

JUN 08 2020

WATER RESOURCES  
WESTERN REGIONSTATE OF IDAHO  
DEPARTMENT OF WATER RESOURCESNOTICE OF PROTEST  
Amended Application for Permit 63-34897

June 8, 2020

**1. Matter being protested**

Amended Application for Permit 63-34897 (Cat Creek Energy, LLC), represented by Idaho Water Engineering

**2. Name of protestant**

United States Department of the Interior  
Bureau of Land Management  
Idaho State Office  
1387 South Vinnell Way  
Boise, Idaho 83709-1657

**3. Protestant's Representative for service (if different than protestant)**

Fredric W. Price (contact person)

**4. Service mailing address**

same as above

**5. Service telephone no.**

(208) 373-3831

**6. Basis of protest (including statement of facts and law upon which the protest is based).**

On April 21, 2020, an Application for Permit 63-34897 (Cat Creek Energy, LLC) was filed with IDWR and Amended April 27, 2020. An Amended Irrigation Land Use list is part of the application filed approximately May 15, 2020. This Application for Permit as amended for 63-34652 ("Application") is one of four inter-related applications filed by the applicant that are part of the proposed Cat Creek Reservoir (new reservoir). BLM has been made a party to all four applications (63-34403, 63-34652, 63-34897, and 63-34900) under IDWR Order issued May 28, 2020. BLM is filing this protest to the specific issues of concern as all four applications have different elements and various uses. Each application may need to be resolved somewhat differently, in order to, resolve protest elements.

The Application seeks 2,000 cfs and 31,000 AF from surface water (South Fork Boise River) for multiple uses: Diversion to Storage; Irrigation Storage; Irrigation from Storage; Municipal Storage; Municipal from Storage; Mitigation by Delivery Storage; Mitigation by Delivery from Storage; and Irrigation. Under the Amended Irrigation Land Use application document, the irrigation use is for 6,210 acres (limited to 6,010 acres) and has a separate storage component of 2,000 cfs from the application.

The Application states the purpose of this application is to provide supplemental Municipal Storage and Mitigation by Delivery Storage for the City of Nampa, supplemental irrigation for the Black Canyon Irrigation District, and Wood Creek Farm. Per IDWR's public notice, of the 6,010 acres irrigation use proposed, 3,210 acres will be newly irrigated lands and 2,800 acres is for supplemental irrigation for land associated with Wood Creek Ranch.

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BLM's protest is based upon the following issues:

1. The Application for Permit has a large Place of Use (POU) for different purposes of use, and some of the POUs entirely describe federal land entirely managed by BLM. POUs on BLM land should be removed. If the application is proposing to use canals or other infrastructure that cross BLM to convey water under this new proposed water use, then a BLM Right-of-Way ("ROW") issued pursuant to FLPMA would be required. Trespass on federal land is a prohibited act and third parties cannot use another entities' ROW. They need their own ROW.

I.C. 42-202(1)(d) states that "[t]he location of the point of diversion and description of the proposed ditch, channel, well or other work and the amount of water to be diverted and used" (emphasis added). The Application does not describe the location of "ditches" (i.e. conveyance infrastructure) that the Applicant will use to deliver water to the place of use. BLM will be able to articulate specific legal land descriptions requiring a ROW once the Applicant provides this information.

2. The Application proposes a "future" mitigation use that has not been previously granted by the State. A "future" use is, by definition, describing a use of water that has not yet occurred, therefore there is no beneficial use to assign a quantity of water to. There is no current expectation of use, no subscribers, or other established relationship with which to ground this use. The statutes only allow one form of speculative future use and that is for municipal purposes sought by a municipality or franchisee (I.C. 42-202(2), 42-202B(5)(a) and (b)). Due to the applications ambiguity and the newly proposed "future" mitigation use, BLM reserves the right to propose conditions that would appropriately protect federal interests.

The proposed Mitigation by Delivery Use POU maps are extensive and ambiguous, including "irrigated lands in the Lower River Basin with senior surface water rights." A listing of individual legal land descriptions is not provided as required by statute. The use of digital boundaries is only provided for irrigation purposes greater than 25,000 acres (I.C. 42-219(2), (5) and (6)).

The Application does not include the location of ditches or other conveyance infrastructure used to deliver water to the place of use, in order for, BLM to articulate what infrastructure may cross federal lands. For any infrastructure crossing federal land, the Applicant does not have legal access to deliver water proposed under this Application across federal land managed by BLM. POUs describing federal land should be removed, and ROWs would be required to use conveyance infrastructure residing on federal land.

3. The Application has indicated the use of both legal land descriptions and/or digital boundaries. The applicant does not have access to federal land managed by BLM. A generalized POU extent via description makes it difficult to articulate specific legal access issues on federal land. The use of digital boundaries is only provided for irrigation purposes greater than 25,000 acres (I.C. 42-219(2), (5) and (6)). BLM reserves the right to identify specific issues as the applicant provides more information.

4. The applicant has indicated that the proposed uses under this application will be subscribers. BLM is concerned about what places of use will be implicated by any future subscribers or possible transfers that could occur if this application is approved.

5. The application is overly broad and is atypical in nature, BLM reserves the right to address additional issues as they become apparent and more information becomes available from the applicant.

Trespass on federal land is a prohibited act (43 CFR §2808.10(a)). A water right also cannot be established in trespass (See e.g., *In RE General Determination of Rights to Use of Surface and Ground Waters of Payette River*, 107 Idaho 221, 687 P.2d 1348, 1353 (1984); citing, *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974); *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844

(1922); *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920); *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931)).

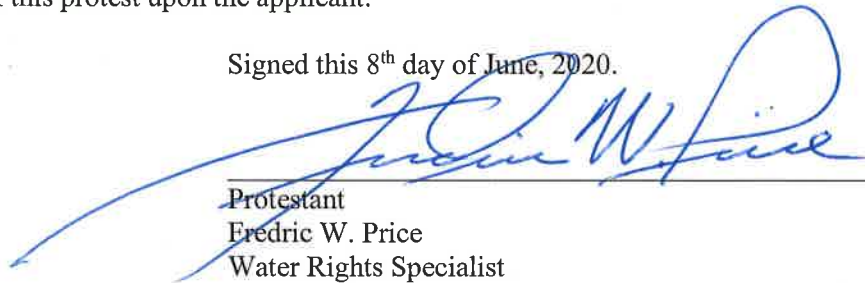
**7. What would resolve your protest?**

BLM's protest can be resolved by:

- 1.) Withdraw the application; or
- 2.) A. Amend the application and the digital boundary to exclude federal land managed by BLM from the PPU, POU, route, and boundary shape (see attached maps), and except terms and conditions that make it clear no BLM land is intended; and
- B. Seek and obtain BLM authorization in the form of an approved FLPMA Right-of Way to transport water proposed under this application across federal land; and
- C. Ensure conditions are added to any issued permit that appropriately protect federal interests.
  - i) "Prior to diversion and use of water under this approval, the right holder shall obtain authorization necessary to access the point of diversion, or place of use, or to convey water across federal lands."; and
  - ii) "This right does not grant any right-of-way or easement across the land of another."; and
  - iii) BLM reserves the right to propose additional conditions to protect federal interests.

I hereby, acknowledge that if I, or my designated representative, fail to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 8<sup>th</sup> day of June, 2020.

  
Protestant  
Fredric W. Price  
Water Rights Specialist

**Attachments:**

- ♦Maps prepared by BLM for illustrative purposes and Master Title Plats.

