

RECEIVED

APR 04 2022

Thomas J. Budge, ISB No. 7465
RACINE OLSON, PLLP
P.O. Box 1391; 201 E. Center
Pocatello, Idaho 83204-1391
208-232-6101 – phone
208-232-6109 – fax
tj@racineolson.com

Department of Water Resources
Eastern Region

Emily E. Lewis, Utah Bar No. 13281
CLYDE, SNOW & SESSIONS, P.C.
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
801-322-2516 – phone
801-521-6280 – fax
eel@clydesnow.com

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 85695 IN THE NAME OF
PACIFICORP

NOTICE OF PROTEST OF BEAR RIVER
WATER USERS' ASSOCIATION

Bear River Water Users' Association, Inc. ("BRWUA") through legal counsel, Racine Olson, PLLP, and Clyde, Snow & Sessions, P.C., hereby protests Application for Transfer of Water Right No. 85695 (the "Application"). In support of its protest, BRWUA states as follows:

1. BRWUA is a non-profit corporation organized to represent its members who are all Bear River Basin water users for the purpose of, among other things, protecting their water rights. BRWUA's membership includes Last Chance Canal Company, West Cache Canal Company, Cub River Irrigation Company, Bear River Canal Company, and Idaho and Utah small pumper associations. BRWUA members represent approximately 3,000 family farms who collectively irrigate more than 150,000 acres in Idaho and Utah.

2. BRWUA members all own water rights to the natural flow of the Bear River and contract rights to storage water in Bear Lake. The storage rights of BRWUA members are incorporated into the decreed Bear Lake storage rights of PacifiCorp which authorize water to be "stored in what is known as the Bear Lake Reservoir and withdrawn therefrom from time to time as needed or required ... for the development of power or generating of electric energy ... and for irrigation purposes in what is generally known as the Bear River Valley."

3. Under Idaho law, BRWUA members hold equitable title to the storage rights that PacifiCorp proposes to change via the Application. *U.S. v. Pioneer Irr. Dist. (In Re SRBA Case No. 3957)*, 147 Idaho 106 (2007). The interests of BRWUA members are further defined in agreements between PacifiCorp and BRWUA and its members, including the Operations Agreement for PacifiCorp's Bear River System dated April 18, 2000, and the Amended and Restated Bear Lake Settlement Agreement dated July 2, 2004.

4. BRWUA files this notice of protest because the proposed transfer will injure existing water rights, constitutes an enlargement in use of the original rights, and is not in the local public interest as defined in Section 42-202(B), Idaho Code. BRWUA reserves the right to protest the Application on any other grounds authorized under Idaho law.

5. If the Application is granted, appropriate terms and conditions must be attached to protect the prior vested water rights of BRWUA members.

6. Please send notices and correspondence regarding this Protest to:

Thomas J. Budge
Racine Olson, PLLP
P.O. Box 1391
Pocatello, Idaho 83204-1391
tj@racineolson.com

Emily E. Lewis
Clyde, Snow & Sessions, P.C.
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
eel@clydesnow.com

DATED this 31st day of March, 2022.

RACINE OLSON, PLLP

By: 
THOMAS J. BUDGE

FOR OFFICE USE ONLY

FEES PAID: \$25.00 DATE: 3/10/22
RECIPT NO.: E047878 BY: MP

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of March, 2022, I mailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

Idaho Department of Water Resources Eastern Regional Office 900 N. Skyline Drive, Suite A Idaho Falls, Idaho 83402	U.S. Mail
Emily E. Lewis Clyde, Snow & Sessions, P.C. One Utah Center, Thirteenth Floor 201 South Main Street Salt Lake City, Utah 84111 eel@clydesnow.com	Email
Christopher H. Meyer GIVENS PURSLEY LLP 601 W Bannock St PO Box 2720 Boise, ID 83701-2720 chrismeyer@givenspursley.com	Email
Mark Sturtevant PacifiCorp 1407 W. North Temple, Suite 110 Salt Lake City, Utah 84116 Mark.Sturtevant@pacificorp.com	Email


THOMAS J. BUDGE



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APR 04 2022

Department of Water Resources
Eastern Region

March 31, 2022

James Cefalo
Idaho Department of Water Resources
Eastern Regional Office
900 N. Skyline Drive, Suite A
Idaho Falls, Idaho 83402

Re: Application for Transfer No. 85695 in the name of PacifiCorp

Dear James:

On March 10, 2022, I filed a Petition to Intervene on behalf of Bear River Water Users Association, Inc. in the matter of Application for Transfer No. 85695. On March 18, 2022, I received your email reporting that the protest deadline has been extended to April 11, 2022. I am hereby withdrawing the Petition to Intervene filed previously, and replacing it with the enclosed Notice of Protest. Please apply the \$25.00 filing fee paid previously to the enclosed Notice of Protest.

I have enclosed a second copy of the Notice of Protest along with a postage paid return envelope. Please conform stamp the extra copy and return it to me.

Sincerely,

A handwritten signature in dark ink, appearing to read 'T. J. Budge', is written over a horizontal line.

T. J. BUDGE

RECEIVED

MAR 10 2022

Thomas J. Budge, ISB No. 7465
RACINE OLSON, PLLP
P.O. Box 1391; 201 E. Center
Pocatello, Idaho 83204-1391
208-232-6101 – phone
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Department of Water Resources
Eastern Region

Emily E. Lewis, Utah Bar No. 13281
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201 South Main Street
Salt Lake City, Utah 84111
801-322-2516 – phone
801-521-6280 – fax
eel@clydesnow.com

SUPERCEDED
-protest Filed 4/4

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 85695 IN THE NAME OF
PACIFICORP

NOTICE OF PROTEST OF BEAR RIVER
WATER USERS' ASSOCIATION

Bear River Water Users' Association, Inc. ("BRWUA"), acting for and on behalf of its members, hereby petitions to intervene in this matter pursuant to rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources ("IDWR").

