

Oct 08, 2026

DEPARTMENT OF
WATER RESOURCES

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Attorneys for Protestant Elmore County, Board of County Commissioners

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

IN THE MATTER OF APPLICATIONS FOR	)	DECLARATION OF DYLAN LAWRENCE
PERMIT NOS. 63-34403, 63-34652,	)	
63-34897, 63-34900, AND 63-35522 IN THE	)	
NAME OF CAT CREEK ENERGY, LLC	)	Prehearing Conference: 05/06/2027
	)	Hearing: 05/17-21/2027
	)	
	)	
	)	
	)	

1. My name is Dylan Lawrence. I am of sound mind and the age of majority. I represent the Board of County Commissioners of Elmore County in this matter, and I have represented Elmore County on water right and resource matters since 2019. In the course of this representation, I have become familiar with the status of the Cat Creek Energy LLC (“CCE”) project with respect

to Elmore County and its authority over the CCE project pursuant to the Idaho Local Land Use Planning Act in Idaho Code Title 67, Chapter 65. I have also been an active participant in CCE's licensing proceedings before the Federal Energy Regulatory Commission ("FERC"). I have access to the files and records relevant to this matter, and I make this declaration based upon my own personal knowledge.

2. Attached hereto as Exhibit A are true and correct copies of the initial CUPs issued to CCE by Elmore County in 2017.

3. Attached hereto as Exhibit B is a true and correct copy of CCE's April 15, 2026, annual report to FERC.

4. Attached hereto as Exhibit C is a true and correct copy of CCE's February 10, 2026 Annual Report to Elmore County.

5. Attached hereto as Exhibit D is a true and correct copy of relevant portions of CCE's August 21, 2026 written discovery responses to the Boise Project Board of Control.

6. Attached hereto as Exhibit E is a true and correct copy of the May 17, 2024 Elmore County order establishing June 14, 2027, as the current expiration date of CCE's CUPs.

7. Attached hereto as Exhibit F is a true and correct copy of the 2018 Development Agreement between CCE and Elmore County.

8. Attached hereto as Exhibit G is a true and correct copy of a November 8, 2019 district court decision in the judicial review matter brought by S Bar Ranch LLC against Elmore County for approving the CUPs to CCE.

9. Attached hereto as Exhibit H are true and correct copies of CCE's January 30, 2024 Annual Report to Elmore County.

10. Attached hereto as Exhibit I is a true and correct copy of CCE's February 12, 2025 Annual Report to Elmore County.

11. Attached hereto as Exhibit J is a true and correct copy of CCE's April 1, 2025 Annual Report to FERC.

Further your declarant sayeth naught.

I declare under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct to the best of my personal knowledge.

Dated: October 8, 2026

By: 
Dylan B. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2026, I served the foregoing on all parties or their designated representatives via email, addressed to the following:

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VARIN THOMAS LLC

By:  _____
Dylan B. Lawrence

Exhibit A

**BEFORE THE ELMORE COUNTY BOARD OF COUNTY COMMISSIONERS
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

In Re: CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07: Cat Creek Energy, LLC

Background:

This "**Matter**" is an appeal of the denial of a request for five (5) Conditional Use Permit (the "**CUP**") applications for transmission lines, pump storage hydro electrical generating facility and wind turbine electrical generating facility in the Agriculture, Wildland Urban Interface and the Area of Critical Concern Overlay Zones and a solar electrical generating facility and an electrical substation in the Agricultural Zone (the "**Applications**"), from **Cat Creek Energy, LLC Development, LLC** (the "**Applicant**"), for that real property as further described herein (the "**Property**"). The Matter was initially presented to the Elmore County ("**County**") Board of Commissioners ("**Board**") following receipt of a request for appeal following a denial of the Matter by the Planning and Zoning Commission of Elmore County, Idaho (the "**Commission**") on August 17, 2016. At that time the Board set the matter for public hearing, to be held on November 16th and 17th in 2016. Prior to the scheduled hearings, the Board received a request from the Applicant to conduct a site visit at the Property. On October 21, 2016, the Board conducted a hearing on the site visit at which time the Applicant withdrew its request for the site visit. The Board heard the Matter as on the 16th and 17th of November, 2016, pursuant to a public hearing, following public notice as required by law. The Board received written and verbal testimony from the Applicant, as hereafter defined, its representatives, those in support, neutral and in opposition, and other testimony and information for the Matter which was part of the record. At a meeting following the public hearings, the Board set deliberations for the Matter for January 13, 2017.

Subsequent to the initial hearing, one Board member inadvertently attended a presentation and discussion of water rights and the underlying project for the Matter. Following public notice of the event the Board conducted an additional hearing on December 16, 2016, to disclose the Board member's receipt of information, open the record and hear testimony in response to the disclosure. This second hearing was held as required by law. The Board received verbal testimony from the Applicant, and parties in opposition as well as other testimony and information for the Matter which is part of the record for the Matter. Deliberations for the matter were conducted on January 13, 2017, February 3, 2017 and February 10, 2017, when the Board issued these Findings of Fact, Conclusions of Law and Order.

Findings of Fact:

If any of these Findings of Fact are deemed to be conclusions of law, they are incorporated into the Conclusions of Law section. The following findings are based upon the record before the Board as well as those facts which are commonly known or of which there is general public awareness.

1. Application.

The Board finds that the applications for the Matter ("Applications**") are comprised of:**

- A. Application form prepared and submitted by the Applicant for a Conditional Use Permit for transmission lines in the Agriculture and Area of Critical Concern Overlay Zones. Case Number: CUP-2015-03 ("**CUP 2015-03**").**

B. Application form prepared and submitted by the Applicant for a Conditional Use Permit for pump storage hydro electrical generating facility in the Agriculture and Area of Critical Concern Overlay Zones. Case Number: CUP-2015-04 ("**CUP 2015-04**").

C. Application form prepared and submitted by the Applicant for a Conditional Use Permit for a PV solar electrical generating facility in the Agriculture Zone. Case Number: CUP-2015-05 ("**CUP 2015-05**").

D. Application form prepared and submitted by the Applicant for a Conditional Use Permit for a wind turbine electrical generating facility in the Agriculture and Area of Critical Concern Overlay Zones. Case Number: CUP-2015-06 ("**CUP 2015-06**").

E. Application form prepared and submitted by the Applicant for Conditional Use Permit for a substation in the Agriculture Zone. Case Number: CUP-2015-07 ("**CUP 2015-07**").

F. Those supplemental letters, email messages and memos submitted by the Applicant or its legal counsel, whether submitted in response to questions from employees of the Elmore County Land Use and Building Department (the "**Department**"), the Commission or the Board in connection with the proceedings before the Commission and the Board, which modify or clarify the Applications, all of which are part of the record for this Matter.

2. Applicant.

The Board finds that the Applicant is:

Cat Creek Energy, LLC
1989 South 1875 East
Gooding, ID 83330

3. Commission Process.

The Board adopts, as their own, the following Commission's findings set forth in those Findings of Fact, Conclusions of Law and Recommendation issued by the Commission on August 17, 2016, (the "**Commission's Findings**") as to the following procedural matters of the Commission pertaining to the Applications:

"III. The Commission finds the following as to the procedural matters pertaining to the Applications:

A. The Applicant participated in a pre-application meeting with the Department on January 15, 2015.

B. The Applicant conducted a neighborhood meeting on January 27, 2015 as required by Elmore County Zoning and Development Ordinance [,] ... Section 6-4-3.

C. The Applicant submitted the Applications to the Department on February 26, 2015.

D. The Elmore County Land Use and Building Director (the "**Director**") determined the Applications were incomplete and notified the Applicant on February 2, 2015, March

27, 2015, April 10, 2015, July 16, 2015, October 1, 2015 and October 21, 2015.

E. The Applicant appealed the Director decision that an Environmental Impact Statement (the "EIS") be required for the Applications on November 2, 2015.

F. The Applicant submitted a Wildlife Mitigation Plan (the "WMP") in lieu of the EIS on December 11, 2015.

G. An appeal hearing on the Director's Decision was tabled on December 16, 2015.

H. The Director accepted the WMP as part of the Applications on February 10, 2016 and determined the appeal hearing was not needed.

I. The Applicant desired to still have the appeal hearing on February 17, 2016.

J. The Commission concurred that the appeal hearing was not necessary due to the Director accepting the WMP.

K. The Applicant submitted applications on February 17, 2016.

L. The Applicant submitted additional information on March 7, 2016 and March 16, 2016.

M. The Department deemed the Application complete on March 21, 2016.

N. The Department mailed notice of the public hearing to neighboring property owners within one mile of the Property on March 24, 2016 pursuant to Zoning Ordinance Section 6-4-5.

O. The Department mailed notice of the public hearing to agencies on March 24, 2016 pursuant to Zoning Ordinance Section 6-4-4.

P. Notice of the public hearing was published in the Mountain Home News on May 25, 2016 pursuant to Zoning Ordinance Section 6-4-5 A.

Q. Notice of the public hearing was posted on the Property on June 6, 2016 pursuant to Zoning Ordinance Section 6-4-5 B.

R. The Commission opened the public hearing on June 15, 2016 and received verbal and written information regarding the Applications.

S. The Commission moved to hold deliberations on July 13, 2016.

T. The Commission moved to **deny** the Applications. The motion to **deny** the Applications passed on a 6-0 vote."

4. Board Process.

The Board finds the following as to the procedural matters pertaining to the appeal of the Applications to the Board:

A. The Commission denied the Applications on July 13, 2016. The Commission

signed its Findings of Fact, Conclusions of Law on August 17, 2016.

- B. "Any affected or aggrieved person having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing ... use by any final action of the Commission may appeal to the Board" pursuant to Zoning Ordinance Section 6-3-2.
- C. August 26, 2016, the Applicant filed the Appeal to the Board.
- D. The Zoning Ordinance, at Section 6-3-2 E, requires that an appeal shall be based on one of the following grounds:
 - 1. The decision was in violation of constitutional or statutory provision; or
 - 2. In excess of the statutory authority of the agency; or
 - 3. Made upon unlawful procedure; or
 - 4. Not supported by substantial evidence on the record as a whole; or
 - 5. Arbitrary, capricious, or an abuse of discretion.
- E. The Zoning Ordinance, Section 6-3-2 F, requires that an appeal must be made by appropriate application and fee paid within ten (10) calendar days of the Commission's final action.
- F. The Commission's final written decision was made on August 17, 2016.
- G. The Appellant filed the Appeal in the form provided by the Department with the required \$800.00 appeal fee on August 26, 2016.
- H. Section 6-3-2 G of the Zoning Ordinance requires that the notice of appeal shall state the date and substance of the decision and the grounds for appeal.
- I. The notice of appeal is dated August 26, 2016, and by supplement to the appeal form, states the grounds for appeal as listed above in Paragraph IV.D above. The substance of the appeal is listed in the notice of appeal and in the supplement thereto.
- J. The appeal was timely filed, the proper fee was paid concurrent with the application and the appeal contained one or more of the necessary grounds set forth in the Zoning Ordinance.
- K. Section 6-3-2 H of the Zoning Ordinance requires a hearing by the Board in accordance with Idaho law and the Zoning Ordinance. Public notice shall be published specifying the time, date and place of the public hearing for the appeal and the subject of the appeal. The notice shall be published once in the newspaper of general circulation at least fifteen (15) calendar days prior to the hearing and shall otherwise meet the same notice requirements as used by the Commission.
- L. The Department gave notice of the public hearing to all agencies and property owners, published notice in the Mountain Home News and posted notice on the Property as required by law.
- M. The Board set the hearing for 6:00 PM on November 16 and 17, 2016, at the Mountain Home Junior High School, 1600 East 6th South, Mountain Home, Idaho. Public Hearing notices were sent to property owners and all agencies on October 24, 2016. Notice of Public Hearing was published in the Mountain Home News on October

26, 2016. The Property was posted on November 7, 2016.

N. Review by the Board of the Commission's findings is a *de novo* review pursuant to Zoning Ordinance Section 6-3-2 H.

O. Prior to the public hearing on the appeal, the Applicant requested the Board to go to the site for a site visit.

P. The Board set a public hearing for October 21, 2016 at 2:00 pm in the Elmore County Commissioner's Room in the basement of the Elmore County Courthouse for a public hearing to consider the request for a site visit. Public Hearing notices were sent to property owners and all agencies on October 3, 2016. Notice of the public hearing regarding the site visit was published in the Mountain Home News on October 5, 2016. The Property was posted on October 13, 2016.

Q. The Board held the public hearing on the site visit on October 21, 2016 at the scheduled time. During the hearing, a representative of the Applicant stated that he would like to withdraw his request for a site visit. With the withdrawal of the request for a site visit the hearing was closed.

R. The Board held the public hearings on the appeal November 16 and 17, 2016.

S. At the conclusion of the public hearing on November 17, 2016, the Board closed the record and set the time of November 18, 2016, to set a time for future deliberation of the appeal.

T. At a meeting held on November 18, 2016, the Board set the matter for initial deliberations on January 13, 2017, commencing at 2:00 PM in the Commissioner's Room in the Elmore County Courthouse.

U. On November 18, 2016, following the closure of the record, one commissioner attended a water meeting regarding Boise River Feasibility Study (Arrowrock Dam Raise). While the matter was not on the agenda, Doug Jones from Cat Creek Energy made a quick 5-10 minute discussion regarding the Cat Creek Energy project. The information presented is the same as was previously presented except he stated they would be willing to increase the reservoir from 50,000-acre foot to 100,000-acre foot to store water for Boise. This is new information that had not been presented to the Board.

V. The Board set a public hearing for December 16, 2016 at 2:00 pm in the Elmore County Commissioner's Room in the basement of the Elmore County Courthouse for a public hearing to reopen the record to accept the information the commissioner received in connection with the Cat Creek Energy project information which was obtained while attending the Boise River Feasibility Study into the record and other written materials which had been delivered to the Department or County pertaining to the appeal and to permit the Applicant and the public to respond to this additional information. Public Hearing notices were sent to property owners and all agencies on November 23, 2016. Notice of the public hearing regarding the site visit was published in the Mountain Home News on November 30, 2016. The Property was posted on December 5, 2016.

W. At the deliberations on January 13, 2017, the Board reviewed the required findings under Sections 6-27-7 and 6-8-26-B.1-4 of the Zoning Ordinance, the Comprehensive Plan, as hereafter defined, and identified certain conditions that it would

like to see included in the final findings of fact and conclusions of law and order, and directed legal counsel and Department staff to draft preliminary findings of fact, conclusions of law and order to be reviewed and considered during continued deliberations which were set for February 3, 2017.

X. The Board continued its deliberations on February 3, 2017 and February 10, 2017 and made and executed these Findings of Fact, Conclusions of Law and Order and made the findings set forth herein.

5. The proposed uses under the Application are as follows:

A. The Board adopts, as its own, the following Commission's Findings pertaining to the Applications:

"A. The Commission Finds the Applications contain the following proposed uses:

CUP-2015-03: Transmission Lines.

CUP-2015-04: Pump Storage Hydro – Electrical Generating Facility.

CUP-2015-05: Solar – Electrical Generating Facility.

CUP-2015-06: Wind – Electrical Generating Facility.

CUP-2015-07: Substation. Commission Findings, page 3.

B. The Commission finds that five (5) separate applications, each for a conditional use permit are required. **The Commission finds** that based on testimony from the Applicant, that all five (5) applications are dependent upon each other and cannot exist separately." Commission Findings, page 3.

6. Descriptions, Parcel Designations, Characteristics and Ownership of the Property.

A. The Board adopts, as its own, the following Commission's Findings pertaining to the Property Description, Parcel Designations, Characteristics and Ownership of the Property:

"The Commission finds the following legal descriptions pertaining to the property and is collectively referred herein as the "[Property]":

A. [Property] Description: the Applications utilize the following property:

CUP-2015-03: Portions of Sections 26 and 35, Township 1N, Range 9E, B.M., Sections 2, 3, 10, and 11, Township 1S, Range 9E, B.M.

CUP-2015-04: Portions of Sections 26, 27, 35, and 36, Township 1N, Range 9E, B.M and portions of sections 1 and 2, Township 1S, Range 9E, B.M.

CUP-2015-05: Portions of Sections 2, 3, 10, and 11, Township 1S, Range 10E, B.M.

CUP-2015-06: Portions of Sections 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 21, 22, 28, 29, 30, 31, 32, and 33, Township 1S, Range 10E, B.M., Sections 19, 20, 28, 29, 30, 31, 32, and 33, Township 1N, Range 10E, B.M., Sections 25, 26, 27, 35, and 36, Township 1N, Range 9E, B.M., Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, and 24, Township 1S, Range 9E, B.M.

CUP-2015-07: Portions of Sections 2 and 11, Township 1S, Range 9E, B.M.

B. Parcel Numbers: The Application utilize the following parcel numbers:
CUP-2015-03:

RP01N09E265410A, RP01S09E039010A,	RP01N09E350010A, RP01S09E100010 A,	RP01S09E020010A, RP01S09E110040A.
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CUP-2015-04:

RP01N09E265410A, RP01N09E360010A, RP01S09E039010A, RP01S09E120040A.	RP01N09E277210A, RP01N09E010610A, RP01S09E100010A,	RP01N09E350010A, RP01S09E020010A, RP01S09E110040A,
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CUP-2015-05:

RP01S09E020010A, RP01S09E110040A	RP01S09E039010A,	RP01S09E100010A,
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CUP-2015-06:

RP01N09E250010A, RP01N09E277210A, RP01N09E191840A, RP01N10E290010A, RP01N10E310010A, RP01S09E020010A, RP01S09E110040A, RP01S09E140040A, RP01S09E230010A, RP01S10E040010A, RP01S10E070010A, RP01S10E102410A, RP01S10E180010A, RP01S10E159010A, RP01S10E280085A, RP01S10E310500A,	RP01N09E251210A, RP01N09E350010A, RP01N10E200010A, RP01N10E300010A, RP01N10E330610A, RP01S09E039010A, RP01S09E120040A, RP01S09E157810A, RP01S09E243010A, RP01S10E051210A, RP01S10E080010A, RP01S10E160040A, RP01S10E190610A, RP01S10E210040A, RP01S10E290020A, RP01S10E320020A,	RP01N09R265410A, RP01N09E360010A, RP01N10E283010A, RP01N10E320010A, RP01S09E010610A, RP01S09E100010A, RP01S09E130040A, RP01S09E220010A, RP01S10E030010A, RP01S10E060640A, RP01S10E090610A, RP01S10E170010A, RP01S10E303010A, RP01S10E220020A, RP01S10E301840A, RP01S10E332410A
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CUP-2015-07:

RP01S09E020010A,	RP01S09E110040A
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C. The "Owners" of the [Property] are:

Sawtooth Grazing Association
1989 South 1875 East,
Gooding, ID 83330

Wood Creek Ranch
1989 South 1875 East,
Gooding, ID 83330

D. Applicant's Property Right in the [Property] is: Lease Agreements.

E. [Property] Characteristics:

Property Size: Approximately 23,000 acres.

Existing Structures: A few agricultural structures and ranch house/cabins.

Existing Vegetation: The vegetation varies and consists of sagebrush, grazing and timber areas.

Slope: Variable and wide ranging from relatively flat to portion in excess of 40%.

Flood Zone Status: Small portions of the [Property] are located in the FEMA defined Zone A flood zones.

Irrigation: Unknown and information not provided." Commission Findings, pages 3-5 (some punctuation added).

7. Current Zoning for the Property.

A. The Board finds the current zoning of the Property as follows:

The current zoning for the Property pursuant to the adopted zoning map under the Elmore County Zoning and Development Ordinance, which was adopted on March 21, 2012, as Ordinance 2012-01; amended on September 19, 2012, as Ordinance 2012-03, and July 23, 2014, as Ordinance 2014-01 (collectively, the "**Zoning Ordinance**") is the following:

CUP-2015-03: Agriculture, Area of Critical Concern and Wildfire Urban Interface Overlay Zones.

CUP-2015-04: Agriculture, Area of Critical Concern and Wildfire Urban Interface Overlay Zones.

CUP-2015-05: Agriculture and Wildfire Urban Interface Overlay Zone.

CUP-2015-06: Agriculture, Area of Critical Concern and Wildfire Urban Interface Overlay Zones.

CUP-2015-07: Agriculture Zone and Wildfire Urban Interface Overlay Zone.

8. Surrounding Land Uses.

A. The Board adopts, as its own, the following Commission's findings pertaining to the surrounding land uses:

"The Commission finds the surrounding land uses to the [Property] as follows:

Land uses to the south are agriculture grazing.

Land uses to the north are agriculture grazing, Anderson Ranch Reservoir and residential subdivisions.

Land uses to the east are agriculture grazing.

Land uses to the west are agriculture grazing, irrigated farm ground, recreational vehicle park and residential subdivision. Findings of Fact, Conclusions of Law and Order, issued by the Elmore County Planning and Zoning Commission on August 17, 2016, at page 5 (emphasis added).

9. Existing Services to the Property.

A. The Board adopts, as its own, the following Commission's Findings pertaining to the existing services to the Property:

"The Commission finds the existing services as follows:

Access Roads: Publically maintained road U.S. Highway 20. Privately maintained road Wood Creek Road, which is a non-paved road with no winter access.

Fire Protection District: None.

Sewage Disposal: None.

Water Service: None.

Highway District: The [Property] is located within the Glenns Ferry Highway District (the "**Highway District**"). The [Property] may also be accessed through Mountain Home Highway District roads." Commission Findings, page 5.

10. The Board finds the following as the applicable law for consideration of the Applications:

A. Comprehensive Plan. Elmore County 2014 Comprehensive Plan, adopted as Resolution 562-15 on January 20, 2014 (the "**Comprehensive Plan**"); and

B. The Elmore County Zoning and Development Ordinance, which was adopted on March 21, 2012, as Ordinance 2012-01; amended on September 19, 2012, as Ordinance 2012-03, and July 23, 2014, as Ordinance 2014-01 (collectively, the "**Zoning Ordinance**").

C. The Local Land Use Planning Act, Idaho Code §§ 67-6501 through -6583 ("LLUPA").

11. Comprehensive Plan:

A. The Board finds that the following goals and objectives from the Comprehensive Plan are important in determining if the Applications will be in harmony and in accordance with the Comprehensive Plan:

"Private Property Rights Objectives

1. No person shall be deprived of private property without due process of law.
7. Property owners shall not use their property in a manner that negatively impacts upon the surrounding neighbors or neighborhoods. ...
9. Property owners must recognize they are only temporary stewards of the land, and shall preserve and maintain their property for the benefit of future generations.
10. Property owners acknowledge and expect that Elmore County will preserve private property rights and values by enforcing regulations that will ensure against incompatible and detrimental neighboring land uses.
11. When the use of private property conflicts with the public interest, such conflicts shall be considered using a context larger than the boundaries of particular land parcel and a time frame longer than a particular property transaction." Comprehensive Plan, pages 12 & 13.

"Economic Goal Statement 1

Diversify and improve the economy of Elmore County in ways that are compatible with community values. ...

Economic Objectives ...

2. Encourage broad-based economic development programs that include:
 - a. Natural resources such as mining, timber, and agriculture from both federal and private lands.
 - b. Commercial Development
 - c. Industrial Development
 - d. Tourism Expansion and Development
 - e. Military Expansion and Development
- ...

11. Recognize the need for electric utility facilities that are sufficient to support economic development." Comprehensive Plan, page 30.

"Land Use Objectives

...

8. Review all commercial and industrial development proposals to determine the land use compatibility and impact to surrounding areas.

9. Review all development proposals in areas that are critical to groundwater recharge and sources to determine impacts, if any, to surface and groundwater quantity and quality. ...

17. Evaluate all development proposals in terms of land use and environmental compatibility. Discourage development proposals, which negatively impact land use patterns and negatively impact the human and natural environment." Comprehensive Plan, pages 36 & 37.

"Water Goal 1

To protect, develop, and maintain the quality and quantity of our water resource. ...

Water Objectives:

1. Encourage land management and development of soil and water resources for economic growth of the County. ...

5. Water quality should be protected and preserved in all proposed developments. ...

7. Work with the Idaho Department of Water Resources and seek approval to study and construct necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County." Comprehensive Plan, pages 45 & 46.

"Fish and Wildlife Goal 2

Recognize the economic contributions that fish and wildlife-based recreation contribute to Elmore County.

Fish and Wildlife Goal 3

Sustain the fish and wildlife habitats necessary to provide quality fish and wildlife-related recreation.

Fish and Wildlife Goal 4

Recognize that fish and wildlife are public resources to be managed for the benefit of all and promote ongoing proper management of fish and wildlife resources. ...

Fish and Wildlife Objectives:

1. Request public agency input on proposed land and water development projects potentially impacting fish and wildlife habitat.

2. Consider ordinances and conditions of approval aimed at avoiding and mitigating adverse impacts to fish and wildlife resources as a result of development.

3. Encourage protection of water quantity and quality and multiple uses that are complementary to fish and wildlife populations." Comprehensive Plan, pages 49 & 50.

"Scenic Areas Goal 1

To promote the preservation of natural scenic areas for the use and benefit of both present and future generations. ...

Scenic Area Objectives

1. Encourage the preservation of scenic areas for their natural beauty.
2. Natural areas should be preserved through proper planning and /or density transfer procedures or development rights transfer procedures.
3. Encourage development in localities that will not degrade scenic areas within the County." Comprehensive Plan, page 51.

"Hazardous Area Objectives

2. Discourage development in or near natural hazardous areas, such as airports, power line corridors, electrical substations, flood plains, unstable soil areas and steep slopes, high velocity wind and storm prone areas, except for industries, which may require these conditions." Comprehensive Plan, page 53.

"Public Service Objectives - Water Supply and Distribution

1. Encourage and promote water conservation to protect local water resources. ...
3. Support water development and conservation projects on the Boise River and other watersheds within the County.
4. Guide growth to areas of the County where there is adequate water for development. ...

Public Service Objectives – Electrical Power

1. Work with Idaho Power Company to promote the development of energy services and public facilities to meet public needs.
2. Encourage the enhancement of the electric system capacity and reliability.
3. Encourage the enhancement of the capacity and reliability of renewable energy resources.
4. Encourage the multiple-use of utility corridors by utility providers. ...
6. Recognize the need for long-range planning and build out of electrical infrastructure as detailed in the Eastern Treasure Valley Electrical Plan (ETVEP), developed by a local Community Advisory Committee. See Map #11A in the map appendix for the conceptual locations of future electrical infrastructure.
7. Recognize that the ETVEP is a conceptual plan and is the first step in planning for new and upgraded transmission lines and substations. Each project will still require jurisdictional approval and will be subject to the public siting process.

8. Support longer term (10 to 15-year) conditional use permits to enable utilities to purchase sites well in advance of needing to build the facility.
9. Support siting of utility corridors within identified or designated transportation corridors and allow the appropriate placement of electric facilities on public rights-of-way.
10. Support the protection of wetlands and other critical areas and recognize that electric facilities sometimes must cross these areas, and that access is essential for repair and maintenance of the facilities.
11. Recognize other types and sources of energy beyond the existing electrical infrastructure have a role to play in the future of Elmore County (e.g. solar, wind, gas). ...
18. Encourage the enhancement of the capacity and reliability of renewable energy resources." Comprehensive Plan, pages 56-58.

"Recreation Objectives

1. Encourage developments that will maintain the aesthetic and scenic value of the area with the least possible disturbance to soil, vegetation, and water. ...
4. Encourage equitable draw down of water levels of Anderson Dam consistent with irrigation and multiple-use management needs." Comprehensive Plan, page 64.

"Areas of Critical Concern Goal 1

To protect and preserve the unique features and land characteristics in these areas that has been designated for additional consideration.

Areas of Critical Concern Goal 2

To implement a special land use review and hearing procedure following the CUP process to fully evaluate any development proposals in any Area of Critical Concern.

Areas of Critical Concern Objectives:

1. Discourage encroachment on lands that contain important feeding grounds for wildlife. ...
3. To the extent possible, preserve the historical and natural resources within Areas of Critical Concern. ...
5. Recognize all areas of critical concern and promote better management of the soils, water, and environment. ...
8. Develop and administer a special permit evaluation procedure for all development applications within any 'Area of Critical Concern.'" Comprehensive Plan, page 67.

Pine, Featherville and Fall Creek Communities Community Goals

"6. Natural Resources

Protect the Anderson Ranch Reservoir, the South Fork of the Boise River and all waterways in the Pine / Featherville / Fall Creek community areas from incompatible land use encroachment and development. ...

11. Special Areas or Sites

Protect the South Fork of the Boise River watershed to preserve water quality." Comprehensive Plan, pages 82 & 83.

12. Zoning Ordinance:

A. The Board finds that the Zoning Ordinance defines the following terms which pertain to the Applications:

"AREA OF CRITICAL CONCERN: The area designated by the Elmore County Board of County Commissioners for special protection and special land use regulations. The area is shown on the zoning map for Elmore County." Zoning Ordinance, Chapter 2, page 17.

"ELECTRICAL GENERATING FACILITIES: Any facility generating electrical power through the use of natural gas, solar cells, water or wind power. The use of diesel fuel is allowed only for emergency generation of electricity for fire suppression or the winding down of turbines." Zoning Ordinance, Chapter 2, page 36.

"ELECTRICAL TRANSMISSION LINES: Those lines carrying from 138 kV, 230 kV to 500 kV of electricity from a power generation site to a substation." Zoning Ordinance, Chapter 2, page 36.

"PUBLIC INFRASTRUCTURE FACILITY: Shall include, but not be limited to: a) pumping station for water, sewer, or gas; b) power substation, electric substation, grid switching site, electric transmission line, electric sub transmission line, electric distribution line, or any major structure connected to a public utility; c) municipal wastewater collection and treatment facility or interim wastewater treatment system; d) utility shop, garage, or storage facility; e) park and ride lot; f) water reservoir and water tank; and g) storm drainage facility and storm detention facility." Zoning Ordinance, Chapter 2, page 66.

"PUBLIC OR QUASI-PUBLIC USE: Public or quasi-public uses shall include, but not be limited to, public buildings and/or public infrastructure facilities and other types of uses such as, churches; Sunday schools; parochial schools; hospitals; convalescent or retirement homes; colleges and other facilities of an educational, religious, charitable, philanthropic or non-profit nature." Zoning Ordinance, Chapter 2, page 66.

B. The Board finds that certain standards apply to conditional use permits under Section 6-27-4 of the Zoning Ordinance and the same shall be included into the conditions set forth in Exhibit A (the "Conditions"), which exhibit is attached hereto and made a part hereof.

C. The Board finds that in order to approve a CUP application, the following findings as set forth in Section 6-27-7 of the Zoning Ordinance shall be made.

"1. The proposed use shall, in fact constitute a Conditional Use as determined in Chapter 8, Table 6-8-11 (C), Elmore County Land Use Table, as contained in this Ordinance;

2. The proposed use shall be in harmony with and in accordance with the Comprehensive Plan and this Ordinance (Title 6);
3. The proposed use complies with the purpose statement of the applicable base zone and with the specific use standards as set forth in this Chapter;
4. The proposed use shall comply with all applicable County Ordinances;
5. The proposed use shall comply with all applicable State and Federal regulations;
6. The proposed use shall be designed, constructed, operated, and maintained in such a way as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity; and that such use shall not change the essential character of said area;
7. The proposed use shall not be hazardous or disturbing to existing neighboring uses or impede their normal development;
8. The proposed use shall be served adequately by available public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, water, sewer, or that the person responsible for the establishment of the proposed conditional use shall be able to provide adequately any such services;
9. The proposed use shall not create excessive additional requirements at public cost for public facilities and services and the proposed use shall not be detrimental to the economic welfare of the County;
10. The proposed use shall not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors;
11. The proposed use shall have vehicular approaches which shall be so designed as not to create an interference with traffic on surrounding public or private roadways;
12. The proposed use shall not result in the destruction, loss or damage of a natural or scenic feature of major importance."

D. The Board finds that in reviewing any proposed development requests in an Area of Critical Concern, pertaining to CUPs 2015-03, 2015-04 and 2015-06, the Board will follow the following development standards:

- "1. Proposed land use must demonstrate a compatibility with the natural surrounding environment; and
2. Technical studies, funded by the applicant, may be required at the discretion of the Director, Commission or Board to identify impacts and to determine the feasibility of the proposed use; and
3. Agriculture and ranching operations may be developed or expanded. Natural and scenic environment should be protected; and

4. Single-family dwellings and all structures must be built to fit into the natural terrain with little or no gouging of hillsides or altering of the landscape. Grading of roads that are used as access to property will be kept to a minimum to prevent erosion and the destruction of scenic value." Zoning Ordinance, Section 6-8-26 B.1-4.

E. The Board finds that in addition to a conditional use permit, additional requirements are found in the following Zoning Ordinance, Section 6-8-94, pertaining to Electrical Generating Facilities:

"Electrical Generating Facilities:

A. Additional standards or requirements for this use. Certain types of electricity generation facilities are permitted as conditional uses in zones as specified in Table 6-8-11 (c) and must adhere to the following conditions:

1. The facility shall use only natural gas, solar cells, water (hydroelectric) or wind power to produce electricity for sale. The use of diesel fuel is allowed only for emergency generation of electricity for fire suppression or winding down turbines.
2. The owner or operator of the facility shall show compliance with all applicable Idaho Public Utility, and Federal Agency rules and regulations before receiving a zoning permit and shall operate the facility in conformance with those same regulations.
3. Facility improvements shall be at least 2,500 feet away from any residence existing at the time of the application for permit. This distance shall be measured from the centerline of the power producing turbine to the closest edge of the residence. The distance may be shortened if the applicant applies for and is granted a waiver using the standards and procedures contained in this ordinance. A distance waiver shall be granted by the Commission provided, the owner(s) of affected residence(s) waive, in writing, the 2,500-foot setback requirements. If such a waiver(s) are submitted to the Administrator for each residence within the 2,500-foot setback no variance approval shall be required.
4. Operation of the facility shall not result in any noise louder than 58 decibels on the A-weighted decibel scale as measured from 750 feet from the centerline of the power producing turbine. A higher decibel reading would require a variance unless the Commission grants a noise waiver. The Commission may grant a noise waiver provided the owner(s) of affected property waive in writing the 58Db noise requirement.
5. The applicant, with its building permit application, shall submit and thereafter follow a landscaping, screening and noise control plan to comply with section 4 above. The plan's ability to comply with section 4 shall be certified by a licensed engineer employed by the applicant. All improvements on the facility shall be enclosed by an appropriate security fence.
6. The applicant shall demonstrate and maintain an adequate fire protection and fire fighting capacity, including entering into an agreement with a public firefighting agency when the applicant's project is within the jurisdiction of such an agency.
7. Before a zoning permit is granted, the applicant shall hold at least two (2) public meetings. Notice of those meetings shall be by publication in local

newspaper and by mail to property owners within one (1) mile of the proposed facility.

8. The Administrator shall cause the applicant to provide information detailing possible adverse impacts and require mitigation of same.
9. Towers and structures that seek to exceed the building height restrictions from Table 6-8-12 (C) must be compatible with the flight operations of MHAFB and the City of Mountain Home and Glenns Ferry public airport operations. The proposed plan should be coordinated and approved by local, state, federal and military aviation officials.
10. Towers and height variances shall not be granted within 5 miles of Mountain Home AFB or along depicted flight corridors.
11. Within the Mountain Home or Glenns Ferry airport influence areas overlay district, the height limits on the tower or facility structures shall be as required by the Code of Federal Regulations 14 CFR 77.
12. Notification distance shall be increased at the discretion of the Director to accommodate for visual impacts." Zoning Ordinance, Section 6-8-94.

F. The Board finds that in addition to a conditional use permit, additional requirements are found in the following Zoning Ordinance, Section 6-8-170, pertaining to Public or Quasi-Public Use - Electrical Generating Facilities:

- "1. Electric distribution lines shall be principal permitted uses. Master site plan approval is not required.
2. Electric sub transmission lines shall be principal permitted uses. Master site plan approval shall be required.
3. Electric transmission lines and substations shall require conditional use approval.
4. All electric transmission, sub transmission, and distribution line rights of way shall be exempt from the landscaping regulations of this Title.
5. Electric substations and other utility structures shall be deemed outdoor storage areas and shall meet the standards in this Chapter.
6. Towers for the purpose of communicating from the substation to remote devices shall be deemed an accessory use to an approved substation, provided that the pole and antenna are no taller than the existing towers.
7. All wire fences, metal structures, and metal objects shall be grounded as required by this Title." Zoning Ordinance, Section 6-8-170."

G. Specific Findings for Conditional Use Permits.

1. Does the proposed use in fact constitute a Conditional Use as determined in Chapter 8, Table 6-8-11 (C), Elmore County Land Use Table, as contained in this Ordinance?

CUP-2015-03: The Board finds that Zoning Ordinance Section 6-8-170 E.3 provides that "Electrical transmission lines and substations shall require conditional use approval."

The Board finds that Public or Quasi-Public Use requires a conditional use permit in Zoning Ordinance Table 6-8-11 (C).

CUP-2015-04: The Board finds that pump storage hydro electrical generating facility is an Electrical Generating Facility which requires a Conditional Use Permit in the Agriculture Zone in Zoning Ordinance Table 6-8-11 (C).

CUP-2015-05: The Board finds that PV solar electrical generating facility is an Electrical Generating Facility which requires a Conditional Use Permit in the Agriculture Zone in Zoning Ordinance Table 6-8-11 (C) and the additional requirements in Zoning Ordinance Section 6-8-94.

CUP-2015-06: The Board finds that a wind turbine electrical generating facility is an Electrical Generating Facility which requires a Conditional Use Permit in the Agriculture Zone in Zoning Ordinance Table 6-8-11 (C) and the additional requirements in Zoning Ordinance Section 6-8-94.

CUP-2015-07: The Board finds that Zoning Ordinance Section 6-8-170 D.3 "Electrical transmission lines and substations shall require conditional use approval." The Board further finds that Public or Quasi-Public Use requires a conditional use permit in Zoning Ordinance Table 6-8-11 (C).

2. Is the proposed use in harmony with and in accordance with the Elmore County Comprehensive Plan ("Plan") and this Ordinance (Title 6)?

The Board finds that the proposed uses under the five CUPs, with the addition of the Conditions, will be in harmony with and in accordance with the Comprehensive Plan and the Zoning Ordinance. The Board considered the following from the Comprehensive Plan:

"Private Property Rights Objectives

1. No person shall be deprived of private property without due process of law." Comprehensive Plan, page 12.

The Board finds that no person has been deprived of private property without due process of law. Public Hearings were conducted on October, 21, November 16, November 17 and December 16, 2016 all in accordance with the Zoning Ordinance and the LLUPA.

- "7. Property owners shall not use their property in a manner that negatively impacts upon the surrounding neighbors or neighborhoods." Comprehensive Plan, page 12.

The Board finds that all applicant-owned private lands will be preserved as open for wildlife use and locate/construct facilities to maintain the function of this land as a wildlife corridor. The solar array, substation and transmission lines would be designed using best practices for minimizing visual impact. These practices include siting considerations, use of vegetative and topographic screening, and selection of appropriate building materials. Record for the Matter, page 675.

- "9. Property owners must recognize they are only temporary stewards of the land, and shall preserve and maintain their property for the benefit of future generations." Comprehensive Plan, page 13.

The Board finds that with Conditions 25, 26, 28, 30 and 32 regarding the decommissioning of the facilities at the completion of their use, the Applicant will maintain and preserve the property for future generations.

The Board finds that the Applicant, under the Conditions, shall establish a Community and Stakeholder Board to assist in providing funding and to seek input from community stakeholders regarding management, conservation and enhancement of plants, animals, and birds that inhabit the project area, enhance community and recreational tourism opportunities, improve sage grouse habitat on balance of ranch lands, wetlands offset and expansion through mitigation, restoration of fish habitat spawning beds, expansion of grazing, feeding and forage for wildlife. Record for the Matter, pages 8007-8008.

"10. Property owners acknowledge and expect that Elmore County will preserve private property rights and values by enforcing regulations that will ensure against incompatible and detrimental neighboring land uses." Comprehensive Plan, page 13.

The Board finds that with the Conditions, the County will preserve private property rights and values by enforcing regulations that will ensure against incompatible and detrimental neighboring land uses and the Applications are for permitted uses under the Zoning Ordinance. Chapter 8 Table 6-8-11 (C) requires a Conditional Use Permit in an "Ag" zone for the proposed uses.

"11. When the use of private property conflicts with the public interest, such conflicts shall be considered using a context larger than the boundaries of particular land parcel and a time frame longer than a particular property transaction." Comprehensive Plan, page 13.

The Board finds that while it doesn't believe the proposed private property use under the Applications conflict with the public interests, it finds that to the extent that they may, that the production of clean, renewable electrical energy for the Pacific Northwest is a viable and useful service to be provided by the Applicants and with the Conditions, it minimizes impacts to surrounding uses. The Applicant estimates the IPUC approved rate per kW for Cat Creek Energy will be 4.4 cents. Record for the Matter, page 8016.

"Economic Goal Statement 1

Diversify and improve the economy of Elmore County in ways that are compatible with community values. Comprehensive Plan, page 30.

The Board finds that the development and operation of the Project will provide for 10,000,000 hours of construction labor and prior to construction 88 full time employees and an estimated 24 full time jobs with 11 full time support employees jobs in Elmore County. Record for the Matter, page 7931. Additionally, based upon the Applicant's estimates, Elmore County property tax revenues for the Project when fully developed would be in excess of \$13 Million. Record for the Matter, page 8009. The Applicant, in conjunction with Condition Number 2, will contribute \$330,000 annually to the Community and Stakeholder Board to be used for management, conservation and enhancement of plants, animals, and birds that inhabit the project area. Record for the Matter, page 8009.

"Economic Objectives ...

2. Encourage broad-based economic development programs that include:
 - a. Natural resources such as mining, timber, and agriculture from both federal and private lands.
 - b. Commercial Development

- c. Industrial Development
- d. Tourism Expansion and Development
- e. Military Expansion and Development." Comprehensive Plan, page 30.

The Board finds that the development and operation of the Project will provide for 10,000,000 hours of construction labor and prior to construction 88 full time employees and an estimated 24 full time jobs with 11 full time support employees jobs in Elmore County. Record for the Matter, page 7931. Additionally, based upon the Applicant's estimates, Elmore County property tax revenues for the Project when fully developed would be in excess of \$13,000,000. Record for the Matter, page 8009. The Applicant, in conjunction with Condition Number 2, will contribute \$330,000 annually to the Community and Stakeholder Board to be used for management, conservation and enhancement of plants, animals, and birds that inhabit the project area. Record for the Matter, page 8009.

"11. Recognize the need for electric utility facilities that are sufficient to support economic development." Comprehensive Plan, page 30.

The Board finds that this project represents a dramatic step forward in the ongoing effort to integrate renewable energy into fully reliable utility grids, to preserve and protect the local environment in which renewable projects are implemented, and to provide local employment opportunities and increase the local and state tax base. Record for the Matter, page 641.

"Land Use Objectives

...

8. Review all commercial and industrial development proposals to determine the land use compatibility and impact to surrounding areas." Comprehensive Plan, page 36.

The Board finds that Applicant does not adversely impact surrounding areas and it is compatible with the current ranching operations and recreation activities, and may enhance areas by its water resource. All applicant-owned private lands on the Property shall be preserved as open space for wildlife use as functioning ranches and all locations and construction of the facilities shall maintain the function of this land as a wildlife migration corridor. Record for the Matter, page 6545.

The Board finds that the Applicant submitted a new master site plan, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

"9. Review all development proposals in areas that are critical to groundwater recharge and sources to determine impacts, if any, to surface and groundwater quantity and quality. Comprehensive Plan, page 37.

The Board finds that the Applications do not include any use of groundwater. Record for the Matter, page 6517.

"17. Evaluate all development proposals in terms of land use and environmental compatibility. Discourage development proposals, which negatively impact land use patterns and negatively impact the human and natural environment." Comprehensive Plan, page 37.

The Board finds that the Applications were the only development proposals submitted for decision.

The Board finds that the Applications with the Conditions, do not negatively impact land use patterns and do not negatively impact the human and natural environment. The Applicant has proposed to establish a Community and Stakeholder Board to assist with funding and to seek input from community stakeholders regarding management, conservation and enhancement of plants, animals, and birds that inhabit the project area, enhance community and recreational tourism opportunities, improve sage grouse habitat on balance of ranch lands, wetlands offset and expansion through mitigation, restoration of fish habitat spawning beds, expansion of grazing, feeding and forage for wildlife.. Record for the Matter, pages 8007-8008.

"Water Goal 1

To protect, develop, and maintain the quality and quantity of our water resource. Comprehensive Plan, page 45.

The Board finds that the Upper Reservoir will be filled during spring run-off. It will hold approximately 50,000 acre-feet of water. Roughly 8,000 – 10,000 acre-feet of water will be cycled through the pumped-hydro system daily. Another 10,000 acre-feet will be kept in reserve for operational purposes. The remaining 30,000 acre-feet will be available, as necessary and appropriate, to downstream irrigation districts and municipal users and, of special interest to Idaho Department of Fish and Game and Trout Unlimited, to help sustain the downstream fishery. The plant will produce power throughout the year. Based upon the Record for the Matter, there are no foreseeable impacts on water quality as a result of such release either in the Upper Reservoir or on the South Fork of the Boise River below the Anderson Ranch Dam. Record for the Matter, page 6688.

"Water Objectives:

1. Encourage land management and development of soil and water resources for economic growth of the County." Comprehensive Plan, page 46.

The Board finds that without the Conditions, disturbance of reservoir shoreline and vegetated upland areas during construction of the hydroelectric intake, powerhouse and penstock has the potential to increase erosion and sedimentation, which could adversely affect water quality in Anderson Ranch Reservoir. Construction of roads and wind tower pads for the wind turbine project element has the potential to cause erosion and sedimentation into Malad River, Castle Creek, Cat Creek, or other small streams located downslope of disturbed areas. With the Conditions, the potential for erosion and sedimentation would be minimized by implementing industry standard erosion control measures for all aspects of the construction effort. Record for the Matter, page 6525.

"5. Water quality should be protected and preserved in all proposed developments." Comprehensive Plan, page 46.

The Board finds that the Upper Reservoir will be filled during spring run-off. It will hold approximately 50,000 acre-feet of water. Roughly 8,000 – 10,000 acre-feet of water will be cycled through the pumped-hydro system daily. Another 10,000 acre-feet will be kept in reserve for operational purposes. The remaining 30,000 acre-feet will be available, as necessary and appropriate, to downstream irrigation districts and municipal users and, of special interest to Idaho Department of Fish and Game and Trout Unlimited, to help sustain the downstream fishery. The plant will produce power throughout the year. Based upon the Record for the Matter, there are no foreseeable impacts on water quality as a result of such release either in the Upper Reservoir or on the South Fork of the Boise River below the Anderson Ranch Dam. Record for the Matter, page 6688.

"7. Work with the Idaho Department of Water Resources and seek approval to study and construct necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County." Comprehensive Plan, page 46.

The Board finds that with the Conditions the Applicant will be required to obtain the necessary water rights and to seek approval from the Idaho Department of Water Resources ("IDWR") for necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County.

The Board finds that the Applicant will not be taking water during the time when the Boise drainage is fully appropriated. Furthermore, the remainder capacity in the Upper Reservoir reserved for other uses is filled during flood control period when excess water is released downstream. The fill rate shall be conditioned by IDWR, Bureau of Reclamation and US Army Corps of Engineers as they manage the Boise River drainage and its reservoirs. Record for the Matter, page 7011.

"Fish and Wildlife Goal 2

Recognize the economic contributions that fish and wildlife-based recreation contribute to Elmore County." Comprehensive Plan, page 49.

The Board finds that the Applicant and the Applications were prepared to recognize the economic contributions that fish and wildlife based recreation contributes to Elmore County by developing reasonable mitigation strategies to minimize entrainment losses at the hydroelectric facility will be employed during the design stage for the intake and tailrace portion of the powerhouse. Any avoidable entrainment impacts to federally listed bull trout would be mitigated through support for long term projects, developed in cooperation with Idaho Department of Fish and Game ("IDFG") and United States Fish and Wildlife Service ("USFWS") to enhance bull trout habitat in the South Fork Boise River upstream of Anderson Ranch Dam. Pursuant to the Development Agreement, as set forth in the Conditions (the "**Development Agreement**") the Applicant would fund annual fish stocking in Anderson Ranch Reservoir to compensate for any net loss of game fish due to entrainment into the hydropower penstocks. The Applicant would work with IDFG to develop the details of this program. Record for the Matter, page 650.

"Fish and Wildlife Goal 3

Sustain the fish and wildlife habitats necessary to provide quality fish and wildlife-related recreation." Comprehensive Plan, page 49.

The Board finds that the powerhouse would be constructed with sound insulation to minimize the potential that powerhouse noise would disturb wildlife or recreation users. Record for the Matter, page 650.

The Board finds that with the Conditions, the Applicant will be required to maintain communications with IDFG and USFWS, as with the other agencies involved, to sustain fish and wildlife habitats necessary to provide quality fish and wildlife recreation. Record for the Matter, page 7004.

The Board finds that with the Conditions, the Applicant will form the Community and Stakeholder Board for management, conservation and enhancement of plants, animals, and birds that inhabit the project area and as specified in the Wildlife Mitigation Plan, among other activities it will monitor possible habitat impacts and population trends during the operational phase of the project. Record for the Matter, page 7004.

"Fish and Wildlife Goal 4

Recognize that fish and wildlife are public resources to be managed for the benefit of all and promote ongoing proper management of fish and wildlife resources." Comprehensive Plan, page 49.

The Board finds that pursuant to the Conditions, the Applicant would fund annual fish stocking in Anderson Ranch Reservoir to compensate for any net loss of game fish due to entrainment into the hydropower penstocks. The Applicant would work with Idaho Fish and Game to develop the details of this program. Record for the Matter, page 650.

