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BOUCHER V. USDA
149 F. Supp.3d 1045 (7th Cir. 2019)

SYNOPSIS

Boucher was an appeal to the 7th Circuit from a Final Technical Determination of the United States Department of Agriculture (“USDA”) finding that Rita Boucher’s property contained wetlands and converted wetlands, pursuant to the Swampbuster provisions of the Food Security Act of 1985. The appeal involved two fields, identified in the record as Un1 (0.7 acres) and Un2 (1.9 acres). The National Resource Conservation Service (“NRCS”) found that the Fields became converted wetlands under the Act when Boucher’s husband removed the sum total of 9 trees from that 2.6 acres of otherwise tillable ground in 1994 and 1998. Boucher’s appeal focused primarily on the USDA’s improper use of a comparison site, and its failure to properly consider her evidence and evaluate whether the Fields had requisite hydrology to be considered wetlands under the Act, prior to the conversion.

RESULT

The 7th Circuit reversed the USDA, finding its decision was arbitrary, capricious, and an abuse of discretion. The case was remanded back to the agency, and Boucher has received a

revised Final Technical Determination that adjudicates the Fields as prior-converted, non-wetlands.

FACTS

Boucher's property ("Property") has been utilized continuously as a farmstead for the production of livestock and grain for more than 150 years. Like any similar farm ground, it has been altered extensively over that time, to reconfigure livestock lots, build and tear down sheds, and modify access roads. The Bouchers purchased the property that contained the Fields in or around 1985. At that time, and continuing through the present, the Fields contained no natural vegetation- they were either used as pasture or for crop production, which use continues through today.

In 1987, the Bouchers received a Notice of Highly Erodible Land and Wetland Conservation Determination, which essentially put them on notice that the land had hydric soils with potential for wetlands, but according to the National Wetland Inventory of 1989, no wetlands were located on the property. During the appeal process, Boucher unearthed cement drainage tile on the property, adjacent to the Fields, which was installed in 1981 or 1982. This discovery became key to Boucher's appeal.

In 1994, Boucher's husband noticed the Fields were being used as a dump and removed 5 trees from Un2. He farmed around the remaining trees until sometime after 1997, when he removed the remaining 4 trees on Un2. In all, Boucher's husband removed 9 trees total from, which trees represented approximately 12/1000th of an acre. There was little evidence the trees were wetland species – the only pictures in the record were from ~10,000 feet. Some of the pictures are in these materials.

As a result of a whistleblower complaint, in 2002 the FSA sent the NRCS to the Fields to determine whether Boucher's husband cleared woody vegetation on the Fields to make them easier to farm. In October 2002, the NRCS completed a Routine Wetland Determination on the Fields, finding them to be converted wetlands. On February 7, 2003, the NRCS sent a Preliminary Technical Determination with appeal rights to Boucher's husband, which found 2.8 acres of converted wetlands on Un1, and 1.6 acres of wetland on Un2. The Preliminary Determination found that Un1 contained converted wetlands due solely to the fact that aerial maps seemed to indicate that trees had been removed from the Property between 1993 and 1994. The NRCS utilized off-site analysis (a comparison site) to determine the presence of hydrophytic vegetation, i.e., no hydrophytic vegetation was present on Un1 and Un2, but no Atypical Situation data sheet was prepared.

Boucher's husband appealed that determination and requested reconsideration and a site visit. On March 19, 2003, the NRCS conducted a site visit and met with Boucher's husband. Boucher's husband was not satisfied with that visit, and requested an appeal through FSA, and asked for a State Conservationist review. The last correspondence in the record from 2003 was sent by the FSA to the NRCS State Conservationist on July 22, 2003, which requested a written technical determination be provided within 30 days, supported by "all factors, technical criteria and facts". There is no evidence that visit ever took place, and the NRCS took no further action until July 2, 2012. Boucher's husband passed away in February 2004.

In July 2012, Boucher contacted FSA and requested approval to remove a house and barn from her property in order to farm another field. FSA sent that request to NRCS for a technical determination. Upon review of its records, NRCS realized it had never entered a Final Technical

Determination on the 2003 appeal and determined to move forward with a site visit in order to issue a Final Technical Determination.

In December 2012, a total of 16 inches of snow fell on Boucher's property, and it held 11 inches of snow in early January 2013, before two inches of rain fell on January 13, 2013. The NRCS made its site visit on January 14, 2013, sending a soil scientist, area easement specialist, and district conservationist to the property. That site visit resulted in conversion of the 2003 Preliminary Technical Determination to a Final Determination, but slightly reduced the size of the Fields (due to better mapping equipment).

