



WAND / NC

March 28, 2013

Colorado/Gunnison Basin
Regulatory Office

RECEIVED

CERTIFIED HAND DELIVERED RECEIPT MAR 28 2013 ; and
EMAILED: 29 March 2013

Ms. Susan Bachini Nall
U.S. Army Corps of Engineers
Colorado West Regulatory Branch
400 Rood Avenue, Room 224
Grand Junction, CO 81501

Re: WAND Pit (SPK-2012-01268)

Dear Ms. Nall

On behalf of Northwest Aggregates, Inc. (NWA) and WAND, Inc. (WAND), we thank you for granting our request for additional time to provide comments for your consideration. The additional time has been helpful because it has given us an opportunity to re-evaluate your allegations and collect information that we believe is pertinent to a final resolution of this matter. As explained in more detail below, the information collected addresses the following four issues:

- a. NWA and WAND have at all times proceeded in a good faith proactive manner;
- b. The WAND Pit activities have occurred predominantly on prior converted croplands which are not Waters of the United States (WOUS);
- c. We never placed rip-rap below the Ordinary High Water Mark (OHWM) of the Yampa River; and
- d. Our efforts are motivated by a desire to protect and improve habitat.

A. NWA and WAND have at all times proceeded in a good faith proactive manner.

We want to clear up an apparent misunderstanding you have about what Mr. Green "relayed" during his site visit in March 2008. In your January 17, 2013 letter, you state that we:

were informed of the Corps' regulatory authorities and the requirement to apply for and secure a Corps permit prior to commencing any discharges within waters of the U.S. (as relayed to you during a site visit made by Nathan Green of this office in March of 2008).

To be clear, no such "project specific" information was relayed to us. Mr. Green never informed us that a Section 404 Permit was required for the proposed activities, which included the repair of the WAND farm dike (also called protective berm), and a possible gravel mining project, later

called the WAND Pit. Though separate projects, together they are often referred to as WAND Pit activities.

What is particularly troubling is that NWA and WAND were the ones who initiated the meeting. They were familiar with the general rule that a permit is required for “discharges within waters of the U.S.”, and contacted the Corps for the express purpose of obtaining project-specific input from the Corps about whether repairing the dike was a regulated or exempt activity; and, if regulated, the steps needed to apply for and secure a Section 404 Permit. Mr. P. J. Nichols, Mr. Roger Simones, and Mr. Bob Golden (representing NWA), and Mr. Gale Norman and Mr. Richard Norman (representing WAND) attended the site visit with Mr. Green. They all recall that Mr. Green was informed of the proposed farm dike repairs, that he was specifically asked if a Section 404 permit would be required for those repairs, and that he said he didn’t know. Mr. Green said that he would have to wait until the snow melted before **he** could make any final determination. See MEMO FOR WAND FILES (attached). Thus, despite the express purpose for the site visit and a direct inquiry, we received no direction from Mr. Green that a Section 404 Permit was required before undertaking the proposed activities; and, if one was required, how we needed to proceed.

In spite of Mr. Green’s representation that he would come back to determine the need for permitting the dike repairs after the snow melted, that 2008 WAND site visit was the last we heard from Mr. Green or the Corps for more than four years.

In the interim, your office had another opportunity to provide direction on the need for a Section 404 Permit in the context of NWA’s mining and reclamation plan for the gravel mine, but declined to do so. As you know, the Colorado Division of Reclamation, Mining and Safety (CDRMS) invited your office to comment on NWA’s mining and reclamation plan for the WAND Pit. See Notice Letter (attached). In that Notice letter, the CDRMS explained that:

If we do not receive your comments or any objection by the end of the public comment period the [CDRMS] Office will assume you have no objection or comment to the proposed activity.

Neither NWA nor the CDMRS received any comments from your office, let alone any suggestion that a Section 404 Permit would be required for the activities.

This silence from your office is meaningful in light of the Corps’ regulations. As you know, the Corps is required to develop a program that will:

ensure that potential applicants for permit are informed of the requirements of this regulation and of the steps required to obtain permits for activities in waters of the United States . . . Whenever a district engineer becomes aware of plans being developed by either private or public entities which might require permits for implementation, he should advise the potential applicant in writing of the statutory requirements and the provisions of this regulation.

33 CFR 325.10 (emphasis added).

In this case, your office had two opportunities to provide written advice on the requirements and permitting steps related to the proposed activities at the WAND Pit – after Mr. Green’s site visit in 2008, and after the CDRMS specifically invited your comments on NWA’s mining and reclamation plan. Despite these opportunities, we didn’t receive anything from your office. You are the regulator, and Mr. Green of your office was familiar with the site and the proposed activities. The most rational interpretation of your silence under these circumstances is that you had concluded that no Section 404 permitting was required for the proposed activities.

This conclusion is consistent with WAND’s independent assessment of the Section 404 requirements pertaining to the berm that protects WAND’s farmland from Yampa River overflows and encroachment. Prior to making those repairs, Mr. Albers reviewed the statute and regulations and concluded that the repairs were exempt based on the following language:

... the discharge of dredged or fill material ... (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; ... is not prohibited by or otherwise subject to regulation under this section...

33 U.S.C. 1344(f)(1)(A)

As part of its normal farming and ranching activities, WAND and its family predecessors have constructed and repaired protective berms for more than 70 years. In some cases, those repairs were extensive and involved reconstruction/relocation of large sections of the dike to repair the damage caused by the encroaching Yampa River. At the time of the most recent repairs (March 2010), the dike was still serviceable but needed to be pulled back further from the River and reconstructed to better protect WAND’s farmland. Importantly, this protective berm has also provided, and still provides, soil conservation benefits by reducing the erosion of arable soil by the River’s unrestricted encroachment onto WAND’s farmland.

WAND also constructed an access road to facilitate repairs to the protective berm and to gain additional access for its farming operations. Again, Mr. Albers concluded that no Section 404 permit was required for this road because it was fundamentally a “farm road” and the “construction or maintenance of farm roads” is also exempt under the statute. *See* 33 U.S.C. 1344(f)(1)(E).

As for the gravel pit operations, NWA relied upon the Corps’ silence in response to the CDRMS’s request for comments. All of the proposed mining activities were disclosed in the application and your office had the opportunity to review and comment on them, but said nothing.

It wasn’t until more than 4 years after the 2008 site visit and 2 1/2 years after the WAND Pit activities commenced that your office expressed any interest in those activities. In response to that interest, we freely accommodated your requested site visit of August 23, 2012. During that site visit, we asked why the Corps had just now taken an interest in the activities when, for

example, it had not provided any input on NWA's mining and reclamation plan. Surprisingly, Mr. Green told us that the Corps' silence on that plan may have been a mistake.

Significantly, Mr. Green did not tell us that we had violated any Section 404 requirement during the August 23, 2012 site visit. Instead, he suggested that certain WAND Pit activities may need permitting which was followed by a discussion about potentially using an after-the-fact (ATF) Permit to resolve those potential issues. In response, NWA voluntarily undertook the work to prepare and submit an application for such a permit before your office even notified us in writing of its initial findings. During preparations, NWA's consultant left a voicemail for Mr. Steve Moore of your office, for the purpose of seeking advice about the permit application. Mr. Moore never called back. Nevertheless, NWA's consultant proceeded without Mr. Moore's input, finalized the ATF Permit application, and submitted it. In response to that application, you specifically expressed an appreciation for this "pro-active step" in resolving the issues identified by Mr. Green. See your December 6, 2012 letter.

Under these circumstances and others outlined in IME's "Supplemental Report" (attached), we do not believe there is any reasonable basis for characterizing our actions as anything but cooperative and in good faith. Thus, the suggestion in your January 17, 2013 letter that we have "knowingly and flagrantly" violated any law or direction from the Corps came as a surprise. Therefore, we ask that, at your earliest convenience, you identify for us the basis for such an assertion, and forward to us any documents in support thereof.

B. The WAND Pit activities have occurred predominantly on prior converted croplands which are not WOUS.

In our haste to proactively address the potential permitting issues raised by Mr. Green during the August 23, 2012 site visit, NWA's consultant overlooked an underlying characteristic of the land on which the activities have taken place. Specifically, Mr. Crofts did not account for the fact that most of the land on which the WAND Pit activities occurred is Prior Converted Cropland (PCC). That is, as documented in the WAND PARTIAL AGRICULTURAL SUMMARY prepared by Mr. Albers (attached), this land: a) was cropped prior to December 23, 1985 with an agricultural commodity (hay); b) was cleared and manipulated to make it possible to plant that crop; c) has continued to be used for agricultural purposes (haying and grazing); and d) does not flood or pond for more than 14 consecutive days during the growing season. See, e.g., Wetland Fact Sheet - Prior Converted Cropland, Vermont NRCS (attached). Further, the local NRCS office supports the finding of PCC classification for the WAND land. See the NRCS letter (attached).

As you know, PCC is specifically excluded from the definition of WOUS. See 33 CFR 328.3(a)(8). As a result, the delineation presented in Mr. Crofts' October 4, 2012 submittal significantly overstates the amount of "jurisdictional" wetlands. His revised delineation is described in IME's "Supplemental Report" (attached). Importantly, all of the repairs to the protective berm and the entire WAND Pit gravel mine area occur on PCC.

Additionally, Mr. Crofts did not account for the fact that repairs to the protective berm are, and have been, a normal farming and ranching activity of WAND for more than 70 years, as explained earlier.