The Board finds that pursuant to the Conditions, the Applicant, through Wood Creek Ranch, will fund conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas 2 and 3, in the eastern part of Wood Creek Ranch where evidence of sage-grouse usage exists and the best sage-grouse habitat is found. The conservation effort would be a cost-share with the Sage-Grouse Initiative and may include measures such as prescribed grazing, fence marking and water tank escape ramps. Record for the Matter, pages 674-675.

"Fish and Wildlife Objectives:

1. Request public agency input on proposed land and water development projects potentially impacting fish and wildlife habitat." Comprehensive Plan, page 50.

The Board finds that the County requested comment from 92 agencies concerning the Applications and reports and comments were made a part of the Record for the Matter. Record for the Matter, pages 6814-6816, 6819-6821, 6824-6826, 6829-6831 and 6835-6837.

The Board finds that the Applicant proposes necessary and reasonable mitigation strategies to minimize entrainment losses at the hydroelectric facility will be employed during design stage for the intake and tailrace portion of the powerhouse. Any unavoidable entrainment impacts to federally listed bull trout would be mitigated through support for long term projects, developed in cooperation with the Applicant, IDFG and

USFWS, to enhance bull trout habitat in the South Fork Boise River upstream of Anderson Ranch Dam. The Applicant would fund annual fish stocking in Anderson Ranch Reservoir to compensate for annual net loss game fish due to entrainment into the hydropower penstocks. The Applicant would work with Idaho Department of Fish and Game to develop the details of this program. Record for the Matter, page 675.

2. "Consider ordinances and conditions of approval aimed at avoiding and mitigating adverse impacts to fish and wildlife resources as a result of development." Comprehensive Plan, page 50.

The Board finds that many of with the Conditions proposed are designed and intend to avoid and mitigate adverse impacts to fish and wildlife resources as a result of the proposed development set forth in the Applications.

3. "Encourage protection of water quantity and quality and multiple uses that are complementary to fish and wildlife populations." Comprehensive Plan, page 50.

The Board finds that based upon the Record for the Matter, there are no foreseeable impacts on water quality as a result of such release either in the Upper Reservoir or on the South Fork of the Boise River below the Anderson Ranch Dam. Record for the Matter, page 6688.

"Scenic Areas Goal 1

To promote the preservation of natural scenic areas for the use and benefit of both present and future generations." Comprehensive Plan, page 51.

The Board finds that additionally, pursuant to Conditions 25, 26, 28, 30 and 32 regarding the decommissioning of the facilities at the completion of their use, the Applicant will preserve the future scenic beauty of the property.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

"Scenic Area Objectives

1. Encourage the preservation of scenic areas for their natural beauty." Comprehensive Plan, page 51.

The Board finds that few man-made structures and unpaved roads will be visible from most viewpoints. Due to the openness of the landscape and lack of tall vegetation the hilly areas and ridgelines proposed for wind turbine development will be visible from adjacent lowland areas. Record for the Matter, page 6523.

The Board finds that the Applicant submitted a new master site plan, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

The Board further finds that landscaping opportunities that do not interfere with the function of the facilities will be incorporated where appropriate, such as to screening views from Running Bear RV Resort near Little Camas Reservoir which already has vegetation for screening in place. Record for Matter, page 6541.

The Board further finds that additionally, pursuant to Conditions 25, 26, 28, 30 and 32 regarding the decommissioning of the facilities at the completion of their use, the Applicant will preserve the future scenic beauty of the property.

2. Natural areas should be preserved through proper planning and/or density transfer procedures or development rights transfer procedures. Comprehensive Plan, page 46.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

3. Encourage development in localities that will not degrade scenic areas within the County." Comprehensive Plan, page 51.

The Board finds that few man-made structures and unpaved roads will be visible from most viewpoints. Due to the openness of the landscape and lack of tall vegetation the hilly areas and ridgelines proposed for wind turbine development will be visible from adjacent lowland areas. Record for the Matter, page 6523.

The Board further finds that additionally, pursuant to Conditions 25, 26, 28, 30 and 32 regarding the decommissioning of the facilities at the completion of their use, the Applicant will preserve the future scenic beauty of the property.

"Hazardous Area Objectives...

2. Discourage development in or near natural hazardous areas, such as airports, power line corridors, electrical substations, flood plains, unstable soil areas and steep slopes, high velocity wind and storm prone areas, except for industries, which may require these conditions." Comprehensive Plan, page 53.

The Board finds that with Conditions, the Applicant will implement soil erosion control measures, which would include minimizing ground disturbance areas during construction, stabilizing soils and installing barriers to prevent runoff, and contouring and revegetating all disturbed areas when construction is complete. Erosion control measures and revegetation activities would meet all industry standards and would prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds and promote re-development of quality wildlife habitat. Record for the Matter, page 6492.

The Board finds that short segments of the hydropower pipeline, powerhouse access road and transmission line lie within 100 feet of the shore of Anderson Ranch Reservoir. Approximately 2,500 feet of penstocks and a small area of the Upper Reservoir would be constructed on slopes exceeding 15%. Approximately 3 miles of the transmission line would traverse areas with hillsides exceeding the 15% slope limit. Record for the Matter, pages 6495-6496. Any improvements on steep slopes will be constructed according to the Zoning Ordinance.

"Public Service Objectives - Water Supply and Distribution

1. Encourage and promote water conservation to protect local water resources." Comprehensive Plan, page 56.

The Board finds that the initial filling of the 50,000 acre-feet Upper Reservoir would be performed during the high-water period from April-June when excess water is often available above the requirements for irrigation storage and in-stream flow. Filling would occur after Arrowrock Reservoir was adequately filled and all other water storage requirements were met. The filling of the Upper Reservoir may cause a short-term decrease in the releases from Anderson Ranch Dam and may thus affect flows in the South Fork Boise River. The fill rate would be adjusted to maintain adequate flows in the South Fork to support fish, wildlife and recreational use. Depending on the water available fill rate would likely be in the range of 100 - 1,000 cfs. Record for the Matter, page 6524.

The Board finds that the initial filling of the Upper Reservoir, during spring run-off in normal water years, could result in reduced flows in the South Fork Boise River. The timing of this reduced flow could be managed by temporarily absorbing the water withdrawal required to fill the Upper Reservoir by allowing the Anderson Ranch Reservoir level to drop or in very low water years, by adjusting the operation on the pumped storage hydro system. By taking this approach, reduced flows in the South Fork Boise River (to recover any lost storage in the reservoir) could be timed to occur during

high flow conditions when the river basin contains excess water. Therefore, it is anticipated that the initial fill of the Upper Reservoir shall occur in a high spring run-off year. There by conserving the water that would have been released downstream. Record for the Matter, page 6532.

"3. Support water development and conservation projects on the Boise River and other watersheds within the County." Comprehensive Plan, page 56.

The Board finds that the Applicant will not be taking water during the time when the Boise drainage is fully appropriated. Furthermore, the remainder capacity in the Upper Reservoir reserved for other uses is filled during flood control period when excess water is released downstream. The fill rate shall be conditioned by IDWR, Bureau of Reclamation and US Army Corps of Engineers as they manage the Boise River drainage and its reservoirs. Record for the Matter, page 7011.

"4. Guide growth to areas of the County where there is adequate water for development." Comprehensive Plan, page 56.

The Board finds that the Applicant will not be taking water during the time when the Boise drainage is fully appropriated. Furthermore, the remainder capacity in the Upper Reservoir reserved for other uses is filled during flood control period when excess water is released downstream. The fill rate shall be conditioned by Idaho Department of Water Resources, Bureau of Reclamation and US Army Corps of Engineers as they manage the Boise River drainage and its reservoirs. Record for the Matter, page 7011.

"Public Service Objectives – Electrical Power

1. Work with Idaho Power Company to promote the development of energy services and public facilities to meet public needs." Comprehensive Plan, page 57.

The Board finds that testimony provided of evidence of an Interconnection Application filed with Bonneville Power Administration ("BPA") on September 24, 2014. The testimony also indicates the Applicant is working with BPA on the use of their existing transmission corridor to radically reduce any environmental impacts of a new separate transmission corridor. Those options include: installing new transmission line in the existing corridor or widening the existing corridor. Evidence provided in testimony shows that Applicant has been working with Idaho Power Company since May 4, 2015 on up to 890 MW of power supply for the facility. Record for the Matter, page 7720.

"2. Encourage the enhancement of the electric system capacity and reliability." Comprehensive Plan, Page 57.

The Board finds that the Applicant will offset 2,980,000,000 pounds of CO2 emissions annually from natural gas plants. Record for the Matter, page 8015.

The Board finds that the Project features: new powerhouse/pump house located in Anderson Ranch Reservoir, new 50,000 acre feet Upper Reservoir, four new 16 foot diameter penstocks between Anderson Ranch Reservoir and Upper Reservoir, new substation and dual circuit 230 kV transmission line, new access road to powerhouse/pump house, a 40.0 MW AC photo-voltaic solar energy array, a 39 tower 110.0 MW wind energy generation facility and an administration and maintenance site

with office and storage buildings, parking and an equipment yard. Record for the Matter, page 6483.

3. Encourage the enhancement of the capacity and reliability of renewable energy resources." Comprehensive Plan, page 57.

The Board finds that the Applicant will offset 2,980,000,000 pounds of CO2 emissions annually from natural gas plants. Record for the Matter, page 8015.

The Board finds that the Project features: new powerhouse/pump house located in Anderson Ranch Reservoir, new 50,000 acre Upper Reservoir, four new 16 foot diameter penstocks between Anderson Ranch Reservoir and Upper Reservoir, new substation and dual circuit 230 kV transmission line, new access road to powerhouse/pump house, a 40.0 MW AC photo-voltaic solar energy array, a 39 tower 110.0 MW wind energy generation facility and an administration and maintenance site with office and storage buildings, parking and an equipment yard. Record for the Matter, page 6483.

"4. Encourage the multiple-use of utility corridors by utility providers." Comprehensive Plan, page 57.

The Board finds that the powerline is anticipated to parallel existing Idaho Power powerline to the south of Running Bear RV Park. Record for the Matter, page 7944.

"6. Recognize the need for long-range planning and build out of electrical infrastructure as detailed in the Eastern Treasure Valley Electrical Plan (ETVEP), developed by a local Community Advisory Committee. See Map #11A in the map appendix for the conceptual locations of future electrical infrastructure." Comprehensive Plan, page 57.

The Board finds that the Master Site Plan does not show any electrical infrastructure in the Eastern Treasure Valley Electrical Plan. Record for the Matter, page 8019.

"7. Recognize that the ETVEP is a conceptual plan and is the first step in planning for new and upgraded transmission lines and substations. Each project will still require jurisdictional approval and will be subject to the public siting process." Comprehensive Plan, page 57.

The Board finds that the Master Site Plan does not show any electrical infrastructure in the Eastern Treasure Valley Electrical Plan. Record for the Matter, page 8019.

"8. Support longer term (10 to 15 year) conditional use permits to enable utilities to purchase sites well in advance of needing to build the facility. Comprehensive Plan, page 57.

The Board finds that the Applicant requested a period of four (4) years, pursuant to Section 6-27-5A of the Zoning and Development Ordinance. Record for the Matter, page 6627.

"9. Support siting of utility corridors within identified or designated transportation corridors and allow the appropriate placement of electric facilities on public rights-of-way. Comprehensive Plan, page 57.

The Board finds that powerlines are anticipated to parallel existing Idaho Power Powerline to the South of Running Bear RV Park. Record for the Matter, page 7944.

"10. Support the protection of wetlands and other critical areas and recognize that electric facilities sometimes must cross these areas, and that access is essential for repair and maintenance of the facilities. Comprehensive Plan, page 57.

The Board finds that within the main habitat categories, up to 31 acres of wetland/riparian habitat could potentially be disturbed or lost. This habitat type is highly utilized by many wildlife species and is relatively uncommon in the high desert environment of the Property. The wetlands/riparian loss would be minimized by adjustment of project facility locations; however, the loss of wetland habitat within the Upper Reservoir footprint is unavoidable. Record for the Matter, page 6556.

The Board finds that with the Conditions, wetlands offset and expansion through mitigation, restoration of fish habitat spawning beds and reduction of streamside erosion mitigation will be paid for by the Stakeholders funds under the Development Agreement. Record for the Matter, page 8008.

"11. Recognize other types and sources of energy beyond the existing electrical infrastructure have a role to play in the future of Elmore County (e.g. solar, wind, gas). Comprehensive Plan, page 57.

The Board finds that well over 100 wind turbines are within a few hundred feet of the Oregon Trail in Idaho including in Elmore County. Record for the Matter, page 7970.

The Board finds that 40% of Idaho Power's generation for ratepayers is from out of state, primarily from coal-fired generation plants. Applicant will offset 2,980,000,000 pounds of CO2 emissions annually from natural gas plants. Hydro power is the main source of in-state generation and long-accepted as a feature of Idaho's landscape. Record for the Matter, page 8015.

"18. Encourage the enhancement of the capacity and reliability of renewable energy resources." Comprehensive Plan, page 58.

The Board finds that the project under the Applications can store up to 36,000 megawatt hours of electricity and can pump and generate simultaneously if needed, that is enough stored energy to run Idaho Power's entire system for over 24 hours, all from renewable electrical generation resources. Record for the Matter, page 7921.

"Recreation Objectives

1. Encourage developments that will maintain the aesthetic and scenic value of the area with the least possible disturbance to soil, vegetation, and water." Comprehensive Plan, page 64.

The Board finds that with the Conditions, the project would implement erosion control measures, which would include minimizing ground disturbance areas during construction, stabilizing soils and installing barriers to prevent runoff, and contouring and revegetating all disturbed areas when construction is complete. Erosion control measures and revegetation activities would meet all industry standards and would

prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds and promote re-development of quality wildlife habitat. The solar array, substation and transmission line would be designed using best practices for minimizing visual impact. These practices include siting considerations, use of vegetative and topographic screening, and selection of appropriate building materials. Record for the Matter, page 6492.

"4. Encourage equitable draw down of water levels of Anderson Dam consistent with irrigation and multiple-use management needs." Comprehensive Plan, page 64.

The Board finds that the initial filling of the 50,000 acre-feet Upper Reservoir would be performed during the high-water period from April-June when excess water is often available above the requirements for irrigation storage and in-stream flow. Filling would occur after Arrowrock Reservoir was adequately filled and all other water storage requirements were met. The filling of the Upper Reservoir may cause a short-term decrease in the releases from Anderson Ranch Dam and may thus affect flows in the South Fork Boise River. The fill rate would be adjusted to maintain adequate flows in the South Fork to support fish, wildlife and recreational use. Depending on the water available fill rate would likely be in the range of 100 - 1,000 cfs. Record for the Matter, page 6524.

"Areas of Critical Concern Goal 1

To protect and preserve the unique features and land characteristics in these areas that has been designated for additional consideration." Comprehensive Plan, page 67.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

"Areas of Critical Concern Goal 2

To implement a special land use review and hearing procedure following the CUP process to fully evaluate any development proposals in any Area of Critical Concern." Comprehensive Plan, page 46.

The Board finds that the Applicant will present the Development Agreement to the Board, in a public hearing meeting the requirements of the Zoning Ordinance and the LLUPA.

"Areas of Critical Concern Objectives:

1. Discourage encroachment on lands that contain important feeding grounds for wildlife." Comprehensive Plan, page 67.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings and under Condition Number 2, and the site plan change relocated the wind turbines from an area of elk and deer migration winter to spring/summer habitat following studies by the Idaho Department of Fish and Game. Record for the Matter, page 8022.

"3. To the extent possible, preserve the historical and natural resources within Areas of Critical Concern." Comprehensive Plan, page 46.

The Board finds that although the Goodall's Cutoff is a historic alternative route of the Oregon Trail and is in the general area, well over 100 wind turbines are within a few hundred feet of the Oregon Trail in the County. Furthermore, the largest impact on the Goodall's Cutoff is US Highway 20. Record for the Matter, page 7970.

The Board finds that based upon the foregoing finding, the Applications, with the Conditions, preserve the historical and natural resources within Areas of Critical Concern.

"5. Recognize all areas of critical concern and promote better management of the soils, water, and environment." Comprehensive Plan, page 67.

The Board finds that the Area of Critical Concern are comprised of lands within 100 feet for the banks of the South Fork of the Boise River or lands situated on hillsides greater than 15% slope. The project area includes lands within 100 feet of the Anderson Ranch Reservoir shoreline.

The Board finds that any facilities constructed within these areas of critical concern would be subject to Zoning Ordinance Supplemental Title 6 construction standards. Short segments of the hydropower pipeline, powerhouse access road and transmission line would lie within 100 feet of the shore of Anderson Ranch Reservoir. Approximately 2,500 feet of penstocks and a small area of the Upper Reservoir would be constructed on slopes exceeding 15%. Approximately 3 miles of the transmission line would traverse areas with hillsides exceeding the 15% slope limit. Record for the Matter, pages 6495-6496.

The Board finds that with the Conditions, any improvements on steep slopes will be constructed according to the Zoning Ordinance.

The Board finds that no more than 40% of CUP-2015-04 pump storage hydro falls within the Area of Critical Concern and CUP-2015-03 only falls with the ACC since its appurtenance include a transmission conveyance system. Record for the Matter, page 6496.

"8. Develop and administer a special permit evaluation procedure for all development applications within any 'Area of Critical Concern.'" Comprehensive Plan, page 67.

The Board finds that in reviewing any proposed development requests in an Area of Critical Concern, pertaining to CUPs 2015-03, 2015-04 and 2015-06, the Board will follow the following development standards under Zoning Ordinance Section 6-8-26 B.1-4:

1. Does the proposed land use demonstrate compatibility with the natural surrounding environment?

The Board finds that wind site was selected based on its wind resource, low human population, the ability to secure the required land, current land use, a large area for micro siting and placement of each wind turbine, and other considerations necessary to allow wind power to be generated from the site. The site boundary encompasses three distinct areas of approximately 3,160 acres. However, the land occupied and disturbed by the wind park would be less than 1% of this area and its traditional agricultural uses would be unaffected. It is anticipated that the area of direct land use for the turbines and associated facilities would be approximately 40 acres including all roads. Record for the Matter, pages 648-649.

2. Were technical studies required by the Director, Commission or Board to identify impacts and to determine the feasibility of the proposed use?

The Board finds that the County considered a Wildlife Mitigation Plan as the environmental study. Record for the Matter, page 6108.

The Board finds the Applicant submitted a Wildlife Mitigation Plan on December 11, 2015 as a technical study in lieu of an Environmental Impact Assessment. Record for the Matter, page 6476.

The Board finds the Applicant submitted a Critical Issues Analysis with the Application on July 2, 2015, outlining possible impact and potential mitigation. Record for the Matter, page 637.

- 3a. Do the Applications develop or expand ranching operations?

The Board finds that all applicant-owned private lands shall be preserved as open space for wildlife use as functioning ranches and all locations and construction of the facilities shall maintain the function of this land as a wildlife migration corridor. Record for the Matter, page 6545.

The Board finds that nearly all project lands are privately owned by the Applicant and project areas would simply be shifted from agriculture and ranching into use for power generation. The project would not have any significant effect on the balance of the ranches normal activities. Record for the Matter, page 6537.

- 3b. Do the Applications protect the natural and scenic environment?

The Board finds that the Applicant as part of the Application and the Conditions, will establish a Community and Ecological Stakeholder Board to ensure the project area improves sage grouse habitat on balance of ranchland, wetlands offset and expansion through mitigation, restoration of fish habitats spawning beds and reduction of streamside erosion mitigation, expansion of grazing feeding and forage opportunities for the public wildlife on ranchlands. Record for the Matter, page 8008.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

The Board finds that few man-made structures and unpaved roads will be visible from most viewpoints. Due to the openness of the landscape and lack of tall vegetation the hilly areas and ridgelines proposed for wind turbine development will be visible from adjacent lowland areas. Record for the Matter, page 6523.

The Board further finds that additionally, pursuant to Conditions 25, 26, 28, 30 and 32 regarding the decommissioning of the facilities at the completion of their use, the Applicant will preserve the future scenic beauty of the property.

4a. Are single-family dwellings and all structures built to fit into the natural terrain with little or no gouging of hillsides or altering of the landscape?

The Board finds that there are no single-family dwellings proposed in the Master Site Plan.

The Board also finds the Applications must be in compliance with Chapter 27 of the Zoning Ordinance. Section 6-27-5A 4.

The Board finds that construction permits are required prior to the commencement of the placement of permanent footings and structures on or in the ground, which shall include sewer lines, water lines, streets, or building foundations. Record for the Matter, page 1.

4b. Will the grading of roads that are used as access to property be kept to a minimum to prevent erosion and the destruction of scenic value?

The Board finds that with the Conditions all grading of roads will be required to comply with the Zoning Ordinance.

The Board finds that access to the solar array would be via a new private all weather road. The road and solar array would be located entirely on private land owned by the Applicant. The land area for the PV solar facility would be graded for the solar farm and then be reclaimed to the extent feasible. Record for the Matter, page 647.

"Pine, Featherville and Fall Creek Communities Community Goals ...

6. Natural Resources

Protect the Anderson Ranch Reservoir, the South Fork of the Boise River and all waterways in the Pine / Featherville / Fall Creek community areas from incompatible land use encroachment and development.” Comprehensive Plan, page 82.

The Board finds that the project would have no impact on fish populations in tributaries to the South Fork Boise River or Anderson Ranch Reservoir because none of the tributaries within the project footprint (hydro and solar) support permanent water flows that would sustain a fishery. Erosion control measures would assure that wind tower development has no adverse effects on water quality in Wood Creek or the Malad River that could adversely affect any resident fish in these streams. Record for the Matter, page 679.

“11. Special Areas or Sites

Protect the South Fork of the Boise River watershed to preserve water quality.” Comprehensive Plan, page 83.

The Board finds that the Applications with the Conditions will protect the South Fork of the Boise River water quality as set forth below.

The Board finds that the Applicant provides multiple solutions for flood control, additional water for fisheries and recreation for the Boise River, while mitigating any potential temperature or quality concerns. The Applicant has identified the following resources which may require additional study analysis: monitoring of temperature and dissolved oxygen in the vicinity of the proposed powerhouse intake/outlet; analysis to quantify if there are any significant potential water temperature effects due to water exchange between the Upper Reservoir and Anderson Ranch Reservoir; analysis of the impact of water levels on the ability of fish to move out of Anderson Ranch Reservoir into the Upper South Fork Boise River. Record for the Matter, pages 6556-6557.

The Board finds that under the Conditions, the Applicant will establish a Community and Ecological Stakeholder Board to ensure the project area improves sage grouse habitat on balance of ranchland, wetlands offset and expansion through mitigation, restoration of fish habitats spawning beds and reductions of streamside erosion mitigation, expansion of grazing feeding and forage opportunities for the public wildlife on ranchlands. Record for the Matter, page 8008.

The Board finds that, pursuant to the Conditions, the project would implement erosion control measures, which would include minimizing ground disturbance areas during construction, stabilizing soils and installing barriers to prevent runoff, and contouring and revegetating all disturbed areas when construction is complete. Erosion control measures and revegetation activities would meet all industry standards and would prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds and promote re-development of quality wildlife habitat. Record for the Matter, page 6492.

The Board finds that, pursuant to the Conditions, disturbance of reservoir shoreline and vegetated upland areas during construction of the hydroelectric intake, powerhouse and penstock has the potential to increase erosion and sedimentation, which could adversely affect water quality in Anderson Ranch Reservoir. Construction of roads and wind tower

pads for the wind turbine project element has the potential to cause erosion and sedimentation into Malad River, Castle Creek, Cat Creek, or other small streams located downslope of disturbed areas. The potential for erosion and sedimentation would be minimized by implementing industry standard erosion control measures for all aspects of the construction effort. Record for the Matter, page 6525.

3. Does the proposed use comply with the purpose statement of the applicable base zone and with the specific use standards as set forth in this Chapter?

The Board finds that the purpose statement for the Agriculture Zone is found in Zoning Ordinance Section 6-8-5 A and states: "General Agriculture: The purpose of the Ag district is to preserve and protect the supply of agriculture and grazing land in Elmore County until development is appropriate. This district will also control the infiltration of urban development and other uses into agriculture areas, which will adversely affect agricultural operations. Uses that are compatible with farming, ranching, grazing, forest products, and limited mining may be considered in this district. Residential land use is allowed in the Ag zone subject to site development standards and compatibility with agricultural operations. The "Ag" land use designation is the base zone throughout Elmore County. It contains areas of productive irrigated croplands, grazing lands, forestland, mining lands, public lands as well as rangeland and ground of lesser agricultural value." Record for the Matter, page 7067.

The Board finds that the Applications are compatible with farming, ranching and grazing. More recent human history includes mostly grazing by domestic livestock in the general area. The "Ag" land use designation is the base zone throughout Elmore County. It contains areas of productive irrigated croplands, grazing lands, forestland, mining lands, public lands as well as rangeland and ground of lesser agricultural value. Project facilities are located predominately on private land owned by the Applicant. These lands are zoned "Ag" and are used currently for livestock grazing. Record for the Matter, page 6502.

The Board finds the purpose state for the Area of Critical Concern Overlay Zone is found in Zoning Ordinance Section 6-8-5 N and states: "Area of Critical Concern Overlay Zone: The purpose of the ACC designation is to preserve and protect natural areas that are critical to the County's water and land resources. Because the base zoning is Agriculture, traditional farming and ranching and related agricultural uses will continue. Residential and commercial uses may also be allowed; however, technical studies and an Environmental Impact Assessment may be required. Land use, lot size and density restrictions may be imposed if warranted." Record for the Matter, page 7068.

The Board finds that the County was willing to consider an environmental study completed in the form of a Wildlife Mitigation Plan. Record for the Matter, page 6108.

The Board finds the Applicant submitted a Wildlife Mitigation Plan on December 11, 2015 as a technical study in lieu of an Environmental Impact Assessment. Record for the Matter, page 6476.

4. Does the proposed use comply with all applicable County Ordinances?

The Board finds that with the addition of the Conditions the proposed use under the Application will be required to comply with all applicable County Ordinances.

The Board finds the Applicant's representative testified at the November 17, 2016 public hearing and stated "I'd like to read the proposed conditions from the staff, and specifically condition number 6, Failure to comply with any of these conditions may results in revocation of the conditional use permit. If we can't comply with what they tell us, our permits are gone. That's how we can assure the community and leave their concerns that we can't just do whatever we want once we get a conditional use permit. The whole point is it's conditioned on doing what we say we're going to do. Record for the Matter, pages 8173-8174.

5. Does the proposed use comply with all applicable State and Federal regulations?

The Board finds that with the additions of the Conditions the proposed use under the Application will comply with all applicable State and Federal regulations.

The Board finds that federal permitting process may involve the following: Federal Regulatory Commission, US Bureau of Reclamation, US Fish and Wildlife Service, US Army Corps of Engineers, Environmental Protection Agency, US Forest Service, US Bureau of Indian Affairs, US Natural Resources Conservation Service, US Bureau of Land Management, Bonneville Power Administration, Federal Aeronautics Administration, US Bureau of Homeland Security, Department of Energy, North American Electric Reliability Corporation and Federal Communications Commission and that under the Conditions, the Applicant must obtain all necessary and required approvals from such federal agencies. Record for the Matter, pages 6555-6556.

6. Is the proposed use designed, constructed, operated, and maintained in such a way as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity; and will such use not change the essential character of said area?

The Board finds that with the Conditions, the proposed use under the Applications shall be designed, constructed, operated and maintained in such a way as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use shall not change the essential character of the area. The use of land in the project area has traditionally been and remains primarily agriculture. Other than the dam and reservoir complex, there has been little development. The project itself occupies a relatively small part of a 23,000-acre ranch, and is surrounded for the most part by other large ranches and USFS land. Record for the Matter, page 6503.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

7. Will the proposed use be hazardous or disturbing to existing neighboring uses or impede their normal development?

The Board finds that the proposed use under the Application, with the Conditions, will not be hazardous or disturbing to existing neighboring uses or impede their development.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

8. Is the proposed use served adequately by available public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, water, sewer, or that the person responsible for the establishment of the proposed conditional use shall be able to provide adequately any such services?

The Board finds the proposed use is adequately served by the following public services shall be provided as follows:

Highways: U.S. Highway 20

Streets: Publicly maintained S. Pine Featherville Road, N Bennett Mountain Road, NE Castle Road, Little Camas Reservoir Road. Privately maintained road Wood Creek Road, which is a non-paved road with no winter access.

Police: Elmore County Sheriff

Fire Protection: None

Drainage Structures: No information provided

Refuse Disposal: None

Potable, Non-Potable Water, Fire Suppression Water Supplies: None

Sewer: None

Record for the Matter, page 7927.

The Board finds that the project is out of any fire district, therefore the Elmore County Sheriff has jurisdiction over fire in this area. An existing water well would supply potable water for the facility and a new septic system would be designed and approved by Elmore County. Central District Health Department has signed the applications, a condition has been placed to ensure compliance. Record for the Matter, page 6491.

9. Will the proposed use create excessive additional requirements at public cost for public facilities and services and the proposed use shall not be detrimental to the economic welfare of the County?

The Board finds that the proposed use will not create any excessive additional requirements at public cost for public facilities and services, which are not going to be reimbursed or paid for in advance by the Applicant.

The Board finds that the Applicant is not requesting any funding for public facilities or services to serve the project which is the subject of the Applications. Record for the Matter, page 6553.

10. Will the proposed use involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors?

The Board finds that the proposed use does not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any person's property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors, except for the anticipated traffic associated with the proposed use, which impact is minimized to the extent possible by the Conditions for proposed use for the CUPs.

The Board finds that another design of the powerhouse similar to the powerhouse silo design at Arrowrock Dam, noise levels as little as 250 feet away are little more than a whisper. At ½ mile away across still water, the noise level would continue to be approximately 27 dBI or less than a whisper decibel level 30 bBI. Record for Matter, page 7954.

The Board finds over 90 percent of the light received by the PV modules will be absorbed so there is little glare. Record for Matter, page 7950.

11. Will the proposed use have vehicular approaches which shall be so designed as not to create an interference with traffic on surrounding public or private roadways?

The Board finds that the Idaho Department of Transportation gave the Applications a "no issues" finding. Mountain Home and Glens Ferry Highway District's support the Project. Egress off of US 20 already exists to Project sites through: Wood Creek Road, Old Bennett Mountain Road, Pine/Featherville Road. Record for the Matter, page 7968.

12. Does the proposed use result in the destruction, loss or damage of a natural or scenic feature of major importance?

The Board finds that the site areas are designated as having a natural or scenic feature of major importance and as a result will not result in the destruction, loss or damage of a natural or scenic feature of major importance.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

H. Specific Findings for Areas of Critical Concern under Zoning Ordinance, Section 6-8-26 B.1-4, pertaining to CUPs 2015-03, 2015-04 and 2015-06.

1. Does the proposed land use demonstrate compatibility with the natural surrounding environment?

The Board finds that wind site was selected based on its wind resource, low human population, the ability to secure the required land, current land use, a large area for micro siting and placement of each wind turbine, and other considerations necessary to allow wind power to be generated from the site. The site boundary encompasses three distinct areas of approximately 3,160 acres. However, the land occupied and disturbed by the wind park would be less than 1% of this area and its traditional agricultural uses would be unaffected. It is anticipated that the area of direct land use for the turbines and associated facilities would be approximately 40 acres including all roads. Record for the Matter, pages 648-649.

2. Were technical studies required by the Director, Commission or Board to identify impacts and to determine the feasibility of the proposed use?

The Board finds that the County was willing to consider an environmental study completed in the form of a Wildlife Mitigation Plan. Record for the Matter, page 6108.

The Board finds the Applicant submitted a Wildlife Mitigation Plan on December 11, 2015 as a technical study in lieu of an Environmental Impact Assessment. Record for the Matter, page 6476.

The Board finds the Applicant submitted a Critical Issues Analysis with the Application on July 2, 2015, outlining possible impact and potential mitigation. Record for the Matter, page 637.

3a. Do the Applications develop or expand ranching operations?

The Board finds that all Applicant-owned private lands shall be preserved as open space for wildlife use as functioning ranches and all locations and construction of the facilities shall maintain the function of this land as a wildlife migration corridor. Record for the Matter, page 6545.

The Board finds that nearly all project lands are privately owned by the Applicant and project areas would simply be shifted from agriculture and ranching into use for power generation. The project would not have any significant effect on the balance of the ranches normal activities. Record for the Matter, page 6537.

3b. Do the Applications protect the natural and scenic environment?

The Board finds that the Applicant as part of the Application and Condition number 2, will establish a Community and Ecological Stakeholder Board to ensure the project area improves sage grouse habitat on balance of ranchland, wetlands offset and expansion through mitigation, restoration of fish habitats spawning beds and reduction of streamside erosion mitigation, expansion of grazing feeding and forage opportunities for the public wildlife on ranchlands. Record for the Matter, page 8008.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which moved the pump storage hydro powerhouse to a new location in response to US Forest Service input. Record for the Matter, page 8020.

The Board finds that the Applicant submitted a new master site plan at the November 16 and 17, 2016 hearings, which is incorporated into Condition 2, which has moved the PV solar site from private land near Fort Running Bear RV Park to east of Pine Road in Wind Area 2 which eliminates visibility of the PV solar plans from the RV park. Record for the Matter, page 8021.

The Board finds that the Applicant submitted a new master site plan that has eliminated wind area #1 in response to Idaho Fish and Game's wildlife studies. Record for the Matter, page 8022.

The Board finds that few man-made structures and unpaved roads will be visible from most viewpoints. Due to the openness of the landscape and lack of tall vegetation the hilly areas and ridgelines proposed for wind turbine development will be visible from adjacent lowland areas. Record for the Matter, page 6523.

The Board further finds that additionally, pursuant to Conditions 25, 26, 28, 30 and 32 regarding the decommissioning of the facilities at the completion of their use, the Applicant will preserve the future scenic beauty of the property.

4a. Are single-family dwellings and all structures built to fit into the natural terrain with little or no gouging of hillsides or altering of the landscape?

The Board finds there are no single-family dwellings proposed in the Master Site Plan.

The Board also finds the Conditional Use Permit Applications must be in compliance with Chapter 27 of the Zoning Ordinance. Section 6-27-5 A 4.

The Board finds that construction permits are required prior to the commencement of the placement of permanent footings and structures on or in the ground, which shall include sewer lines, water lines, streets, or building foundations. Record for the Matter, page 1.

4b. Will the grading of roads that are used as access to property be kept to a minimum to prevent erosion and the destruction of scenic value?

The Board finds that with the Conditions all grading of roads will be required to comply with the Zoning Ordinance.

The Board finds that access to the solar array would be via a new private all weather road. The road and solar array would be located entirely on private land owned by the Applicant. The land area for the PV solar facility would be graded for the solar farm and then be reclaimed to the extent feasible. Record for the Matter, page 6487.

I. Additional Requirements Pertaining to Electrical Generating Facilities under the Zoning Ordinance, Section 6-8-94.

The Board previously found that in addition to a conditional use permit, additional requirements are found in the following Zoning Ordinance, Section 6-8-94, pertaining to Electrical Generating Facilities:

"1. The facility shall use only natural gas, solar cells, water (hydroelectric) or wind power to produce electricity for sale. The use of diesel fuel is allowed only for emergency generation of electricity for fire suppression or winding down turbines." Zoning Ordinance, Section 6-8-94.

The Board finds that the project' overall electrical generation profile is designed for 400 MW of pump storage hydro, 110 MW of wind, 40 MW of PV solar ad 370 MW of ancillary services available 24/7/365. Record for the Matter, page 7920.

"2 The owner or operator of the facility shall show compliance with all applicable Idaho Public Utility, and Federal Agency rules and regulations before receiving a zoning permit and shall operate the facility in conformance with those same regulations. Zoning Ordinance, Section 6-8-94.

The Board finds that with the Conditions, the Applicant shall be required to show compliance with all applicable Idaho Public Utility, and federal regulatory agencies' rules and regulations, prior to the construction or operation of the project described in the Applications as amended by the Conditions.

"3. Facility improvements shall be at least 2,500 feet away from any residence existing at the time of the application for permit. This distance shall be measured from the centerline of the power producing turbine to the closest edge of the residence. The distance may be shortened if the applicant applies for and is granted a waiver using the standards and procedures contained in this ordinance. A distance waiver shall be granted by the Commission provided, the owner(s) of affected residence(s) waive, in writing, the 2,500-foot setback requirements. If such a waiver(s) are submitted to the Administrator for each residence within the 2,500-foot setback no variance approval shall be required. Zoning Ordinance, Section 6-8-94.

The Board finds that there are no wind turbines within 2 miles of any residence. Record for the Matter, page 7954.

"4. Operation of the facility shall not result in any noise louder than 58 decibels on the A-weighted decibel scale as measured from 750 feet from the centerline of the power producing turbine. A higher decibel reading would require a variance unless the Commission grants a noise waiver. The Commission may grant a noise waiver provided the owner(s) of affected property waive in writing the 58Db noise requirement." Zoning Ordinance, Section 6-8-94.

The Board finds that another design of the powerhouse similar to the powerhouse silo design at Arrowrock Dam, noise levels as little as 250 feet away are little more than a whisper. At ½ mile away across still water, the noise level would continue to be approximately 27 dBI or less than a whisper decibel level 30 dBI. Record for Matter, page 7954.

The Board finds that sound levels along a fence boundary of the PV arrays were generally at background levels, though a faint inverter hum could be heard at some locations. Any sound from the PV array and equipment was inaudible at set back distance of 50 to 150 feet from the boundary. Average sound levels at a distance of 10 feet from the inverter face varied over the range of 48 dBA to 61 dBA for Site 2 and Site 3 Inverters, and were higher in the range of 59 to 72 dBA for Site 1 Inverters. Along the axis perpendicular to the plane of the inverter face and at a distance of 10 to 30 feet, sound levels were 4 to 13 dBA higher compared to at the same distance along the axis parallel to the inverter face. At 150 feet from the inverter pad, sound levels approached background levels. Sound levels measurements generally followed the hemispherical wave spreading law (6 dB per doubling of distance). Record for the Matter, page 987.

"5. The applicant, with its building permit application, shall submit and thereafter follow a landscaping, screening and noise control plan to comply with section 4 above. The plan's ability to comply with section 4 shall be certified by a licensed engineer employed by the applicant. All improvements on the facility shall be enclosed by an appropriate security fence." Zoning Ordinance, Section 6-8-94.

The Board finds that with the Conditions, an appropriate security fence will be installed.

"6. The applicant shall demonstrate and maintain an adequate fire protection and fire fighting capacity, including entering into an agreement with a public firefighting agency when the applicant's project is within the jurisdiction of such an agency." Zoning Ordinance, Section 6-8-94.

The Board finds that this project is outside of any fire jurisdiction and the Elmore County Sheriff Department has jurisdiction for fire.

"7. Before a zoning permit is granted, the applicant shall hold at least two (2) public meetings. Notice of those meetings shall be by publication in local newspaper and by mail to property owners within one (1) mile of the proposed facility." Zoning Ordinance, Section 6-8-94.

The Board finds that with Conditions, the Applications will comply with the requirement.

"8. The Administrator shall cause the applicant to provide information detailing possible adverse impacts and require mitigation of same." Zoning Ordinance, Section 6-8-94.

The Board finds the Applicant submitted a Critical Issues Analysis with the Application on July 2, 2015, outlining possible impact and potential mitigation. Record for the Matter, page 637.

The Board finds the Applicant submitted a Wildlife Mitigation Plan on December 11, 2015 as a technical study in lieu of an Environmental Impact Assessment. Record for the Matter, page 6476.

"9. Towers and structures that seek to exceed the building height restrictions from Table 6-8-12 (C) must be compatible with the flight operations of MHAFB and the City of Mountain Home and Glenns Ferry public airport operations. The proposed plan should be coordinated and approved by local, state, federal and military aviation officials." Zoning Ordinance, Section 6-8-94.

The Board finds that the Property is more than 5 miles from Mountain Home AFB as described in the Applications. Record for the Matter, page 105.

"10. Towers and height variances shall not be granted within 5 miles of Mountain Home AFB or along depicted flight corridors." Zoning Ordinance, Section 6-8-94.

The Board finds that the Property is more than five miles from Mountain Home AFB. Record for the Matter, page 105.

11. Within the Mountain Home or Glenns Ferry airport influence areas overlay district, the height limits on the tower or facility structures shall be as required by the Code of Federal Regulations 14 CFR 77. Zoning Ordinance, Section 6-8-94.

The Board finds that this Property is not within the Mountain Home or Glenns Ferry airport influence areas overlay district as described in the Applications. Record for the Matter, page 105.

"12. Notification distance shall be increased at the discretion of the Director to accommodate for visual impacts." Zoning Ordinance, Section 6-8-94.

The Board finds that the Director extended the radius of notification to 5,280 feet. Record for Matter, page 107.

J. Additional Requirements Pertaining to Public or Quasi-Public Use - Electrical Generating Facilities under the Zoning Ordinance, Section 6-8-170.

The Board finds that in addition to a conditional use permit, additional requirements are found in the following Zoning Ordinance, Section 6-8-170, pertaining to Public or Quasi-Public Use - Electrical Generating Facilities.

"1. Electric distribution lines shall be principal permitted uses. Master site plan approval is not required." Zoning Ordinance, Section 6-8-170.

The Board finds the Applicant submitted a Transmission Map on July 31, 2015. Record for the Matter, page 744.

2. Electric sub transmission lines shall be principal permitted uses. Master site plan approval shall be required." Zoning Ordinance, Section 6-8-170.

The Board finds the Applicant submitted a new Master Site Plan on November 16, 2016, which shall be incorporated herein under Condition Number 2. Record for Matter, page 8022.

3. Electric transmission lines and substations shall require conditional use approval." Zoning Ordinance, Section 6-8-170.

The Board finds the Applicant submitted Conditional Use Permits for transmission lines CUP-2015-03 and substation CUP-2015-07 on February 17, 2015. Record for the Matter, pages 1-104 and 420-524.

4. All electric transmission, sub transmission, and distribution line rights of way shall be exempt from the landscaping regulations of this Title." Zoning Ordinance, Section 6-8-170.

The Board finds that the transmission lines would be built to current avian protection standards. The transmission line would be constructed to avian protection standards pursuant to Suggested Practices for Raptor Protection on Powerlines: The State of the Art of 2006 or other current standard recommended by wildlife agencies. The project would implement erosion control measures, which include minimizing ground disturbance areas during construction, stabilizing soils, and installing barriers to prevent runoff, and recontouring and revegetating all disturbed area when construction is complete. Erosion control measures and revegetation activities would meet all industry standards and would prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds, and promote re-development of quality wildlife habitat. Record for the Matter, page 675.

5. Electric substations and other utility structures shall be deemed outdoor storage areas and shall meet the standards in this Chapter." Zoning Ordinance, Section 6-8-170.

The Board also finds the Conditional Use Permits Applications must be in compliance with Chapter 27 of the Zoning Ordinance. Section 6-27-5A 4. Record for the Matter, page 1.

6 Towers for the purpose of communicating from the substation to remote devices shall be deemed an accessory use to an approved substation, provided that the pole and antenna are no taller than the existing towers." Zoning Ordinance, Section 6-8-170.

The Board also finds the Conditional Use Permits Applications must be in compliance with Chapter 27 the Zoning Ordinance. Section 6-27-5A 4. Record for the Matter, page 1.

7. All wire fences, metal structures, and metal objects shall be grounded as required by this Title." Zoning Ordinance, Section 6-8-170.

The Board finds the Conditional Use Permits Applications must be in compliance with Chapter 27 of the Zoning Ordinance. Section 6-27-5A 4. Record for the Matter, page 1.

13. No Approval to Develop or Use Public Lands.

The Board finds that nothing contained herein shall grant the Applicant consent or approval to develop, construct improvements on, use or operate any of the uses set forth in the Applications on any federal or state grounds without such permits, licenses and approvals as may be required by the United States of America or the State of Idaho, as applicable.

14. Idaho Code § 67-6519(4)(c) what actions, if any, that the Applicant could have taken to obtain approval.

With the addition of the Conditions the Applications are approved as further set forth herein.

CONCLUSIONS OF LAW

If any of the conclusions of law are deemed to be findings of fact, they are incorporated in the Findings of Fact section.

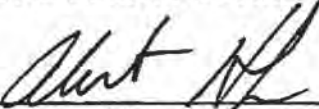
1. The Board concludes that the appeal application meets the requirements of Zoning Ordinance.
2. The Board concludes that the notice requirements of the Zoning Ordinance have been met.
3. The Board concludes that the public hearing notice requirements of LLUPA have been met.
4. The Board concludes that the Applications with the Conditions comply with the required findings set forth in [Sections 6-27-4, 6-27-7 and 6-8-26 B.1-4 of] the Zoning Ordinance.

ORDER

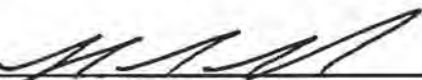
Based upon the foregoing Findings of Fact and Conclusion of Law and the record for the Applications, the Board hereby **reverses** the decision of the Commission denying the Applications and **approves** the Applications subject to the Conditions.

Dated this 10th day of February 2017.

ELMORE COUNTY BOARD OF COMMISSIONERS:

By: 
Albert Hofer, Chairman

By: Absent from hearings and deliberation
Wesley R. Wootan, Commissioner

By: 
Franklin L. Corbus, Commissioner

Attest:

By: 
Barbara Steele, Clerk



NOTICE PURSUANT TO ZONING ORDINANCE SECTION 6-3-2 J

A decision made by the Elmore County Board of Commissioners (the "Board") may be reconsidered by the Board provided the reconsideration application is complete and reconsideration fee is submitted to the Land Use and Building Department within ten (10) calendar days of Board's action. The reconsideration may be granted upon a determination of a "good cause." Questions concerning reconsideration or deadlines should be asked of the Elmore County Land Use and Building Department.

NOTICE PURSUANT TO IDAHO CODE § 67-6519(4)(C)

The Applicant shall have the right to request a regulatory taking analysis pursuant to Idaho Code § 67-8003. An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by Idaho Code title 67, ch. 52.

Exhibit A
Conditions of Approval of the Applications

"Conditions"

General Conditions:

1. The Conditional Use Permit is valid for four (4) years and may be extended for one 2-year period ("**Expiration Date**") upon application to the Department, which extension may be granted in the discretion of the Commission or Board, if appealed thereto, provided the Applicant has demonstrated significant progress in obtaining federal permits and it is likely that the Applicant will be in a position to start construction of the proposed improvements within the two-year extension period. All improvements shall be completed and the use shall commence within this timeframe.
2. A "**Development Agreement**" between the Applicant, the landowner of the Property and Elmore County which shall be recorded against the Property on or before November 15, 2017, which date may be extended by the Board for one additional six month period, and shall following ongoing discussions and draft reviews with county staff, be presented to the Board in a public hearing subject to the Zoning Ordinance and the LLUPA, and shall include, among other things, the following terms and conditions:
 - (a) clear definition of the project based upon the site plan presented to the Board at the November 16 and 17, 2016 hearings and such site plan and project description shall be added to and included into the Application;
 - (b) develop methods of furthering water delivery in the county for the transfer of county water to Little Camas Reservoir or other county water diversion or storage areas based upon county needs and the county's water rights, which may include the storage of water for the county until such time as the county water may be needed;
 - (c) in conjunction with IDWR approval, construct necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County;
 - (d) obligation and time frame to develop a Community and Stakeholder Board ("**Stakeholder Board**"), to: (a) oversee the expenditure of the required the annual contribution of \$330,000 by the Applicant to the Stakeholder Board for management, conservation and enhancement of plants, animals, fish and birds that inhabit the project area, (b) oversee development of wetlands mitigation due to the project which is the subject of the Applications; (c) provide oversight and approval of the visual audio screening and minimization of impact to the surrounding areas of the solar array, substation and transmission lines which shall be designed using best practices to minimizing visual and audio impact; The number, backgrounds, stakeholder groups for members of the Stakeholder Board will be established by the Applicant and the Board as a part of the Development Agreement and shall consist of members from different agencies such as Mountain Home Irrigation District, Idaho Department of Fish and Game, Glens Ferry Highway District, a member or the chairman of the sage grouse conservation group for Elmore County, a Pine-Featherville resident, one or more representatives of Elmore County

- government, as well as other interested parties as determined by the Applicant and the Board.
- (e) the Applicant's obligation to fund annual fish stocking in Anderson Ranch Reservoir to compensate for any net loss of game fish due to entrainment into the hydropower penstocks and working with Idaho Fish and Game to develop the details of this program;
 - (f) the Applicant's obligation to fund conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas 2 and 3, in the eastern part of Wood Creek Ranch, where evidence of sage-grouse usage exists and the best sage-grouse habitat is found. The conservation effort would be a cost-share with the Sage-Grouse Initiative and may include measures such as prescribed grazing, fence marking and water tank escape ramps;
 - (g) the Applicant's obligation to fund annual fish stocking in Anderson Ranch Reservoir to compensate for annual net loss game fish due to entrainment into the hydropower penstocks and that the Applicant would work with Idaho Department of Fish and Game to develop the details of this program on or before commencement of the operation of the project with is the subject of the Applications;
 - (h) the Applicant's plan to implement erosion control measures, which would include minimizing ground disturbance areas during construction, stabilizing soils and installing barriers to prevent runoff, and contouring and revegetating all disturbed areas when construction is complete, including erosion control measures and revegetation activities which will meet all industry standards and would prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds and promote re-development of quality wildlife habitat;
 - (i) the Applicant's erosion control plan for all aspects of the construction effort to minimize disturbance of reservoir shoreline and vegetated upland areas during construction of the hydroelectric intake, powerhouse and penstock has the potential to increase erosion and sedimentation, which could adversely affect water quality in Anderson Ranch Reservoir. Construction of roads and wind tower pads for the wind turbine project element has the potential to cause erosion and sedimentation into Castle Creek, Cat Creek, or other streams located downslope of disturbed areas;
 - (j) the solar array, substation and transmission lines shall be designed using best practices for minimizing visual impact and shall be subject to oversight and approval by the Stakeholder Board;
 - (k) maintain communications with IDFG and USFWS, as with the other agencies involved, to sustain fish and wildlife habitats necessary to provide quality fish and wildlife recreation;
 - (l) establishment of permissible noise limitations for each aspect of the project under the Applications;
 - (m) the Scholarship Fund;
 - (n) review of the proposed or anticipated coverage of the water transmission lines from the Anderson Ranch Reservoir to the Property storage reservoir; and
 - (o) Incorporation of the Conditions as may be expanded and refined by the Board and the Applicant.