The NRCS Final Technical Determination found that Un1 and Un2 and could not be adequately tested for wetland characteristics because "drainage tile [had] been added to these locations" so the NRCS completed an "Atypical Situation Data Sheet" to explain the decision to use Field 7 (a woods, which the NRCS found to be a wetland) as a reference site to determine vegetation and hydrology for the Fields.

Boucher appealed the Final Technical Determination to the National Appeals Division ("NAD") of the USDA. Her appeal provided six (6) reasons the wetland determination was in error, including that drainage for the Fields was enhanced by drainage tile that was installed prior to 1985 and the Food Security Act and that no free water or saturation levels were found or documented and no primary indicators were noted under the hydrology criteria.

As part of her appeal, Boucher had the Fields trenched in May 2013. The trenches were dug at a depth of 5.5 feet and width of 9 inches in a crisscross pattern. Over the course of a week of observation, water in the trenches never rose above approximately 18 inches; 4 feet of dry ground remained in each trench. Boucher also obtained a GPS laser survey that determined the

property was largely level but tended to be slightly higher in the middle and sloped lower at the sides, meaning water would run across and off the Fields to other parts of the property.

During the NAD hearing, the NRCS asserted that the trenching was not conclusive and continued to maintain that the Fields had been tiled, but ignored the evidence of cement drainage tile, which had to be installed before 1983, which was important, because the Act provides that a wetland that was converted before December 23, 1985 is considered a non-wetland (i.e., there are no restrictions on its use). Eventually, the NRCS conceded that tile had not been installed on the Fields but took the position that it did not matter because the tree removal permitted it to use a comparison site to establish hydrology. This position was inconsistent with the Final Technical Determination, an issue that became important as the appeal progressed.

The NAD and the NAD Director both affirmed the NRCS, finding that the tree removal permitted the NRCS to use a comparison site. The United States District Court did the same. None of them took issue with the NRCS's change of position on appeal, nor did any of them address Boucher's evidence that the Fields did not contain requisite hydrology in the absence of drainage tile. They each found that tree removal permitted the NRCS to utilize a comparison site (which bore little actual comparison) to evaluate all 3 requirements of the Act- hydric soil, hydrophytic vegetation, and hydrology.

7TH CIRCUIT

Boucher raised a number of issues before the District Court. On appeal to the 7th Circuit, she narrowed her focus to two, arguing that either 1) the Fields had been drained, as the NRCS Final Technical Determination stated, by the cement tile installed before 1985, and were therefore prior converted, non-wetlands or 2) the Fields were never wetlands to begin with. Boucher rested

her positions on the part of the record where the parties agreed – that the Fields did not contain wetland hydrology as of 2003 or 2013.

In response, the USDA again redirected the argument, and asserted that 1) the tree removal permitted the NRCS to use a comparison site, and 2) that what's more, the tree removal was touchstone to the wetland conversion. In support of its second position, the USDA cited to 7 CFR 12.2, which it argued would permit a finding of a converted wetland any time hydrophytic vegetation had been removed. This ignored the immediately preceding provisions, which said essentially that a wetland could be converted by the removal of hydrophytic vegetation, meaning that before vegetation removal could convert a wetland, the land first had to meet all 3 wetland criteria.

Oral argument focused generally on the trees that were removed and the evidence Boucher provided that the Fields did not contain requisite hydrology. The 7th Circuit opinion held, in essence, that the USDA ignored the impact of Boucher's evidence, and failed to conduct further investigation to determine whether her evidence was accurate. In sum, instead of making the objective review of the Fields required by the Act, the NRCS changed its position – but importantly, the record did not support either of its positions.

In its opinion, the court noted that the USDA's regulations defining a "converted wetland" are "slightly altered from the statutory text", "pulling the definition away from the statutes primary focus on hydrology", particularly with respect to 7 CFR 12.2, where the court found the USDA's argument that the "removal of woody hydrophytic vegetation from hydric soils is sufficient by itself to deem the site a converted wetland, without reference to hydrological factors", which "conflicts with the statutory definition's focus on hydrology." *Id.* at 7n.2, 43. The

court confirmed that the all 3 wetland criteria must be present under normal circumstances for an area to be a wetland under the Act, affirming by implication that the NRCS may not conflate the existence or removal of hydrophytic vegetation with hydrology, as the NRCS did in *Boucher* and in *B&D Land and Livestock Company v. Schafer*, 584 F.Supp.2d 1182 (N.D. Iowa 2008).

