's really just crop residue. But
24 you want to get rid of it so that you can pull your
25 implements through there and have more precision with

CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

I, LORRAINE F. SPENCER, a Certified Shorthand Reporter, licensed by the State of California, being empowered to administer oaths and affirmations pursuant to Section 2093 (b) of the Code of Civil Procedure, do hereby certify:

That the witness named in the foregoing deposition was present at the time and place specified, and was by me sworn to testify as to the truth, and whole truth, and nothing but the truth; that the said proceeding was taken before me, in shorthand writing, and was thereafter transcribed, under my direction, by computer-assisted transcription;

That the foregoing transcript constitutes a full, true and correct report of the proceedings which then and there took place; that I am a disinterested person to said action.

IN WITNESS WHEREOF, I have hereunto subscribed my signature on this 28th day of October, 2019.

Lorraine F. Spencer

LORRAINE F. SPENCER, CSR
Certified Shorthand Reporter
California License #10006

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

---oOo---

UNITED STATE OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No.
)	2:16-cv-01498-KJM-
ROGER J. LAPANT, JR., et)	DB
al.,)	
)	
Defendant.)	
_____)	

**CERTIFIED
TRANSCRIPT**

VIDEOTAPED DEPOSITION OF
WADE L. NUTTER, Ph.D., PH
THURSDAY, MAY 24, 2018

NOTICING ATTORNEY: ROBERT P. SORAN

REPORTED BY: DINA M. MARCUS, CSR NO. 8579

1 The next sentence, the next paragraph,
2 excuse me, states:

3 "The agencies will assert jurisdiction over
4 non-navigable tributaries of TNWs where the
5 tributaries are, 'relatively permanent waters,'
6 (RPWs), i.e., tributaries that typically flow
7 year-round or have continuous flow at least
8 seasonally, e.g., typically three months." Period,
9 closed quote.

10 You indicated that in Appendix A, Part 4 of
11 the Team Report that the 12 alleged tributaries were
12 claimed to be RPWs, correct?

13 A. Correct.

14 Q. And is there data that supports that each of
15 those tributaries has continuous flow for typically
16 three months?

17 A. That's for example, typically three months.
18 The analysis that was done by -- and it doesn't say
19 it has to be three months. It says for example,
20 three months. This is a Mediterranean climate where
21 you have rain for a much shorter period of time and
22 it's also low rainfall; typically, 29 inches, I think
23 is the average rainfall, normal rainfall.

24 Q. And that's low rainfall for where?

25 A. For -- that's semi-arid region.

1 specifically set forth in a form that is part of the
2 opinion to which they've asserted RPW status. It's
3 provided for in their opinions, so he can testify
4 about that.

5 MR. BRODERICK: That doesn't have anything
6 to do with public comment or any such thing that he's
7 talking about.

8 THE WITNESS: I did not read the public
9 comment. But I would say that that would have
10 continuous flow at least seasonally, and we define
11 the seasonal flow, and Mark Rains' analysis have two
12 different ways of looking at it show that there was
13 about 84 days of continuous flow that could be
14 expected.

15 Q. BY MR. SORAN: So Mr. Rains' 85 -- you said
16 84 or 85?

17 A. 84 days.

18 Q. Mr. Rains characterizes that as 84 days of
19 continuous flow?

20 A. Yes. By two methods, by two approaches.

21 Q. What were most approaches?

22 A. The one was, I mentioned earlier, using the
23 USGS gauging stations for a series of basins around
24 the area, the upper Sacramento Valley. And then the
25 other was using actual data from the site and

CERTIFICATE OF REPORTER

I certify that the witness in the foregoing deposition, WADE L. NUTTER, Ph.D., PH, was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of June 2018.



DINA M. MARCUS
Certified Shorthand Reporter
Certificate No. 8579

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

**CERTIFIED
TRANSCRIPT**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO.

ROGER J. LAPANT, JR., et al.,

2:16-CV-01498-KJM-DB

Defendants.

_____/

The deposition of MARK RAINS was held on
Friday, October 11, 2019, commencing at 9:44 a.m., at
the offices of CRC Soloman Reporting, 1775 Eye Street,
N.W., 1150 Washington, D.C, before Steven Poulakos,
Notary Public.

REPORTED BY: Steven Poulakos, RPR

1 A That's correct, and it's what I was
2 referring to earlier. I spoke about, you know, most
3 rivers get bigger as we go downstream and a variant
4 bigger would be most rivers at least in seasonal
5 flowing landscapes, most rivers will flow for longer
6 duration the larger the watershed. Therefore, the more
7 water they need to route from sort of the remote
8 portions of the watershed to the mouth.

9 Q So my question then is: Are there any
10 analyses of what the duration of flow is from the
11 Tehama North site in this section of the report?

12 A This is -- the data in figure 5-14 are from
13 the gauges listed in table 5-5 immediately above. So
14 these are sort of watersheds in the northwestern part
15 of the Sacramento Valley. The data in figure 5-15 are
16 from area 13 in the Coyote Creek conservation area.

17 Q So looking at the top of page 99, the
18 partial paragraph that begins that page, concludes with
19 a sentence therefore these results suggest that intact
20 vernal pools and swales on the Coyote Creek
21 conservation area, i.e., area 13, should produce
22 approximately 85 days per year of flow in a normal
23 year.

24 First of all, I want to make sure I
25 understand the tilt of this before the 85 there. What

1 does that signify?

2 A It signifies that we shouldn't assume that
3 the number is 85 for two reasons. Number one, you
4 know, this analysis ultimately -- you know, we sort of
5 calibrate an expectation using the USGS data which is
6 for a region and we validate using data from a very
7 specific vernal pool complex on area 13. So we don't
8 want to make a statement that it's 85 days, you know,
9 no matter where you go and which vernal pool you query,
10 right?

11 And furthermore there's uncertainty in any
12 analysis and we want to acknowledge that there's a
13 level of uncertainty and it could be plus or minus a
14 little bit. So that till there represents both sort of
15 both of those elements which adds some uncertainty to
16 how much you would expect to flow out of one vernal
17 pool versus another.

18 Q And so -- but that 85 days qualified the
19 way you've described is applicable to -- is what you
20 determined with in this paragraph the duration of flow
21 on the Coyote Creek conservation area would be?

22 A Well, you know, look back at table 5-5.
23 Stone Corral Creek near Sites, California is about a
24 hundred miles south. Cottonwood Creek near Cottonwood,
25 California is about 15 miles north. That analysis

1 that's the data of which are expressed in table 5-5 and
2 the analysis of which is expressed in figure 5-14
3 represents regional conditions not unique to the Coyote
4 Creek conservation area.

5 Where Coyote Creek conservation area
6 becomes relevant as an independent location is in
7 figure 5-15. Those data were collected over the course
8 of five years of continuous measurements in area 13 on
9 the Coyote Creek conservation area.

10 Q So I'm still trying to make sure I
11 understand what this says in the first paragraph on
12 page 99. Let me just read the whole thing then. "In
13 these landscapes, the smallest possible watersheds are
14 commonly the small watersheds that contribute to a
15 single depression swale like the headwater vernal pools
16 and swales in the Coyote Creek conservation area.
17 Therefore, these results suggest that intact vernal
18 pools and swales in the Coyote Creek conservation area,
19 i.e., area 13, should produce 85 days per year of flow
20 in a normal year," with 85 qualified the way you
21 describe it.

22 So is this a conclusion that the Coyote
23 Creek conservation area -- let me step back. Is this
24 analysis based on the relative size of the Coyote Creek
25 conservation area to the watersheds that are listed in

1 table 5-5?

2 A So you could read figure 5-14 this way.
3 The horizontal axis or the X axis is watershed area.
4 The vertical axis and the Y axis is the mean annual
5 days of flow. If I extend backwards along this
6 relationship, the line is the relationship. The points
7 are the actual data. If I extend that line backwards
8 to zero or near zero, I hit about 85 days.

9 So that implies that in every small
10 watershed that I could find out there and define out
11 there, vernal pool after vernal pool after vernal pool
12 after vernal pool, each one of those would have a very
13 small watershed and each -- inside each one of those
14 watersheds, about 24.8 inches a year of rain falls,
15 slightly more than 2 feet that. That water has got to
16 do something.

17 This would imply that that flow would be
18 one of those things and as it took the time to evacuate
19 all of that rainfall from each one of those little
20 watersheds, I might expect flow on the order of 85 days
21 plus or minus some margin of error.

22 Q Explain what the analysis in the next
23 paragraph on 99 is.

24 A The paragraph beginning total annual
25 precipitation?

1 Q Yes.

2 A If we go back to table 5-5 on page 98, you
3 see that we begin with one, two, three, four, five,
4 six, seven gauges. These are stream gauges maintained
5 by the U.S. geological survey for periods of time in
6 the past. We didn't truncate the data. Those are all
7 the data available.

8 USGS often measures for a period of time
9 and then decommissions gauges. They might reactivate
10 gauges at a later date. They might hand gauges off to
11 a partner, but these are all the data that were
12 available for these gauges, and you could see the years
13 of record. One had 27 years of record, another 15, so
14 on and so forth.

15 So we typically define norm like the normal
16 rainfall condition, for example, on 30-year averages.
17 So we say, well, we've got some long-term records here.
18 They probably represent a norm, right? And a norm
19 would be a hundred percent on average, right? Some
20 years it might rain less and we would expect the number
21 of days of flow in those years to be less. Some years
22 it rains more and we would expect the number of days of
23 runoff to be more in those years. But if we looked at
24 a long period of record, we would expect these things
25 to sort or arrange themselves around a central

1 tendency.