The failure to complete this Condition on or before the date set forth herein shall result in the termination of the approval to which this Condition is attached.

3. The Applicant shall comply with any highway district requests for a formal road analysis done in advance and approved by the applicable highway district commissioners and any public roadway improvements required by the highway district shall be paid for by the Applicant.
4. All restroom facilities shall be installed to meet Idaho State Sewage Regulations.
5. The proposed use shall comply with all the requirements of section 6-8-97 of the Elmore County Zoning and Development Ordinance.
6. All outstanding taxes and fees, including county consultant fees, must be paid prior to the issuance of an Elmore County building permit.
7. Failure to comply with any of these Conditions on or before the dates set forth on any individual Condition may result in revocation of the Conditional Use Permit(s).
8. The proposed use will be constructed in substantial conformance with the master site plan submitted on November 16, 2016, which shall be defined in the Development Agreement.
9. Prior to issuance of building permit, Applicant must hold two (2) public meetings. Notice of those meetings shall be by publication in local newspaper and by mail to property owners within one (1) mile of the proposed facility, an overall site plan, stamped and signed by Applicant's engineer, must be approved by the County Engineer to ensure drainage and storm water management is adequate.
10. Grading or development on slopes greater than 15% shall meet Zoning Ordinance requirements.
11. All proposed new roads shall meet Zoning Ordinance requirements.
12. The use shall comply with all applicable requirements of Zoning Ordinance. All new structures shall comply with Elmore County Sheriff and/or Idaho State Fire Marshal requirements for fire suppression.
11. All solid waste, refuse and trash removal shall be the responsibility of the property owner to have removed by private hauler. The site shall remain clear of any public nuisance or accumulation of construction debris, trash and/or rubbish.
12. The use shall comply with all Idaho Department of Transportation regulations.
13. All improvements shall be funded and completed by the Applicant.
14. All facilities and buildings shall be removed within 180 days of the expiration of the use. All footings and foundations shall be removed to a depth of three feet below the surface.
15. Prior to any construction an updated Wildlife Mitigation Plan/Environmental Impact Statement shall be submitted to Elmore County once the NEPA process is near completion. The Wildlife Mitigation Plan/Environmental Impact Statement shall be reviewed and will be subject to approval by the Commission for compliance with

Elmore County Ordinances, including but not limited to standards for conditional use permits and environmental studies.

16. Applicant/owner shall be required to obtain all necessary permits, as maybe required under Federal, State or local statutes and regulations including but not limited to building permits. The applicant/owner shall provide verification with the regulations and requirements of the agencies.
17. The Applicant shall obtain all necessary approvals from all necessary Federal and State agencies prior to making any change to any wetland or riparian area in existence as the date of this approval.
18. All structures to be built shall comply with the Zoning Ordinance.
19. All roads shall be constructed and maintained in full compliance with the Zoning Ordinance.
20. All permits necessary to construct, build and operate any improvements on land belonging to the United States of America or the State of Idaho, including all permits necessary to operate power generating facilities, shall be obtained on or before the Expiration Date.
21. Zoning Ordinance Section 6-27-4 Conditional Use Standards:
 - A. The applicant shall agree to comply with the approved plans and specifications.
 - B. The applicant shall have a continuous obligation to maintain adequate housekeeping practices so as not to create a nuisance.
 - C. Prior to review of the proposed conditional use, the applicant or owner shall obtain the written approval of the appropriate fire authority with regard to the location specifications of any proposed structure, facility, or use.
 - D. No structure or facility (excluding signs) shall be located within twenty (20') feet of a residential district unless a sound wall or screen as approved by the Director is provided.
 - E. A sound wall shall be included in the landscape plan for any parking areas abutting a residential district.
 - F. The owner and/or operator shall maintain sanitary practices so as not to create a public nuisance and to reduce noise and odor.
 - G. The owner and/or operator shall furnish evidence that any dangerous characteristics of the proposed use have been or shall be eliminated or minimized so as not to create a nuisance or be detrimental to the public health, safety, or welfare.
 - H. If abutting a residential district or within a residential district, the facility hours may be limited by the decision-making body.
 - I. If abutting or within an Agricultural district, the proposed use shall not cause detrimental impacts to agriculture.
 - J. The decision-making body may require additional conditions to mitigate impacts. The conditions may include, but shall not be limited to, any or all of the following:
 - K. Standards related to the emission of noise, vibration, and other potentially objectionable impacts; and
 - L. Limits on time of day for the conduct of the specified use; and
 - M. The period within which the permit shall be exercised or otherwise lapse; and

- N. Other standards necessary to protect the public health, safety, and welfare and mitigate adverse effects on surrounding property.
22. Obtain approval for water rights from Idaho Department of Water Recourses as may be necessary and required to operate the facilities under the Applications on or before the expiration of the CUPs.
 23. Obtain all necessary federal and state permits as may be necessary and required to operate the facilities under the Applications on for before the expiration of these CUPs.
 24. Approval of the Interconnection Application by the Bonneville Power Administration.
 25. Completion of a power sale agreement by and between the Applicant and Idaho Power or another established utility for the sale and deliver of electrical power developed as part of the project under the Applications.
 26. Compliance with all Central District Health Department requirements concerning wells or potable water systems, septic or sewer systems and refuse disposal.
 27. Compliance with all Idaho Public Utility, and federal regulatory agencies' rules and regulations prior to the construction or operation of the project described in the Applications as amended by the Conditions.
 28. Compliance with all federal, state and local laws, rules and regulations.
 29. The Applicant and operator of the project under the Applications, shall provide an annual report to the Board and public meeting with the Board, no less than once each year commencing in the spring of 2018, to provide a status report to the Board regarding compliance with these Conditions, construction and development status of the project under the Applications, status of the Stakeholder Board, compliance with the Development Agreement, public complaints, and such other matters pertaining to the project under the Applications as the Board may desire to discuss.
 30. Upon commencement of the operation of the project under the Applications, the operator and/or Applicant shall make an annual contribution in the amount of Ten Thousand Dollars (\$10,000.00) per year ("**Scholarship Fund**") to fund a post high school education opportunities for students who are residents of Elmore County, which scholarship fund shall be administered by the Board or such other committees and administer and distribute other Elmore County scholarship programs, as further set forth in the Development Agreement.
 31. Upon commencement of the operation of the project under the Applications, the operator and/or Applicant shall make an annual contribution in the amount of Ten Thousand Dollars (\$10,000.00) per year ("**Senior Fund**") to be divided between the three senior citizens centers located in Elmore County.
 32. For all purposes under the Development Agreement or these Conditions, the Applicant shall also mean any assignees of the rights under the Matter described in the Findings of Fact, Conclusions of Law and Order and the operator of the project as described in the Development Agreement or the Applications.

Conditions for transmission lines (CUP-2015-03):

33. Prior to any construction of any power line towers, the developer will submit a decommissioning plan to the Department estimating the cost of restoring the site to its original conditions. Developer will enter a bond with Elmore County for the net cost of the restoration. The amount and terms of the bond shall be approved by the Board. Developer shall submit an updated decommissioning plan every five years and will increase the amount of the bond if the net cost of restoration increases from the prior study.

Conditions for pump storage hydro electrical generating facility (CUP-2015-04):

34. Prior to any construction, the developer will submit a decommissioning plan to the Land Use and Building Department estimating the cost of restoring the site to its original conditions. Developer will enter a bond with Elmore County for the net cost of the restoration. The amount and terms of the bond shall be approved by the Elmore County Board of County Commissioners. Developer shall submit an updated decommissioning plan every five years and will increase the amount of the bond if the net cost of restoration increases from the prior study.
35. A security fence shall be installed around the electrical generating portion of the project.

Conditions for PV solar electrical generating facility (CUP-2015-05):

36. Prior to any construction, the developer will submit a decommissioning plan to the Land Use and Building Department estimating the cost of restoring the site to its original conditions. Developer will enter a bond with Elmore County for the net cost of the restoration. The amount and terms of the bond shall be approved by the Elmore County Board of County Commissioners. Developer shall submit an updated decommissioning plan every five years and will increase the amount of the bond if the net cost of restoration increases from the prior study.
37. A security fence shall be installed around the electrical generating facility.

Conditions for wind turbine electrical generating facility (CUP-2015-06):

38. Prior to any construction, the developer will submit a decommissioning plan to the Land Use and Building Department estimating the cost of restoring the site to its original conditions. Developer will enter a bond with Elmore County for the net cost of the restoration. The amount and terms of the bond shall be approved by the Elmore County Board of County Commissioners. Developer shall submit an updated decommissioning plan every five years and will increase the amount of the bond if the net cost of restoration increases from the prior study.
39. All facilities and buildings shall be removed within 180 days of the expiration of the use. All footings and foundations shall be removed to a depth of three feet below the surface.

Conditions substation (CUP-2015-07):

40. Prior to any construction, the developer will submit a decommissioning plan to the Land Use and Building Department estimating the cost of restoring the site to its original conditions. Developer will enter a bond with Elmore County for the net cost of the restoration. The amount and terms of the bond shall be approved by the Elmore County Board of County Commissioners. Developer shall submit an updated decommissioning plan every five years and will increase the amount of the bond if the net cost of restoration increases from the prior study.
41. A security fence shall be installed around the facility.
42. The governing body or administrator for these conditions and the development agreement shall be the Board.

Exhibit B

CAT CREEK ENERGY, LLC
398 S. 9TH Street, Suite 240
Boise, ID 83702
info@catcreekenergy.com
208-208.2667

April 14, 2026

Ms. Kimberly D. Bose
Federal Energy Regulatory Commission
88 First Federal Street, NE
Washington, D.C. 20426

Subject: Annual Report – Cat Creek Energy Storage Facility Pumped Storage Hydroelectric Project – FERC No. p-1-14655-001.

Brief Overview

1. In 2025, an additional direction was added to the overall mission for the Cat Creek Energy & Water Storage Renewable Energy Station Project. Stimulated by the federal government's direction on AI and data centers, CCE has fielded numerous inquiries from data centers from 100 MW to 1,500 MW. Those inquiries and negotiations have ranged from energy and, especially energy storage for anticipated facilities in and outside of Idaho and, especially, co-location of energy, water, and data centers. The CCE Project allows for secondary use of clean energy, water, and social benefits that should be a requisite of data center location.
2. CCE continues its mission to satisfy the West's demand for firm, reliable, and resilient energy. No project, regardless of technology, offers flexibility and latitude of power quality and power generation combined with unprecedented levels of energy storage.

To this effect, CCE has continued to refine operational parameters and have found that our ability in both our energy absorption [charging] and generation [discharge] to instantaneously adapt to any grid condition is not only vital to grid security and integrity, but also delivers that same energy performance integrity for large varying loads.

3. CCE has responded to Department of Energy's requests for transmission innovation, but to date without success. CCE has proposed that, since its capabilities far exceed

any other Project for grid stability, the 1,782 MW capacity transmission system be underground. In times of daily attempts to compromise grid functions from those wishing to harm the USA, CCE has the opportunity to harden a Project where massive Black Start capabilities exist for the western integrated transmission grid.

4. The function of water is now front and center on the Project. CCE is a dual infrastructure Project. By expanding storage to incorporate other beneficial water use, the attitude of the Project moves from singularly fit for purpose to adaptability of purpose. The CCE design of up to 150,000 acre-ft. of new reservoir produces manifold benefits for Idaho and the Pacific Northwest in new water storage for beneficial use. Add the fact that whatever water is released to beneficial use and the timing, should increase overall power generation at the three dams on the Boise River system annually.
5. In 2025, CCE entered into an agreement with Elmore County for water storage in in Cat Creek Reservoir. Elmore County has a water right approved and is pursuing their own waterworks infrastructure, but added an agreement between CCE and Elmore County for temporary water storage.

Progress will be made in 2026 to take the Project out of FERC abeyance and move to the next stages of development and licensing.

6. CCE is bult on 99% private lands, uses the current Reclamation Anderson Ranch Reservoir on the South Fork of the Boise River as its lower reservoir. There is a dam raise program being worked through on Anderson Ranch Dam to raise by the dam six feet and add 29,000 acre-ft of new water storage. The CCE Project lies 99% on private lands and is a private project which will yield extensive benefits for the public.
7. Just as in the federal government's push for using existing transmission corridors to locate new and expanded transmission, the same holds true for water and other energy infrastructure. CCE has made it clear our resolve in efficiency. It stands to reason both the federal government and state of Idaho should investigate the diverse benefits from such a strategic and long-term relationship. Unlike any other form of energy production, CCE delivers not only on multiple disciplines to benefit the public, but also no other energy facility has the ability to span 100 years of operation as cost effective with minimal social and environmental effects.

This concludes our annual progress updates on Preliminary Permit 14655-1. We look forward to resuming the Study Plan/License process in 2026. CCE spent some time in its 2025 report explaining why the installation of the CCE project has been delayed in unforeseen ways. Delays are not uncommon in very large-scale projects of this kind, a significant reason why so few have been built in this country over the past 25 years. However, few pumped storage hydro facilities, existing or in progress, have the same integration of outstanding topography, available transmission, and advanced technology that the CCE project enjoys. The Cat Creek team has been working to bring it into existence for more than nine years. We are now well within sight of our goal.

Regards,

A handwritten signature in blue ink that reads "James Carkulis". The signature is fluid and cursive, with a light blue circular stamp or watermark visible behind the text.

James Carkulis
Authorized Agent

Exhibit C



Terri R. Pickens
Attorney at Law
terri@pickenslawboise.com
www.pickenslawboise.com

398 S. 9th Street, Ste. 240
P.O. Box 915
Boise, Idaho 83701
208.954.5090 (t)
208.954.5099 (f)

February 10, 2026

SENT VIA EMAIL

James Roddin
Interim Director
Elmore County Land Use and Building Department
520 East 2nd South Street
Mountain Home, ID 83647

WITH EMAIL COPIES TO:

Abigail R. Germain – arg@elamburke.com
Dylan Lawrence - dylan@varinthomas.com
James Roddin - jroddin@elmorecountyid.gov

Re: Cat Creek Energy, LLC CUPs
Our File No: 360-2

Dear James:

Please accept the attached as the Annual Report to be submitted to the Elmore County Commissioners in compliance with the Development Agreement.

If you have any questions concerning the foregoing, please do not hesitate to contact me.

Sincerely,

/s/ Terri R. Pickens

Terri R. Pickens

- 1) Compliance with the CUPs
- 2) Construction and development status of the project
- 3) Status of the Stakeholder Board
- 4) Compliance with the Development Agreement
- 5) Water as the Most Important Regional Element under the CUPs.
- 6) Such other matters as the Board may desire to discuss

COMPLIANCE WITH THE CONDITIONAL USE PERMITS

CCE is in compliance with the CUPs and development agreement. A new water compact under Section 2.2 of the Development Agreement

CONSTRUCTION AND DEVELOPMENT STATUS OF THE PROJECT

- CCE has been waiting patiently on what we were told last fall was to be an Executive Administration Order on Hydropower. None has been announced to date anticipating it would give further guidance as to hydropower permitting requirements and timelines.
- CCE and Reclamation have not reach resolution on funding and we expect that to happen by March of 2026. are negotiating and exchanging proposals for the next funding round under the Preliminary Lease of Power Privilege.
- Once the new funding agreement is reached between Reclamation and CCE, CCE will ask FERC to take our licensing process out of abeyance. At which point the Study Plan implementation will proceed.
- Wind, solar, transmission, and substations will move to a building permit in 2026, with the requisite hearings before the Commission on updates and on the final wind turbine siting.

STATUS OF STAKEHOLDER BOARD

The CCE Stakeholder Board is a product of CCE. Its mission is to manage funds invested by CCE to help mitigate environmental concerns first, then any remaining monies for social impacts in Elmore County. Once a Notice to Proceed is issued, first for the wind and solar, substations, and transmission, CCE will begin a sequential and proper vetting of applicants for the positions it will create for the Board. The Board, by definition, does not give advice or consent of CCE actions.

WATER AS THE CRITICAL PATH ELEMENT IN REGIONAL PLANNING

The continued lack of water storage resources, despite the reasonable and successful efforts of the state of Idaho on groundwater recharge efforts remain a critical mass to resolve. The CCE Reservoir is a major solution for regional water storage opportunities. In this vein, Elmore County and CCE came to an agreement on March 13, 2025, for ElCo's use of the CCE reservoir for temporary use for water and storage for the benefit of Elmore County. With this arrangement, the direct withdrawal when ElCo's water right is in priority results of 397 acre-ft per day can be fully utilized. That could result in up to 25 days in priority.

SUCH OTHER MATTERS AS THE BOARD MAY DESIRE TO DISCUSS

It should be noted the Section 2.2 of the development agreement recommended language accepted by CCE's counsel and proposed by ElCo's counsel results in a \$50,000,000 contribution to the citizens of Elmore County by Cat Creek Energy as per the valuation determined in the 31-January meeting of the Idaho Water Resource Board subcommittee on water storage. Moreover, water storage rights for the dam raise are pari passu, with WD63 water users the first in line, essentially nullifying any notion of water storage in Anderson Ranch Dam for ElCo's water rights.

CCE has a strong relationship with Bayer, a Fortune 100 company, and have contracted for 1,400,000 MWh of energy production from the CCE sites. That contract remains intact.

CCE is working in conjunction with INL and PNNL on our projects and the relationship is instrumental in design and other production factors for our facilities. Their work in the past year on our Corral Summit PSH has stimulated CCE to negotiate with INL as to how they might be instrumental in the Cat Creek Energy & Water Renewable Power Station.

CCE has fielded inquiries from data center companies over the past 12 months from 100 MW to 1,500 MW of Hyperscale Data Center buildout. It will be determined in the 2026 Idaho legislative session whether large loads in Idaho [assume 20 MW plus] must provide their own generation profile solution. If that is the case, Elmore County should recognize it will be a major destination for data centers as Idaho Power has now applied for over 1,219 MW of new natural gas generators interconnection beyond the existing 447 MW of nat gas turbines at Mountain Home.

Co-location of data centers with power centers remains high on the current administration set of policies. Word came down on February 9th on a new draft policy compact with data centers to ensure they are not a burden on the ratepayer.

CCE will be applying under the new rules of the interconnection process that account for both load supply and generation as opposed to simply generation under the old rules.

Exhibit D

Thomas J. Budge (ISB No. 7465)
RACINE OLSON, PLLP
201 E. Center St. / P. O. Box 1391
Pocatello, Idaho 83204-1391
Phone: (208) 232-6101
tj@racineolson.com

Attorney for Cat Creek Energy, LLC

**DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34403, 63-34652,
63-34897, 63-34900, AND 63-35522 IN
THE NAME OF CAT CREEK ENERGY,
LLC

**CAT CREEK ENERGY, LLC'S
AMENDED RESPONSES TO BOISE
PROJECT'S FIRST DISCOVERY
REQUESTS**

Cat Creek Energy, LLC ("CCE"), by and through counsel, responds to Boise Project's First Discovery Requests to Cat Creek Energy, LLC (the "Requests") as follows.

These responses are based on information presently known to CCE after reasonable inquiry and are made subject to the General Objections and the specific objections stated below. CCE's responses are made without waiving, and expressly preserving, all objections to the relevance, proportionality, admissibility, confidentiality, discoverability, and legal sufficiency of the Requests and any documents or information produced or identified in response.

CCE will supplement these responses as required by applicable rule or order if additional responsive documents within the proper scope of discovery are later identified and may be disclosed consistent with applicable confidentiality obligations and protections.

Documents produced with these responses, including documents too large to transmit by email, will be made available through a cloud-based document-sharing folder, with a link to be provided to Boise Project Board of Control.

GENERAL OBJECTIONS

1. CCE objects to the Requests, including the definitions and instructions, to the extent they exceed the scope of discovery permitted by IDAPA 37.01.01.520 and the Idaho Rules of Civil Procedure.
2. CCE objects to the Requests to the extent they seek information that is not relevant to the issues properly before IDWR under Idaho Code § 42-203A and the Water Appropriation Rules or is not proportional to the needs of this administrative proceeding.
3. CCE does not understand these Requests to require the production of attorney-client communications, attorney work product, consulting-expert materials, or other privileged or protected materials,

on non-preempted water-allocation issues. Subject to these objections, CCE states that it is not aware of any lawsuits filed by creditors seeking payment of debt owed by CCE or its guarantors related to the Project. CCE further refers Boise Project to CCE's response to Request for Production No. 5 regarding the Letter of Commitment, but those materials are not lawsuit documents responsive to this request.

REQUEST FOR PRODUCTION NO. 12: Please produce all communications and all agreements between you and any data center developers regarding potential future projects in Elmore County, that may be supplied with water or power from your Project. Include in your response documentation of the communications with "data center companies" as described in your communication from Pickens Law to the Elmore County Land Use and Building Department, dated February 10, 2026.

Response: CCE objects that this request seeks information beyond the scope of permissible discovery because communications and agreements with data center developers regarding potential future projects in Elmore County are not relevant to the issues properly before IDWR under Idaho Code § 42-203A and the Water Appropriation Rules and are not proportional to the needs of this water-right proceeding. CCE further objects that the request seeks confidential commercial negotiations, proprietary business information, and documents subject to third-party confidentiality obligations. CCE also objects to the extent the request seeks financing, power-sale, or economic information for the FERC-licensed hydropower project that is preempted from state adjudication except to the limited extent, if any, it bears on non-preempted water-allocation issues. Subject to and without waiving these objections, CCE refers Boise Project to CCE's response to Request for Production No. 5, which describes the Letter of Commitment, its current status, and the confidentiality restrictions that presently prevent production of the unsigned draft and related materials. CCE will supplement this response when the identity of the company and non-confidential responsive documents may be publicly disclosed, to the extent such information is within the proper scope of discovery.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents describing the proposed beneficial uses and places of use for which water appropriated under water right nos. 63-34403, 63-34652, 63-34897, 63-34900, and 63-35522 will be put, where the place of use is outside the Boise River Basin, Basin 63.

Response: CCE objects to the extent this request assumes documents exist beyond the pending applications or seeks legal conclusions concerning future storage-water contracting. Subject to that objection, CCE does not presently have documents describing beneficial uses outside the Boise River Basin other than the water right applications and documents previously disclosed. Beneficial use of CCE storage water will be defined by storage-water contracts and Idaho law. CCE will supplement if additional responsive documents are created or located.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents relating to any and all representations, statements, and past and present plans that you intended or intend to "borrow" water stored in Anderson Ranch Reservoir for your Project. Include in your response all documents relating to the statements at pages 28 & 40 of your Preliminary Application Document filed with the Federal Energy Regulatory Commission, suggesting that you intend to "borrow" water stored in Anderson Ranch Reservoir and move that water to your proposed new reservoir when your water rights are not in priority.

Response: CCE objects to the extent this request mischaracterizes prior filings. Subject to that objection, CCE refers Boise Project to CCE's prior Rule 40.05 disclosures; the November 17, 2020 Idaho Water Engineering memorandum; the Idaho Water Engineering Hydrological Analysis of the Cat Creek Energy Project dated July 19, 2025, attached to Cat Creek Energy, LLC's Notice of Disclosure of Documents filed

Response: CCE refers Boise Project to preliminary design and engineering materials previously disclosed under Rule 40.05. CCE has not prepared all 30%, 60%, 90%, or 100% design-stage documents requested and will supplement if responsive documents within the proper scope of discovery are later prepared and may be disclosed consistent with applicable confidentiality obligations and protections.

REQUEST FOR PRODUCTION NO. 19: Please produce all cost estimates for construction costs at the conceptual, 30%, 60%, 90%, and 100% design stages and any schedules for preparing those cost estimates.

Response: CCE objects that this request seeks confidential, proprietary, and commercially sensitive cost information and assumes the existence of stage-specific cost estimates that may not exist. Subject to that objection, CCE has disclosed overall project-cost information and previously disclosed relevant materials under Rule 40.05, including the Cat Creek Energy, LLC Financial Update dated July 21, 2025, attached to Cat Creek Energy, LLC's Notice of Disclosure of Documents filed July 21, 2025. CCE will not produce detailed itemized or stage-specific confidential cost estimates absent an appropriate protective order and a showing that the information is relevant and proportional.

REQUEST FOR PRODUCTION NO. 20: Please produce all contracts for procurement of equipment and all contracts for the construction of your Project or any portion thereof and all cost estimates for the costs of any such construction contracts.

Response: CCE objects that this request seeks information beyond the scope of permissible discovery because procurement contracts, construction contracts, and detailed construction-contract cost estimates are not relevant to the issues properly before IDWR under Idaho Code § 42-203A and the Water Appropriation Rules except to the limited extent they bear on financial resources or water-allocation issues, and the request is not proportional to the needs of this proceeding. CCE further objects that this request seeks confidential commercial information and assumes the existence of procurement and construction contracts that may not yet exist. Subject to these objections, CCE has not entered into final procurement or construction contracts for the Project as requested. CCE will supplement if responsive documents within the proper scope of discovery are later executed and may be disclosed consistent with applicable confidentiality obligations and protections.

REQUEST FOR PRODUCTION NO. 21: Please produce all contracts for the operation and maintenance of your Project, and all cost estimates for the costs of any such operation and maintenance contracts.

Response: CCE objects that this request seeks information beyond the scope of permissible discovery because operation-and-maintenance contracts and related cost estimates are not relevant to the issues properly before IDWR under Idaho Code § 42-203A and the Water Appropriation Rules except to the limited extent they bear on water allocation, water supply, effects on existing water rights, or financial resources, and the request is not proportional to the needs of this proceeding. CCE further objects that this request seeks confidential commercial information and assumes the existence of operation-and-maintenance contracts and cost estimates that may not yet exist. Subject to these objections, CCE has not entered into final operation-and-maintenance contracts for the Project as requested. CCE will supplement if responsive documents within the proper scope of discovery are later created and may be disclosed consistent with applicable confidentiality obligations and protections.

REQUEST FOR PRODUCTION NO. 22: Please produce all documents and agreements relating to purchase and sale of power to be generated by your project, including the Bayer/CCE RPA Contract for

1,400,000 MWh of resources for over 20 years term as identified in Exhibit A to your letter from Pickens Law to James Roddin, Elmore County Planning Director, Elmore County Commissioners, dated July 28, 2025.

Response: CCE objects that this request seeks information beyond the scope of permissible discovery because power-purchase and power-sale agreements are not relevant to the issues properly before IDWR under Idaho Code § 42-203A and the Water Appropriation Rules, and the request is not proportional to the needs of this proceeding. CCE further objects that power-sale agreements and related hydropower economics are matters within FERC's licensing jurisdiction and are preempted from state adjudication except to the limited extent they bear on IDWR's non-preempted authority over water allocation, water supply, or effects on existing water rights. CCE also objects to the extent this request seeks confidential commercial agreements, negotiations, proprietary terms, or documents subject to third-party confidentiality obligations. CCE will supplement with responsive documents within the proper scope of discovery, if any become available and may be disclosed consistent with applicable confidentiality obligations and protections.

REQUEST FOR PRODUCTION NO. 23: Please produce all Generator Interconnection Agreements with Idaho Power Company, Bonneville Power, and any other entity for your Project.

Response: CCE objects that this request seeks information beyond the scope of permissible discovery because generator interconnection agreements are not relevant to the issues properly before IDWR under Idaho Code § 42-203A and the Water Appropriation Rules, and the request is not proportional to the needs of this proceeding. CCE further objects that generator interconnection matters are within federal energy regulation and FERC-related hydropower licensing processes and are not properly subject to discovery in this IDWR proceeding except to the limited extent they bear on IDWR's non-preempted authority over water allocation, water supply, or effects on existing water rights. CCE also objects to the extent this request seeks confidential commercial information, proprietary terms, or documents not yet finalized. CCE will supplement with responsive documents within the proper scope of discovery, if any are located and may be disclosed consistent with applicable confidentiality obligations and protections.

REQUEST FOR PRODUCTION NO. 24: Please produce all agreements with the Bureau of Reclamation regarding a Lease of Power Privileges for use of Anderson Ranch Reservoir for your Project.

Response: CCE refers Boise Project to CCE's prior Rule 40.05 disclosures, which include a Preliminary Lease of Power Privilege. Amendment No. 002 to the Preliminary Lease of Power Privilege is being produced with these responses through the cloud-based document-sharing folder.

REQUEST FOR PRODUCTION NO. 25: Please produce all documents relating to the Memoranda of Understandings (MOUs) that Cat Creek Energy has entered with potential contracting entities regarding use of water to be stored under water right nos. 63-34652, 63-34897, 63-34900, or 63-35522, or otherwise describing the uses and places of use for said water, under water right nos. 63-34652, 63-34897, 63-34900, or 63-35522, including communications subsequent to execution of the MOUs.

Response: CCE refers Boise Project to documents previously disclosed under Rule 40.05. CCE will supplement with responsive documents within the proper scope of discovery if additional responsive materials become available and may be disclosed consistent with applicable confidentiality obligations and protections.

expert reports required to be disclosed by applicable deadlines. CCE may rely on or use at hearing any documents previously disclosed by CCE, any documents contained in the agency record of this matter, any documents disclosed by any other party, and any documents produced with these responses, subject to applicable evidentiary and procedural rules. CCE has not yet made final expert-witness determinations and will supplement as required.

REQUEST FOR PRODUCTION NO. 45: Please produce all documents that you intend to offer into evidence in this proceeding.

Response: CCE objects to this request as premature to the extent exhibit disclosures are not yet due under any scheduling order, Department order, or applicable rule. Subject to the foregoing objection, CCE may offer into evidence any documents previously disclosed by CCE, any documents contained in the agency record of this matter, any documents disclosed by any other party, and any documents produced with these responses. CCE has not yet made final exhibit determinations and will supplement as required by applicable deadlines and orders.

DATED this 21st day of August, 2026.

RACINE OLSON, PLLP

By:  _____

Thomas J. Budge

Attorney for Applicant Cat Creek Energy, LLC

Exhibit E



Elmore County Board of County Commissioners

Findings of Fact, Conclusions of Law, and Order

Request for Reconsideration of Board's Decision regarding Second Amendment to Cat Creek Energy LLC's Development Agreement

Hearing Date: April 19, 2024; May 3, 2024

BEFORE THE ELMORE COUNTY BOARD OF COUNTY COMMISSIONERS

In the matter of Request for Reconsideration	)	
of Board's Decision regarding Second	)	
Amendment to Cat Creek Energy LLC's	)	FINDINGS OF FACT,
Development Agreement originally executed	)	CONCLUSIONS OF LAW,
on February 9, 2018 and Amended on	)	AND ORDER
December 31, 2028.	)	
	)	
	)	

In Re: Request for reconsideration of the Elmore County Board of County Commissioners' (the "Board") decision regarding a Second Amendment ("DA-2024-01") to the Cat Creek Energy LLC's ("CCE") Development Agreement ("Development Agreement") for CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07 ("CUPs"). This matter having come before the Board on April 19, 2024, for a public hearing conducted pursuant to public notice as required by law was held to reconsider the Board's decision following the hearing on February 9, 2024, to consider a proposed second amendment to the CCE Development Agreement. CCE filed for reconsideration of the Board's February 9, 2024, decision pursuant to Elmore County Code 7-13-12 and Idaho Code § 67-6535(2)(b). Following the hearing on reconsideration on April 19, 2024, the Board left the public hearing open and continued the public hearing until May 3, 2024, to consider additional information requested of the Elmore County Land Use and Building Department ("Department") staff ("Department Staff"). The Board heard the matter at the continued public hearing on May 3, 2024. The Board closed the public hearing, deliberated on the information, and found the following:

FINDINGS OF FACT

If any of these Findings of Fact are deemed to be conclusions of law, they are incorporated into the Conclusions of Law section. The following findings shall be based upon the facts, the analysis, and the information in the Elmore County Land Use and Building Department ("Department") record, and the testimony and evidence provided at the April 19, and May 3, 2024, hearings, all of which is incorporated herein as if set forth in full.

1. The Board finds that the record is comprised of:

- a. The request for extension application filed by CCE January 12, 2022.
- b. The Staff Report and accompanying documents from the February 4, 2022, hearing on the request for extension by CCE.
- c. The Findings of Facts, Conclusions of Law, and Order from the February 4, 2022, hearing.
- d. The December 1, 2023, application for Second Amendment to the Development Agreement, DA-2024-01, and accompanying documents.
- e. The Staff Report for the February 9, 2024, public hearing on the request for Second Amendment to the Development Agreement and accompanying documents.
- f. All documents and testimony received at the February 9, 2024, and February 16, 2024, public hearings.
- g. Board's Findings of Facts and Conclusions of Law, Order from February 16, 2024, and accompanying documents.
- h. Timeline of Events prepared at the request of the Board.
- i. Request for Reconsideration by CCE filed on February 27, 2024, and accompanying documents.
- j. Staff Report for April 19, 2024, hearing and accompanying documents and May 3, 2024, Supplemental Staff Report and accompanying documents.
- k. All documents and testimony received at the April 19, 2024, and May 3, 2024, public hearings on the Request for Reconsideration.

2. The Board Finds the Appellant is:

Cat Creek Energy, LLC
398 S 9th Steet #240
Boise, Idaho 83702

3. The Board finds the following procedural facts pertaining to this matter:

- a. The Development Agreement was a condition of approval for the CUPs and has been deemed amended CUPs by the courts.
- b. On December 1, 2023, CCE filed an application for a Second Amendment to the Development Agreement (DA-2024-01) and submitted the required fee.
- c. The matter was set for public hearing before the Board on February 9, 2024.
- d. Notice of the public hearing and site posting occurred as required by Elmore County Code.

- e. The public hearing took place on February 9, 2024, and the Board received testimony from the Appellant (then Applicant), Department Staff, and the public.
- f. The Board continued the public hearing until February 16, 2024, and requested additional information from staff including a detailed timeline of deadlines pursuant to the Development Agreement and CUPs, and associated litigation delays.
- g. The Board issued Findings of Facts, Conclusions of Law, and Order on February 16, 2024.
- h. On February 27, 2024, CCE filed a request for reconsideration of the Board's decision on February 16, 2024.
- i. The Board considered the request for reconsideration on April 5, 2024, and granted a reconsideration hearing on April 19, 2024, at 1:30 p.m.
- j. Notice of the reconsideration public hearing and site posting occurred as required by Elmore County Code.
- k. The public hearing on reconsideration occurred on April 19, 2024, and the Board received testimony from the Appellant, Staff, and the public. The Board kept the public hearing open and continued the public hearing until a date certain of May 3, 2024, and requested additional information from Department Staff.
- l. The Board continued the public hearing on reconsideration on May 3, 2024, received additional information, and closed the public hearing.
- m. Following the public hearing on the reconsideration, the Board GRANTED IN PART and DENIED IN PART the Request for Reconsideration and the Board instructed Staff to prepare Findings of Facts and Conclusions of Law, and Order consistent with their findings and decision on the matter.

4. The Board finds the following related to Section 1.1 of the Development Agreement:

- a. The Board finds that its decision of February 16, 2024, amending Section 1.1 of the Development Agreement to provide that the CUPs shall be valid until October 17, 2026, was appropriate and provided a greater extension than CCE was entitled to.
- b. The Board finds it is undisputed that the CUPs were issued on February 10, 2017. Pursuant to the Development Agreement, Section 1.1, the CUPs were valid for a period of five years from February 10, 2017. This meant the CUPs, under the terms of the Development Agreement were valid until February 10, 2022, unless otherwise extended. On February 4, 2022, the Board provided a one-time, two-year extension of the CUPs. With this two-year extension in 2022, the CUPs' new deadline was February 10, 2024. The two-year extension was contingent on CCE making progress in its FERC licensing proceedings.
- c. The Board finds, on May 17, 2019, the District Court issued an Order Granting Intervenor Cat Creek Energy, LLC's Motion to Stay Proceedings ("Stay"). This Stay expressly related only to Section 2.2 of the Development Agreement related to CUP-2015-04. Therefore, by the plain language of the Stay, the Stay only applied to

Section 2.2 and did not otherwise provide for an extension of Section 1.1 or the CUPs. Therefore, CCE was only entitled to an extension of the CUPs until February 10, 2024.

- d. The Board finds that the Board's decision on February 16, 2024, to extend the deadline of Section 1.1 of the Development Agreement to October 17, 2026, was above and beyond what was necessary or required, and was done so in a showing of good faith to accommodate CCE's development delays specifically related to the SBar Ranch appeal, since that was the express basis of CCE's request.
- e. The Board finds CCE has failed to articulate any evidence which supports how the Board erred in providing an extension until October 17, 2026, and not June 14, 2027. CCE requests that it be provided a five (5) year extension from the date the litigation ended which was June 14, 2022. CCE provides no basis or evidence for why CCE should be entitled to a five (5) year extension from the end of the litigation, when the CUPs were issued in February 10, 2017. CCE attempts to argue that the practical effect of the litigation is that it was somehow "robbed" of its entire five (5) year development period, but CCE does not articulate any basis for why the Court only stayed Section 2.2, nor does CCE provide another legal basis for such entitlement to five (5) years. Even if the Board were to agree that the Stay was applicable to Section 1.1 and the CUPs, which it does not, the Stay does not provide for a five (5) year extension from the end of litigation, but instead stays the deadlines and timelines only for the duration for which the Stay is in effect (May 17, 2018 – June 14, 2022).
- f. However, the Board further finds that the difference between the deadline of October 17, 2026, and June 14, 2027, equates to roughly 8 months and would not unduly burden Elmore County in providing such extension. The Board finds agreeing to the extension of the CUPs until June 14, 2027, will provide a clear, easily ascertainable date for the validity of the CUPs as provided for in Section 1.1

5. The Board finds the following related to the February 2022 extension:

- a. The Board finds the evidence in the record supports that the extension request by CCE in February 2022, was granted pursuant to Section 1.1 of the Development Agreement, and was provided as CCE's one-time, two-year extension per the Development Agreement.
- b. The Board finds that the Findings of Fact, Conclusions of Law, and Order for the February 4th, 2022, hearing where the Board considered CCE's request for a two-year extension clearly establishes that the request was provided to CCE pursuant to the terms of Section 1.1 of the Development Agreement.

- c. The Board finds CCE's application for extension in January 2022 did not request an extension pursuant to Section 1.1 of the Development Agreement, but instead requested an extension based on the delays of litigation related to the project.
- d. The Board finds the audio recording from the February 4th, 2022, public hearing makes clear that the Board believed its authority to grant an extension was found in Section 1.1 of the Development Agreement.
- e. The Board finds that the Findings of Facts, Conclusions of Law, and Order from the February 4, 2022, hearing clearly establishes that:
 - i. Finding No. 3 expressly states, "[a] one (1) time two-year time extension is envisioned for the conditional use permits in the Development Agreement between CCE and the Board."
 - ii. Condition No. 3 states "Based on the foregoing facts and conclusions, the Board concludes that the applicant and/or owner have adequately justified the need for a time extension per Section 7-3-17 of the Zoning Ordinance and the **Development Agreement**." (emphasis added)
 - iii. The Order itself states, the Board "APPROVES an extension for CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07 **as provided for in the Development Agreement**, subject to the Court's Orders regarding a stay of proceedings, and/or by other legal function of the Court's Orders."
- f. The Board finds that the audio recording at approximately 58:15, shows Commissioner Corbus reading Section 1.1 into the record and making a motion to provide a two-year extension pursuant to Section 1.1 of the Development Agreement.
- g. The Board finds that the audio recording goes on to demonstrate that the Board clarified that should the courts determine that a judicial stay applied to all five (CUPs) and Section 1.1, then such order by the courts would render the Board's two-year extension moot and therefore would not count against CCE as its one-time, two-year extension.
- h. The Board finds the record is clear that at no point in the judicial proceedings did any court formally stay the provisions of Section 1.1 or issue a ruling that the judicial stay was applicable to all CUPs or Section 1.1
- i. The Board finds that at 19:15 in the audio recording of the February 4, 2022, hearing, CCE states at the conclusion of the litigation CCE would file a motion to the district court related to the stay and the ability for CCE to proceed. CCE never took this action and therefore the condition that would have mooted the extension pursuant to Section 1.1 never took place.

- j. Furthermore, the Board finds that the granting of a two-year extension pursuant to Section 1.1 is in the “discretion” of the Board, and is premised on the requirement that CCE has demonstrated “significant progress in obtaining federal permits....” and “it is likely that the Applicant will be in a position to commence regular operations within the two-year period.”
- k. The Board finds that CCE will not be prohibited from seeking an additional two-year extension if upon the expiration of the deadline June 14, 2027, the project is not complete. Such an extension will be in the sole discretion of the Board and will not be granted unless CCE can demonstrate significant progress in the construction of the project and that the CCE will commence regular operations within the requested two-year extension period.

6. *The Board finds the following related to Section 2.2 of the Development Agreement.*

- a. The Board finds that CCE, in its request from December 1, 2023, never requested an extension of the deadline contained in Section 2.2 and therefore the Board cannot reconsider a new deadline of June 14, 2027, as now requested by CCE.
- b. The Board finds the record demonstrates that CCE instead attempted to satisfy the requirements of Section 2.2 of the Development Agreement by insufficient means and never request an extension of Section 2.2 of the Development Agreement.

CONCLUSIONS OF LAW

If any of the Conclusions of Law are deemed to be findings of fact, they are incorporated in the Findings of Fact section.

Holding: CCE failed to show good cause for how the Board's decision to provide an extension of Section 1.1 of the Development Agreement until October 17, 2026, was in error.

Holding: The Board was under no legal or contractual obligation to provide an extension to CCE of Section 1.1 of the Development Agreement being that the Stay issued by the Court related to Section 2.2 and CUP-2015-04 only.

Holding: The Board finds that CCE's requested extension date of June 14, 2027, equates to roughly eight additional months from the October 17, 2026, extension the Board provided. The Board does not believe providing this additional eight months will have a significant impact on overall development of the project nor negatively impact Elmore County.

Holding: The Board will extend the deadline of Section 1.1 of the Development Agreement to June 14, 2027.

Holding: The evidence in the record demonstrates that the one-time, two-year extension provided by the Board in February 2022 was granted pursuant to the authority of Section 1.1 of the Development Agreement.

Holding: The caveat in providing this one-time, two-year extension was that should the courts determine that a judicial stay applied to all five CUPs and Section 1.1 then that would render the Board's two-year extension moot and would not count against CCE's one-time extension.

Holding: The Board finds the courts made no such finding and therefore the two-year extension was not rendered moot.

Holding: The Board finds that CCE is not prohibited from seeking an additional two-year extension if upon the expiration of the deadline on June 14, 2027, the project is not complete. Such an extension will be in the sole discretion of the Board and will not be granted unless CCE can demonstrate significant progress in the construction of the project and that CCE will commence regular operations within the requested two-year extension period.

Holding: The request for an extension of Section 2.2 of the Development Agreement until June 14, 2027, was never before the Board for consideration at its February 16, 2024, as it was never requested by CCE, and therefor is not before the Board for reconsideration.

Holding: The language of Section 2.2 is affirmed.

Holding: The Board finds that the Department has followed all procedural requirements for a request for reconsideration as outlined in Elmore County Code Section 7-3-12 and Idaho Code Section 67-6535(2)(b).

Holding: These Findings of Facts, Conclusions of Law, and Order serve as the final written action setting forth the reasons and basis for the Board's decision on CCE's Request for Reconsideration.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the information contained in the record for the February 4, 2022, hearing, and the February 9, 2024, and February 16, 2024, hearings, as well as the record for the Request for Reconsideration hearings on April 19, 2024 and May 3, 2024, the Board **AFFIRMS IN PART and DENIES IN PART** its decision from February 16, 2024, holding:

- 1) Section 1.1 of the Development Agreement shall read as follows:

"The Conditional Use Permits shall be valid until June 14, 2027. The Applicant may seek a two-year extension upon application to the Elmore County Land Use

and Building Department ("Department"). The approval of an application for extension shall be in the sole discretion of the Commission, or Board if appealed thereto, provided the Applicant has demonstrated significant progress toward construction and it is likely that the Applicant will be in a position to commence regular operations within the two-year extension period. Provided all improvements are completed and the use commences within this timeframe, the CUPS, subject to compliance with the Conditions and this Agreement shall continue in effect for such time as the Project is in regular operation. In the event that the improvements are completed, and use commences within the timeframes provided for some but not all of the CUPs, the Approval for those CUPs that are not built out and operated within the foregoing time frames may be terminated as to those CUPs."

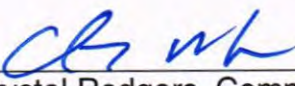
- 2) The decision to allow CCE to withdraw the proposal for increasing water storage capacity of the proposed Cat Creek Reservoir is affirmed.
- 3) The existing language of Section 2.2 of the Development Agreement and the current deadline following the litigation stay is affirmed, requiring:

"Given the complexities of water diversion and delivery related to the Project, and in an effort to move the Project forward without further delay, the County and Developer have agreed to defer the negotiations and execution of all Water Diversion and Delivery Agreements to a later date, to be heard after notice and public hearing, but which shall be done prior to July 28, 2024 or the CUP related to water (CUP-2015-04) shall lapse."

Dated this 17th day of May 2024.

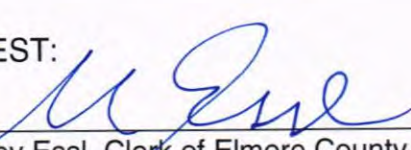
Elmore County, Idaho

By 
Franklin L. Corbus, Chairperson

By 
Crystal Rodgers, Commissioner

By 
Albert Hofer, Commissioner



ATTEST:

Shelley Essl, Clerk of Elmore County

4871-7567-4296, v. 2

Exhibit F

**DEVELOPMENT AGREEMENT RELATIVE TO CAT CREEK ENERGY, LLC
CONDITIONAL USE PERMITS (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07)**

This Development Agreement Relative to Cat Creek Energy, LLC Conditional Use Permits (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07) (the "Agreement") is entered into this 9 day of February, 2018, ("Effective Date"), by and between Elmore County (the "County"), a political subdivision of the State of Idaho, and Cat Creek Energy, LLC, an Idaho limited liability company (the "Developer") (collectively, the "Parties").

WITNESSETH:

WHEREAS, Developer, pursuant to a Memorandum of Agreement with Sawtooth Grazing Association, Inc. and Wood Creek Ranch, LLC (the "Landowners") has the authority and responsibility to develop, construct, install, and operate an electrical generating facility, known as the Cat Creek Energy & Water Storage Renewable Power Station (the "Project"), on a certain tract of land in the County of Elmore, State of Idaho, which land is more particularly described in Exhibit A, attached hereto and incorporated herein by this reference, (the "Property"); and

WHEREAS, the Project will be comprised of: 1) a wind turbine electrical generating facility; 2) a pumped storage hydro electrical generating facility; 3) a photovoltaic solar electrical generating facility; 4) electrical substations; 5) overhead and underground transmission lines; and (6) operations, maintenance, and other buildings and appropriate structures necessary for all accompanying uses related to the successful operations of the Project to generate and store both electricity and water therein; and

WHEREAS, the Project also serves as a water storage facility; and

WHEREAS, the Landowners are the fee simple owners of the Property; and

WHEREAS, Developer submitted an application ("Application") for the Project to the County for the approval of five (5) Conditional Use Permits ("CUPs") for the Project that was deemed complete on or about March 21, 2016 under the Elmore County Zoning and Development Ordinance, as amended (the "Zoning Ordinance"); and

WHEREAS, the CUPs were for electrical transmission lines, pumped storage hydro electrical generating facility in the Agricultural Zone, Wildland Urban Interface and the Area of Critical Concern Overlay Zones, solar electrical generating facility, wind turbines as an electrical generating facility, and an electrical substation in the Agricultural Zone, which were all approved by the Board of Elmore County Commissioners (the "Board") with those conditions ("Conditions") set forth in and pursuant to the Findings of Fact, Conclusions of Law and Order dated February 10, 2017 (the "Approval"); and

WHEREAS, this Agreement shall serve as the Development Agreement as set forth in condition No. 2 of the Conditions; and

WHEREAS, the Application, including, but not limited to, all testimony made at the November 16, 2016 and November 17, 2016 public hearings ("Public Hearings"), for File Nos. CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07, established the Project may be a benefit to the County and was an essential inducement to the Board for its approval of the Project; and

WHEREAS, Developer is subject to rules governing development of the Project, as set forth under this Agreement, the Approval, the Zoning Ordinance, and other state and federal laws and regulations ("Rules"); and

WHEREAS, Developer desires to be assured that it may proceed with development of the Project in accordance with those Rules; and

WHEREAS, Developer, through its Project's investment and infrastructure, has a unique ability to assist the County in water delivery; and

WHEREAS, the County, following the notice provisions under Idaho Code § 67-6509, conducted a public hearing regarding this Agreement; and

WHEREAS, both the County and Developer, in order to derive mutual benefits, have determined it is advantageous to enter into this Agreement to ensure Developer may design, develop, procure, construct, and operate the Project under a defined set of predictable conditions in order to advance the Project's development in an orderly sequence and concurrently, to assure the County the Project will be designed, developed, constructed, and operated in compliance with this Agreement, the Approval, Zoning Ordinance, and state and federal laws and regulations.

NOW, THEREFORE, in consideration of the promises, covenants, and provisions set forth herein, the Parties agree as follows:

AGREEMENT

SECTION 1. DEVELOPMENT OF THE PROJECT.

1.1. Effective Date. This Agreement will be effective upon the Effective Date and, except as otherwise provided herein, shall run so long as the Project is being operated and one or more of the CUPs remain in full force and effect. Notwithstanding, certain dates set forth in the Approval and/or Conditions, may be changed as set forth in this Agreement.