Final Wetland Determination

Date: 1/14/2013

Customer(s): RAYMOND LEE HELMS
Hancock County: Farm #5309 Tract #813

Agency: USDA-NRCS
Assisted By: Rick Neilson and Jerry Roach



Legend



- Sampling Points
- Field Boundary
- street_dm_1_in059





1861
NW

36



↑
1981

depth should be
1986
(but is dryland
anyway)

37

A-113



5811
1985

000224

38

A-114



N
↑
1986

39



↑N
1990

40

AKZ

1993

EXHIBIT B PAGE 75

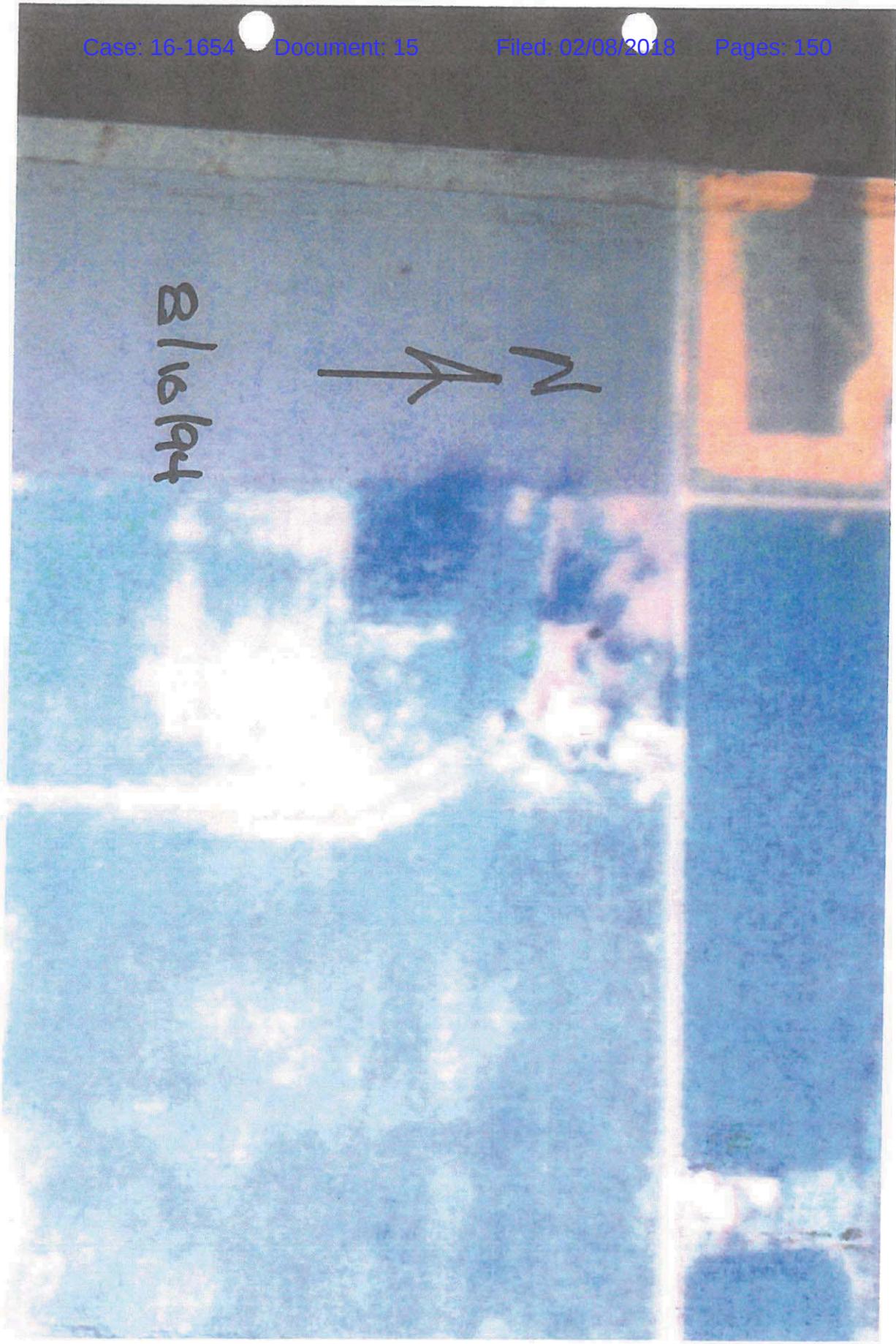


EXHIBIT B - PAGE 76



AK

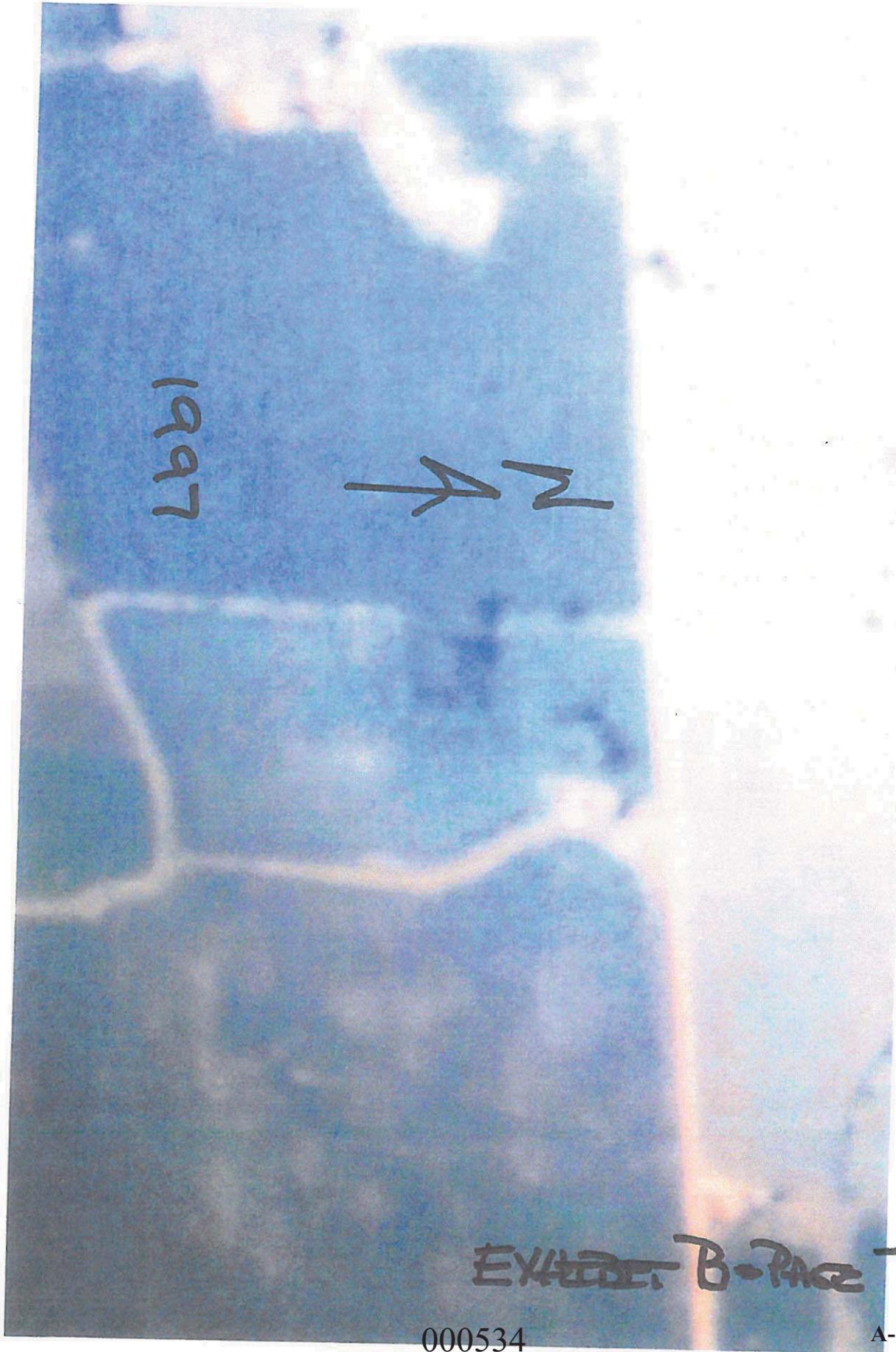
9/12/95



101192

N

EXHIBIT B - PAGE 78



1997

→ N

EXHIBIT B - PAGE 79

2003
Boucher

N
↑

2003

EXHIBIT B-PAGE 80

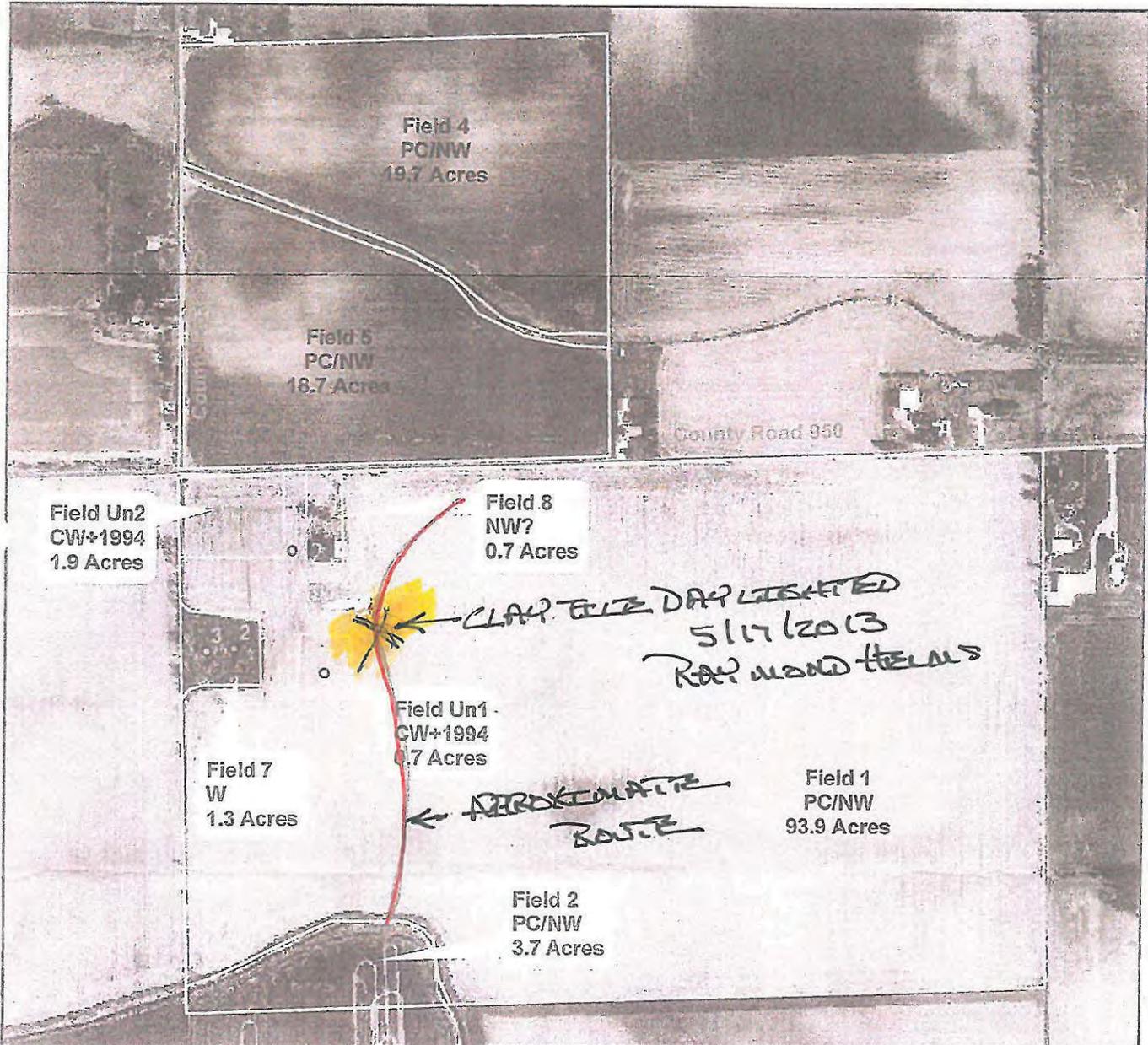
Final Wetland Determination

Date: 1/14/2013

Customer(s): RAYMOND LEE HELMS

Agency: USDA-NRCS

Assisted By: Rick Neilson and Jerry Roach



Julius and Julia Wittman

per my son said filing

was done back 1980-1981

*5-28-2013

Legend

○ Sampling Points

Field Boundary

— street_dm_l_in059





05/17/2018

BROKEN PIECE OF CLAY TILE

DAYLOADED CLAY TILE



EVIDENCE B - PAGE 98

000553

A-148



B. Thompson Associates, LLC

7810 North 50 West
Fortville, IN 46040
Blake: 317-491-3392

Boucher, 950 N and 125 W Hancock County Indiana



Map indicating approximate elevations based on mean sea level.