2 So that's what that first figure, figure
3 5-14, sort of says. It says, look, if we take a
4 long-term average, you know, these things will range
5 themselves on a straight line. And if I extend that
6 straight line back to the origin to a watershed area of
7 zero, you're about 85 days.

8 So we didn't have the benefit of going out
9 to area 13 and getting a hundred percent of rainfall
10 every single year. Even if we did, the distribution of
11 rainfall might be different. It rains a lot in one
12 month and not in another. Maybe it spreads itself out
13 over the year. So there's all kinds of inherent
14 variability.

15 In this, what we said was, well, look,
16 we've got five years of data with different percentages
17 of norm rainfall at 66 percent, a 59, a 74, a 98, and
18 114 fortunately spanning sort of a wide range from, you
19 know, there wasn't a lot of rain some years and there
20 was more than average in some other years.

21 And so we could ask questions about, well,
22 I know how many days it flowed. We measured it each
23 one of those years. So if you turn to page 100, figure
24 5-15, that's the relationship expressed there. Now
25 that X axis or that horizontal axis is percent annual

1 precipitation and that Y axis or vertical axis is days
2 of flow.

3 So if I go to 100 percent on the X axis and
4 I look vertically up until I hit the green line, that's
5 the expected value of flow and I track that to the left
6 over two days of flow, I hit about 85. So we've got a
7 result here in figure 5-14 which says in a small
8 watershed, I bet you get 85 days of flow. And then
9 over here in figure 5-15, we've got totally independent
10 data from a small watershed that says, hey, your
11 expectation ought to be about 85 days.

12 So we converged on the same number from two
13 totally different directions, two totally different
14 data sets, and that corroborates our findings. It
15 says, yeah, we kind of validated that. That sounds
16 like a pretty good finding.

17 Q And the finding is that the Coyote Creek
18 conservation area produces probably about 85 days worth
19 of flow?

20 A Yeah, or any small -- and let's go back to
21 that sentence because words matter, right? Therefore,
22 these results suggest that intact vernal pools and
23 swales on the Coyote Creek conservation area, i.e.,
24 area 13, should produce approximately 85 days per year
25 of flow in a normal year, but that's like those, right?

1 So anyplace else if I found another vernal pool complex
2 that was intact, I might say the -- have the same
3 expectation.

4 Q Okay. On page 99, you refer to just above
5 the -- there's a caption for table V6 and then just
6 above that, there's a paragraph. It refers to field
7 data collected in a grazed portion of the Coyote Creek
8 conservation area.

9 Is the grazing use of that area significant
10 to the analysis or the findings here at all?

11 A So the -- what we call area 13 is an area
12 of largely intact vernal pools that have been
13 historically grazed way back to the elk that used to
14 cruise around the Central Valley before the Europeans
15 were there and then after the Spanish were granted land
16 grants and they grazed cattle there on up til today.

17 So that's landscape that has sort of
18 evolved substantively in the presence of some level of
19 grazing, and at area 13 anyway is continued on until
20 today.

21 Q Is it significant to how much -- how long a
22 duration of flow you would expect from a site like
23 that?

24 A Certainly different land uses could produce
25 different durations of flow.

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Steven Poulakos, registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 11th day of October 2019.

My commission expires:

May 31, 2021

NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

**CERTIFIED
TRANSCRIPT**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO.

ROGER J. LAPANT, JR., et al.,

2:16-CV-01498-KJM-DB

Defendants.

_____/

The deposition of PETER M. STOKELY was held on Thursday, October 10, 2019, commencing at 10:00 a.m., at the offices of CRC Soloman Reporting, 1775 Eye Street, N.W., 1150 Washington, D.C., before Steven Poulakos, Notary Public.

REPORTED BY: Steven Poulakos, RPR

1 you've mapped would be wetland pools and swales, but
2 the location of them within that mapped feature would
3 be more uncertain?

4 A Well, I did not attempt to map the
5 locations. Within that feature we were just
6 discussing, that large polygon, I did not attempt to
7 map the individuals pools and swales. I just mapped
8 the complex of them, the outer bounds.

9 Q Am I correct in saying based on your
10 methodology that where they are within the feature is
11 less certain than how much of the feature is actually
12 wetland depressions and swales?

13 A Well, I mean, it's hard for me to say it's
14 less certain because if we looked at the aerial
15 photography, we could see them most certainly, but I
16 just didn't make that effort to map them.

17 Q Is that true also of the areas within the
18 Tehama North site that are mapped in figure 2 as vernal
19 pool complexes?

20 A So in the Tehama North site, I did a more
21 detailed, you know, identification of the individual
22 pools and swales.

23 Q So on page 8, the next heading is stream
24 connections?

25 A Yes.

1 Q And you refer to a dense network of
2 seasonally flowing streams that all lead to Coyote
3 Creek. What does seasonally flowing mean as you use
4 the term here?

5 A Meaning that they would flow during the wet
6 season, when the water is present during the wet
7 season.

8 Q And by wet season, you mean that January,
9 February, March timeframe that we mentioned earlier?

10 A Yes, that's my understanding is the general
11 wet season in California.

12 Q And then moving on to the heading Oak
13 Creek -- Oat Creek Watershed comparison. You mention
14 that the Oat Creek Watershed is larger than Coyote
15 Creek, but has fewer wetland depressions and wetland
16 swale complexes and you say I estimate there are at
17 least 1,251 acres of wetland depression and wetland
18 swale complexes.

19 Did you use the same methodology to arrive
20 at the estimate of 1,251 acres of wetland depression
21 and wetland swale complexes, make sure of that, at
22 least 1,251 acres of complexes in the Oat Creek
23 Watershed as you did for the Coyote Creek Watershed?

24 A Yes.

25 Q Then using the same percentages as used in

1 Coyote Creek, so you applied the same 23 percent within
2 the complex -- 23 percent of the complex would actually
3 be depressions and swales?

4 A Yes.

5 Q Remind me. The percentage is derived from
6 the -- I want to say it's a frequency study that's in
7 the U.S. expert team report. Am I correct about that?

8 A Yes.

9 Q Is that -- do you think that -- so that
10 frequency study is done on a site in the Coyote Creek
11 Watershed, correct?

12 A I'm trying to remember the scope of that
13 study. It was -- I believe it was a Coyote Creek
14 Watershed. It may have been other areas as well, but I
15 don't recall now.

16 Q But you do think that it's generally
17 applicable enough to apply the same percentage to the
18 Oat Creek Watershed?

19 A Yes.

20 Q What was the reason for doing the
21 comparison study of the Oat Creek Watershed?

22 A I've been wondering about that as we've
23 been talking. I don't actually recall why I did Oat
24 Creek as well. I would say in general probably to
25 provide additional information. It was something I

1 could do. It was something I could measure. It was
2 data I could provide.

3 Q Did you consider looking at any other
4 adjacent watersheds?

5 A I may have considered or we may have
6 considered it, but we did not.

7 Q I'll ask you a few questions on section
8 4.2, observations of Coyote Creek, and then maybe we'll
9 take our lunch break. I just have a few questions
10 about this.

11 A Okay.

12 Q So the top of page 9, 4.2, observations of
13 Coyote Creek, in the second paragraph, you say: "I
14 observed a continuous stream channel and bed and bank
15 features."

16 What's the significance to you of having --
17 let me finish the sentence. "I observed a continuous
18 stream channel and bed and bank features from the
19 headwaters of Coyote Creek to its confluence of Oat
20 Creek on the Sacramento River."

21 What's the significance to you of having
22 observed a continuous stream channel and bed and bank
23 features?

24 A That -- those features being present
25 represent a feature that you can observe from aerial

1 photography that's continuous. It represents there's a
2 stream there.

3 Q So by continuous, do you mean that
4 spatially the channel and bed and bank are relatively
5 unbroken from the headwaters to the confluence?

6 A Yes.

7 Q Do you mean anything else by that?

8 A No.

9 Q I wanted to clarify one of the figure
10 references then. You got a heading main stem of Coyote
11 Creek to Oat Creek. At the end of the first paragraph,
12 you refer to figure 4.

13 MR. COGHLAN: What page are we on?

14 MR. FRANCOIS: I apologize. I'm on page 9.
15 I'm reading the last sentence of the first paragraph
16 under main stem of Coyote Creek to Oat Creek.

17 THE WITNESS: It refers to figure 3.

18 BY MR. FRANCOIS:

19 Q Well, the copy I have says figure 4.

20 A I'm sorry. You've already moved down to
21 main stream of Coyote Creek to Oat Creek?

22 Q Yeah. I apologize. So figure 3 is
23 referenced above. But then the subsequent paragraph
24 that starts further downstream, the eastern most arrows
25 on page 9, that refers to figure 3, right?

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Steven Poulakos, registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 10th day of October 2019.

My commission expires:

May 31, 2021



NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

EXHIBIT E

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF CALIFORNIA
3
4

5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 vs.

8 ROGER J. LAPANT, JR.; J&J
FARMS; GOOSE POND AG, INC.;
9 and FARMLAND MANAGEMENT
SERVICES,

10 Defendants.
11

) Case No.:

) 2:16-cv-01498-KJM-DB

12
13
14 DEPOSITION OF PAUL WISNIEWSKI

15 San Francisco, California

16 Tuesday, October 22, 2019

17 Volume II
18
19
20
21
22

Reported by: SUZANNE F. GUDELJ

23 CSR No. 5111

24 Job No. 3599851A

25 PAGES 272 - 317

1 San Francisco, California; Tuesday, October 22, 2019

2 9:46 a.m.

