

JUN 08 2020

WATER RESOURCES
WESTERN REGIONSTATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**NOTICE OF PROTEST**
Amended Application for Permit 63-34900

June 8, 2020

1. Matter being protested

Amended Application for Permit 63-34900 (Cat Creek Energy, LLC), represented by Idaho Water Engineering

2. Name of protestant

United States Department of the Interior
Bureau of Land Management
Idaho State Office
1387 South Vinnell Way
Boise, Idaho 83709-1657

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

Fredric W. Price (contact person)

4. Service mailing address

same as above

5. Service telephone no.

(208) 373-3831

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

On April 22, 2020, an Application for Permit 63-34900 (Cat Creek Energy, LLC) was filed with IDWR and Amended Maps and Land List approximately May 14, 2020. This application of one of four inter-related applications filed by the applicant that are part of the proposed Cat Creek Reservoir (new reservoir, 100,000 AF). BLM has been made a party to all four applications (63-34403, 63-34652, 63-34897, and 63-34900) under IDWR Order issued May 28, 2020. BLM is filing this protest to ensure that BLM interests are protected as all four applications have different elements and various uses. BLM is filing this protest to make it clear that each application may need to be resolved separately in order to protect federal interests. Each application may need to be resolved somewhat differently, in order to, resolve protest elements.

The Application for Permit seeks 2,000 cfs and 19,000 AF from surface water (South Fork Boise River) and states storage may be use for any purpose authorized by existing water rights held by entities who contract for the rental or distribution thereof (see attachment A)". The application states, "the individual "storage" and "from storage" allocations for each of the various end users would be amended at the time of licensing based on contracts for use of such storage that are entered during the developmental period". The application also lists the following multiple uses: Diversion to Storage (2,000 cfs, 19,000 AF); Irrigation Storage, Municipal Storage, Groundwater Recharge Storage, Water Quality Improvement Storage, Industrial Storage, Recreation Storage, Fish Habitat Storage, Commercial Storage, Domestic Storage, Streamflow Maintenance Storage, Wildlife Storage, and Mitigation by Delivery Storage (19,000 AF); Municipal and Mitigation from Storage (19,000 AF); Irrigation from Storage 03/15 to 11/15 (19,000 AF); Irrigation from Storage, Groundwater from Recharge Storage, Water Quality Improvement from Storage, Industrial from Storage, Commercial

from Storage, Commercial from Storage, Domestic from Storage, Streamflow Maintenance from Storage; and Mitigation by Delivery from Storage (19,000 AF).

BLM's protest is based upon the following issues:

1. The Application for Permit has an Amended Map with a proposed Place of Use (POU) boundary that entirely includes Ada County and Canyon Counties, with portions of Payette, Gem, and Malheur (Oregon) Counties. The POU boundary states Elmore County and Camas County are excluded even though the application boundary dubiously includes it. BLM manages federal land that is included within the application's POU boundary. The applicant is not authorized for any uses proposed, or inferred, under this application. POUs on BLM land should be removed and should not be included on any issued permit. If the application is proposing to use canals that cross BLM to transfer water under this new proposed right, a BLM Right-of-Way "ROW" issued pursuant to FLPMA would be required. Trespass on federal land is a prohibited act and third parties cannot use another entities' ROW.

I.C. 42-202(1)(d) states that "[t]he location of the point of diversion and description of the proposed ditch, channel, well or other work and the amount of water to be diverted and used" (emphasis added). The Application does not describe the location of "ditches" (i.e. conveyance infrastructure) that the Applicant will use to deliver water to the place of use. BLM will be able to articulate specific legal land descriptions requiring a ROW once the Applicant provides this information.

2. The Application proposes a "future" mitigation use that has not been previously granted by the State. A "future" use is, by definition, describing a use of water that has not yet occurred, therefore there is no beneficial use to assign a quantity of water to. There is no current expectation of use, no subscribers, or other established relationship with which to ground this use. The statutes only allow one form of speculative future use and that is for municipal purposes sought by a municipality or franchisee (I.C. 42-202(2), 42-202B(5)(a) and (b)). Due to the applications ambiguity and the newly proposed "future" mitigation use, BLM reserves the right to propose conditions that would appropriately protect federal interests.

The proposed Mitigation by Delivery Use POU maps are extensive and ambiguous, including "irrigated lands in the Lower River Basin with senior surface water rights." A listing of individual legal land descriptions is not provided as required by statute. The use of digital boundaries is only provided for irrigation purposes greater than 25,000 acres (I.C. 42-219(2), (5) and (6)).