Condition No. 1 from the Approval is hereby deleted in its entirety and replaced with the following:

"1. The Conditional Use Permits shall be valid for a period of time for five (5) years from February 10, 2017 and may be extended for one 2-year period upon

application to the Elmore County Land Use and Building Department ("Department"). The approval of an application for extension shall not be unreasonably withheld and is in the discretion of the Commission, or Board if appealed thereto, provided the Applicant has demonstrated significant progress in obtaining federal permits and it is likely that the Applicant will be in a position to commence regular operations within the two-year extension period. Provided all improvements are completed and the use commences within this timeframe, the CUPs, subject to compliance with the Conditions and this Agreement, shall continue in effect for such time as the Project is in regular operation. In the event that improvements are completed, and use commences within the timeframes provided for some but not all of the CUPs, the Approval for those CUPs that are not built out and operated within the foregoing time frames may be terminated as to those CUPs."

1.2. Development of Permitted Uses. This Agreement describes the right to develop the Project in conjunction with, and subject to, the Conditions set forth in and pursuant to the Board Findings; and Developer shall comply with applicable rules, regulations and review processes required by the Zoning Ordinance in effect as of the Effective Date and as modified by this Agreement. Developer will pay all applicable fees required by the Zoning Ordinance as such fees may be established from time to time, by resolution approved by the Board, in relation to this Agreement.

Subject to the foregoing, and pursuant to the Zoning Ordinance, if the County adopts new ordinances, resolutions, rules or regulations that conflict with, alter, or amend the ordinances, resolutions, rules or regulations in effect at the time the CUPs were approved on February 10, 2017, such actions by the Board shall not prevent Developer from its right to develop and complete the Project as set forth in this Agreement. The County and Developer may amend this Agreement to include such changes to the ordinances, resolutions, rules and regulations as they apply to the Project, if beneficial to the Project and the County. Furthermore, the County may enact ordinances and amendments to existing ordinances that are applicable to the Project in so far as those ordinances do not materially and negatively impact the Developer's rights to develop the Project in conformance with this Agreement, the Approval, and the Site Plan presented in the Application, as modified at the Public Hearings, and which Site Plan will be amended as set forth in this Agreement.

1.3. Compliance with the Approval. Approval of the CUPs through the Board Findings established that the Project is in compliance with the Zoning Ordinance and the County Comprehensive Plan. The development of the Project shall be in compliance with the Board Findings and Conditions, unless modified by and subject to the terms in this Agreement. The Conditions may be further amended, defined, expanded and/or refined by the Board and Developer, at a later date following notice and public hearing. To the extent there are any terms and conditions set forth herein that contradict terms or conditions of the CUP, this Agreement shall control.

1.4. Compliance with Project Schedule. Developer shall diligently proceed with the development of the Project in conformance with the provisions of the Approval and Conditions as

modified in this Agreement. The Project schedule may be modified by Developer and the County following notice and public hearing. Otherwise, Developer's failure to meet the time frame set in this Agreement shall constitute a default under the Conditions as modified herein and the Agreement, subject to the default provisions of this Agreement.

1.5. Changes in State and Federal Law. This Agreement shall not preclude the application of any law that is specifically mandated and required by changes in state or federal laws or regulations applicable to the Project. In the event such law prevents or precludes compliance with one or more provisions of the Conditions or this Agreement, excluding the Condition that the Project must be substantially complete and operational by that date set forth in the Conditions or this Agreement, the County and Developer shall, following notice and pursuant to a public hearing, meet and confer to determine how the provisions of this Agreement and/or Conditions would need to be modified, extended, or suspended in order to comply with the law and shall prepare and process the necessary amendment or amendments to this Agreement. If no agreement is reached, and federal or state law do not otherwise control, the Board may elect to pursue remedies under the default provisions of this Agreement. In the event federal and state laws in force on the Effective Date are in conflict with the Conditions or this Agreement, the federal and state laws shall control.

1.6. Police Power. Nothing in this Agreement shall be construed to be in derogation of the County's police power to protect the public health and safety in the case of an emergency. In the event of an emergency, Developer agrees to provide and maintain ongoing and daily contact with applicable County emergency response officials.

1.7. Effect of Landowners' Consent. In the event the Landowners desire to develop the Project, prior to doing so, the Landowners shall assume and undertake all obligations of Developer under this Agreement, pursuant to a written assignment of this Agreement, as stated in Section 11 herein.

1.8. Incorporation of Recitals. The foregoing recitals shall be deemed true and correct in all respects to this Agreement and shall serve as the basis for the interpretation of this Agreement.

SECTION 2. REQUIRED ENCLOSURES FROM CONDITION NUMBER TWO.

2.1 Site Plan.

2.1.1. Legal Description. The legal description of the Property is set forth in Exhibit A attached hereto. The County Tax Parcel for each of the areas for the CUPs are shown on Exhibit B, attached hereto.

2.1.2. Master Site Plan. The Master Site Plan presented at the Public Hearings in connection with the Board's Approval of the Project, subject to the Conditions, is the approved site plan for the Project, a copy of which is attached hereto as Exhibit C and made a part hereof. The Developer desires to further amend the Master Site Plan as set forth in Exhibit D attached hereto and made a part hereof by the terms

and conditions of this Agreement. This Agreement hereby amends the Master Site Plan on Exhibit C, with Master Site Plan as Exhibit D. The Master Site Plan attached hereto as Exhibit D contains certain modifications as provided for in this Agreement and shall serve as the Master Site Plan for all purposes related to the Project. Should further material modifications need to be made to the Master Site Plan, as a result of any federal permitting, state legislation, or amendment request by Developer, Developer and Board may, subject to notice and public hearing, process the necessary amendment or amendments to the Master Site Plan within this Agreement.

2.1.3. Further Site Plan Changes. All requests for changes to the Master Site Plan shall be submitted to the County's Director of the Land Planning and Use Department (the "Director"), for further review by the County for a determination of whether any requested change is material, which will determine if the Master Site Plan should need modification as set forth herein. All minor, non-material site plan changes, may be made by Developer, with the written approval of the Director so long as best available technology and practices are used for minimizing visual and audio impact.

2.1.4. Change of Use. No change in use from the Approval shall be permitted without an application to the County in accordance with the Zoning Ordinance. As set forth hereinabove, the approved use is as set forth in the Approval.

2.1.5. Modification. Material modifications of the Master Site Plan, as determined by the Director in Section 2.1.3. herein regarding, among other items, the locations for wind turbines, solar panels, transmission lines, substation, collector stations, the operations and maintenance building, reservoir boundaries, and the pumped storage hydro equipment may be modified, with consent of Parties and following public hearing. Specifically, the following changes to the Master Site Plan shown on Exhibit D, and the terms, conditions, and descriptions provided in this Agreement, are incorporated into and shall become part of the Applications.

2.2. Water Diversion and Delivery. Given the complexities of water diversion and delivery related to the Project, and in an effort to move the Project forward without further delay, the County and Developer have agreed to defer the negotiation and execution of all Water Diversion and Delivery Agreements to a later date, to be heard after notice and public hearing, but which shall be done prior to December 31, 2018 or the CUP related to water shall lapse.

2.3 Stakeholder Advisory Board. Prior to the issuance of the first building permit for the Project, Developer and the Board shall create the Cat Creek Energy Stakeholder Advisory Board ("Stakeholder Advisory Board"). Stakeholder Advisory Board's purpose is to oversee the expenditure of funds (the "Contribution") by the Developer, in the amount to be based upon a formula set forth herein in Section 2.3.3 for (a) environmental mitigation as determined by federal and state permitting for the management, conservation and enhancement of plants, animals, fish and birds that inhabit the Project area, (b) review of the development of wetlands mitigation due to the Project; (c) review and recommendation to the Board of the visual and audio screening and

minimization of impact to the surrounding areas of the solar array, substation and transmission lines which shall be designed using best practices to minimizing visual and audio impact.

2.3.1. Members. The Stakeholder Advisory Board shall consist of and shall be appointed jointly by the Board and the Developer:

- a. Two environmental members (i.e. Idaho Department of Fish and Game, Sage-Grouse Conservation Group, or other environmental organization inside or outside of a government entity impacted by the Project),
- b. One Member from Mountain Home Irrigation District,
- c. One Member from Glenns Ferry Highway District,
- d. One County representative,
- e. One County resident from the Pine-Featherville area,
- f. One Developer operations manager,
- g. One Developer designee, and
- h. One Landowner.

2.3.2. Funding. The initial funding for the Stakeholder Advisory Board mitigation efforts during construction is anticipated not to exceed \$1,345,000 and would fund those mandated mitigation requirements and offsets necessary as part of the federal permitting processes. Subsequent annual contributions to the funding would first be used for environmental remediation as required by federal permitting and ancillary agreements, and then for the purposes the Stakeholder Advisory Board advises and recommends how to distribute funds to serve the purpose set forth herein.

2.3.3. Formula. The formula for the annual funding of the Stakeholder Advisory Board shall be as follows:

- a. 2.5 mils on revenues of the Project as defined as gross electrical power generation revenues less any associated pumping costs of the pump storage hydro portion of the facility. For example, if the gross revenues are \$1,000,000.00 and the pumping costs are \$300,000.00, the Stakeholder Advisory Board receives as follows:
 $700,000 \times 0.0025 = \$1,750.00$.
- b. The minimum amount of Contribution per year shall be \$100,000.
- c. The maximum amount of Contribution per year after the project is operational shall not exceed \$300,000. In the event the federal or state environmental mandate is greater than \$300,000, the Developer shall pay all costs in excess of \$300,000 to comply with those federal or state environmental mandates outside of the Stakeholder Advisory Board.
- d. If the Stakeholder Advisory Board does not designate any portion of the annual Contribution, that amount shall carry over to the next year and reduce the Contribution by that amount.

2.3.4. Designation of Funds. The Stakeholder Advisory Board shall first apply funds to all mandatory federal mitigation requirements. State mitigation requirements shall then be applied. Anticipated environmental mitigation procedures on an annual basis that may be conditioned for funding under federal and state permitting provisions are:

- a. Fish entrainment re-stocking.
- b. Upstream of Anderson Ranch Reservoir aquatic improvements.
- c. Monitoring of conditions in Anderson Ranch Reservoir.
- d. Wetlands improvements.
- e. Wildlife habitat improvements.

2.3.5. Meetings. Meetings of the Stakeholder Advisory Board shall be called by Developer with a two-week notice prior to the date of any funds distribution. A quorum is necessary for any resolution of the Stakeholder Advisory Board. A majority of the members constitutes a quorum. All resolutions for distribution of funds shall be by unanimous consent of all Stakeholder Advisory Board Members present at the meeting, including through teleconferencing, assuming a quorum is present. If there is any dissenting vote that stalls distribution of funds, Developer will fulfill its federal contractual and regulatory mitigation funding obligations first. Any remaining issues shall be determined by the Board after recommendation by the Stakeholder Advisory Board.

2.4. Fish Stocking. As part of the Stakeholder Advisory Board fund, Developer shall fund annual fish stocking in Anderson Ranch Reservoir to compensate for any net loss of game fish due to entrainment into the hydropower penstocks. Developer shall comply with all federal and state recommendations and directives agreed to during the federal permitting process on potential mitigation efforts that may be required for fish habitat, maintaining fish populations, and mitigating loss due to potential entrainment. As part of this Agreement, Developer shall also work closely with the Idaho Department of Fish and Game in conjunction with federal agencies on the fisheries of Anderson Ranch Reservoir for any mitigation that may be required in the federal permitting process.

2.5. Sage Grouse Mitigation. During the construction of the Project, and as part of the Stakeholder Advisory Board fund, Developer shall fund conservation efforts affecting areas of sage-grouse habitat on the Property where evidence of sage-grouse usage exists. Developer shall work with Idaho Department of Fish and Game to comply with the Sage-Grouse Initiative and may include measures such as prescribed grazing, fence marking, and water tank escape ramps. After any mitigation recommendation that may be required by federal permitting is completed, the Stakeholder Advisory Board may decide that if any monies are left over after the annual funding protocol in Section 2.3.4, a portion of those remaining funds may be dedicated to sage-grouse habitat enhancement on the Property, and then on other lands in the general geographic area of the Project.

2.6. Erosion Control Measures. Developer shall comply with all US Army Corps of Engineers and the Environmental Protection Agency regulations that are administrated through the

Idaho Department of Environmental Quality, submit applications for, and receive the permits from, those relevant agencies responsible for erosion control measures during construction and operations of the Project. Developer shall utilize best industry practices to implement erosion control measures, which would include minimizing ground disturbance areas during construction, stabilizing soils and installing barriers to prevent runoff, and contouring and revegetating all disturbed areas when construction is complete, including erosion control measures and revegetation activities that shall meet all industry standards and would prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds and promote quality wildlife and grazing habitat.

2.6.1. Developer shall utilize best industry practices to implement erosion control measures, which would include minimizing disturbance of reservoir shorelines and vegetated upland areas during construction of the pump storage hydro intake, powerhouse and penstock, to minimize water quality impacts due to erosion/sedimentation, and to further minimize the potential to increase erosion and sedimentation, which could adversely affect water quality in Anderson Ranch Reservoir.

2.6.2. Developer shall utilize best industry practices to implement erosion control measures, which would include minimizing ground disturbance areas during the construction of roads and wind tower pads for the wind turbine project locations, including erosion control measures and revegetation activities which will meet all industry standards and would minimize erosion and sedimentation into any stream located in the construction area.

2.7. Communications with Wildlife Agencies. Developer shall maintain communications with Idaho Department of Fish and Game, the United States Federal Wildlife Service, and other agencies, in order to sustain fish and wildlife habitats on and surrounding the Project.

2.8. Noise Standard. Noise Standards shall comply with the Zoning Ordinance. No Noise Standard shall be more restrictive than the standards set forth in the Zoning Ordinance. The Noise Standards do not apply to any component constructed exclusively on federal lands or any component, facility, or technology that require approvals by the federal agencies overseeing the federal process for the Project.

2.9. Water Transmission Lines. Prior to the issuance of any building permit for the hydro electrical generation portion of the Project, Developer will submit to the Board for review the proposed water transmission lines from the Anderson Ranch Reservoir to the Reservoir, which submission shall include any proposed visual and audio screening.

2.10. Scholarship Fund. Upon commencement of the operation of the Project, or any part thereunder as set forth in the Application, the Developer shall make an annual contribution on October 1 of each year thereafter, in the amount of Ten Thousand Dollars (\$10,000.00) per year to the County ("**Scholarship Fund**") to fund post high school education opportunities for students who are residents of Elmore County, which Scholarship Fund shall be administered by the Board

or such other committees and administer and distribute along with other County scholarship programs.

2.11. Senior Contribution. Upon commencement of the operation of the Project, or any part thereof, the Developer shall make an annual contribution on October 1 of each year thereafter, in the amount of Ten Thousand Dollars (\$10,000.00) per year ("**Senior Contribution**") to the County to be distributed to Elmore County senior citizens by the Board.

2.12. Incorporation and Modification of Conditions. The Conditions as modified herein, are hereby incorporated into this Agreement.

2.12.1. Conditions 2m, 25, 30, and 31 are hereby deleted.

2.12.2. Condition 24 shall read: Approval of the Interconnection Application.

2.12.3. Condition 15 shall read: Prior to any single CUP construction, an updated Wildlife Mitigation Plan/Environmental Impact Statement ("WMP/EIS") shall be submitted to Elmore County. The WMP/EIS shall be reviewed by and subject to the approval by the Board for compliance with the Zoning Ordinance, including but not limited to standards for conditional use permits and environmental studies.

SECTION 3. ADDITIONAL VISUAL MITIGATION MEASURES.

Developer shall utilize best industry practices to implement visual mitigation surrounding the water pumping stations, pipelines, penstocks, solar array, substation, and transmission lines as prescribed by federal permitting rules set forth by the Bureau of Reclamation and FERC. Wind turbines do not qualify for visual mitigation. Developer shall provide visual elevations of the water pumping and diversion lines, solar array, substation and transmission lines to the Board, for the County's review, demonstrating visual mitigation efforts and options prior to construction of these portions of the Project. The Board acknowledges and agrees that there shall be no further oversight by the Board on any additional visual mitigation measures beyond what is established, conditioned, or required under any federal or state procedures or permits.

SECTION 4. CONSTRUCTION.

The Project shall be developed in substantial compliance with the Master Site Plan and such other plans and specifications as approved by the County in this Agreement and subsequent amendments to this Agreement per Section 1.2. All development of the Project shall be constructed, processed, and approved in accordance with the Zoning Ordinance and federal and state laws as described in this Agreement. If a building permit is needed for any structure in the Project, then a building permit application shall be submitted to the Elmore County Building Department for review and approval. For purposes of the construction and permitting provisions under this Agreement, each CUP is separate. Prior to issuance of a building permit under each CUP, Developer shall be in substantial compliance with this Agreement pertaining to that CUP, defining the location of project structures for which such a permit is necessary. The County Engineer shall review the submission for drainage, storm water management, and any structural

element in the design to ensure compliance with all regulations. The submission of engineered drawings by Developer shall bear the appropriate professional stamp of an Idaho licensed engineer or architect. Original Equipment Manufactured components are an exemption to this provision as long as documented compliance is submitted under any IEEE and ISO designation. A state electrical permit as required for any electrical associated construction shall be submitted as an additional requirement for a building permit.

SECTION 5. DEFAULT.

5.1. General Provisions. A party shall be deemed to be in default of this Agreement only upon the expiration of ninety (90) days (ten [10] days in the event of failure to pay money) from receipt of written Notice from the other party specifying the particulars in which such party has failed to perform the obligations of this Agreement unless such party, prior to the expiration of said ninety (90) days (ten [10] days in the event of failure to pay money), has rectified the particulars specified in said Notice of default. However, such party shall not be deemed to be in default if such failure (except a failure to pay money) cannot be rectified within said ninety (90) day period and such party is using good faith and its best efforts to rectify the particulars specified in the Notice of default and such party in default shall have an additional ninety (90) days (180 days in total) to cure such default.

5.2. Hearings on Violations. Upon a determination by the Director that Developer has violated this Agreement and has failed to cure the violation as described in Section 5.1 above, the Director shall schedule a hearing before the Board with notice prior to a hearing. At the conclusion of the hearing, the Board may determine Developer to be in default, in partial default, may modify its decision, or take other action that the Board deems just, reasonable and in accordance with law, including termination of this Agreement and the revocation of the Approvals.

5.3. County Remedies. Should the Board determine Developer to be in default or partial default, the County, at its option, may institute all remedies available at law or equity; modify, in whole or in part, the permit, specific plan, or amend the Conditions; and/or terminate the Agreement and the Approvals, all as the Board may determine in the exercise of its discretion and subject to Idaho law.

5.4. Developer's Remedies. If the County is in default under this Agreement, after the expiration of the right to cure, Developer may pursue all remedies available at law or equity.

5.5. Restrictions to Cure. The Board shall not restrict the ability for any mortgagee, lender, insurer, Landowners, or equity member of Developer (the "Curing Party") from assuming all liabilities in the event of a default by Developer, which Developer is either unable or unwilling to cure, so long as such cure of the default(s) occurs within the time frames set forth in Section 5.1 or as otherwise established by the Board.

5.6. Landowners and Curing Party Remedies. During the time in which Developer is in default as provided in Section 5, the Landowners or any Curing Party who has an interest in the Project, may cure the default of Developer by giving Notice to the County of its desire to cure

such default and such cure shall be made within the time frame provided to Developer under Section 5.1.

5.6.1. The County agrees to give a copy of any Notice of default of Developer to the Landowners and any Curing Party so long as it provides advance written Notice to the County of their desire to receive any Notice of default and their Notice address(es).

5.6.2. The Landowners or Curing Party may cure the default of Developer within the time frame set forth in Section 5.1 or as otherwise established by the Board.

5.7. Termination.

5.7.1. This Agreement may be terminated upon the request of Developer, upon approval of the Board, following notice and public hearing, or upon a finding of default by the Board that Developer, a subsequent owner or any other person acquiring an interest in the Project site, is in default of any requirement in this Agreement.

5.7.2. Unless cured by the Landowners or a Curing Party, the Landowners and/or the Curing Party shall be subject to any default remedies of the County, including but not limited to termination of this Agreement.

5.7.3. Following notice and hearing procedures required above, the Board, may in its discretion, amend this Agreement in lieu of terminating the Agreement if the amendment otherwise complies with the Zoning Ordinance.

5.7.4. Should a default and termination occur after portions of building permits have been issued for a portion of the Project and such work under the issued building permit has commenced, beyond grading, the Developer or Landowners shall be permitted to complete such work, so long as they otherwise comply with this Agreement, the Zoning Ordinance, federal and state law, and the Board may not terminate this Agreement as to those developed sections that comply with this Agreement. The Board, after notice and public hearing may amend this Agreement to include only those sections, and the termination of this Agreement shall apply only to the undeveloped sections where no infrastructure has been provided.

SECTION 6. INTENTIONALLY OMITTED.

SECTION 7. PERMITTING.

Prior to issuance of any building permit for each CUP, Developer shall obtain: (i) any federal and state licenses and approval to operate that portion of the Project under the appropriate CUP; (ii) a demonstrated ability to connect to the appropriate electrical control area operator transmission or distribution lines or the construction of alternate transmission lines specifically for

this Project; and (iii) a strategy for the generating facility falling under the relevant CUP for the sale and delivery of electrical power as part of the Project.

SECTION 8. DECOMMISSIONING.

8.1. Decommission of Project. Prior to the issuance of any building permit for each CUP, Developer, Landowners, and the County shall enter into a decommissioning agreement and Developer shall place a bond or other acceptable financial instrument as approved by the County with the County based upon a decommissioning plan presented to the Director and approved by the Board, estimating the net cost of restoring the site pursuant to the decommissioning agreement. All improvements, facilities and buildings containing power generating or transmitting equipment with the Project shall be removed within 180 days of the discontinuance of operation of the Project on the Property and the Property restored to its natural state. For purposes of this Section, improvements, facilities, and buildings shall not include: (i) transmissions lines and the Reservoir, provided they are in use, and (ii) any storage or housing buildings. All footings and foundations shall be removed to a depth of three feet below the surface. The amount and terms of the bond shall be approved by the Board. Developer shall submit an updated decommissioning plan every five years and shall increase or decrease the amount of the bond if the net cost of restoration changes from the prior study.

SECTION 9. ANNUAL REVIEW.

Commencing on the first-year anniversary of the Effective Date, and every year thereafter, so long as the Project is in operation, Developer shall submit a status report, and meet in person with the Board, detailing the status of the development and operations of the Project ("Annual Review"). Upon request by Developer, the Board, in its sole and absolute discretion, may modify, waive or terminate the Annual Review requirement after 5 years of Project operation.

The Annual Review during construction activities shall include a review of Developer's plan (i) to implement erosion control measures, (ii) for the timing of construction activities, (iii) on federal and state permitting efforts, and (iv) for any other activities associated with construction and permitting activities. The Annual Review once the Project is operational shall include a review of (i) fish stocking and other wildlife management, (ii) general operations and any problems associated with those operations, (iii) Developer concerns, and (iv) any other matters pertaining to the Project.

SECTION 10. NOTICES.

10.1. Notices. Any notice, demand, or other communication (a "Notice") given under this Agreement shall be in writing and given personally or by certified mail (return receipt requested). If given by certified mail, a Notice shall be deemed to have been given and received on actual receipt of the certified mail or therein, its rejection as required by the U.S. Mail. If to a specific person, a Notice shall be deemed to have been given when delivered to the party to whom it is addressed, and notice of delivery has been registered. A courtesy copy of the Notice may be sent by facsimile transmission and/or electronic communication. Any party may designate any other address in substitution of the address contained herein by like written Notice.

10.2. Addresses. Notices shall be given to the Parties at their addresses set forth below:
If to County, to:

Elmore County Board of County Commissioners
150 South 4th East
Mountain Home, Idaho 83647
Telephone: 208-587-2130 ext. 212
Facsimile: 208-587-2159

With copy to:

Elmore County Courthouse Annex
Attn: Elmore County Prosecuting Attorney
190 South 4th East
Mountain Home Idaho 83647
Telephone: 208-587-2130

If to Developer, to:

Cat Creek Energy, LLC
Attn: John Faulkner
1989 South 1875 East
Gooding, Idaho 83330

With a copy to:

Terri Pickens Manweiler
Pickens Cozacos, P.A.
398 S. 9th Street, Ste. 240
Boise, ID 83702
Telephone: (208) 954-5090
Facsimile: (208) 954-5099
Email: terri@pickenslawboise.com

SECTION 11. ASSIGNMENT OR TRANSFER.

11.1. Assignment. Developer may assign or transfer all or any portion of the Project to any person or entity ("Transferee"), subject to the provisions of this Section.

11.2. Effect of Assignment; Public Records. It is the intent of the Parties that as the Project is developed, all requirements of the Approval, Conditions, as modified herein, and this Agreement shall be met. To that end, if Developer transfers any portion of the Property to a Transferee, Developer shall continue to be responsible for performing the obligations under this Agreement until such time as is there is delivered to the County a legally binding instrument in a form approved by the County (an "Assignment and Assumption Agreement") where a Transferee agrees to perform all obligations and be responsible for all provisions of the Approval, Conditions as modified herein, and this Agreement as to the transferred property. The County shall review the

submittals for approval, approval by the County is required and such approval shall not be unreasonably withheld, that the transfer is in accordance with the provisions of this section. The County shall retain all records in compliance with the Idaho Public Records Law, including maintaining such confidential information, when marked as such by Developer or the Transferee, as permitted under the Idaho Public Records Law. No additional conditions may be placed on the Transferee outside this Agreement, other than the curing of any defaults.

11.3. Procedures. No fewer than sixty (60) days prior to entering into an Assignment and Assumption Agreement, Developer shall submit to the County a draft of the proposed Assignment and Assumption Agreement referring to the obligation of the Transferee to assume the obligation of the Conditions as modified herein and this Agreement and the conditions pertaining to the transferred property along with any other applicable conditions of approvals and any other obligations to be assumed by Transferee pursuant to the Assignment and Assumption Agreement.

Developer shall cooperate with the County by providing documents and information the County may deem necessary in the exercise of its reasonable discretion. All assignment information record keeping shall be administered by the County pursuant to the Idaho Public Record Law. The County may schedule a public hearing to discuss the transfer and make a decision, on the request for Assignment and Assumption. Such approval cannot be unreasonably withheld.

11.4. Default. Failure of Developer to provide an Assignment and Assumption Agreement as approved by the County, shall be a default under this Agreement.

11.5. The Entirety of this Agreement. This Agreement, the Approval, and the Conditions as modified herein, shall run with the land and shall be binding upon the Landowners, the Developer, and their successors, assigns, and heirs, and all obligations assumed by Developer are binding upon the Curing Parties, successors, heirs, assigns and transferees of the Curing Parties whether such is by contract, operation of law or any other mechanism.

SECTION 12. REPRESENTATIONS AND WARRANTIES OF DEVELOPER AND LANDOWNERS.

Developer represents it has full authority under existing agreements between Developer and Landowners to pursue development, construction, and operation of the facilities in the Project. Landowners represent they have given consent for the development, construction, and operation of said facilities contained in the Project and further represent that any agreements between Developer and Landowners are in full force and effect and are not currently in default and will not be in default prior to the Effective Date. Developer and Landowners represent and warrant to the County that the Landowners own the Property in fee simple title free and clear of all encumbrances unless set forth in the Title Commitment from Guaranty Title dated January 25, 2018. Developer represents and warrants to the County that no consent from any other person or entity is required for either Landowners or Developer to enter into this Agreement and that all corporate, company or other entity requirements have been fully satisfied.

SECTION 13. GENERAL PROVISIONS.

13.1. Recordation. This Agreement shall be recorded in the public land records of the County.

13.2. CUPs Run with the Land. The CUPs for the Project run with the land as long as the County, Developer, and Landowners are in compliance with the Approval, the Conditions as modified herein, and this Agreement. This Agreement is not a Development Agreement pursuant to I.C. § 67-6511A, but rather an agreement as a condition of the CUPs.

13.3. Existing Mortgages. In the event of the entry of decree of foreclosure of the Property by either of the two existing lenders, Northwest Farm Credit Services and Metlife Agricultural Investments, including all successors, assigns or purchasers of such loan(s), or a deed in lieu of foreclosure of each Property, the County shall have the absolute right to terminate the CUPs including the Agreement.

13.4. Mortgages and Other Security Provisions and Obligations ("Mortgage"). Subject to the entering into a subordination or non-disturbance and attornment agreement in such form as approved by the County, by those parties with a security interest in the Property, the Developer, and the Landowners, this Agreement and any easements granted by the Developer or Landowners for water distribution points and transmission lines, shall not be disturbed and shall be subordinate to those secured parties (along with the County, the Developer and the Landowners) that enter in to the agreement and record the same upon the Property. No default hereof shall invalidate or impair the lien of any Mortgage made in good faith and for value, and any acquisition or acceptance of title or any right or interest in or with respect to the Project, or any portion thereof, by a mortgagee (herein defined to include a beneficiary under a deed of trust), whether under or pursuant to a mortgage foreclosure, trustee's sale or deed in lieu of foreclosure or trustee's sale, or otherwise, shall be subject to all of the terms and conditions contained in this Agreement, but any such mortgage shall not prevent termination of this Agreement or other remedies by the County. No mortgagee shall have an obligation or duty under this Agreement to perform Developer's obligations or other affirmative covenants of Developer hereunder, or to guarantee such performance; except that to the extent that any covenant to be performed by Developer is a condition to the performance of a covenant by County, the performance thereof shall continue to be a condition precedent to County's performance hereunder.

13.5. Severability. If any provision of this Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect. It is the Parties express intention that the terms and conditions be construed and applied as provided herein, to the fullest extent possible. It is the Parties further intention that, to the extent any such term or condition is found to constitute an impermissible restriction of the police power of County, such term or condition shall be construed and applied in such lesser fashion as may be necessary to not restrict the police power of the County.

13.6. Good Standing; Authority. Developer hereby represents to that Developer is an Idaho limited liability company; (b) County represents that it is a governmental entity in the State of Idaho; and (c) the individual(s) executing this Agreement on behalf of the Parties represent that

they are authorized and empowered to bind the party, respectively, on whose behalf each such individual is signing.

13.7. Amendment. Subject to notice and hearing, all amendments shall be in writing and shall be approved and signed by the County, Developer and Landowners. Any amendment to this Agreement may be evidenced by recordation in the County land records. Developer agrees to pay all recording fees necessary to record any such amendment requested by Developer.

13.8. No Agency, Joint Venture or Partnership. County and Developer hereby renounce the existence of any form of joint venture or partnership between County and Developer and agree that nothing contained herein or in any document executed in connection herewith shall be construed as making County and Developer joint ventures or partners.

13.9. Construction. This Agreement has been reviewed by legal counsel for both County and Developer, and this Agreement, no presumption or rule that ambiguities shall be construed against the drafting party shall apply to the interpretation or enforcement of this Agreement.

13.10. Choice of Law. This Agreement and its performance shall be construed in accordance with and governed by the laws of the State of Idaho, with venue for any action brought pursuant to this Agreement to be in the Fourth Judicial District, State of Idaho.

13.11. Merger and Integration. The Application, Approval, Conditions as modified herein, and this Agreement embody the whole agreement of the parties. There are no promises, terms, conditions, or obligations other than those referenced to in the Recitals, contained in this Agreement or in the Application, Approval, and Conditions as modified herein. All previous and contemporaneous communications, representations, permits, or agreements, either verbal or written, between the Parties are modified or superseded by this Agreement.

13.12. Third Party Beneficiaries. Nothing contained herein shall create any relationship, contractual or otherwise, with, or any rights in favor of, any third party.

13.13. Waivers. No provision or condition of this Agreement shall be considered waived unless duly amended. The failure of County or Developer to require strict performance of any term or condition of this Agreement or to exercise any option here in conferred in any one or all instances shall not be construed to be a waiver or relinquishment of any such term or condition, but the same shall be and remain in full force and effect, unless such waiver is evidenced by the prior written consent of either County or Developer, as the case may be.

13.14. Duty to Act Reasonably. Unless otherwise expressly provided, each party shall act reasonably in giving any consent, approval, or taking any other action under this Agreement.

13.15. Excused Delay; Extension of Time of Performance.

13.15.1. "Excused Delay" means, with respect to Developer, any event or circumstance which is beyond the reasonable control of Developer and having a direct effect on Developer's performance of this Agreement, and which (a) could not be

avoided, prevented or removed by Developer's commercially reasonable efforts, and (b) is not caused by or does not result from the negligence of Developer or breach or failure of Developer to perform its obligations under the Agreement; provided that Developer has taken all reasonable precautions, care and alternate measures to avoid or mitigate the effects thereof.

13.15.2. Excused Delay events shall include, but not be limited to: natural disasters, fire, hurricanes, tornadoes, dust or sand storms, mudslides, subsidence, lightning, flood, earthquake, explosions, acts of God, terrorism or similar actions by the public enemy, strikes or lockouts affecting the industry in general (national or regional in scope) where such strike or lockout has a direct effect on the performance of the Agreement, public disorder or civil disturbance, blockages, insurrections, riots, war, hostilities, sabotage, expropriation or confiscation, epidemic or quarantine, or environmental terrorism.

13.15.3. Upon delivery of written Notice of Excused Delay by Developer to the County an extension of time for cause will be considered, and may be granted in writing by the County for the period of the Excused Delay.

13.16. Covenants Appurtenant to the Project. All covenants and conditions set forth herein shall be appurtenant to and run with the Project and shall be binding upon the Parties hereto, their heirs, successors, and assigns.

13.17. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument shall form a single document.

13.18. Further Acts. Each of the Parties shall execute and deliver all such documents and perform all such acts as reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement.

13.19. Headings. The descriptive headings of the sections of this Agreement are inserted for convenience only and shall not control or effect the meaning or construction of any of the provisions hereof.

13.20. Names and Plans. Developer shall be the sole owner of all names, titles, plans, drawings, specifications, ideas, programs, designs, technology, processes, and work products of every nature at any time developed, formulated or prepared by or at the request of Developer in connection with the Project.

13.21. Attorney Fees. In the event that either party to this Agreement shall file suit or action at law or equity to interpret or enforce this Agreement, the unsuccessful party to such litigation agrees to pay to the prevailing party all costs and expenses, including reasonable attorneys' fees incurred by the prevailing party. Similarly, all fees and costs associated with an

appeal to any appellate court thereafter, including, without limitation, the prevailing party's attorneys' fees, shall be paid by the non-prevailing party.

13.22. Termination. This Agreement may be terminated upon the mutual written consent of the Parties.

13.23. Recitals. The Recitals to the Agreement are incorporated into the Agreement.

[Signatures on following pages]

Exhibits:

Exhibit A – Legal Description of the Property

Exhibit B – County Tax Parcels for Each of the Land Areas Comprising the CUPs

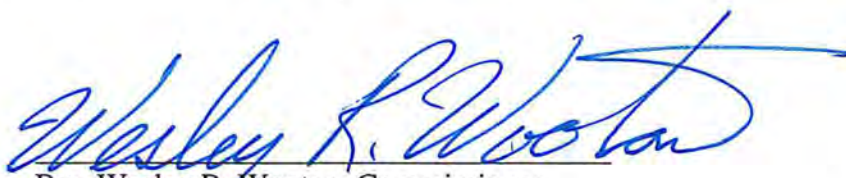
Exhibit C – Master Site Plan – from the November 2016 hearings

Exhibit D – Master Site Plan as modified under this Agreement

IN WITNESS WHEREOF, this Agreement has been executed by the Parties hereto on the day and year first above written.

ELMORE COUNTY:

Board of Elmore County Commissioners


By: Wesley R. Wootan, Commissioner


By: Franklin L. Corbus, Commissioner



ATTEST:


Barbara Steele, Elmore County Clerk

STATE OF IDAHO)
) ss.
County of Elmore)

On the 9 day of February, 2018, before me, Debra Marceau, a Notary Public in and for said state, personally appeared WESLEY R. WOOTAN, Commissioner of **Elmore County**, a political subdivision of the State of Idaho, the county that executed the foregoing instrument, who duly acknowledged to me that such county executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Debra Marceau
NOTARY PUBLIC for Idaho
Residing at Hammett, Idaho
My commission expires: 10-18-2023

STATE OF IDAHO)
) ss.
County of Elmore)

On the 9 day of February, 2018, before me, Debra Marceau, a Notary Public in and for said state, personally appeared FRANKLIN L. CORBUS, Commissioner of **Elmore County**, a political subdivision of the State of Idaho, the county that executed the foregoing instrument, who duly acknowledged to me that such county executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Debra Marceau
NOTARY PUBLIC for Idaho
Residing at Hammett Idaho
My commission expires: 10-18-2023

STATE OF IDAHO)
) ss.
County of Elmore)

On the 9 day of February, 2018, before me, Debra Marceau a Notary Public in and for said state, personally appeared BARBARA STEELE, the Clerk of **Elmore County**, a political subdivision of the State of Idaho, the county that executed the foregoing instrument, who duly acknowledged to me that such county executed the same.

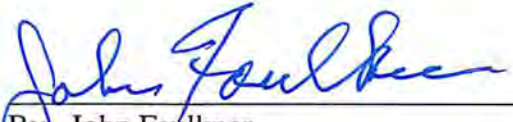
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Debra Marceau
NOTARY PUBLIC for Idaho
Residing at Hammett, Idaho
My commission expires: 10-18-2023

IN WITNESS WHEREOF, this Agreement has been executed by the Parties hereto on the day and year first above written.

CAT CREEK ENERGY, LLC
an Idaho limited liability company

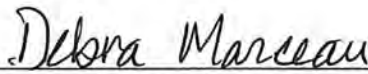

By: John Faulkner
Its: Manager

STATE OF IDAHO)
) ss.
County of Elmore)

On this 9 day of February, in the year 2018, before me, a Notary Public in and for the State of Idaho, personally appeared John Faulkner, known or identified to me to be the Manager of the limited liability company that executed the instrument or the person who executed the instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.




NOTARY PUBLIC for Idaho
Residing at Hammett, Idaho
My commission expires: 10-18-2023

Landowner:

The undersigned, each as an owner of the Land, hereby acknowledges and agrees to the terms of this Agreement and in order to receive the benefits of this Agreement, agrees to assume all obligations of Developer under this Agreement on any Transfer and Assignment.

Sawtooth Grazing Association, Inc.
An Idaho corporation


By: _____
Name: JOHN FAULKNER
Title: PRESIDENT

Wood Creek Ranch, LLC
An Idaho limited liability company


By: _____
Name: JOHN FAULKNER
Title: MANAGER

STATE OF IDAHO)
) ss.
County of Elmore)

On this 9 day of February, in the year 2018, before me, a Notary Public in and for the State of Idaho, personally appeared John Faulkner, known or identified to me to be the President of the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



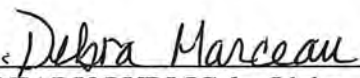

NOTARY PUBLIC for Idaho
Residing at Hammett, Idaho
My commission expires: 10-18-2023

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

Tract I:

Township 1 South, Range 10 East, Boise Meridian, Elmore County, Idaho

Section 13: S1/2SW1/4

Section 14: S1/2SE1/2

Section 15: S1/2SE1/4, SE1/4SW1/4

Section 21: SW1/4SW1/4, E1/2NE1/4, NE1/4SE1/4 and SE1/4SE1/4

SAVE AND EXCEPT

Commencing at the SE Corner of Section 21 and running West 400 feet more or less to the Point of Beginning; running

thence N65°43'10" E 190 feet more or less, running

thence S 15°50'38" W 80 feet more or less, running

thence West 150 feet more or less to the Point of Beginning.

Section 22: All lying North of Highway 68

SAVE AND EXCEPT

Louse Creek Road running through Section 22

Section 23: N1/2, S1/2 lying North of Highway 68

Section 24: NW1/4, N1/2SW1/4

Section 28: NW1/4 lying North of Highway 68,
SW1/4 lying South of Highway 68,
SE1/4NW1/4 lying South of Highway 68, and
NE1/4 lying North of Highway 68

SAVE AND EXCEPT

A parcel of land being a portion of the Northeast 1/4 of the Northeast 1/4 of Section 28, Township 1 South, Range 10 East, B.M., Elmore County, Idaho:

Commencing at a found brass cap marked G.L.O. 1938, monumenting the East 1/4 corner of said Section 28;

thence along the Easterly boundary of said Section 28, North 00°36'26" West 2,433.62 feet to a point on the centerline of State Highway 20, said point being the beginning of a non-tangent curve, concave to the Southeast

and

having a radius of 5,729.58 feet, to which point a radial line bears North 21°04'18" West;

thence leaving said Easterly boundary, Southwesterly along said Centerline and arc of said curve 620.60 feet, through a central angle of 06°12' 22", having a chord bearing and distance of South 65°49'31" West 620.29 feet; thence leaving said center line, North 27°16'40" West 75.00 feet to a point on the Northerly right-of-way of said Highway 20, the REAL POINT OF BEGINNING;

thence leaving said Northerly right of way North 27°16'40" West 271.01 feet;

thence North 65°43'10" East 421.93 feet more or less to a point on a existing fence line;

thence East 150 feet more or less,

thence S 15°50'38" W 264.15 feet more or less;

thence leaving said fence line, Southwesterly along said right of way and the arc of said curve 376.11 feet through a central angle of 03°42'45", having a chord bearing and a distance of South 64°34'43" West 376.05 feet to the REAL POINT OF BEGINNING.

Subject To: All existing road right of way and easements of record or appearing on the above-described parcel of land.

Section 29: E1/2NW1/4, NE1/4, SW1/4 lying North of Highway 68,
W1/2SE1/4 lying North and South of Highway 68, and the
E1/2SE1/4 lying South of Highway 68

Section 30: S1/2NE1/4, N1/2SE1/4, and SE1/4SW1/4, S1/2SE1/4

SAVE AND EXCEPT

A parcel of land located in the North half of Section 31 and the South half of Section 30, Township 1 South, Range 10 East, Boise Meridian, Elmore County, Idaho, and more particularly described as follows:

Beginning at the Northeast corner of said Section 31, from which the North Quarter corner of said Section 31 bears

South 89°31'09" West 2,632.14 feet;

thence South 00°25'47" East along the East boundary of said Section 31 for a distance of 281.74 feet;

thence South 89°31'09" West parallel with the North boundary of said Section 31 for a distance of 1,383.62 feet;

thence South 00°19'47" East parallel with the West boundary of the NE1/4 of said Section 31 for a distance of 750.00 feet;

thence South 89°31'09" West parallel with the North boundary of the NE1/4 of said Section 31 for a distance of 1,249 .01 feet to a point on the West boundary of the NE 1/4 of said Section 31;

thence South 89°55'49" West parallel with the North boundary of the NW1/4 of said Section 31 for a distance of 1,308.70 feet to a point on the West boundary of the NE1/4NW1/4 of said Section 31;

thence North 00°05'27" West along the West boundary of the NE1/4NW1/4 of said Section 31 for a distance of 427.50 feet to a point on the southerly Right of Way of US-20, Highway project Number FHP-47A;

thence the following courses and distances along the southerly right of way of US Highway Number 20, Highway project number FHP-47A;

North 68°30'16" East for a distance of 86.29 feet to a point of spiral, Station 593+43.59, 75.00 feet right of said Highway project;

Northeasterly along a spiral curve left parallel to and 75.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 65°16'55" East for a distance of 367.86 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 597+00.00;

South 86°57'58" East for a distance of 141.25 feet to a point of curvature and being 160.00 feet perpendicular to the centerline of US-20, Station 598+00.00;

Northeasterly 233.31 feet along a non-tangent curve left having a radius of 1,114.93 feet, delta angle of 11°59'22", and a long chord bearing North 47°06'10" East for a distance of 232.88 feet to a point being 160.00 feet perpendicular to the centerline of US-20, Station 600+00.00;

North 01°00'56" East for a distance of 140.75 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 601+00.00;

Northeasterly 215.62 feet along a non-tangent curve left having a radius of 1,029.93 feet, delta angle of 11°59'43",

and a long chord bearing North 29°06'35" East for a distance of 215.23 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 603+00.26;

Northeasterly along a spiral curve left parallel to and 75.00 feet distant South easterly from the centerline of US-20

having a long chord bearing North 19°08'41" East for a distance of 208.28 feet to a point being 75.00 feet

perpendicular to the centerline of US-20, Station 605+00.26;

North 17°13'45" East for a distance of 31.99 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 605+32.26;

Northeasterly along a spiral curve right parallel to an 75.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 18°55'19" East for a distance of 156.23 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 607+00.00;

North 52°48'40" East for a distance of 100.76 feet to a point being 120.00 feet perpendicular to the centerline of US-

20, Station 608+00.00;

Northeasterly 391.23 feet along a non-tangent curve right having a radius of 596.20 feet delta angle of 37°35'53", and a long chord bearing North 49°17'46" East for a distance of 384.25 feet to a point being 120.00 feet perpendicular to the center line of US-20, Station 612+69.70;

Northeasterly along a spiral curve right parallel to and 120.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 77°51'29" East for a distance of 296.18 feet to a point being 120.00 feet perpendicular to the centerline of US-20, Station 616+00.00;

North 72°51'47" East for a distance of 232.06 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 619+00.00;

North 84°05'42" East for a distance of 261.31 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 621+61.37;

Northeasterly along a spiral curve right parallel to and 75.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 85°34'48" East for a distance of 294.03 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 624+61.37;

Southeasterly 767.52 feet along a curve right having a radius of 1,834.86 feet, delta angle of 23°58'00", and a long chord bearing South 79°25'18" East for a distance of 761.93 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 632+57.97;

Southeasterly along a spiral curve right parallel to and 75.00 feet distant Southwesterly from the centerline of US-20

having a long chord bearing South 64°25'24" East for a distance of 294.03 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 635+57.97 Ahead-Station 635+60.26 Back;

South 62°56'18" East for a distance of 124.25 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 636+83.07;

Southeasterly along a spiral curve left parallel to and 75.00 feet distant Southwesterly from the centerline of US-20

having a long chord bearing South 62°56'34" East for a distance of 18.13 feet to a point being 75.00 feet perpendicular to the center line of US-20, Station 637+00.00;

South 71°32'51" East for a distance of 101.40 feet to a point being 60.00 feet perpendicular to the centerline of US-20, Station 638+00.00;

Southeasterly along a spiral curve left parallel to and 60.00 feet distant Southwesterly from the centerline of US-20

having a long chord bearing South 64°19'24" East for a distance of 284.73 feet to a point being 60.00 feet perpendicular to the centerline of US-20, Station 640+83.07;

Southeasterly 44.64 feet along a curve left having a radius of 3,879.72 feet, delta angle of 00°39'33", and a long chord bearing South 66°16'05" East for a distance of 44.64 feet to a point on the East boundary of the SE1/4 of Section 30 and being 60.00 feet perpendicular to the centerline of US-20;

thence South 00°27'03" East along the East boundary of said Section 30 for a distance of 399.14 feet to the Southeast corner of said Section 30 and being the POINT OF BEGINNING.

Section 31: EI/2NW1/4 and NE1/4, N1/2SE1/4 and
EI/2SW 1/4 lying North of County Road

SAVE AND EXCEPT

A parcel of land located in the North half of Section 31 and the South half of Section 30, Township 1 South, Range 10 East, Boise Meridian, Elmore County, Idaho, and more particularly described as follows:

Beginning at the Northeast corner of said Section 31, from which the North Quarter corner of said Section 31 bears South 89°31'09" West 2,632.14 feet;

thence South 00°25'47" East along the East boundary of said Section 31 for a distance of 281.74 feet;

thence South 89°31'09" West parallel with the North boundary of said Section 31 for a distance of 1,383.62 feet;

thence South 00°19'47" East parallel with the West boundary of the NE1/4 of said Section 31 for a distance of 750.00 feet;

thence South 89°31'09" West parallel with the North boundary of the NE1/4 of said Section 31 for a distance of 1,249.01 feet to a point on the West boundary of the NE1/4 of said Section 31;

thence South 89°55'49" West parallel with the North boundary of the NW1/4 of said Section 31 for a distance of 1,308.70 feet to a point on the West boundary of the NE1/4NW1/4 of said Section 31;

thence North 00°05'27" West along the West boundary of the NE1/4NW1/4 of said Section 31 for a distance of 427.50 feet to a point on the southerly Right of Way of US-20, Highway project Number FHP-47A;

thence the following courses and distances along the southerly right of way of US Highway Number 20, Highway project number FHP-47A;

North 68°30'16" East for a distance of 86.29 feet to a point of spiral, Station 593+43.59, 75.00 feet right of said Highway project;

Northeasterly along a spiral curve left parallel to and 75.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 65°16'55" East for a distance of 367.86 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 597+00.00;

South 86°57'58" East for a distance of 141.25 feet to a point of curvature and being 160.00 feet perpendicular to the centerline of US-20, Station 598+00.00;

Northeasterly 233.31 feet along a non-tangent curve left having a radius of 1,114.93 feet, delta angle of 11°59'22", and a long chord bearing North 47°06'10" East for a distance of 232.88 feet to a point being 160.00 feet perpendicular to the centerline of US-20, Station 600+00.00;

North 01°00'56" East for a distance of 140.75 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 601+00.00;

Northeasterly 215.62 feet along a non-tangent curve left having a radius of 1,029.93 feet, delta angle of 11°59'43", and a long chord bearing North 29°06'35" East for a distance of 215.23 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 603+00.26;

Northeasterly along a spiral curve left parallel to and 75.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 19°08'41" East for a distance of 208.28 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 605+00.26;

North 17°13'45" East for a distance of 31.99 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 605+32.26;

Northeasterly along a spiral curve right parallel to a 75.00 feet distant Southeasterly from the centerline of US- 20

having a long chord bearing North 18°55'19" East for a distance of 156.23 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 607+00.00;

North 52°48'40" East for a distance of 100.76 feet to a point being 120.00 feet perpendicular to the centerline of US-20, Station 608+00.00;

Northeasterly 391.23 feet along a non-tangent curve right having a radius of 596.20 feet delta angle of 37°35'53", and a long chord bearing North 49°17'46" East for a distance of 384.25 feet to a point being 120.00 feet perpendicular to the centerline of US-20, Station 612+69.70;

Northeasterly along a spiral curve right parallel to and 120.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 77°51'29" East for a distance of 296.18 feet to a point being 120.00 feet perpendicular to the centerline of US-20, Station 616+00.00;

North 72°51'47" East for a distance of 232.06 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 619+00.00;

North 84°05'42" East for a distance of 261.31 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 621+61.37;

Northeasterly along a spiral curve right parallel to and 75.00 feet distant Southeasterly from the centerline of US-20

having a long chord bearing North 85°34'48" East for a distance of 294.03 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 624+61.37;

Southeasterly 767.52 feet along a curve right having a radius of 1,834.86 feet, delta angle of 23°58'00", and a long chord bearing South 79°25'18" East for a distance of 761.93 feet to a point being 75.00 feet perpendicular to the centerline of US-20. Station 632+57.97;

Southeasterly along a spiral curve right parallel to and 75.00 feet distant Southwesterly from the centerline of US-20

having a long chord bearing South 64°25'24" East for a distance of 294.03 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 635+57.97 Ahead-Station 635+60.26 Back;

South 62°56'18" East for a distance of 124.25 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 636+83.07;

Southeasterly along a spiral curve left parallel to and 75.00 feet distant Southwesterly from the centerline of US-20

having a long chord bearing South 62°56'34" East for a distance of 18.13 feet to a point being 75.00 feet perpendicular to the centerline of US-20, Station 637+00.00;

South 71°32'51" East for a distance of 101.40 feet to a point being 60.00 feet perpendicular to the centerline of US-20, Station 638+00.00;

Southeasterly along a spiral curve left parallel to and 60.00 feet distant Southwesterly from the centerline of US-20
having a long chord bearing South 64°19'24" East for a distance of 284.73 feet to a point being 60.00 feet perpendicular to the centerline of US-20, Station 640+83.07;
Southeasterly 44.64 feet along a curve left having a radius of 3,879.72 feet, delta angle of 00°39'33", and a long chord bearing South 66°16'05" East for a distance of 44.64 feet to a point on the East boundary of the SE1/4 of Section 30 and being 60.00 feet perpendicular to the centerline of US-20;
thence South 00°27'03" East along the East boundary of said Section 30 for a distance of 399.14 feet to the Southeast corner of said Section 30 and being the POINT OF BEGINNING.

Section 32: E1/2, NW1/4, N1/2SW1/4

Section 33: W1/2

Tract II: Wood Creek Ranch, LLC

Township 1 South, Range 9 East, Boise Meridian, Elmore County, Idaho

Section 1: U.S. Government Lots 2, 3 and 4,
South 1/2 North 1/2,
South 1/2
Together with vacated road which attached to said land by operation of law, as disclosed in Resolution No. 01(14)
Recorded: July 14, 2014, as Instrument No. 442877, or Official Records.

Section 2: U.S. Government Lots 1, 2, 3 and 4,
South 1/2 North 1/2,
South 1/2

Section 3: South 1/2 Southeast 1/4

Section 10: North 1/2 North 1/2

Section 11: ALL

Township 1 North, Range 9 East, Boise Meridian, Elmore County, Idaho

Section 25: East 1/2 East 1/2 Northeast 1/4 Northeast 1/4
South 1/2 Southeast 1/4 Northeast 1/4
Southwest 1/4 Northeast 1/4
Southeast 1/4 Northwest 1/4
South 1/2, SAVE AND EXCEPT Southwest 1/4 Southwest 1/4

Section 26: Northwest 1/4 Southwest 1/4
South 1/2 Northeast 1/4 Southwest 1/4
South 1/2 South 1/2

Section 27: North 1/2 North 1/2 Southeast 1/4

Section 35: ALL

Section 36: ALL

EXHIBIT B
TAX PARCEL NUMBERS BY CUP

Solar	Parcel Number	Acreage	Notes
	RP01S10E230025	509.24	
	RP01S10E220020	587.61	
	RP01S10E149010	160.00	
	RP01S10E159010	120.00	
	RP01S10E136610	80.00	
	RP01S10E242410	240.00	
Wind			
	RP01S10E210040	519.83	
	RP01S10E220020	587.61	Only that portion to the west of Elmore County Right of Way
	RP01S10E280085	347.09	
	RP01S10E290020	504.14	
	RP01S10E301840	231.02	
	RP01S10E310500	284.62	
	RP01S10E320020	560.00	
	RP01S10E332410	320.00	
Transmission			
	RP01S09E100010	160.00	
	RP01S09E039010	80.00	
	RP01S09E020010	577.00	
	RP01N09E350010	640.00	
	RP01N09E265410	220.00	
	RP01N09E277210	40.00	
Hydro			
	RP01N09E277210	40.00	
	RP01N09E265410	220.00	
	RP01N09E251210	380.00	
	RP01N09E360010	640.00	
	RP01N09E350010	640.00	
	RP01S09E020010	577.00	
	RP01S09E010610	551.58	Official Site Address: 10888 NE WOOD CREEK RD, 83647
	RP01S09E110040	640.00	
Substation			
	RP01S09E020010	577.00	
	RP01S09E110040	640.00	
	RP01N09E265410	220.00	Alt.

EXHIBIT C
MASTER SITE PLAN – REVISED 11-16-16

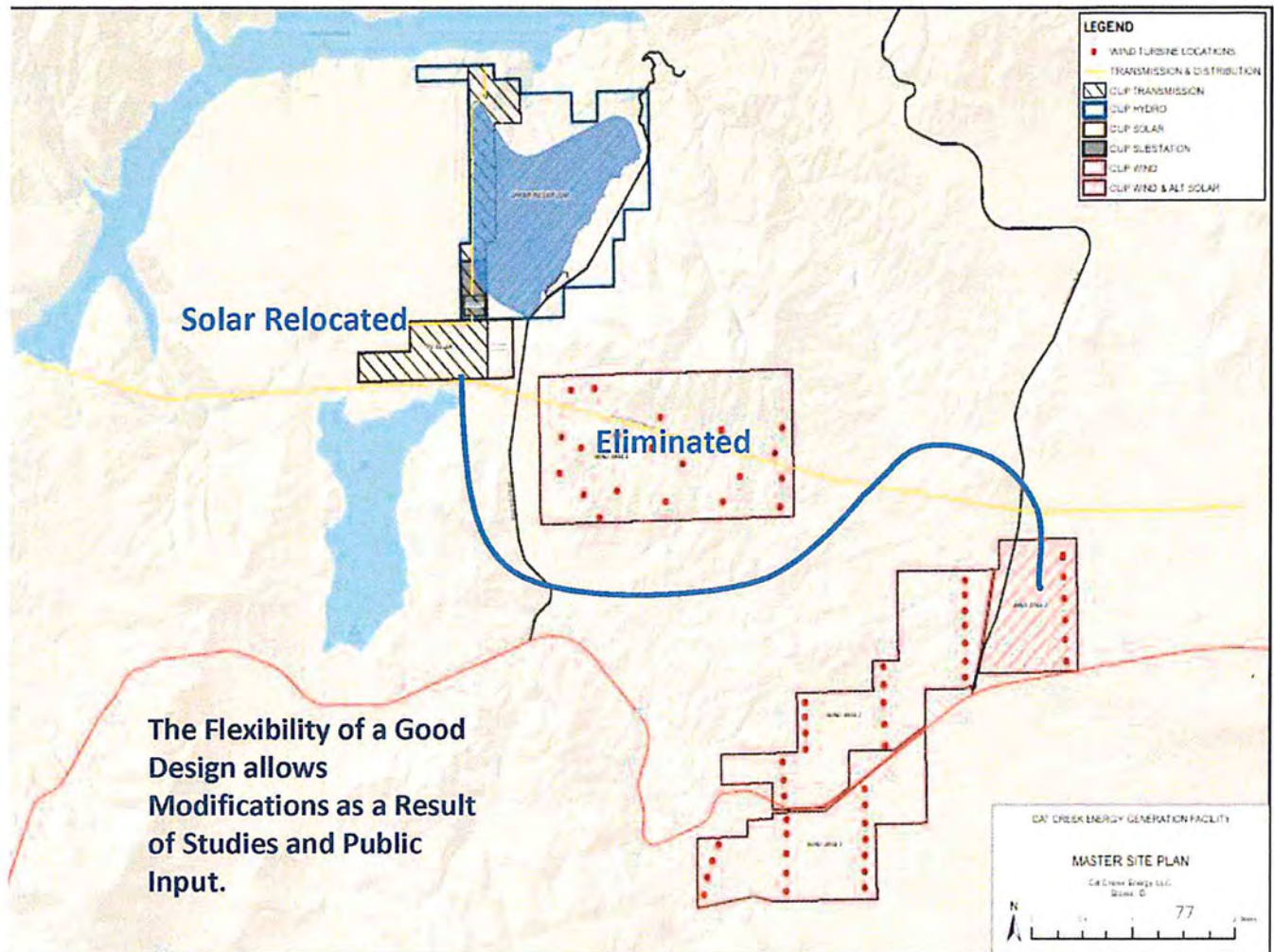


EXHIBIT C **ORIGINAL MASTER SITE PLAN WITH APPLICATION**

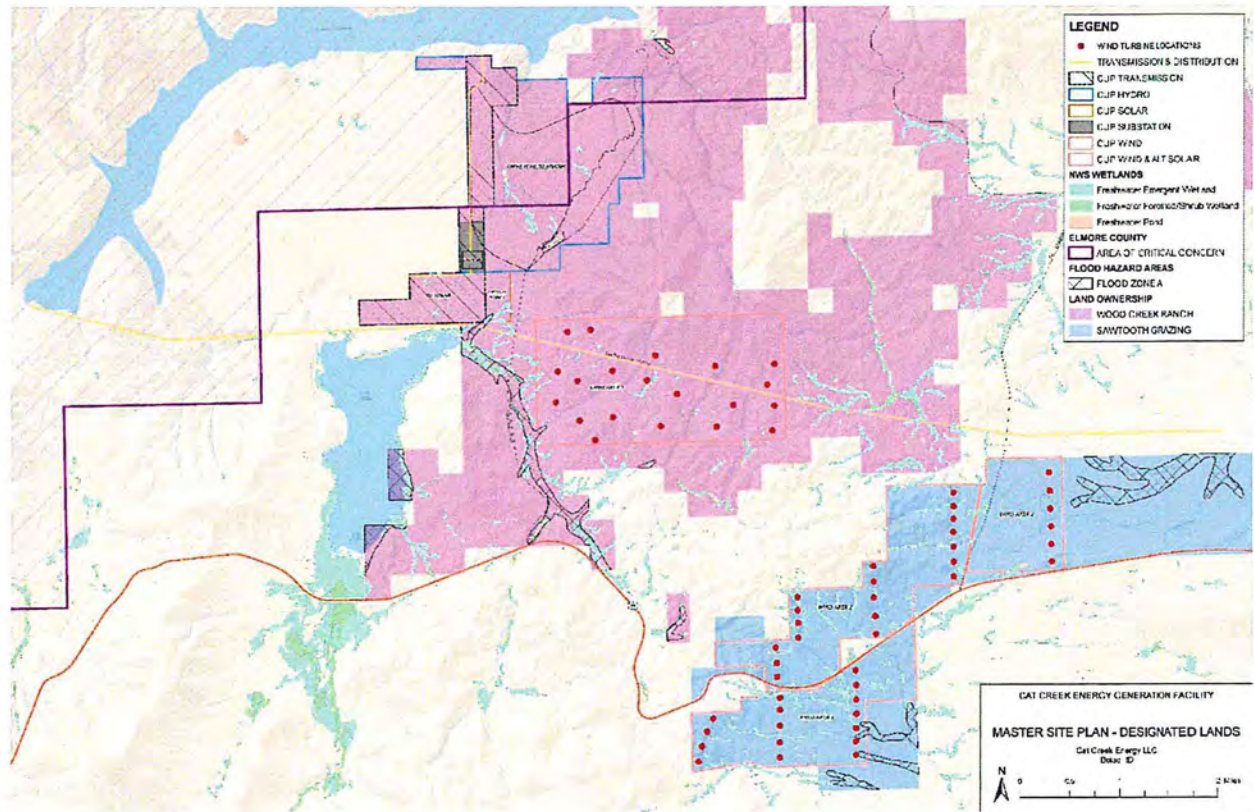
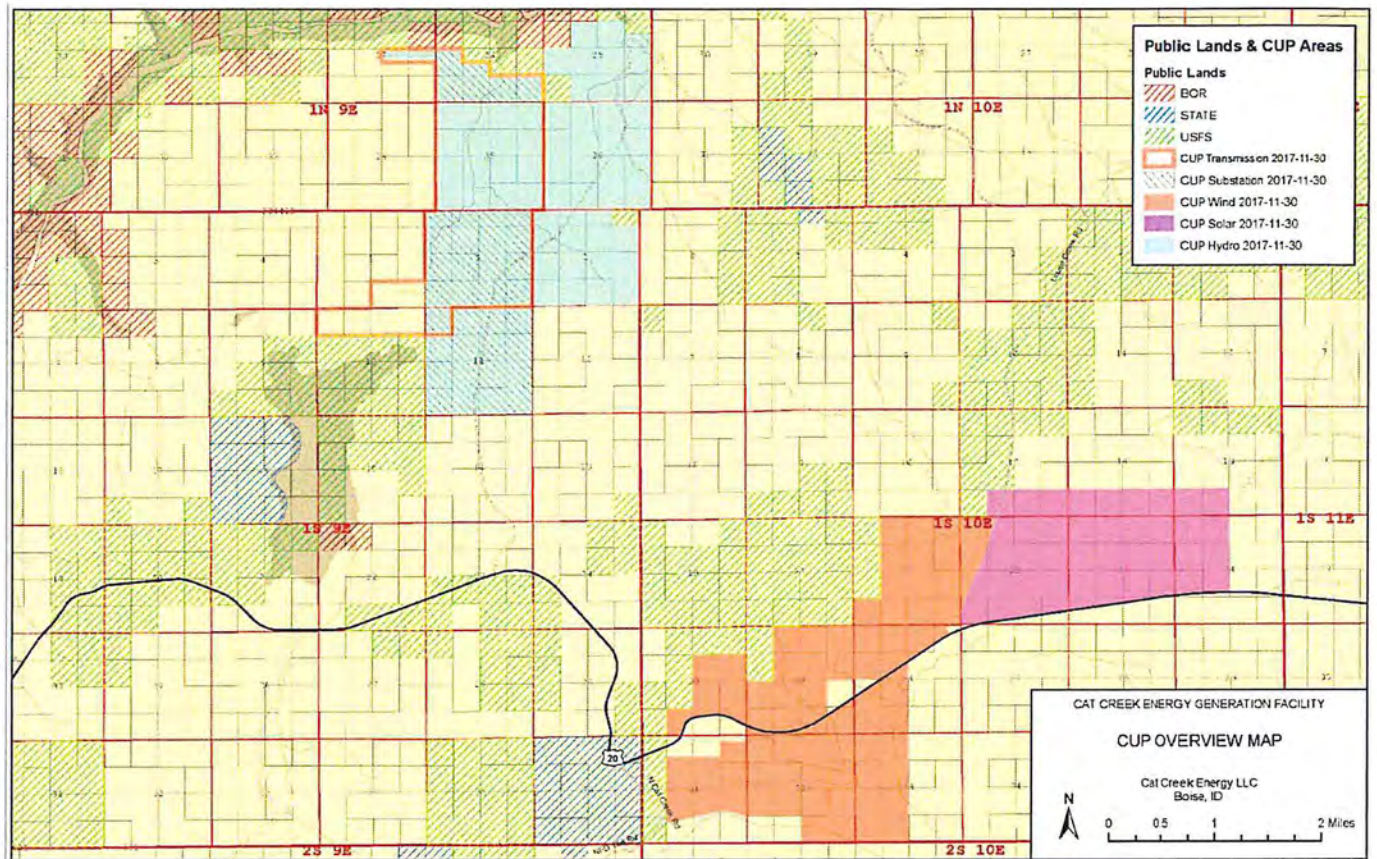


Exhibit D
Master Site Plan as of the Effective Date



The following modifications are incorporated into the Master Site Plan according to the Approval, Conditions, and this Agreement.

- 1) The Upper Reservoir commonly known as the Cat Creek Reservoir ("CCR") can be increased to a maximum size of 1,700 surface acres and 100,000 acre feet volume.
- 2) CCR can increase its depth up to ninety (90) feet maximum depth. The depth is a combination of excavation and the height of the embankment created.
- 3) The Pumped Storage Hydro ("PSH") facility may contain up to six (6) penstocks, each with a maximum diameter of sixteen (16) feet.
- 4) The PSH facility may have underground tunnels with a maximum of thirty-four (34) feet in diameter on and under the CUP site.
- 5) The PSH facility may have an underground powerhouse cavern with dimensions of one hundred (100) feet in height, one hundred twenty ("120") feet in width, and two hundred forty (240) feet in length under the CUP site.
- 6) A main electrical substation and switch station may be located anywhere in the Substation CUP as long as it is no less than 2,500 feet from any current residence.
- 7) The electrical switch station may be located alongside the electrical substation or may stand alone.
- 8) If auxiliary cooling is determined to be necessary for the PSH pump/generating units by the water quality studies, a water tower is permitted by the County as part of the equipment necessary for the successful operation of the PSH facility under any federal permitting as provided in the Zoning Ordinance.
- 9) A new wind/solar substation replaces the collector station for the wind/solar CUP site.
- 10) A transmission line replaces the distribution lines from the new wind/solar substation to the main substation or switch station.
- 11) Wind turbine towers may be located anywhere on the Wind CUP site. The maximum number of towers is thirty-nine (39). The maximum height is five hundred (500) feet. The minimum setback from any public road is 1.25 times the overall height of the wind turbine from the centerline of the wind turbine tower. The minimum setback from any existing residential dwelling shall be at least 2,500 feet.
- 12) A permanent meteorological tower can be built as necessary of any wind turbine configuration up to a height of three hundred twenty (320) feet and can be placed on any of the Land on or adjacent to the Wind CUP site.
- 13) A Doppler radar facility can be built on any of the Land as to accommodate its performance parameters.
- 14) The O&M complex site can incorporate a maximum of twenty (20) acres and can be placed on any CUP site.
- 15) One main O&M building can be built up to a maximum fifteen thousand (15,000) square feet with an approved building permit.
- 16) One equipment storage building up to five thousand (5,000) square feet can be built within the footprint of the overall O&M complex site with a maximum height of thirty-five (35) feet.
- 17) For each CUP site, a storage building or shipping containers with a total footprint of no greater than twenty-four hundred (2,400) square feet are permitted for housing spare parts, consumables, and vehicles with an approved building permit.

- 18) A cellular and/or microwave communication tower up to two hundred (200) feet in height may be placed on any of the Property on the CUP sites subject to any federal requirements and state permitting.
- 19) Transmission level electrical towers are engineered to accommodate the topography and electrical conductor size on any CUP site.
- 20) Temporary housing can be built on the PSH CUP Site to accommodate the construction cycle as provided in 6-8-206 with an approved Administrative Decision and an approved building permit.
- 21) One permanent Caretaker/Security dwelling unit can be constructed within the PSH or Substation CUP boundaries as provided in 6-8-89 with an approved building permit.
- 22) One duplex dwelling unit can be constructed within the PSH or Substation CUP boundaries as provided in 6-8-93 with a Conditional Use Permit and an approved building permit.
- 23) Temporary housing to accommodate construction personnel is allowed during the construction activity period under 6-8-206 and must be removed within thirty (30) days after commercial operations of the final power generator facility commences.
- 24) Rock crushing is allowed during the construction period as provided in 6-8-164 and an approved Administrative Decision for a temporary use.
- 25) Concrete batch plants are allowed during the construction period as provided in 6-8-164 and an approved Administrative Decision for a temporary use.
- 26) For fire safety, on site equipment shall include a tender, a pumper, and all necessary equipment for fire suppression.

The Developer will comply with the requirements for Building Permits in the Ordinance, including the Building Code, under the Agricultural Zoning designation, and FAA Regulations.

Exhibit G

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

SBAR RANCH, an Idaho limited liability
company,

Petitioner,

vs.

ELMORE COUNTY, IDAHO, a political
subdivision of the State of Idaho,

Respondent.

CAT CREEK ENERGY, LLC, an Idaho
limited liability company,

Intervenor.

Case No. CV20-18-00525

MEMORANDUM DECISION AND
ORDER ON PETITION FOR JUDICIAL
REVIEW

This case is a Petition for Judicial Review from the Board of Commissioners of Elmore County (“County” or “Board”) decision to allow Cat Creek Energy, LLC (“Cat Creek”) to begin development of an alternative energy generation project in Elmore County (“Project”). For the reasons explained in more detail below, the Petition is denied as the Court finds that while the Petitioner, SBar Ranch (“SBar”), has standing to challenge part of the County’s decisions, the County did not commit reversible error and SBar’s substantial rights have not been prejudiced.

I. FACTUAL AND PROCEDURAL BACKGROUND

The administrative record (“Record”) is voluminous in this case. The Court will cite to specific pages in the Record with an R. followed by the Bates stamp number of the applicable page or pages cited.

About 30 miles northeast of Mountain Home is Anderson Ranch Reservoir. A few miles south of the reservoir lies SBar Ranch, a 2,890 acre property purchased by Chris Stephens in July

2015. **R.10075**. (“SBar Ranch acquired parcels RP02S10E046000A, RP02S10E047040A, and RP02S10E056010A (‘S Bar Ranch Property’) on or about July 31, 2015”). Mr. Stephens purchased the property for recreational use. **R.11379**. Bordering the reservoir to the east is 23,000 acres of land owned by John Faulkner or entities owned by Mr. Faulkner **R.7296**.

In late 2014, Cat Creek Energy, LLC (“Cat Creek”) began preliminary discussions to develop a large-scale alternative energy project involving wind, solar, and hydroelectric power on Mr. Faulkner’s land. It held a series of neighborhood meetings to talk to the community about the planned Project, and to determine what support or opposition there may be to it. *See* **R.10107**. (Letter sent to Half Moon, LLC, owner of property purchased by SBar in 2015, on December 14, 2014 inviting them to a neighborhood meeting involving the Project). In February 2015, Cat Creek applied for five Conditional Use Permits (“CUPs”) in order to start the development process on the Project. **R.1** (CUP 2015-03 Transmission Lines Application); **R.105** (CUP-2015-04 Hydro Pump Storage Application); **R.211** (CUP-2015-05 PV Solar Application); **R.316** (CUP-2015-06 Wind Power Application); **R.420** (CUP-2015-07 Substation Application). After supplementation from Cat Creek regarding certain deficiencies, those applications were deemed complete in March 2016 and sent to the Elmore County Planning and Zoning Commission (“P&Z”).

The P&Z set a hearing for June 2016 on the Project. SBar did not receive notice of this hearing as the County was using an out-of-date mailing list that listed SBar’s predecessor-in-interest, Half Moon, LLC, on it. *See* **R.12506** (Mailing list used by P&Z). After the hearing, P&Z conducted deliberations and issued a Findings of Fact, Conclusions of Law, and Order denying the CUP applications. **R.12730-821** (Transcript of June 15, 2016 P&Z hearing), **R.7275-92** (Minutes of P&Z deliberations), **R.7293-311** (P&Z Findings of Fact, Conclusions of Law,

and Order). On August 26, 2016, Cat Creek appealed that decision to the County. **R.6113-32** (Appeals for each CUP denial).

The Board set a public hearing on Cat Creek's appeal for November 16 and 17, 2016. **R.826**. SBar was sent notice, but did not attend the hearing. **R.12467** (Mailing list showing SBar was sent notice), **R.8061-66** (Sign-in sheets for the meeting showing neither SBar nor any representative in attendance). During this hearing, Cat Creek submitted a Master Site plan that was different from the plan included with the original CUP applications. **R.7917-8005**. During this hearing, Cat Creek and the Board agreed that water was an issue in Elmore County and that Cat Creek would be willing to partner with the County on water delivery as part of the Project. **R.8116-17**. After the hearing was closed, the Board deliberated on Cat Creek's Appeal, then continued those deliberations into January 2017. **R.8265**. The following week, the Board issued a notice to reopen the record on Cat Creek's appeal due to ex-parte communications received by one of the Commissioners. **R.8208-09**. This hearing was held on December 16, 2016. **R.12376** (Hearing Minutes). The County continued the deliberations in January and February 2017. **R.13785-93** (Transcript of January 13, 2017 deliberations), **R.13794-810** (Transcript of February 10, 2017 deliberations). On February 10, 2017, the Board issued its written Findings of Fact, Conclusions of Law, and Order approving Cat Creek's CUP applications and approving the Project. **R.8261-314**. However, as part of this approval, the County placed a number of conditions on the Project, including a requirement that gave Cat Creek a year to draft a "Development Agreement"¹ detailing how Cat Creek has satisfied certain of the conditions, or how it would in the future. **R.8308-14**. No requests for reconsideration of the February 10, 2017

¹ The term "Development Agreement" used in that document has been both misleading and confusing for the Court and other parties involved in this litigation as it is the same term used for a specific zoning agreement in Idaho Code section 67-6511A. Because the conditions ask for what should be viewed as amendments to the five CUP Applications, the Court will refer to that agreement as the CUPs Amendment.

decision were filed by any party. No petition for judicial review was filed by any party until SBar filed its Petition on May 1, 2018.

Cat Creek spent the majority of 2017 negotiating the terms of the CUPs Amendment with the County. The Board published a notice that it would be considering the CUPs Amendment during a hearing on October 20, 2017. **R.10901**. During this hearing, Cat Creek asked for that discussion to be extended to a later hearing. **R.12822-38**. That hearing was set for December 22, 2017 and notice of that hearing was sent out in early December. **R.8797** (Notice of December 22, 2017 hearing). That notice stated the Record for the hearing would be publicly available. *Id.* Cat Creek provided a draft CUPs Amendment, and then in early December provided an updated draft to the County that incorporated changes made during November 2017 public hearings. **R.8800-57**.

During that December hearing, it became apparent that there were substantial changes to the Project, including increasing the size of the proposed water reservoir from 50,000 to 100,000 acre feet. **R.12851-52**. A third Master Site Plan was also presented. **R.12851-52**. Due to the numerous proposed changes, and the disagreements that took place about those changes, the Board decided to appoint Commissioner Hofer as its representative for a working group that would be formed to finalize the draft of the CUPs Amendment. **R.12962-75**. The hearing was then continued to January 26, 2018. **R.12870-71**. Commissioner Hofer then began to attend the working group meetings, ultimately spending over 20 hours in discussions on the CUPs Amendment. **R.12981-85**.

During this time, SBar began to discuss possible options with its attorney, Rick Goodson. **Pet.Reply.Br., Exhibit 1, pg.6**. Mr. Goodson then reviewed the Record and submitted comments on the CUPs Amendment to the County in advance of the January 26, 2018 hearing. **R.9767-69**. Those comments were then referenced by Buzz Grant, Elmore County Attorney,

during the hearing. **R.13038-39**. During this hearing, counsel for Cat Creek acknowledged that they were still unaware of what the locations and heights of the Wind Turbines would end up being. **R.13004-06**. The hearing was then continued to February 9, 2018. **R.13153-58**.

During the hearing on February 9, 2018, the Board and Cat Creek could not agree on the language for the delivery of water to Elmore County from the Project, and another revised draft CUPs Amendment was presented by Cat Creek. **R.12896-97**. This draft eliminated terms for water storage and delivery of the County's potential water rights via Cat Creek's project. This revised version was adopted with the understanding that the working group would continue to work on a separate agreement for the water delivery section to try and create a manageable plan for the County's future needs and Cat Creek. **R.13219-20**. It does not appear that copies of the revised draft submitted by Cat Creek's attorney were available to the public prior to the hearing. However, the public was advised of the nature of the differences during the hearing between the draft publicly available prior to the public hearing and the revised draft adopted by the Board. No written Findings of Fact or Conclusions of Law were issued at the end of this meeting; however, an ordinance and resolution were adopted by the County. **R.9974** (Ordinance 2018-02), **R.9977** (Resolution 653-18).

One week after the adoption of that ordinance and resolution, SBar submitted its First Request for Reconsideration. **R.9905-79**. The Board set a hearing date of March 23, 2018 for this reconsideration hearing. **R.9980**. On March 2, 2018, the Board deliberated on supplemental findings to the CUPs Amendment, then continued those deliberations to March 16, 2018. **R.14625-35** (Minutes from March 2, 2018 hearing), **R.14636-53** (Transcript of March 2, 2018 hearing). At the March 16 meeting, the Board issued its written Findings of Fact, Conclusions of Law, and Order based on those deliberations, along with the CUPs Amendment, resolution, and ordinance adopted on February 9, 2018. **R.9993-10008** (March 16, 2018 Findings of Fact,

Conclusions of Law, and Order), **R.14654-56** (Board minutes from March 16, 2018 hearing), **R.14657** (Transcript of March 16, 2018 hearing).

On March 23, 2018, the Board held a hearing on SBar's First Request for Reconsideration. **R. 13227-305**. During that hearing, the Board did not allow SBar to introduce anything related to the March 16 Findings of Fact, Conclusions of Law, and Order. *Id.* The Board then set deliberations on SBar's First Request for Reconsideration for April 6, 2018. *Id.* Three days later, on March 26, 2018, SBar submitted its Second Request for Reconsideration based on the Board's written Findings of Fact, Conclusions of Law, and Order from March 16. **R. 10173- 241**. The Board set a hearing for that Second Request for Reconsideration for May 11, 2018. **R.11748**. On April 6, 2018, the County deliberated on SBar's First Request for Reconsideration and denied it. **R.10243-60**.

At the hearing on May 11, 2018, the Board discussed SBar's Second Request for Reconsideration and heard public comments on what members of the community felt were inconsistencies in the Board's decision on the CUPs Amendment. **R.13316-69**. The Board deliberated the following week and determined that there were twenty topics that needed to be discussed in more depth as a result of SBar's Second Request for Reconsideration. **R.13370-86**. The Board issued written Findings of Fact, Conclusions of Law and Order on the Second Request for Reconsideration on May 18, 2018. **R.11030-11043**. The Board stated it would hold a rehearing on the CUPs Amendment which was set for July 26, 2018. *Id.* Despite the Board's decision to hold a rehearing on the CUPs Amendment, SBar filed its first Petition for Judicial Review on May 1, 2018, based on the Board's denial of its First Request for Reconsideration. It then filed a First Amended Petition on June 13, 2018².

² SBar did not file leave to amend, but neither Cat Creek or the County objected to the First Amended Petition.

On July 26, 2018, the rehearing on the twenty topics related to the CUPs Amendment was held. **R.11810-51**. SBar submitted a Notice of Objections to the rehearing. **R.11281-309**. During the hearing, both Mr. Stephens and Merlyn Clark testified on behalf of SBar. **R.11650-52**. On September 7, 2018, the County issued its Findings of Fact, Conclusions of Law, and Order from the July 26, 2018 rehearing. **R.11868-907**. Four days later, on September 11, 2018, SBar submitted its Third Request for Reconsideration, asking the Board to reconsider its decision from the July 26 rehearing. **R.11981-89**. The Board denied that request without a hearing on September 21, 2018. **R. 12005-09**.

In response to SBar's Petition for Judicial Review, on June 19, 2018, Cat Creek filed a Motion to Dismiss Part of Count I of SBar's Petition for Judicial Review which asks the Court to dismiss all of the allegations challenging approval of the Project in February 2017 as time barred and attempting to appeal denials of request for reconsideration³. Cat Creek also argued SBar only has standing to challenge the CUPs Amendment related to the wind turbines CUPs, CUP-2015-06. SBar's lack of notice for the P&Z hearings. SBar filed a Response to that Motion on July 16, 2018, and Cat Creek filed a Motion to Dismiss SBar's Response as untimely on July 17, 2018. A hearing on Cat Creek's two motions was held on September 18, 2018. The Court denied the Motion to Strike the untimely response and took the Motion to Dismiss under advisement. The Court later orally granted Cat Creek's and the County's motions to dismiss the claims related to the Board's original approval of the Project in February 2017. SBar conceded its 42 U.S.C. § 1983 claim was not properly before the Court in a petition for judicial review and that claim was dismissed without prejudice.

On October 10, 2018, SBar filed a Motion asking leave to file a Second Amended Petition that would include the County's actions from the time of the filing of First Amended

³ SBar conceded denials of Request for Reconsideration are not appealable and the Petition for Judicial Review captures all of SBar's objections to the land use proceedings.

Petition through the Board's denial of its Third Request for Reconsideration. SBar, with leave of the Court, submitted its Second Amended Petition for Judicial Review on February 11, 2019.

When the County gave SBar Notice in mid-November that it would be holding a public hearing regarding a proposed amendment to the CUPs Amendment on December 14, 2018, SBar submitted objections to the County regarding that hearing, then submitted a Motion for Preliminary injunction on December 11, 2018. SBar did not request a hearing on the motion prior to the December 14, 2018 public hearing. The Court heard that Motion on February 19, 2019. For reasons explained later in this Order, that motion was denied by the Court.

SBar's Opening Brief in Support of that Petition on March 7, 2019. The County and Cat Creek both filed separate Responses to SBar's Brief on April 2, 2019. SBar filed a joint reply to both the County's and Cat Creek's Responses on April 16, 2019. Oral argument on SBar's Second Amended Petition for Judicial Review was heard on May 16, 2019, at which time the Court asked the County to supply addition documentation regarding Notices for certain County meetings. The County filed those on May 20, 2019. SBar filed a Motion to Strike parts of the County's response as unresponsive on May 28, 2019 to which the County responded on May 30, 2019. The Court hereby denies SBar's Motion to Strike as it must consider the Record in its entirety and the County's response provided the Court with the information the Court was seeking by acknowledging that no written notice was provided to the public for the February 9, 2018 hearing, by showing no notice was included in the Record.

On June 28, 2019, the Court requested further documentation and briefing from the parties on the working group and actual notice give to SBar. The Court asked the parties to file simultaneous replies no later than July 12, 2019 to those questions, and all parties complied. At that time, the Court took this entire matter under advisement. This ruling follows.

II. ISSUES ON APPEAL

SBar has presented seven issues on appeal to this Court:⁴

1. Whether SBar Ranch is an affected party as provided in I.C. § 67-6521(1)(a)(1) and has standing to object to the issuance of the CUPS and the Development Agreement.
2. Whether the Board erred in finding that SBar Ranch's Requests for Reconsideration and objections to the actions were not timely filed with the Board under I.C. § 67-6535(2) and the applicable Zoning Ordinances.
3. Whether the Board's decision to approve the CUPS and Development Agreement was in violation of constitutional and statutory provisions or was based on unlawful procedure.
4. Whether the conflicts of interest of the Board and the Commissioners prevented the Board and the Commissioners from performing their duties as neutral decision-makers regarding the terms of the CUPS and the Development Agreement and violated the due process rights of SBar Ranch.
5. Whether the filing of the initial Petition for Judicial Review deprived the Board of jurisdiction to issue orders in this matter from and after the date of filing of the Petition.
6. Whether the substantial rights of SBar Ranch have been violated by the actions of the Board.
7. Whether Petitioner is entitled to an award of attorney fees and costs pursuant 10 LC. §§ 12-117 and/or 12-121.

Pet.Br., 27.

The County presents no additional issues on appeal beyond a request for an award of costs and fees under Idaho Code § 12-120(3). **Elmore County's Brief in Response to SBar Ranch Opening Brief (the "County's Reply"), 50.**

Likewise, Cat Creek presents no additional issues on appeal beyond an award of costs and attorney fees. **Intervenor Cat Creek Energy, LLC's Brief in Response to Petitioner's Opening Brief ("Cat Creek Reply"), 36.**

III. STANDARD OF REVIEW

"The Local Land Use Planning Act ("LLUPA") allows an affected person to seek judicial review of an approval or denial of a land use application, as provided for in the Idaho

⁴ These will be referred to collectively as the "Issues Presented" and each one individually as an "Issue Presented."

Administrative Procedural Act (“IDAPA”).” Idaho Code § 67–6521(1)(d); *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (citing *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003)). For purposes of LLUPA, a local agency making a land use decision is treated as a government agency under IDAPA. *Neighbors for a Healthy Gold Fork v. Valley Cty.*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007); *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

A governing board’s “planning and zoning decisions are entitled to a strong presumption of validity; this includes the board's application and interpretation of their own zoning ordinances.” *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (citing *Sanders Orchard v. Gem County*, 137 Idaho 695, 698, 52 P.3d 840, 843 (2002)); *Dry Creek Partners, LLC, v. Ada Cty. Comm'rs, ex rel. State*, 148 Idaho 11, 16–17, 217 P.3d 1282, 1287–88 (2009) “This Court defers to the Board of Commissioners' findings of fact unless the findings of fact are clearly erroneous.” *Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (citing *Evans*, 137 Idaho at 431, 50 P.3d at 446; *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13)). “The Board of Commissioners' factual findings are not clearly erroneous so long as they are supported by substantial, competent, although conflicting, evidence.” *Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (citing *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13)).

A court may review an administrative action only when that review is “expressly authorized by statute.” I.R.C.P. 84(a)(1); *In re City of Shelley*, 151 Idaho 289, 292, 255 P.3d 1175, 1178 (2011). LLUPA authorizes judicial review of “some land use decisions,” but not all of them. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008). In addition to permitting review by those “adversely affected by the issuance or denial of a permit authorizing development,” I.C. § 67–6521, it specifically permits judicial review for

issues surrounding applications “for permit[s] required or authorized under LLUPA,” I.C. § 67–6519; “special use permits, I.C. § 67–6512; subdivision permits, I.C. § 67–6513; planned unit development permits, I.C. § 67–6515; variance permits, I.C. § 67–6516; and building permits, I.C. § 67–6517.” *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008).

The County’s actions shall be affirmed unless the Court finds the agency’s findings, inferences, conclusions or decisions are in violation of constitutional or statutory provisions; the County exceeded its statutory authority; the decision was made based on unlawful procedure; the decisions of the County are not supported by substantial evidence on the record; or the County’s decisions were arbitrary, capricious or an abuse of discretion. *See Cowan v. Bd. of Comm’rs of Fremont Cty.*, 143 Idaho 501, 508 148 P.3d 1247, 1254 (2006) (*citing* I.C. § 67–5279(3)). When reviewing these matters,

the courts of the state are directed to consider proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making. *Only those whose challenge to a decision demonstrates actual harm or a violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision.*

Terrazas v. Blaine Cty. ex rel. Bd. of Comm’rs, 147 Idaho 193, 201, 207 P.3d 169, 177 (2009) (*quoting* I.C. § 67–6535(c) (emphasis added)).

IV. ANALYSIS

- A. Cat Creek and the County’s motions to dismiss claims regarding the original Project approval of the five CUPS were granted; therefore, SBar’s current petition for judicial review is limited to the Board’s actions amending the CUPS.

Cat Creek and the County moved to dismiss SBar’s petition for judicial review related to the original approval of the five CUPs which was approved in writing on February 10, 2017. SBar argued the February 10, 2017 Findings of Fact and Conclusions of Law and Order was not

final agency action. The Court orally granted the motion to dismiss all of SBar's claims related to the Board's February 10, 2017 approval of the five CUPs since SBar had not timely moved for reconsideration nor filed a notice of appeal for judicial review. Instead, SBar filed its initial petition for judicial review on May 1, 2018, after its First Motion for Reconsideration was denied by the County on April 6, 2018. (**R. 10243-60**).

SBar reiterated its argument in its briefing on the Petition for Judicial Review that the February 10, 2017 approval of the Project was not "final agency action" as the conditions of approval required further action by the Board of County Commissioners in the form of approval of a development agreement as well as other conditions. **R. 8308-14** (Findings of Fact, Conclusions of Law and Order, Exhibit A, Conditions of Approval of the Applications). The County and Cat Creek maintained that the written approval of the CUPs on February 10, 2017 was final agency action, as conditions of approval do not prevent the action from being final agency action under LLUPA, the applicable Elmore County Zoning and Development Ordinance ("Zoning Ordinance") made clear the order was final action, and because the conditions of approval allowed Cat Creek to immediately take action on the property.

The Court again finds the written February 10, 2017 Findings of Fact, Conclusions of Law and Order (**R. 8261-8314**) was a final agency action. The Supreme Court has held that the ability to appeal an order begins with an examination of the relevant zoning and development ordinance. *Rural Kootenai Organization, Inc. v. Board of Comm'rs*, 133 Idaho 833, 993 P.2d 596 (1999). Appeal rights are determined by the ordinance in existence at the time of the filing of the application for the conditional use permit. *See Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012).

First, the February 10, 2017 decision provides on page 47 (**R. 8307**) that a motion for reconsideration must be filed within ten (10) days pursuant to Zoning Ordinance Section 6-3-2, J. The next paragraph indicates that an aggrieved party by a final decision concerning matters identified in Idaho Code section 67-6521(1)(a) has twenty-eight (28) days after all remedies have been exhausted under the local ordinance to seek judicial review by the procedures in Idaho Code title 67, chapter 52. The very language of the Findings of Fact, Conclusions of Law and Order indicating the reconsideration and appellate that applied indicated Cat Creek and any other party the document was a final order.

Moreover, the applicable Zoning Ordinance sets forth that the Planning and Zoning (“P&Z”) Commission’s decision is final action. *See* Zoning Ordinance Section 6-3-2, A. The appeal process to the Board of Commissioners on decisions of the P&Z’s requires the appeal of the P&Z’s “final action” to be within ten days. *See Id.* Section 6-3-2, F. The Zoning Ordinance requires the Board to enter an order after the hearing affirming, reversing or modifying the Commission’s decision and such decision shall contain a statement of the reasons for the Board’s decision and shall be served on all parties to the appeal. *See Id.* Section 6-3-2, I. The applicant or an aggrieved party may seek reconsideration of the Board’s decision. *See Id.* Section 6-3-2, J. The decision by the Board to deny or approve the reconsideration is not appealable, but the party seeking reconsideration may still exercise rights to further appeal the Board’s decision by seeking judicial review. *See Id.* Section 6-3-2, K, 6.⁵ This is exactly what occurred after Cat Creek appealed the P&Z’s final decision to the Board. So the decision by the Board was also final agency action.

⁵ The ordinance states “the applicant may still exercise applicant’s rights to further appeal the Board’s decision” but the process for reconsideration allows “the applicant or aggrieved party” to move for reconsideration. *See* Zoning Ordinance Section 6-3-2, J. Therefore, based on Constitutional due process concerns, the Court interprets the ordinance broadly as also allowing the applicant or any aggrieved party to exercise its appeal rights which were set forth in the notice of Idaho Code title 67, ch. 52 on page 47 of the February 10, 2017 decision.

Public notice was given in Elmore County regarding this Project. While it is undisputed that SBar did not receive written notice of the P&Z hearing (as notice was sent by the County using an owner list that was not updated for the transfer of land ownership to SBar after it was generated), SBar admits it had actual written notice of the hearing regarding the appeal of the P&Z's decision to the Board.

SBar's failure to get actual notice of the P&Z hearing was harmless as adequate public notice was given and there is no evidence SBar did not have notice of the Project prior to the P&Z hearings. SBar only claims it did not receive written notice from the County. Furthermore P&Z denied the applications which is the same position SBar would have argued for if SBar had written notice of the P&Z hearing. Finally, any appeal of the defective notice to the P&Z hearing needed to be made by timely moving for reconsideration and filing a petition for judicial review after the Board's written decision was issued in February of 2017.

SBar had actual notice of Cat Creek's appeal to the Board. While SBar did not exercise its right to participate and oppose the Project before the Board at the November 16-17, 2016 hearings, the language in the Elmore County Zoning and Development Ordinance ("Zoning Ordinance") combined with the notices included in the February 10, 2017 written decision put SBar and any other aggrieved party on notice that the action by the Board was a final Order approving the applications subject to conditions and that the applicant or aggrieved parties had rights to move for reconsideration and seek an appeal via a petition for judicial review of the Board's final decision on the Project's five CUPs.

Second, the February 20, 2017 Conditions of Approval attached to the Findings of Fact, Conclusions of Law and Order did not contain any condition which would prevent Cat Creek from immediately taking action on the Project. **R. 8308-8314**. While it is true the Conditions of Approval provided for a development agreement to be entered between Cat Creek and the Board,

the Conditions of Approval set forth that the adoption of the development agreement would be subject to an additional public hearing process consistent the modification process under the Zoning Ordinance and LLUPA. **R. 8308**. As a matter of law, and as discussed in further detail later in this Memorandum Decision, the Court finds the development agreement discussed in Condition 2 was not a “development agreement” as defined in LLUPA, Idaho Code section 67-6511A. This distinguishes this case from *Taylor v. Canyon County Bd. of Com’rs*, 147 Idaho 242, 210 P.3d 532 (2009), where a development agreement for rezoning was required before the governing body’s action were final and appealable. Here, here was no rezoning required for approval of the Project.

Third, on February 10, 2017, Cat Creek had the ability to immediately start the Project and take action on the land. Under the Zoning Ordinance section 6-27-5⁶ (in effect in 2016⁷), allows the holder of a CUP to acquire construction permits and commence placement of permanent footings and structures on the ground and commence the use permitted by the permits in accordance with the Conditions of Approval. While it is true Condition 9 required two public meetings prior to the issuance of building permits, the public meetings required were not before the Board and did not require the Board’s approval of the building permits. In Condition 15, prior to any construction, Cat Creek was required to file with the County certain documents such as an updated Wildlife Mitigation Plan/Environmental Statement once the NEPA process was near completion. However, any updated plans did not require the approval of the Board.

Clearly, the Conditions of Approval require a number of additional steps to be taken by Cat Creek, such as obtaining approval for water rights from the Idaho Department of Water Resources, approval of the Interconnection Application by the Bonneville Power Administration,

⁶ Section 6-27-5: Terms of Approval has a subsection A and then the subsections under A are listed as 4, 5 and 6. It appears that these subsections should have been 1, 2 and 3 since there are no subsections 1, 2 and 3. The Court finds there are typographical errors in the Zoning Ordinance.

⁷ Elmore County’s Zoning Ordinance was Amended May 18, 2018. Similar code language exists in the Amended Zoning Ordinance.

and completion of a power sale agreement with Idaho Power. *See*, Conditions 22, 24, and 25. The Conditions of Approval also require any roads and construction to comply with all permitting, licenses, zoning ordinances, and fencing and decommissioning plans were able to be drafted. *See*, Conditions 33-14. In reviewing the Conditions of Approval as a whole, the Court finds the conditions did not prohibit Cat Creek from taking action to make modifications to the land consistent with the Master Site Plan approved by the Board at the November 16-17, 2018 hearings. This is consistent with the test set forth in *Johnson v. Blaine County*, 146 Idaho 916, 925, 204 P.3d 1127, 1136 (2009):

The Supreme Court clarified the appealability depends upon whether, under the governing ordinance, the granting of the order “allows the developer to take immediate steps to permanently alter the land.” If it does then the order is appealable.”...

If the ordinance authorizing the developer to alter the land upon issuance of the permit, it does not matter if the ordinance states the issuance of the permit is or is not appealable. It is appealable under LLUPA.

If the County did not want the issuance of the CUPs to be appealable, then the issuance of the fire conditional use permit could not authorize the developer to permanently alter the land. Here, the Conditions of Approval did authorize the developer to permanently alter the land and Cat Creek could have started “moving dirt” for access roads, fencing, getting building permits for substations, etc., regarding the Project without any further action by the governing board.

Fourth, the required Board approval of a development agreement did not prevent the February 10, 2017 Findings of Fact, Conclusions of Law and Order from being a final order. SBar argues that *Johnson* holds no CUP is final even if the land can be altered because the Conditions of Approval required further action by the Board approving a development agreement. The Court respectfully disagrees.

The Court acknowledges that *Johnson* used the following language:

Whether the governing board's decision is the approval of a preliminary plat as in *Stevenson* and *Rural Kootenai Organization*, or of a conditional use permit, as in *Canal/Norcrest/Columbus Action Committee* and *Payette River Property Association*, it is a final decision subject to judicial review if it allows the developer to take immediate steps to permanently alter the land without further action of the governing board.

Johnson at 926, 1137.

SBar focuses on the phrase “without further action of the governing board” to argue since a development agreement was required to be approved by the Board of Commissioners, the approval of the CUPs was not final as further action of the governing board was required. The final sentence of Condition 2 states failure to complete Condition 2 shall result in the termination of the approval to which this Condition is attached. It should be noted that the approval of the five CUPs was subject to all of the Conditions attached as Exhibit A. The Court finds SBar's restrictive interpretation of *Johnson* is not required under the facts of this case, is inconsistent with the Zoning Ordinance which allows modifications of conditions of approval with proper due process, and is inconsistent with the process for CUPs with conditions to be approved in a final appealable order. Seldom are all conditions of approval complete by the time a governing board approves a project. To hold otherwise would require large expenditures of monies by an applicant prior to approval of a project, and that is not how the Zoning Ordinance at issue or LLUPA requires approved developments to proceed.

Condition 2 for a development agreement specifically provided there would be further discussions between Cat Creek and County staff, and a draft agreement would be presented to the Board in a public hearing with notice and opportunity to be heard and subject to the requirements of the Zoning Ordinance and LLUPA. Because there would be new procedural due process on that development agreement, the development agreement functioned as a potential modification of the February 10, 2017 decision, not as a condition that kept the February 2017 MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW - PAGE 17

decision from being final. Often further governing board action is required to address modifications to a project. If any modification process results in material modification to the approved conditional use permits, the Zoning Ordinance requires additional procedural due process to be followed for the modification. *See*, Section 6-27-2.

Here, the Court finds the development agreement described in Condition 2 covered numerous topics and was expected to take some time to draft as the Board allowed the agreement should be recorded against the Project by November 2017 (subject to certain extensions). While execution of the development agreement by the applicant and Board was required as a condition, it did not prevent the developer from taking other actions consistent with the Conditions of Approval to further the Project, nor did the condition change the approval of the Project from being a final action by the Board. The development agreement was viewed as a document to provide clarification of the Project as well as potential modification of terms that would require an additional due process hearing and additional findings of fact, conclusions of law and order which would ultimately be a separate final decision under the Zoning Ordinance and LLUPA subject to appeal. If the development agreement was not finalized, it could result in the termination of approval of the Project, but arguably such was true for all of the Conditions of Approval that Cat Creek had to satisfy.