3 ---oOo---

4
5 PAUL WISNIEWSKI,

6 having been previously administered an oath, was
7 examined and testified as follows:

8
9 EXAMINATION

10 BY MR. DOYLE:

11 Q Okay. We're back on the record for the
12 continuation of the deposition of Paul Wisniewski.

13 Good morning, sir.

14 A Good morning.

15 Q Thank you for doing some work after the
16 conclusion of yesterday's deposition. And the first
17 thing that was produced this morning was a collection of
18 the EDR aerial photo decade package, the -- which was
19 originally attached to your February 2018 -- no, I'm
20 sorry, your June 2018 report, and is Exhibit 2000 -- no?

21 A February. It's the --

22 Q Absolutely, yes. So let me start again.

23 The -- through counsel you handed me this
24 morning a package where the unedited version was
25 originally attached to your February 2018 report, which

1 is Exhibit No. 283. And what you have done last night
2 is made markings on some of the aerial photos in this
3 package. Is that fair?

4 A Yes.

5 Q All right. And you also provided a thumb drive
6 with a -- which is a true and complete copy of the edits
7 you made.

8 Is that fair to say?

9 A Of the markings.

10 Q Of the markings, yes. We've been calling it
11 markings. We should call it markings, yes. Okay? We
12 will not mark the thumb drive, because that was just
13 produced to counsel, but we will mark the package as
14 284.

15 (Deposition Exhibit 284 marked by the
16 court reporter.)

17 BY MR. DOYLE:

18 Q Okay. The assignment was to look at -- for
19 you, sir, to look at aerial photographs between the
20 years 1985 and 2010, and to the extent you believe you
21 see indications of new on-the-ground activities -- we
22 may have used the term ground-disturbing activities.
23 What term are you comfortable with?

24 A Land- or ground-disturbing activities.

25 Q So that you were going to identify within those

1 years any aerial photographs where you believe you see
2 new, that is, since the prior aerial photograph in that
3 area, ground-disturbing activities.

4 Is that your understanding of the assignment?

5 A Yes.

6 Q And have you completed that?

7 A Yes.

8 Q And did you do that -- did you complete that
9 assignment on your own without the assistance of any
10 other person?

11 A Yes.

12 Q So let's go to the first -- direct me, please,
13 if you would, to which page of this -- of Exhibit 284 is
14 the first one in which you made markings.

15 A The 1988 photograph -- photographs.

16 Q Is that the first sequential page or first
17 chronological aerial?

18 A First chronological.

19 Q Okay. So this -- this page -- package, I don't
20 believe, has page numbers?

21 A No, but it has -- so, yeah, there are two 1988
22 photographs.

23 Q I see. Well, on the -- if you look at page 2,
24 which this page is numbered, the index indicates that
25 there's one '88.

1 A Yes. However, the frames are not large enough
2 to capture the whole property, so it's produced on two
3 pages.

4 Q Oh, okay. But it's the same date?

5 A Yeah, same date. Same series of photos --

6 Q Okay.

7 A -- but two pages to represent the whole
8 property.

9 Q All right. And I have now located that on my
10 copy. Looks like we're on the same page. If counsel
11 wants to follow along --

12 Mr. LaPant, do you want to follow along?

13 MR. LAPANT: Okay.

14 MR. DOYLE: -- for 1988?

15 MR. LAPANT: I got it.

16 BY MR. DOYLE:

17 Q Right. Mr. Wisniewski, two pages on '88?

18 A I believe there are two pages for each photo
19 year.

20 Q Oh, okay. Good to know.

21 A Yeah.

22 Q So for 1988, you have made yellow markings on
23 these two pages to illustrate your -- your opinion on
24 the issue of new ground-disturbing activities; is that
25 correct?

1 A Yes.

2 Q And does your expert report or reports speak to
3 what -- what specifically -- to the extent you are able
4 to be more specific than ground-disturbing activities
5 does your expert report, in a narrative fashion,
6 describe what you believe you're seeing?

7 A Yes.

8 Q Okay. Then let's go to the next sequential
9 year on the aerials that you made markings on.

10 A If I might, rather than continuing with the
11 package here, we can skip to look at the Grip report
12 which has a 1992 photo, which would be the next in the
13 sequence, or if you prefer, we can continue to go
14 through the EDR aerials.

15 Q Did you make -- did you make any markings on
16 the Grip report?

17 A No, I think they speak for themselves.

18 Q Okay.

19 A But they do demonstrate what I'm trying to
20 illustrate, and they do appear in the 1998 photos, so I
21 think it would be good to reference and also to keep it
22 in sequence to look at these first.

23 Q You had me at sequence. Let's do that.

24 A Okay.

25 Q So let's take out that page that you wish to

1 talk about.

2 A Actually, it's pages.

3 Q Take out whatever '92 pages you wish to talk
4 about, and let's mark that collection as the next
5 exhibit.

6 A Okay. And this is in the Grip report, and it's
7 marked as, in the Grip report, as Exhibit 3.4-69 through
8 -85.

9 BY MR. DOYLE:

10 Q All right. And you have put Post-it notes on
11 certain pages, correct?

12 A Just bracketing those exhibits.

13 Q So they don't indicate any -- there's no
14 opinion of you associated with the Post-its; is that
15 fair to say?

16 A No, the opinion is throughout these pages.

17 Q Okay.

18 A Right.

19 Q So if the court reporter lost the Post-it
20 notes, it would be no big deal?

21 A No. Well, because Mr. Grip has already marked
22 them, and I wouldn't -- and as I mentioned earlier, I
23 believe we see the same or similar, I should say,
24 evidence in the '92 photos as we do see in the '98
25 photos.

1 Q In the '98?

2 A Which we're going to look at next, right.

3 Q Oh, okay.

4 A So in this series of photos that Mr. Grip
5 produced, this is April 18th of 1992.

6 Q Exhibit 285.

7 A The first page is Exhibit 3.4-69, and this is
8 just an index of the 16 areas that he looked at.

9 (Deposition Exhibit 285 marked by the
10 court reporter.)

11 BY MR. DOYLE:

12 Q Do you mind, at this time, if we remove the
13 Post-it notes?

14 A Sure, that's fine.

15 Q Okay. Since they don't -- they don't have any
16 significance other than helping you create this exhibit.

17 A Okay.

18 Q Okay. First page -- I'm sorry, by the way, the
19 court reporter should note this is a double-sided
20 exhibit, so we'll have to deal with that. Many aren't.
21 Most of them aren't.

22 MS. CANNATA: I wanted him to have a color copy
23 here at the deposition so he got the benefit of my extra
24 copy.

25 MR. DOYLE: To which I'm very grateful. I

1 appreciate that.

2 BY MR. DOYLE:

3 Q Okay. Go ahead. First page.

4 A First thing I wanted to note, before we move on
5 from the first page, is that in the Grip report, he, in
6 his other exhibits, had index pages similar to this one
7 for the April 18th, 1992, set, and in those indices he
8 indicated agricultural activities in the various
9 locations that he had identified them for that photo
10 series. On this index, he did not do that, and I don't
11 know for sure, but my suspicion is that he didn't do it
12 because there's evidence of farming in almost every
13 frame.

14 Q All right. Let me ask a preliminary question
15 about Mr. Grip or Dr. Grip -- I don't know which.

16 A Actually, it's in every frame.

17 Q Are you relying on his opinions in any way,
18 shape, or form?

19 A No, I'm looking at his photos --

20 Q Right.

21 A -- which he's produced --

22 Q Right.

23 A -- that show zoomed-in areas, the 16 areas that
24 are shown on the first page on the index.

25 Q And you're making your own independent

1 assessment of his --

2 A Right.

3 Q -- of the photos that he identified --

4 A Right.

5 Q -- but not his testimony about what he believes
6 are on those frames?

7 A That's correct.

8 Q Go ahead.

9 A And so on the first page after the index, which
10 is Exhibit 3.4-70 --

11 Q Of Exhibit 285?

12 A Of Exhibit 285 -- he shows the northwest corner
13 of the property. So this would be --

14 Q Zone 1?

15 A -- zone 1.

16 Q Grip zone 1?

17 A Grip zone 1. And he has two lines that are
18 drawn roughly east/west to indicate land impact

19 approximate direction. And what I believe he's looking
20 at, which I see here, too, are linear striations that
21 cut across the property.

22 Q Let me just pause you there. Does linear
23 striations that cut across the property, to use your
24 words, are those new, in your opinion, ground-disturbing
25 activities since the prior aerial photograph?

1 A Yes.

2 Q Okay.

3 A The --

4 Q Is that all about -- is that all you have to --
5 to testify about Grip Zone 1?

6 A Well, it's actually Grip Zone 1 through 16 --

7 Q Okay.

8 A -- showing a series of photographs that show --
9 in many cases's it's easier to see the striations
10 through the lighter colored portion of the photo,
11 because it's visible as compared to the darker portions,
12 but you can see that, for example, in area 4, the zoomed
13 aerial, Exhibit 3.4-73, shows the striations cutting
14 across both the light and the dark features that are
15 visible in the photos.

16 And again, zoom of aerial, April 18th, 1992,
17 area 5, this one is showing, again, very clear
18 striations evidence of what appears to be farming
19 activities on Exhibit 3.4-74, and similarly with the
20 other photographs that are zoomed aeriels. It appears
21 to be a theme across the entire property.

22 Q Have you -- have you taken a look to see
23 whether all of the zones marked by Mr. Grip are -- do,
24 in fact, cover the whole property and new activity is
25 seen in each and every zone? Is that what you are

1 saying?

2 A They cover the vast majority of the property.

3 While it's not -- these zones do not represent the
4 entire property, they do have very good coverage across
5 the property from east to west and north to south.