**FOR DEPARTMENT USE ONLY**

Received by LE Date 06/08/2020  
Fee Paid \$25.00 Date 06/08/2020 Received by LE Receipt # W046366

## CERTIFICATE OF SERVICE

I certify that on June 8, 2020 I served a true and correct copy of the “**Protest of Application for Permit 63-34897**” for Cat Creek Energy, LLC, with enclosures upon the following individuals by placing the documents in the United States mail in Boise, Idaho, postage paid, and addressed as follows:

Original to:

Nick Miller, P.E., Regional Manager  
Idaho Department of Water Resources  
Western Regional Office  
2735 Airport Way,  
Boise, Idaho 83705-5082

Copies to:

Cat Creek Energy, LLC  
c/o John Faulkner  
398 S. 9<sup>th</sup> Street, Suite 240  
Boise, Idaho 83702-7169

Randall C. Budge  
Thomas J. Budge  
RACINE OLSON, PLLP  
PO Box 1391  
Pocatello, Idaho 83204-1391

Idaho Water Engineering  
c/o David R. Tuthill, Jr.  
2918 N. El Rancho Pl.  
Boise, Idaho 83704-6286

James Tarter, Natural Resource Specialist  
U.S., Department of the Interior  
Bureau of Land Management  
Boise District Office  
3948 South Development Avenue  
Boise, Idaho 83705-5339

SANDRA MCCREA

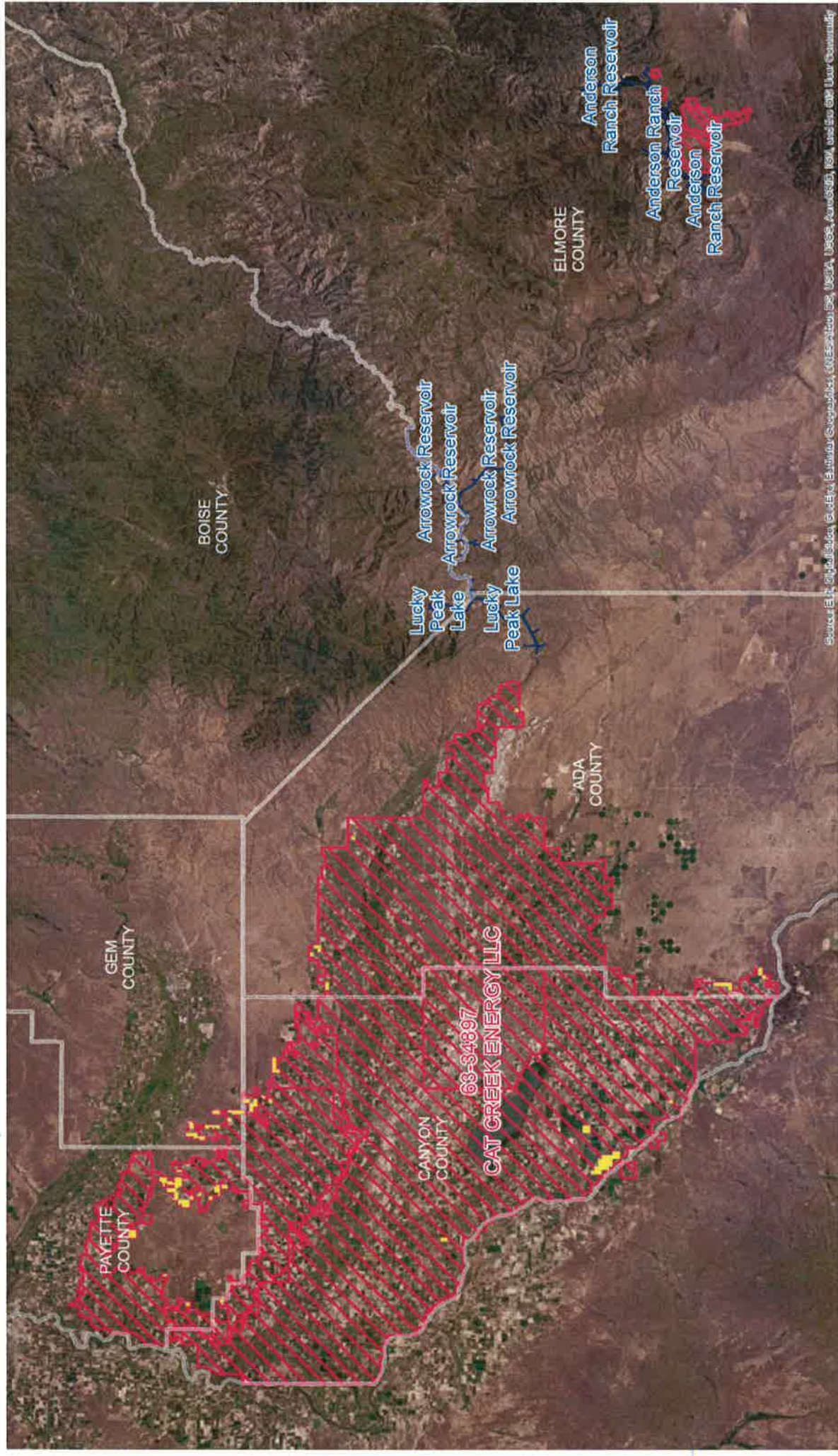
Person Serving Documents (print name)