For these reasons, the February 10, 2017 decision of the Board was a final action subject to judicial review. "Requirements for timely filing and service of a petition for review are jurisdictional. Absent compliance with this statutory requirement, a district court has no jurisdiction to review a final determination of the district board." *Floyd v. Board of Comm'rs of Bonneville County*, 137 Idaho 718, 723, 52 P.3d 863, 868 (2002). If motions for reconsideration and appeals are not filed within applicable timeframes, the agency decision stands and the challenging landowner is no longer able to remedy any possible or actual errors in the agency's

decision or process. *See Curtis v. City of Ketchum*, 111 Idaho 27, 33, 720 P.2d 210, 216 (1986) (A landowner was “precluded from challenging the city's actions with regard to [his] application because he failed to seek review of the city's action within” the appropriate timeframe).

Here, the Board’s approval of the five CUPs was appealable and no motion for reconsideration or appeal was taken from that decision by the applicant or any aggrieved party. Therefore, this Court has no jurisdiction to review the determinations made in the decision to approve the five CUPs on February 10, 2017. Any remedy for possible or alleged errors in the Board’s decision or deficiencies in any notice for the related public hearings is foreclosed because SBar failed to timely pursue its claims on that decision. For these reasons, claims related to the February 10, 2017 approval of the five CUPs cannot be addressed by this Court. This result is consistent with the purpose behind judicial review which is to allow a *timely* review of the approval of a contested project. Accordingly, the Court’s granting of the motions to dismiss challenges to the Board’s written February 10, 2017 decision approving the five CUPs stands and this Court has no jurisdiction over these claims on appeal.

The Court will now proceed with its analysis on SBar’s challenges to the CUPs Amendments and development agreement. In order for SBar to succeed on these claims, it must first show that it meets LLUPA’s requirements for standing before it can challenge the actions of the County. If it can show this, it must then show that the County erred in a manner specified in Idaho Code section 67-5279 and that SBar’s substantial rights have been prejudiced as a result of that error. For the reasons discussed below, SBar has shown that it has standing over some claims, that some irregularities occurred, but the alleged errors did not violate SBar’s substantial rights.

B. LLUPA requires a party to show it has met seven requirements in order to have standing to challenge a land use decision.

SBar's first Issue Presented is whether or not it has standing to challenge the County's decision regarding the CUPs Amendments and development agreement⁸. **Pet.Br., 27.** The County and Cat Creek both argue that SBar does not have standing to challenge all of the five CUPs, only the CUP related to the wind turbines; SBar disagrees, arguing it has standing on all the CUPs, as the five CUPs were originally approved as a package, so the decision by the Board to separate the CUPs can be challenged by SBar. "Standing is a preliminary question that the Court must resolve before reaching the case's merits." *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011) (citing *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 707, 152 P.3d 575, 578 (2007)). Thus, before the Court can even get to any of SBar's arguments regarding alleged errors in the approval of the Project, it must first determine if SBar – as a party – has standing to challenge any of the actions of the County. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) ("The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated") (citing *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) (*abrogated on other grounds by Bowen v. Kendrick*, 487 U.S. 589, 618–19 (1988))). In addition, "in land use decisions, a party's standing depends on whether his or her property will be adversely affected by the land use decision." *Cowan*, 143 Idaho at 509, 148 P.3d at 1255 (citing *Evans*, 139 Idaho at 75, 73 P.3d at 88). In other words, the Court can only consider the party's arguments as they relate to the land in question.

"Idaho's standing requirement 'is a self-imposed constraint adopted from federal practice, as there is no 'case or controversy' clause or an analogous provision in the Idaho

⁸ As discussed above in the Factual and Procedural History, the Court will be referring to what was known as the Development Agreement as the CUPs Amendment to prevent confusion for reasons that will be discussed in more depth below.

Constitution as there is in the United States Constitution.” *Employers Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (“ERMC”) (quoting *Coeur d’Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015)). The Legislature cannot confer standing by statute; standing only exists for “those whose challenge to a decision demonstrates actual harm or violation of fundamental rights.” I.C. § 67-6535(3); *See Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (“[T]he legislature cannot, by statute, relieve a party from meeting the fundamental constitutional requirements for standing”), and *Noh v. Cenarrusa*, 137 Idaho 798, 803, 53 P.3d 1217, 1222 (2002) (The Legislature “cannot compel the Court to decide a case that lacks a judicable controversy”).

When seeking standing to challenge an agency action, “if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court.” *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010); (citing *Inama v. Boise County ex rel. Bd. of Comm’rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003)). The burden is on the party seeking standing to challenge agency actions under Idaho Code § 67-5279 to not only support their arguments, but to support them with “substantial evidence.” *Paul v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.* 134 Idaho 838, 840, 11 P.3d 34, 36 (2000) (“The agency’s findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole”) (internal citations omitted). Substantial evidence requires “more than a scintilla of proof, but less than a preponderance.” *Erickson v. Idaho Bd. of Licensure of Prof’l Engineers & Prof’l Land Surveyors*, No. 45205, 2019 WL 2098461, at *3 (Idaho May 14, 2019) (quoting *Paul v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.* 134 Idaho 838, 840, 11 P.3d 34, 36 (2000) (internal citations omitted)). “It is relevant evidence that a reasonable mind might accept to support a conclusion.” *Paul v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.* 134 Idaho 838, 840, 11 P.3d 34, 36 (2000) (citing *Boley v. State, Industrial Special Indemnity Fund*,

130 Idaho 278, 280, 939 P.2d 854, 856 (1997)). To ensure they have satisfied this requirement, parties should follow the old writing adage to “show, don’t tell” the Court how the standing requirements are met in relation to the land in question. *Inst. for Policy Studies v. CIA*, 124 F. Supp. 3d 1, 3 (D.D.C. 2015), *on reconsideration*, 153 F. Supp. 3d 352 (D.D.C. 2016).⁹ If they do not show this clearly, then the Court may not be able to rule in their favor. *Burt v. City of Idaho Falls*, 105 Idaho 65, 665, P.2d 1075 (1983) (holding that land-use decisions will not be overturned unless there is a clear showing that the decision did not satisfy the statutory requirements).

In Idaho, there are seven requirements that must be met before landowners can have standing under LLUPA to challenge a proposed development. The first three requirements are the general standing requirements applicable in any case, and the final four are specific to actions raised under LLUPA. Landowners must clearly show by substantial evidence that:

- 1) there is a probability of peculiarized harm to their property as a result of the proposed development;
- 2) that particular harm is (or could potentially be) the result of the proposed development;
- 3) the alleged injury to their property can be redressed by an order of a court,
- 4) their land is adjoining or adjacent to the proposed development, or how the proximity of the planned development adversely impacts their property;
- 5) there was a final agency action that can be challenged;
- 6) that they have exhausted all administrative remedies; and
- 7) that their claims were filed within a specified time period after the final agency action has taken place.

SBar must show it meets those seven requirements in order to have standing under LLUPA to challenge the County’s actions relating to the Cat Creek CUPs Amendment¹⁰.

⁹ For a party to “show” something, they need to “make (facts, etc.) apparent or clear by evidence.” *Show*, BLACK’S LAW DICTIONARY (10th Ed. 2014).

Before moving forward, however, the Court needs to address one issue. In its opening brief, SBar implies that it may have standing based only on allegations regarding particular or peculiar injuries it may suffer will be sufficient to grant it standing. **Pet.Br., 30**. It supports that claim by citing to *Hawkins v. Bonneville Cty. Bd. of Comm'rs*. 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011). If that is, in fact, SBar's position—that it can have standing by only making allegations without any support—the Court respectfully finds that is an overbroad interpretation of *Hawkins*. The *Hawkins* court stated that the landowner in that case had standing based on allegations that allowing non-conforming development next to his property would cause specific problems; however, the court cited specific facts and examples the landowner gave supporting each allegation. *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011). Thus, only allegations made by SBar that are supported by substantial evidence will be considered by this Court for standing purposes.

1. *The landowner challenging the agency decision must show by substantial evidence how the planned development is, or may be an actual source of a concrete and particularized injury to their land; SBar has done this.*

The first step in any standing analysis is determining if there was an injury. For land-use cases, the injury does not have to be a past or present injury, as long as the landowner can show they have “an interest in real property which *may be adversely affected* by the issuance or denial of a permit authorizing the development.” *Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (quoting I.C. § 67–6521(a) (emphasis added)). However, while landowners in Idaho may “allege, not prove” the potential harm to their property in order to get standing, those allegations must be supported by substantial evidence. *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011). As with any alleged injury, a land use injury must “be concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017) (internal citations and quotation marks

omitted). A ‘peculiarized’ harm is one that is “[d]ifferent from the norm; special; [or] particular.” *Peculiar*, BLACK’S LAW DICTIONARY (10th Ed. 2014). There must be evidence showing that the land use decision “would inconvenience the [challenging party] in some manner, limit its use and enjoyment of the property, or cause economic harm” particular to it regardless of the parcel’s distance from the proposed development. *Ciszek v. Kootenai Cty. Bd. of Comm’rs*, 151 Idaho 123, 128, 254 P.3d 24, 29 (2011) (internal citations removed). While the location of the land in dispute is relevant to this analysis, the landowner must still show how “the property’s location exposes the landowner to peculiarized harm.” *Student Loan Fund of Idaho, Inc. v. Payette Cty.*, 125 Idaho 824, 828, 875 P.2d 236, 240 (Ct. App. 1994). Thus, even if the landowner can only show how the land in question may suffer a peculiarized harm in the future, “[t]he existence of real or potential harm is sufficient to challenge a land use decision.” *Evans v. Teton Cty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003).

Here, SBar has alleged potential injuries due to the entire Project, but the Record only supports that argument as it relates to the Wind Turbines, the Transmission Lines, and the Substation CUPs; there is no support for that claim as it relates to the hydroelectric and solar CUPs.

SBar has made specific arguments regarding three potential injuries to its property that are related to the County’s approval of the Wind CUP. First, SBar argues that its property value may be diminished if the wind turbines are built. **Pet.Br., 31**. Second, it argues that the Project (specifically the wind turbines, the transmission lines, and the power substation) will cause “visual and aesthetic damage” to its property. **Pet.Br., 31**. Finally, it argues that the migratory patterns of wild game in the general area will be disrupted and that it may lose its designation as an Idaho Shooting Preserve. **Pet.Br., 33**. SBar’s first argument regarding the potential diminution in value of its property satisfies the first requirement for standing.

SBar alleges the value of its property will be reduced by at least 10% and supports that allegation with a detailed property appraisal. **Pet.Br., 31, R.11378-472.**¹¹ That appraisal is substantial evidence the Court can rely on when making its decision and satisfies the LLUPA requirement of a showing of peculiarized or particularized harm. However, the submitted appraisal specifically only addresses the impact of the Wind Turbines on SBar's value, it does not specifically address the other pieces of the Project.

While the Court finds that SBar has supported its argument regarding its injury as to the Wind Turbines, that finding is sufficient for the Court to also find an injury as to the Transmission Lines and the Substation CUPs. The Board determined based on subsequent comments from Cat Creek during the process on the CUPs Amendments, that the success of the Project was enhanced by allowing the CUPs for solar, wind and pump storage hydro to be separated and developed in phases. **R. 10004, Section 7 Project Phasing.** This finding did not change the Board's original conclusion wherein it agreed with the Planning and Zoning Commission's findings that the five applications are "dependent" on each other. **R. 8265.**

Even though the Board found there was evidence supporting Cat Creek's request to develop the solar, wind, and pump storage hydro CUPs in phases, the Court does not find that the Board changed its original conclusion that all five CUPs were *dependent* on each other for the overall success of the Project. The Board merely modified its conclusion by finding the *phasing* the power generating portions of the Project enhanced the overall Project. **R. 10004.** Without the Transmission Lines and Substation, there would be no way to transmit any electricity created by the power generation pieces (Hydroelectric, Solar, or Wind Turbines) for use elsewhere. Each power generation piece may create electricity independently of the other two, but each of those power generation sources is interdependent on both the Transmission Lines and Substation. In

¹¹ SBar's brief cites to R.10986-1105 as the location for the appraisal; that document is actually located at R.11378-472.

addition, those two pieces (Transmission Lines and Substation) are interdependent—one need not exist without the existence of the other. Similarly, if Cat Creek were to build the Transmission Lines and Substation without proceeding on at least one of the three power generation pieces, it would be a waste of money and resources.

While the Court finds there was substantial evidence for the Board’s determination in the Findings of Fact, Conclusions of Law and Order—CUP Amendments on March 16, 2018, that the power generating CUPs may be considered separately and developed in phases, the Court must next determine whether SBar has established standing to challenge all five CUPs in this appeal (**R. 10004**). The Court finds because SBar has established it could be injured by the Wind Turbine CUP, it necessarily requires a finding that injury also applies to the Transmission Lines and Substation due to their interdependence with the Wind Turbines and each other. However, the Court finds SBar has failed to allege potential injury to SBar from the solar and hydro power generation CUPs even though they are part of the overall Project.

SBar’s other arguments regarding alleged general injury relate the impact on its view and potential problems with game animal migration being impacted by the Project from its property. Individual landowners’ conclusory opinions without data supporting such opinions as to potential impacts on views and wildlife does not establish these particularized injuries. However, The Court finds based on the statements of members of the public and photos/videos of the area, the wind turbines are likely to have an impact on the views from SBar’s property. The exact impact on SBar’s view is unknown since the location and heights of the wind turbines are not finalized and no data on animal migration being permanently impacted by the Project’s wind turbines was submitted.

The evidence submitted to back up the allegation regarding the impact on SBar’s view included a video production with computer-generated images of the wind turbines superimposed

on the property in question and into downtown Boise. While SBar's video is certainly a persuasive illustrative exhibit, and supports a findings that SBar also has standing based on the likely visual impacts of the wind turbines on its views.

The Court finds, SBar has not provided information, documentation, affidavits, or any other forms of evidence backing up its claims regarding the potential loss of status as to certain land being in an Idaho Shooting Preserve or how changes to potential wildlife migration would actually impact SBar. Opinion statements by nearby landowners alone are not sufficient to establish particularized injury to SBar.

As to wildlife injuries, the Court finds these alleged injuries are not specific to SBar but generalized complaints about the Project. The Record establishes the Board considered the impact the Project may have on wildlife in the surrounding area and Cat Creek continues to work with local, state, and federal agencies to mitigate any negative impact. *See* **R.6476-6571** (Cat Creek Energy's Wildlife Management Plan). The Wildlife Management Plan provided to the County early in the process establishes the Board considered such issues in its approval of the Project and the CUPs Amendment. *See* **R.6476-6571; R9873** (fish stocking and sage grouse mitigation); **R. 9875** (additional visual mitigation measures). The Board noted in its original approval that the County requested comments on the Project from 92 agencies regarding impact on fish and wildlife habitat. **R. 8293**. The Board specifically addressed Fish and Wildlife Goals as well as Scenic Area Goals in its Findings of Fact. **R. 8292-96**. Specifically, the Board found the new Master Site Plan #2 eliminated wind area #1 in response to Idaho Fish and Game's wildlife study citing the Record at 2008. **R. 8297**. In the Conditions of Approval, the Board required an updated Wildlife Mitigation Plan/Environmental Impact Statement to be submitted once the NEPA process is near completion and is subject to review by the Planning and Zoning Commission. *See* Condition 15, **R. 8310-11**. In the CUPs Amendment section 2.7 requires

communication with Wildlife Agencies to sustain fish and wildlife habitats on and surrounding the Project. **R. 9874.**

For standing purposes, the Court only needs to find that SBar has supported at least one allegation of particularized injury with substantial evidence. Because SBar did so regarding the possible diminution of its property value and impact on its views, the Court finds the first LLUPA standing requirement is satisfied.

2. *SBar has presented evidence the challenged land use decision is an actual or probable cause of particularized or peculiarized harm to its property that cannot be traced to a third party.*

Next, the party must show that the alleged injury is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Tucker v. State*, 162 Idaho 11, 21, 394 P.3d 54, 64 (2017) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). While land use cases require the Court to consider the distance of the proposed development to the challenging landowner’s property, merely being a landowner within a reasonable distance from the proposed development “does not relieve a complainant of the necessity of demonstrating a distinct palpable injury traceable to the challenged governmental conduct.” *Student Loan Fund of Idaho, Inc.*, 125 Idaho at 828, 875 P.2d at 240 (internal quotation marks and citations removed).

Here, SBar has shown that the approval of the Project CUPs by the County is a direct cause of the probable diminution in value of its property. As described above, SBar has presented substantial evidence that if the Project is allowed to continue, its property value will be decreased by approximately 10%. **Pet.Br., 31** (citing **R.10986-11005**). It is undisputed that the County granted Cat Creek the CUPs relating to the Project. There is substantial evidence that SBar’s potential diminution in value would be caused by the County’s approval of those CUPs. Thus, the second requirement for standing is met.

3. *SBar has shown how its alleged injury may be redressed by a court.*

Even if the landowner can show a potential injury that is directly traceable to the challenged governmental action, “it cannot be only speculative that a favorable decision will redress the injury.” *Tucker*, 162 Idaho at 24, 394 P.3d at 67 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). This does not mean that the party is required to show “that a favorable decision will *inevitably* redress the injury,” only that “a favorable decision is *likely* to redress the injury.” *ERMC*, 162 Idaho at 777, 405 P.3d at 36 (emphasis added) (internal citations and quotations marks removed) (emphasis in original). Thus, even if a party shows that the potential harm to their property is peculiar and can be traced directly back to the challenged government action, if the Court cannot do anything about it, then its claim must fail and the Court’s analysis stops there. However, if the party can show that the Court can redress its injury in any fashion, then the Court’s analysis can continue.

Thus, the third requirement for standing under LLUPA is that the action being complained of can be redressed by the Court. As described above, there only needs to be a showing that the injury is likely to be redressed. *See ERMC*, 162 Idaho at 777, 405 P.3d at 36. In other words, if the Court rules in SBar’s favor, is there a possibility that the potential diminution of its property value will not happen? The answer to that is a qualified “yes.” If the Project is stopped, then SBar’s view will be unspoiled, animal migrations should not be impacted, and they will continue to have the same enjoyment of their property that they have had until now. If SBar is successful in its appeal and the agency decision is remanded back to the Board, the County could be required to restart the process. Then SBar will have a further opportunity to receive proper notice and to be heard. At which point there is a possibility – not a guarantee – of a resolution in SBar’s favor because there is still a possibility that the Board would make the same decision. But that possibility is sufficient for standing and thus, this requirement is also met.

4. *Under LLUPA, property owners generally are required to be either adjoining or adjacent property owners to a proposed development and SBar is an adjacent property owner.*

Once those traditional standing requirements have been satisfied, land use cases require the Court to do further analysis. First, LLUPA only allows a person with “a bona fide interest in real property which may be adversely affected” by land use decisions to challenge those decisions. I.C. § 67-6521. If the property owner “is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *ERMC*, 162 Idaho at 778, 405 P.3d at 37 (quoting *Lujan*, 504 U.S. at 562 (in turn quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984))). Thus, not every landowner can challenge every land use decision where such landowner is *not* the applicant requesting the agency to make a land use decision.

The location of the property matters under LLUPA because a court is more likely to find standing when the landowner’s property is “adjoining the proposed development” or “adjacent to” it. *See, e.g. Evans*, 139 Idaho at 75, 73 P.3d at 88, *and Cowan*, 143 Idaho at 509-510, 148 P.3d 1255-56 (properties were “adjoining the proposed development”); *Johnson v. Blaine Cty.*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009) (property was “adjacent to” proposed development); *see also* I.C. § 67-6516 (Notice required for property owners whose land is “adjoining the parcel under consideration”). A property is ‘adjoining’ when it is “[t]ouching [or] sharing a common boundary” with another property. *Adjoining*, BLACK’S LAW DICTIONARY necessarily touching.” *Adjacent*, BLACK’S LAW DICTIONARY (10th Ed. 2014). However, Courts “will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision.” *Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). Thus, even if a particular property is located some distance from the proposed development, a traceable injury can be found if the landowner can show how a unique situation has the possibility of negatively impact their land. *Davisco Foods Int’l, Inc. v. Gooding* MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW - PAGE 30

Cty., 141 Idaho 784, 790, 118 P.3d 116, 122 (2005) (finding probable injury where expert testimony showed how odors from a proposed wastewater treatment plant could potentially impact a property three miles away).

All parties agree that SBar's location is adjacent to at least the wind turbine portion of the Project. The Court also finds SBar's location is adjacent to the potential locations of transmission lines/substation of the Project and possibly the new solar panel locations. **R. 11108-12** (color maps with locations for all CUPs attached to public notice for July 26, 2018 rehearing). Clearly, this requirement is satisfied and there is no need for further analysis by the Court.

5. *LLUPA only allows challenges to final agency actions and there was a final action here.*

Even if the landowner's property is adjoining or adjacent to a proposed development, and there has been presented substantial evidence showing injury, cause, and redressability, the Court's standing analysis does not end there. Not all agency actions can be challenged. Challenges under LLUPA may only be brought by "affected persons" and for final agency actions relating to "the issuance or denial of a permit authorizing development." *Neighbors For Responsible Growth v. Kootenai Cty.*, 147 Idaho 173, 176, 207 P.3d 149, 152 (2009) (quoting I.C. § 67-6521). Any action that "places the developer in a position to take *immediate* steps to permanently alter the land before final approval" is a final agency action. *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs. of Valley County*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012) (emphasis added).

Here, SBar must show the Court that there was a final agency action that it can challenge, such as "the issuance or denial of a permit authorizing development." I.C. § 67-6521.¹² The Court finds the CUPs Amendment decision entered on March 16, 2018 was an order of the

¹² This will be discussed in more depth in Part B(7) below.

Board. This order was not final and ripe for appeal until all motions for reconsideration by SBar were ruled upon by the Board. The First Request for Reconsideration was denied, but the Second Request for Reconsideration was denied in part and granted in part when the Board determined the motion for reconsideration should be denied but also found an additional public hearing should be held on 20 specific issues related to its decision on the CUPs Amendment. When the Board issued its third written order on the CUPs Amendment (after the July 2018 rehearing) on September 7, 2018 and denied SBar's Third Request for Reconsideration on September 21, 2018, the Board's decision on the CUPs Amendment was final agency action. SBar timely filed its petition for judicial review on the CUPs Amendment when it filed its original Petition on May 1, 2018 and properly amended the petition based on the further actions by the Board related to the CUPs Amendment after the Second and Third Requests for Reconsideration were ruled upon by the Board.

Yes, there are still additional steps Cat Creek must take before being able to actually begin construction (such as applying for building permits and receiving permission from Federal and State authorities). However, the final written decision related to the CUPs Amendment in September 2018, allowed the modifications in the Development Agreement to continue moving the Project forward. The Court finds the written approval of the CUPs Amendment after the July 2018 rehearing was final agency action under LLUPA. Thus, the final agency action requirement is satisfied as to the CUPs Amendment.

6. SBar has exhausted all options within the agency before filing its petition for judicial review.

If the action being challenged is a final agency action, landowners must first exhaust all options within the agency itself. I.C. § 67-5271(1)(d) ("A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter"). This is because the courts may only act once the agency has had the opportunity to

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complete its process and issue a final agency action. *Buckskin Properties, Inc. v. Valley Cty.*, 154 Idaho 486, 493, 300 P.3d 18, 25 (2013) (“The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act”) (quoting *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004); *Petersen v. Franklin Cty.*, 130 Idaho 176, 185, 938 P.2d 1214, 1223 (1997) (“Exhaustion of administrative remedies generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered”) (internal quotation marks and citations removed). Because LLUPA does not incorporate all of the provisions of the Idaho Administrative Procedures Act (“IDAPA”), a challenging party must look to the applicable local ordinances to determine what procedures are required before filing for judicial review. *Arthur v. Shoshone Cty.*, 133 Idaho 854, 860, 993 P.2d 617, 623 (Ct. App. 2000) (“Section 67–6521(1)(d) specifies that after all remedies have been exhausted under local ordinances, an aggrieved person may seek judicial review as provided by chapter 52, title 67, Idaho Code”) (internal quotation marks removed). Thus, a property owner is not allowed to bring a judicial challenge of an agency action until all other actions permitted under the local ordinances have been brought within the agency itself.

In order to meet this sixth LLUPA requirement, SBar must show it has exhausted all available administrative remedies before filing a petition for judicial review. LLUPA requires that all administrative remedies, including any requirements under local ordinances, be exhausted before a petition for judicial review may be filed. Here, Zoning Ordinance Section 6-3-2, J allows for parties to seek reconsideration of Board decisions. Thus, before this Court can review any actions of the County, SBar must show that it has asked the County to reconsider its decisions. The Record reflects that after the February 9, 2018 hearings where the County approved the CUPs Amendment, SBar filed for reconsideration of that decision. It also filed for

reconsideration of the Board's March 16, 2018 written Findings of Fact, Conclusions of Law, and Order regarding the CUPs Amendments, and the Board's decision after the July 26, 2018 hearing. *See Pet. Joint Reply Brief, 3, Exhibit A* (Chronology of Relevant Events). Thus, the Court finds that SBar has exhausted the available administrative remedies and, accordingly, satisfies this requirement.

7. *All claims must be filed within a certain time of the final agency action; SBar has done so only as to the CUPs Amendment.*

LLUPA requires any requests for further action be filed within certain periods of time. Where local ordinances authorize reconsideration, landowners must file any requests for reconsideration with the agency within 14 days of the agency's final action where reconsideration is allowed. I.C. § 67-6535(2)(b). Where reconsideration is authorized, petitions for judicial review must be filed within 28 days of the agency's action on that reconsideration request; where reconsideration is not allowed, the 28 day period begins when the final agency action has been issued. *See Arthur v. Shoshone Cty.*, 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000) (Local ordinances did not authorize applicant to bring a motion for reconsideration or empower the county to reconsider its decision); *also* I.C. § 67-6521(1)(d); I.R.C.P. 84. Thus, if a landowner has filed its petition for judicial review with the appropriate timeframes and has satisfied the other four requirements detailed above, then it has standing to proceed on its claim.

With this final LLUPA requirement, SBar must show that any requests for reconsideration or petitions for judicial review were timely filed. Decisions by an agency are final on the date it releases its required written decision with its findings of fact and conclusions of law, not on the date of the hearing where the application was approved or denied. *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (An agency decision regarding a conditional use permit requires, among other things, "specific, written findings of fact"). The agency is required to "establish by rule a time period within which a recommendation

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or decision must be made.” I.C. § 67-6519. Thus, an agency action is not final until there is a written decision released within the time period specified by the rules governing the agency.

Where local ordinances authorize reconsideration requests, LLUPA requires those requests be filed within 14 days of the agency’s written decision. I.C. § 67-6535(2)(b).¹³ The agency then has 60 days to act on that request or “or the request is deemed denied.” I.C. § 67-6535(2)(b). Once the written decision on reconsideration has been issued (or the 60 day time period has passed), a Petition for Judicial Review must be filed within 28 days. I.C. § 67-6521. Where reconsideration is permitted, “[t]he twenty-eight (28) day time frame for seeking judicial review is tolled until the date of the written decision regarding reconsideration or the expiration of the sixty (60) day reconsideration period, whichever occurs first.” I.C. § 67-6535(2)(b).

Elmore County requires that “[t]he Board shall provide the applicant written findings of fact and conclusions of law in accordance with Idaho Code sections 67-6519 and 67-6535 stating the reasons for the decision.” Zoning Ordinance section 6-4-9.E (March 21, 2012). The Board had sixty days to rule on any request for reconsideration under Idaho Code section 67-6535(2)(b).

The Board approved and issued its written order for the original five CUPs on February 10, 2017. **R.8261-314**. This was one day after it orally voted. SBar would have needed to apply for reconsideration of the County’s decision arguably within 14 days, so no later than February 24, 2017. As discussed earlier SBar did not file any request for reconsideration, it cannot challenge the original issuance of the CUPs.

¹³ In its brief, Elmore County references the Elmore County Code in effect at the time of SBar’s request for reconsideration which states that any requests for reconsideration must be filed “within ten (10) calendar days” of the final action. **Elmore County’s Br. In Response, 14** (citing E.C. CODE, 6-3-2.K (Mar. 21, 2012)). However, “[t]he Idaho Constitution, Article XII, § 2, provides, ‘Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations *as are not in conflict* with its charter or *with the general laws*.’” *Arthur v. Shoshone Cty.*, 133 Idaho 854, 861, 993 P.2d 617, 624 (Ct. App. 2000) (Emphasis added in original). Because Elmore County’s ordinance is in conflict with a State statute, the Court will review all requests under LLUPA’s fourteen (14) day time limit. Moreover, the County amended its reconsideration ordinance to fourteen (14) days on May 18, 2018. *See*, Section 7-3-10, E. of Elmore County’s Amended Zoning and Development Ordinance.

The Record shows that the first of SBar's reconsideration requests after approval of the CUPs Amendment was premature. The Board approved adoption of the CUPs Amendment on February 9, 2018. **R.13160-226**. The Board did not issue its Findings of Fact, Conclusions of Law and Order – CUP Amendments until March 16, 2018. **R. 9993-10008**¹⁴. Thus, SBar's 14 day period of time to file began to run at on that date. However, SBar filed its first Request for Reconsideration on February 16, 2018, even though it did not need to file it until March 30, 2018. **R.9905-79**. In spite of the premature filing, the Board still set a hearing for March 26, 2018 on that First Reconsideration Request. **R.10173-241**. At that hearing, SBar acknowledged it had been provided with the written decision but the Board would not allow it to include that decision in its first request for reconsideration. *See* **R.13243-44** (Rick Goodsen, Attorney for SBar stating "'Now you've changed it. Last week, you changed it"); **R.13274** (Buzz Grant, Elmore County Attorney stating during the same meeting, "And you [the Board] approved an amendment to the CUP and the conditions on March 16th of this year"); **R.13313** (Commissioners agreeing that they will hold a hearing on May 11 regarding SBar's second request for reconsideration that was filed on March 26).

From the time the Board began considering the CUPs Amendment in late 2017 SBar was an active participant in the public hearings and timely filed for reconsideration of every action taken by the Board. The Board orally approved the CUPs Amendment on February 9, 2018. **R.13160-226**. SBar's First Request for Reconsideration was made on February 16, 2018, within the 14 day time as required by Idaho Code section 67-6535(2)(b). **R.9905-79**. SBar next timely filed its Second Request for Reconsideration of the Board's written Findings of Fact, Conclusions of Law, and Order amending the CUPs on March 26, 2018. **R.10173-2411**. Finally, SBar timely filed its Third Request for Reconsideration of the Board's September 7, 2018

¹⁴ The fact that the County erred by not filing its written decision until 34 days after the hearing (not within 30 days as required by the Zoning Ordinance section 6-4-9.G.) is a harmless error due to the fact that SBar's Request for Reconsideration of this piece was granted in part as will be discussed below.

written Findings of Fact, Conclusions of Law, and Order issued after the July 26, 2018 hearing. **R.11981-89.** SBar's Third Request for Reconsideration was filed on September 11, 2018. Accordingly, SBar has timely filed for reconsideration of those actions taken since February 2018 when the County approved the CUPs Amendment which modified the original CUPs.

This determination and the Court's ruling on the motions to dismiss answers SBar's second Issue Presented which asks, "Whether the Board erred in finding that SBar Ranch's Requests for Reconsideration and objections to the actions were not timely filed with the Board under I.C. § 67-6535(2) and the applicable Zoning Ordinances." **Pet.Br., 27.**

8. SBar has standing to challenge the CUPs Amendment related to the wind turbines transmission lines and substations.

Thus, SBar has standing to pursue its claims against the County for approval of the Project's CUPs Amendment as it has met all seven requirements for standing under LLUPA. SBar has alleged a potential reduction in property values and impact on its views and supported that allegation with substantial evidence. It has shown how that injury may be caused by the Board's approval of the CUPs Amendment. It has shown how that injury may be redressed by this Court. No party disputes that SBar's land is adjoining or adjacent to at least one part of the Project. The Record shows there was a final agency action by the Board. SBar has shown that it has exhausted all administrative options before filing for judicial review. Finally, the Record reflects that SBar has timely filed for reconsideration and judicial review as to the Wind Turbines, the Transmission Lines, and the Substation components of the CUPs Amendment.

C. SBar has not shown that the County erred under Idaho Code section 67-5279 and that at least one of its substantial rights has been prejudiced.

Having determined that SBar has standing to challenge the County's actions relating to its approval of the Wind Turbines, Transmission Lines, and Substation portions of the CUPs

Amendment, the Court next turns to the next four of SBar's Issues Presented as they relate to those three pieces of the CUPs Amendment:

3. Whether the Board's decision to approve the CUPs Amendment and Development Agreement was in violation of constitutional and statutory provisions or was based on unlawful procedure.
4. Whether the conflicts of interest of the Board and the Commissioners prevented the Board and the Commissioners from performing their duties as neutral decision makers regarding the terms of the CUPs Amendment and the Development Agreement and violated the due process rights of SBar.
5. Whether the filing of the initial Petition for Judicial Review deprived the Board of jurisdiction to issue orders in this matter from and after the date of filing of the Petition.
6. Whether the substantial rights of SBar have been violated by the actions of the Board regarding the CUPs Amendment and motions for reconsideration.

Pet.Br., 27. In addition, when SBar filed its Petition, it made 38 allegations regarding specific errors made by the County and 13 allegations regarding prejudice to its substantial rights.

Petition, 15-19.¹⁵ SBar's Brief clarifies and supports those arguments; however, the Court feels that each of the arguments raised in the Second Amended Petition should at least also be individually referenced as it applies to each applicable Issue Presented to ensure none of SBar's allegations are even inadvertently overlooked.¹⁶

These four Issues Presented all fall under Idaho Code section 67-5279. There are two parts to challenges under that statute: first, that SBar must show that the County "erred in a manner specified" in Idaho Code section 67-5279(3). *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (quoting *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P. 3d 494, 498 (2004)) (internal quotation marks removed). I.C. § 67-5279(3) requires SBar to show the County erred because its decision was made "(a) in violation of constitutional or statutory provisions;¹⁷ (b) in excess of the statutory authority of the agency;¹⁸

¹⁵ That portion of SBar's Petition is included as Appendix A to this Memorandum. Each of the 51 alleged errors from the Petition will be referenced and cited to by the paragraph number and subsection from the Petition as Allegation 40(a), Allegation 40(b), and so on.

¹⁶ As many of the Allegations can arguably fit with different Issues Presented, some of them may be referenced more than once.

¹⁷ Allegations 40(C), 40(B), 40(H), 40(Y), 40(Z), 40(AA), 41(h).

(c) made upon unlawful procedure;¹⁹ (d) not supported by substantial evidence on the record as a whole;²⁰ or (e) arbitrary, capricious, or an abuse of discretion.”²¹ *917 Lusk, LLC v. City of Boise*, 158 Idaho 12, 14, 343 P.3d 41, 43 (2015) (quoting I.C. § 67-5279(3)). Second, courts shall affirm the actions of an agency “unless substantial rights of the appellant have been prejudiced” by the agency’s actions. I.C. § 67-5279(4). The Court will address certain specific arguments of SBar before evaluating whether the CUPs Amendment overall violated Idaho Code section 67-5279.

1. *The Development Agreement approved by the County was not a Development Agreement under I.C. § 67-6511A.*

SBar’s third Issue Presented asks, “Whether the Board’s decision to approve the CUPS and Development Agreement was in violation of constitutional and statutory provisions or was based on unlawful procedure.” **Pet.Br., 27.** This Issue Presented asks if the actions of the County were “(a) in violation of constitutional or statutory provisions,²² [(c) made upon unlawful procedure,²³ [or were] (d) not supported by substantial evidence on the record as a whole.”²⁴ I.C. § 67-5279(3).

As was previously discussed, SBar does not have standing to challenge the County’s initial approval of the CUPs, but it does have standing in part to challenge the Board’s final approval of the CUPs Amendment. One of SBar’s main problems within this Issue Presented is whether what was called the Development Agreement was a “Development Agreement” as laid out in Idaho Code § 67-6511A. *See* Appendix A, Allegations 40(O), 40(S), 40(CC), and 41(b). This statute states that counties may “require or permit *as a condition of rezoning* that an owner or developer make a written commitment concerning the use or development of the subject

¹⁸ Allegations 40(E), 40(K), 40(R).

¹⁹ Allegations 40(I), 40(N), 40(V), 40(BB), 41(a), 41(c), 41(d), 41(e), 41(g).

²⁰ Allegations 40(O), 40(S), 40(CC), 41(b).

²¹ Allegations 40(J), 40(T), 40(U), 40(DD), 40(EE), 40(FF), 40(II), 41(i)(1-6).

²² Allegations 40(C), 40(B), 40(H), 40(Y), 40(Z), 40(AA), 41(h).

²³ Allegations 40(I), 40(N), 40(V), 40(BB), 41(a), 41(c), 41(d), 41(e), 41(g).

²⁴ Allegations 40(O), 40(S), 40(CC), 41(b).

parcel.” I.C. § 67-6511A (emphasis added); *see also* Zoning Ordinance Section 6-29 (specifically outlining process “for the creation and administration of development agreements as provided in Idaho Code section 67-6511A”). In other words, Development Agreements as described by that statute are written commitments by a landowner that, if granted rezoning of a property, that it will only be used for the purposes agreed to in that document.

SBar’s argument that the CUPs Amendment is an Idaho Code § 67-6511A Development Agreement is not supported by the Record as a whole. As no rezoning was required for the Project, there was no need for a Development Agreement under that statute or zoning ordinance code section. In fact, there is substantial evidence that beginning early in the process, the Board and acknowledged that what was being called the Development Agreement was not an Idaho Code § 67-66511A Development Agreement. **R.9881** (“This Agreement is not a Development Agreement pursuant to I.C. § 67-6511A, but rather an agreement as a condition of the CUPs”); **R.10006 and 10258-59** (showing the Board reviewed that statute and determined the CUPs Amendment was not a Development Agreement under that statute); *see also* County’s Brief, 16, Cat Creek Brief, 26 . The section of Elmore County’s Code applying Idaho Code § 67-6511A only discusses the process by which properties may be rezoned in accordance with that statute, no development argument was required by the Zoning Ordinance.

Thus, because the Court finds that what was being called a Development Agreement, was not actually a Development Agreement as described in Idaho Code § 67-6511A, it must determine what it actually was. “As Shakespeare wrote, ‘[What’s in a name? T]hat which we call a rose, [b]y any other name would smell as sweet.’” *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1130 (9th Cir. 2013) (citing William Shakespeare, *Romeo and Juliet*, act 2, sc. 2). The Court finds that the parties chose a poor name for this agreement as it was actually an amendment to the Conditions of Approval of the CUPs from February 2017. An amendment is “[a] formal and

usually minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specifically, a change made by addition, deletion, or correction; especially, an alteration in wording.” *Amendment*, BLACK’S LAW DICTIONARY (10th Ed. 2014). This document was a formal revision, addition or modification that included numerous additions, deletions, or clarifications to the initial Conditions of Approval.

2. *There are no conflicts of interest with the voting County Commissioners and the Court cannot interfere with statutory requirements of another branch of government.*

SBar’s fourth Issue Presented asks, “Whether the conflicts of interest of the Board and the Commissioners prevented the Board and the Commissioners from performing their duties as neutral decision makers regarding the terms of the CUPS and the Development Agreement and violated the due process rights of SBar Ranch.” **Pet.Br., 27.** This Issue Presented asks if the actions of the County were “(a) in violation of constitutional or statutory provisions,²⁵ [(c) made upon unlawful procedure,²⁶ [or were] (e) arbitrary, capricious, or an abuse of discretion.”²⁷ I.C. § 67–5279(3). SBar alleges the County’s actions violated its substantive due process rights because the County Commissioners had conflicts of interest directly relating to their ownership or leasing of land that could be benefited by the water delivery requirement from the CUPs Amendment. **Pet.Br. 37-41.**

County commissioners are required to reside in the area they represent. I.C. § 31-702 (“Each member of a board of commissioners must meet the residency requirements in the county and district which he represents as set out in section 34-617, Idaho Code”). A person is ineligible to be a commissioner unless he “shall have resided in the county one (1) year next preceding his election and in the district which he represents for a period of ninety (90) days next preceding the primary election.” I.C. § 34-617. Once elected, one of the statutory duties of all commissioners is

²⁵ Allegations 40(C), 40(B), 40(H), 40(Y), 40(Z), 40(AA), 41(h).

²⁶ Allegations 40(I), 40(N), 40(V), 40(BB), 41(a), 41(c), 41(d), 41(e), 41(g).

²⁷ Allegations 40(J), 40(T), 40(U), 40(DD), 40(EF), 40(FF), 40(II), 41(i)(1-6).

to ensure that their county has a sufficient supply of water. I.C. § 31-877. (Commissioners “shall have the authority to provide necessary water” and “shall have the authority granted to water and sewer districts pursuant to chapter 32, title 42, Idaho Code, and the authority granted to municipalities pursuant to the provisions of title 50, Idaho Code” to do so).

The Commissioners here have a statutory duty to ensure that Elmore County is supplied with sufficient water for its citizens. If the Court were to agree with SBar that the Commissioners need to be excused from any discussions regarding use of Cat Creek’s proposed water storage and delivery systems for Elmore County’s use, that interpretation would make it impossible for the Commissioners to perform one of their statutory duties. That strikes the Court as an unreasonable proposition because the Commissioners were elected to represent the people of Elmore County. When the Commissioners are considering any development in Elmore County – subdivisions, commercial or industrial development, agriculture, or anything else – the Commissioners are allowed to, and in fact must consider the impact of water on the county. It would almost be a dereliction of their duty if they were to not think about the water needs of the residents of Elmore County or a landowner’s right to develop its property when discussing any project such as this. Consideration and advocacy of Elmore County’s needs and potential benefits from the Project do not make the Commissioners non-neutral decision makers. The fact that the Commissioners expressed concern about the availability of water in Elmore County, and then sought to find a way to get additional water is one of the very things they were elected to do. The County’s water rights counsel, Mr. Scott Campbell, filed a motion to intervene in before the Federal Energy Regulatory Commission (FERC) regarding Cat Creek’s application in October of 2015. **R. 7835**. This as well as many other documents and statements in the record indicate that increasing the amount of water available to Elmore County was an ongoing concern

for the County and was a relevant issue for the Commissioners to consider as part of its consideration of the approval of this Project as well as the terms of the CUPs Amendment.

Each Commissioner is a landowner or user of water in Elmore County; but so is every other landowner, resident, or visitor to the County who gets a drink of water, uses the restroom facilities in any public or private building, or even just visits a public or private building that uses water in any fashion. If this, or any future project, that could benefit the people of Elmore County were to come before the Commissioners, who could approve those projects if every elected Commissioner was ineligible to rule on those applications simply because they were a landowner? If the Court were to give SBar what it is asking for, every resident of Elmore County would immediately be disqualified from participating in any land issue that has the potential to impact any possible person in the County. That result is simply untenable to the Court. Commissioners are elected and by necessity must decide the issues before them.

It is important to note, the County's water needs issue still has not been resolved between Cat Creek and the County. That unresolved issue was one of the reasons the Development Agreement that was approved was not handed out prior to the February 9, 2018 public hearing. The striking of certain language regarding the County's future water needs was the major substantive change in the draft Development Agreement provided to SBar and others attending the public hearing and the final Development Agreement approved by the Board. Up until that February 2018 hearing, the parties were still working on language. The Board ultimately agreed to proceed without *any* agreement regarding Cat Creek's obligations transporting any water the County may rights to in the future, thus eliminating any alleged "quid pro quo" by the County to suggest even an alleged conflict of interest.

Further, the Court finds even in the future there will be only a minimal, indirect impact on land owned by any of the Commissioners if that issue is resolved. SBar has not shown how

individual Commissioners would be benefited any more than SBar itself would be. *See Sprenger, Grubb & Assocs., Inc. v. City of Hailey*, 127 Idaho 576, 584, 903 P.2d 741, 749 (1995) (“I.C. § 67–6506 prohibits a member of a governing board or commission, who has “an economic interest in the procedure or action,” from participating in a zoning proceeding. No such showing of economic interest has been shown by SBar. If such a conflict existed, such a member is prohibited from participating even if he or she will not vote”) (quoting *Manookian v. Blaine County*, 112 Idaho 697, 735 P.2d 1008 (1987)).

The Record reflects the inadequacy of water supplies are an on-going issue for Elmore County. *See R.8119* (Commissioner Corbus testifying that “this county has to have water”). SBar alleges that the County is putting undue pressure on Cat Creek to ensure that it will supply water from the Project to Elmore County. Pet.Br., 11. As evidence for this claim, SBar cites to a letter sent to the County from Gary Slette, the attorney for the Faulkner family that alleges the County was requiring unconstitutional conditions relating to the water delivery. **R.8385-86** (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). However, during the November 16, 2016 hearing, Doug Jones with Cat Creek stated, “But we will say publicly tonight that we are absolutely 100-percent committed to working with you guys [on the water issue].” **R.8116**. Even after sending that letter, Mr. Slette stated during the December 22, 2017 hearing that “[w]e’re willing as an applicant to work with the county to provide an ability for you to get water here if we can.” **R.12862**. Later in that hearing, Mr. Slette also said that Cat Creek “would be more than pleased to work with the county in order to make, to help you get your water where you want it to go, if you get your water. And that’s, every time I have spoken with John and James, that sentiment has echoed. We’re more than happy to cooperate with you guys to try and put a deal together that works for you as well as us. We recognize that you have a water shortfall. We’ll work with you. That’s the bottom line.” **R.12870-71**. The Board agreed that it had “kind of pushed” the water

delivery issue because it was a goal “as a county we felt we needed to do.” **R.12871** (Testimony of Commissioner Wootan). But later in that meeting, Commissioner Corbus expressed his frustration with those concerns because “they [Cat Creek] were the ones that offered to help.” **R. 12873**. Implying it was Cat Creek, not the County that first brought up the Project as a mechanism to also store and transport County water. To alleviate those concerns, the County created a working group together with Cat Creek and assigned one of its Commissioners, Mr. Hofer, to help work on the final language of the CUPs Amendment. **R.12975**. Furthermore, Commissioner Hofer recused himself from voting or deliberating on the County’s approval of the CUPs Amendment due to that work together with Cat Creek. *See* **R.12316 and R.13228-29** (Commissioner Hofer reaffirming that he is continuing to work with Cat Creek on the water issue and is recused from this decision). The CUPs Amendment was still approved by a majority of the elected Commissioners. **R.9885** (showing two commissioners, Corbus and Wootan, voting in favor of approving CUPs Amendment). The Court will not manufacture or create a controversy where none exists. *See generally Drennon v. Idaho State Corr. Inst.*, 145 Idaho 598, 603, 181 P.3d 524, 529 (Ct. App. 2007) (“This Court will not search the record for error”). Commissioners Corbus and Wootan specifically considered and determined they had no conflict of interest under Idaho Code section 67-6506. **R. 11887**. The Court agrees the Record supports this finding.

In addition, the Court is troubled by SBar’s allegation because agreeing with it would, by extension, eliminate every other citizen of Elmore County from being able to do what the current Commissioners are doing if elected to the same office. The Court simply cannot agree with an argument that would be directly at odds with the statutory requirements for those holding that office. Finally, the Commissioners are elected officials who have been elected to serve the citizens of Elmore County and advocate for their needs. Water issues in Elmore County are well-

known and properly considered by the Commissioners in evaluating the Project and the CUPs Amendment. The Court cannot and will not interfere in that arena. *See United States v. Munoz-Flores*, 495 U.S. 385, 386 (1990) (The judicial branch should be restrained “from inappropriate interference in the business of the other branches”). Furthermore, SBar could not cite the Court to a mechanism to replace Commissioners in considering projects that also impact other County concerns. Rather, if the members of the community do not agree with the decision of the Board, the people are free to appeal decisions that do not comply with LLUPA and exercise their right to elect new commissioners. Accordingly, SBar’s allegations regarding the County’s possible conflicts of interest are without merit and not a basis for the relief requested.

3. *The County did not violate the due process rights of SBar.*

LLUPA requires that “[t]he party challenging the decision of the Board must not only demonstrate that the Board erred in a manner specified by I.C. § 67–5279(3) *but must also show that its substantial rights have been prejudiced.*” *Hawkins v. Bonneville Cty. Bd. of Comm’rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011) (emphasis added) (quoting *Kirk–Hughes Dev., LLC v. Kootenai Cnty. Bd. of Cnty. Comm’rs*, 149 Idaho 555, 557, 237 P.3d 652, 654 (2010) (both in turn citing I.C. § 67–5279(4)); *see also Krempasky v. Nez Perce Cnty. Planning and Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010), *Cowan v. Bd. of Comm’rs of Fremont Cty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006), and *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004). If the Court cannot find a substantial right was prejudiced, the “agency action shall be affirmed.” *Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 137 Idaho 377, 379, 48 P.3d 1266, 1268 (2002) (internal quotations and citations removed).

SBar directly addressed this with its sixth Issue Presented which asks, “Whether the substantial rights of SBar Ranch have been violated by the actions of the Board.”²⁸²⁹ While the nature of all of the Petition’s 13 allegations related to this Issue Presented will be covered, one in particular encapsulates the rest: Allegation 40(GG) asks, “Did the Board’s actions violate SBar Ranch’s right to due process or right to equal protection of the law?” **Petition, 18.** The essence of this Issue Presented asks if the actions of the Board were “(a) in violation of constitutional or statutory provisions,³⁰ (b) in excess of the statutory authority of the agency,³¹ (c) made upon unlawful procedure,³² [or were] (e) arbitrary, capricious, or an abuse of discretion.”³³ I.C. § 67–5279(3). A party can show an infringement on its substantial rights by demonstrating that the governing board violated either its substantive or procedural due process rights. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999). Thus, analysis needs to be done to determine if either SBar’s substantive or procedural due process rights have been violated.

i. The Board’s actions did not violate SBar’s substantive due process rights.

