

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

ANN Y. VONDE (ISB #8406)
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8072

Attorneys for the Idaho Department of Fish and Game

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

)	
IN THE MATTER OF)	
APPLICATION FOR PERMIT)	PETITION FOR CLARIFICATION
NOS. 63-34403, 63-34652, 63-34900,)	
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	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> Email: gary.spackman@idwr.idaho.gov
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2. Copies to

Randy C. Budge Racine Olson PLLP PO Box 1391 Pocatello ID 83204	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: randy@racineolson.com <input type="checkbox"/> Statehouse Mail
James Carkulis Cat Creek Energy LLC 398 S. 9 th Ste 240 Boise ID 83701	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> Email: jtc@ccewsrps.net
David R. Tuthill Hal Anderson Idaho Water Engineering 2918 N. El Rancho Pl. Boise ID 83704	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: dave@idahowaterengineering.org hal@idahowaterengineering.org <input type="checkbox"/> Statehouse Mail
Gary D. Slette Roberston & Slette PLLC PO Box 1906 Twin Falls ID 83303-1906	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: gslette@rsidaholaw.com <input type="checkbox"/> Statehouse Mail

<p>Bryce Farris Sawtooth Law Offices PLLC PO Box 7985 Boise ID 83707</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: bryce@sawtoothlaw.com dan@sawtoothlaw.com andy@sawtoothlaw.com <input type="checkbox"/> Statehouse Mail</p>
<p>Gail McGarry United State Bureau of Reclamation 1150 N Curtis Rd. Ste. 100 Boise ID 83706-1234</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: EMcgarry@usbr.gov <input type="checkbox"/> Statehouse Mail</p>
<p>Matt Nykiel Idaho Conservation League PO Box 2308 Sandpoint ID 83864</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: mnykiel@idahoconservation.org mkellner@idahoconservation.org <input type="checkbox"/> Statehouse Mail</p>
<p>Al Barker Barker Rosholt & Simpson LLP PO Box 2139 Boise ID 83701-2139</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: apb@idahowaters.com <input type="checkbox"/> Statehouse Mail</p>
<p>Allen R. Thompson 406 N Thompson Rd. Kind Hill ID 83633</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: kimraftertranch@gmail.com <input type="checkbox"/> Statehouse Mail</p>
<p>Michael P. Lawrence Givens Pursley LLP PO Box 2720 Boise ID 83701-2720</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: mpl@givenspursley.com chrismeyer@givenspursley.com <input type="checkbox"/> Statehouse Mail</p>

<p>Wildlands Defense c/o Katie Fite PO Box 125 Boise ID 83701</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: katie@wildlandsdefense.org <input type="checkbox"/> Statehouse Mail</p>
<p>Tree Top Ranches LP c/o William J. Mulder 101 S Capitol Blvd. Ste. 1801 Boise ID 83701</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: wjmulder@treetopranches.com <input type="checkbox"/> Statehouse Mail</p>
<p>Dana Hofstetter Hawley Troxell Ennis & Hawley PO Box 1617 Boise ID 83701-1617</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: dhofstetter@hawleytroxell.com rgoodson@hawleytroxell.com <input type="checkbox"/> Statehouse Mail</p>
<p>Gwinn Rice Ranch LLC c/o Jim Rice 2851 W Balata Ct. Meridian ID 83646-5197</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: jimrice1965@gmail.com <input type="checkbox"/> Statehouse Mail</p>
<p>Abigail Germaine Boise City Attorney's Office PO Box 500 Boise ID 83701-0500</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: agermaine@cityofboise.org <input type="checkbox"/> Statehouse Mail</p>
<p>Wendi Combs 704 Lindenwood Dr. Nampa ID 83638</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: missterry52@yahoo.com <input type="checkbox"/> Statehouse Mail</p>

<p>Charles L. Honsinger Honsinger Law PLLC PO Box 517 Boise ID 83701</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: honsingerlaw@gmail.com <input type="checkbox"/> Statehouse Mail</p>
<p>John K. Simpson Barker, Rosholt & Simpson PO Box 2139 Boise ID 83701-2139</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: jks@idahowaters.com <input type="checkbox"/> Statehouse Mail</p>
<p>Trout Unlimited c/o Peter Anderson 910 W Main St. Ste. 342 Boise ID 83702</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: peter.anderson@tu.org <input type="checkbox"/> Statehouse Mail</p>
<p>Fredric W. Price United States Bureau of Land Management 1387 S. Vinnell Way Boise ID 83709-1657</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: fwprice@blm.gov <input type="checkbox"/> Statehouse Mail</p>
<p>Lisa Lance US Department of Interior Office of the Solicitor 960 S Broadway Ave. Ste. 400 Boise ID 83706</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Email: Lisa.Lance@sol.doi.gov <input type="checkbox"/> Statehouse Mail</p>

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