JUN 0 8 2020

## STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

WATER RESOURCES WESTERN REGION

# NOTICE OF PROTEST Amended Application for Permit 63-34897

June 8, 2020

## 1. Matter being protested

Amended Application for Permit 63-34897 (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 21, 2020, an Application for Permit 63-34897 (Cat Creek Energy, LLC) was filed with IDWR and Amended April 27, 2020. An Amended Irrigation Land Use list is part of the application filed approximately May 15, 2020. This Application for Permit as amended for 63-34652 ("Application") is one of four inter-related applications filed by the applicant that are part of the proposed Cat Creek Reservoir (new reservoir). 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 the specific issues of concern as all four applications have different elements and various uses. Each application may need to be resolved somewhat differently, in order to, resolve protest elements.

The Application seeks 2,000 cfs and 31,000 AF from surface water (South Fork Boise River) for multiple uses: Diversion to Storage; Irrigation Storage; Irrigation from Storage; Municipal Storage; Municipal from Storage; Mitigation by Delivery Storage; Mitigation by Delivery from Storage; and Irrigation. Under the Amended Irrigation Land Use application document, the irrigation use is for 6,210 acres (limited to 6,010 acres) and has a separate storage component of 2,000 cfs from the application.

The Application states the purpose of this application is to provide supplemental Municipal Storage and Mitigation by Delivery Storage for the City of Nampa, supplemental irrigation for the Black Canyon Irrigation District, and Wood Creek Farm. Per IDWR's public notice, of the 6, 010 acres irrigation use proposed, 3,210 acres will be newly irrigated lands and 2,800 acres is for supplemental irrigation for land associated with Wood Creek Ranch.

// // // // BLM's protest is based upon the following issues:

- 1. The Application for Permit has a large Place of Use (POU) for different purposes of use, and some of the POUs entirely describe federal land entirely managed by BLM. POUs on BLM land should be removed. If the application is proposing to use canals or other infrastructure that cross BLM to convey water under this new proposed water use, then 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. They need their own ROW.
- I.C. 42-202(1)(d) states that "[t]he location of the point of diversion and <u>description of the proposed ditch, channel, well or other work</u> 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/or digital boundaries. The applicant does not have 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. The use of digital boundaries is only provided for irrigation purposes greater than 25,000 acres (I.C. 42-219(2), (5) and (6)). 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

Eredric 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	Receipted by	LE	Receipt # <b>W046366</b>

#### **CERTIFICATE OF SERVICE**

I certify that on <u>June 8, 2020</u> I served a true and correct copy of the "**Protest of Application for Permit 63-34897**" 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. 9<sup>th</sup> Street, Suite 240 Boise, Idaho 83702-7169

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

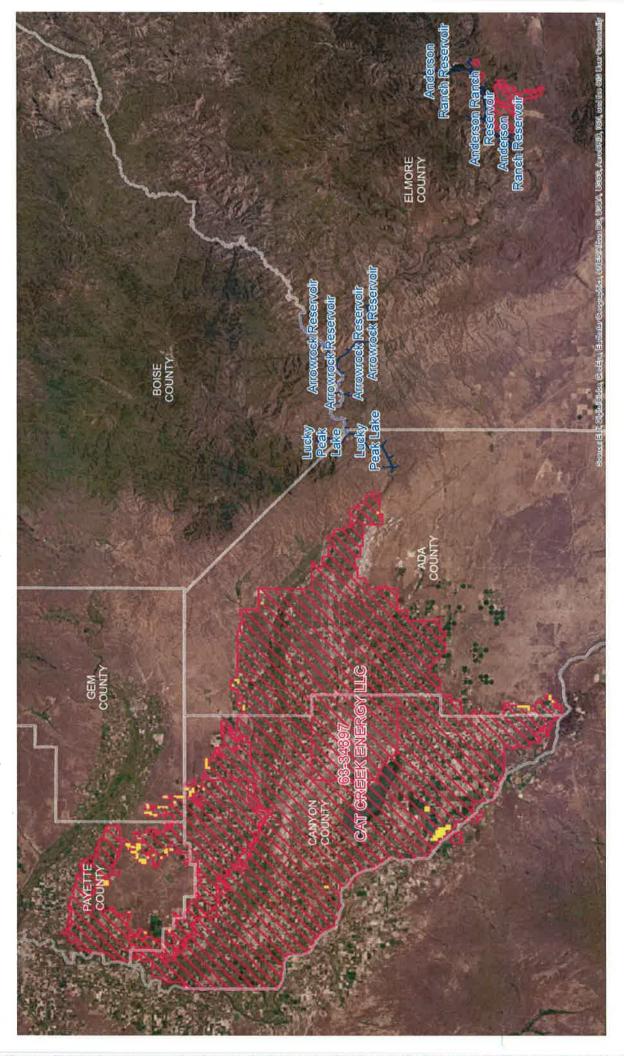
James Tarter, Natural Resource Specialist U.S., Department of the Interior Bureau of Land Management Boise District Office 3948 South Development Avenue Boise, Idaho 83705-5339