Because substantive due process is discussed first in *Aberdeen-Springfield* and can be dealt with quickly, it will be dealt with first. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999). Substantive due process under “both the United States and Idaho Constitutions” requires there be a “reasonable relationship” between the action being considered and a legitimate governmental objective. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999) (quoting *In re McNeely*, 119 Idaho 182, 189, 804 P.2d 911, 918 (Ct. App. 1990)). “In this context, substantive due process means that legislation

²⁸ Allegations 40(A), 40(F), 40(G), 40(L), 40(M), 40(P), 40(Q), 40(W), 40(X), 40(GG), 40(HH), 41(f).

²⁹ SBar’s fifth Issue Presented is directly related to its substantial rights and will be discussed in depth in Part B(3)(iii).

³⁰ Allegations 40(C), 40(B), 40(H), 40(Y), 40(Z), 40(AA), 41(h).

³¹ Allegations 40(E), 40(K), 40(R)

³² Allegations 40(I), 40(N), 40(V), 40(BB), 41(a), 41(c), 41(d), 41(e), 41(g).

³³ Allegations 40(J), 40(T), 40(U), 40(DD), 40(EE), 40(FF), 40(II), 41(i)(1-6).

which deprives a person of life, liberty, or property must have a rational basis—that is, the reason for the deprivation may not be so inadequate that it may be characterized as arbitrary.” *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999) (internal citations and quotation marks removed). SBar’s argument that their substantive due process rights were violated because the Board considered a condition that Cat Creek provide infrastructure for water delivery to the residents of Elmore County does not satisfy those requirements.

As discussed in part C.2. above, what SBar seems to be asking for is the disqualification of every member of the Board from considering this or any similar project. SBar has not shown its substantive due process rights were violated by this discussion of water storage and delivery. There is a reasonable relationship between the government action being considered CUPs Amendment and the overall water needs of Elmore County’s residents. However, SBar’s argument is too attenuated as it does not show how its life, liberty, or property is negatively impacted by this discussion. If anything, what results from this discussion may actually benefit SBar by ensuring there is adequate water for all of the County’s future needs. Further, the final CUPs Amendment did *not* provide for infrastructure for delivery of any water owned by the County. While this issue may be discussed in the future and decisions by the Board will be subject to notice and public hearings. SBar’s substantive due process argument is dismissed.

- ii. SBar’s procedural due process rights were not violated when the County did not provide notice that satisfied the requirements of Idaho Code section 67-6512(b).

The Court turns now from substantive to procedural due process issues. This discussion requires more analysis by the Court because procedural due process, as incorporated to the states through the Fourteenth Amendment,

requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). But the process and procedures that are provided do not need to be rigid and inflexible, it “is not a stringent set of uniform requirements.” *Powers v. Canyon Cty.*, 108 Idaho 967, 969, 703 P.2d 1342, 1344 (1985); *Floyd v. Bd. of Ada Cty. Commissioners*, 164 Idaho 659, 666, 434 P.3d 1265, 1272 (2019), reh'g denied (Mar. 7, 2019) (describing the *Mathews* test as a “principle of flexible due process” in land use and other cases). The Supreme Court has also stated that

the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectable “property” or “liberty” interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.

Mackey v. Montrym, 443 U.S. 1, 13 (1979). While *Mackey* may specifically have been discussing procedures involving suspensions of drivers’ licenses, the principle it expresses remains true in land-use contexts: while due process procedures are a prerequisite for pending proceedings, there are no precedential precepts proscribing that published procedures be precisely perfect or provide for every possible permutation of potential proclamations that may be pronounced. But when an agency provides a procedure, procedural due process does require that the agency actually follow that procedure. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures”).

In land use cases, procedural due process requires that there is “some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 512, 148 P.3d 11247, 1258 (2006) (emphasis added) (quoting *Aberdeen–Springfield Canal Co. v. Peiper*, 133 Idaho MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW - PAGE 49

82, 91, 982 P.2d 917, 926 (1999) (internal quotations and citations omitted)); *see also Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1267 (1998). In quasi-judicial proceedings such as land use decisions, procedural “due process requires: (a) notice of the proceedings, (b) a transcribable verbatim record of the proceedings, (c) specific, written findings of fact, and (d) an opportunity to present and rebut evidence.” *Cowan*, 143 Idaho at 510, 148 P.3d at 1256 (citing *Chambers v. Kootenai Cty. Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994)). Both (a) – whether SBar was given adequate and proper notice – and (d) – whether SBar had an opportunity to present and rebut evidence – are at issue here.³⁴

Due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011) (“[E]veryone with a statutory interest in the outcome of a decision is entitled to meaningful notice and a fair hearing before an impartial decision-maker”). It does not require verification that each person is fully aware of the particular proceeding. “The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.” *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (internal citations and quotation marks removed). However, when there is inadequate notice or a failure of written notice in a land-use case, a landowner participating in a subsequent hearing “cure[s] notice defects attendant to the initial hearing.” *W. Boise 87 v. L&S Dev. Co.*, 108 Idaho 449, 451, 700 P.2d 71, 73 (Ct. App. 1985); *see also Cowen v. Bd. Of Comm'rs of Fremont Cty.*, 143 Idaho 501, 513 148 P.3d 1247, 1259 (2006) (County did not violate due process where notice was defective, but landowner still participated in hearings), *and Neighbors for a Healthy Gold Fork*

³⁴ SBar also argues that there were deficiencies in the way the transcript was produced, but the Court does not find those alleged errors to be actionable as they can be explained by the transcriptionist simply being unfamiliar with the different voices of those speaking.

v. Valley County, 145 Idaho 121, 176 P.3d 126, 133-34, N.1 (2007) (Due process was not violated by a defective notice because landowners acknowledged they were made aware of revisions to a previously discussed plan). As discussed above, LLUPA requires that notice be given to property owners whose land adjoins or is adjacent to the proposed development, or whose land is within one mile “when the peak height of a structure in an unincorporated area is four hundred (400) feet or more.” I.C. § 67-6512(b), I.C. § 67-6521(1)(a) (describing notice required for landowners whose land is adjacent or adjoining).

Here, some of SBar’s arguments regarding insufficient notice are not supported by the Record. As will be discussed in more depth below, SBar’s predecessor-in-interest received actual notice of the Planning and Zoning Commissions hearings. SBar acknowledges that it received actual notice starting in November 2016 of every hearing before the Board and attended all hearings. **Pt.Br., 5** (Acknowledging receipt of notice for hearings beginning November 2016), **R. 12467** (Mailing list for November 16, 2016 hearing). The Record also reflects that the County published notices in the local newspaper and posted signs on the property around the proposed Project area. **R.7758** (Notice for Cat Creek's appeal of P&Z decision), **R.13709** (Notice for November 16, 2016 hearing), **R.8797** (Notice for the December 22, 2017 hearing), **R.9053** (Notice for continuation of hearing to January 26, 2018), **R.9980** (Notice for March 23, 2018 hearing), **R.10529** (Photos of Notices posted for October 13, 2016 Hearing), **R.10785** (Notice for May 11, 2018 Hearing), **R.11105** (Notice for July 26, 2018 hearing), **R.13720** (Notice of special hearing for July 26, 2018), **R.11534** (Notice for August 24, 2017 hearing), **R.11990** (Photos of Notices posted on September 18, 2018).³⁵

While all parties agree there was no written notice for the February 9, 2018 hearing, that defect was harmless as to SBar as its counsel was present for that meeting and submitted written

³⁵ This is not a comprehensive list as the titles of the documents in the Record reveal 33 different documents with the word “notice” in the title. These are just an example of notices the Court found to be applicable to this point.

comments beforehand and the Board ultimately held a rehearing in July. **R.9818** (February 8, 2018 e-mail from SBar attorney confirming receipt of CUPs Amendment draft for hearing the next day). Prior to and after the December 2017 hearings regarding the CUPs Amendment, SBar was well aware of the proposed changes that may impact the originally issued CUPs, the disagreements between Cat Creek and the Board regarding water delivery, and what the discussions would be focused on at the January and February continuations of the December hearing. **R.9767** (January 25, 2018 e-mail from SBar attorney with written comments for proposed CUPs Amendment). Most importantly, the Record shows that SBar knew about these changes because it had copies of the proposed CUPs Amendment document before each meeting and submitted suggested changes to the County. Thus, those arguments regarding the Board's failure to provide proper notice to SBar can be dismissed as SBar had actual notice.

The Court must also address SBar's argument regarding insufficient notice regarding the wind turbines related to LLUPA notice requirements for tall structures. SBar argues "(2) the notice issued by the Board for its November 16 and 17, 2016; hearings did not contain the height and location requirements set out in I.C. § 67-6512(b)." **Pet. Br. at 42**. That LLUPA statute states, "[W]hen [a structure's proposed height is] four hundred (400) feet or more, the structure's proposed location and height *shall be stated in the notice.*" I.C. § 67-6512(b) (emphasis added). When the five CUPS were initially approved in February 2017, the estimated height of the towers was discussed in the record in several places which put SBar on notice that the height could be greater than 400 feet tall. **R. 766-67, 8026-34**.

SBar has a real interest in the location and height of the wind turbines as its property line is located less than a mile from the proposed location for those turbines. But not even the County or Cat Creek seem to know exactly where the turbines will be located. It should be noted, that after searching through the Record, the Court cannot find *any* of the notices related to the wind

turbine piece of the Project that contain a potential height for the wind turbines. In addition, the locations for the turbines are not specific. In some notices, all that was stated was that the Wind Turbines would be in “portions” of as few as nine sections, to as many as 45. **R.6161** (Notice for December 16, 2015 hearing stating, "The site is located in portions of Sections 15, 21, 22, 28, 29, 30, 31, 32 & 33, Township 1 South, Range 10 East, B.M."), **R.6832** (Listing the location as “portions of” 45 sections). Cat Creek’s initial CUP application for the Wind Turbines stated the location as portions of thirteen Sections, but that was increased to as many as 31 sections in the CUP Supplement and Exhibit. **R.335** (Application for CUP 2015-06 showing location as portions of 13 sections within Township 1 South, Range 10 East), **R.629-30** (Supplement to CUP Application), **R.740** (Exhibit to CUP Supplement). The Board’s approval of the CUPs in February 2017 listed 48 different parcels listed as potential locations for the wind turbines. **R.8267**. This land area is over 18,741 acres.³⁶ Cat Creek stated in its CUP applications that it wanted to install approximately 39 turbines in total. *See, e.g.* **R.318**, **R.766**, and **R.8287-88**. Cat Creek indicated the area for the direct land use for the turbines would be approximately 40 acres. **R.767**.

The public, SBar and the Board had information since before 2017 there was the possibility the wind turbine heights could exceed 400 feet. **R. 767** (height of turbines shall be 510 feet ground to tip of blade, number of turbines 39 and direct land use for the turbine and associated facilities would be approximately 40 acres). This information was clearly contained in the Wind CUP application that the public could review and that the Board approved subject to certain Conditions of Approval. Because SBar failed to appeal the allegedly defective notices regarding the wind turbines’ location and heights related to the Project’s approval in February 2017, any such LLUPA challenges under § 67-6512(b) are time barred.

³⁶ A chart showing the parcel numbers, acreage for each parcel, the average parcel size, and total acreage of the possible wind turbine locations has been attached as Appendix B.

This LLUPA notice argument also arguably applies to the CUPs Amendment public hearing process. For example, the Notice for the December 22, 2017 public hearing does not include the heights or locations of wind turbines. **R.8797**. The Development Agreement states that the “Wind turbine towers may be located anywhere on the Wind CUP site. The maximum number of towers is thirty-nine (39). The maximum height is five hundred (500) feet.” **R.9902**. The Development Agreement also sets forth the minimal set back from any public road is 1.25 times the overall height and at least 2,500 feet from any residential dwelling. **R.9902**.

As to the notices for the CUPs Amendment, it is undisputed those notices did fully not comply with § 67-6512(b). It is disputed whether such notices needed to comply. Since the height did not exceed the height Board originally approved in the Wind CUP of 512 feet, it is unclear if specific notice of the minor height reduction by 12 feet was required. If the heights were being increased, the public would have had a right to specific notice of an increase as such would be a negative impact to any views. Here, the impact of a reduction in height from the Wind CUP application did not prejudice SBar or any other member of the public and was not a material change to the height originally approved. Further, Bar had notice of the change in heights when it participated in commenting on the Development Agreement. So any failure to include the reduced height in the notice was harmless and does not rise to the level of a due process violation or a violation of SBar’s substantial rights.

Between the time of Cat Creek’s initial applications for the five CUPs, the site plan has changed multiple times. *Compare* **R.741-47** (Maps showing locations of each piece of the Project submitted with initial CUP applications), **R. 6730** (Master Site Plan as of March 16, 2016), **R.7166-70** (Maps presented as exhibits at June 15, 2016 public hearing), **R.7994** (Showing elimination of a portion of the initial wind turbine locations as of November 16, 2016),

Master Site Plan #2 approved in February 2017, **R. 8056**, and **R.9901-03** (Master Site Plan #3 of Project and description of changes included with CUPs Amendment).

It is true the land parcels related to the wind turbines was reduced from over 18,000 acres to 3,354 acres in Exhibit B of the Development Agreement. **R. 9888**. But every tax parcel listed in Exhibit B was included in the tax parcels originally approved by the Board. *See Appendix B* (comparing tax parcels for Wind CUP originally approved and those identified in Exhibit B to the Development Agreement). So no *new* tax parcels were identified since the Project's approval in 2017. For this reason, the Court finds the Development Agreement did not broaden the wind turbine locations originally disclosed and approved by the Board. The Development Agreement reduced the affected area in which the turbines may be placed. Also, this clarification of the acreage is consistent with the Wind Energy Facility document submitted by Cat Creek which described the turbines as being placed throughout an area of 3,600 acres. **R.764-65**. The overall site boundary was expected to be an area of 15,000 acres with direct land for the wind turbines being approximately 40 acres of the approximate 3,600 acre area the turbines would be placed. **R.766**.

The Court finds the Board was aware from the Wind CUP application the general area for the wind turbines was a large area of over 15,000 acres when it approved the parcel numbers for the wind turbines site in its Findings of Facts, Concluding of Law, and Order in February 2017. The Board was also aware the Master Site Plan #2 showed a larger area for the wind turbines than would actually be used as Cat Creek had consistently maintained the acres the wind turbines would ultimately be placed on would be not exceed a narrowed site area of approximately 3,600 acres. The Court finds the Development Agreement's narrowing of the land for the wind turbines was consistent with the Wind CUP application for which SBar and the public had received notice and the opportunity to review the Record at the County offices. Therefore, the

Court finds the reduction in acreage did not require a more specific LLUPA notice as to the location of the turbines since the subset of 3,354 acres was part of the 18,000 acres in the tax parcels attached as part of the Project's approval by the Board in February 2017. SBar had actual notice of the revised tax parcel identifiers based on its participation and comments related to the CUPs Amendments and exhibits to the draft Development Agreement. Any defect in the notice was harmless and cured by SBar's actual notice of narrowing of the location for the turbines *Cowan v Bd. of Comm'rs of Fremont Cty*, 143 Idaho 501, 143 P.2d 1247 (2006). Thus, SBar's due process rights or substantial rights were not violated by the failure of the notices for the CUPs Amendment to comply with § 67-6512(b).

As to the exact placement of the turbines on approximately 40 of the 3,354 acres, the Court finds SBar does have a valid argument that it cannot effectively evaluate the impact of the placement of 39 wind turbines without more specific notice of the locations and final heights. However, even now, Cat Creek still is unable to articulate exactly where those towers will be located on the 3,354 acres. During the July 2018 hearing, counsel for Cat Creek stated,

Now, there's been some concern about the height of the towers and the location of the towers. *We don't know and we've never known.* We know generally where we want to put the wind towers within the CUP. We know the general height of wind towers as they exist today in the construction industry, but we don't know because we haven't completed feasibility studies, we haven't completed wind studies, we have complied with all of the FAA feasibility studies. *So we don't know.*

R.11643 (emphasis added).

Because Cat Creek still does not know the final heights or locations of the wind turbines, proper notice under LLUPA will be required when such information is determined and considered by the Board. The statutory language is clear—that information regarding locations and heights “shall” be in the official notice. I.C. § 67-6512(b) if the turbines are 400 feet or higher in height. The Board's approval of the final locations of the wind turbines and their final heights are therefore likely to require an additional public hearing under LLUPA and the Zoning

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Ordinance to avoid violating due process rights or substantial rights of SBar and other members of the public. This additional hearing was provided for under the Development Agreement Section 2.1.5 **R. 9871** (material modifications to the Master Site Plan may be modified with the consent of the parties and following public hearing). The County is on notice any public hearing on the final location and heights of turbines will have to be consistent with procedures for material modifications of the CUPs Amendment, the Amended Zoning Ordinance, and LLUPA.

iii. SBar's procedural due process rights were not violated when the scope of the rehearing is considered.

As part of its discussion about its Sixth Issue Presented, SBar specifically argues that its rights to procedural due process were violated in five different ways:

(1) Petitioner was never provided notice, at all, of the P&Z Commission hearings; (2) the notice issued by the Board for its November 16 and 17, 2016; hearings did not contain the height and location requirements set out in I.C. § 67-6512(b), and failed to contain an adequate description of what would be discussed at the hearing; (3) the notices issued by the Board regarding the Development Agreement did not indicate that the Board would consider and potentially modify the CUPS; (4) the notices regarding the Development Agreement contained inaccurate descriptions of location of the project; and (5) the Board failed to provide copies of the final Development Agreement before it was approved at the February 9, 2018, hearing.

Pet. Br., 42. As previously discussed, procedural due process requires an agency to follow its own procedures. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Violations (1) and (2) are untimely and arguably harmless since SBar had actual notice of the appeal to the Board decided in 2017 and failed to file an appeal. Violation (3) was cured by the July 26, 2018 rehearing. As to Violation (4), any inaccuracies in the descriptions of the location of the Project when initially approved were not material and were waived when no appeal was taken in 2017. Moreover, the tax parcels for wind turbines was clarified in the Development Agreement hearing which SBar actively participated in. So this alleged violation is either harmless or was cured by further actions of the Board. Violation (5) was cured by the rehearing and the Record shows that SBar

had access to the final CUPs Amendment document before the July 2018 hearing. *See* **R.11105** (Notice for July Hearing showing that the CUPs Amendment document was available for review before the public hearing). So all of these alleged due process violations are rejected by the Court.

4. The Board still has jurisdiction over the Project.

The Court next needs to discuss SBar's fifth Issue Presented which asks, "Whether the filing of the initial Petition for Judicial Review deprived the Board of jurisdiction to issue orders in this matter from and after the date of filing of the Petition." **Pet.Br., 27**. The answer to this Issue Presented is, "No." The Court finds that SBar's initial Petition for Judicial Review was premature and did not deprive the Board of the ability to move forward with other actions relating to the Project. Some background on that finding is required. First, the Court finds SBar jumped the gun with its February 16, 2018 reconsideration filing—none of the arguments it raises in the First Request for Reconsideration were properly before the Board because there was no written decision and thus the Board's oral decision from February 9, 2018 was not final. While the Board held a hearing and considered SBar's First Request for Reconsideration, the Board properly did not allow SBar to challenge at the time the Board's written findings released on March 16, 2018. **R. 9983-10008** during that hearing as the First Request for Reconsideration was limited to the Board's oral deliberations. *See* **R.10173-241**.

Any time a governing board's decision is challenged by request for reconsideration that does not limit the governing board's ability to take further action related to an approved project or development. Rather, any further actions by the governing board are done at their own peril if overturned as a result of its consideration of the request or judicial review. The Board's approval of the CUPs Amendment and SBar's petition for judicial review does not require the Board to stay any further action on the Project. While it is possible some applicants may choose not to

proceed on a project while a request for reconsideration or judicial petition is pending for fear of wasting monies on a project that could be overturned, that is a risk/benefit analysis for Cat Creek and not this Court. Moreover, the Court's finding the proceedings are not automatically stayed is discussed in the analysis of the Court denying SBar's motion for a preliminary injunction as discussed later in this Memorandum Decision Order.

It is a different story when considering the Sixth Issue Presented³⁷ and SBar's Second and Third Requests for Reconsideration. As previously discussed, an agency decision is not final until the required written decision is released. *See Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996) (An agency decision regarding a conditional use permit requires, among other things, "specific, *written* findings of fact") (emphasis added). Thus, the Board's decision on the CUPs Amendment was not final for LLUPA purposes until that written decision was released and the statutory clock for timeliness should not have been started until this was released. SBar's Second Request for Reconsideration was proper because it was filed based on the Board's written Findings of Fact, Conclusions of Law and Order.³⁸ **R.9993-10008**. As soon as that Second Request for Reconsideration was filed, it arguably made the First Request for Reconsideration moot. Further, the Court finds the Board's denial of the First Reconsideration was supported by substantial evidence and was not arbitrary or capricious decision, was not a violation of SBar's due process right or right to equal protection of the law.

The Board properly considered this Second Request for Reconsideration as it was timely filed. **R.10173-241**. Notice was given, and a public hearing was held on that Second Reconsideration Request. **R.6832** (Notice of hearing), **R.13227-305** (Transcript of hearing). The Board deliberated on that Second Request and then issued its written Findings of Fact,

³⁷ "Did the Board's actions violate SBar Ranch's right to due process or right to equal protection of the law?" **Pet.Br., 18**.

³⁸ The fact that the County erred by not filing its written decision until 34 days after the hearing (not within 30 days as required by the Elmore County Code 6-4-9.G.) is a harmless error due to the fact that SBar's Second Request for Reconsideration was granted in part.

Conclusions of Law and Order. **R.11030-43**. During its deliberations, the Board determined that some of SBar's arguments had some validity and determined that an additional hearing needed to be held to give the public notice and an opportunity to be heard. This is how the reconsideration process is designed to work to give the governing body the first opportunity to address any errors.

The Court respectfully disagrees with SBar's argument that the Board made a *sua sponte* decision to have a rehearing. The Board held the rehearing based on SBar's Second Request for Reconsideration being granted in part. The Board made clear that the hearing would be limited to the list of 20 topics – not the entire Project – and the public notices for that hearing specifically included that information. *See R.11105-12*.³⁹ This is exactly the purpose of the reconsideration process – to allow the Board the opportunity to correct and cure any errors.

Before the written decision on the Second Request for Reconsideration was released by the Board on May 18, 2018 SBar had already filed a premature petition for Judicial Review based on the Board's denial of the First Request for Reconsideration. SBar argues that the filing of this Petition should have stayed the proceedings before the County and prevented the County from taking any further action on anything relating to the Development. *See Pet.Br., 27* However, as previously discussed, that First Request for Reconsideration and Petition for Judicial Review were not based on final agency action and were arguably subsumed into the filing of the Second Request for Reconsideration. In addition, when the Petition was filed, SBar was aware that the County had already set a time for the hearing on its Second Request for Reconsideration. **R.10786** (Notice showing it was published on April 18 and 25, 2018). SBar can't have it both ways – it can't claim that the Board was prevented from taking further action after the premature Petition was filed, then also proceed forward with the Second Request for

³⁹ Even the title of the document from the July hearing stated that it was a Rehearing. *See R.11868-907* ("July 26, 2018 – Rehearing"). Those twenty topics are attached in Appendix C.

Reconsideration. The Board had a duty under the Zoning Ordinance to resolve the Second Request for Reconsideration. SBar had a duty to exhaust all administrative remedies before seeking judicial review.

Moving forward, however, SBar's Second Request for Reconsideration was not "denied" in total because the Board found there were 20 topics relating to the CUPs Amendment that it wanted to receive additional comment and hold a hearing on. It made this decision because it had received complaints from individuals within the community claims they had not received notice or opportunity to be heard. *See* **R.13373-75**. The Board limited what was going to be discussed because it felt that "a *rehearing* on the amendments to the Approval and Conditions should be held" on specific topics amended by the CUPs Amendment that it may not have received proper public participation. **R.11040** (emphasis added). That decision by the Board to have a rehearing essentially rebooted the process for the CUPs Amendment as the Board wanted to make sure everything was done properly – including notice of the public hearing and the decision to phase or separate the five CUPs. **R.13385** ("The County has taken the position that [the July 26, 2018 hearing will be] pertaining to anything that was amended. So, the issue of whether five permits are tied together or separate was one of the things we amended. So, that would be subject, would be a fair subject for that hearing"); *see also* **R.11106** (Notice of the July 26, 2018 rehearing with the list of the 20 topics to be discussed).

The County's Findings of Fact, Conclusions of Law, and Order on September 7, 2018 was the final written decision from that rehearing, which meant it was the final written decision on the CUPs Amendment **R. 11868-11907**. Thus, SBar's time to ask for reconsideration actually began on that date and it timely asked for reconsideration of that decision on September 11, 2018. **R.11981-89**. The Third Request for Reconsideration was denied without a hearing on September 21, 2018. **R. 12005**.

To the extent SBar is arguing in its appeal, the rehearing process was defective as it should have been as to the entire project, this argument is not persuasive as the time to challenge the original approval of the Project had passed and the granting of the rehearing was limited to issues related only to the CUPs Amendment. Further, the Board was not required to hold a hearing on the third request for reconsideration. *See* Amended Zoning Ordinance Section 7-3-12.

Before the CUPs Amendment decision was “final” agency action, the Board had the authority and obligation to resolve the requests for reconsideration. The initial filing of the Petition did not prohibit the Board from fulfilling its obligations in the requests for reconsideration. In reviewing the written Findings of Fact, Conclusions of Law and Orders on the CUPs Amendment decisions and the three requests for reconsideration, the Court finds the Board’s dispositions were supported by substantial evidence set forth in those written findings and were not arbitrary or capricious decisions did not violate SBar’s due process right or right to equal protection under the law.

D. The County did not violate Idaho’s Open Meeting Laws.

SBar alleges that the meetings where Cat Creek and the County worked together on the CUPs Amendment were done in violation of Idaho’s Open Meeting Law. **Pet.Br.46-50**. Idaho’s Open Meeting Laws are contained in Idaho Code sections 74-201 through 74-208. These laws were enacted to help Idahoans know how their government conducts its business. I.C. § 74-201 (Stating "it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret"). If a public body, such as a board of county commissioners, holds certain meetings without making them open to the public, then those meetings and any actions taken as a result of them may be void. I.C. § 74-208. In addition, any challenges to meetings under the Open Meeting Laws must be challenged within 30 days of the alleged action and there is no evidence in the Record SBar did this in any of their Requests for Reconsideration.

I.C. § 74-208(6); *See, e.g.* **R.9909** (SBar's First Request for Reconsideration stating, "the Applicant may believe that the negotiations taking place in an open public meeting afforded the public "notice" to comment on the proposed CUPs Amendment, there is no discussion of Open Meeting Law violations); **R.10179** (SBar's Second Request for Reconsideration stating the same thing with no discussion of Open Meeting Law violations); *and* **R.11986** (SBar's Third Request for Reconsideration stating the same thing with no discussion of Open Meeting Law violations).

As described in the County's Reply to the Court's Request for Additional Briefing, "[i]t is common for many meetings to occur between county planning and zoning staff and a developer in connection with a proposed development in order to reduce the number of or clarify the issues for consideration by planning and zoning commissions or county boards of commissioners. These meeting are not meetings of the Board and are not public meetings." **County's Reply, 3.** The Court agrees. If a quorum of the Board was at meetings then it may be a violation. Negation meetings with one commissioner (who recused himself from the decision making process) was not a public meeting subject to the Open Meeting Laws.

Because the Court finds the negotiation meetings were not required to be held under Idaho's Open Meeting Laws, and because SBar did not file any complaints within the time provided in the Open Meeting Laws statutes with the proper court, this claim must be dismissed.

E. The Board's CUPs Amendment decisions did not violate Idaho Code section 67-5279(3).

SBar challenges the Board's actions since 2017. The Court has attempted to address all of SBar's arguments which overlap each other based on the lengthy and complex record presented to the Court. To the extent the Court has not made specific findings on a specific argument, the Court makes a comprehensive finding on the Petition and arguments of SBar set forth in Appendix A.

The Court finds for the reasons previously discussed as well as its review of the Record as a whole, the Board's findings, conclusions and decisions must be affirmed by the Court. SBar has not established the Board acted in violation of constitutional or statutory provisions; acted in excess of its statutory authority; or followed unlawful procedure that was not otherwise cured or can be cured by a future public hearing on the final location and height of the wind turbines. Furthermore, SBar failed to timely appeal any defects in procedure or substance related to the February 10, 2017 approval of the Project.

The Court also finds that the County did not act in a manner that was "not supported by substantial evidence on the record as a whole; or [that was] arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3)(d) and (e). When the Court considers the Record as a whole, from the time Cat Creek submitted its initial CUP applications, including the approval in the February 10, 2017 Findings of Fact, Conclusions of Law, and Order, and through to the Board's denial of SBar's Third Request for Reconsideration on September 21, 2018, it is clear to the Court that the Board considered the entire Record before it. The Board's oral and written findings were supported by reference to substantial evidence in the Record, its conclusions of law were consistent with its obligation under the Zoning Ordinance and LLUPA and such decisions were not arbitrary or capricious.

The February 10, 2017 Findings of Fact, Conclusions of Law, and Order needs to be addressed in order to directly address one of SBar's specific arguments: that the County acted in a manner inconsistent with its own Comprehensive Plan. *See Pet.Br., 1, Fn.3, 7, 28, 33-34, 50-52.* However, the Supreme Court has clearly stated that

A brief review of the purpose of a comprehensive plan within the framework of the Local Land Use Planning Act will help explain this Court's view of the appropriate standards to be applied by the Board on remand. The Local Land Use Planning Act was promulgated to ensure the orderly and effective development of land to the benefit of Idaho citizens. *See* I.C. § 67-6502. The Act indicates that a comprehensive plan and a zoning ordinance are distinct concepts serving different

purposes. A comprehensive plan reflects the “desirable goals and objectives, or desirable future situations” for the land within a jurisdiction. I.C. § 67–6508. This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions. *South Fork Coalition v. Board of County Comm'rs of Bonneville County*, 117 Idaho 857, 863, 792 P.2d 882, 888 (1990) (quoting *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984)); cf. *Sprenger, Grubb & Assocs., Inc., v. City of Hailey*, 127 Idaho 576, 585, 903 P.2d 741, 750 (1995); *Balser v. Kootenai County Board of Comm'rs*, 110 Idaho 37, 39, 714 P.2d 6, 8 (1986); *Ferguson v. Board of County Comm'rs for Ada County*, 110 Idaho 785, 787, 718 P.2d 1223, 1225 (1986). The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels within the jurisdiction. See I.C. § 67–6511. Given this distinction, we turn to an examination of the controlling law in this case.

Urrutia v. Blaine Cty., 134 Idaho 353, 357–58, 2 P.3d 738, 742–43 (2000). In other words, a county’s Comprehensive Plan does not control the actions of the County, it is more of a big picture general guide.

Here, there is substantial evidence in the record that supports the findings and conclusion of the Board as to the Comprehensive Plan. The 2017 Findings of Fact, Conclusions of Law, and Order specifically discussed the Comprehensive Plan as being law applicable to its findings. **R.8269**. It then specifically found a number of places in the Comprehensive Plan that were directly applicable to the CUPs Applications. **R.8269-74**. It then made detailed specific findings regarding how the proposed CUPs are in line with that Comprehensive Plan. **R.8278-95**. This was not an arbitrary or capricious decision by the Board regarding the Comprehensive Plan. The Board further addressed the applicable Zoning Ordinances related to the Project and made requisite findings to support its conclusions. These were not arbitrary and capricious decisions by the Board. Further, by not timely appealing the 2017 decision on the Project, SBar waived any challenge to their findings and conclusions.

To the extent SBar is arguing the Board needed to reopen its Comprehensive Plan analysis at the hearings on the CUPs Amendments, this Court finds that was unnecessary. The
MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW - PAGE 65

Court finds the CUPs Amendment did not affect the Board's February 10, 2017 findings and conclusions regarding the Project's compliance with the Comprehensive Plan. Therefore, no further discussion of Comprehensive Plan was required in the CUPs Amendment decisions issued by the Board.

As to the CUPs Amendment, the Court finds the Development agreement signed February 9, 2018 and Findings of Fact, Conclusions of Law and Orders issued on March 16, 2018, April 6, 2018, May 18, 2018, September 7, 2018 and September 21, 2018 satisfy all legal requirements of Idaho Code section 67-5279(3).

F. SBar's has failed to establish substantial rights have been prejudiced.

The Court must next discuss SBar's argument that its substantial rights have been prejudiced. *See* I.C. § 67-5279(4); **Pet.Br., 27** (Issue Presented 6, "Whether the substantial rights of SBar Ranch have been violated by the actions of the Board"). However, SBar, "having slept on its rights, now asks [this Court] to do what by orderly procedure it could have done for itself." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). As discussed earlier, the Court declines to reopen the original approval of the Project.

SBar admits that it received notice in 2016 of Cat Creek's appeal to the Board on the P&Z's denial of the Project and CUP applications. *See Pet.Reply Br., Exhibit 1, 2* ("Although, SBar Ranch received a notice of the hearings, [it] did not attend the hearings on November 16-17, 2016"). Actual notice is sufficient in face of a formal written notice requirement, *see Cowan v. Bd. of Comm'rs of Fremont Cty*, 143 Idaho 501, 503, 148 P.3d 1247, 1247 (2006) (no substantial rights violated when complaining party had not been provided with proper public notice, but had actual notice).

The Court agrees that the specific locations and heights of the potential Wind Turbines were not included in the notice for that hearing. **R.7758-60**. However, that notice also stated

three things: first, that part of Cat Creek's appeal involved a "wind turbine electrical generating facility;" second, that those wind turbines would be located within a certain geographical region; and finally, that the full record was available for inspection. **R.7759-60**. Having received that notice, if SBar was concerned, worried, or curious about where those turbines would be located and how tall they might be, it had the ability to see exactly what the Board would be considering during the November 2016 hearings because the notice specifically stated that the record was available. **R.7760**. If it would have examined that record, it would have seen a map with the proposed locations for the wind turbines (**R.746**) and a description – including the heights – of the specific turbines being considered (**R.767**). And while the site map of the Project has been changed multiple times, the general area for the wind turbines closest to SBar's property has not changed across all of them. *Compare* **R.746** with **R.8381** and **R.11105**. Further, Cat Creek specifically told the Board that even as of July 2018 it was still unaware of what the specific heights of the towers would be and where they would specifically be located. **R.11643**.

Thus, SBar's contention that its substantial rights have been violated because the County did not supply more accurate information in the notices about the locations and heights of the wind turbines is not supported by the Record of the information that was available to SBar. The CUPs Amendment document itself requires that any requests to make changes to the site plan regarding the wind turbines (among other pieces) have a hearing. *See* **R.9871** (Section 2.1.5 requiring public hearing for changes to "locations for wind turbines") and **R.9902** (Item 11 discussing expectations of heights and locations for wind turbines).

In addition, this is not a situation where SBar has had only one opportunity to present its case to the County or that it has not had a full and fair opportunity to be heard. The Board is required to consider all points of view and make the best decision possible based on the record before it. SBar added to that record when it submitted comments to the County in January and

February 2018 before the Board approved the CUPs Amendment. **R. 9767** (E-mail from SBar's attorney on January 25, 2018 to County with comments for public hearing), **R.9818** and **R.10351** (E-mails from SBar's attorney on February 8, 2018 with additional comments). After the Board's initial approval of the CUPs Amendment, SBar filed two Requests for Reconsideration and the Board had hearings on both requests. Due to SBar's allegations, the Second Request for Reconsideration was granted in part. At that rehearing, SBar was allowed to make a presentation to the County that included testimony from both Mr. Stephens and SBar's Attorney Merlyn Clark, but also an audio/visual presentation. **R.11535-37**, **R.11589-91** (Written comments submitted by Mr. Stephens), **R.11650-52** (Video presentation played, followed by comments by Mr. Stephens), **R.13424-33** (Testimony by Merlyn Clark) After that rehearing in July 2018, SBar filed a third Request for Reconsideration which was considered and denied by the Board.

Accordingly, when the Court considers the record as a whole, it finds that SBar has not shown how its substantial rights under LLUPA or the Elmore County Zoning Ordinance have been violated regarding the CUPs Amendment decision. *See Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011) ("The party challenging the decision of the Board must not only demonstrate that the Board erred in a manner specified by I.C. § 67-5279(3) *but must also show that its substantial rights have been prejudiced*") (emphasis added) (internal quotations and citations omitted). SBar had meaningful notice, actively participated in commenting on the CUPs Amendment, and had multiple opportunities to be heard.

SBar's claims based on the fact the Project will reduce the value of its property equals its substantial rights have been violated. This argument misapplies the law. Just because a project or development possibly reduces the value of a neighboring property, does not mean substantial rights to weigh in on the decision were prejudiced or that the applicant landowner cannot get

their project or development approved. Where the decision making body listens to all the parties and has substantial evidence to support its decision then the substantial rights of the affected parties have not been violated. To find otherwise would allow every decision made against an affected neighbor's position alone enough to be a violation of substantial rights.

Here, SBar has real concerns and may be impacted by the wind turbines, transmission lines and substations, but a neighboring property owner also has the right to develop their property within in the confines of the applicable Zoning Ordinance and LLUPA. Here, the Board found the Project was well as the CUPs Amendment including all Conditions of Approval were consistent with the Zoning Ordinance and LLUPA. Based on the record this Court must affirm the Board's actions. Claims of improper notice violating SBar's substantial rights were either untimely or not ripe as the CUPs Amendments did not resolve the final height and location of the wind turbines and actually lowered the height by twelve feet.

G. SBar's takings claim was not properly pursued.

SBar's original Petition included Count 3, an unlawful taking. This claim was included in SBar's Second Amended Petition in Count 1, 40(H)(H). The Court finds SBar is not entitled to relief as there has been no taking of SBar's property without just compensation as a result of the CUPs Amendment. Notice pursuant to Idaho Code section 67-6519(4)(C) that a takings analysis could be requested pursuant to Idaho Code section 67-8003 was included in the original Project approval and all CUPs Amendments approvals **R. 8307; 10008; 10260; 11042; 11889; and 12009**. The Court cannot find that SBar ever made a request for a taking analysis by the Board in any of its requests for reconsideration. Therefore, this claim is dismissed.

H. SBar's Motion for Preliminary Injunction is denied.

On December 11, 2018, SBar filed a Motion for Preliminary Injunction alleging that County is not allowed to take any further action on the CUPs Amendment until the Court has

completed its decision on the Petition for Judicial Review. **Pet. Motion for Preliminary Injunction, 9.** This filing was in response to a Notice SBar received on November 16, 2018 stating that a hearing was scheduled for December 14, 2018 where the County would consider amendments to the CUPs Amendment. **Pet. Motion for Preliminary Injunction, 8.** Elmore County and Cat Creek both replied to that Motion on January 18, 2019.

In its Motion, SBar alleges that its Petition deprived the County of jurisdiction to consider anything relating to the original CUPs or the CUPs Amendment. **Pet. Motion for Preliminary Injunction, 11-13.** SBar also alleges it will suffer irreparable harm to its Due Process rights if the County was allowed to hold that hearing as scheduled on December 14, 2018. **Pet. Motion for Preliminary Injunction, 13-14.** The County responded by alleging that even if SBar's argument was not moot, its actions were lawful and valid, and that SBar failed to support its argument with admissible evidence. **Elmore County's Opposition to Pet. Motion for Preliminary Injunction, 1-7.** Similarly, Cat Creek responded by stating SBar is not entitled to seek injunctive relief and that SBar has not shown a risk of irreparable harm or a likelihood of prevailing on the merits of its argument. **Cat Creek's Opposition to Pet. Motion for Preliminary Injunction, 2.** The Court heard oral argument on SBar's Motion on February 22, 2019. Counsel for all parties agreed that 30 days' notice would be given before any actions were taken by the County regarding further modifications of the Project. The Court indicated it did not need to make a ruling on the motion as Counsel were going to get approval from their clients regarding the notice; if no agreement could be reached, then the Court would make a ruling on that Motion. Since no further agreement was filed, the Court denies the motion for Preliminary Injunction.

During the consideration of a Petition for Judicial Review, the underlying proceedings are not automatically stayed unless provided for by statute. I.R.C.P. 84(m). As LLUPA does not

discuss a stay during a petition for judicial review, the Court looks to IDAPA for guidance. I.C. §§ 67-6519, 67-6535 (Judicial review is conducted “under the procedures provided by chapter 52, title 67, Idaho Code”). However, IDAPA only provides that “[t]he filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action [and] the reviewing court may order[] a stay upon appropriate terms.” I.C. § 67-5274. Where no specific rules can be found in those statutes and this Motion was filed under Rule of Civil Procedure 65, the Court will base its ruling on the requirements from that Rule. 65. *See Great Beginnings Child Care, Inc. v. Office of Governor of State of Idaho*, 128 Idaho 158, 160, 911 P.2d 751, 753 (1996) (Implying in dicta that the “the standards for TROs set forth in I.R.C.P. 65(b)” may be used during the pendency of petitions for judicial review).

Rule 65(e) sets forth when a preliminary injunction may be granted. Three are applicable here: The party asking for the preliminary injunction shows that it is entitled to relief and that at least part of the requested relief is a restraint on the other party’s actions. I.R.C.P.65(e)(1). “The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt.” *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988, 993 (Idaho 1984). The party asking for the injunction shows that allowing the actions to continue would “produce waste, or great or irreparable injury.” I.R.C.P.65(e)(2). *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988, 993 (Idaho 1984) (“[A] preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal”). Finally, the requesting party shows the other party is currently violating, or is about to violate, its rights. I.R.C.P.65(e)(3). A grant of a Preliminary injunction is discretionary for the Court. *Walker v. Boozer*, 140 Idaho 451, 456, 95 P.2d 69, 74 (2004).

Here, SBar first asked that the Court to prevent the December 14, 2018 hearing from happening. **Pet. Motion for Preliminary Injunction, 9.** However, that meeting had already occurred when the hearing on the motion noticed for hearing by SBar. “An injunction cannot restrain an act already completed.” *Brady v. City of Homedale*, 130 Idaho 569, 572–73, 944 P.2d 704, 707–08 (1997) (citing *Wilson v. Boise City*, 7 Idaho 69, 73, 60 P. 84, 85 (1900) (“That act already taken place, a writ of injunction could not prevent it.”)). Thus, SBar’s request for an injunction to prevent that meeting is denied.

SBar has alleged that it is entitled to relief, that allowing the County to continue moving forward on Cat Creek’s CUPs would cause great or irreparable injury, and that allowing the County to continue would violate its rights. **Pet. Motion for Preliminary Injunction, 10.** The Court has three problems with that request. First, SBar has not provided any surety or a bond of any sort as required under either the Appellate Rules or the Rules of Civil Procedure. I.A.R. 13(b)(14) (“Stay execution or enforcement of any judgment, order or decree appealed from, other than a money judgment, upon the posting of such security and upon such conditions as the district court shall determine”), I.R.C.P. 65(c) (“The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages, including reasonable attorney’s fees, sustained by any party found to have been wrongfully enjoined or restrained”). Second, SBar has presented no evidence about how exactly it will be irreparably harmed or how its substantial rights will be violated if the County is allowed to continue. Its statement that “[o]ne can only conclude that the actions [of the County] are a violation of [its] rights” is just that: a statement. The affidavit supplied in support of its motion provides no evidence showing how its rights will be violated or how it will be irreparably harmed if the injunction is not granted, nor does anything in its Second

Amended Petition for Judicial Review. *See* **Pet. Motion for Preliminary Injunction, 6, Fn.2.**

Finally, SBar has not shown how it may succeed on the merits.

The parties, during the argument on the Motion for Preliminary Injunction, were able to come to an agreement regarding the notice that would be provided for any further actions that will be taken in conjunction with the Project. SBar's counsel indicated that was all it was really seeking. So the Court thought the motion was resolved. Such notice is also required under the Amended Zoning Ordinance for modification of the CUPS Amendment. The parties should continue to abide by any agreements reached. The Motion for Preliminary Injunction is denied to the extent it seeks enjoin any further actions by the County.

V. ATTORNEY FEES

All parties have asked for attorney fees to be awarded. SBar believes they should be awarded costs pursuant to Idaho Appellate Rule 40(a), and attorney fees if they are the prevailing party pursuant to Idaho Code § 12-117(1). **Pet.Br., 27-28.** It also asks for attorney fees to be awarded against Cat Creek under Idaho Code § 12-121 because it allegedly defended "this action frivolously, unreasonably or without foundation." **Pet.Br., 28.**

The County believes they should be awarded costs under Idaho Appellate Rule 40(a) and attorney fees under Idaho Code § 12-117 and § 12-121 as "many of the acts and conduct of SBar Ranch appear motivated solely to delay the project rather than to assert properly contested issues." **County Reply, 51-52.** It also requests fees under Idaho Code § 12-120(3) if it is determined to be the prevailing party in this action.

Cat Creek believes it should be awarded costs pursuant to Idaho Appellate Rule 40(a) as the Court early in the litigation dismissed challenges to SBar's arguments against the Hydroelectric, Transmission Lines, Solar, and Substation CUPs. Cat Creek Reply, 37-38 (citing *Melton v. Lehmann*, 118 Idaho 61, 794 P.2d 650 (1990) (Idaho Appellate Rule 40 entitled MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW - PAGE 73

landlord to fees even though he only partially prevailed on his claims)). Due to those rulings, it feels that SBar's continued insistence on challenging those actions of the County amounted to arguments that were frivolous or without foundation because they were argued solely in an "attempt to obstruct the Project." Cat Creek Reply, 37.

An award of attorney fees is within the discretion of the Court. *Lunneborg v. My Fun Life*, 163 Idaho 856, 873, 421 P.3d 187, 204 (2018) ("[T]he granting of fees [is] a discretionary matter" for the court). When considering a discretionary issue, the Court must first perceive the issue as one of discretion (as it has done here), act within the outer boundaries of that discretion, act "consistently with the legal standards applicable to the specific choices available," and finally, reach its decision "by the exercise of reason." *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 388, 430 P.3d 1284, 1287 (2018) (quoting *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

In Idaho, costs and fees will not be awarded to a non-prevailing party. *Idaho Indep. Bank v. Frantz*, 162 Idaho 509, 517, 399 P.3d 836, 844 (2017), *reh'g denied* (Aug. 15, 2017) (citing *Cummings v. Stephens*, 157 Idaho 348, 336 P.3d 281, 300 (2014)). To award fees under Section 12-117(1), the Court must find "that the nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117(1). The same rule applies if a party is only partially the prevailing party. I.C. § 12-117(2) (Fees shall be awarded to the partially prevailing party "with respect to that portion of the case on which it prevailed"). "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.C. § 12-121. In addition, "costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." I.A.R. 40(a). As there is no more specific statute

directing the Court in respect to an award of costs and fees, those statutes and rules provide the Court with the outer boundaries of its determination.

Next, the Court must act “consistently with the legal standards applicable to the specific choices available” and reach its decision “by the exercise of reason.” *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 388, 430 P.3d 1284, 1287 (2018) (quoting *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

Here, all three parties have argued that they should each be awarded fees. This is a close call for the Court and it appreciates that this has been a big expense for all parties involved. However, the Court will not award costs and fees to any party. SBar is not entitled to costs and fees as it is not the prevailing party in this action, but the Court finds that it did not pursue this action frivolously or without foundation solely in an attempt to obstruct the Project. The record reflects that SBar is genuinely concerned about the impact the Project may have on its land and scenic views. Likewise, Cat Creek did not intervene in this case frivolously, unreasonably, or without merit. The record shows it has a genuine concern for being able to proceed with the Project. The Project is complex, but appears to comply with the applicable ordinances and state statutes for developing a property. Finally, the record reflects that the County has spent a considerable amount of time and energy on the multiple hearings, rehearings, and requests for reconsideration with this Project. The Court finds the Board has given ample opportunities for both SBar and Cat Creek to present their arguments and it has made its decisions within the bounds of the law. Each party has diligently approached this litigation and has “made reasoned arguments in a case with a complex and sometimes confusing history.” *Baker v. KAL, LLC*, 163 Idaho 530, 536, 415 P.3d 939, 945 (2018). Accordingly, the Court finds that each party will bear their own costs and no fees will be awarded to any party.

VI. CONCLUSION

SBar's challenges to the approval of the Project in 2017 are time barred. SBar has standing to challenge the Board's actions on the CUPS Amendment related to the wind turbines, transmission lines and substations. SBar has not shown it has standing to challenge the Hydroelectric and Solar CUPs.

The party challenging a board's action "must first illustrate that the board erred in a manner specified therein and must then show that a substantial right of the party has been prejudiced." *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (citing *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P. 3d 494, 498 (2004)). "Absent either of these two conditions, the district court must affirm the board's action." *Dry Creek Partners, LLC, v. Ada Cty. Comm'rs, ex rel. State*, 148 Idaho 11, 16, 217 P.3d 1282, 1287 (2009) (quoting *Taylor v. Canyon Cty. Bd. of Comm'rs*, 147 Idaho 424, 431, 210 P.3d 532, 539 (2009)). The fact SBar disagrees with the decisions the Board reached on the CUPs Amendment is understandable. But SBar waived its right to challenge the Project more broadly by not appealing in 2017. SBar's concerns can again be raised when the exact locations and heights of the wind turbines are determined with specificity and a properly noticed public hearing occurs. Cat Creek is aware of the visual impacts of wind turbines even from a distance and it has the opportunity to meet its needs as well as address the concerns of its neighbors as it did with moving the solar portion of the Project and in eliminating a portion of the Wind Turbine site in order to address wildlife concerns.

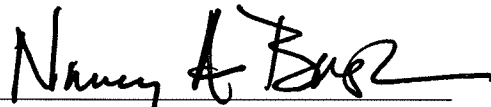
In addition, SBar's allegations of conflicts of interests or violations of Idaho's Open Meeting Laws are not supported by the Record.

SBar has failed to carry its burden under Idaho Code section 67-5279 to show an error by the Board and that a substantial right has been prejudiced. Considering the individual arguments

of SBar as well as the collective impact of its arguments, the Court finds all the claims in the Petition should be dismissed.