6 Q To the extent Mr. Grip did not give -- does not
7 speak or does not provide a photograph and an arrow of a
8 particular spot or a zone, pardon me, where he believes,
9 and you believe apparently, too, that there was new
10 agricultural activities, then it's not your testimony
11 that you see indications of new on-the-ground --
12 ground-disturbing activities in that particular area?

13 A Would you mind restating the question?

14 Q Sure. To the extent that in this collection of
15 zoomed-in areas on Exhibit 285, to the extent there are,
16 you have not included -- that there is not included
17 within there a zoomed-in portion of a particular Grip
18 zone, then you do not offer an opinion about whether
19 there is a new -- there is a ground-disturbing activity
20 in that particular omitted zone?

21 A Correct.

22 Q Okay.

23 A Only the zones that he is showing. However, I
24 do note that they are or do provide very good coverage
25 of almost the entire property with the exception of

1 along Rawson Road and immediately north of Coyote Creek,
2 running east to west in the case of Coyote Creek and
3 north to south along Rawson Road.

4 Q But that's your attempt to sum up the upshot --

5 A Correct.

6 Q -- of the zoomed-in areas?

7 A That's correct; that's correct.

8 Q All right. If you're done with 1992, let's go
9 to the next photo in sequence.

10 A I just wanted to point out one of the other
11 photos in particular, the zoomed area 11. This is
12 Exhibit 3.4-80.

13 Q All right. Up by Ohm Road?

14 A Correct. It shows very clearly a large light
15 colored area, again with evidence of what appears to be
16 farming activities, linear striations through that area.

17 Q For purposes of looking at Mr. Grip's photos,
18 in 285, did you look at anything beyond the PDF version?

19 A No.

20 Q Okay. Did you -- we had talked about this
21 yesterday. Were you able to discern whether you looked
22 at any of the TIFF or other native resolution files that
23 Mr. Grip produced in this case?

24 A I have some native TIFFs, but not of this time
25 period.

1 Q Okay.

2 A And I could obtain those prior to trial.

3 Q But did you -- as you sit here today --

4 A No.

5 Q -- have you reviewed any TIFF file?

6 A For this time period, no.

7 Q For any time period?

8 A Yes.

9 Q All right. Which time periods?

10 A They all predate 1984.

11 Q Okay. All the ones -- all the TIFFs that you
12 reviewed predate 1984?

13 A I believe that's the case, yes.

14 Q All right. Do you know approximately how many
15 TIFFs you did review at that time period?

16 A Perhaps four or five.

17 Q Okay. And to the best of your memory, you did
18 not review any TIFFs post-dating 1984?

19 A I do have -- GIS shapefiles were downloaded,
20 but I was unable to pull those up on my machine because
21 I do not have that program installed.

22 Q So you did not review them?

23 A Not for this effort, but I had looked at them
24 previously.

25 Q When did you look at them?

1 A This was for preparation of my expert reports.

2 Q So which -- which years did you look at them,

3 the TIFFs?

4 A I'd have to look back at that shapefile.

5 Q Did you do that last night?

6 A No.

7 Q Okay. That was one of the --

8 MS. CANNATA: He couldn't access it on his

9 screen.

10 THE WITNESS: I couldn't access it on my remote

11 laptop.

12 BY MR. DOYLE:

13 Q We have WiFi. Will that help?

14 A No, no, it's an installed program; it's a
15 licensed program, so I don't have it on this machine.

16 Q Let me ask you this --

17 MS. CANNATA: The answer, just to be clear, is
18 that was one of the homework assignments, but that was
19 limited because the laptop that he's traveling with does
20 not access the program that he can access at his desk.

21 THE WITNESS: Right.

22 MR. DOYLE: If I was told that nuance, I've
23 forgotten it, so forgive me if the error is mine.

24 MS. CANNATA: No, you weren't told it, but we
25 found it out. So we're reporting back on the half dozen

1 homework assignments that we had.

2 MR. DOYLE: Well, that's probably too much, but
3 anyway...

4 MS. CANNATA: Well, four maybe.

5 MR. DOYLE: There was homework, yeah, clearly,
6 but let me drill down this further.

7 BY MR. DOYLE:

8 Q Did you yourself pull any TIFFs or other native
9 resolutions as part of your work in this case? That
10 is -- and I want to exclude TIFFs and other native
11 resolutions provided to you by either Mr. Grip through
12 counsel or Mr. Stokely through counsel. Outside of
13 those two productions, did you, yourself, pull any TIFF
14 or other native resolutions from --

15 A No other.

16 Q -- some commercial source --

17 A No other native resolutions.

18 Q -- other than the productions by Mr. Grip and
19 Mr. Stokely through counsel?

20 A And the ones that I had previously mentioned --

21 Q Now that's where I'm confused. What are those?

22 A -- prior to 1984. The TIFFs prior to 1984.

23 Q So where did you obtain those?

24 A From the respective sources, I believe USDA and
25 USGS.

1 Q Okay.

2 A And we're in the process of obtaining the
3 remaining TIFFs.

4 Q Through whatever source?

5 A Correct. But I believe, mainly, it's USDA and
6 USGS.

7 Q Okay. So if we're done -- are we done with
8 1992?

9 A Yes.

10 Q Okay. So what's the next aerial in sequence
11 that you either marked on or you wish to use the Grip
12 report to illustrate your opinion about
13 ground-disturbing activities that you claim you see?

14 A The 1988 aerial photographs that are included
15 in Exhibit 284.

16 Q Okay. I'm sorry, what year?

17 A 1998.

18 Q Thank you.

19 A And there are, again, two photos, one that
20 provides coverage of the eastern portion and central
21 portion, and the other that provides coverage of the
22 western portion and central portion of the site.

23 Q All right. So these are on two pages, right?
24 Your markings are on two pages?

25 A Correct; correct. Two pages.

1 Q And the first of those two pages, you've got
2 some arrows that point in both directions, right?

3 A Correct.

4 Q What do you mean by that?

5 A That you can see the same or very similar
6 lineations or striations that we just -- or I just
7 discussed in the 1992 photos that were produced by Grip
8 in this 1998 photo in the northwest corner of the
9 property in this example.

10 Q Were you able to trace the geographic extent of
11 what you're seeing in that particular area?

12 A To some degree. This image is not a TIFF
13 image, and so it is -- and I think the resolution isn't
14 quite as good as with the 1992 photo. However, the
15 striations are evident, particularly in the areas that I
16 marked. There are also, say, land-disturbing activities
17 or what appears to be land-disturbing activities in the
18 other areas that I marked.

19 Q With yellow?

20 A With yellow.

21 Q And to the extent that you gave a narrative
22 description of what it is you believe you're seeing,
23 would that be set forth in your reports?

24 A Yes, but not as -- not in as much detail as
25 this.

1 Q And what do you mean by that?

2 A Well, I'm making general statements in my
3 February report, Exhibit 283, and in some cases, I'm
4 identifying specific areas, but I don't identify in
5 every case all the areas that I'm discussing or that I
6 have marked here.

7 Q And -- okay. So you've done that now?

8 A Yes, because it was requested.

9 Q Okay.

10 A In the one case of the 1998 photograph where I
11 have marked the northeast corner of the property with a
12 larger polygon, the key point here that I wanted to make
13 is that -- and I believe this is referenced in my
14 report -- is that this area appears to have been
15 smoothed or altered in comparison with the previous
16 photo in this decadal of time series package from EDR.

17 So if you compare this same corner of the
18 property in 19 -- in the 1998 photo to the 1988 photo,
19 there is a marked difference. And again, I interpret
20 this as a land-disturbing activity, possible smoothing
21 of the landscape.

22 Q Anything else about '98?

23 A There are other, I would just say,
24 land-disturbing activities that are along Coyote Creek
25 on its northern side.

1 Q Which you've marked these in yellow?

2 A And I've marked these small polygons in yellow.

3 And these could be related to the access road that

4 somewhat parallels Coyote Creek along the southern

5 border of the property. These could be landings that

6 come off the road for equipment staging. It's just not

7 clear, but it appears to be a land-disturbing activity,

8 and those are also evident in the 1990 -- I'm sorry, in

9 the 1988 photographs.

10 Q So is that -- so that's not new then?

11 A Well, but they appear to be different in scope

12 in some cases, and there's some additional disturbances

13 that are shown in the 1998 photo as compared with the

14 1988.

15 Q Anything else with '98?

16 A It appears on the 1998 photo, which is marked

17 with the arrows, that the linear electrical corridor had

18 some land-disturbing activities associated with it, and

19 so those polygons are markings that connect with the

20 roughly north/south marking along the corridor is what

21 I'm intending to point out at that location.

22 Q But nothing beyond the yellow that you've

23 shown?

24 A Correct.

25 Q Okay. Next sequentially?

1 A In the 2005 photo in the same exhibit, photos I
2 should say, I have marked one of the photos, and again,
3 this is -- and these are more difficult to see. I
4 apologize. I was using a yellow mark -- marking.

5 MS. CANNATA: Can I suggest on the original
6 exhibit he take a green marker and go over that yellow
7 marker just to be clear.

8 THE WITNESS: It's very difficult to see these
9 because the background is yellow.

10 MR. DOYLE: I agree. Take whatever time you
11 need to do that.

12 MS. CANNATA: Just trace over it.

13 THE WITNESS: It will probably --

14 MS. CANNATA: -- cover it up.

15 THE WITNESS: -- cover it up, but then someone
16 could compare two identical photos, an unmarked and a
17 marked version.