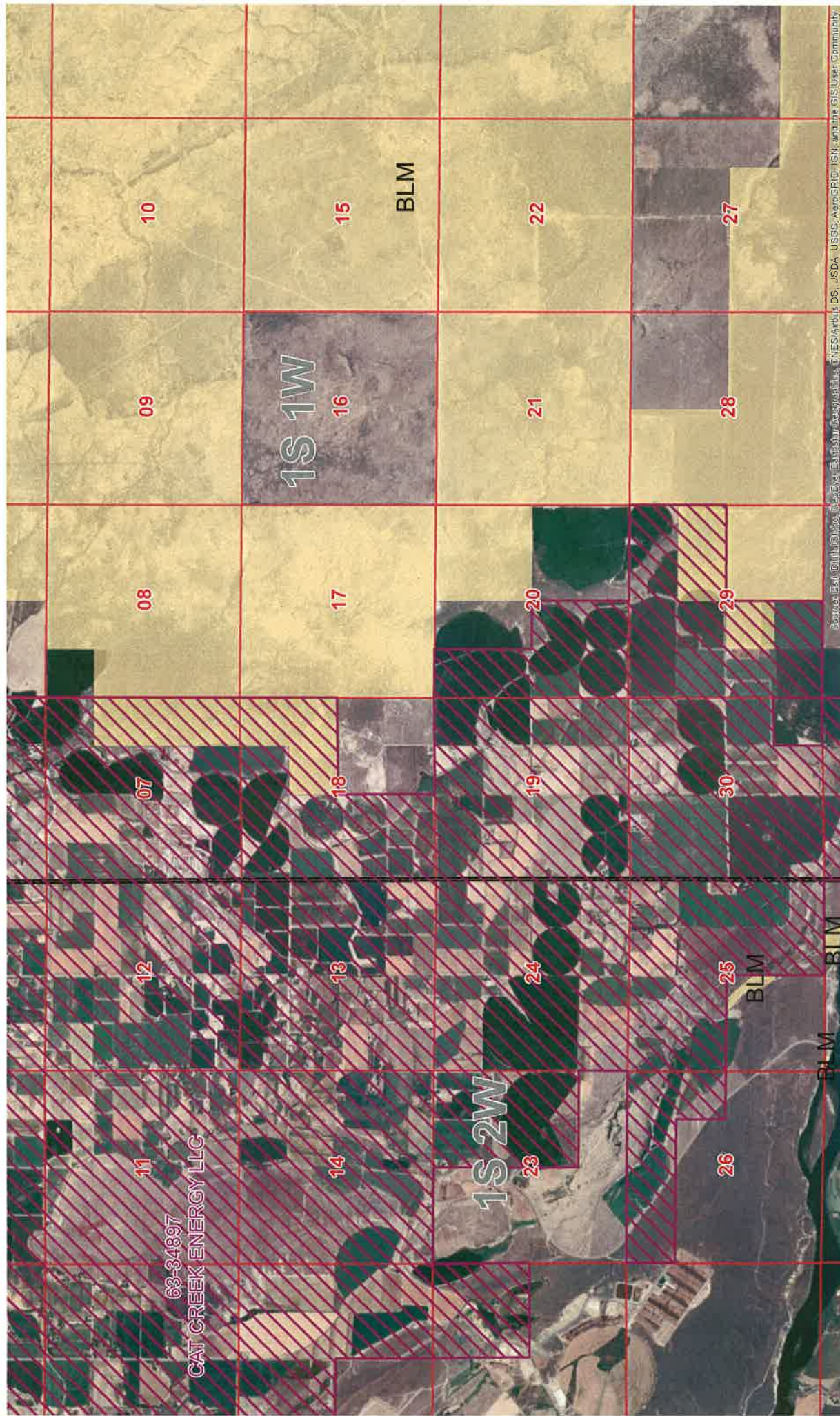
Signature of Person Serving Document



**BLM Protest to Application for Permit 63-34897 (Cat Creek Energy, LLC)**  
**Generalized POU boundary includes BLM land, applicant is not authorized**



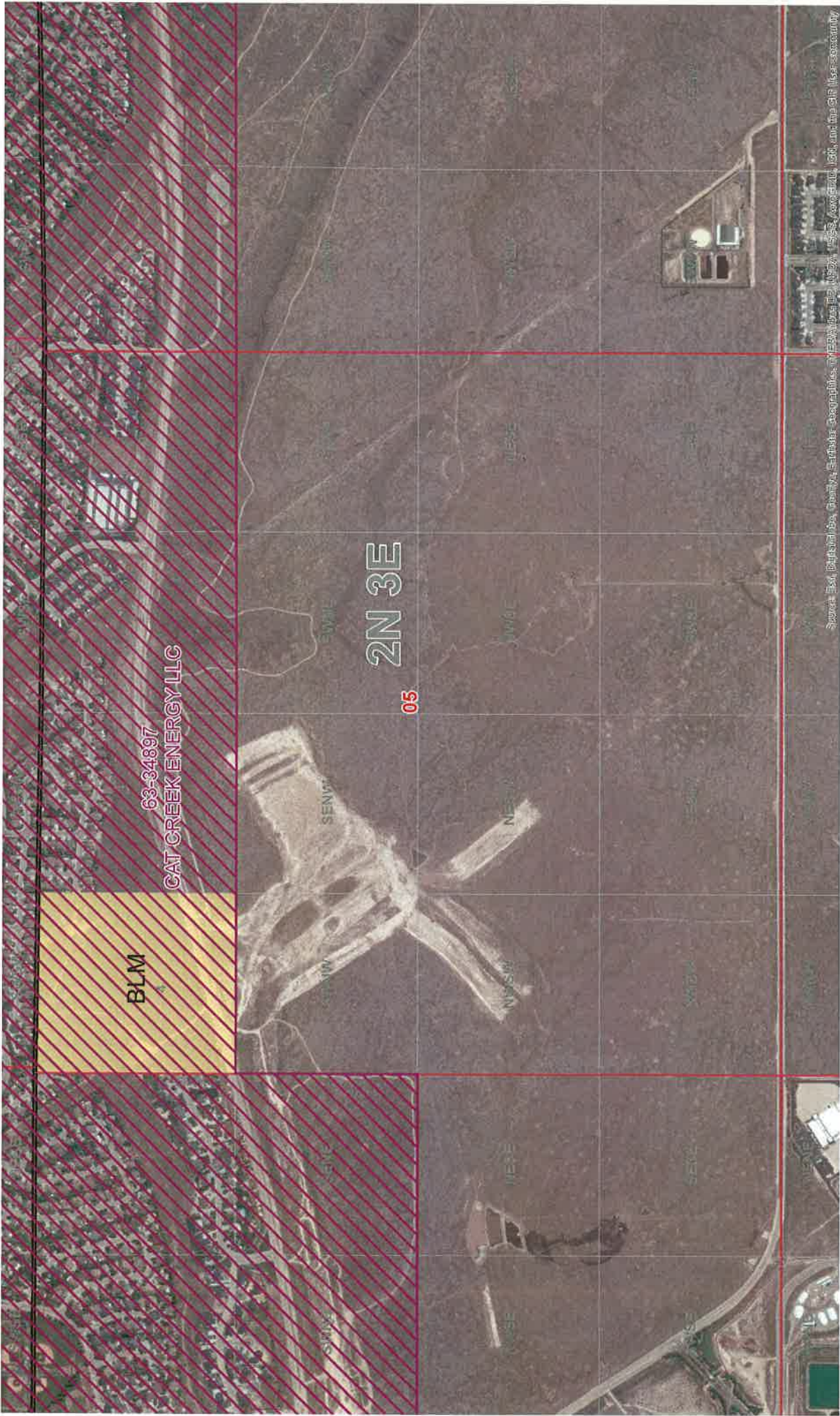












BLM

63-34897  
CAT CREEK ENERGY LLC

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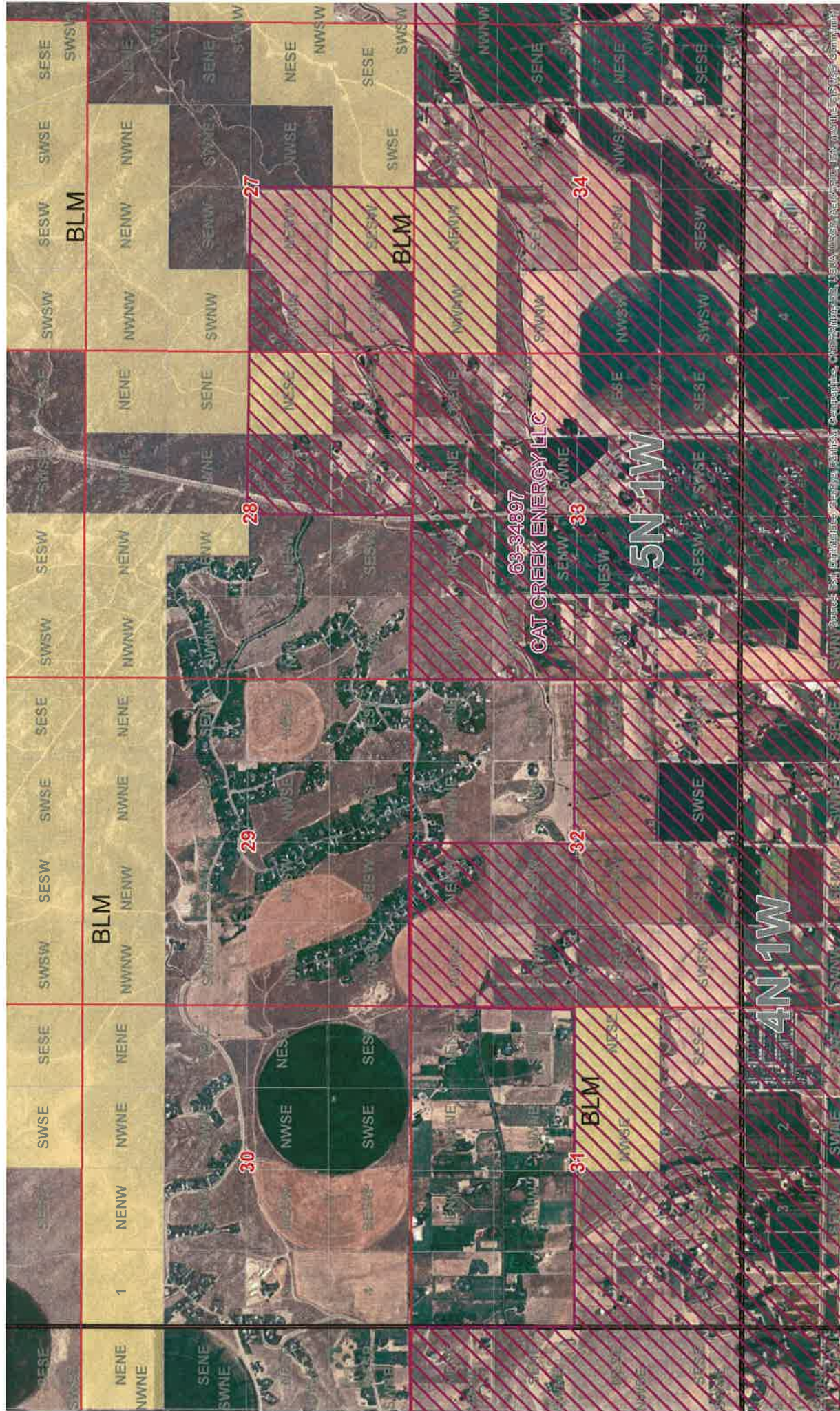
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Aerial photograph provided by the BLM for informational purposes only. The BLM does not warrant the accuracy or completeness of the information shown on this map.



**SOURCE:** PSM Publishing, Coyle's E-Book Catalogue; INTERNATIONAL DS, USGA, USGS, AEWGFC, ISN, and THE GOLFWRITERS' COMMUNITY.

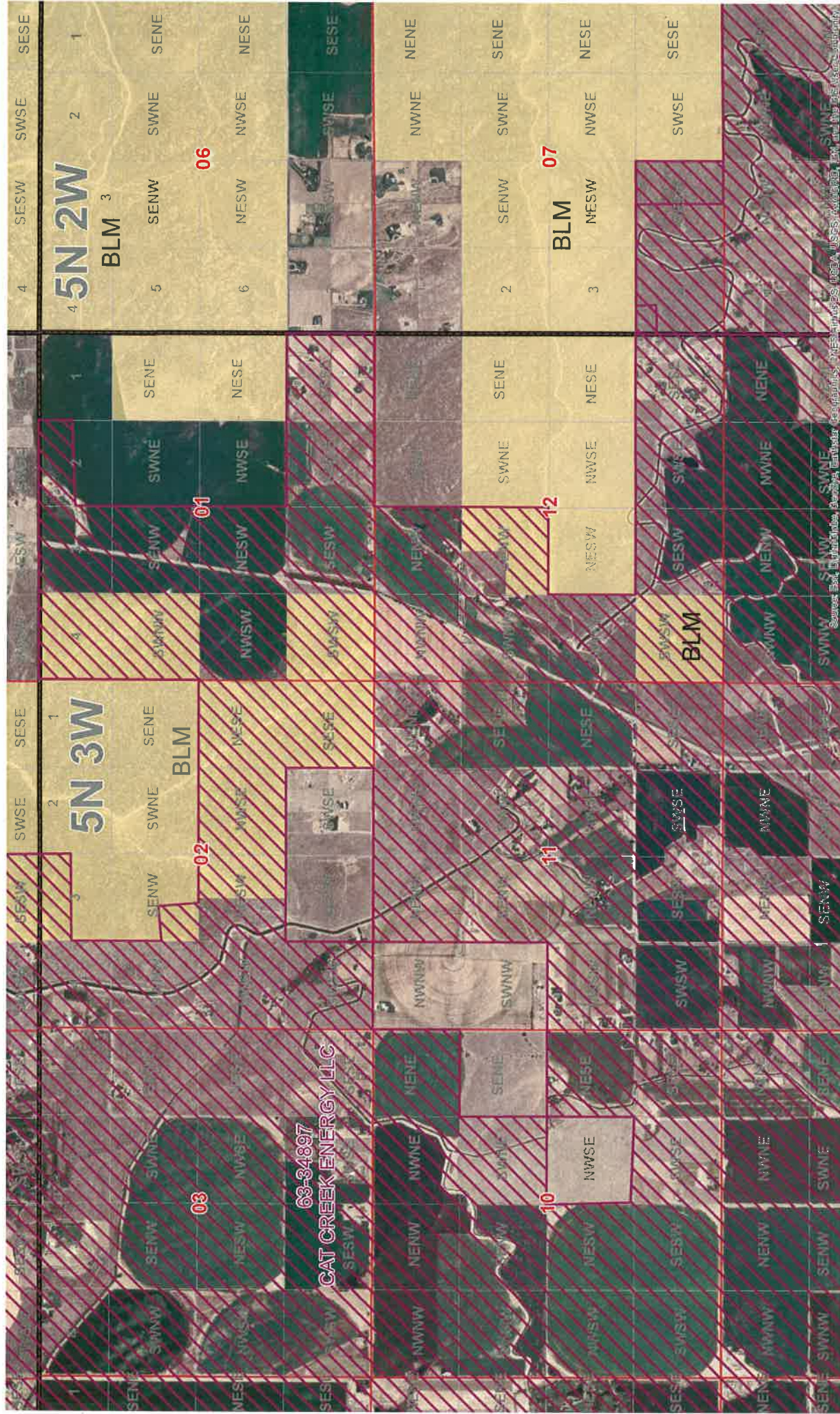




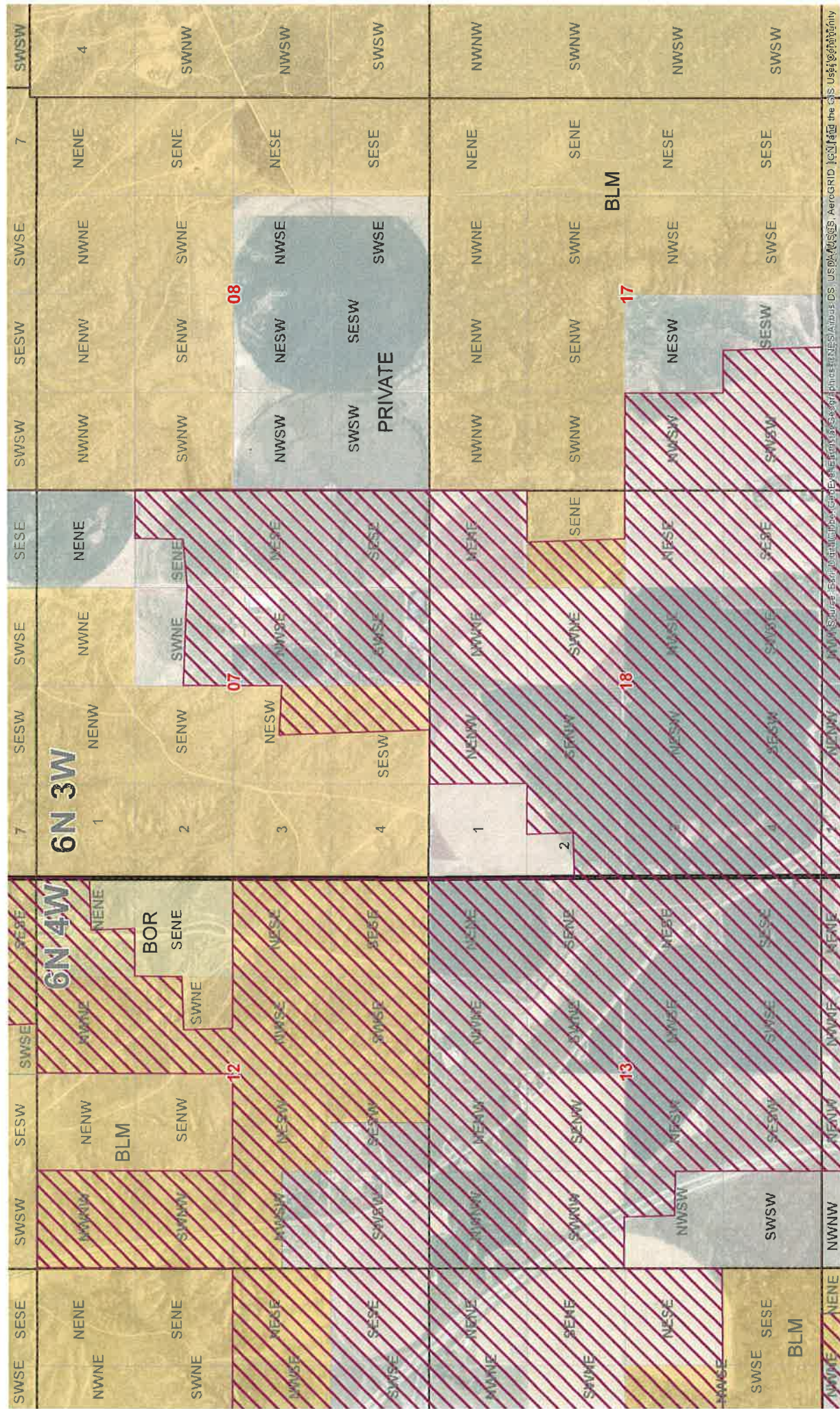




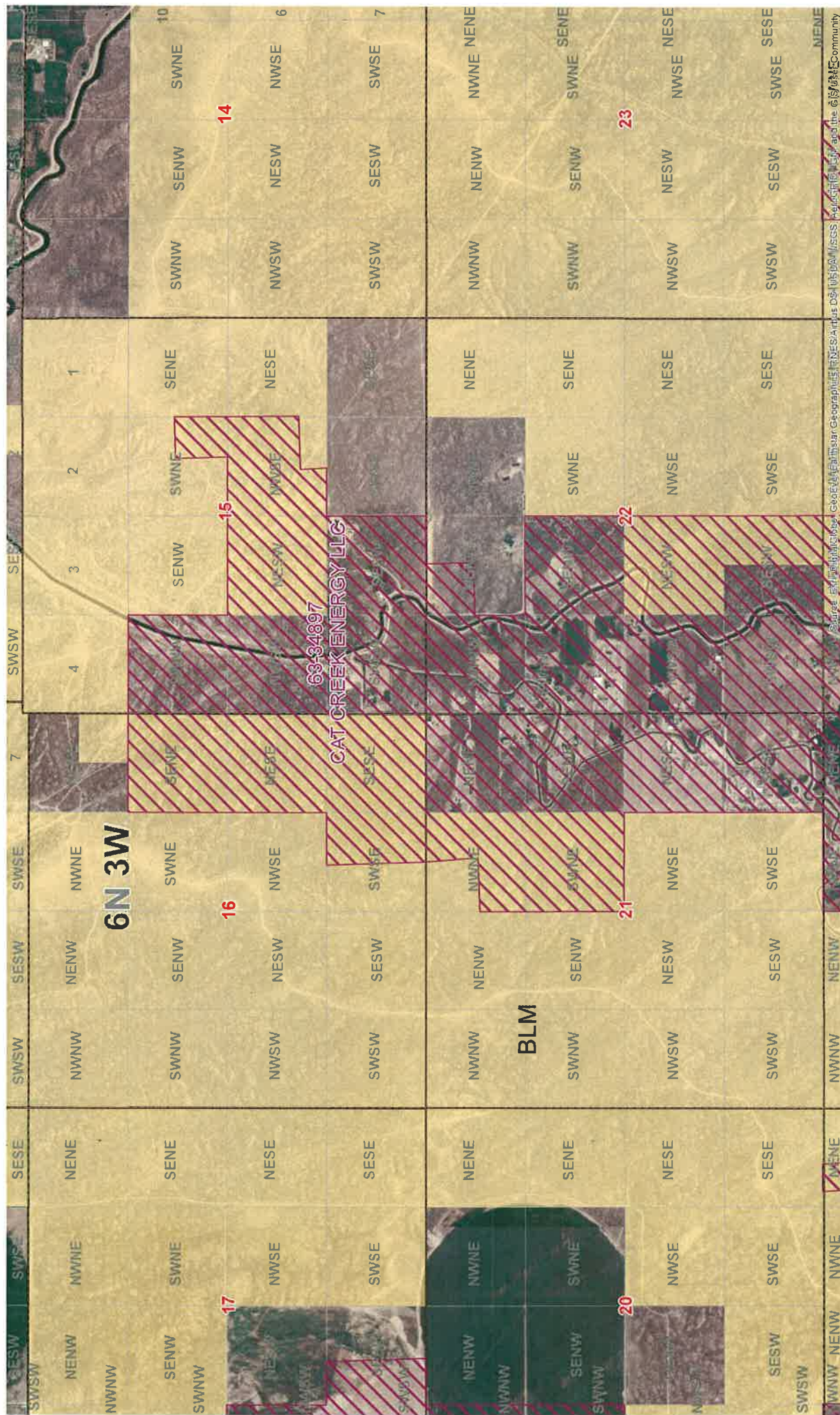




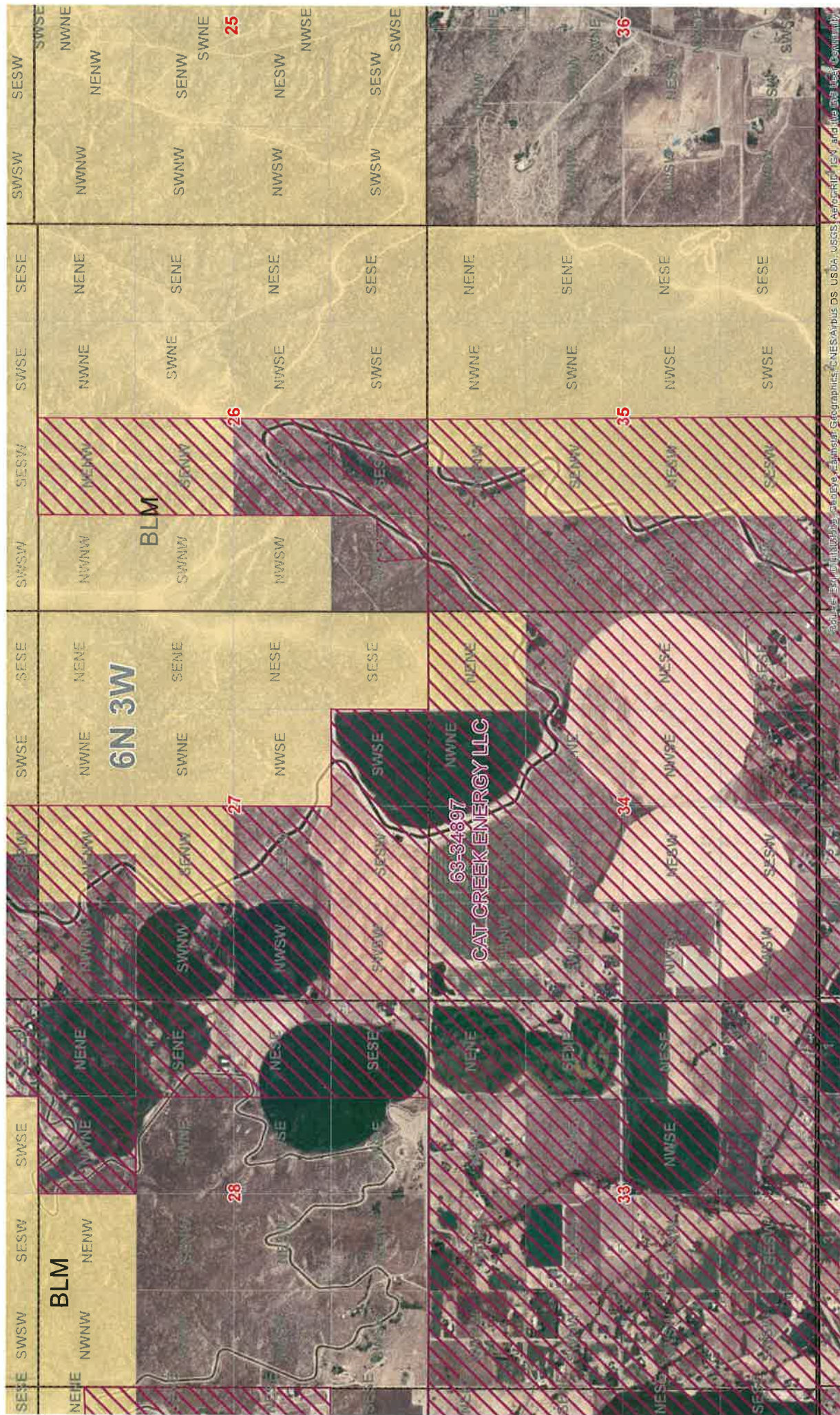












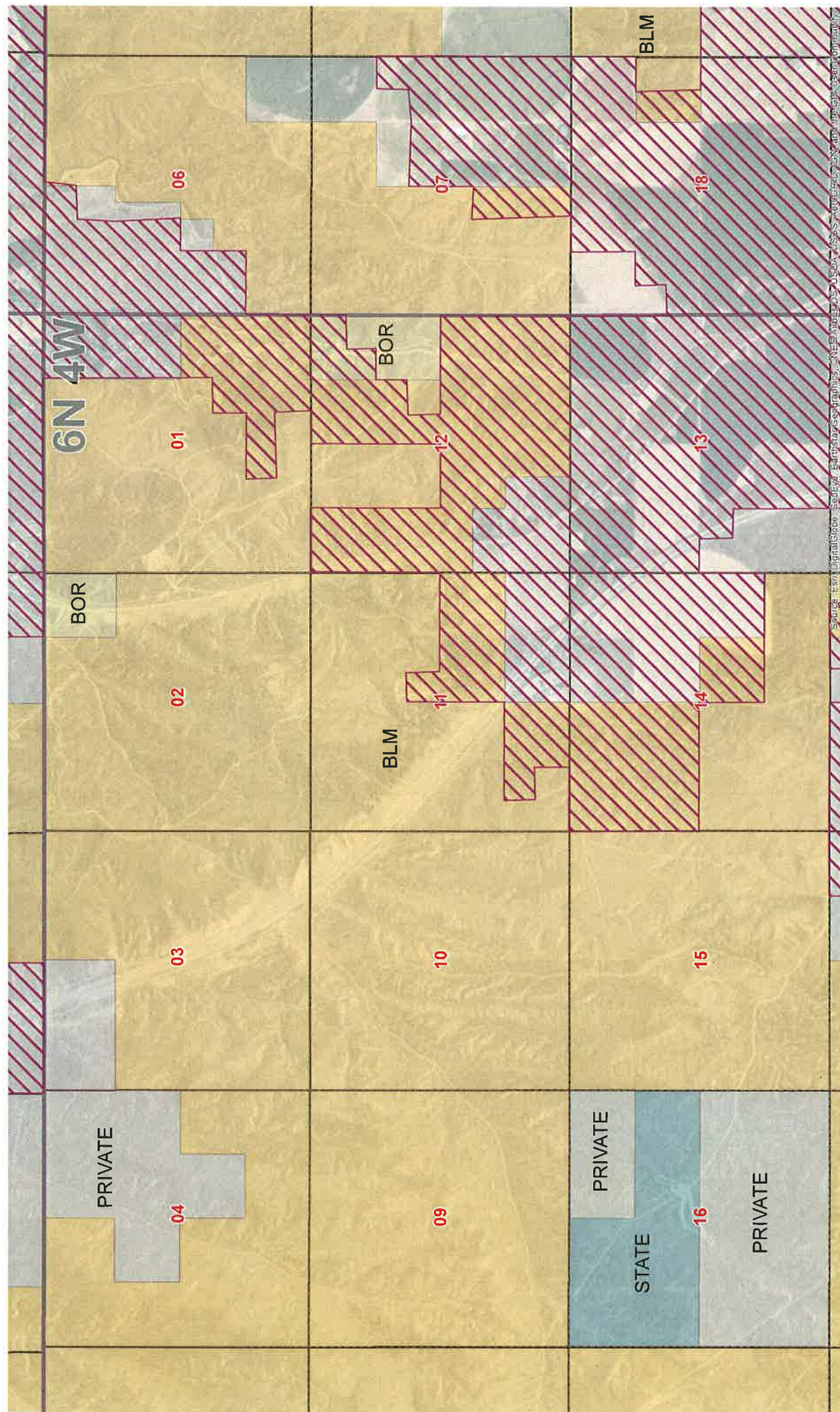