IT IS SO ORDERED.

Dated this 7th day of November, 2019.



NANCY A. EASKIN
District Judge

CERTIFICATE OF MAILING

Signed: 11/8/2019 08:41 AM

I hereby certify that on _____, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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By *S. Furst*
Deputy Clerk



APPENDIX A:

List of SBar's specific allegations from its Second Amended Petition for Judicial Review

The following are found on pages 15-19 of SBar's Second Amended Petition for Judicial Review.

40. A statement of the issues Petitioner intends to assert on judicial review, provided this statement does not prevent Petitioner from asserting other issues later discovered, are as follows:
- (A) The Board erred by concluding that SBar Ranch is not an affected party under Idaho code § 57-6521(1)(a)(i) for CUP-2015-03, CUP-2015-04, CUP-201505, and CUP-2015-07.
 - (B) The Board erred by concluding that the time has passed to seek reconsideration of the February 2017 Order under Idaho Code § 67-6535(2) and the County Zoning and Development Ordinance § 6-3-2.F.
 - (C) The Board erred by concluding that changes made to the Development Agreement, which included changes to the CUPS, were not violations to the notice and hearing requirements of Idaho Code § 67-6509 or § 67-6512(e).
 - (D) The Board erred by concluding that the changes made during the November 16 and 17, 2016 appeal hearings were not in violation of Idaho Code § 67-6509 or § 67-6512(e).
 - (E) The Board erred by concluding that the County did not violate the County Zoning and Development Ordinances in connection with its approval of the Development Agreement.
 - (F) The Board erred by finding and concluding that SBar Ranch did not present any evidence of how it might be adversely affected by CUP-2015--03, CUP2015-04, CUP-2015-05 and CUP-2015-07.

- (G) The Board erred by finding and concluding that the SBar Ranch's time to seek reconsideration of the Approval expired on February 24, 2017 under Idaho Code § 67-6535(2)(b) and February 20, 2017 under Elmore County Code § 63-2.F., and was therefore untimely.
- (H) The Board erred by finding and concluding that the Conditions placed on the CUPs were in accordance with Idaho Code § 67-6512(d).
- (I) The Board erred by finding and concluding that the Development Agreement as a Condition of the Approval was not reviewable.
- (J) The Board erred by finding and concluding that the Board did not amend the Approval and the Conditions until March 16, 2018, when it adopted the CUP Amendment Findings.
- (K) The Board erred by finding and concluding that the CUP Amendment Findings comply with Idaho Code
- (L) The Board erred by finding and concluding that Idaho Code 67-6535(2) does not give SBar Ranch the right to object to the terms of the Development Agreement beyond those which amend the Approval and the Conditions.
- (M) The Board erred by finding and concluding that the Zoning Ordinance, Title 6, Chapter 3 does not give SBar Ranch the right to object to the terms of the Development Agreement beyond those which amend the Approval and the Conditions.
- (N) The Board erred by finding and concluding that while changes to the Applications were proposed during the November 16 and 17 Board appeal hearing, the public was given notice of the hearing, the public was permitted to provide written and verbal testimony concerning the matter and review changes to the site plan as proposed by the Applicant, and that such procedure complied with the law.

- (O) The Board erred by finding and concluding that the Development Agreement is not governed by Idaho Code § 67-651 IA, but rather is an agreement between the parties as a condition to the approval of the conditional use permits.
- (P) The Board erred by finding and concluding that the failure to serve notice of the hearings of the Planning and Zoning Commission did not result in SBar Ranch suffering any harm because the Applications were denied by the Commission and SBar Ranch could not have provided further input which would have caused the Commission to deny the Applications, notwithstanding that SBar Ranch was entitled to notice and could have used the opportunity to place testimony and other evidence into the record before it was presented to the Board.
- (Q) The Board erred by finding and concluding that SBar Ranch did not allege actual harm or violation of fundamental rights in the Request for Reconsideration.
- (R) The Board erred by finding and concluding that Applicant did not violate § 6-8-94.A.7 of the Zoning Ordinance as claimed by SBar Ranch.
- (S) The Board erred by finding and concluding that the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance.
- (T) The Board erred by finding and concluding that it did not have to have the draft of the Development Agreement reviewed by the County Prosecutor prior to the submission to the Commission.
- (U) The Board erred by finding and concluding that the removal of the water diversion and delivery from the Development Agreement was proper and does not materially change the Application.
- (V) The Board erred by finding and concluding that it could hear and consider new additional evidence at the November 16, 2016 Board of County Commissioners Appeal Hearing on the applications for the CUPS, without

proper notice given to the affected parties, in violation of the affected parties due process rights to know what actions were being considered at such public hearing as required by Idaho Code 67-6512(e) when the Board accepted a new master site plan from Applicant.

- (W) The Board erred by finding and concluding that SBar Ranch had an opportunity to be heard at a meaningful time and in a meaningful manner on all terms of the Development Agreement adopted by the Board on February 9, 2018.
- (X) That the Board erred by finding that SBar Ranch accepted the position of the Board by paying a reconsideration fee in the amount of \$800.00 for the reconsideration of one CUP and not \$4,000.00 for the reconsideration of five CUPs because following SBar Ranch's counsel's inquiry to the Board about whether or not the Board required SBar Ranch to pay another \$4,000.00 fee the Board agreed that the reconsideration fee required would be \$800.00.
- (Y) Were the Findings and the Conclusions of the Board when it denied the Second Request for Reconsideration in compliance with the LLUPA, the Elmore County ordinances, or other law.
- (Z) Were the Board's actions in violation of Idaho state constitutional or statutory provisions?
- (AA) Were the Board's actions in violation of Federal constitutional or statutory provisions?
- (BB) Were the Board's actions taken upon unlawful procedure?
- (CC) Were the Board's actions unsupported by substantial evidence on the record as a whole?
- (DD) Were the Board's actions arbitrary or capricious or did they constitute an abuse of discretion?
- (EE) Were the Board's actions based upon conclusory findings and conclusions?
- (FF) Did the Board act without a reasonable basis in fact or law?

- (GG) Did the Board's actions violate SBar Ranch's right to due process or right to equal protection of the law?
- (HH) Did the Board's actions result in a taking of property right SBar Ranch without just compensation?
- (II) Did the Board have a vested interest in the decisions it has made to approve the CUPs and the Development Agreement, and to deny all protests and requests for reconsideration that have been made by the Board, notwithstanding its direct conflict of interest.

Petitioner reserves the right to assert additional bases for judicial review.

41. With respect to the Board's Reconsideration Findings, Petitioner intends to assert the following issues:

The Board lacked the authority or jurisdiction to issue the Reconsideration Findings because there were no pending motions and the Board's prior decisions dealing with the matter had already been appealed by the filing of the Initial and First Amended Petitions for Judicial Review.

- (a) The Board erred in its Finding that the Development Agreement is not an Idaho Code § 67-651 IA Development Agreement, but an agreement between the parties as a condition to the approval of the conditional use permits.
- (b) The Board erred in adopting the CUP Amendment Findings without providing a notice and opportunity to be heard by the public at a meaningful time and in a meaningful manner.
- (c) The Board erred in finding that there was no written or verbal testimony provided to the Board on or before the Reconsideration Hearing, following notice and opportunity to be heard by the public at a meaningful time and in a meaningful manner, upon which the Board is warranted to change the foregoing findings, [Findings 1- 4.20 of the Reconsideration Findings].
- (d) The Board erred in finding that Condition 2(o) of the Conditions authorizes the Board to modify the Conditions and change the terms of the Initial Findings, Conclusions and Order which authorized the CUPs without restriction and

without providing notice and opportunity to be heard by the public at a meaningful time and in a meaningful manner.

- (e) The Board erred in adopting and revising the Development Agreement without providing notice and opportunity to be heard by the public at a meaningful time and in a meaningful manner.
- (f) The Board erred in separating the CUP Permits issued by the Board to segregate the hydro portion of the project from the remainder of the project without providing notice and opportunity to be heard by the public at a meaningful time and in a meaningful manner.
- (g) The Board erred in adopting the Reconsideration Findings because it failed to comply with the Elmore County Comprehensive Plan, Idaho Code § 67-6512, and Elmore County Code § 6-27-7.
- (h) The Board erred in adopting the following Conclusions of Law:
 - (1) that the public hearing notice and hearing requirements of the Zoning Ordinance have been met;
 - (2) that the public hearing notice and hearing requirements of LLUPA have been met;
 - (3) that the Development Agreement is not a development agreement subject to Idaho Code § 67-651 IA, since the Development Agreement was required by the County as a condition to a conditional use permit and not as a part of a rezone;
 - (4) that the Development Agreement is not a development agreement under Section 6-29-1 of the Former Zoning Ordinance or under Section 7-10-1 of the Zoning Ordinance, since the Development Agreement was required by the County as a condition to a conditional use permit and not a part of a rezone and is therefore not an Idaho Code § 67-651 IA development agreement;
 - (5) that the changes, deletions or modifications of the Conditions, Approval or Initial Findings contemplated by the Development Agreement are hereby approved by the Board as modifications of the Initial Findings, the Approval or Conditions after the Board's review of the record, which includes the materials

submitted, and testimony given, on or before the Reconsideration Hearing, following public notice and the opportunity to be heard by the public at a meaningful manner as required by due process; and

- (6) that Idaho Code § 67-6506 does not preclude Commissioners Wesley R. Wootan and Franklin L. Corbus from participating in the Reconsideration Hearing, deliberating on this Matter, and approving these Reconsideration Findings because neither of them has a conflict of interest as defined in Idaho Code § 67-6506.

APPENDIX B:

Chart of the Parcel Sizes from the Wind CUP Notices

The Court created this list of parcels from the February 10, 2017 Findings of Fact, Conclusions of Law and Order. R.8267. It then accessed the Elmore County Assessor's Parcel Data and Address Lookup Website (<http://idahoparcels.us/county/elmore.html>) to determine the information in this table. The table below has been sorted by the size of the listed parcels.

Parcel Numbers	Size in Acres
RP01N09E250010	10
RP01N09E277210	40
RP01S10E303010	73.19
RP01S10E102410	80
RP01S09E039010	80
RP01S10E190610	80
RP01n10E320010	80
RP01S10E159010	120
RP01S09E243010	160
RP01S09E100010	160
RP01S09E157810	200
RP01S10E051210	200
RP01N09E265410	220
RP01S10E301840*	231.02
RP01S10E310500*	284.62
RP01S09E230010	320
RP01S10E332410*	320
RP01S10E040010	328.84
RP01S10E280085*	347.088
RP01N10E330610	360
RP01N09E251210	380
RP01S10E170010	400
RP01S10E060640	424.77
RP01N10E290010	440
RP01S09E220010	440
RP01N10E200010	470
RP01N10E191840 (Listed as RP01N09E191840) ⁴⁰	473.03
RP01S09E130040	480
RP01N10E283015 (Listed as RP01N10E283010) ⁴¹	480
RP01S10E030010	488.52

⁴⁰ No parcel found for listed parcel number, so the Court selected the next parcel on site map located next to the other parcels.

⁴¹ No parcel found for listed parcel number, so the Court selected the next parcel on site map located next to the other parcels.

* Same tax parcel number as on Exhibit B to Development Agreement. **R.9898.**

RP01S10E290020*	504.14
RP01N10E310010	512.96
RP01S10E210040*	519.83
RP01S10E160040	549.7
RP01S09E010610	551.58
RP01S10E320020*	560
RP01S10E090610	560
RP01S09E020010	577
RP01S10E220020*	587.61
RP01S10E070010	589.79
RP01S10E080010	600
RP01S10E180010	626.38
RP01N10E300010	631.64
RP01S09E110040	640
RP01S09E140040	640
RP01N09E350010	640
RP01S09E120040	640
RP01N09E360010	640
Total Size in Acres	18741.71
Average Parcel Size in Acres	390.45

APPENDIX C:

List of Twenty (20) Topics For July 26, 2018 Rehearing

The following is taken directly from the Notice of Public Hearing as seen in the Record at R.11105-06.

Any and all interested persons shall be heard at the hearing to take testimony limited to: (i) the CUP Amendments and any other matter raised in the Development Agreement to the extent that it amends the Approval; (ii) the Settlement, if any; (iii) any amendments to the Development Agreement that would be consistent with the matters described in subparts (i) and (ii) above; and (iv) any amendments or modifications to the matters described in subparts (i), (ii), and (iii) above that are raised during the public hearing. With respect to the amendments described in subpart (i) above, testimony will be limited to the modification, removal, or addition of findings of fact, conclusions of law, or conditions set forth in the Approval on the following subject matters:

- An extension of the time Cat Creek has to satisfy Conditions No. 2 (b) and (c) of the Approval with respect to CUP-2015-04 (hydro electrical generating facility);
- The site plan and Project description;
- The Stakeholder Board (as defined in Condition No. 2 (d) of the Approval);
- Annual fish stocking in Anderson Ranch Reservoir;
- Conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas 2 and 3 in the eastern part of Wood Creek Ranch;
- Erosion control measures;
- Cat Creek's erosion control plan;
- Visual mitigation measures;

- Communication with governmental agencies regarding fish and wildlife habitats and other matters;
- Noise standards;
- The Scholarship Fund (as defined in Condition No. 30 of the Approval);
- The term of approval of the CUPs, including any option to extend the approval within the possible period of approval of the CUPs;
- The Senior Fund (as defined in Condition No. 31 of the Approval);
- An updated Wildlife Mitigation Plan/Environmental Impact Statement;
- A power sale agreement between Cat Creek and Idaho Power;
- The Interconnection Application;
- The annual report requirement;
- The County's right to terminate the CUPs;
- Separation of the County's approvals of the CUPs to allow phasing of the Project;
- and
- Any other matter raised in the Development Agreement to the extent that it amends the Approval.

A more detailed description of the above-described subject matters of the rehearing is set forth in the Approval Amendments and the Development Agreement, both of which, as part of the record for this matter, are available for review as set forth below.

Exhibit H



Terri R. Pickens
Attorney at Law
terri@pickenslawboise.com
www.pickenslawboise.com

398 S. 9th Street, Ste. 240
P.O. Box 915
Boise, Idaho 83701
208.954.5090 (t)
208.954.5099 (f)

January 30, 2024

SENT VIA E-MAIL

Mitra Mehta-Cooper
Vicky Trevathan
Dylan Lawrence
Elmore County Board of Commissioners
Elmore County Clerk's Office
150 South 4th East, Suite #3
Mountain Home, ID 83647

Re: Cat Creek Energy, LLC
CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07
Our File No.: 360-2

Ladies and Gentlemen:

Please accept this letter and the foregoing attachment as Cat Creek Energy, LLC's Annual Report for 2024, as required in the Development Agreement. Cat Creek Energy, LLC is pleased to provide the following narrative and timeline for the Project, and we look forward to discussing this Annual Report further with the Board of County Commissioners on Friday, February 9, 2024, at 10:30 a.m.

In the meantime, if you have any questions concerning the foregoing, please do not hesitate to contact me.

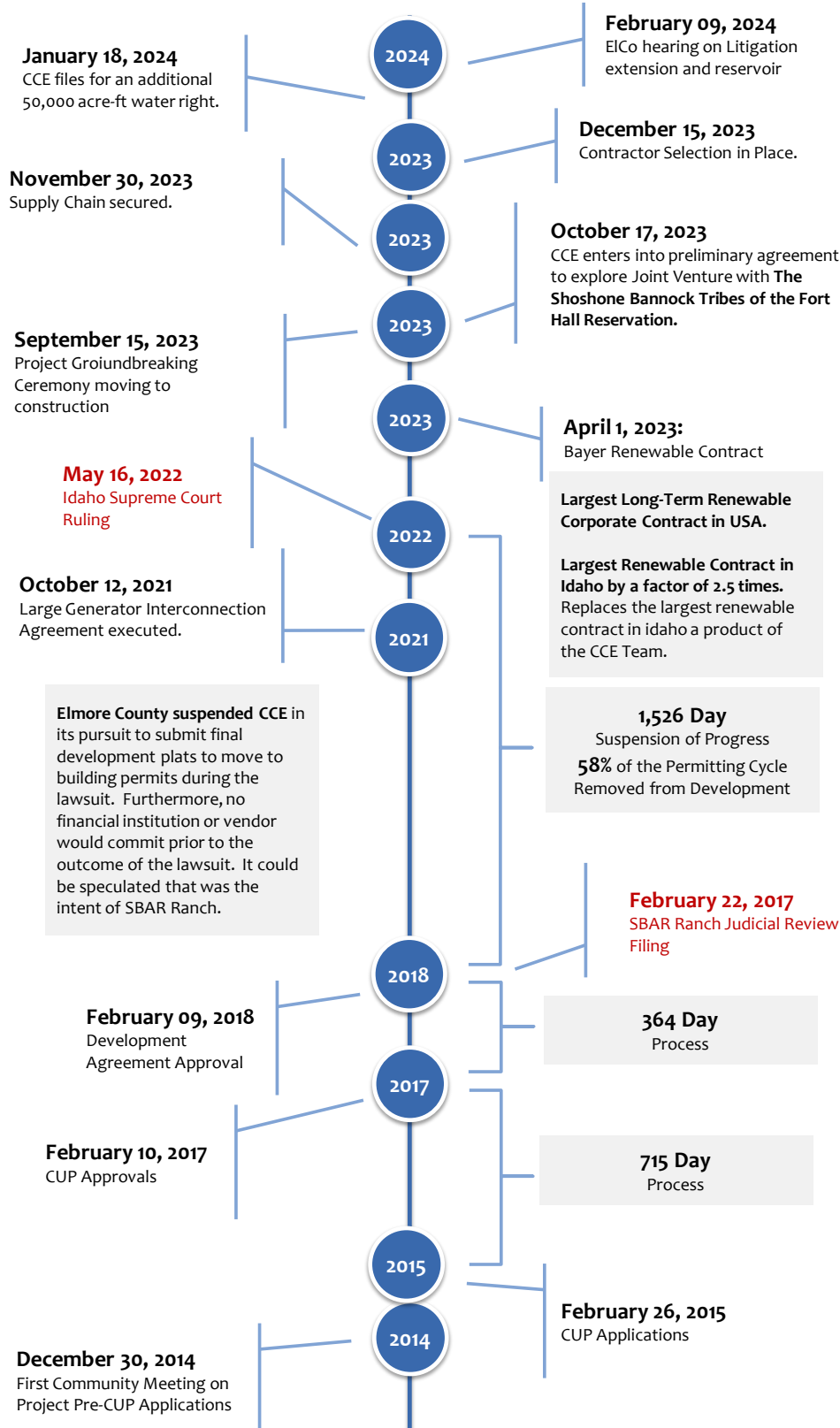
Sincerely,

/s/ Terri R. Pickens

Terri R. Pickens



Permitting CCE Timeline





THE SIGNIFANCE ADVANCEMENTS OF CAT CREEK ENERGY FOR IDAHO



PROLOGUE - CAT CREEK ENERGY UPDATE

What follows is the CCEW Annual Update.

58% of the Cat Creek Energy development cycle [February 26, 2015, to May 18, 2022] was stolen from us during the litigation period. The S Bar Ranch's ineffective, time consuming, and very costly lawsuit against Elmore County, forced the county into a position of not allowing Cat Creek Energy to advance its Project during the **1,528 days** of litigation. This deliberate measure and the fallout from the litigation, and SBAR Ranch's apparent intention of bankrupting both Cat Creek Energy and Elmore County through meritless litigation needs to be put into proper context as to why it failed as evidenced by the rapid and substantial progress of Cat Creek Energy over this past reporting period.



For clarity, on February 22, 2018, SBar Ranch filed a petition for Judicial Review of the Board of Commissioners approval of five Conditional Use Permits and a Development Agreement pertaining to the permits. On May 18, 2022, the Supreme Court rejected SBAR Ranch's Petitions.

The meritless and drawn-out process meant that for **over four (4) years** Cat Creek Energy was forced to work to preserve the integrity of the Project under the sustained threat that any investment of time or money could disappear if SBAR Ranch was successful. It effectively forced a measured halt to much of our work and that of our strategic partners. It had its desired effect at the time of impacting both federal and state permitting processes, as well as equity and funding for the Project.

During this time, Elmore County specifically restricted Cat Creek Energy from proceeding with the Project's entitlement process until such time as the Idaho Supreme Court ruled. This frustrated the Cat Creek Energy team because the goal of S Bar became clear during a concurrent mediation, where CCE offered to settle, and SBar Ranch refused the offer. Clearly, other developers may have given up during the drawn out litigation, but CCE was not deterred, and the Project survived. The Update includes actions in the wake of the 2022 Supreme Court decision, where CCE was able to accelerate its development pace and achieve major milestones leading to many of the CUPs being ready for construction. The advancements have led to the construction readiness now fully baked and perfunctory tasks with Elmore County will bring many of the CUPs to construction readiness this year.

SUSPENSION TIME IMPACT - RETROSPECT

1,526 Days Suspension of Progress due to SBAR Ranch litigation.

58% of the entire original Permitting Cycle removed from the Development Cycle.

The SBAR Ranch's lawsuit against Elmore County was meant to injure both Cat Creek Energy and Elmore County. It forced Elmore County to suspend Cat Creek Energy's ability in our pursuit to submit final development plats to move to building permits during the lawsuit. Furthermore, no financial institution or vendor would commit prior to the outcome of the lawsuit. It could be viewed in the rearview mirror that was the intent of SBAR Ranch.



REQUIRED ANNUAL UPDATE

23 FEBRUARY 2023 - HYDROPOWER MEETINGS

On January 25, 2023, Cat Creek filed a Proposed Study Plan under the Integrated Licensing Process required by FERC for a Pumped Storage Hydropower License. On February 23 and 24, meetings were held with a number of state and federal agencies as well as an interested NGO, all of whom submitted comments on the Study Plan.



Water Storage	Acre-ft.
Current Boise River Storage Capacity	949,700
Identified Additional Need [2060]	188,000
CCE Storage to Latest Water Filing	101,300
CCE New Water Filing	50,000
CCE Total Contribution to Boise River Storage	151,300
Increase Overall	16%
Contribution to Shortfall [2060]	80%

Cat Creek Energy analyzed and crafted responses to the agency and public comments. FERC placed the project in suspension, allowing our experts and legal team to reconcile cost obligations within the FERC and LOPP regulatory processes.

01 APRIL 2023 - BAYER / CCE OFFTAKE CONTRACT

The largest, long-term corporate renewables contract in the USA was signed with Bayer, Inc. Construction of facilities in both Jerome and soon Elmore Counties is commencing.

This contract represents the largest renewables contract in Idaho by an order of magnitude of 2.5 times the current largest project, which incidentally is also a product of the CCE Team. This



1,400,000 MWh annual, 21-year contract offsets 40% of Bayer’s global electrical emissions and 60% of its USA emissions. The contract provides a full substitution for Bayer’s Soda Spring processing facility, the largest load in PacifiCorp control area and the largest load in Idaho.

Bayer’s EVP of Public Affairs, Science, Sustainability and HSE Matthias Berninger:

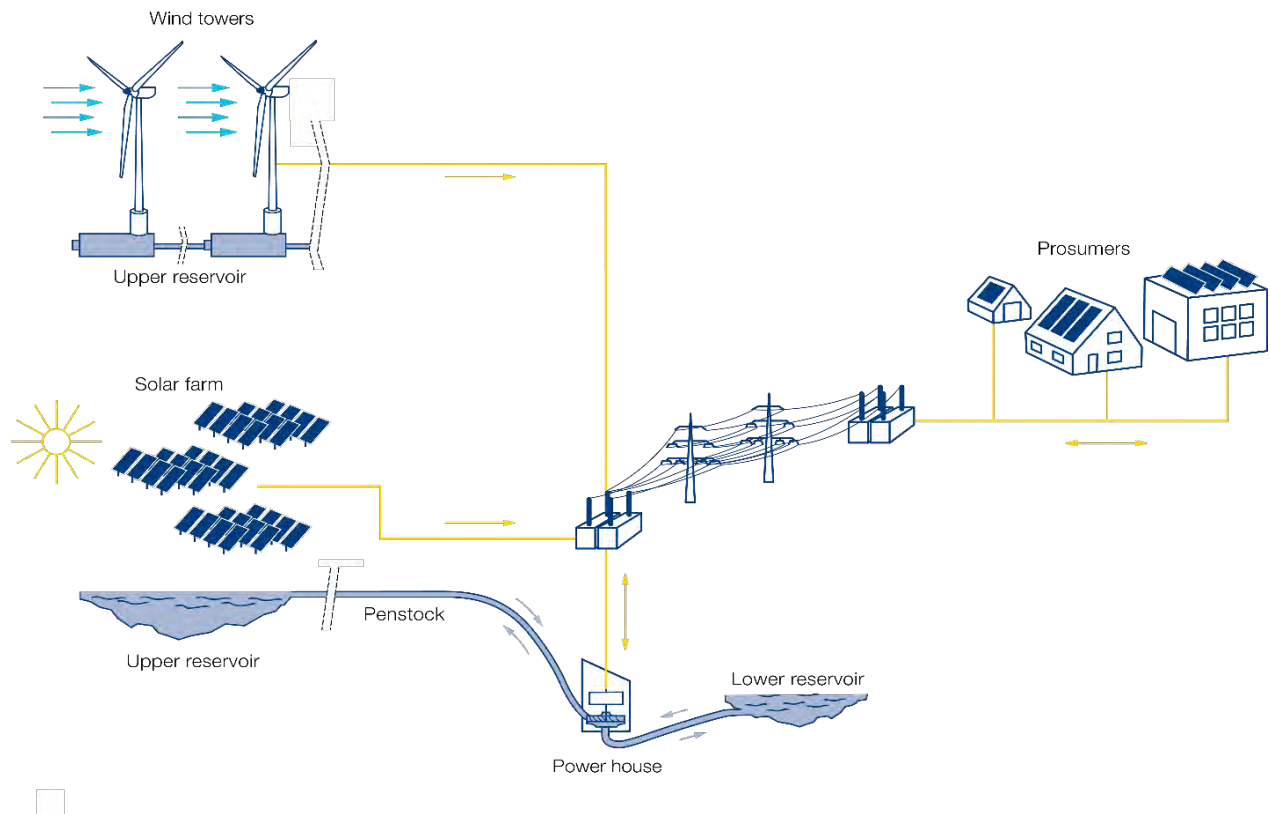
“As an innovation driven company, Bayer recognizes the need to introduce renewable energy solutions that are healthier for the planet and healthier for humans.”

Then Bayer AG CEO Werner Baumann confirmed:

“This project with Cat Creek Energy is exciting because it catapults our energy goal target fulfilments while also supporting Idaho, a state many of our employees call home.”

BAYER CONTRACT EMPLOYS ALL CCE TECHNOLOGIES

Bayer is in every county in Idaho. Every day, Bayer’s employment and products help Idahoans and their partnership with Cat Creek Energy advance these opportunities.



The contract provides a full substitution for Bayer's Soda Spring processing facility, at approximately 1,400,000 MWh annual electrical needs, the equivalent of 140,000 households.

08 SEPTEMBER 2023 – ENGAGEMENT ELMORE COUNTY ON 2ND AMENDMENT TO DA

Terri Pickens [Cat Creek Energy counsel] first reached out to Dylan Lawrence [Elmore County counsel] on addressing provisions for a 2nd Amendment to the Development Agreement. Later in the month, the first draft was exchanged.

15 SEPTEMBER 2023 - CONSTRUCTION GROUNDBREAKING CEREMONY

A groundbreaking ceremony was held near Eden, Idaho, for the first set of Modules [facilities] of PV solar + battery energy storage as part of the overall Bayer RPA contract obligation of Cat Creek Energy. Among those in attendance were the Idaho Lieutenant Governor, Idaho Comptroller, representatives from Bayer Germany and Bayer Soda Springs, the state government, county



officials, the Shoshone-Bannock Tribe, the Laborers' International Union, project suppliers, contractors, and Cat Creek Energy. The significance of the Project for water security, mitigating pending climate effects, and the substantial benefits to both Idaho and the entire West from the overall Project were discussed in detail.

17 OCTOBER 2023 - SHOSHONE BANNOCK TRIBES – CAT CREEK ENERGY PARTNERSHIP



Cat Creek Energy executed a tentative LOI agreement with the Shoshone-Bannock Tribes of the Fort Hall Reservation to enter into a joint venture on the Project. Such a partnership has much to recommend, especially the fact that Tribal ancestral lands included the Camas Prairie area, and the Tribes' expertise in environmental restoration, wildlife protection, and water stewardship brings another level to the Project attributes.

The significance of such a joint venture is pronounced. Revenues from the Project remain in Idaho and do not end up elsewhere like New York City or overseas. Those revenues will churn in Idaho and will multiply purchasing power many times over what other renewable facilities revenues that have only a small portion that would remain in the Idaho economy.

15 NOVEMBER 2023 - BAYER AG GLOBAL SUPPLIER DAYS

The Bayer RPA Contract delivers a full offset for Bayer's Soda Spring processing facility, the largest load in PacifiCorp control area and the largest load by a factor of six to the next largest load in Idaho.

Bayer AG works with over **80,000** Global suppliers. The significance of the Bayer/CCE relationship was borne out with Cat Creek Energy being awarded, out of those 80,000 suppliers in the agriculture, pharmaceutical, research, and development fields as Bayer's:



“2023 Supplier of the Year.”

30 NOVEMBER 2023 - SUPPLIER COMMITMENTS

The Supplier Chain for components is secure and ready for delivery commencing in 2024. Master Supply Agreements for the entire Project have been negotiated and executed ensuring quality components and timing to correspond with CCE’s construction build-out.

15 DECEMBER 2023 - CONTRACTOR COMMITMENTS

Contractors have come and gone over the years of uncertainty during the litigation, but Cat Creek Energy was able to secure the highest quality contractors, including the umbrella EPC [engineering, procurement, and construction] contractor. Many contractors who have Idaho divisions or Idaho companies are part of the construction contracting.



- EPC Contractor
- Civil Contractor
- Solar Contractor
- Wind Contractor
- Substation & Battery Contractor
- Electrical Contractor
- High Voltage Contractor
- Pumped Storage Contractor
- Subcontractors

Our contractors are committed to prevailing wage and apprenticeship programs, both internally and through the Laborers International Union of North America, local subcontractors hiring, and contributing to programs that benefit local social and charitable organizations and programs.



18 JANUARY 2024 - ADDITIONAL WATER RIGHTS FILING

Continuing to recognize the critical needs of Idaho for water storage and needs, Cat Creek Energy took up the mantle again and filed an application with the Idaho Department of Water Resources for an additional 50,000 acre-feet of heretofore unappropriated Spring run-off water from the South Fork of the Boise River.

This additional appropriation will be to the direct benefit of Elmore County and Boise Basin inhabitants, compensating as it does for the decreasing ability of mountain snowpack to store water as it has done traditionally.

CRITERIA UNDER DEVELOPMENT AGREEMENT SECTION 9, ANNUAL REVIEW

“The Annual Review during construction activities shall include a review of Developer’s plan (i) to implement erosion control measures, (ii) for the timing of construction activities, (iii) on federal and state permitting efforts, and (iv) for any other activities associated with construction and permitting activities.”

REVIEW TO IMPLEMENT EROSION CONTROL MEASURES

No construction activities have been performed to date. Therefore, no erosion control measures have been evidenced.

REVIEW FOR THE TIMING OF CONSTRUCTION ACTIVITIES

Construction of the wind and solar portions of the Project will receive a Limited Notice to Proceed in 2024.

REVIEW ON FEDERAL AND STATE PERMITTING EFFORTS

As explained above, FERC licensing is in suspension and extensions on the CUPs due to litigation will be decided on February 9, 2024.



REVIEW OF ANY OTHER ACTIVITIES ASSOCIATED WITH CONSTRUCTION

The aggressive schedule has been throttled back due to forestalling the permitting process in reference to challenges to the five Conditional Use Permits and the Development Agreement have been advanced and significant progress made in 2023.

02 FEBRUARY 2024 - UPDATE SUBMITTED



Thus, ends our Update to the Elmore County Commissioners on the Cat Creek Energy & Water Storage Renewable Power Station Projects deemed as the

“Most Consequential Water and Energy Project in the West”

The unprecedented benefits to the county, state, and the West have been articulated year-over-year.

The evidence is clear. An attempt to destroy the viability of the Project by introducing the most insidious of actions, litigation, indeed, did not destroy it. It hobbled us, prevented timely deployment of assets and buildout, but did not kill the Project as was apparently intended. In fact, the Project moved forward rapidly and decisively once the litigation came to a conclusion as identified in this Update. Elmore County and Cat Creek Energy were caught in a whirlwind which cost the two of us both precious time and came at great expense, yet both still stand to benefit from such an important dual purpose infrastructure.

Submitted this 02-February-2023 to Elmore County.

Exhibit I

CAT CREEK ENERGY 2025 UPDATE FOR THE ELMORE COUNTY COMMISSIONERS

Upon the recommendation of outside counsel for Elmore County, Dylan Lawrence, Cat Creek Energy has modified the format for its annual report to the Elmore County Commissioners, providing an update on the Cat Creek Energy Project.

COMPLIANCE WITH THE CONDITIONAL USE PERMITS

Cat Creek Energy, LLC (“CCE”) is in compliance with the CUPs and Development Agreement.

Condition 2(b) of the CUPs requires CCE and the County to enter into a development agreement to “develop methods of furthering water delivery in the county for the transfer of county water to Little Camas Reservoir or other county water diversion or storage areas based upon county needs and the county’s water rights, which may include the storage of water for the county until such time as the county water may be needed.” The Parties entered into a Development Agreement Relative to Cat Creek Energy, LLC Conditional Use Permits (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07) dated February 9, 2018, as amended by the First Amendment to Development Agreement Relative to Cat Creek Energy, LLC Conditional Use Permits (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07) dated December 14, 2018, the Second Amendment to the Development Agreement Relative to Cat Creek Energy, LLC Conditional Use Permits (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07), dated February 16, 2024, and the First Addendum to Second Amendment to Development Agreement Relative to Cat Creek Energy, LLC Conditional Use Permits (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07), dated May 17, 2024, and the Third Amendment to Development Agreement Relative to Cat Creek Energy, LLC Conditional Use Permits (CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP 2015-06, CUP 2015-07) dated August 2, 2024 (collectively, the “Development Agreement”).

The Third Amendment to Development Agreement mandates a deadline of July 24, 2025, to reach an agreement with the County related to water delivery and storage as required by the CUPs and Development Agreement. CCE is pleased to announce that it has reached an agreement on the general language of a Water Storage and Delivery Agreement with outside counsel for the County. The Water Storage and Delivery Agreement that was collectively drafted by the CCE legal team and the County legal team is being presented to the Commissioners on February 21, 2025. CCE is confident that the draft agreement includes the necessary terms to comply with Section 2.2 of the Development Agreement, while meeting the expectations of the County with respect to the partnership between CCE and the County for water delivery and storage in Cat Creek Reservoir.

CONSTRUCTION AND DEVELOPMENT STATUS OF THE PROJECT

CCE has made significant progress in moving the project forward this past year. With the legal challenges behind CCE and the County, CCE has had more freedom to work with state and federal agencies and departments, as well as private companies to move the project forward. Specific actions taken by CCE include but are not limited to:

- CCE has applied to the BPA for use of the Right of Way corridor from the Anderson Ranch substation to the Mountain Home substation.
- CCE and Reclamation are negotiating and exchanging proposals for the next funding round under the Preliminary Lease of Power Privilege.
- CCE met with Jennifer Carrington on 15 January 2025 in order to move the process forward. Once the new funding agreement is reached between Reclamation and CCE, CCE will ask FERC to take our licensing process out of abeyance. At this point, the Study Plan implementation will proceed.
- Wind, solar, transmission, and substations will proceed to a building permit stage in 2025, with the requisite hearings before the Commission taking place on updates and on the final wind turbine siting.
- CCE has established an independent analysis engineering firm to assess decommissioning costs for bonding and that bond will be through our insurance underwriters, March McLennan.

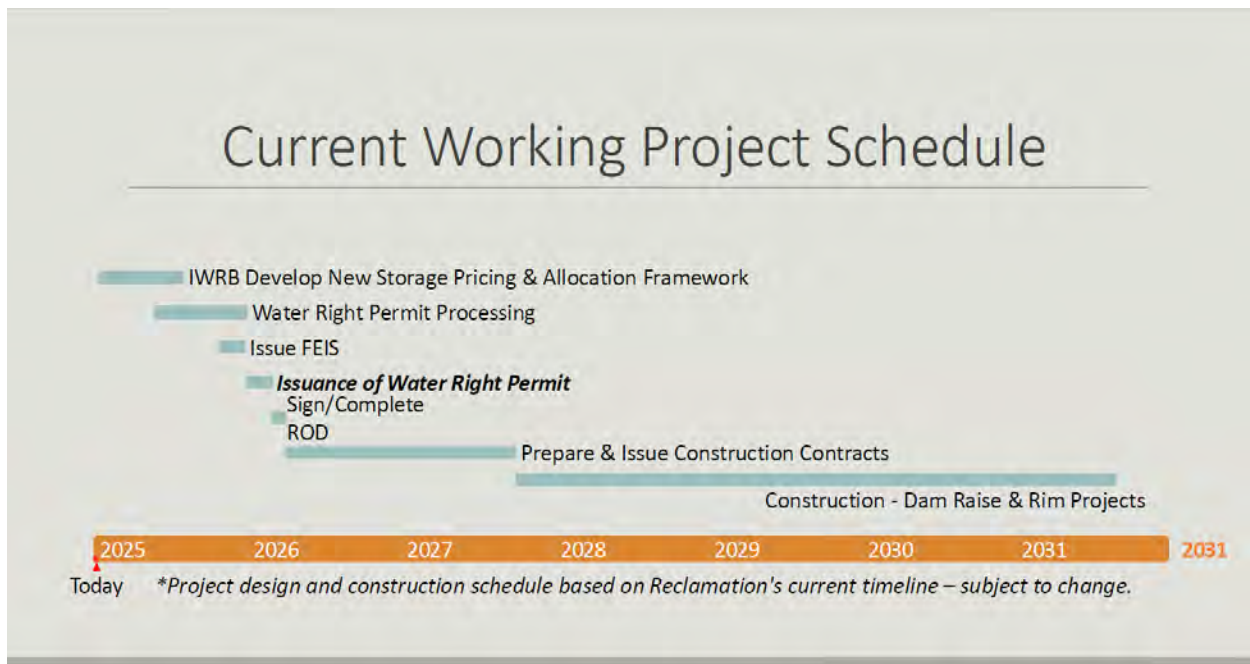
STATUS OF STAKEHOLDER BOARD

The CCE Stakeholder Board was conceived by CCE. Its mission is to manage funds granted to the Board CCE to help mitigate and where possible eliminate environmental concerns primarily, with any remaining monies used for social impacts within Elmore County. Once a Notice to Proceed is issued, first for the wind and solar, substations, and transmission project components, CCE will begin a formal vetting of applicants for the Board positions. The Board is not intended to give advice or consent with regard to operational activities, but rather to manage available funds for the benefits described above.

PUBLIC COMPLAINTS

Critical comments on the project from some members of the public will not end so long as they do not understand the paramount importance that both state and federal programs recognize, of keeping as much Idaho water as possible, especially so that it can be stored to offset the seasonal changes in total precipitation. Water retention and storage will only continue to be the number one economic challenge facing the state until it is addressed in the kind of large-scale and efficient way that it is by the CCE Project. That the Project at the same time provides fossil-free energy in the same large-scale and efficient way to the strained Western grid and dampens the effects of climate change and in the process benefits us all. Unfortunately, due to the abnormal interaction between CCE and Elmore County, the result of the third party failed court litigation, not enough has been done by either CCE or public officials to inform those who reside in the area about these benefits or the ways in which they are made possible. For example, one audience participant in a recent Commission hearing made an erroneous claim that Cat Creek Energy personnel were deceiving the Commission because he knew that there was no possible way gravity feed between Cat Creek Reservoir and Little Camas Reservoir, could occur. The Commission did not question this assertion or even ask CCE personnel for a rebuttal. For accuracy, CCE's minimal required pool elevation for hydropower operations is currently 4,950 ft and the maximum pool level of over 5,000 ft., both are above the Little Camas Reservoir full pool elevation of 4,937 ft. Other complaints had to do with the time it was taking to install the Project.

It is correct, large-scale energy generation and water retention projects of this kind take a long time to reach an operational stage, 12-15 years on average. Look at other large projects slated for completion on the S. Fork of the Boise River, the 6' raising of the Anderson Ranch Dam proposed by the Bureau of Reclamation for a striking example; its completion date has already been postponed more than once. Moreover, modifications to those projects have taken place during the pre-construction phase. Both Elmore County's waterworks and Idaho Water Resource Board, in conjunction with USBR, started their processes back around 2016. While we do not know the present online target date of Elmore County's waterworks, the latest estimate from USBR is now an online date of 2031 for the dam raise.



The public review and approval process is an important reason for the extended timeline. Criticism of the CCE's proposed project timeline is misplaced as it is consistent with those of other local and regional projects. Those criticisms also fail to recognize the nearly four (4) years the County and CCE defended the project in litigation efforts by members of the public.

SUCH OTHER MATTERS AS THE BOARD MAY DESIRE TO DISCUSS

It should be noted that the language accepted by CCE as proposed by the County that is contained in Section 2.2 of the Development Agreement can now be established as an equivalent \$50,100,000 contribution to the citizens of Elmore County by CCE. This value basis was established during the 31 January 2025 meeting of the Idaho Water Resource Board subcommittee on water storage. Moreover, water storage rights for the dam raise are established as existing users, meaning water storage and water is granted to Water District 63 existing users first, essentially nullifying any notion of water storage reservation in Anderson Ranch Dam for the County's water rights. Timing of that withdrawal might become even a larger problem.

Proposed Permanent Sales Allocation Plans:



Model No. 1 – Direct Sale of Storage Space To Interested Parties

- Direct sales prices could be set at the total project costs per new acre-foot of storage created

Model No. 2 – Auction Sale of Storage Space To Highest Bidders

- A minimum bid could be set and blocks offered for auction to determine market interest

Model No. 3 – Combined Auction Sale Format and Direct Sale Format

- Remaining unsold volume being sent to auction.
- A minimum bid in this scenario may need to be less than the project costs to sell the remaining volume

Proposed Volume & Estimated Value

Volume	Estimated Value @ 26,000 AF
1 AF	\$4,510
5 KAF	\$25,050,000
10 KAF	\$50,100,000
15 KAF	\$75,147,000

**Cost estimates are based on 60% Design Figures*

While the employment and tax benefits are huge for Elmore County and its residents, this contribution to water storage availability is unprecedented in the County's history. The value of this contribution exemplifies another CCE good faith commitment and stands out as a rebuttal of the continuing but misguided criticism made against the owners of the Project.

CCE has a strong relationship with Bayer, a Fortune 100 company; it has contracted 1,400,000 MWh annually of production from CCE. That contract remains intact.

CCE had approached the Shoshone Bannock Tribes of the Fort Hall Reservation to partner with CCE on its Project. However, the timeline of the Shoshone Bannock Tribes' decision process made it a real struggle to honor the Bayer contract and other important commitments essential to Project development. It was worth the effort to try to partner with the Tribes, but it impacted our progress significantly.

CCE is working in conjunction with INL and PNNL on our projects and this relationship is instrumental, influencing design and other production factors for our facilities.

Regards,

James Carkulis

Authorized Agent for Cat Creek Energy, LLC

Exhibit J

CAT CREEK ENERGY, LLC
398 S. 9TH Street, Suite 240
Boise, ID 83702
info@catcreekenergy.com
208-336.1370

March 30, 2025

Ms. Kimberly D. Bose
Federal Energy Regulatory Commission
88 First Federal Street, NE
Washington, D.C. 20426

Subject: Annual Report – Cat Creek Energy Storage Facility Pumped Storage Hydroelectric Project – FERC No. p-1-14655-001.

Brief Overview

1. In the CCE 2024 report, it was noted that “Extensive discussions with the DOE Loan Program Office over the past year, where our engagement with a Native American tribal nation to enter into a business relationship has influenced our interest in the LPO.” Those discussions continued throughout 2024, but they did not produce the expected results. Since the reasons for this failure should be of interest to federal agencies charged with the permitting as well as the funding of large energy generation and storage projects, they are worth a brief summary.
 - A. Although both CCE and the tribal nation signed a Letter of Interest and agreed informally to a partnership with the Tribe, and despite the best efforts of the tribal attorney, circumstances prevailed at the Fort Hall Reservation, where the Tribal Council could not make a final assessment and decision leading to a formal agreement required by the LPO for a loan guarantee. CCE finally ran into deadlines for some of the major project components and thus out of time. It was with genuine regret that the company notified the Tribe. The effort to negotiate a contract took well over a year or so.
 - B. CCE had been in serious discussion with the LPO for more than two years. In fact, proposals continued to be submitted to it months after the Tribal effort was abandoned. But the effort to secure a federal loan for the project has been placed on hold. There were at least two reasons. First, although the head of the LPO advised us to pursue a tribal partnership so as to “streamline” the approval process, there was foot-dragging on its part from the outset. The LPO Point of

Contact changed six times, each necessitating a virtual restart. Second, each time CCE was told why its application could not be approved and the application was revised accordingly, a new reason for not approving it was given. Finally, on December 14, 2024, the LPO NEPA Advisor, announced (for the first time) that there would be no further discussion until “*written evidence from both FERC and the USBR that even after substantial, uninterrupted engagement on scoping process, Cat Creek has 2 separate, written, and agreed preliminary NEPA scopes...*”. It was a classic case of Catch-22: on the one hand, CCE was advised to seek a tribal partnership, on the other, it was not possible to make “*uninterrupted engagement*” on the scoping progress until a partnership agreement had been reached and CCE could make its terms clear to potential equity investors. Despite a great deal of Administration rhetoric about wanting tribal projects, only a few small such projects have received loans and then on a conditional basis (disallowed in the case of CCE).

2. In light of the above, a major step forward has been taken since October 2024 with the negotiation of the requisite Funding Agreement between Cat Creek Energy and the USBR including a meeting with the Northwest Region Director and her staff on January 15, 2025. The activities that remain to be carried out to support USBR in their efforts according to the preliminary Lease of Power will soon be underway. CCE will document the finance agreement and then ask FERC to take the Licensing process out of abeyance, at which point the Study Plan implementation process can proceed. The obstacles leading to unforeseen delays in carrying out these activities in conjunction with the USBR and implementing the Study Plan with FERC will soon be a moot point.
3. In the meantime, a great deal of project progress has been made over the past year in addition to continuing interaction with the USBR, Idaho National Laboratory, and project vendors and contractors. One can be cited as of special interest:

A major insurance and surety underwriting agency issued a letter to CCEW Vendors. It reads in part: “*We are providing a letter of good standing for Cat Creek Energy & Water LLC. We have insured and can bond Cat Creek Energy & Water LLC for many years. They are an excellent client in good standing. Because of our relationship with [CCEW] our Surety is willing to favorably consider issuance of performance and payment bonds, when required by [CCEW] for contacts/projects.*”

The larger case for the success of CCE is premised on the dramatic new demand for both power generation and storage in Idaho and the Pacific Northwest which CCE is uniquely well-suited to meet.

Cat Creek Interaction with the Federal Regulatory Commission: Key 2024 Dates

1. On March 29th, CCE filed its Annual Report for 2023.
2. On April 16th, CCE responded to Christopher Stephens of S Bar Ranch's comments to FERC on the 3/13 Report. In its response, CCE noted the misrepresentations in Mr. Stephens' brief comments and pointed out that the suit he brought against the Elmore County Commissioners for approving CCE came to an end when the Idaho Supreme Court unanimously upheld a District Court's decision upholding the Commissioners' approval of the CCEW project. Unfortunately, the litigation stretched over four years and effectively halted any progress at the project site.
3. Again, on April 16, CCE responded to Elmore County's request for "clarification" of the Annual Report in three areas. The requested clarifications were provided in Cat Creek's response as was the fact that the CCE project landed the largest single renewable energy corporate contract in the USA in 2023. It is important to note that the request for clarification did not constitute opposition to the project. The Commissioners extended the Conditional Use Permits deadlines for completion into mid-2027.

CCE Project Development Carried Out in 2024

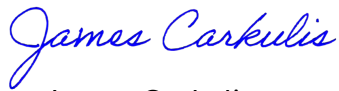
1. On January 18th, CCE filed an application to the Idaho Department of Water Resources seeking to appropriate an additional 50,000 acre-feet of water for its proposed Cat Creek Reservoir and pumped-storage project. The additional water sought is to provide additional storage water for the Boise River system. This brings the total water rights application filings to 151,300 AF. Engineering studies have been commissioned and are now underway to expand the proposed Reservoir accordingly.
2. CCE has applied for use of the Right of Way corridor from the Anderson Ranch substation to the Mountain Home substation.
3. CCE contracted an independent analysis engineering firm to assess decommissioning costs for bonding under the jurisdictions.

Elmore County Interaction

1. In 2024, CCE received extensions on its substations, transmission system, wind, solar, and pumped storage hydro installations to June 14, 2027, with an automatic two year extension if substantial progress is shown.
2. On February 11th, 2025, CCE provided the Elmore County Commissioners with its annual update on CCE. The annual update underlined the huge employment and tax benefits that will stem from the project as well as the unprecedented contribution it will make to the County's water storage capacity.

This concludes our annual progress updates on Preliminary Permit 14655-1. We look forward to resuming the Study Plan/License process in the coming quarter of 2025. CCE has spent some time in this report explaining why the installation of the CCE project has been delayed in unforeseen ways. Delays are not uncommon in very large-scale projects of this kind, a significant reason why so few have been built in this country over the past 25 years. However, few pumped storage hydro facilities, existing or in progress, have the same integration of outstanding topography, available transmission, and advanced technology that the CCE project enjoys. The Cat Creek team has been working to bring it into existence for more than nine years. We are now well within sight of our goal.

Regards,

A handwritten signature in blue ink that reads "James Carkulis". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

James Carkulis
Authorized Agent