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WATER RESOURCES
WESTERN REGION

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

NOTICE OF PROTEST

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, and 42-222, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

1. Matter being protested Application for Permit No. 65-23967 in the name of H.O.T. 2 LLLP2. Name of protestant Black Canyon Irrigation District

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

Andrew J. Waldera4. Service mailing address P.O. Box 7985, Boise, ID 837075. Service telephone no. 208-629-7447 Email Address: andy@sawtoothlaw.com

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

Please see attached.

(additional pages may be attached to describe nature of the protest)

7. What would resolve your protest? To be determined; adequate conditioning of any permit and futurelicense to protect the physical filling of Cascade Reservoir during federal flood control/release operations.

I hereby, acknowledge that if I, or my designated representative, fails 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 4th day of September, 2020.

Protestant

Protestant's Representative

Andrew J. Waldera

NOTE:

A protestant is required to timely file a protest with the department together with a \$25.00 protest fee for each application being protested in order for the protestant to be considered a full party by the department. In addition, the department's Rule of Procedure, IDAPA 37.01.01203, requires a protestant to send a copy of a protest to the applicant.

INSTRUCTIONS

1. The matter being protested must be clearly identified. A typical matter is identified by the application number such as "Application for Permit No. _____ in the name of _____" or "Application for Transfer No. _____ in the name of _____."
 2. Show the name of the protestant. Only one (1) protestant may be shown per protest form. If this protest form is signed by more than one person, the hearing officer will consider the first signer as the official protestant and the representative for service of documents.
 3. If the protestant is represented by an attorney or other authorized representative, show the representative's name. The department then will serve documents on the representative and upon the protestant if specifically requested.
 4. Show the address where the department is to serve the documents. This should be the address of the authorized representative unless the protestant does not designate a representative.
 5. Show the telephone number of the authorized representative unless the protestant does not designate a service representative.
 6. Specifically describe the nature of the protest.
 7. Describe the relief being sought by the protestant.
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FOR DEPARTMENT USE ONLY

Received by LE Date 09/04/2020 Time 3:16 PM
\$25.00 fee Receipted by LE # W048681 Date 09/04/2020

**APPLICATION FOR PERMIT NO. 65-23967
in the name of H.O.T. 2 LLLP**

PROTEST SUPPLEMENTAL SHEET

Question No. 6 (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 0.02 cfs from Payette Lake for irrigation purposes from April 15 thru October 31. Payette Lake forms a portion of and is tributary to the Payette River upstream of Cascade Reservoir. Approximately three months of the proposed season of use (April 15 thru July 15) 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” basis. This water right accounting construct is performed year-round and accrues/accounts natural flow to the senior Cascade 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 to 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

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 and Deadwood Reservoirs) 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.

otherwise historically available and used to physically fill the reservoirs, in turn injuring existing water users dependent on stored water supplies, including BCID.

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.