18 BY MR. DOYLE:

19 Q Well, you're in charge of the master exhibit in
20 your opinion, so...

21 A Why don't I bracket the areas.

22 MS. CANNATA: Sure.

23 THE WITNESS: That way I'm not covering them.

24 BY MR. DOYLE:

25 Q Or outline it, because I don't want to miss --

1 A Or circle.

2 Q The goal is for us to not miss an area that you
3 marked in yellow just because we can't see it.

4 A I'm just going to circle the whole --

5 Q Well, no, that sounds like you're -- I want
6 to --

7 A You don't want to -- okay.

8 Q So trace the area in yellow with green.
9 Hopefully --

10 A Around the perimeter of it?

11 Q Yes.

12 A Okay. We'll do that.

13 MS. CANNATA: Is it showing up?

14 THE WITNESS: Kind of.

15 BY MR. DOYLE:

16 Q I got black. Would that be any better?

17 A Yeah, maybe black.

18 MS. CANNATA: Black would be better.

19 BY MR. DOYLE:

20 Q So black for the year 2005 would be used to
21 trace around the yellow. Is that a fair statement?
22 That's the goal, right?

23 A Correct.

24 Q Okay.

25 A (Marking document.) Realtime analysis.

1 Q Right. Slash drawing of a previous analysis.

2 A I don't -- this one is more clear over here.

3 Would you like me to mark this one?

4 Q Just for continuity. While we're doing
5 kindergarten drawing. I don't mean to be facetious, by
6 the way. It's getting back to my inability to color
7 within the lines back in the day.

8 A (Marking document.)

9 Q Okay. Thank you.

10 And how about the second page of 2005? Is
11 there anything new -- any new yellow on there that's not
12 on the first page?

13 A I don't see any that I marked on here. I
14 wonder if I should open my laptop just to be sure. But
15 because of the yellow tint on the --

16 MS. CANNATA: We have a data stick over here.

17 THE WITNESS: I have it on this machine here
18 just for reference.

19 MR. DOYLE: Yes, let's take a break to do that.
20 Off the record.

21 (Discussion off the record.)

22 (Recess 10:13 a.m. to 10:16 a.m.)

23 BY MR. DOYLE:

24 Q All right. We took a brief break regarding
25 2005 just to make sure there was nothing else to trace

1 in black for that year. Is that correct, Mr.

2 Wisniewski?

3 A Yes, correct.

4 Q Let's go to the next sequential year within the
5 time period 1985 to 2010 where you believe you're seeing
6 new ground-breaking activities.

7 A On the 2009 photo set --

8 Q From Exhibit 280- --

9 A -- 4.

10 Q -- 4, thank you.

11 A Yes.

12 Q 2009. Okay.

13 A On the northeast corner of the property I see
14 what appears to be new land-disturbing activities in
15 comparison to the 2005 photos.

16 Q And you've marked that in yellow on the first
17 of two pages of 2009?

18 A Correct.

19 Q And not on the second page, correct?

20 A Correct.

21 Q All right. And to the extent that you
22 discussed what you claim you're seeing, is that
23 information in your report?

24 A Yes. And I believe I referred to this as
25 smoothing, and again, it looks like potential farming

1 activity.

2 Q All right. Any other photographs?

3 A If I could go back to the 2005s just briefly --

4 Q All right.

5 A -- and more fully describe the marking on the
6 one photo for the 2005 series.

7 Q That's -- is it not mentioned in your report?
8 Is that why you want to do this?

9 A Well, it's mentioned in general terms as, I
10 believe, access road construction. And that's what I'm
11 generally seeing here is that --

12 Q On the left?

13 A On the left side, this is the -- this is what
14 appears to be a new access road. It's the north/south
15 oriented access road coming off of sort of the major
16 east/west access road that parallels Coyote Creek.

17 Q Okay.

18 A And then there's sort of this four finger set
19 of access roads that are on the -- in the northeast
20 portion of the property --

21 Q That you've outlined in black?

22 A -- that I've outlined in black.

23 Q And colored in yellow?

24 A Correct.

25 Q Okay.

1 A Okay.

2 Q Anything else? Any other aerials between the
3 time period 1985 and 2010 that you believe show new
4 ground-disturbing activities that we haven't discussed
5 today?

6 A We didn't talk about the 2009s completely.

7 Q Well, you had been talking about them before
8 you wanted to return to 2005.

9 A Yes.

10 Q Is there something more you want to add to
11 2009?

12 A Yes, let me add one --

13 Q Okay. Go ahead.

14 A -- actually two more points I wanted to make
15 there.

16 Q Again, I did ask you if you had -- whatever --
17 to the extent you had a narrative description of what
18 you claim you're seeing, it's in the report, right?

19 A Yes; yes.

20 Q Okay. Then I don't need more.

21 A Okay.

22 MS. CANNATA: He just wanted to make sure you
23 know there are yellow markings on this page if you can't
24 see them.

25 THE WITNESS: Right.

1 BY MR. DOYLE:

2 Q All right. We did cover that.

3 A There are two access roads that appear on the
4 2009 photo as compared with the 2005 photos --

5 Q Okay.

6 A -- that are south of the sort of four-finger
7 road construction activity that was appearing in the
8 2005 photo. In addition, it appears that there is at
9 least one new access road in the south central portion
10 of the property that is immediately north and parallel
11 to Coyote Creek.

12 Q And you've outlined that in yellow?

13 A Correct.

14 Q Okay.

15 A And now that I was looking at those, we may
16 have skipped over one thing that I wanted to mention on
17 the 1988 photographs. So if we could just go back real
18 quick to that.

19 Q And this is actually something that's not
20 mentioned in your report?

21 A Something that's not mentioned in the report
22 because I just saw it last night.

23 Q Is it outlined in yellow?

24 A It is outlined in yellow.

25 Q Okay.

1 A It's the long linear road that's outlined in
2 yellow on the 1988 photograph.

3 Q Which of the two pages of the '88?

4 A And it is on the one that has more coverage of
5 the eastern side of the property, and it is --

6 Q Looks like it's the first of the two. No, I'm
7 sorry, that's '98.

8 MS. CANNATA: One of two.

9 BY MR. DOYLE:

10 Q Second of two.

11 A Second of two --

12 Q Thank you.

13 A -- in the sequence.

14 Q Okay.

15 A And so there's a polygon that I've outlined
16 that shows some, what appears to be, land-disturbing
17 activities in the southeastern portion of this photo.
18 And then connected to that --

19 Q What kind? Is that the access road you
20 mentioned?

21 A The second one, the linear feature that I
22 outlined, is an access road.

23 Q What about the block on the right side?

24 A First, let me discuss what I -- the point of
25 going back to this photo, which is this long linear

1 feature. What I see here is that if you compare this
2 road in 1988 to the trace or -- of the same road in
3 1983, the road has been modified. This is a
4 straightened version of the same road but in some cases
5 occupies different position completely. So if you
6 compare the 1983 version of that road to the 1988
7 version of that road along the length that I outlined,
8 you'll see that there are differences in the road
9 alignment.

10 Q What about the other block on the second page
11 of the '88 exhibits -- I mean aerials?

12 A I think this one I was just pointing out what I
13 observed to be land-disturbing activities, and I'd have
14 to -- I'd have to zoom in on this to recall exactly what
15 I was looking at.

16 Q Is it road related or otherwise; do you recall?

17 A I don't believe this was road related. I
18 believe this was land-disturbing activities that I could
19 not identify.

20 Q Okay. Any other -- any other aerial
21 photographic depiction -- any other discussion of aerial
22 photographs between 1985 and 2010 regarding what you
23 claim to be new ground-disturbing activities?

24 A Let me just verify -- I believe that's the
25 case, but let me just verify.

1 Q Sure.

2 A That's all.

3 Q Okay. Yesterday we were talking about your
4 conversations with Mr. LaPant in terms of information
5 he's providing to you verbally about what activities he
6 performed on the property at issue in this case. And
7 my -- my question for you was -- was where did you write
8 down everything that he told you that was of
9 significance to your opinions in this case?

10 A And my response was in my field notes in
11 September I believe I had a page, two pages that had
12 some notes about what Mr. LaPant was trying to tell me
13 with respect to timeline of what occurred on the
14 property and then the details of what he did on the
15 property. I believe all that information has been
16 reported in Paul Squires' report and in some cases in my
17 report.

18 Q Okay. Any other place that you know of?

19 A I did have telephone conference calls with Mr.
20 LaPant and also in-person meetings with Mr. LaPant with
21 our team and took notes in some cases, but there's no
22 information that's in -- no factual information that's
23 in those notes that's not already presented in our
24 reports.

25 Q Okay. Then let's talk about the photographs,

1 LAPANT 5013-5015. Have you had a chance to look at
2 those photographs?

3 A Yes, these are the images that I took in the
4 field in September. I did review them.

5 Q Okay. I want to mark these. I'm not sure I
6 want to do it one by one. The court reporter can do it
7 later with counsel. We can figure that out.

8 Here's what -- here's my goal, and let's talk
9 about the best way to do this because we've got limited
10 time. I would like to know if you're able to piece
11 together each photo with respect to areas -- the soil
12 pit numbers.

13 A Okay.

14 Q That's my goal.

15 A Yeah.

16 MR. DOYLE: Let's go off the record.

17 (Discussion off the record.)

18 MR. DOYLE: We're going to go ahead and mark
19 the photographs that were produced yesterday. And we've
20 off the record agreed that Mr. Wisniewski will within --
21 right now we're thinking two weeks -- within two weeks
22 of today, and we can amend that as necessary with
23 discussions with counsel -- that's our working goal
24 right now -- within two weeks he will have -- provide a
25 short declaration that simply takes each photo, to the

1 best of his ability, and says this goes with Soil Pit 1,
2 2, 3, whatever the case may be.

3 BY MR. DOYLE:

4 Q Is that your understanding of what we're doing,
5 Mr. Wisniewski?

6 A Yes.

7 MR. DOYLE: Your understanding, Counsel?

8 MS. CANNATA: Yes.

9 MR. DOYLE: So let me just mark these, and this
10 is just going to be me blabbing here for a minute.

11 Exhibit No. --

12 (Discussion off the record.)

13 MR. DOYLE: So 286 is LAPANT 5013.

14 (Deposition Exhibit 286 marked by the
15 court reporter.)

16 MR. DOYLE: 287 will be LAPANT 5014. The
17 witness will help the court reporter kindly on where to
18 put the sticker.

19 THE WITNESS: Sure.

20 MS. CANNATA: 287, you said?

21 MR. DOYLE: Correct.

22 (Deposition Exhibit 287 marked by the
23 court reporter.)

24 MR. DOYLE: Now, LAPANT 5015 will be 288.

25

1 (Deposition Exhibit 288 marked by the
2 court reporter.)

3 MR. DOYLE: 289 will be LAPANT 5016.

4 (Deposition Exhibit 289 marked by the
5 court reporter.)

6 MR. DOYLE: 290 will be LAPANT 5017.

7 (Deposition Exhibit 290 marked by the
8 court reporter.)

9 MR. DOYLE: 291 will be LAPANT 5018.

10 (Deposition Exhibit 291 marked by the
11 court reporter.)

12 MR. DOYLE: 292 will be LAPANT 5019.

13 (Deposition Exhibit 292 marked by the
14 court reporter.)

15 MR. DOYLE: 293 will be LAPANT 5020.

16 (Deposition Exhibit 293 marked by the
17 court reporter.)

18 MR. DOYLE: 294 will be LAPANT 5021.

19 (Deposition Exhibit 294 marked by the
20 court reporter.)

21 MR. DOYLE: 295 -- LAPANT 5022 will be
22 Exhibit 295.

23 (Deposition Exhibit 295 marked by the
24 court reporter.)

25 MR. DOYLE: 296 will be exhibit -- I'm sorry,

1 will be LAPANT 5023.

2 (Deposition Exhibit 296 marked by the
3 court reporter.)

4 MR. DOYLE: All right. Exhibit 297 will be
5 LAPANT 5024.

6 THE WITNESS: Inadvertent picture it looks
7 like. I don't think we'll be tying that to anything.
8 And I hope that's okay if there's some of these that --
9 you know, looks like an inadvertent picture here.

10 MR. DOYLE: That's all you need to say, then,
11 exhibit so-and-so is an inadvertent picture.

12 (Deposition Exhibit 297 marked by the
13 court reporter.)

14 MR. DOYLE: And it looks like 298 might fall
15 under that same category. LAPANT 5025. Right? See
16 what I'm heading to?

17 THE WITNESS: Right.

18 (Discussion off the record.)

19 (Deposition Exhibit 298 marked by the
20 court reporter.)

21 MR. DOYLE: 299 will be LAPANT 5026.

22 (Discussion off the record.)

23 (Deposition Exhibit 299 marked by the
24 court reporter.)

25 MR. DOYLE: LAPANT 5027 will be Exhibit 300.

1 (Deposition Exhibit 300 marked by the
2 court reporter.)

3 MR. DOYLE: Exhibit 301 is LAPANT 5028.

4 (Deposition Exhibit 301 marked by the
5 court reporter.)

6 MR. DOYLE: Exhibit 302 will be LAPANT 5029.

7 (Deposition Exhibit 302 marked by the
8 court reporter.)

9 MR. DOYLE: LAPANT 5030 will be Exhibit 303.

10 (Deposition Exhibit 303 marked by the
11 court reporter.)

12 MR. DOYLE: 304 is LAPANT 5031.

13 (Deposition Exhibit 304 marked by the
14 court reporter.)

15 MR. DOYLE: 305 is LAPANT 5032.

16 (Deposition Exhibit 305 marked by the
17 court reporter.)

18 MR. DOYLE: 306 is LAPANT 5033.

19 (Deposition Exhibit 306 marked by the
20 court reporter.)

21 MR. DOYLE: 307 is LAPANT 5034.

22 (Deposition Exhibit 307 marked by the
23 court reporter.)

24 MR. DOYLE: 308 is LAPANT 5035.

25

1 (Deposition Exhibit 308 marked by the
2 court reporter.)

3 MR. DOYLE: LAPANT 309 is Exhibit -- I'm sorry,
4 Exhibit 309 is LAPANT -- marked LAPANT 5036.

5 (Deposition Exhibit 309 marked by the
6 court reporter.)

7 MR. DOYLE: Exhibit 310, LAPANT -- will be
8 LAPANT 5037.

9 (Deposition Exhibit 310 marked by the
10 court reporter.)

11 MR. DOYLE: Exhibit 311 will be LAPANT 5038.

12 (Deposition Exhibit 311 marked by the
13 court reporter.)

14 MR. DOYLE: Exhibit 312 will be LAPANT 5039.

15 (Deposition Exhibit 312 marked by the
16 court reporter.)

17 MR. DOYLE: Exhibit 313 will be LAPANT 5040.

18 (Deposition Exhibit 313 marked by the
19 court reporter.)

20 MR. DOYLE: Exhibit 314 will be LAPANT 5041.

21 (Deposition Exhibit 314 marked by the
22 court reporter.)

23 MR. DOYLE: Exhibit 315 will be LAPANT 5042.

24 (Deposition Exhibit 315 marked by the
25 court reporter.)

1 MR. DOYLE: Exhibit 316 will be LAPANT 5043.

2 (Deposition Exhibit 316 marked by the
3 court reporter.)

4 MR. DOYLE: Exhibit 317 will be LAPANT 5044.

5 (Deposition Exhibit 317 marked by the
6 court reporter.)

7 MR. DOYLE: Exhibit 318 will be LAPANT 5045.

8 (Deposition Exhibit 318 marked by the
9 court reporter.)

10 MR. DOYLE: Exhibit 319 will be LAPANT 5046.

11 (Deposition Exhibit 319 marked by the
12 court reporter.)

13 MR. DOYLE: Exhibit 320 will be LAPANT 5047.

14 (Deposition Exhibit 320 marked by the
15 court reporter.)

16 MR. DOYLE: 321 will be LAPANT 5048.

17 (Discussion off the record.)

18 (Deposition Exhibit 321 marked by the
19 court reporter.)

20 MR. DOYLE: 322 is LAPANT 5049.

21 (Deposition Exhibit 322 marked by the
22 court reporter.)

23 MR. DOYLE: Exhibit 323 is LAPANT 5050.

24 (Deposition Exhibit 323 marked by the
25 court reporter.)

1 MR. DOYLE: Exhibit 324, the last in these
2 series, is LAPANT 5051.

3 (Deposition Exhibit 324 marked by the
4 court reporter.)

5 (Recess 10:45 a.m. to 11:03 a.m.)

6 BY MR. DOYLE:

7 Q Mr. Wisniewski, did Mr. LaPant ever discuss
8 with you something to the effect of something he
9 received from an agency of the U.S. Department of
10 Agriculture had an aerial photograph attached to it that
11 Mr. LaPant initially thought was a 1995 era aerial, but
12 it turned out to be -- later turned out -- and he later
13 discovered it was a 1984 aerial photograph? And
14 that's -- I don't mean to be testimony there. Mr.
15 LaPant spoke to this in his deposition, and I'm not
16 trying to change this. I'm just trying to convey to you
17 anything to that effect that you recall discussing with
18 Mr. LaPant.

19 A I recall Mr. LaPant mentioning that he had
20 approached the government to obtain any agricultural
21 information about the property, but the specifics of
22 what you just said I don't recall.

23 Q Okay. Your three reports in this case,
24 Exhibit 280, which is the June 2018, and then there's
25 the supplemental report of Exhibit 282, and then your

1 February 2019 report is Exhibit 283, right?

2 A Yes.

3 Q Do all those reports collectively contain a
4 complete statement of all the opinions that you will
5 express in this case?

6 A Yes.

7 Q And how about -- does -- do those exhibits
8 contain a complete statement of the bases for the
9 opinions you will express in this case?

10 A Yes.

11 Q Do those -- those three exhibits, your reports,
12 contain a complete statement of the reasons for your
13 many opinions in this case?

14 A Yes.

15 Q And with that --

16 A As far as the basis, though, I realize we have
17 field notes that are not included in the reports, but
18 they are part of the basis for some of the opinions --

19 Q All right.

20 A -- and that's Exhibit 281.

21 MR. DOYLE: All right. And with that I think
22 we are likely concluding this deposition with the
23 proviso that if there's some late-breaking photographs
24 from Mr. Parkinson, maybe we'll use them in this
25 deposition, maybe we'll do a different route. But one

1 way or another, we will follow up with the court
2 reporter with Mr. Wisniewski present to shore that up at
3 some point today.

4 MS. CANNATA: Yes.

5 MR. DOYLE: So with that, we can switch chairs,
6 and we'll go into a new deposition unless you had
7 anything.

8 MS. CANNATA: No.

9 (Deposition adjourned at 11:06 a.m.)

10

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24

25

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

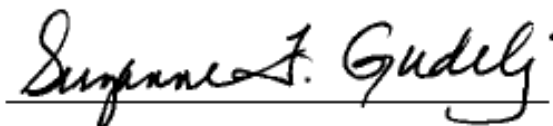
3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand which
8 was thereafter transcribed under my direction; that the
9 foregoing transcript is a true record of the testimony
10 given.