GPS SURVEY / LOCATED

EXHIBIT B - PAGE 102

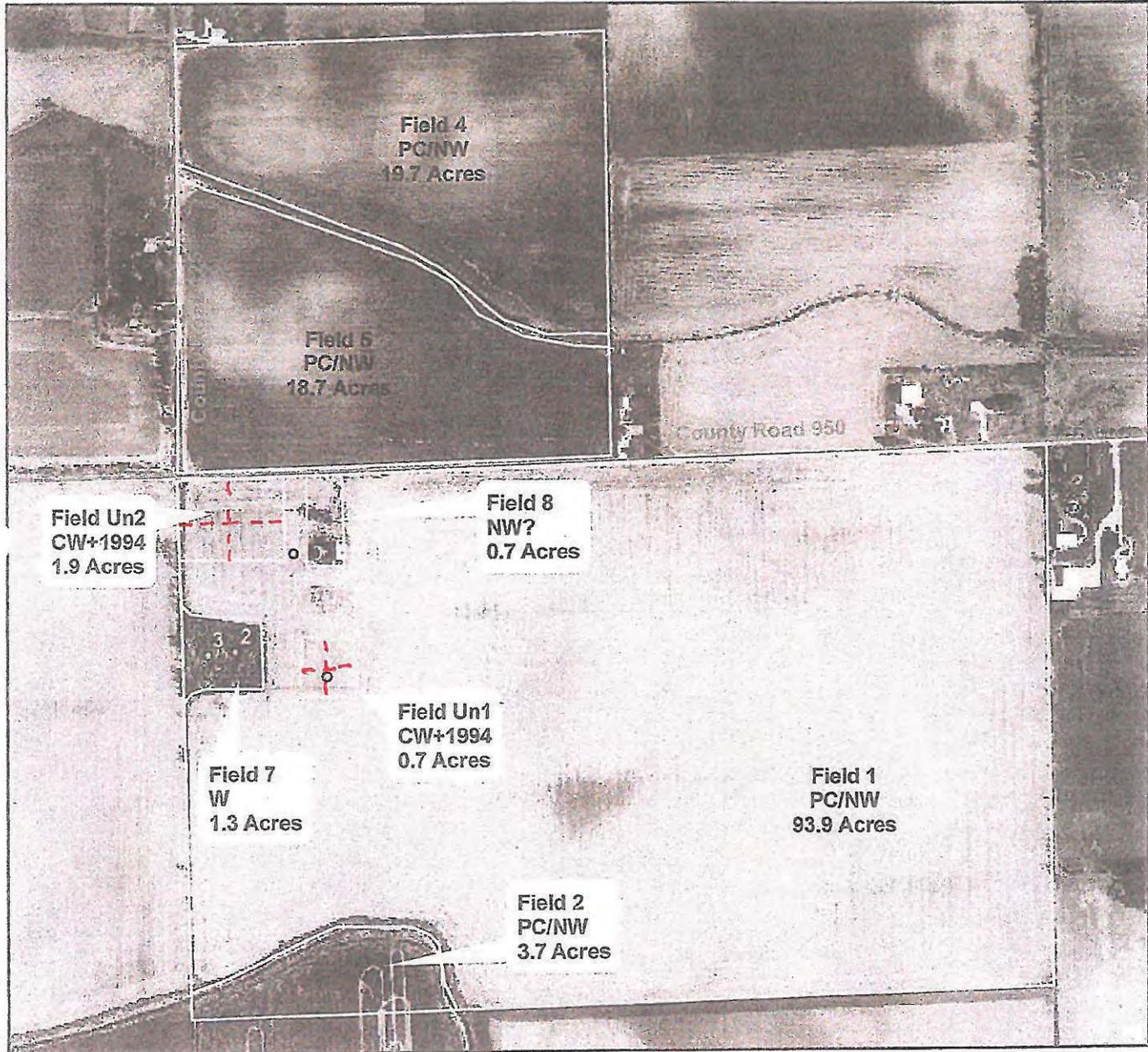
Final Wetland Determination

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Agency: USDA-NRCS

Assisted By: Rick Neilson and Jerry Roach

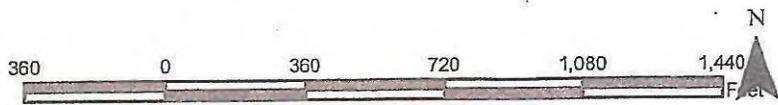


----- Trenching

Legend

- Sampling Points
- Field Boundary
- street_dm_l_in059

EVAPORATION BASE 103





01 Trench View Un1 Facing East - 5-31-13
EXHIBIT B = PAGE 108

000563

A-157