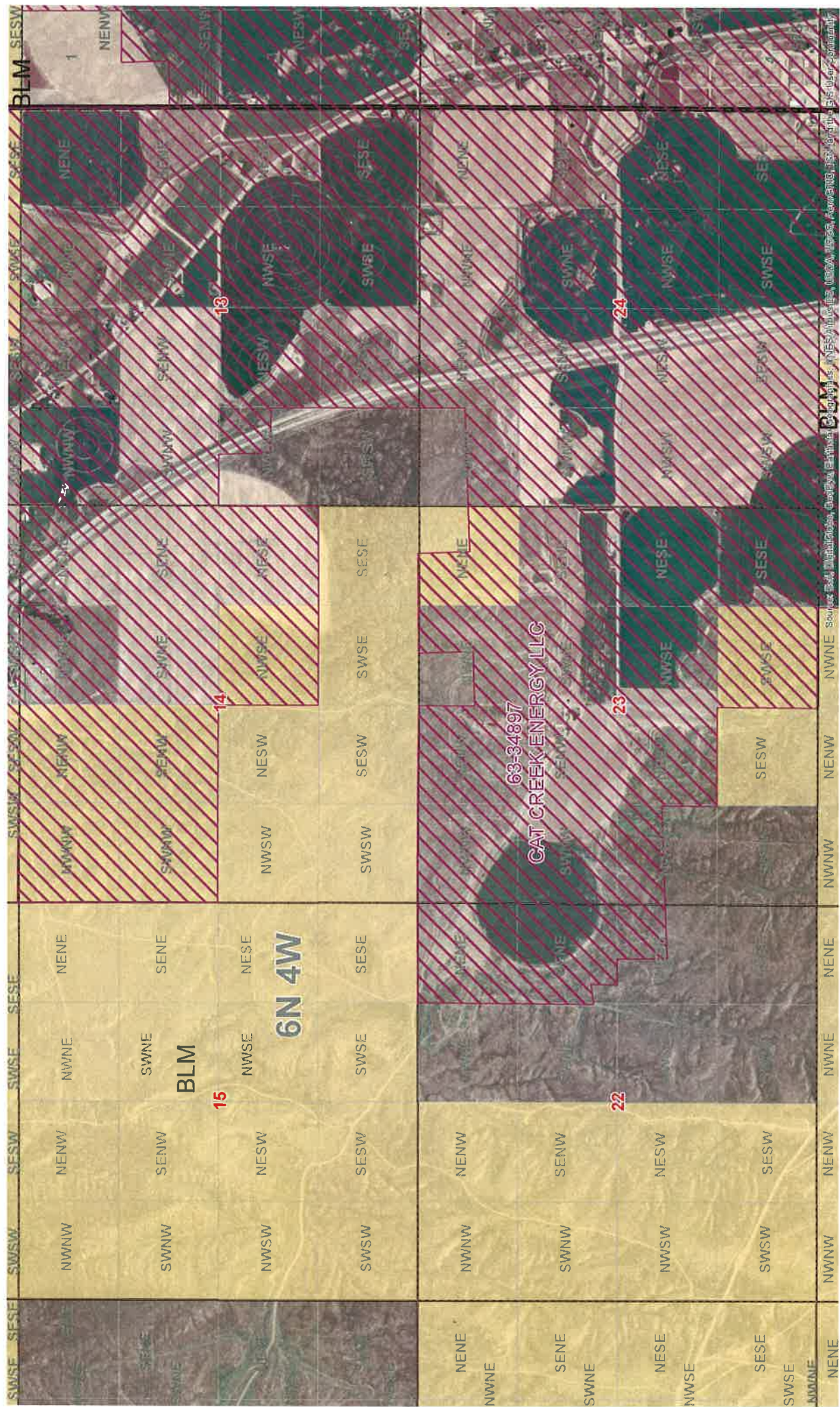




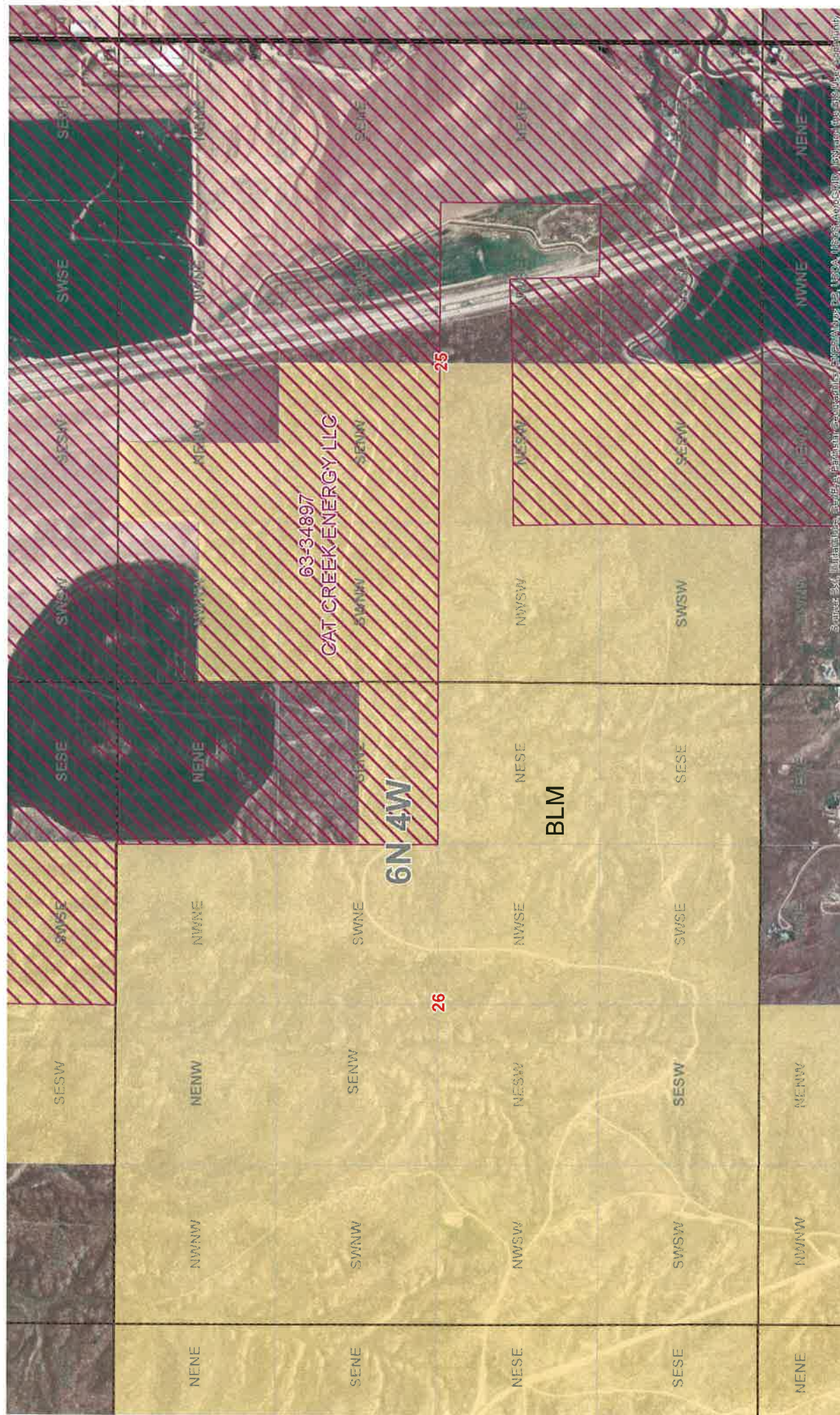








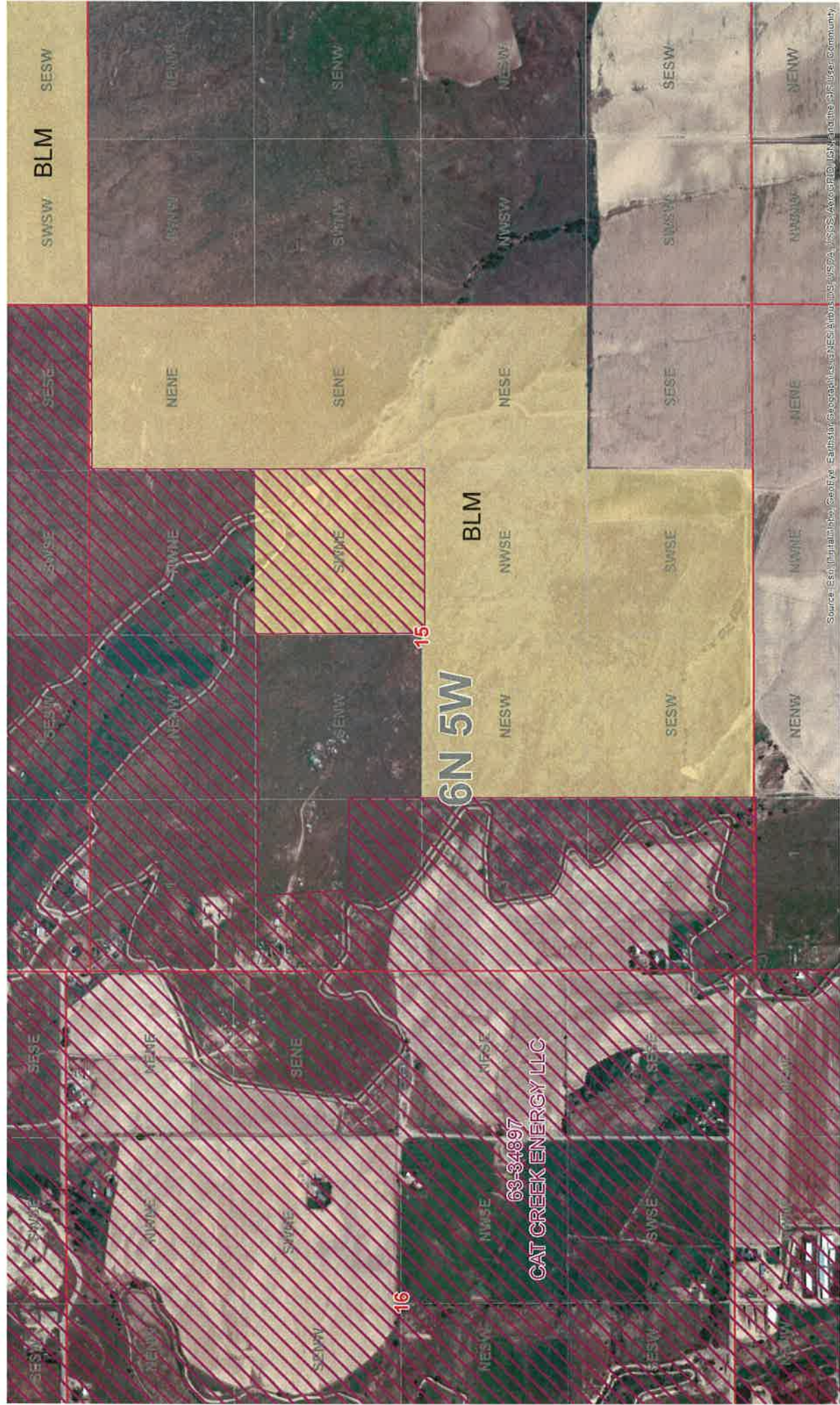












Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community





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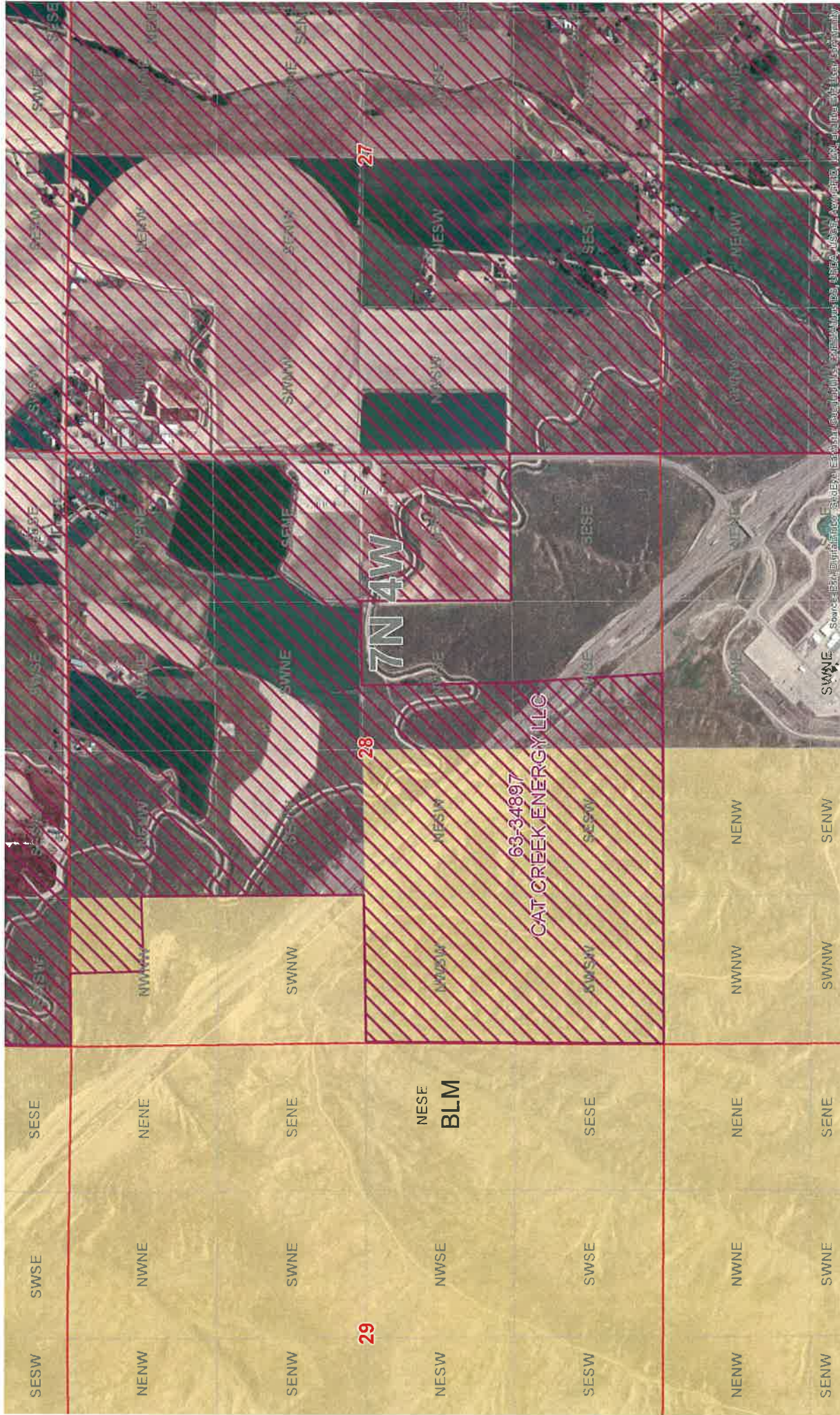
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6N 5W BLM

63-34897  
CAT CREEK ENERGY LLC

Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, AeroGRID, IGN, and the GIS User Community





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BLM

CAT CREEK ENERGY LLC

63-34897

SWNE

Source: BLM, Department of the Interior, Bureau of Land Management, 2014. Data: USGS, National Wetlands Inventory, 2014. Data: USGS, National Wetlands Inventory, 2014.