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

Person Serving Documents (print name)

Signature of Person Serving Document

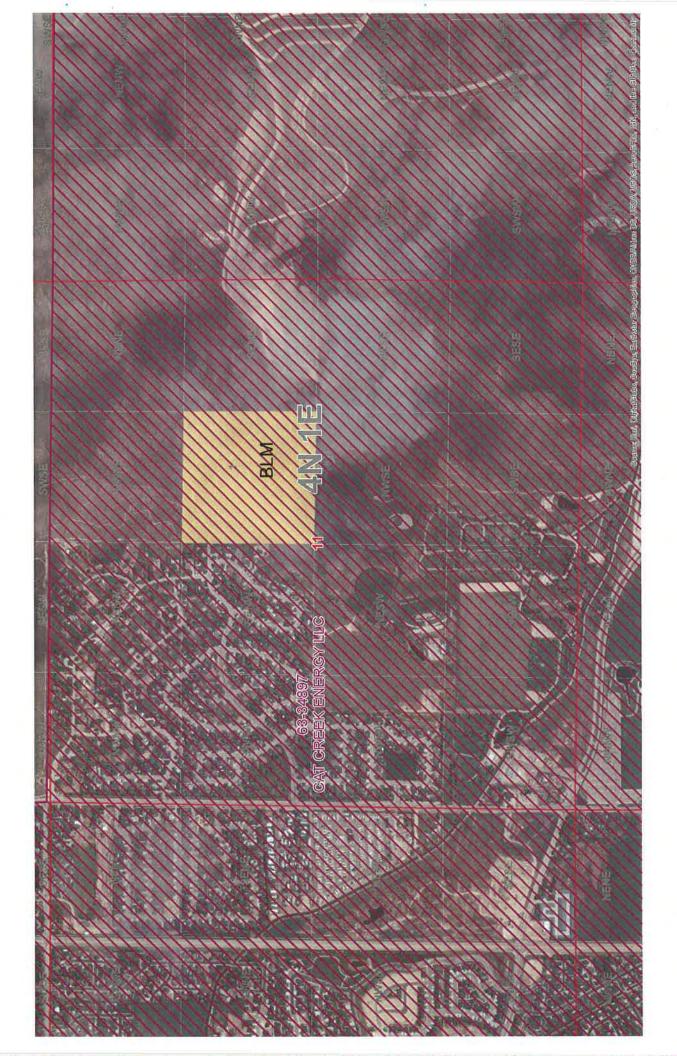
Generalized POU boundary includes BLM land, applicant is not authorized BLM Protest to Application for Permit 63-34897 (Cat Creek Energy, LLC)











SESE		SENE)	NESE	SESE	Newwy	SENE	NEST NEST NEST NEST NEST NEST NEST NEST	S I S I	Amplement February
SWSE	NWNE			SWSE			S S S S S S S S S S S S S S S S S S S		E. 158 south
SESW	NEWW	SERVICE STATES		1 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2	The state of the s			SESW	Econo decino
SWSW	NAVINAN	SWINW			Santana			MSMS	nes es autres
	NENE	SENE						SESE	September 1
						TROVILO			A STATE OF THE STA
SESW	NEWW				- 200	CAT CREEK ENERGY		SEST	on lighted to
WSWS	NAVANA			CONTRACTOR OF THE PARTY OF THE		CAT CF			Surate
SESE	NENE			X					
SINSE	NIWNE							SWSE	No.
SESW	M								
SWSW	BLM NVVNN NE								
SESS	NENE		NES	SES		Part of			
SWSE	NWNE		NWSE	SWSE			BEN		SWINE
	NENW			the second		A.			
	1		Ø						
SESE	NENE	SENE							



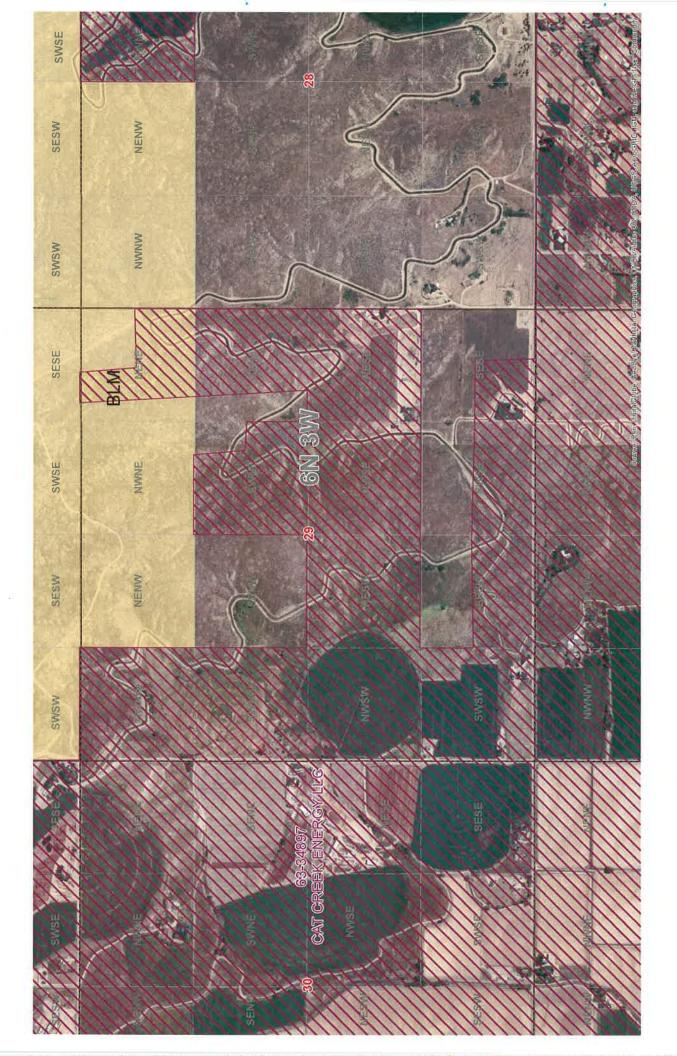
SESE			SENE	NESE	SESE	NENE	SENE	NESE	SESE	
SWSE	2		SWNE	NWSE		NWNE	SWNE	NWSE	SWSE	W. on the state of
SESW	45N 2W	.M	SENW	06 NESW		e 3	3	BLM U/		
4	45N	BI	r)	ω - H	29 Tui.in		7	m		n voen segui
10000000000000000000000000000000000000	_		SENE	NESE			SENE	NESE		MENE SALES
	N.		swnë	NWSE			SWNE	SAN	A S	NWWE
ESW			SENIM	MESW	SESW			MESAM	SESW	NEWW
			Spring	NAMAN					200	WWW Symme
SESE	- M8		SENE				18	NESE		
SWSE	5N 3W		SWNE SER	The state of the s	asset and a second				38/9E	NWW
S MASS				200						SENW
11/10						NAVANA	SWWW		SWSW	
1111						MENE	Sene			
			Number of the Control	A Bean	68-24897 BEK ENERGY	NVVINE		NVVSE		NAVINE NAVINE
			SEMM		68-34897 Cat Creek energ	NEWW		2	Needs	
MA					Co.	Mannak	\$		100	MARNAW NEW
		SEN		MES	SES				SES	NEW SEN