The Application does not include the location of ditches or other conveyance infrastructure used to deliver water to the place of use, in order for, BLM to articulate what infrastructure may cross federal lands. For any infrastructure crossing federal land, the Applicant does not have legal access to deliver water proposed under this Application across federal land managed by BLM. POUs describing federal land should be removed, and ROWs would be required to use conveyance infrastructure residing on federal land.

3. The application has indicated the use of both legal land descriptions and a large generalized POU boundary. The applicant does not have legal access to federal land managed by BLM. A generalized POU extent via description makes it difficult to articulate specific legal access issues on federal land. BLM reserves the right to identify specific issues as the applicant provides more information.

4. The applicant has indicated that the proposed uses under this application will be subscribers. BLM is concerned about what places of use will be implicated by any future subscribers or possible transfers that could occur if this application is approved.

5. The application is overly broad and is atypical in nature, BLM reserves the right to address additional issues as they become apparent and more information becomes available from the applicant.

Trespass on federal land is a prohibited act (43 CFR §2808.10(a)). A water right also cannot be established in trespass (See e.g., *In RE General Determination of Rights to Use of Surface and Ground Waters of Payette River*, 107 Idaho 221, 687 P.2d 1348, 1353 (1984); citing, *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974); *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920); *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931)).

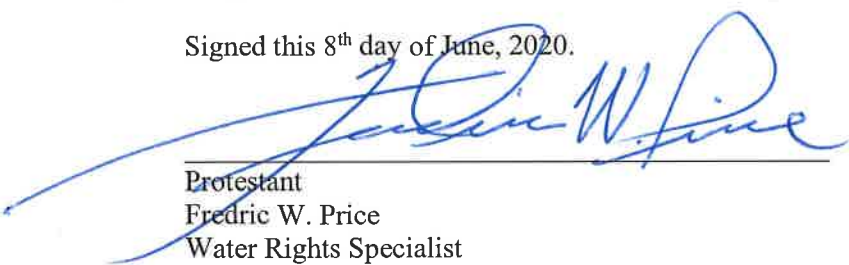
7. What would resolve your protest?

BLM's protest can be resolved by:

- 1.) Withdraw the application; or
- 2.) A. Amend the application and the digital boundary to exclude federal land managed by BLM from the PPU, POU, route, and boundary shape (see attached maps), and except terms and conditions that make it clear no BLM land is intended; and
- B. Seek and obtain BLM authorization in the form of an approved FLPMA Right-of Way to transport water proposed under this application across federal land; and
- C. Ensure conditions are added to any issued permit that appropriately protect federal interests.
 - i) "Prior to diversion and use of water under this approval, the right holder shall obtain authorization necessary to access the point of diversion, or place of use, or to convey water across federal lands."; and
 - ii) "This right does not grant any right-of-way or easement across the land of another."; and
 - iii) BLM reserves the right to propose additional conditions to protect federal interests.

I hereby, 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 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 8th day of June, 2020.


Protestant
Fredric W. Price
Water Rights Specialist

Attachments:

- ◆ Maps prepared by BLM for illustrative purposes and Master Title Plats

FOR DEPARTMENT USE ONLY

Received by LE

Date 06/08/2020

Fee Paid \$25.00

Date 06/08/2020

Received by LE

Receipt # W046366

CERTIFICATE OF SERVICE

I certify that on June 8, 2020 I served a true and correct copy of the “**Protest of Application for Permit 63-34900**” for Cat Creek Energy, LLC, with enclosures upon the following individuals by placing the documents in the United States mail in Boise, Idaho, postage paid, and addressed as follows:

Original to:

Nick Miller, P.E., Regional Manager
Idaho Department of Water Resources
Western Regional Office
2735 Airport Way,
Boise, Idaho 83705-5082

Copies to:

Cat Creek Energy, LLC
c/o John Faulkner
398 S. 9th Street, Suite 240
Boise, Idaho 83702-7169

Randall C. Budge
Thomas J. Budge
RACINE OLSON, PLLP
PO Box 1391
Pocatello, Idaho 83204-1391

Idaho Water Engineering
c/o David R. Tuthill, Jr.
2918 N. El Rancho Pl.
Boise, Idaho 83704-6286