When these factors (Prior Converted Cropland, and normal farming and ranching activities) are incorporated into Mr. Crofts' analysis, the only possible "regulated" disturbance to "jurisdictional" wetlands caused by the WAND Pit activities is the temporary mine road (former farm road) that provides access to the area. See IME's "Supplemental Report" (attached). However, both the farm road and the temporary mining road are exempt from Section 404 regulation. See 33 USC § 1344(f)(1)(E). Thus, none of the activities for the WAND Pit, including the farm dike repair, require a Section 404 permit.

C. We never placed rip-rap below the OHWM of the Yampa River.

We assume that the allegation in your December 6, 2012 letter regarding placement of rip-rap below the OHWM (also referred to as "in the river") "of various portions of a 1,300 linear-foot section of the north bank of the Yampa River" stems from Mr. Green's recollection of seeing rip-rap material in the Yampa River during his August 23, 2012 site visit. We did not place that or any other material in the river.

The protective berm was repaired (pulled back from the River and upgraded with rip-rap) in accordance with construction Cross-Section C-C ("Farm Dike Specs", attached). As you can see, the toe of the berm is set back from the edge of the river by approximately 15 feet. And, as documented by pictures taken during the repairs (one such, "Farm Dike Reconstruction", attached), this buffer zone between the river's edge and the toe of the protective berm was maintained during the repair effort. The rip-rap was placed on the face of the protective berm; not in the buffer zone and not in the river. Further, as documented in IME's "Supplemental Report", the rip-rap was not placed "below the OHWM" as it existed in 2010 (before the spring runoff) when the repair occurred. Note that the OHWM in 2010, before the spring runoff, was the same as the OHWM in 2009, after the spring runoff.

The most likely explanation for rip-rap being in the river now is that, as has occurred in the past, the river continues to migrate to the north toward WAND's cropland in this reach of the river. This migration can be seen in the three attached edited aerial photos. Thus, since reconstruction of the protective berm in 2010, the river has encroached into the original buffer zone such that the river's edge is now at, or has undercut, the toe of the protective berm in certain places which, in turn, has allowed rip-rap to slough into the river.

During his August 23, 2012 site visit, Mr. Green appeared to realize that such encroachment and undercutting by the River could explain the presence of the rip-rap material in the river, when he remarked (paraphrasing) that he could see how someone would argue that nothing was discharged into the river. Whatever the cause, we know that we never placed any rip-rap below the OHWM as it existed in 2010 when the repairs occurred.

D. Our efforts are motivated by a desire to protect and improve habitat.

As a final matter, WAND would like to describe a small part of its overall plan for the WAND property, because we believe that our environmental interests align with those of the Corps. The protective berm is intended to perform two functions – protect agricultural cropland, and reduce

sediment loading to the Yampa River that would be caused if this cropland eroded further by the river's continued migration to the north. As for the WAND Pit, it will be reclaimed after mining as an open water wildlife habitat area of approximately 10 acres. We are trying to protect and improve this area. NWA's mining makes this possible. The income generated from the mining enables WAND to 1) repair the protective berm, 2) dedicate the mined area as open water wildlife habitat, and 3) otherwise increase and improve wetlands and wildlife habitat on the property. For years, we've documented these long term goals (and our corresponding contacts, which include the Yampa Valley Land Trust and the Colorado Division of Wildlife) in our corporate meeting minutes and related correspondence.

Thank you for your consideration of our comments. We remain committed to working with you to address your concerns. Toward that end, we believe that a meeting to discuss these matters in more detail would be useful. We've prepared a revealing PowerPoint presentation showing the history of the Yampa River's encroachment and WAND's efforts to maintain its protective berm. We would like you to see that presentation, and we ask that you contact us to set up a time.

We look forward to hearing from you in the near future.

Sincerely,

Northwest Aggregates, Inc.

By: 

Mr. Peter J. Nichols, COO
2930 East US Highway 40
Craig, CO 81625

WAND, Inc

By: 

Mr. Ted L. Albers, President
701 Haughey Road
Craig, CO 81625

Copy (without attachments) to:

Office of U S Congressman Scott Tipton

Copy (with attachments) to:

Ms. Michelle Heldmyer, Assistant U.S. Attorney, 1225-17th Street, Suite 700, Denver, Colorado 80202; and Michelle Heldmyer, Assistant U. S. Attorney, U. S. Attorney's Office, 205 N. 4th Street, Suite 400, Grand Junction, CO 81501

Ms. Monica Heimdal and Mr. Richard Clark, 8ENF-W, Water Technical Enforcement Program, Office of Enforcement, Compliance and Environmental Justice, U.S. Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129

✓ Mr. Dustin Czapla, Colorado Department of Natural Resources, Division of Reclamation, Mining and Safety, 101 South 3rd, Suite 301, Grand Junction, CO 80501

Ms. Patty Schrader Gelatt, Western Colorado Supervisor, U.S. Fish and Wildlife Service, Ecological Services, 764 Horizon Drive, Building B, Grand Junction, CO 81506

Mr. William Atkinson, Colorado Parks & Wildlife, 925 Weiss Drive, Steamboat Springs, CO 80477

Mr. Jerry Hoberg, Moffat County Planning Department, 221 West Victory Way, Suite 110, Craig, CO 81625

Mr. Kent Crofts, IME, P.O. Box 270, Yampa, CO 80483

MEMO FOR WAND FILES

March 20, 2008

Dear Wand Members,

Updating you on the proposed lease of gravel.

Yesterday, March 29, 2008, the Corp. of Engineers' man, along with P.J. Nichols, Roger Simones, and Bob Golden, of Northwest Redi-Mix and a State official, met with Gale and Richard Norman to look at the proposed Dike repair that both Northwest Redi-Mix and Wand were planning to do. The snow is deep this year down at Wand, but Rich brought his Snowcat down so they could see where the dike has been washed out. They took pictures, I guess to confirm that we had had a dike there.

Here is where we ran into the Government Red Tape. We would like to get a dike in before the high water comes. The Corp of Engineers man said he would have to see what vegetation is on the ground to confirm whether it is a wetlands or something else, and what effect having a dike would make. This sounds pretty stupid to me, since we have had a dike in, until it washed out - so surely "replacing the dike" wouldn't change anything.

The Corps of Engineers guy said he would have to wait until the snow melts so he can determine the status of the place. SO, this makes it impossible to get a dike in before high water this year. As I understand it, the determination of the "status" will determine how we can replace the dike.

By the way, we had made an appointment with Attorney Sherman Romney to go over the lease that Redimix had proposed, but cancelled the appointment when we found out that we can't even consider the gravel sales until all this nonsense is settled with the Corp. of Engineers.

Gale + Lisa

STATE OF COLORADO

DIVISION OF RECLAMATION, MINING AND SAFETY

Department of Natural Resources

1313 Sherman St., Room 215

Denver, Colorado 80203

Phone: (303) 866-3567

FAX: (303) 832-8106



Bill Ritter, Jr.
Governor

James B. Martin
Executive Director

Notice of 110 Construction Materials

Reclamation Permit Application Consideration

DATE: February 24, 2010

TO:

U.S. Army Corps of Engineers
Colorado/Gunnison Basin Office
400 Rood Avenue, Room 142
Grand Junction, CO 81501-2563

FROM:

Sub for GRM
G. Russell Means, Environmental Protection Specialist

RE:

Northwest Aggregates Inc., Wand Pit, File No. M-2010-007

Please be advised that on February 24, 2010, Northwest Aggregates Inc., whose address and telephone number are 2930 E. US Hwy 40 Suite 4, Craig, CO 81625; (970) 824-5252, filed an application to conduct extraction of construction materials and reclamation, at or near Section 4, Township 6N, Range 90W, 06th Prime Meridian, in Moffat County. Please be advised that the permit area may be located in more than one Section, Township, and Range. The application decision is scheduled for March 26, 2010.

A copy of the application is available for review, unless you receive a CD, at the Moffat County Clerk & Recorder's office and at the office of the Division of Reclamation, Mining and Safety, Room 215, 1313 Sherman Street, Denver, Colorado 80203.

If you desire to make comments or objections of the mine plan and/or the reclamation plan, they must be submitted within ten (10) days of the date of the newspaper public notice to be considered in the application review process by the Division. You should contact the applicant for the newspaper publication date. If we do not receive your comments or any objection by the end of the public comment period, the Office will assume you have no objection or comment to the proposed activity.

WAND PARTIAL AGRICULTURAL SUMMARY

I've made an abbreviated summary and assessment of the agricultural history of the WAND, Inc property at 4050 E Highway 40, Craig, CO.

I was able to summarize and assess the history by using available information, primarily from the following sources.

1. Information from WAND property owners, dwellers, users, and a consultant; all with pertinent knowledge dating from the late 1930s to the present.
2. Selected records from WAND and Northwest Aggregates (NWA) files, dating from the 1940s to the present. These records include photos, a Soil Conservation Service Land Use Map, correspondence, a vegetation drawing, and an irrigation flow rate table.
3. Various relevant USDA products, including multi spectral satellite photos and the Moffat County Area Soil Survey mapping.
4. Numerous satellite photos and high resolution aerial photos dating from 1968 to 2011.