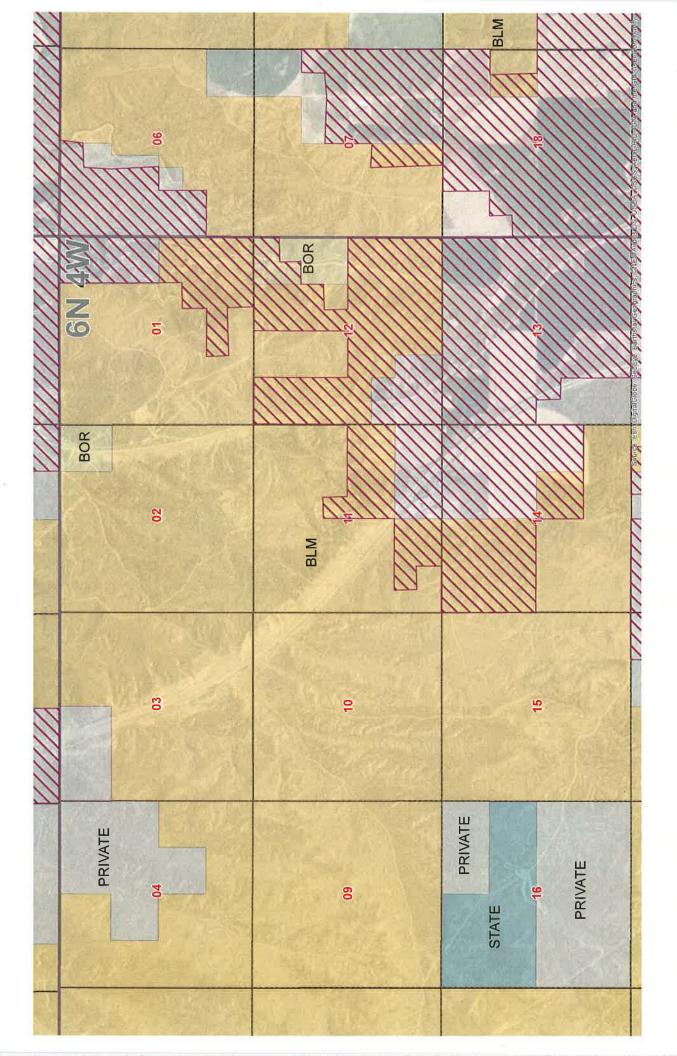
MSMS	7	SWNW	NWSW	SWSW	NWNW	SWNW	NWSW	SWSW S. User Roofmannin
7	NENE	SENE	NESE	SESE	NENE	SENE	N E S E	SESW SWSE SESE SWSW
SWSE	NWNE	SWNE	NWSE	SWSE	NWNE	SWNE	NWSE	SWSE
SESW	NENW	SENW	NESW	SESW ATE	NENW	SENW	NESW	SESW
SWSW	NWNW	WWWS	NWSW	SWSW	MNAN	SWNW		N SAME
SESE	N Ei N					SENE	NASA)	ACSA AMERICAN AND AND AND AND AND AND AND AND AND A
SWSE	NWNE	SWINE	Service 1					
SESW	3W NENW	SENW	NESW	SESW				
1	6N 3	2	n	4	-	7		
/ 新作	N 4W	BOR		Medical		ANA I	186	
SWSE	O ANALON	SWNE		Asilya	Sala			
SESW	NENW	SENW						
SWSW	The state of the s	Shering		Najas Selection of the selection of the		and the second	Masanin	SWSW
SESE	NENE	SENE	AN I		A STATE OF THE STA			SE SESE BLM
SWSE	NWNE	SWNE						SWSE