11 Further, that if the foregoing pertains to the
12 original transcript of a deposition in a Federal Case,
13 before completion of the proceedings, review of the
14 transcript [] was [X] was not requested.

15 I further, certify I am neither financially
16 interested in the action nor a relative or employee of
17 any attorney or party to this action.

18 IN WITNESS WHEREOF, I have this date subscribed
19 my name.

20 Dated:

21 
22

23 SUZANNE F. GUDELJ

24 CSR No. 5111
25

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19 Telephone: (415) 409-8900

20 Facsimile: (415) 409-8904

21 *Attorneys for Defendant,*

22 *Roger J. LaPant, Jr., dba J&J Farms*

23 UNITED STATES DISTRICT COURT

24 EASTERN DISTRICT OF CALIFORNIA

25 UNITED STATES OF AMERICA ,

26 Plaintiff,

27 v.

28 ROGER J. LAPANT, JR., ET. AL,

Defendants.

CASE NO. 2:16-CV-01498-KJM-DB

**DECLARATION OF PAUL SQUIRES IN
SUPPORT OF DEFENDANT ROGER J.
LAPANT'S MOTION FOR SUMMARY
JUDGMENT**

[Fed. R. Civ. P. 56]

1 I, PAUL SQUIRES, declare as follows:

2 1. I am an expert witness in the above-entitled action. I have personal knowledge of
3 the matters set forth in this declaration, and if called upon to testify, I could and would do so
4 based upon my own personal knowledge, and as to those matters stated upon information and
5 belief, I believe them to be true.
6

7 2. Attached hereto as **Exhibit A** is a true and correct copy of my expert report, dated
8 February 23, 2018, which I verify as accurate. In it, I note that the Property at issue in this case
9 was enrolled in several USDA farm programs, receiving farm support payments in the years
10 1996 through 2006 (most of which were specifically for wheat subsidies).

11 3. These payments were authorized under prior legislation and were available based
12 on the number of acres historically farmed, whether or not it was farmed in the year the payment
13 was received.
14

15
16 I declare under penalty of perjury under the laws of the State of California and the United
17 States that the foregoing is true and correct, except as to matters stated on information and belief
18 and as to those matters, I believe them to be true.
19

20 Executed this 19 day of DECEMBER 2019 at YUBA CITY, California.
21


22
23 
24 _____
25 PAUL SQUIRES
26
27
28

EXHIBIT A

**EXPERT REPORT OF PAUL SQUIRES PURSUANT TO FEDERAL RULE OF CIVIL
PROCEDURE 26(a)(2)**

A. Preliminary Information

Paul Squires
Squires Ag. Consulting, Inc.
546 Tudor Road,
Yuba City, CA 95991

B. Qualifications

My detailed resume is included as Exhibit 2A.

C. Statement of Opinions

I received and reviewed from counsel the documents listed in Section D, *infra*. I also interviewed the following individuals: Mr. Jack LaPant and Ms. Lynette Filter. I have formed the following conclusions.

Soil characteristics, type, contents and moisture can determine the level of tillage necessary for the production of a crop or the preparation for propagation of natural occurring plant species. Rocks, organic matter, percentage of sand, silt and clay, cation exchange capacity, pH, percentage of sodium, and calcium magnesium ratios in a given soil will determine the soils ability to sustain vegetation. Water penetration is influenced by all of these factors. Difference in elevation is also important to the soils ability to maintain moisture in a proper root zone for plant development. Tillage is a major influence affecting the soils ability to manage vertical root development, soil moisture content and proper oxygen availability.

Plowing is a vertical tillage operation that can be accomplished with many different types of tools. Chisel plows can employ shanks that are straight or curved, mounted on springs or solid without any tolerance forward or back; and can be used at depths up to 16 inches depending on the conditions. Chisel plows are used primarily to open the soil and allow it to dry out, introducing oxygen from the soil surface to a depth of at least 10 inches. A curved chisel can

1 move soil up and flip it depending on the moisture and soil type. A moldboard plow is designed
2 to turn the soil over, in an effort to move the soil surface to a depth of about 10 inches depending
3 on the size of the moldboard and replace it with the soil at the depth of about 10 inches. This
4 practice is designed to mix the soil, incorporate organic matter, improve oxygen in the soil at
5 depths that are not usually exposed to the sun, and sometimes used to disperse or displace weed
6 seeds to a depth that does not allow them to grow and interfere with a crop. Plowing is
7 considered to be shallow tillage, necessary in some environments for seed bed preparation.

9 Discing creates vertical and horizontal tillage. A disc is designed to reduce clod size,
10 chop and incorporate organic matter and prepare a fine seed bed. Used primarily as a finishing
11 tool, there are smooth disc blades, and stubble disc blades that are notched along the outside edge
12 of the disc. Stubble discs are generally heavier than finish discs; their main purpose in
13 comparison to a finish disc is to reduce particle size of organic matter and soil clods while
14 displacing both at different depths. Finish discs usually have blades that can range from 12" up to
15 20". Stubble disc blades can be as large as 36 inches which would allow the blade to be dropped
16 into the soil at a depth of close to 15 inches depending on the size of the spool that the blades are
17 attached to. Normal depth of discing is 0 to 10 inches; however, it could be used to till the soil at
18 depths of 15 inches. Discing will create subsurface soil compaction due to the horizontal
19 movement of the soil and the weight of the implement. Discing usually takes place after the soil
20 is plowed or ripped, and will compact soil that has been plowed or ripped.

23 Deep ripping is a process employed when penetration of subsurface soil below 15 inches
24 is necessary; usually for the development of permanent crops such as trees or vines. I have
25 owned and used a seven-shank ripper to till soil at depths of 0 to 14 inches. Significant horse
26 power is required to pull a seven-shank ripper at depths between 10 and 14 inches, even in a loam
27 soil without a hardpan or impermeable layer. Depending on the soil and the moisture content of
28

1 the soil at the time of ripping, the shanks may slice through the ground or bring large clods to the
2 surface that would require additional tillage to break down. In preparation for planting orchards,
3 growers will use large shanks that are capable of disrupting soil at depths up to five feet;
4 generally, an implement that large will require a large tractor or dozer with shanks attached to the
5 frame of the tractor.

6
7 Plowing, ripping or discing at depths of less than 16 inches should not be considered
8 “deep ripping”. Deep ripping is an expensive operation that requires significant horse power and
9 limits the ability of the operator to move more than approximately 3 miles per hour with an
10 implement that is usually covering less than 8 feet per pass. In order to illustrate the lack of
11 efficiency, you can use a formula to calculate how many acres per hour a “deep ripper” can cover
12 by multiplying the speed (x) the width (/) 8.25. The value of 8.25 can be as great as 10 depending
13 on the time it takes to turn the implement and efficiency of the length of the pass. For example, if
14 you have a 20-foot disc and you pull it 6 mph, you would have to use a factor of 10 because it
15 takes longer to turn a disc than it does to pick up a chisel plow or a ripper and line up for the next
16 pass. A 20-foot disc should be able to achieve 12 acres per hour. A 20-foot chisel should be able
17 to cover about the same because you have to slow down depending on the depth you are
18 affecting. If a deep ripper is 8 feet wide and you can pull or drive 3 mph, you would only be able
19 to cover approximately 2.9 acres per hour. It is very time consuming and not part of the process
20 when planting dry land wheat. Dry land farming practices usually involve plowing at depths less
21 than 14 inches and discing at depths less than 10 inches to create a seedbed suitable for the
22 drilling of seed at depths less than 1 inch or harrowing over the seed. Deep ripping would not be
23 a normal or economical input that would improve or be justified in a budget considering the
24 return on investment when calculating the value of a wheat crop. Wheat is generally a rotational
25 crop on laser leveled ground, or a crop grown on soils that do not have the ability to be irrigated
26
27
28

1 and are dependent upon rain fall for germination and season long development. Considering the
2 crop planted by Mr. LaPant, deep ripping would not have been an economical practice that would
3 have increased his return on investment; especially considering that penetrating the hardpan or
4 disrupting soil below 10 to 14 inches would have increased the soils ability to dry out and deprive
5 the intended crop of necessary moisture. Undulated ground is affected by gravity, if water is
6 allowed to run off or run through the soil structure, it will not stay in the root zone where it is
7 necessary for the vegetative development that is required for the creation of seed. Hydrologic
8 properties of soil are not modified by a 12 foot orchard disc, 24 foot spike tooth harrow, an aqua
9 bar, a mud chisel and a two shank 18" ripper used at depths no greater than 8 inches below the
10 soil surface. Hydrologic modifications of land usually involve surveying, cutting and filling,
11 ridging or other practices that are not accomplished with the implements used by Mr. LaPant.

12
13 Cattle will compact soil where they travel; compaction is increased when soil contains
14 moisture and weight is applied. Cattle create compaction due to the high percentage of pounds
15 per square inch that narrow hooves produce given their upper body weight. Farmers and ranchers
16 can benefit from appropriate tillage. Improving the tilth of the soil in the root zone for annual
17 crops combined with incorporation of organic matter, increases the microorganism activity, the
18 level of oxygen and root development of naturally occurring plants or plants grown from seed.
19 The objective of a farmer or rancher is to capitalize on inputs, maximize return on investment and
20 balance the ecosystem in the field for the long-term benefit of the business. Tillage can improve
21 the ability of the soil to produce healthier plants that provide more seed or forage for the livestock
22 that graze the rangeland or pastures and provide an environment for a root structure that will
23 maximize the harvest of an intended crop.