Key findings and conclusions from my assessment

1. WAND property owners have farmed the property continuously from the late 1930s to the present time.
 - a. The WAND property was used exclusively for family farming and related activities until 2009, when the owners allocated about 10 acres of cropland for gravel mining.
 - b. Mining proceeds were to pay for the farm's dike repairs and to finance follow-on wetland, waterfowl, and wildlife development and conservation projects planned for the property.
2. WAND property owners have initiated periodic contacts with the SCS, now NRCS. These contacts generally have sought SCS advice for issues including:
 - a. clearing additional areas for cropping,
 - b. contouring and irrigating the croplands, and
 - c. constructing, repairing, and maintaining dikes to protect the croplands.
3. Along with annual cultivating, harvesting, and pasturing croplands, maintaining soil protective dikes is a crucial part of on-going farming operations on WAND property.
 - a. In concert with soil and cropland conservation goals of the NRCS, these dikes combat adverse effects from river flooding.
 - b. During high runoffs, typical WAND farm activities include daily dike inspections to identify and repair structure degradations usually caused by erosion or animals.
4. Historical aerial photographs clearly show that footprints from the 2009-2010 WAND property dike and gravel mining work rest entirely on Prior Converted Cropland, with the exception of a farm road that was later enlarged to accommodate the movement of mining equipment for Northwest Aggregates' gravel mining operation. These photos

and additional information sources lead to related conclusions about much of the WAND property, including the footprint areas, as follows.

- a. The land was cleared and mechanically worked to make planting a crop possible.
 - b. Subsequently, starting decades prior to 23 December 1985, the property has been cropped with an annually tilled agricultural commodity; typical activities as follows.
 - 1) Protect the croplands from water borne debris and excessive Spring flooding by performing daily inspections and as needed maintenance of the farm's dikes.
 - 2) Use a spring toothed harrow to work the croplands and other pastured areas.
 - 3) Mechanically harvest the crop(s) for use both on and off the property.
 - 4) Pasture the croplands and other areas after harvesting.
 - c. Also subsequently, the land has been used without interruption for agricultural purposes, primarily for haying or grazing.
 - d. For most of the croplands and for the footprint areas in particular, no surface water pools for greater than 14 consecutive days during the growing season.
5. In March of 2007, Mr T L Albers contracted with Mr P J Nichols of NWA for NWA to repair the damaged, but currently serviceable, WAND farm dike. Work was to begin after Mr Albers could secure financing for those repairs. This initiative eventually led to a meeting and tour, among NWA, WAND, and Government representatives, of the farm dike location on 29 March 2008.



Ted L Albers
President, WAND, Inc

United States Department of Agriculture



Natural Resources Conservation Service

356 Mountain View Drive, Suite 105

Colchester, VT 05446

Phone: (802) 951-6795

Fax: (802) 951-6327

Wetland Fact Sheet - Prior Converted Cropland

Background

The Swampbuster provision of the 1985 Farm Bill was aimed at reducing the conversion of wetlands for agricultural purposes. If you drain, fill, level, clear stumps or otherwise alter a wetland you will lose eligibility for U.S. Department of Agriculture (USDA) program benefits.

Prior Converted Cropland Exemption

Areas that qualify as Prior Converted Cropland (PC) are exempt from the Swampbuster provision of the Farm Bill. These areas can be further drained, cropped or manipulated without loss of eligibility for USDA program benefits. Prior converted croplands that are certified by NRCS are also exempt from wetland regulations administered by the Army Corps of Engineers and EPA (Section 404 of the Clean Water Act). However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA.

What it Takes for Farmland to Qualify as Prior Converted Cropland

Farmland must meet all of the following criteria for it to be designated as Prior Converted Cropland:

- Cropped prior to December 23, 1985 with an agricultural commodity (an annually tilled crop such as corn);
- The land was cleared, drained or otherwise manipulated to make it possible to plant a crop;
- The land has continued to be used for agricultural purposes (cropping, haying or grazing)
- The land does not flood or pond for more than 14 days during the growing season

Woodland, pasture and hayland without a history of annual tillage and cropping do not qualify as Prior Converted Cropland.

How to Get Your Land Designated as Prior Converted Cropland

Farmers can request a Certified Wetland Determination from their local NRCS office for areas they want to have designated as Prior Converted Cropland. This request must be in writing using Form NRCS-CPA-38, Request for Certified Determinations. Determinations should be requested for any areas where manipulations such as draining or land clearing are planned.

NRCS will use a variety of tools such as cropping history records, aerial photography, maps and an on-site evaluation to determine if the area qualifies as Prior Converted Cropland.

Please contact your local NRCS office for further information. You can also visit us on the web at: www.vt.nrcs.usda.gov.

The Natural Resources Conservation Service provides leadership in a partnership effort to help people conserve, maintain, and improve our natural resources and environment.

An Equal Opportunity Provider and Employer

United States Department of Agriculture



Craig Field Office
USDA Service Center
145 Commerce Street
Craig, Colorado 81625

Phone 970-824-3476

<http://www.co.nrcs.usda.gov>

Fax 970-824-7055

March 11, 2013

TO: Ted Albers

SUBJECT: Preliminary determination on Prior Converted Cropland for the WAND property

Ted, I'm writing this today as documentation for the conversation we had on March 5, 2013. At that meeting we discussed what constitutes Prior Converted Cropland in regards to complying with section 404 of the Clean Water Act. The major items discussed are as follows:

1. The WAND property has been has been farmed continuously from the late 1930's to present time.
2. The Soil Conservation Service (SCS) aided in advising with: contouring, irrigation infrastructure, construction and maintaining dikes to protect farmland.
3. The fields have been annually cultivated, harvested and pastured.
4. You discussed the maintenance schedule for the dikes and how they are an integral part of the farming operation.
5. You presented to me historical aerial photography that clearly demonstrates the fields were indeed cropland prior to December 23, 1985.
6. You discussed that the fields are not flooded or ponded with water for longer than 14 consecutive days during the growing season.
7. You presented mapping data from an Environmental Engineer, that concluded only 5% of area were potential wetlands and that 5% lies on Prior Converted Cropland.

The facts as you have presented them to me indicate the fields are Prior Converted Cropland. The NRCS has the lead responsibility for indentifying wetlands on agricultural lands for purposes of implementing USDA's Swampbuster program.

Sincerely,

Justin Shirley
District Conservationist

Farm Dike Specs

NW1/4SW1/4 SECTION 4, T6N, R90W

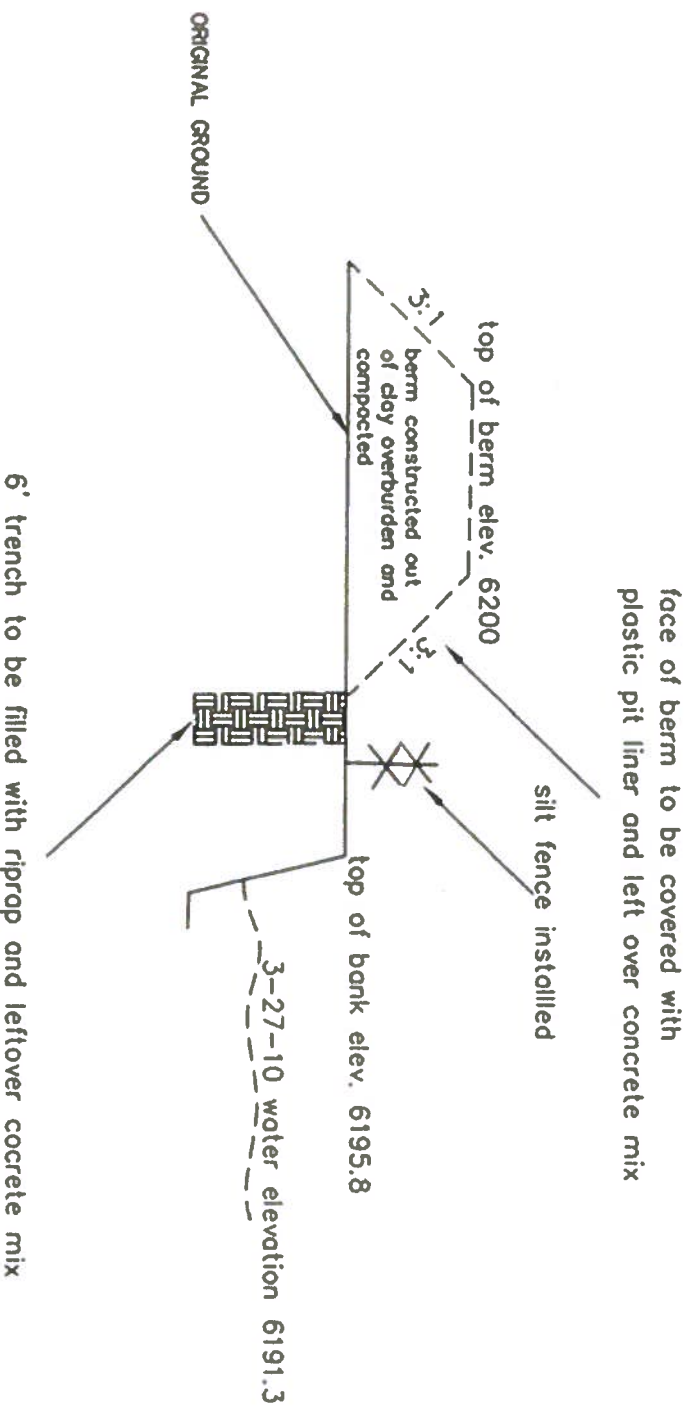
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EXISTING BERM