BACKGROUND

On November 22, 2021, PacifiCorp filed Application for Transfer No. 85695 (the "Application"). The Application was published in the Idaho Statesman on February 17 and February 24, 2022. The protest deadline expired March 7, 2022. Counsel for BRWUA inadvertently overlooked the Application and did not file a protest prior to the February 7 deadline.

The Application seeks to change four water rights owned by PacifiCorp to allow the construction of two new reservoirs—an "Upper Reservoir" and a "Lower Reservoir." Water will be diverted from the Bear River to fill both reservoirs and to mitigate for evaporation from both reservoirs. The Application contains a proposed mitigation plan for evaporation that is intended to offset impacts to other water users.

LEGAL STANDARD

Rule 350 of the Department's Rules of Procedure states: "Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding." If the petition "shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties." (IDAPA 37.01.01.353.)

ANALYSIS

1. BRWUA claims a direct and substantial interest in the Application.

BRWUA is a non-profit corporation organized to represent its members who are all Bear River Basin water users. BRWUA's membership includes Last Chance Canal Company, West Cache Canal Company, Cub River Irrigation Company, Bear River Canal Company, and Idaho and Utah small pumper associations. Collectively, BRWUA members represent approximately 3,000 family farms having a combined irrigated acreage exceeding 150,000 acres in Idaho and Utah. Each of BRWUA's own natural flow water rights in the Bear River as well as contract rights to the use of storage water in Bear Lake.

The storage rights of BRWUA members are incorporated into the decreed Bear Lake storage rights of PacifiCorp which authorize water to be "stored in what is known as the Bear Lake Reservoir and withdrawn therefrom from time to time as needed or required ... for the development of power or generating of electric energy ... *and for irrigation purposes in what is generally known as the Bear River Valley.*" Thus, BRWUA members have an equitable interest in the storage rights that PacifiCorp proposes to change via the Application. BRWUA's interest in such water rights are further defined in agreements between PacifiCorp and BRWUA and its members, including the Operations Agreement for PacifiCorp's Bear River System dated April 18, 2000, and the Amended and Restated Bear Lake Settlement Agreement dated July 2, 2004.

BRWUA has a direct and substantial interest in the Application because it will change the diversion, use, and delivery of storage water under PacifiCorp's storage rights in which BRWUA members have an equitable interest and contractual rights. BRWUA additionally has a direct and substantial interest in the Application because its mitigation plan attempts to mitigate impacts to BRWUA and its members.

2. This Petition does not unduly broaden the issues.

BRWUA seeks to intervene solely to address the statutory criteria under Idaho Code 42-222, which are issues that the Department must consider in any case. In addition, other irrigation entities have filed timely protests due to concerns related to impacts to irrigators from the Application and its mitigation plan. Thus, this Petition does not unduly broaden the issues.

3. BRWUA's interests are not adequately represented by existing parties.

BRWUA's interests are not adequately represented by existing parties because only BRWUA members have storage rights in Bear Lake, and because the existing parties are not parties to the agreements with PacifiCorp cited above. Because of the unique interests and contractual rights of BRWUA members, its interests are not capable of being adequately represented by other parties.

4. BRWUA's Petition to Intervene should not be denied based on timeliness.

"Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice." Rule 352. A prehearing conference has not yet been held in this matter, nor has a formal hearing been scheduled. Therefore, this petition is timely filed.

CONCLUSION

Based on the foregoing, BRWUA respectfully requests that this petition to intervene be granted.

DATED this 8th day of March, 2022.

RACINE OLSON, PLLP

By: _____


THOMAS J. BUDGE

FOR OFFICE USE ONLY

FEES PAID: \$25.00 **DATE:** 3/10/22
RECIPT NO.: E047878 **BY:** MP

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of March, 2022, I sent a true and complete copy of the foregoing document to the following persons in the manner indicated below:

Idaho Department of Water Resources Eastern Regional Office 900 N. Skyline Drive, Suite A Idaho Falls, Idaho 83402	Overnight Mail
Emily E. Lewis Clyde, Snow & Sessions, P.C. One Utah Center, 22 nd Floor 201 South Main Street Salt Lake City, Utah 84111 dbr@clydesnow.com eel@clydesnow.com	Email
Christopher H. Meyer GIVENS PURSLEY LLP 601 W Bannock St PO Box 2720 Boise, ID 83701-2720 chrismeyer@givenspursley.com	Email
Mark Sturtevant PacifiCorp 1407 W. North Temple, Suite 110 Salt Lake City, Utah 84116 Mark.Sturtevant@pacificorp.com	Email


THOMAS J. BUDGE



RECEIVED

MAR 10 2022

Department of Water Resources
Eastern Region

March 8, 2022

Idaho Department of Water Resources
Eastern Regional Office
900 N. Skyline Drive, Suite A
Idaho Falls, Idaho 83402

Re: Application for Transfer No. 85695 in the name of PacifiCorp

To whom it may concern:

Enclosed please find for filing the original and extra copy of Bear River Water Users' Association's Notice of Protest in this matter, together with a check in the amount of \$25.00 for the filing fee. Please conform stamp the extra copy and return back to me in the enclosed stamped and addressed return envelope.

Sincerely,

A handwritten signature in dark ink, appearing to read 'T. J. Budge', with a stylized flourish at the end.

T. J. BUDGE