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June 16, 2005

Mr. Shelley W. Keen
Water Rights Supervisor
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Request to Cancel Permit 65-13598
Our File No. 7346-1

Dear Shelley:

I represent Michael and Sarah Redman who hold a senior water right, License 65-13156, on Fir Tree Gulch Creek downstream of Permit 65-13598 issued to Betty Derbonne. The Redmans purchased the downstream property with License 65-13156 and other senior water rights in the Fall of 2003 and since that time have experienced shortages in flows to fill their water rights. After investigating the water right files and their upstream neighbors' (Jack Mooers and Betty Derbonne) use of water under Permit 65-13598, the Redmans believe the permit was improperly developed. Therefore, the Redmans have significant concerns about the pending license for 65-13598 and request IDWR to cancel the permit pursuant to Idaho Code § 42-311.

Unauthorized Point of Diversion

The application and permit for 65-13598 incorrectly stated that the point of diversion from Fir Tree Gulch Creek is located in the NENE of Section 21, T10N, R1E. In fact, the point of diversion for Permit 65-13598 is located in the NWNE of Section 21, T10N, R1E on land owned by the Bureau of Land Management ("BLM"). At some point, IDWR apparently realized this fact and required the applicant to obtain authorization from the BLM. The applicant's counsel obtained a letter from Gary Madenford at the BLM stating that, based on a presented 1969 photograph of a pre-Federal Land Policy and Management Act ("FLPMA") diversion, "BLM's concerns regarding the diversion and canal on public land, claim number 65-13598 have been satisfied."

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I have spoken with Gary Madenford and another BLM employee, Fred Price, who were involved in this exchange with the applicant's counsel. Both Mr. Madenford and Mr. Price have explained to me that the intent of this letter was merely to note that the BLM would not object to a diversion on their land, *so long as* a valid state-based water right existed prior to the enactment of FLPMA in 1976 *and* the diversion and associated right would continue to be used in the same nature, amount, and dimension as it was prior to 1976. By definition, a *new* application for permit does not meet these terms. And, there is no evidence of a prior state-based water right existing at this location for the use and amount sought under the permit. Mr. Madenford and Mr. Price explained that the BLM did not authorize any new or expanded diversion and use of water from BLM land. Mr. Madenford and Mr. Price have agreed to testify to these facts at a contested case hearing involving another new application for permit (65-22718) filed by the same applicant to divert an additional 0.1 cfs of water from the same unauthorized point of diversion.

Without a valid right-of-way from the BLM, Permit 65-13598 is improperly developed on BLM land and should be canceled.

Permit Partially Undeveloped

Permit 65-13598 allowed 4 cfs for the irrigation of 200 acres and 32 AF for irrigation and wildlife storage from Fir Tree Gulch Creek and unnamed streams in multiple locations throughout Sections 21, 22 and 27 (which includes an area in Section 22 around Box Canyon Springs, the sole water source for the Redmans' senior water rights 65-13155 and 65-3025X).

IDWR's beneficial use field exam on August 21, 2001 found that no irrigation had been developed under Permit 65-13598. The exam found a developed diversion from Fir Tree Gulch Creek to a man-made pond created by the applicant ("Fir Tree Reservoir") and then running to four additional ponds created by the applicant ("Four Lower Ponds"). The exam also noted that a diversion developed in a stream called "Scott's Gulch" (which was not allowed under the permit) was not recommended because the diversion was developed after proof of beneficial use was due and submitted in April 2000. The only beneficial use recognized during the exam was wildlife storage in Fir Tree Reservoir and the Four Lower Ponds. Yet, the exam report recommended no amendments to the permitted points of diversion or places of use. ("None" is checked under the Recommended Amendments section of the report).

Under Idaho Code § 42-204, permitted rights that are not developed and placed to beneficial use within the allotted period of time are deemed abandoned. If issued at all, the pending license for Permit 65-13598 should be carefully limited to the use amounts, places of use, and points of diversion timely developed under the permit.

IDWR's Recommended License Amount of 1 cfs is Unwarranted

Based on a license examination analysis by John Westra (dated August 28, 2001), the Beneficial Use Field Report for Permit 65-13598 (dated June 27, 2002) recommends 1 cfs for

diversion to storage and 26.2 afa for wildlife storage in the five ponds. Mr. Westra's analysis is based on unknown lengths of varying pipe size over an estimated distance of approximately one mile and an estimated elevation drop of 480 feet. Using broad assumptions, Mr. Westra calculated the diversion rate to storage as 0.69 cfs, which he then rounded up to 1 cfs. This analysis and the resulting recommendation present two significant problems.

First, it is inappropriate for IDWR to recommend a 1 cfs diversion rate based on broad assumptions and a 40 percent "rounding bonus" from a reputedly low-flow creek with senior rights downstream that—even in the modest amounts of 0.02 (65-22874 held by Pat Carlock) and 0.2 (65-13156 held by the Redmans)—are not being filled. IDWR has the capability of measuring the flow precisely and it should have done so in this case.

Second, and more importantly, it is inappropriate for IDWR to recommend a constant diversion rate of 1 cfs for ponds that, once filled, need only a fraction of that amount to maintain the claimed beneficial use. The total surface area of the five ponds is 2.9 acres (see attached maps provided by Christian Petrich of SPF Water Engineering LLC). Using IDWR's general approach to estimating pond evaporation losses (*e.g.*, Molnau et al. 1992), 2.9 acres requires a diversion rate of less than 0.06 cfs. Seepage losses should be minimal since at least the large upper pond, Fir Tree Reservoir, is lined with bentonite and the flow between at least some of the ponds is piped. Even under the generous assumption that seepage losses equate to a doubling of the pond acres, only a 0.12 cfs diversion would be appropriate. Given that the only developed beneficial use under Permit 65-13598 is wildlife storage (and thus the water should not be "flowing through" to any other use) and given the concerns of injury to downstream water rights on Fir Tree Gulch Creek, it is critical that IDWR distinguish between the diversion rate necessary to initially fill the ponds (which already has occurred) and that rate necessary to maintain them.

If issued at all, the pending license for Permit 65-13598 should have a constant diversion rate based solely on reasonably-determined evaporation and seepage losses associated with the five ponds.

Adequate Measuring Device Is Not Installed

Permit 65-13598 is expressly conditioned on the permanent installation and maintenance of a measuring device and lockable controlling works. Idaho Code § 42-701(1) confirms this requirement. No such device has been installed at Permit 65-13598's point of diversion at Fir Tree Gulch Creek.

On August 18, 2004, Steve Lester wrote a letter to water users in this area documenting his inspection of and his conclusions regarding numerous diversion facilities, including the diversion for Permit 65-13598. Lester notes that a control box for the diversion is located near the upper pond and not at the diversion point itself, but he concludes, "Controls not necessary at creek intake pipe unless events show otherwise." The Redmans believe events have indeed shown otherwise.

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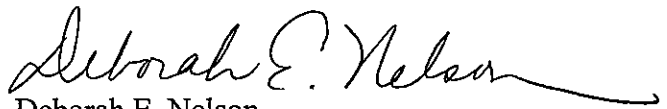
The installation of an accurate measurable, lockable diversion works at the point of diversion is particularly important here. The Redmans and other senior downstream water users, including Pat Carlock (holder of right number 65-22874) who also has protested the new proposed use on Fir Tree Gulch Creek (contested case 65-22718), have not been receiving sufficient water flows to fill their rights. Depending on the type of measuring device installed at the pond, the "control box" might not be capable of accurately measuring a diversion occurring a mile away. Additionally, the rugged terrain and remote location of the diversion make it essentially unregulated by the only watermaster who lives over 50 miles away. Locating the control box a mile into the permit-holder's private property exacerbates this problem because it means that neighboring property owners such as the Redmans have no ability to monitor the diversion themselves.

Conclusion

Given the unauthorized point of diversion and other significant concerns outlined in this letter, pursuant to Idaho Code § 42-311, IDWR should cancel Permit 65-13598. At a minimum, pursuant to Idaho Code § 42-311, IDWR should order all diversion under Permit 65-13598 to cease until (1) the permit holder obtains a valid right-of-way for diversion on BLM land; (2) IDWR determines the appropriate diversion rate to maintain the only developed use under the permit; and (3) an accurate measurable, lockable diversion works is installed at the point of diversion.

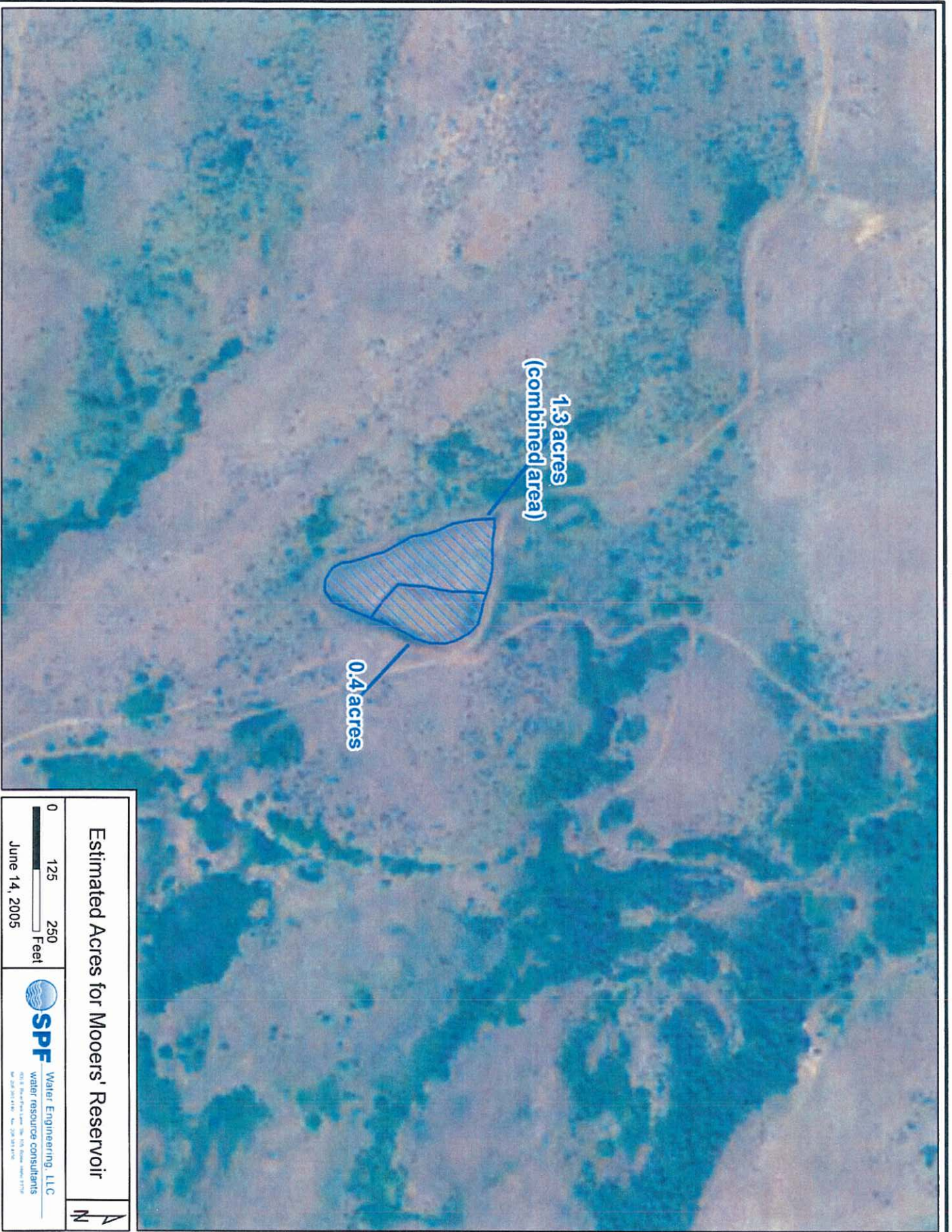
Please keep me informed of any developments in IDWR's consideration of this letter and the pending license for Permit 65-13598.

Sincerely,


Deborah E. Nelson

Encl.

cc: Kay Walker, IDWR State Office (w/ enclosures)
Lori Graves, IDWR Western Regional Office (w/ enclosures)
Steve Lester, IDWR Western Regional Office (w/ enclosures)
John Westra, IDWR Western Regional Office (w/ enclosures)
Gary Madenford, Bureau of Land Management (w/ enclosures)
Fred Price, Bureau of Land Management (w/ enclosures)
Michael and Sarah Redman (w/ enclosures)
Pat Carlock (w/ enclosures)



Estimated Acres for Mooers' Reservoir

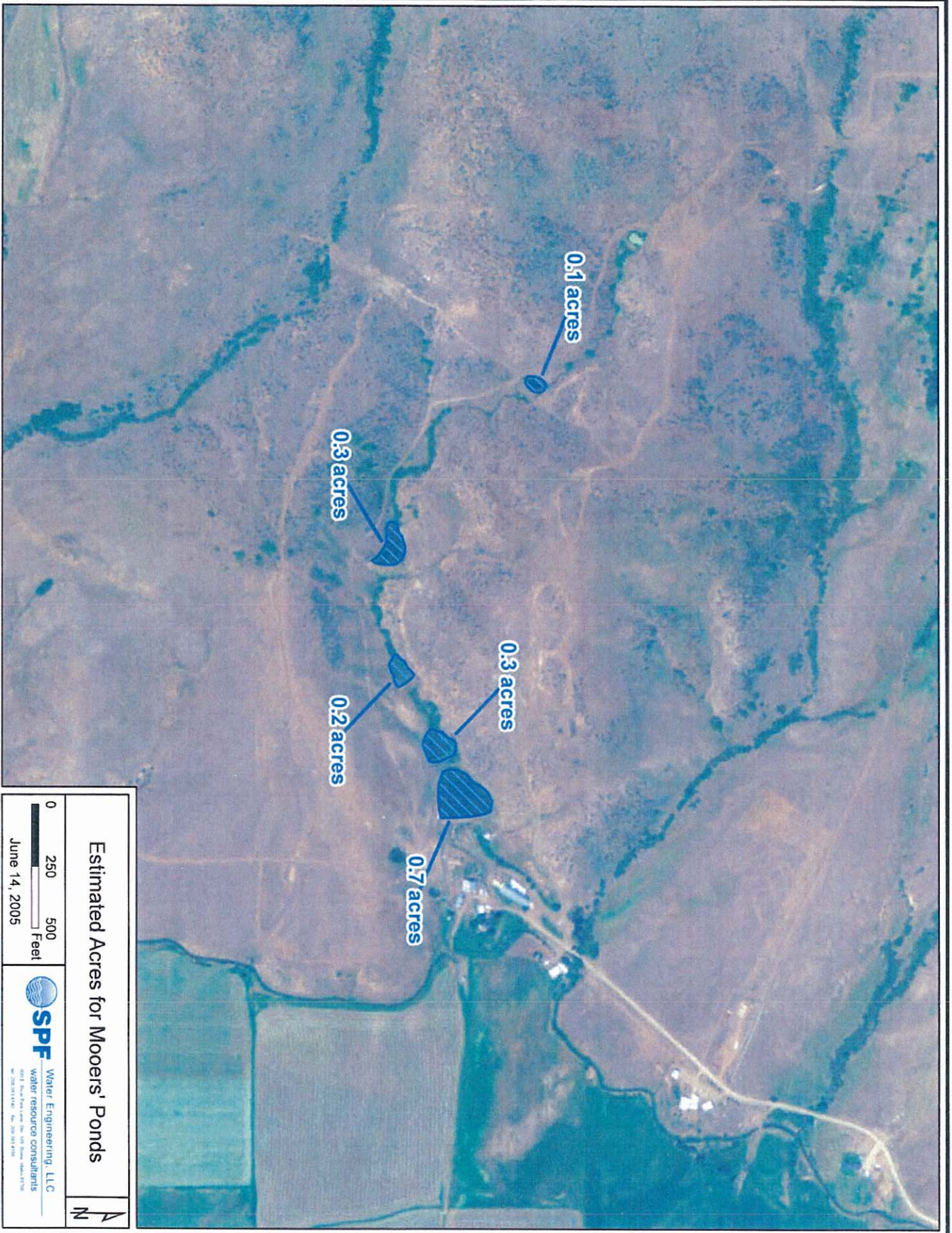


June 14, 2005



Water Engineering, LLC
Water Resource Consultants





Estimated Acres for Mooers' Ponds

0 250 500
Feet

June 14, 2005



Water Engineering, LLC
water resource consultants

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