NW Aggregates – WAND pit

CROSS SECTION C – C

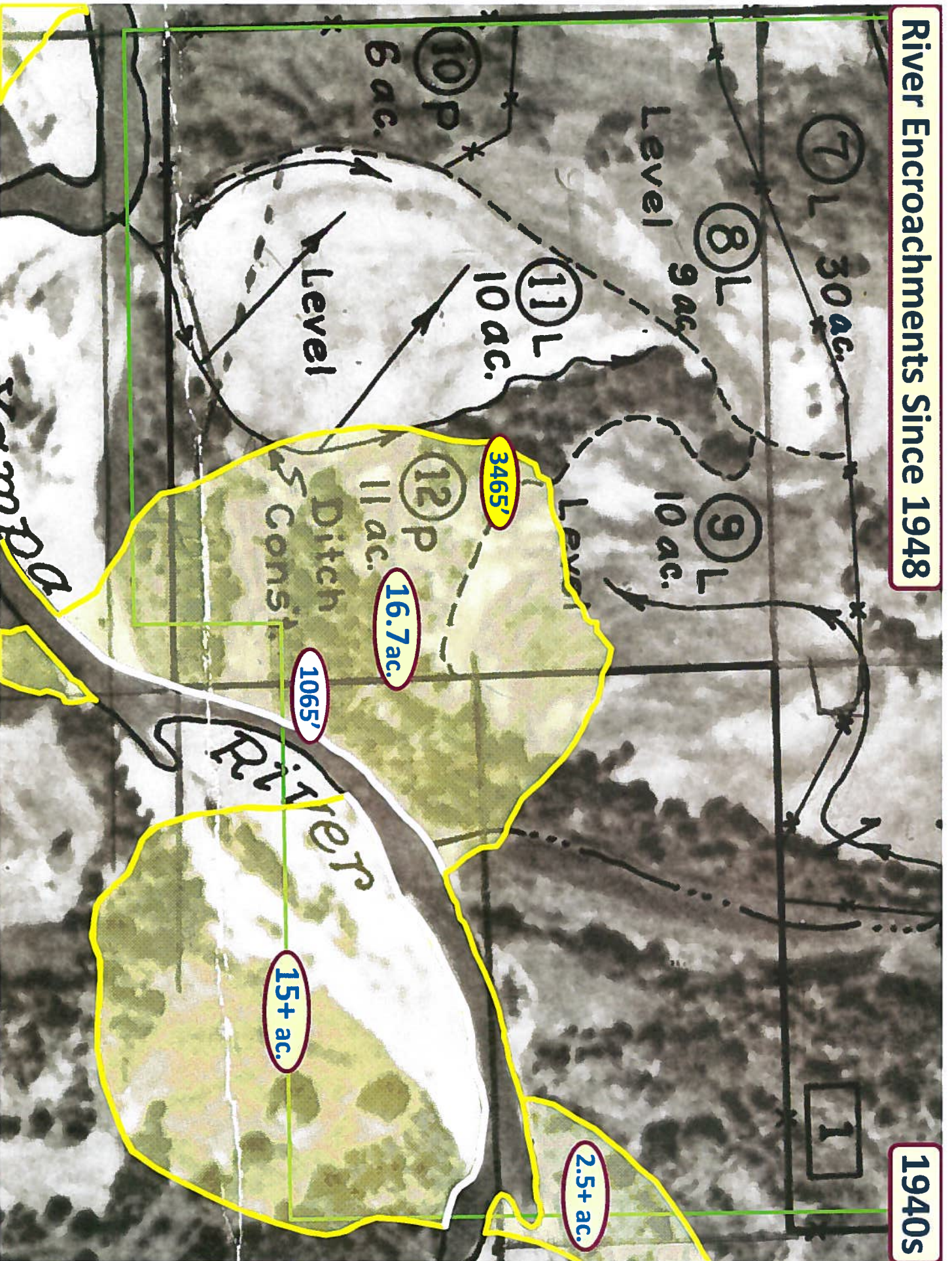
100 year flood plain elevation 6197



Farm Dike Reconstruction

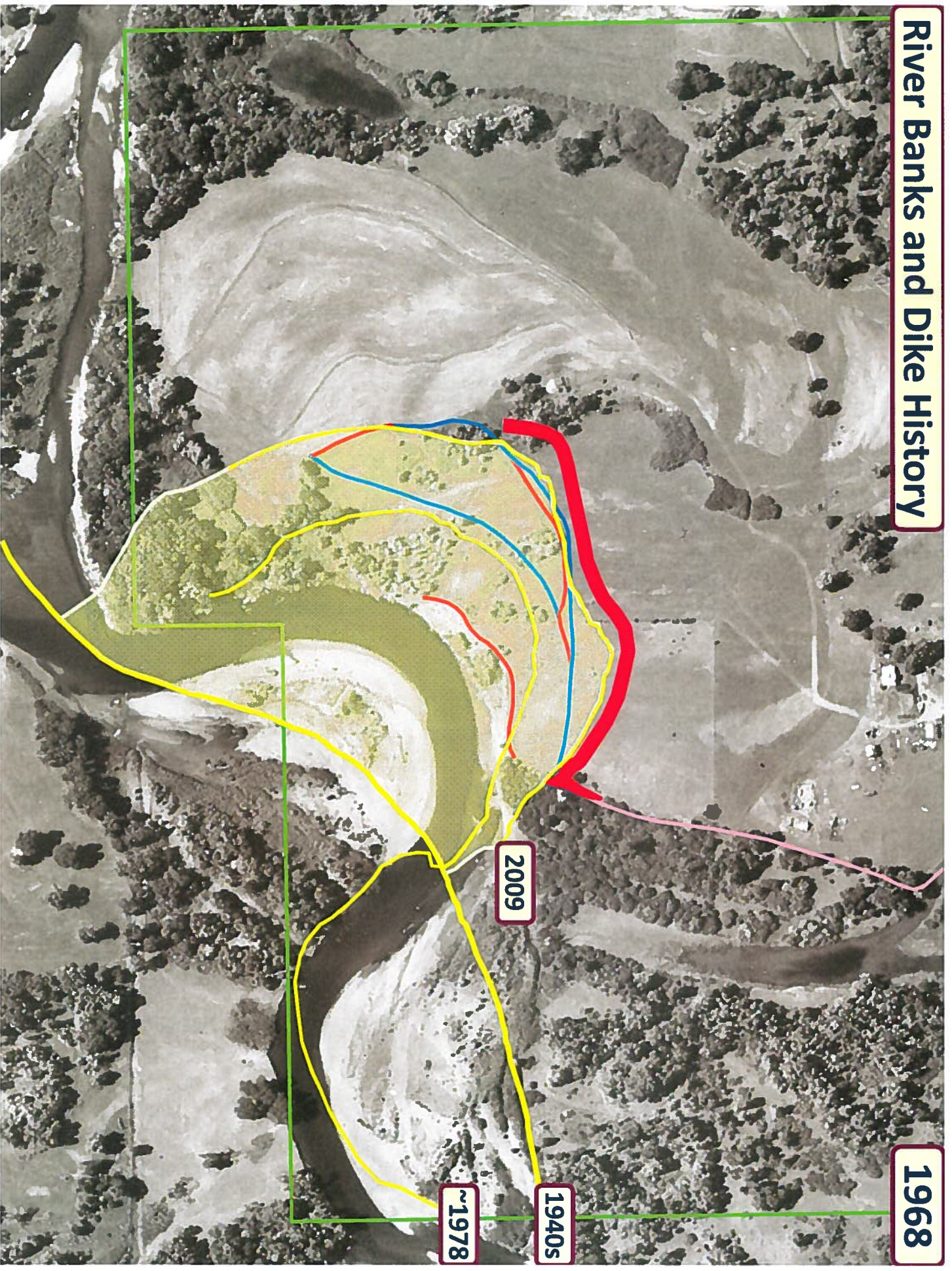


River Encroachments Since 1948

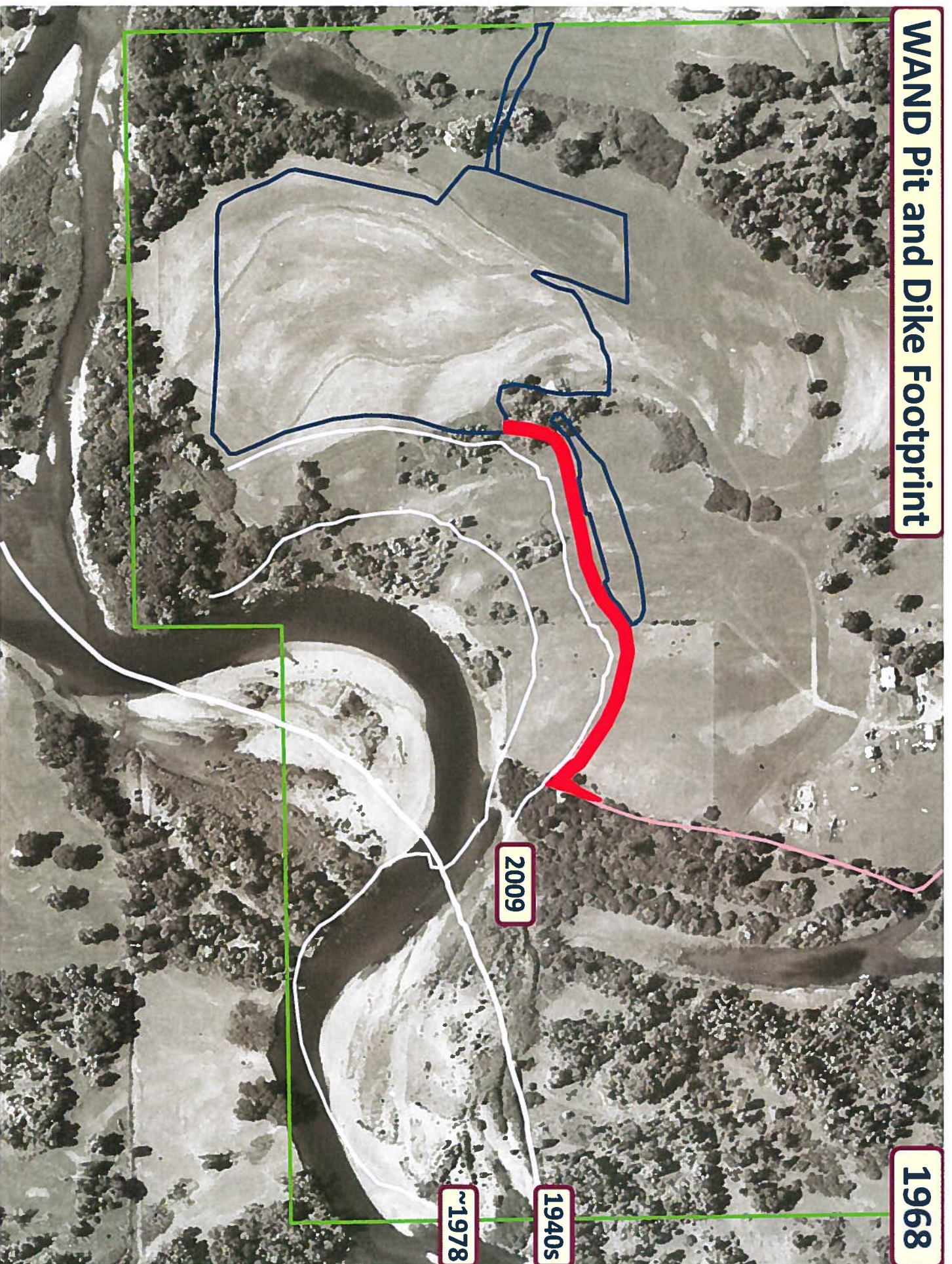


1940s

River Banks and Dike History



WAND Pit and Dike Footprint



IME

SUPPLEMENTAL REPORT

As requested, IME is providing a supplemental report regarding the construction activities at the WAND Gravel Pit located near Craig, CO, being operated by Northwest Aggregates, Inc. (NWA) and owned by WAND, Inc.

As an initial matter, we emphasize that, after a more detailed reevaluation of the available information as well as the finding of new information, we now conclude that there are **no impacts** to any jurisdictional waters at this site from a regulated activity. Our original impact numbers were in error because, as explained in more detail below, we overlooked the presence of “prior converted cropland” (PCC) at this site and the applicability of “agricultural” and “temporary mine road” exemptions.

We have also determined through a detailed reevaluation of the 2009 NRCS aerial photograph, which was not examined previously, as well as several photographs taken during the actual reconstruction of the berm in early 2010, that the reconstruction along the eastern portions of the Yampa River did not result in materials of any kind being placed below the ordinary high water mark (OHWM) of the Yampa River. The presence of rip-rap material below the current OHWM, if any, is due to continued erosion and bank cutting by the river since the completion of the reconstructed berm.

A. No Impacts from a regulated activity.

After a careful review of our ATF Permit Application, COE regulations and guidance documents, and along with new information provided by NWA and WAND, the calculated wetland impacts found in Permit Table 1, WAND Gravel Pit Waters of the U.S. Impact Summary, have been revised, from an estimated 33,351 SF of impacts to **no impacts** from a regulated activity. The reasons for these changes are documented in the following discussion.

1. Agricultural Exemptions: According to ***33 CFR 323.4 Discharges not requiring permits***, certain agricultural activities are not regulated and do not need to be permitted. Therein it states: “*any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404: (1)(i) Normal farming, silvicultural and ranching activities, such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . (ii) To fall within this exemption, the activities specified . . . must be part of an established (i.e., on-going) farming, silvicultural, or ranching operation . . . [or] (2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees . . .*”

Consultation with the USDA Natural Resource Conservation Service (NRCS) and USDA Farm Service Agency (FSA) offices in Craig, reveals that their records prior to 2009 were destroyed in a fire. However, WAND has personal knowledge and records documenting that farming and

ranching operations have been conducted continuously by their family on this site since the late 1930's, and probably by others as early as the 1890s when the property was originally homesteaded. For example, Mr. Gale Norman, nearly 90 years old, a longtime resident on the property and formerly a longtime member of the WAND Board of Directors, has personal knowledge that his father, Howard Norman constructed the first berm along the Yampa River slough in about 1940, with an additional berm along the river about 20 years later. These berms were constructed with the technical assistance of the USDA Soil Conservation Service (SCS, now NRCS). Mr. Norman also recalls that from about 1971-74, WAND reconstructed the river berm, incorporating extensive input and direction from a district conservationist at the local SCS office in that reconstruction. A review of the WAND files, reveals that in the summer of 1971, three WAND board members met with Mr. Harlan Ross, the local SCS Engineer and obtained guidance for repairing the previously constructed berm. In addition, WAND records include decades of tax notices from the Moffat County Assessor's Office wherein this property has always been taxed as "agricultural" property.

The history of the ranch and berms, and the fact that the berms were originally constructed and maintained in concert with "*water and soil conservation practices*" designed by the SCS, demonstrates that the construction and maintenance (including repairs and reconstruction) of the berms was an ongoing and integral part of WAND's normal farming and ranching activities. Thus, reconstructing the berm in 2010 was an exempt activity under 33 CFR 323.4(a)(1) and (2). This means that the estimated wetland impacts found in Table 1, WAND Gravel Pit - Waters of the U.S. Impact Summary, wherein an estimated 5,374 SF of wetland impacts were associated with Permanent Wetland Impact Site D were not impacts from a regulated activity that needed permitting.

2. Prior Converted Cropland: According to 33 CFR 328.3(a)(8) "*Waters of the United States do not include prior converted cropland.*" The exclusion of prior converted cropland (PCC) as being a jurisdictional water has been in place since 1993, when this exclusion was adopted jointly by the COE and EPA (58 FR 45007-45039). In the initial rule making, the COE and EPA stated that "*PC cropland is defined by SCS, as areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. PC cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothold or playa wetlands*" (58 FR 45032). The COE and EPA stated that "*by definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions and values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purpose of the CWA.*"

As stated above, farming and ranching operations have been conducted continuously on this site since the late 1930s, long before the regulatory cutoff date of December 23, 1985. Evidence of those operations appears in the aerial photographs previously submitted. Additionally, a review of the existing plant species demonstrates that the farming operations have resulted in a domination of introduced herbaceous pasture species; there is very little woody vegetation. This

is demonstrated by a comparison of the potential native plant species against the observed species. Table 7, Ecological Sites and Characteristic Native Vegetation found in the NRCS Moffat County Soil Survey lists three NRCS soils mapping units associated with this site: Soil Mapping Units 5, 44 and 70. The potential native species composition of these soils mapping units is presented in Table 1, NRCS Soils Mapping Units and Plant Species Composition which is attached. The actual plant species composition in the cropped areas is found in Table 2, Percent Plant Cover and Species Composition of Wetland Sample Plots Located in Prior Converted Cropland Areas which also is attached. This summary was prepared based upon the vegetation characteristics of the 19 sample plots sampled in this area in September 2012, of which eight of these plots were located in areas corresponding to the cropped areas. The locations of these eight sample plots are shown in the ATF Permit Application.

This comparison clearly documents that the natural vegetation on the cropped areas has been modified, with essentially a complete loss of woody vegetation, as well as a pronounced conversion from native plant species to herbaceous introduced agronomic plants, including Timothy (PHLPRA), Quackgrass (AGRREP), and Smooth Brome grass (BROINE). The ecological potential of the vegetation of these areas was originally dominated entirely by native plant species. However, on the cropped areas, introduced plant species, typically having higher forage values and productivity, now account for 63.96 percent of the existing vegetation. In their undisturbed configuration, all of the vegetal characteristics of the four NRCS Ecological Sites were dominated by a diverse mixture of native plants; now they are dominated by introduced species and in some instances are dominated by a single plant species, further evidence that the agricultural practices on this site have significantly modified the area so that it no longer exhibits its natural wetland vegetation. The reconstructed berm and the gravel pit are located in these cropped areas.

In addition to the significant changes in vegetation, there has been a significant change in hydrology as result of human activity on this site. Examination of an aerial photograph generated by the SCS in about 1948, which was a part of the Farm Management Plan and which is entitled "Land Use Map," clearly shows that virtually all of the areas corresponding to the gravel pit and the reconstructed berm areas were within locations that the SCS recommended be leveled and that new irrigation ditches be constructed in these areas. WAND has personal knowledge that these fields were indeed leveled, in many instances several times, as recommended by the SCS. In addition, the annual husbandry practices employed on the site consisting of harrowing and tillage have all significantly modified the hydrological conditions of the site. Given these facts, the cropped areas qualify as prior converted cropland (PCC) and are therefore not waters of the United States. This conclusion has been supported by the local NRCS office. See Letter from Justin Shirley dated March 11, 2013 (attached to NWA/WAND letter to Ms. Nall). Since the reconstructed berm and gravel pit were located in these PCC areas, those activities were not regulated by Section 404.

As such, the original estimated wetland impacts found in Table 1, WAND Gravel Pit - Waters of the U.S. Impact Summary need to be changed. All of the Temporary Wetland Impacts associated with wetland impact sites Ca and Da, as well as Permanent Wetland Impact Site D (18,854 SF) correspond to PCC areas and are not jurisdictional wetland impacts. This means that neither the reconstructed berm nor the gravel pit was a regulated activity that needed

permitting under Section 404 of the CWA.

3. Placement of Rip-Rap Below the Ordinary High Water Mark of the Yampa River. The COE asserts in their December 6, 2012 letter that rip-rap was placed “below the Ordinary High Water Mark (OHWM) of various portions of a 1,300 linear-foot section of the north bank of the Yampa River, including wetlands.” NWA and WAND deny placing any rip-rap below the OHWM of the Yampa River.

In the October 4, 2012 ATF Permit application, it was estimated that two potential stream sites had been impacted, Permit Stream Impact Sites A and B, totaling 2,491 SF of estimated impacts. However, these impacts were calculated in error. While we had a copy of the Colorado Division of Reclamation, Mining and Safety (CDRMS) permit cross-section involving berm reconstruction, which is referenced in the ATF Permit application as “Cross-Section Plan Map - Proposed Gravel Pit - Northwest Aggregates Inc. - Wand Pit” and “Existing Berm - Cross Section C-C”, we were unable to confirm through photographic evidence whether any actual fill had been placed below the then current OHWM of the Yampa River. However, during a further examination of the NWA files, a series of photographs which were taken during the actual berm reconstruction were located, specifically showing that the two potential stream impact areas originally identified in the ATF Permit application were not water impact sites at all.

We also very carefully reexamined the disturbance boundaries based upon the August 2009 USDA aerial photograph, taken just a few months before the berm was reconstructed. The 2009 aerial photograph was not used in evaluating the probable impact limits for the ATF Permit application. This reevaluation revealed that the stream impacts calculated for that application were incorrect. Based upon this reevaluation, it can be determined that there were no discharges of fill materials into the Yampa River during the reconstruction of the berm. Therefore, Permanent Stream Impact Sites A and B do not exist.

The CDRMS permit approval required that a vegetative buffer zone of approximately 10 to 15 feet in width would remain between the toe of the reconstructed berm and the top of river bank which was above the then existing OHWM for the river as shown on the attached 2009 satellite photo. . NWA and WAND confirm, and the attached cross section specification and four photographs show, that this was the design used and followed to reconstruct the berm.

Since NWA and WAND know that no rip-rap was placed into the Yampa River during the berm reconstruction activities, the current presence of rip-rap material in the Yampa River, if any, can most likely be explained by the fact that the River has eroded away the 10-15 foot buffer zone to the point that some rip-rap fell over the encroaching River bank. During the August 23, 2012 site inspection, Mr. Nathan Green verbally implied that he could see where NWA and WAND could believe that no rip-rap was ever placed into the Yampa River if the river had eroded away the buffer zone.

Finally, we reevaluated the location of the OHWM for the Yampa River in this area as it existed at the time of the berm reconstruction. As indicated on the enclosed 2009 satellite photo, the berm reconstruction including placement of rip-rap occurred outside of the then existing OHWM. Therefore, there are no Permanent Stream Impacts associated with this action.

4. Farm Road - Temporary Mine Road: In the ATF Permit Application it was calculated that the construction of the mine road, resulted in a total of 10,986 SF of impacts to jurisdictional wetlands, corresponding to wetland impact sites A (4,283 SF) and B (6,703 SF). Upon further reevaluation of these impacts, it has been determined that all of these impacts correspond to impacts associated with the construction of a farm road, constructed in the summer of 2009, and the enlargement of that farm road to accommodate the temporary movement of mining equipment. Although neither of these roads were constructed entirely on PCC, they do not need a Section 404 permit because they are exempt under 33 CFR 323.4(a)(6) as described in more detail as follows:

a. 33 CFR 323.4(a)(6)(i)

Permanent roads (for farming or forestry activities) temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U. S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions.

The initial construction activities on the farm road commenced in the summer of 2009 and are clearly evident as being ongoing in the August 2009 USDA aerial photograph which is attached. The construction work on this farm road was completed in the fall of 2009. The purpose of constructing the farm road was to provide access to the southern and southwestern portions of the WAND, Inc. property which provided better access for reconstruction of the berm and other agricultural activities. Movement of the equipment and materials needed to reconstruct the berm along the existing North farm road would have resulted in approximately 22,000 SF of farmland disturbance. In contrast, the amount of wetland impacts associated with the construction of the new farm road resulted in a total of 2,317 SF and 3,405 SF (total equals 5,722 SF) of impacts associated with Wetland Impact Sites A & B respectively.

In the ATF Permit Application, it was documented how NWA initially attempted to obtain the CDRMS mining permit with a smaller road, but the CDRMS required that the farm road be enlarged to be above the 100-year floodplain elevation, which resulted in more disturbance of this site. The enlargement of the farm road, from an average width of 20 feet to a new average width of 40 feet resulted in an increase in wetland impacts as shown in Table 1, WAND Gravel Pit, Waters of the U.S. Impact Summary, of 5,264 SF over and above the 5,722 SF of impacts due to the farm road, for a total of 10,986 SF.

The gravel pit is a seasonal operation; gravel cannot be mined on a year round basis. Each year the mining excavation equipment is moved onto the site in the spring once the snow has melted and excavation occurs until the fall, when the winter snows arrive or sufficient reserves have been stockpiled to sustain the gravel making operations over the winter months. Since the mining equipment must be moved on the site in the late spring and off the property in the fall, the use of the road for the movement of mining equipment is temporary.

Importantly, the roads were combined. Only one road was built. This road was constructed across the narrowest wetland area possible to reach the gravel pit area and the minimum width of

this road was mandated by the CDRMS requirement that the running surface of the road had be to constructed to be at an elevation of 1.5 feet above the elevation of the 100-year flood event, which was calculated to equal 6,198 feet elevation. NWA and WAND believe that the width of this road is the narrowest width possible from a safe equipment operation standpoint. The length of this road was also minimized to where the most direct road alignment feasible was constructed.

b. 33 CFR 323.4(a)(6)(ii)

All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of the roads which must cross the water bodies) to minimize the discharges of dredged or fill material into waters of the U.S.;

Both the farm road and the temporary mine road are located as far as possible from all streams and other water bodies except for the actual road crossing of the unnamed drainage swale of the Yampa River which cannot be avoided. At this location, the proposed road alignment has been designed to minimize the discharge of fill material into all wetland areas.

c. 33 CFR 323.4(a)(6)(iii)

The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows.

Due to the temporary nature of this wetland crossing, it is operationally unreasonable and excessively expensive to bridge this road crossing so it can support the large off road mine equipment which must pass over the unnamed drainage swale. The road was constructed using broken concrete as the road base fill material which will perform the same functions as a culvert and allow the expected flood volumes for this road crossing to pass without overtopping the road. Since completion in the spring of 2010, the road crossing has accommodated the very high 2011 flood event with no flow across the top of the road.

d. 33 CFR 323.4(a)(6)(iv)

The fill shall be properly stabilized and maintained during and following construction to prevent erosion.

Due to the design of this road crossing, with most of the road base consisting of broken concrete, with very high pore volumes, and only a minimal amount of gravel, there is very little potential for erosion. The fill material should be stable throughout the operations phase of this project.

e. 33 CFR 323.4(a)(6)(v)

Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within the waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself:

IME RESPONSES AND SUPPLEMENTAL REPORT

The farm road and upgraded temporary mine road were constructed in a linear fashion at right angles to the unnamed drainage swale, wherein the fill was brought in and placed only within the roadway area consisting of the driving surface and embankment down to the swale, with the extension of the mine road occurring only from the disturbed areas into the undisturbed areas. Therefore, there was no reason for construction equipment to operate beyond the roadway and embankment area.

f. 33 CFR 323.4(a)(6)(vi)

In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U. S. shall be kept to a minimum;

After careful examination of the area, the farm road and temporary mine road crossing was located in an area where the wetlands are the narrowest in this unnamed drainage swale. Thus, this alignment reduced the vegetative disturbance to wetlands to the minimum amount possible.

g. 33 CFR 323.4(a)(6)(vii)

The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

The unnamed drainage swale which the farm road and temporary mine road cross does not contain a water body and only wetlands occur at this location. The construction design of the roads, using large pieces of concrete as the base material, creates large pore spaces which do not act as a barrier to the movement of any aquatic life inhabiting the area.

h. 33 CFR 323.4(a)(6)(viii)

Borrow material shall be taken from upland sources when possible;

All of the fill material needed to construct the farm road and temporary mine road was obtained from elevated upland areas located to the west from the Northwest Ready Mix property, and to the east of the actual wetland crossing site from the WAND Pit area. Therefore, there was no disturbance to any jurisdictional wetland or stream to obtain fill for the roads.

i. 33 CFR 323.4(a)(6)(ix)

The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

Formal consultation with both the Colorado Division of Parks and Wildlife and the U.S. Fish and Wildlife Service in connection with the WAND Gravel Pit by the CDRMS resulted in documentation that no federally listed threatened or endangered species exist in this area, nor is there any critical habitat of any such species located in this area.

j. 33 CFR 323.4(a)(6)(x)

Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practicable alternatives exist;

Consultation by the CDRMS during the 110 Mine Permitting for the WAND Gravel Pit and WAND Gravel Pit expansion area, resulted in the identification of no breeding or nesting waterfowl areas, and no spawning areas. The road alignment was purposely designed to minimize the impacts to wetlands. Complete avoidance of all wetland impacts was impossible, as there was no alternative location that would further reduce wetland impacts.

k. 33 CFR 323.4(a)(6)(xi)

The discharge shall not be located in the proximity of a public water supply intake;

There is no public water supply intake located in this area.

l. 33 CFR 323.4(a)(6)(xii)

The discharge shall not occur in areas of concentrated shellfish production;

There is no shellfish production located in this area.

m. 33 CFR 323.4(a)(6)(xiii)

The discharge shall not occur in a component of the National Wild and Scenic River System;

The Yampa River in this area is not a part of the National Wild and Scenic River System.

n. 33 CFR 323.4(a)(6)(xiv)

The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts, and;

The fill materials were suitable for road construction and were free of all toxic pollutants.

o. 33 CFR 323.4(a)(6)(xv)

All temporary fills shall be removed in their entirety and the area restored to its original elevation;

Immediately following the cessation of all gravel mining operations in this area, all of the temporary fill beyond the average of 20 feet of width associated with the farm road will be removed and all impacted wetland areas will be restored to their original elevation or "approximate original contour" as required by the CDRMS Mine Permit. All wetland topsoil

disturbance areas will then be reseeded with an approved wetland seed mixture.

p. 33 CFR 323.4(b)

If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a)(1)-(6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

No listed toxic pollutant materials were used as fill in this road crossing.

B. Field verification.

Given the PCC and the agricultural exemptions, there has been no regulated activity requiring a Section 404 Permit. Thus, field verification should no longer be required. However, to the extent such verification is required, we believe the COE's decision to delay that verification is contrary to the regulations. Further, the "onset of winter weather" did not make such a verification "impracticable."

The requirements regarding the time frames wherein COE must approve a wetland delineation are spelled out in multiple places in the COE regulations and written guidance documents. Of particular relevance here are the following:

- a. In an e-mail from Susan Nall dated January 9, 2012 USACE Colorado West Regulatory Branch - Updates and Reminders, she states that JDs are to be approved in a "timely manner."
- b. In 77 FR 10287, the COE states that "*the PCN must include a delineation of wetlands*" and that "*the 45-day period will not start until the delineation has been submitted*" to the COE. Since a formal wetland delineation was submitted concurrently with the ATF Permit application, the time frames run concurrently.
- c. *Regulatory Guidance Letter 08-02 Jurisdictional Determinations* states that "*it is the Corps' goal that every JD requested by an affected party should be completed within 60 calendar days of receiving the request.*" Submittal of a formal 404 permit application containing a formal JD, should therefore be approved within 60 calendar days.
- d. The 2008 *Arid West Regional Supplement* (page 18) states that wetland delineations can be performed any time during the year when it is practicable to "*identify the plant species and estimate plant cover.*" This same reference also states on page 17 that instead of performing wetland delineations only "*during the wet portion of the growing season . . . wetland determinations must often be performed at other times of the year . . .*"
- e. With regard to "seasonal considerations and cautions" the COE has stated that "*The Corps of Engineers must make timely decisions on permit applications and often must make wetland determinations under less-than-optimal conditions. These sections provide options when environmental conditions are poor but they are not intended to restrict wetland determinations*

to any particular time of year."

(<http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg>).

f. The Sacramento District REGULATORY BRANCH MEMORANDUM 2004-12, issued on February 13, 2004, entitled *Wetland Delineations Under Snow Conditions*, recognizes that in certain conditions there is a "pressing need" for approval of the wetland delineation under less than optimal conditions. Given your assertion that certain violations may have occurred, one would think that there is a "pressing need" for the COE to make a "timely approval" on a final decision relative to those assertions.

In addition, the COE's decision to delay the verification ignores basic plant taxonomy. Virtually every plant in every plant herbarium in the world is a dried plant specimen. Thus, verification can be accomplished at times of the year other than when the plants are green and actively growing.

Further, it was not "impracticable" to verify the wetland delineation in the fall of 2012. The disturbance footprint is less than 15 acres which is not a "large size." This is not a "complex site", and the wetland and water boundaries are very abrupt and obviously discrete. NWA and WAND specifically informed the COE during the August 23, 2012 inspection that they would soon be completing a formal wetland delineation and the COE expressed an interest in receiving this information and expressed a willingness to work with us. For our part, we called Mr. Steve Moore on the morning of September 2, 2012, and left a voice mail explaining that we were starting the wetland delineation and specifically asked that they put us on their schedule for their next trip to Northwest Colorado to field verify this wetland mapping. We also asked that the COE let us know what specific concerns or issues they thought we needed to address.

Our September 2, 2012 notification gave the COE ample opportunity to visit the site and verify the delineation. As it turned out, there was about a four month window from our September 2, 2012 notification when there was nothing present to "obscure" the presence of any one of the three wetland parameters (i.e., vegetation, hydrology and soils).

The COE never responded to the voice mail. Despite a verbal commitment to work with us to resolve these issues, the COE failed to respond to or acknowledge our request.

More troubling is our understanding that field personnel from the Grand Junction office of the COE did, in fact, make various trips to northwest Colorado after our September 2, 2012 notification. Under the circumstances, it appears that the COE purposefully ignored our request to meet during what amounted to be a four-month window of suitable weather.

C. The COE's suggestion that there has been a knowing and flagrant CWA violation is unfounded.

Although we were not engaged by NWA until September 2, 2012, we offer the following comments on the suggestion in Ms. Nall's letter that there has been a knowing and flagrant violation of the CWA.

In *Regulatory Guidance Letter 90-09 - Wetland Enforcement Initiative*, a “flagrant violator” was defined as “someone who engaged in an unauthorized discharge activity after being denied a Section 404 permit or withdrawing a permit application for such activity.” As far as we know, NWA and WAND have never been denied or withdrawn a 404 permit.

According to the Procedures Flowchart attached to the *Memorandum of Agreement Between The Department of Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (January 19, 1989) a “flagrant violator” is described as someone who has “obvious prior knowledge.” Under the circumstances as we know them, it does not appear that either NWA or WAND had obvious prior knowledge that a Section 404 Permit was required for the activities for a number of reasons including the following.

First, verbal comments received from the COE regarding the presence or absence of jurisdictional wetlands or potential permitting needs, requirements or conditions, to the extent any were given in this matter, are insufficient. As noted in 51 FR 41214, “*verbal notifications . . . greatly increase the chance of errors.*” The *Memorandum of Agreement Between The Department of Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* addresses the validity of oral statements regarding the presence or absence of wetlands as requiring that the COE must inform potential permit applicants “*that oral statements regarding jurisdiction are not official agency determination.*” Further, according to Regulatory Guidance Letter 05-02 - Expiration of Geographic Jurisdictional Determinations of Waters of the United States, all wetland determinations “*must be verified in writing*” and that “*it is very important to have complete and accurate documentation that substantiates the Corps decisions.*” Thus, whatever verbal comments were made, they could not be binding. As such, they do not support a finding that NWA and WAND had “obvious prior knowledge” that the activities were regulated and needed a Section 404 Permit.

Second, in response to two specific invitations from the CDRMS, your office failed to provide any comments on or objections to NWA’s gravel mining application. Similarly, in the March 29, 2008, site inspection, Mr. Nathan Green stated that he would perform a more detailed inspection of the site after the snow had melted in the spring. NWA and WAND heard nothing more from Mr. Green until he showed up almost four and a half years later on August 23, 2012. Given your long span of silence, the only “obvious prior knowledge” that could be imputed to NWA and WAND is that no Section 404 Permit was required.

Third, even your office hadn’t reached a final determination about any possible violations until **after** the August 23, 2012 site meeting. During that meeting, NWA and WAND representatives specifically remember that the COE mentioned that they were still not sure whether a violation had occurred, and that they were still investigating the matter. This is consistent with the COE’s response to the CDRMS a month earlier. As you know, the CDRMS inspected NWA’s gravel pit on March 28, 2012. The resulting inspection report states that “it was uncertain during this inspection whether this [farm berm] activity required Army Corp of Engineers (Corp) authorization, and if so whether Corp authorization had been granted.” The COE was copied on this report and they responded, in an e-mail dated July 6, 2012 back to the CDRMS, stating that

“this work **may** constitute a violation of Section 404 of the CWA.” If the COE wasn’t sure that a violation had occurred more than two years after the farm dike had been repaired and nearly four and one half years after Mr. Green’s initial site inspection, it is difficult to imagine how NWA and WAND had “obvious prior knowledge” that they needed a Section 404 Permit for that activity.

Fourth, it appears that NWA and WAND have been caught up in a broader enforcement initiative unrelated to any alleged wrong doing on their part. IME met with Mr. Nathan Green in June, 2011 in connection with other unrelated work we were performing in the Steamboat Springs area. During that meeting, Mr. Green expressed concern about three gravel pit operations in the Craig area (the Elam Breeze Basin Pit and two gravel pits located on the east side of town), and informed us that the COE was going to get their attention and make an example out of them. Importantly, this comment came a year before your email to CDRMS about the WAND Gravel Pit wherein you were unable to confirm if there had been any violation at that pit.

