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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF	)	
APPLICATION FOR PERMIT	)	
NOS. 63-34403, 63-34652, 63-34900,	)	PETITION FOR CLARIFICATION
AND 63-34987 (Cat Creek Energy	)	
LLC)	)	
	)	

COMES NOW, the Idaho Department of Fish and Game (“IDFG”) pursuant to IDAPA 37.01.01.260, .513, .710–.711, .770, hereby petitions for clarification of the *Amended Order Consolidating Dockets and Parties; Order to Reorganize Applicant’s Rule 40.05 Information; Order Establishing Protective Order Procedure; Order Authorizing Discovery; Notice of Continued Prehearing Conference* (“Amended Order”) dated June 10, 2020 with regard the scope of discovery authorized for the consolidated docket.

The Amended Order consolidates the two new Applications for Permit Nos. 63-34900 and 63-34987 with Applications for Permit Nos. 63-34403 and 63-34652. *Amended Order* at 2. The Amended Order states: “Applications for Permit 63-34403, 63-34652, 63-34900, and 63-34987 will now proceed as one consolidated contested case.” *Id.* The Order makes clear that: “All parties (whether protestant or intervenor) to this docket are

recognized as parties to the consolidated contested case without additional procedure, protest, or intervention.” *Id.* The Amended Order also authorized all parties to “immediately conduct and engage in discovery pursuant to IDAPA 37.01.01.521.” *Id.*

The Rules of Procedure for IDWR provide that discovery will be governed by the Idaho Rules of Civil Procedure, unless otherwise provided by “statute, rules, order or notice.” IDAPA 37.01.01.520.02. The IDWR Rules also provide that discovery may include: “depositions, productions requests or written interrogatories, requests for admission, subpoenas, and statutory inspection, examination (including physical or mental examination, investigation, etc.” IDAPA 37.01.01.520.01. The Amended Order did not provide notice that procedures other than I.R.C.P. should apply in this case, nor did it otherwise limit the types of discovery that could be conducted. Therefore, discovery in this matter should be conducted as set forth in the Idaho Rules of Civil Procedure.

Clarification is needed, however, with regard to the effect the order consolidating the four applications into “one consolidated contested case” will have on the scope of discovery. *Amended Order* at 2. Idaho Rule of Civil Procedure 33(1) provides: “Unless otherwise stipulated or ordered by the court for good cause allowing a specific additional number of interrogatories, a party may serve on any other party no more than 40 written interrogatories, including all discreet subparts.” Thus, under I.R.C.P. 33(1) and absent the consolidation order, the parties would have had the opportunity to posit forty interrogatories *for each application*. The Amended Order leaves open the question of whether, after consolidation, the parties will be limited to forty interrogatories *total* or whether they may serve forty interrogatories *for each separate application*.

As noted in the Amended Order, the initial purpose of consolidation in this matter was to recognize “all parties (whether protestant or intervenor)” to one application as being parties “to the consolidated contested case docket without additional procedure, protest, or intervention.” *Amended Order* at 2. IDFG did not contemplate consolidation for these purposes would translate into a limitation of its ability to conduct discovery under each of the applications separately. The Rule 40.05 Information provided by applicants in its *Notice of Amended Rule 40.05 Disclosure* dated June 16, 2020 provides only a fraction of the information that IDFG needs to evaluate the impacts of the water use proposed under the applications. There are a multitude of factual questions that still remain with regard to

the proposed applications. While the applications are certainly interrelated, a cursory look at the elements of each makes clear that they cover distinctly different beneficial uses. Application 63-34403 will cover a 100,000 acre-foot pump-storage hydropower project. Application 63-34652 will cover 30,000 acre-feet of storage for downstream consumptive uses within the service areas of Suez Water Idaho Inc., Pioneer Irrigation District, and the City of Meridian. Application 63-34897 will cover 31,000 acre-feet of downstream consumptive uses for the City of Nampa, Black Canyon Irrigation District, and Wood Creek Ranch (this application also includes 120.2 cfs of natural flow diversion from the South Fork of the Boise for new and supplemental consumptive irrigation use on 6010 acres owned by Wood Creek Ranch). Application 63-34900 covers 19,000 acre-feet of downstream consumptive uses by beneficial users that have not yet been identified. Even this simple overview illustrates that the beneficial uses proposed by the applications necessitate individualized discovery tailored to the individualized facts of each application.

Indeed, Cat Creek itself recognizes that the Rule 40.05 information it has provided is not “a detailed explanation of every minute detail of its project or financing plans” nor does it “introduce every item of evidence that the applicant may introduce at trial.” Cat Creek’s expectation is that details “may be fleshed out through discovery and motion practice as in any other adjudicative case.” *Notice of Amended Rule 40.05 Disclosure* at 7. Cat Creek points out that “[a]ll parties are well-equipped to propound discovery requests to address matters for which questions exists [sic] or additional details are sought.” *Id.*

Given Cat Creek’s recognition that discovery will play an important role in further developing the factual record in this matter, IDFG’s concern that many of the details it needs to conduct its effects analysis are still missing, and the overall magnitude of the project being proposed, it does not make sense to unduly limit the parties ability to conduct discovery in this matter. Therefore, IDFG respectfully requests clarification of the Amended Order to the effect that the parties may conduct discovery to the full extent allowed by IDAPA 37.01.01.520.02 and the Idaho Rules of Civil Procedure *for each application* and that the limits on interrogatories set forth in I.R.C.P. 33(1) will apply to each application individually and not to the four applications as a whole.

DATED this 24th day of June, 2020.

/s/ Ann Y.Vonde
ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2020, I caused to be served a true and correct copy of the foregoing PETITION FOR CLARIFICATION by transmitting a copy thereof in the manner listed below:

1. Original to:

Director Spackman Idaho Department of Water Resources PO Box 83720 Boise ID 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☒ Email: gary.spackman@idwr.idaho.gov
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