WSW	Sivie	SESE	SWSW	SESW	SWSE	7	SWSW	SEVEN	ALCON.	STATE OF THE PARTY		1881	
NEWW	NAME	NENE	NWNW	NENW	NWNE		4	n	2	-	)	2	
NVVNV				9	6N 3W		/						
SENW	SWNE	SENE	SWNW	SENW	SWNE	SERVE		SENW	SWINE	SENE	SWNW	SENW	SWNE
	NWSE 7	NESE	NWSW	NESW	16 NWSE		654397			NESE	WSWN	NESW	14 NWSE
	SWSE	SESE	SWSW	SESW	Manus	CAT	CREEK ENERGY				SWSW	SESW	SWSE
NENW	NWNE	NENE	MMMN	NENW					(4	NENE	NWNW	NENW	NWNE NENE
SENW	SWINE	SENE	SWNW	SENW	San Aller				SWNE	SENE	ANNAS	SENW	SWNE SENE
	NWSE	NESE	NWSW	NESW	NWSE				NWSE	NESE	NWSW	NESW	NWSE NESE
SESW	SWSE	SESE	SWSW	SESW	SWSE				SWSE	SESE	SWSW	SESW	SWSE SESE
MWWW NENW	NW/NE	AMENIC	a by and who as	The second second	Control of the Control								

BLM NEWW NEWW	トートートー とうしゅうしゅうしゅう						
	NENE COUNTY OF A CASAGO	NEWE	MANARA	NWNE	NENE	NWNW	NWNE
		6N 3W					
	ENE SYMMY	SWNE	SWAN	SWNE	SENE	SWNW	SENW
						V	SWNE
				0			3
	Est Unism	NWSE NESE	MSMAN	NWSE	NESPI	MSMN	NESW
	SESE CANADA	SESE		SWSF	SESE	MSMS	SESW
							SWSE
MINISTER SECTION	100 PM	WWWE W	1000				
	CAT CREEK ENERGY LLC	RGY LLC		NAN	NENE		
						ď	
			Notes Section	SWNE	SENE	Salamine .	
							January C.
					(		
Nuise	The Boy	Navise News		NWSE	N N N	A ST	TO THE STATE OF TH
						4	
	Joseph J. Market			SWSE	SESE		1 38
		の上の種を入り					SMR







3.M. SESW	SENIO			- Table 1		
NENE			Sec. 1			
		Swaf		Style		SWSE
						E PERMI
		SE SESE			NESE	SESE
	NESW A	SESW SWSE	34897/	KEEK ENERGY L		SESW
A STATE OF THE STA	NWSW	SWSW		CATCREE		S N
NEN EN		SESE		# A		N N
NWNE SESE	3LM nwse	SWSE		A MARINE		ENWIN
NENW		SESW	NENW	SENW	NESW	SESW
	NWSW	MSMS	MMMM	SWNW	NWSW	SWSW
TS-IS - SMS			NENE	SENE	NESE	SESE SWSE MMME

					NEW STANSON OF STANSON
SWSE					NOTALE PROSECUTION OF THE PROSEC
		SELVICE SERVICE SERVIC			
Means		GS-34897 CREEK-ENERGY-1	Novswa	swsw	gerdone hermet fra 40 septembrigg be entre
Sess	W. W.		NESE	SO SO SU SU SU SU SU SU SU SU SU SU SU SU SU	3
S S S S S S S S S S S S S S S S S S S	NWW	SWNE 6N 4W	NVVSE BLM	SWSE	
SESW	NENW	SENW	<b>3</b>	SESW	WE MUR
	NAVAW.	SWAW	NWSvw	AASWAS	NAMAN
	N EN	SENE	E S E S	SESE	NENE