Finally, as we have explained above, there was no violation. The farm berm and the gravel pit are located on PCC which are not waters of the United States. The farm/mine road did cross jurisdictional wetlands but those activities are exempt from regulation. Thus, no Section 404 Permit was required for any of the activities. Failure to obtain such a permit does not constitute a violation of the Clean Water Act.

Table 1,

NRCS Soils Mapping Units and Percent Plant Species Composition

Characteristic Native Vegetation

SPECIES	5-Apmay Soils	44-Cowestglen Soils	70-Fluvaquents Soils	70-Haplaquolls Soils
Basin Wildrye	15	40		
Other Shrubs	15	5		
Western Wheatgrass	15	10		
Willow	15			15
Slender Wheatgrass	10			
Nebraska Sedge	5			
Basin Big Sagebrush		10		
Other Perennial Forbs		10		
Other Perennial Grasses		10		
Cattail			15	15
Rush			15	15
Sedge			15	15
Common Reed			10	
Reed Canarygrass			10	

Table 2.

Percent Plant Cover of Wetland Sample Plots Located in Prior Converted Cropland Area

SPECIES	WP-2	WP-3	WP-6	WP-10	WP-11	WP-12	WP-13	WP-19	TOTAL	MEAN	% COMP
Trees & Shrubs											
SALEXI		4							4	0.50	0.61
Subtotal		4							4	0.50	0.61
Grasses											
PHLPRA*	23	6	37	34		23	50	15	188	23.50	28.70
AGRREP*	27	62	24	23			26	19	181	22.63	27.63
PHAARU	21			21	81	41		8	170	21.25	25.95
AGRSTO						25	13		38	4.75	5.80
BROINE*	5	19							24	3.00	3.66
POAPRA*		4	9					6	19	2.38	2.90
Subtotal	76	91	70	78	81	89	89	46	620	77.51	94.64
Forbs											
EQUARV								13	13	1.63	1.98
ASCSP								8	8	1.00	1.22
CIRARV*								5	5	0.63	0.76
ERIUMB			3						3	0.38	0.48
TAROFF*	2								3	0.25	0.31
Subtotal	2							26	31	3.89	4.75
TOTAL	78	95	3	78	81	89	89	72	655	81.88	100.00

* Denotes Introduced Plant Species

Farm Dike Specs

NW1/4SW1/4 SECTION 4, T6N, R90W

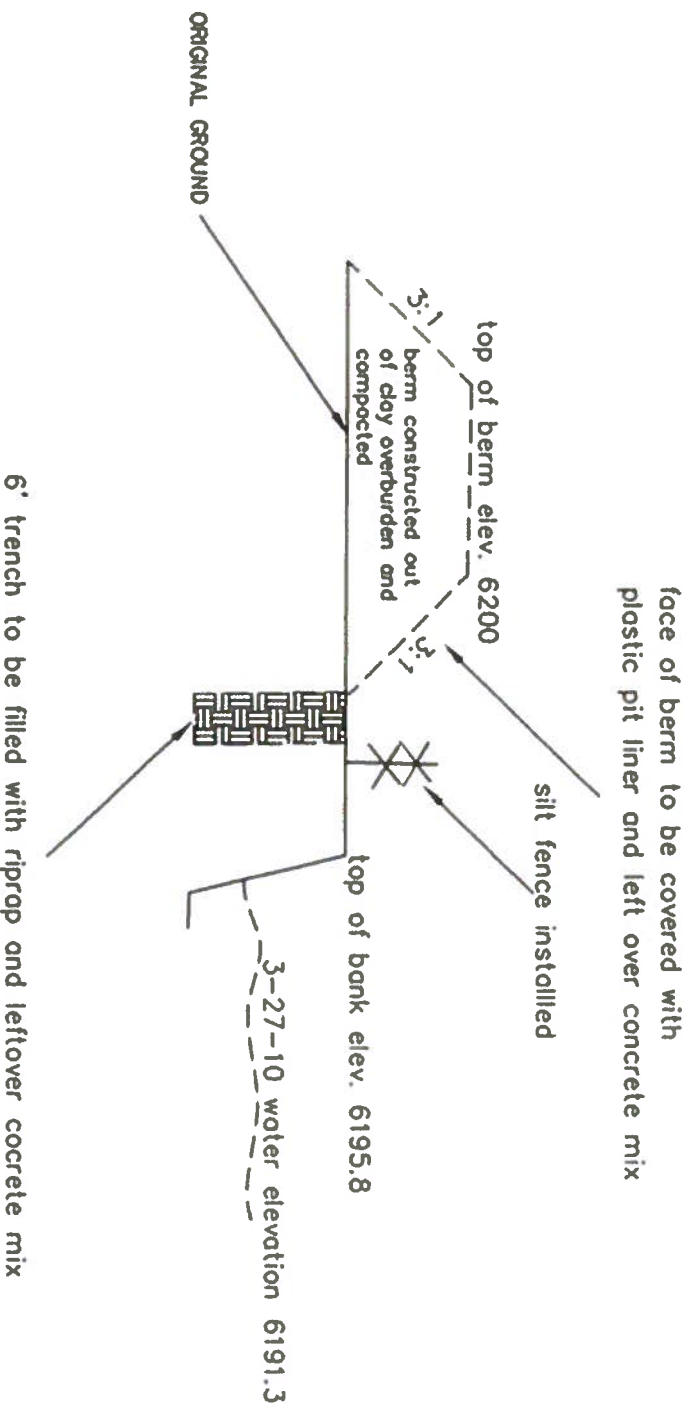
EXISTING BERM

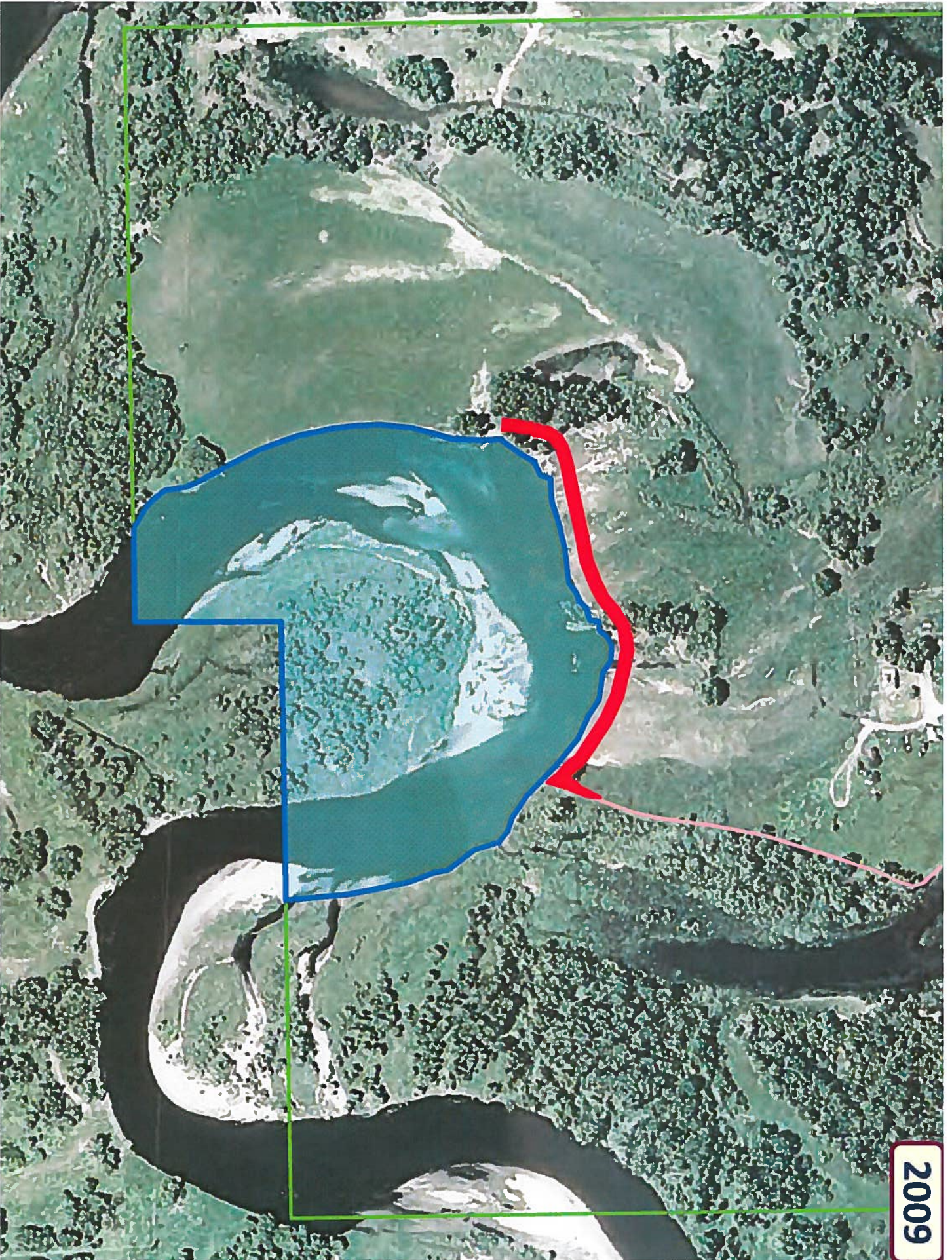
CROSS SECTION C - C

SCALE: N.T.S.

NW Aggregates - WAND pit

100 year flood plain elevation 6197





2009







