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WATER RESOURCES
WESTERN REGION

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Filing Fee: \$25.00

NOTICE OF PROTEST

This form may be used to file a protest under Sections 42-203A, 42-203C, 42-211, 42-222 or 42-240, Idaho Code. The Department will also accept a timely protest completed in a different format if it contains the same information requested on this form. Each protestant must provide a separate \$25 filing fee for each application protested. The Department's Rules of Procedure (IDAPA 37.01.01) require the protestant to **send a copy of the protest to the applicant.**

1. Matter protested. Application for ☒ Permit ☐ Amendment of Permit ☐ Transfer ☐ Exchange
No. 65-24118 in the name of Colt Brown
2. Protestant's Name: Black Canyon Irrigation District
Address: P.O. Box 226, Notus, ID 83656
Telephone: 208-459-4141 Email: carl@blackcanyonirrigation.com
3. Protestant's Representative: Andrew J. Waldera
Address: Sawtooth Law Offices, 1101 W. River St., Ste. 110, Boise, ID 83702
Telephone: 208-629-7447 Email: andy@sawtoothlaw.com
4. Basis of protest. Clearly state your objections to approval of the application and identify the applicable review criteria. See Instructions for Filing a Notice of Protest for the relevant review criteria.
The District is concerned over whether a permit, if granted, will interfere with the physical filling of Cascade Reservoir during and after federal flood control operations until the date of allocation. Please see attached explanation sheet.

(Additional pages may be attached to describe the basis of your protest.)

Identify any review criteria that are not a basis for your protest:

5. ☒ Check here if Protestant and Representative will accept service of documents by email at the email address(es) listed under Item #2 and #3 above.

I 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 properly notified, 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.**

Protestant's or Representative's Signature

Andrew J. Waldera, Representative
Printed Name and Title (if applicable)

Date

5/14/22

\$25.00 fee received by

FOR DEPARTMENT USE ONLY

Receipt #

Date

dj

W050425

05/13/2022

**APPLICATION FOR PERMIT NO. 65-24118
in the name of Colt Brown**

PROTEST SUPPLEMENTAL SHEET

Question No. 4 (Basis of Protest)

Black Canyon Irrigation District (“BCID”) protests the above-referenced Application for Permit under Idaho Code Section 42-203A on the following grounds:

Section 42-203A(5)(a); Injury

Applicant seeks to appropriate 1.8 cfs from the Gold Fork River upstream of, and tributary to, Cascade Reservoir for irrigation purposes from March 15 thru October 31. Several months of the proposed season of use overlap with forecast and rule curve-based federal flood control operations during flood control years. The current position of the Idaho Department of Water Resources (“Department”) and the State of Idaho is that senior storage water rights for Cascade Reservoir are accounted for on a “paper fill” (*i.e.*, accrual method) basis. This water right accounting construct is performed year-round and accrues/accounts natural flow to the senior Cascade Reservoir storage water rights regardless of whether physical storage actually occurs (*i.e.*, the paper fill-based water right accounting construct counts flood control bypass flows and reservoir evacuations against the existing storage rights for Cascade Reservoir).

Whether the Department’s paper fill-based water right accounting construct is consistent with Idaho law is still an open question at the ultimate appellate level. The Idaho Supreme Court declined the address the “already appropriated” arguments presented by BCID in the context of its (BCID’s) recent “refill”-based appeal in *Black Canyon Irr. Dist. v. State (In Re SRBA Case No. 39576*, 163 Idaho 144, 408 P.3d 899 (2018), holding that those arguments are matters of water right administration first reserved for the Director to address. Nearly identical “already appropriated” arguments were also pending before the Idaho Supreme Court in the Boise River Basin appeals because: (1) flood control operations in the basin occur under similar forecast and rule-curve-based protocols; and (2) the appeals were predicated on IDAPA-based judicial review of administrative contested case proceedings directly addressing the Department’s paper-fill water rights accounting construct. The Idaho Supreme Court was poised to address the “paper fill” water rights accounting construct in the Boise River Basin (Basin 63), but the matter was ultimately settled by those parties short of oral argument and Court decision. To the extent the paper-fill water rights accounting construct is consistent with Idaho law, this Application for Permit can decrease the quantity of “excess” or “ancillary use” water available and necessary to physically fill Cascade Reservoir during flood control years under the existing storage water rights.¹

¹ The Department expressly recognizes the “historic practice” of using so-called “excess” flows to physically fill reservoir spaces in the Payette River Basin bypassed or vacated for flood control purposes. The pending Application for Permit, if not sufficiently conditioned, erodes the quantity of “excess” water otherwise historically available and used to physically fill the reservoirs, in turn injuring existing water users dependent on stored water supplies, including BCID.

This injury concern is magnified by what the Idaho Supreme Court did decide in Docket Nos. 44635 (the United States appeal) and 44636 (the BCID appeal): namely that beneficial use-based late claims previously pending in the SRBA designed to preserve the undisputed historic practice of storing and using post-flood control release water in the Payette River Basin are barred by the operation of *res judicata* (resulting from the prior completion of the Payette Adjudication in 1986).

One of the administrative means by which BCID is left to preserve the historic status quo (*i.e.*, by preventing the future/further erosion of available “excess” flows used to physically fill Cascade Reservoir) is protesting new surface water right applications sourced from the Payette River and its tributaries going forward under Idaho Code Section 42-203A(4).

Section 42-203A(5)(e); Conflicts with the Local Public Interest

As noted in the *Comprehensive State Water Plan for the Payette River Basin* (approved and adopted by the Idaho Legislature on February 5, 1999), forecast and rule curve-based flood control operations (*i.e.*, “spill and fill” reservoir operations) are critical to the protection of property and life in the lower Payette River Valley. *See, e.g., id.*, pp. 39-42; 68-72; and 160-163. Consequently, the Plan memorializes the existence and desirability of these operations and the balance between flood control and beneficial use storage the operations achieve (through the “refilling” of Cascade and Deadwood Reservoirs as and when it is safe to do so for beneficial use storage; *i.e.*, as the flood risk wanes). *Id.*, pp. 160-163.

Issuing the requested permit in this matter is contrary to the public interest because it jeopardizes the integrity (and balance) of spill and fill flood control operations by widening the gap between “paper fill” and physical fill of the reservoirs. This, in turn, could lead to future reservoir operations shifting closer to a “fill and spill” flood control regime providing less public flood control benefit than presently exists.

Section 42-203A(5)(f); Contrary to the Conservation of Water Resources

Cascade Reservoir contains a conservation pool (both for water quality and wildlife/fisheries habitat) and additional water storage increasingly relied upon for downstream anadromous fish flow augmentation. While much of Cascade Reservoir is “uncontracted space,” that space is not free to be used for other purposes. Rather that space was formally set aside via NEPA process in 1995—creating a pool of water supporting a variety of environmental demands integral to local water quality and fisheries, and central to meeting the flow augmentation requirements of the landmark Nez Perce Water Rights Settlement Agreement (and resulting Congressional Act) of 2004. Flows from the Payette River Basin are also integral to meeting downstream Snake River minimum stream flows, particularly at the Weiser Gage.

Issuing the requested permit can decrease the quantity of water available to physically fill the reservoir in flood control years, thereby jeopardizing the conservation, environmental, and water rights settlement-based demands already placed on those stored water supplies.

Reservation of Rights

During the course of these proceedings, additional bases of protest may come to light. BCID reserves the right to raise additional contentions as they reveal themselves and as it deems necessary.