24
25 I now consider the property owned by Mr. LaPant from March of 2011 to April of 2012,
26 and the use of the property prior to or during the period of time that it was under his management;
27
28

1 I do not believe it was necessary for him to hydrologically modify the soil or land to reestablish
2 the ability to produce wheat regardless if the land had previously been used for the production of
3 wheat, was grazed and considered rangeland, or fallowed for an extended period of time.
4 Shallow tillage can be beneficial to native vegetation and the addition of fertilizers could improve
5 the organic matter and microorganism activity in a soil. The equipment described to me by Mr.
6 LaPant is not the type of equipment used to modify or destroy wetlands or convert wetland to
7 upland. If it is factual that a representative of the Army Corp of Engineers witnessed and
8 recorded the tillage performed by Mr. LaPant, I think it would be reasonable for that individual to
9 communicate the issues they may have during the act of farming in order to realistically
10 understand and measure what was actually taking place instead of making assumptions after the
11 crop was planted. Land management requires an effort and financial investment, coupled with an
12 understanding of what the investment is and what is actually happening beneath the surface. I
13 have seen the property where Mr. LaPant produced wheat, I do not believe the properties of the
14 soil, its integrity or ability to produce or maintain native species has been adversely affected by
15 his actions. Seeds will develop, wetlands will continue to be wetlands, and the positives and
16 negatives of tillage, grazing, planting and harvesting will be balanced by natural occurrences and
17 continued management of the land.

20 The property owned by Mr. LaPant, farm #198, has a 489.3-acre wheat base, a yield of 14
21 (CWT) per acre, and 1863.6 acres of cropland. The farm is a participating farm. A “wheat base”
22 is the number of acres on which a farm’s payments are based. A farm number in the hundreds,
23 such as “198,” tells me that the farm has been established for a number of decades and is long-
24 standing (newer farms are assigned much higher numbers (for example, # 3931)).

26 The documents provided by counsel demonstrate that the farm was enrolled in Production
27 Flexibility Contract Payments, a wheat subsidy program, and was paid on that program in 1996,
28

1 1997, 1998, 2000, and 2002. The farm was also enrolled in the Market Loss Assistance for
 2 Disaster Program for livestock loss feed, and was paid on that program in 1999 and 2001. The
 3 Market Loss Assistance for Disaster Program provided money for cattle. As an example, if there
 4 was a drought and grass/feed was not available for the cattle to eat, the government would
 5 provide money to a farm so that the farm could purchase grain to feed the cattle. Because the
 6 farm was enrolled in the Market Loss Assistance for Disaster Program in 1999 and 2001, I
 7 believe that there were cattle on the land in those years. The farm was also enrolled in the Direct
 8 Payment Subsidy Program, which is a wheat subsidy program, and was paid on that program in
 9 2003, 2004, 2005, and 2006. The calculation used for payment was: Base x yield x rate x 85% =
 10 payment (in this case: 489.3 acres x 14 (CWT) x rate x 85% = payment).

11
 12 In my opinion, the farm (#198 and #3931) is and was considered an active, ongoing, and
 13 participating farm in the USDA Farm Service Agency ever since it obtained its wheat base. This
 14 opinion is bolstered by the fact that the farm was enrolled in the Production Flexibility Contract
 15 Payments, the Market Loss Assistance for Disaster Program and the Direct Payment Subsidy
 16 Program in 1996, 1997, 1998, 1999, 2000, 2001, 2003, 2004 and 2005.

17
 18 **D. Documents/Facts/Data Reviewed**

19 -LAPANT 244-248
 20 -LAPANT 261-270
 21 -LAPANT 1058
 22 -LAPANT 1097
 23 -LAPANT 1098
 24 -LAPANT 1100
 25 -LAPANT 1101-1110
 26 -LAPANT 1106
 27 -LAPANT 1145-1154
 28 -NSE 5989-6001
 -NSE 6266
 -USA 72-73
 -USA 1169-1173
 -USACE 212
 -USACE 657-658
 -USACE 20141-20163
 -USACE 20197-20199
 -USACE 20281-20309

1 -USACE 20310-20342
-USACE 20343-20378
2 -USACE20379-20404
-USACE 20405-20435
3 -USACE 20436-20477
-USACE 100036-100037
4 -USACE 100039
-USACE 100041-100048
5 -USACE 100050-100060
-USACE 100062
6 -USACE 100064
-USACE 100066-100074
7 -USACE 100076-100088
-USACE 100090-100106
8 -USACE 100108-100109
-USACE 100111-100121
9 -USACE 100123
-USACE 100127
10 -USA-NOSTR-119-572
-USA-NSR-1-146

11 **E. Exhibits That Will Be Used to Support Opinions**

12 *See* Section D, *supra*.

13
14 **F. Prior Testimony**

15 I have been called upon on four occasions over the past four years to testify as an expert at
16 trial or by deposition. Those matters are as follows: *Vanbuskirk v. Irwin* (2014); *McKenzie v.*
17 *Pacific Gas & Electric* (2016); *Robertson v. ProAg* (2016); *Sheehan v. Sheehan* (2017).

18 **G. Compensation**

19 My fees for this case are \$225 per hour for research & discovery services and \$350 per
20 hour for testifying.
21

22 Dated: February 23, 2018


23 
24 _____
PAUL SQUIRES

EXHIBIT 2A

PAUL R. SQUIRES

546 TUDOR ROAD, YUBA CITY CA. 95991
530.682.9418 squiresp@sbcglobal.net

EXPERIENCE

2002 - Present **Squires Ag. Consulting, Inc.** Yuba City, Ca.
Owner ~Independent Crop Consulting {Pest Control Advisor}

- Provide crop production solutions for 10,000 acres of rice and 10,000 acres of field and row crops annually. Agronomic, pest control and cultural practice advice on more than 350,000 acres.
- Expert witness discovery, damage calculation, claim settlement and testimony services.
- Qualified Expert in Yolo County Superior Court. (Almonds)

2008 - Present **G1 Farms** Yuba City, Ca.
Partner ~Farm & Land Management

- Develop and manage farm operations, budgets, & contracts for row crop, field crop and rice production.

2016 – Present **O-R Ranch** Colusa, Ca.
Partner ~ Conservation & Habitat Management

- Wetland construction & management.

2005 - 2010 **Worth Harvesting, LLC.** Yuba City, Ca.
Partner ~Custom Farming & Harvesting

- Partnership that grew and harvested 1000 – 2000 acres of rice annually.

1992 - 2002 **John Taylor Fertilizers / Wilbur-Ellis** Yuba City, Ca.
Pest Control Advisor / Certified Crop Advisor

PAUL R. SQUIRES

EDUCATION / LICENSE

- | | | |
|-------------|---|--------------------------|
| 1994 | Chico State University | Chico, Ca. |
| ■ | B.S. Agricultural Business / Agricultural Science | |
| | | |
| 2006 - 2008 | California Agricultural Leadership Program | |
| ■ | Alumni (Class 37) | California, China & Laos |
| | | |
| 1994 | | |
| ■ | California Pest Control Advisor License #72105. (Current) | |

INDUSTRY & COMMUNITY INVOLVEMENT

Past President / Current Board member - California Association of Pest Control Advisers {Sutter Chapter}

Vice President - California Rice Marketers

Vice President – Meridian Farms Water District

Farm Credit West Local Advisory Committee member {Sac. Valley}

State Selection Committee member – California Agricultural Leadership Program

(Intentionally blank)

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Attorneys for Defendant,

Roger J. LaPant, Jr., dba J&J Farms

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER J. LAPANT, JR., *et al.*,

Defendants.

Case No.: 2:16-cv-01498-KJM-DB

**STATEMENT OF UNDISPUTED FACTS IN
SUPPORT OF DEFENDANT ROGER J.
LAPANT'S MOTION FOR SUMMARY
JUDGMENT**

Pursuant to Federal Rules of Civil Procedure 56(c)(1) and Local Rule 260(c), Defendant Roger J. LaPant, Jr., d.b.a. J & J Farms, submits the following Statement of Undisputed Facts in support of his Motion for Summary Judgment.

	Undisputed Facts	Supporting Evidence
1	The seasonal aquatic features on the subject	Cannata Decl., Ex C (Rains trans.) at 2-9.
2	property stand or flow no more than 3-4 months of	Cannata Decl., Ex D (Stokely trans.) at 3.
3	the year.	LaPant Decl., ¶ 23.
4		
5	2 The only soil that Mr. LaPant moved at the subject	LaPant Decl., ¶¶ 21-22.
6	property was the result of plowing.	
7		
8	3 Mr. LaPant's plowing, cultivating, and seeding on	LaPant Decl., ¶ 24.
9	the subject property was a normal farming and	Cannata Decl., Ex A (House trans.) at 3.
10	ranching activity.	
11		
12	4 The subject property was an ongoing (<i>i.e.</i>	LaPant Decl., ¶¶ 12-16.
13	"established") farm and/or ranch at the time of Mr.	Squires Decl., Ex A at 6.
14	LaPant's farming activity on the subject property	Cannata Decl., Ex A (House trans.) at 2-3.
15	in 2011.	
16		
17	5 Mr. LaPant did not modify the hydrological regime	LaPant Decl., ¶¶ 12-16.
18	of the subject property when he prepared the soil or	Squires Decl., Ex A at 6.
19	planted wheat on portions of the subject property.	Cannata Decl., Ex A (House trans.) at 2-3.
20		
21	6 Mr. LaPant's wheat crop on the subject property	LaPant Decl., ¶ 24.
22	was not incidental to any other activity at or on the	
23	subject property.	
24		
25	7 Mr. LaPant's wheat crop did not bring the subject	LaPant Decl., ¶¶ 12-16, 24.
26	property into a new use.	Cannata Decl., Ex A (House trans.) at 4.
27		
28		

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Respectfully submitted,

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