James Tarter, Natural Resource Specialist
U.S., Department of the Interior
Bureau of Land Management
Boise District Office
3948 South Development Avenue
Boise, Idaho 83705-5339

SANDRA MCLREA

Person Serving Documents (print name)



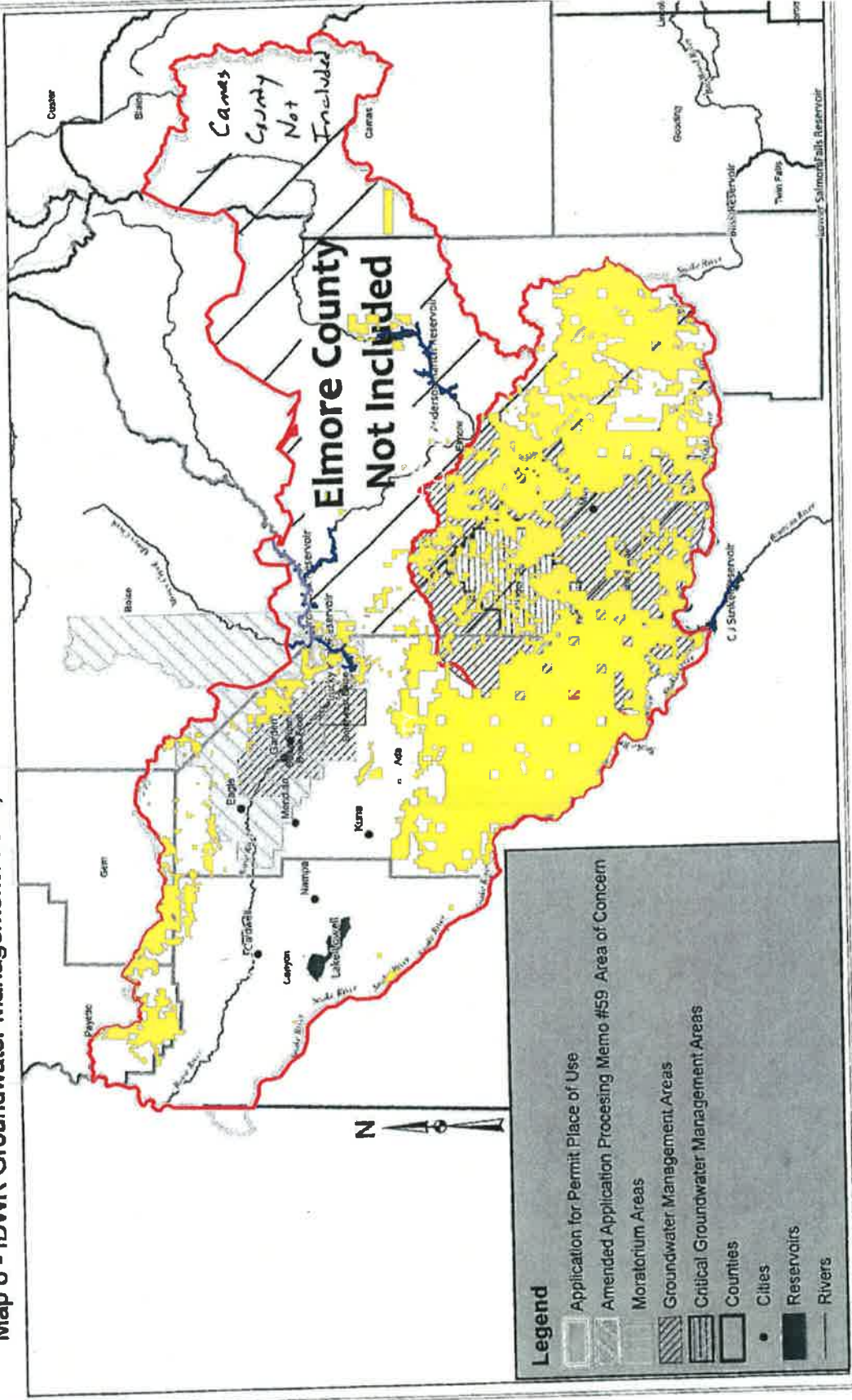
Signature of Person Serving Document

Map 6 - IDWR Groundwater Management Areas, Critical Groundwater Management Areas, and Moratorium Areas



BLM Protest to Application for Permit 63-34900 (Cat Creek Energy, LLC)

Map 6 - IDWR Groundwater Management Areas, Critical Groundwater Management Areas, and Moratorium Areas



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN