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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	)	RESPONSE TO MOTION TO VACATE
PERMIT NOS. 63-34403, 63-34652,	)	AND RESET HEARING SCHEDULE
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
	)	
	)	
	)	

The Board of Commissioners for Elmore County, through undersigned counsel of record and pursuant to the Department's Rules of Procedure 002.17 and 220.02(b), hereby responds to the Motion to Vacate and Reset Hearing Schedule and for Status Conference filed by Applicant Cat Creek Energy LLC ("CCE") on September 24, 2026.

I. Introduction

Elmore County participates in these proceedings in two capacities. First, Elmore County holds water permit 63-34348, which authorizes the diversion of water from Anderson Ranch Reservoir very close to the location of CCE's proposed project. Second, Elmore County exercises jurisdiction over the CCE project pursuant to the Local Land Use Planning Act and a series of Conditional Use Permits ("CUPs") it initially issued to CCE in 2017.

In the former capacity, Elmore County is growing increasingly frustrated with the disconnect between the time, effort, and resources it continues to expend in participating as a protestant in administrative water right proceedings that have seen very little movement in nearly 10 years. Like CCE, Elmore County applied for its permit 63-34348 in 2017. Unlike CCE, the County obtained its permit in 2019.

In the latter capacity, the County believes it is important to ensure all agencies with jurisdiction over CCE are aware of the same information regarding the project's background and status. CCE's Motion relies nearly exclusively on action taken by Elmore County as the basis for its request. Therefore, Elmore County believes it is particularly important for it to provide the Department with detailed information about its emergency ordinance and CCE's status with Elmore County, so that the Department may render a fully informed decision. As the agency with land use authority over CCE, that issued the emergency ordinance described in the Motion, and that is a party to both these proceedings and CCE's licensing proceedings before the Federal Energy Regulatory Commission ("FERC"), the County hopes the Department finds these response materials useful for its decision-making process.

At the outset, CCE characterizes its Motion as a modest request for scheduling relief necessitated by an unexpected and temporary obstacle to its new data center plans. But the County believes the Motion reveals a more fundamental problem. CCE states that agreements still being

negotiated will materially change the ownership, financing, design, construction, operation, and permitting structure of its Project, and will therefore influence the evidence, witnesses, documents, and expert analysis relevant to its pending water right Applications. These circumstances do not demonstrate that CCE needs a different litigation schedule. They demonstrate that CCE is not prepared to prosecute the Applications it has kept pending for years.

To be clear, the County does not oppose reasonable accommodations for an applicant diligently pursuing a sufficiently defined project. But CCE should not be permitted to continue to preserve the priority dates for its long-pending Applications while it develops fundamental aspects of its Project. This is particularly true where CCE has already failed to comply with the Scheduling Order's expert-disclosure deadline, its CUPs expire in June 2027, and the financing arrangements it has previously identified as supporting the Project have repeatedly changed.

II. Legal Analysis

A. CCE's Attempt to Demonstrate "Good Cause" to Vacate the Scheduling Order

The Department's Rules of Procedure provide that a prehearing order "will control the course of subsequent proceedings unless modified by the presiding officer for good cause." IDAPA 37.01.01.514. Although the Department does not appear to have articulated specific factors governing that determination, the Idaho Supreme Court has explained that in judicial proceedings, the decisionmaker considering the "good cause" standard should weigh "potential prejudice to both parties, the alleged 'good cause' for relief, and the relevant circumstances of the case." *See Dodd v. Jones*, 566 P.3d 379, 405, Ida Sup. Ct. Dkt. No. 50748 (Apr. 15, 2025).

The circumstances described in the Motion concern CCE's readiness to proceed with the Applications themselves, not merely its ability to comply with the existing litigation schedule. CCE asserts that potential agreements that do not yet exist will "materially" affect the Project's

financing, ownership, configuration, development and operating responsibilities, knowledgeable persons and entities, responsive documents, expert work, and evidentiary record. (Carkulis Decl. ¶ 13.) It further acknowledges that the financing commitment it expected to document by approximately September 1, 2026 “has not yet been finalized.” (*Id.* ¶ 8.) In other words, the problem is not the schedule; it is the maturity of the Applications.

The circumstances described in CCE’s Motion demonstrate that CCE continues to change fundamental aspects of its Project. Those circumstances bear directly on whether the Applications are sufficiently developed to satisfy Idaho’s requirements governing proposed appropriations in the first instance. These proceedings have been pending since 2017, with lots of changes but virtually no meaningful progress. CCE does not explain what makes this time any different.

B. The End Use of Power Generated by CCE’s Project Is Not Relevant to the CUPs or to These Water Right Proceedings

CCE asserts that “[b]ecause the financing and construction structure depends on the associated data center development, the resulting moratorium prevented the parties from formally proceeding on the anticipated timetable.” (Mot. of 9/24/26, p. 2.) This assertion conflates CCE’s recently developed plans concerning the potential end use of electricity generated by its project with the project that is actually the subject of these permitting proceedings. A data center is not among the uses authorized by CCE’s CUPs. (*See* Lawrence Decl., Ex. A (2017 CUPs).) Instead, the CUPs authorize five specific uses: (1) electrical transmission lines, (2) pumped storage hydroelectric generation, (3) solar electrical generation, (4) wind generation, and (5) an electrical substation. (*Id.*) A data center is not among them.

Nor was a data center part of the project presented in CCE’s applications to the Department. (*See* Apps. for Permit of 5/16/17, 4/26/19, 4/21/20, 4/22/20, 1/18/24). Instead, the connection between CCE’s project and data center development is recent. In its April 15, 2026 annual report

to FERC, CCE expressly acknowledged this chronology, reporting that “[i]n 2025, an additional direction was added to the overall mission” of the CCE project. (Lawrence Decl., Ex. B, p. 1.) CCE explained that this “additional direction” resulted from increased demand associated with artificial intelligence and data centers and included inquiries and negotiations concerning possible “co-location of energy, water, and data centers.” (*Id.*) CCE similarly advised Elmore County in February 2026 that it had “fielded inquiries from data center companies over the past 12 months” concerning potential hyperscale data center development. (Lawrence Decl., Ex. C, p. 3.) Thus, by CCE’s own contemporaneous description, data center development was an “additional direction” added years after CCE applied for the water rights and land use approvals at issue here. If data centers are not authorized by the CUPs and are not contemplated by the permit applications generating these proceedings, then it makes literally no logical or legal sense for Elmore County’s emergency ordinance regarding data centers to affect these proceedings.

Most significantly, CCE itself recently took the position that its relationship with prospective data center developers is not relevant to these water right proceedings. On August 21, 2026—only approximately one month before filing the present Motion—CCE served amended responses to discovery propounded by the Boise Project Board of Control. Request for Production No. 12 sought communications and agreements between CCE and data center developers concerning potential projects in Elmore County that might be supplied with water or power from CCE’s project. CCE objected that:

[C]ommunications 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.

(Lawrence Decl., Ex. D, p. 6 (discovery resp.) (emphasis added).)

CCE further objected to the extent the request sought “financing, power-sale, or economic information for the FERC-licensed hydropower project,” asserting that such matters fell outside the proper scope of IDWR’s proceeding except to the extent they bear upon water-allocation issues. (*Id.*) CCE made the same point concerning the ultimate purchaser of electricity generated by the project. Request for Production No. 22 sought documents and agreements concerning the purchase and sale of power to be generated by CCE’s project, including CCE’s previously disclosed arrangement with Bayer. CCE responded that “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.” (Lawrence Decl., Ex. D, pp. 8-9 (discovery resp).) CCE further asserted that such agreements and the associated economics of its hydropower project fall outside the proper scope of the IDWR proceeding except to the extent they bear upon matters within IDWR’s water-allocation authority. (*Id.*)

CCE’s position on August 21 cannot logically be reconciled with the position it advances on September 24. When another party sought discovery concerning CCE’s arrangements with data center developers, CCE asserted that those arrangements were not relevant to the issues properly before IDWR. When asked to produce agreements concerning who would purchase the electricity generated by its project, CCE likewise asserted that such agreements were not relevant. CCE now relies upon the status of those same commercial arrangements as the reason for IDWR to suspend the schedule for adjudicating its water right applications.

CCE’s own historical treatment of its Bayer arrangement further illustrates the distinction. CCE has previously reported a significant commercial arrangement with Bayer involving the electrical output of its project and, as recently as February 2026, represented to Elmore County that its contract with Bayer “remains intact.” (Lawrence Decl., Ex. C, p. 3 (CCE 2/10/26 Annual

Report).) Yet the identity of Bayer as a purchaser of project output did not transform Bayer's facilities or operations into components of CCE's project, nor did CCE contend that IDWR's adjudication of its water right applications depended upon resolution of the details of that commercial relationship. Indeed, CCE's August 21 discovery responses confirm the opposite. As a reminder, "[j]udicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Safaris Unlimited, LLC v. Jones*, 169 Idaho 644, 650, 501 P.3d 334, 340 (2021) (quoting *McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013)).

The same distinction applies here. CCE may now contemplate that a data center developer will provide capital for construction of CCE's project, and prospective data center tenants may provide a market for some portion of the electricity generated by it. But that does not make the contemplated data center part of the project described in CCE's pending water right applications or authorized by the CUPs. Nor does it make the identity or location of a prospective consumer of CCE's electricity material to adjudication of those applications. Whatever significance CCE's new data center strategy may have on CCE's current business plans, CCE has not explained why uncertainty concerning that strategy prevents IDWR from proceeding with adjudication of water right applications that predate the strategy by years—particularly when CCE itself represented only weeks ago that data center agreements and power-sale agreements are not relevant to the issues properly before IDWR.

C. CCE's Request is Not "Narrowly Tailored" to the Circumstances; The Duration of the Existing Restrictions on Data Centers Is Unknown

CCE repeatedly characterizes Elmore County's emergency moratorium as a "temporary" impediment to its proposed data center development and emphasizes that the moratorium has a defined expiration date. (Mot. of 9/24/26, pp. 2, 5, 6.) But the fact that the emergency moratorium

must expire does not establish that the land-use restrictions imposed by the County will expire with it. LLUPA expressly contemplates otherwise.

Idaho Code Section 67-6523 limits an emergency ordinance or moratorium to 182 days, but then expressly provides the mechanism by which its restrictions may continue: “To sustain restrictions established by an emergency ordinance or moratorium beyond the one hundred eighty-two (182) day period, a governing board must adopt an interim or regular ordinance” pursuant to LLUPA's ordinary notice and hearing procedures. IDAHO CODE § 67-6523. Similarly, Section 67-6524 authorizes an interim ordinance or moratorium for up to one year and provides that, “[t]o sustain restrictions” beyond that period, the governing board must adopt a regular ordinance. *Id.* at § 67-6524. Thus, LLUPA itself expressly contemplates that restrictions first imposed on an emergency basis may be continued through subsequent action.

Elmore County's emergency moratorium therefore establishes only that the emergency enactment will terminate within the statutory period. It does not establish what regulations will govern data centers after that date. The County may adopt interim or permanent regulations further restricting data center development. CCE cannot possibly know which will occur. This distinction is important because CCE asks the Director to vacate an established hearing schedule based upon its assumption that the County's action represents only a temporary event. The stated expiration date and the plain language of LLUPA provide no basis for that assumption.

Finally, it is worth noting another flaw in the factual allegations supporting CCE's Motion. Nowhere in the Carkulis Declaration supporting the Motion is there any representation that any hypothetical data center would be located within unincorporated Elmore County and therefore within the County's jurisdiction in the first place. (*See* Carkulis Decl. of 9/24/25, ¶¶ 1-16.) Nor does it provide any explanation as to why this is a necessary assumption, given that the end use

for electricity is often quite distant from its generating source. Although co-location may provide economic or transmission-related advantages, CCE has not explained why physical co-location is necessary to the financing arrangement it now relies upon. Again, CCE merely suggests that it is partnering with a data center developer for financing. And, there are currently no pending land use applications for data centers within unincorporated Elmore County that could arguably relate to CCE. (Roddin Decl., ¶ 2.)

D. CCE Failed to Timely Disclose Its Expert Witnesses and Testimony and Admits the Project Has Recently “Materially Changed,” and Yet It Has Been Maintaining Its Priority For Nearly 10 Years

The pending Motion should also be considered in the context of a deadline that has already passed. Under the May 15, 2026 Scheduling Order, CCE’s expert witness disclosures and expert reports were due September 25, 2026. (Scheduling Order of 5/15/26, p. 2.) CCE did not serve expert disclosures or reports by that deadline. Instead, one day before the deadline, CCE filed the Motion asking the Director to vacate the existing schedule.

CCE’s explanation for why it cannot proceed at this time does not support simply establishing another schedule. To the contrary, CCE affirmatively represents that its project itself is undergoing material changes. According to CCE, its recently assembled data center coalition is “materially changing anticipated ownership, financing, design, construction, operation, and permitting structure of the overall project.” (Mot. of 9/24/26, p. 4 (emphasis added).) CCE further represents that agreements that have not yet been negotiated and executed will determine “the configuration of the project and the entities responsible for its financing, construction, operation, and use,” which will in turn determine “the evidence, witnesses, and documents relevant to the Applications, as well as the scope and focus of expert analysis.” (*Id.* at pp. 4–5.)

Those representations describe something more fundamental than a scheduling problem. CCE is not asking for a brief extension to complete an identified expert analysis concerning a

defined project. According to CCE, the project's ownership, financing, design, construction, operation, and permitting structure are undergoing material change; future agreements will determine the project's configuration and the entities responsible for it; and those developments will determine what evidence, witnesses, documents, and expert analysis are relevant to CCE's pending Applications. By CCE's own account, therefore, CCE cannot identify and present the evidentiary and expert case necessary to adjudicate the Applications it has kept pending for years. Furthermore, any fundamental change to the project's design and construction require CCE to apply for and secure amended CUPs.

Idaho's constitutional prior appropriation doctrine and water appropriation statutes do not contemplate indefinite maintenance of permit applications while an applicant determines whether and how its proposed project will proceed. Idaho Code Section 42-203A requires the Director, before approving an application, to determine, among other things, "to what use or uses the water sought to be appropriated can be and are intended to be applied." IDAHO CODE § 42-203A(5). The statute further provides that an application may be rejected where "the application is not made in good faith, is made for delay or speculative purposes," or where the applicant lacks sufficient financial resources to complete the work involved. *Id.* The Water Appropriation Rules similarly require consideration of whether an applicant intends to put the water to beneficial use with reasonable diligence and identify impediments to successful completion of the project as relevant to that inquiry. IDAPA 37.03.08.045.01(c).

These requirements reflect fundamental principles of Idaho's prior appropriation system. An application for a permit does not itself create a vested water right. Rather, filing an application creates an inchoate right that may ripen into a water right only through compliance with Idaho's statutory appropriation process. *Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 625,

636 P.2d 745, 747 (1981). Nevertheless, the filing date is significant because, upon successful completion of that process, the priority of the resulting appropriation relates back to the date of the application. *Id.* Thus, maintaining a permit application indefinitely is not without consequence to other water users.

That consequence is particularly significant here. CCE is not merely requesting additional time to complete a procedural step. It is asking the Director to preserve Applications and their associated priority dates while CCE continues to determine the configuration of its project, the entities that will finance and construct it, the structure under which it will operate, and even the evidence and expert analysis necessary to support them. Idaho's prohibition against speculative applications would have little practical meaning if an applicant could preserve an early position in the priority system indefinitely while the project underlying the application remains insufficiently developed to proceed to adjudication.

Idaho law instead requires an applicant to pursue an actual beneficial use rather than reserve water for an indefinite future project. *See* IDAHO CODE § 42-203A(5); IDAPA 37.03.08.045.01. In *North Snake Ground Water District v. IDWR*, the Idaho Supreme Court upheld IDWR's determination that applications were not speculative where the evidence established an identified beneficial use for the proposed appropriation and demonstrated that the applicants intended to furnish the water for that use. 160 Idaho 518, 376 P.3d 722, 731-33 (2016). The anti-speculation inquiry therefore serves an important function: an applicant seeking the benefit of Idaho's appropriation process must be pursuing an actual project and intended beneficial use, not simply preserving an application while future circumstances determine whether, when, and in what form a project will materialize.

Idaho Code Section 42-204 further illustrates the importance the Legislature places upon the relationship between a viable application and its priority date. Where IDWR requests information necessary to correct a defective application and the applicant fails to provide that information within the prescribed period, the Department may void the application. If the applicant subsequently supplies the required information, the submission is treated “in all respects as a new application,” with priority determined accordingly. IDAHO CODE § 42-204(1). Although CCE’s failure to disclose its expert case does not arise under that particular provision, Section 42-204 demonstrates that preservation of an earlier filing date is not an entitlement divorced from an applicant’s ability to prosecute a legally sufficient application.

E. CCE’s CUPs from Elmore County Expire on June 14, 2027

CCE's Motion also fails to acknowledge an important deadline governing the underlying Project. After having received multiple extensions of its CUPs since they were first approved in 2017, CCE's CUPs are now valid through June 14, 2027. (Lawrence Decl., Ex. E, pp. 7-8 (Elmore County Order of 5/17/24).) Although CCE may apply for an additional two-year extension, *it has no entitlement to one*. The operative CUP provision expressly states that an extension may be granted only if CCE “has demonstrated significant progress towards construction” and “it is likely that [CCE] will be in a position to commence regular operations within the two-year extension period.” (*Id.*) As of the date of this filing, CCE has not applied for any building permits with Elmore County in order to effectuate its CUPs. (*See* Roddin Decl., ¶ 3).

The hearing on these water permit Applications is scheduled for May 17–21, 2027—less than one month before the CUPs expire. CCE nevertheless asks the Director to vacate the hearing and defer even a status conference until sometime after January 30, 2027. CCE therefore asks IDWR to postpone adjudication of its Applications into the immediate vicinity of the expiration of the land use approvals upon which its Project depends.

CCE cannot assume those approvals will be extended. Whether CCE will satisfy the applicable extension criteria in June 2027 will be determined by Elmore County based upon the circumstances existing at that time. The County need not, and does not here, prejudice any future extension request. It is sufficient for these purposes to simply acknowledge that CCE possesses no right to an additional extension.

F. Vacating the Schedule Prejudices Parties That Complied With It and Would Continue to Impose Costs Resulting From CCE's Lack of Readiness

CCE's assertion that its requested delay will cause “no prejudice” overlooks what has already occurred under the existing Scheduling Order. The Director established September 25, 2026 as the deadline to identify the expert witnesses and testimony upon which the parties intend to rely. (Scheduling Order of 5/15/26, p. 2.) The Scheduling Order separately established October 30, 2026 as the deadline for rebuttal expert reports. (*Id.*) CCE did not comply with the September 25 deadline. Other parties did by disclosing their own experts, and others such as Elmore County prepared and served written discovery requests based on the Scheduling Order.

IDFG, in particular, devoted substantial resources to developing and disclosing its expert case. IDFG retained University of Idaho limnologist Dr. Frank Wilhelm, who prepared an expert report addressing potential effects of CCE's proposed project on the thermal structure, dissolved oxygen concentrations, and sediment conditions in Anderson Ranch Reservoir. (IDFG Expert Witness Disclosure of 9/25/26, pp. 2–3.) IDFG also disclosed multiple agency scientists and reports addressing potential effects upon bull trout, other Anderson Ranch Reservoir fish populations, fisheries in the South Fork Boise River, sage-grouse, and big game. (*Id.* at pp. 3–9.) Those reports and the opinions of IDFG's experts have now been disclosed to CCE.

The Boise Project also complied with the September 25 deadline. While the Boise Project stated that CCE's repeated changes prevented it from completing its expert reports, it nevertheless

identified the witnesses upon whom it expects to rely and disclosed the subjects of their anticipated testimony. (Boise Project Expert Witness List of 9/25/26, pp. 1–2, 2–4.)

Vacating the schedule now therefore does not simply return all parties to the position they occupied before the Scheduling Order. IDFG and the Boise Project have disclosed substantial portions of their affirmative expert cases. CCE has not. If CCE is subsequently permitted to make its initial expert disclosures under a new schedule, it will do so with the benefit of knowing expert opinions and anticipated testimony that other parties were required to develop and disclose without the reciprocal benefit of CCE's expert case. That is cognizable procedural prejudice, particularly where the existing Scheduling Order separately reserved October 30 for rebuttal expert reports.

CCE's broader assertion that there is “no prejudice” also ignores the practical burdens its delays, false starts, and head fakes continue to impose on others. This proceeding involves the Department itself and numerous Protestants, many of which are governmental entities, and their respective attorneys, technical consultants, and experts. The existing schedule required those parties to organize discovery, retain and prepare experts, evaluate CCE's Applications, and prepare for dispositive motions and a May 2027 hearing. Each time the project changes materially or the adjudicatory schedule is suspended and restarted, those parties must expend additional resources to reassess the project, determine the consequences of the latest changes, and prepare anew.

Those burdens are particularly difficult to justify where the requested delay results from CCE's own lack of readiness to prosecute Applications that have remained pending for years. CCE is entitled to develop and modify its proposed project on whatever timetable it chooses. It should not, however, be permitted to shift the resulting costs onto the other parties by maintaining its Applications indefinitely while requiring Protestants and governmental agencies to remain prepared to litigate a project that CCE itself says is materially changing.

G. CCE's Public Interest Argument Mischaracterizes Elmore County's Reference to a "Severe Water Crisis"

CCE argues that further delay serves the public interest because "[t]he need for additional storage is greater than ever." (Mot. of 9/24/26, p. 5.) In support of that assertion, CCE relies upon Elmore County's emergency data center moratorium, stating that the moratorium "underscores that need by declaring a 'severe water crisis' and finding that existing supplies and infrastructure are under stress." (*Id.*) CCE then immediately compares the approximately 29,000 acre-feet of additional storage contemplated by the Anderson Ranch Dam Raise with the approximately 150,000 acre-feet of storage proposed by CCE in the Boise River system.¹ (*Id.*)

CCE's reliance upon the County's "severe water crisis" language removes that language from its stated context. The County's resolution does not identify a shortage of Boise River storage as the "severe water crisis." Rather, the resolution states:

"WHEREAS, Elmore County is facing a severe water crisis as is shown by the enactment of the Cinder Cone Butte Critical Groundwater Management Area and the Mountain Home Groundwater Management Area by the Idaho Department of Water Resources[.]"

(Carkulis Decl., Ex. A, p. 1 (emphasis added).)

The distinction is significant. As the Department well knows, the Cinder Cone Butte Critical Groundwater Management Area and Mountain Home Groundwater Management Area concern the severe groundwater deficit within the greater Mountain Home area in Basin 61. CCE's Applications, by contrast, seek to appropriate water from the Boise River system in Basin 63. The

¹ It may be worth noting that CCE's CUP's currently authorize storage up to 100,000 acre-feet—not 150,000 acre-feet. (*See* Lawrence Decl., Ex. F, p. 36 (2018 Dev. Agr.)). The courts have ruled that the 2018 Development Agreement between CCE and Elmore County constitutes an amended set of the CUPs previously issued by Elmore County. (*See* Lawrence Decl., Ex. G, p. 3 n. 1 (11/8/19 district court order); *S Bar Ranch LLC v. Elmore County*, 170 Idaho 282, 510 P.3d 635, 646 (2022).)

County's reference to groundwater conditions in the Mountain Home area therefore does not establish an existing shortage of Boise River water or demonstrate a need for the additional Boise River storage proposed by CCE.

Indeed, CCE's own quotation demonstrates the disconnect. The Motion extracts the phrase “severe water crisis” from the County's resolution and uses it to introduce a discussion of Boise River storage, but it omits the remainder of the same recital identifying the specific circumstances the County cited as evidence of that crisis. The County did not state that the Cinder Cone Butte or Mountain Home groundwater conditions demonstrate a shortage of storage in the Boise River system. CCE supplies that connection itself.

Nor does the County's concern regarding the potential water demands of data centers establish the need for CCE's proposed project. The moratorium identifies a range of potential impacts associated with large-scale data center development—including impacts to water resources, electrical infrastructure, transportation systems, emergency services, public safety, land-use compatibility, and agricultural lands—and directs the County to study those issues before processing data center applications. (Carkulis Decl., Ex. A, pp. 1–2.) It does not find that CCE's proposed storage project is necessary to address those concerns, nor does it identify CCE's project as a solution to the groundwater conditions underlying the County's “severe water crisis” finding.

CCE may separately attempt to establish that additional Boise River storage would serve the public interest. ***But the point is that Elmore County's emergency moratorium does not establish that proposition.*** The County's resolution addresses a different problem in a different hydrologic context, and its reference to a “severe water crisis” provides no support for delaying adjudication of CCE's pending Applications.

CCE's public interest argument also contains a more fundamental inconsistency. The County cited potential data center water demand as one of the reasons further study and regulation are necessary. (Carkulis Decl., Ex. A, p. 1.) CCE, however, invokes those same concerns as support for preserving and delaying its Applications while it attempts to finalize an arrangement under which its Project would facilitate development of a new hyperscale data center. CCE does not explain how supplying electricity to a new data center would alleviate the Mountain Home-area groundwater conditions identified in the County's resolution. To the contrary, the resolution identifies large-scale data center development as a potential additional demand upon water resources that warrants further study. Thus, even accepting CCE's newly proposed relationship with a data center and unnamed participants in some amorphous "coalition," the County's moratorium does not establish a public-interest justification for delaying these proceedings.

H. CCE's Financing Plans Continue to Change

CCE's latest financing proposal must be considered in the context of the financial-resource and anti-speculation requirements applicable to its Applications. From the outset of these proceedings, CCE has recognized that it must demonstrate that financing is reasonably likely to be available to appropriate the water and place it to beneficial use. In its June 2020 Rule 40.05 disclosure, CCE quoted the requirement that an applicant provide a financial statement, financing commitment, "or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed." (CCE Rule 40.05 Disclosure of 6/16/20, p. 5.) CCE declined to provide a financial statement or financing commitment letter, but it represented that it had instead produced "other evidence" demonstrating the reasonable probability that financing would be available. (*Id.*) CCE further maintained that its disclosures were "more than sufficient to satisfy Rule 40.05" and that the Rule did not require disclosure of "every minute detail of its project or financing plans." (*Id.* at p. 7.)

CCE supplemented those disclosures in November 2020. It represented that it had provided, among other things, a project construction schedule, project milestones, a construction budget, “probable uses and sources of financing,” a “finance process narrative,” and an accounting of CCE's investment in the Project. (CCE Rule 40.05 Disclosure of 11/19/20, pp. 1–2.) Thus, more than six years ago, CCE took the position that its Project and financing were sufficiently developed to satisfy the financial requirements applicable to the Applications at that time.

The financing and development arrangements described by CCE have continued to change. In October 2023, CCE entered into a letter of intent with the Shoshone-Bannock Tribes concerning a structured relationship or joint venture in the Project. (CCE Status Report of 3/29/24, pp. 2-3; Lawrence Decl., Ex. H, pp. 2, 8 (CCE ltr. of 1/30/24.) By February 2025, however, CCE reported to Elmore County that the Tribe's decision-making timeline had made it “a real struggle to honor the Bayer contract and other important commitments essential to Project development” and had “impacted our progress significantly.” (Lawrence Decl., Ex. I, p. 4 (CCE Annual Report of 2/12/25).) CCE likewise reported to FERC that, although CCE and the Tribe had signed a letter of interest and informally agreed to a partnership, the Tribal Council had not made the decision necessary to produce the formal agreement required for the contemplated federal loan guarantee, and CCE eventually “ran into deadlines for some of the major project components and thus out of time.” (Lawrence Decl., Ex. J, p. 1 (CCE 4/1/25 Annual Report).)

By July 2025, CCE presented IDWR with a different and considerably more specific financing plan. In a Financial Update submitted in response to an IDWR order requiring documentation demonstrating how CCE had secured funds for construction, CCE again articulated the governing standard: it was required to demonstrate that “it is reasonably probable that financing will be available to appropriate the water and put it to beneficial use.” (CCE Not. Of Disclosure

of 7/21/25, App. B, pp. 1, 4.) CCE reported that it had invested \$38.6 million in the Project, consisting of \$13.8 million funded through notes and \$24.8 million through self-financing. (*Id.* at p. 3.) CCE represented that its Bayer off-take agreement enabled it to proceed with the wind, solar, and energy-storage components, which in turn would “undergird financing and construction of the PSH component of the project.” (*Id.*)

CCE then described its anticipated financing structure further. It represented that remaining engineering and permitting work would be financed through proceeds from wind and solar facilities, sales of tax credits, and income from the Bayer contract; that construction would generally be financed using 20% equity and 80% debt; and that Lotus Infrastructure Global Operations, LLC was “currently in negotiations with CCE to acquire equity in the project” and was “currently providing credit support.” (*Id.*, App. B., at pp. 4-5.) The accompanying Lotus letter dated April 7, 2025 contemplated acquisition of up to 100% of the equity interests in the Project, subject to finalizing definitive agreements. (*Id.*) Based upon those representations, CCE stated that its “track record clearly demonstrates that ‘it is reasonably probable that financing will be available to appropriate the water and put it to beneficial use.’” (*Id.*, App. B., p. 5.)

Less than nine months later, the financing picture changed again. On April 6, 2026, CCE advised the Department it was “actively engaged in confidential negotiations with multiple potential financial and development partners.” (CCE Status Report of 4/6/26, p. 1.) CCE explained it had delayed filing its required annual status report because it expected those negotiations to produce a “material development regarding project financing and advancement,” but reported that the negotiations remained ongoing. (*Id.*) CCE specifically requested to remain in informal proceedings while those financing negotiations continued. (*Id.* at pp. 1–2.)

CCE now presents yet another financing structure. Its Motion states that negotiations conducted after the matter returned to formal proceedings produced a new coalition involving an unnamed hyperscale data-center developer, unidentified prospective technology-company tenants, and an unidentified design-build company. (Mot. of 9/24/26, pp. 1–3.) Under this latest contemplated structure, the data-center developer—not Lotus, Bayer revenues, tax-credit proceeds, the Shoshone-Bannock Tribes, or any financing source previously identified to the Department—is now “expected to provide the capital needed to construct the CCE water and energy project.” (*Id.* at p. 2.) No such financing commitment currently exists. CCE anticipated documenting one by approximately September 1, 2026, but acknowledges that the commitment “has not yet been finalized.” (Carkulis Decl. ¶¶ 6–8.)

The County does not contend that any specific representation made by CCE was inaccurate when made. Nor does the County contend that a developer of a large infrastructure project must maintain identical financial counterparties throughout project development. The problem is more fundamental. Even assuming all of CCE's representations were accurate at the time, the chronology demonstrates that the financing and development structure supporting the Applications has repeatedly failed to become fixed. Potential financing arrangements have emerged, changed, and been replaced, while the Applications themselves remain pending, and their original priority dates have remained reserved. It is difficult to understand how this complies with Idaho’s requirement that water be put to beneficial use and its prohibition against speculation.

Moreover, CCE's latest proposal cannot fairly be characterized as merely substituting one financing source for another for an otherwise fixed project. CCE itself states that the agreements now being negotiated will “materially” affect the Project's financing, ownership, configuration, development and operating responsibilities, knowledgeable persons and entities, responsive

documents, expert work, and evidentiary record. (Carkulis Decl. ¶ 13.) Indeed, CCE relies upon that very uncertainty as the reason the existing adjudicatory schedule supposedly cannot proceed. If CCE does not yet know the Project's ultimate ownership, configuration, development responsibilities, operating responsibilities, or financing structure, that uncertainty is relevant to whether the pending Applications represent a sufficiently concrete appropriation capable of proceeding with reasonable diligence to beneficial use.

That is precisely the concern addressed by Idaho's anti-speculation requirements. An application may establish an inchoate priority capable of relating back to its filing date if the statutory requirements are ultimately satisfied, but filing an application does not itself create a vested water right. *See Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 624-25, 636 P.2d 745, 746-47 (1981). The anti-speculation doctrine would have little meaning if an applicant could preserve an early priority date indefinitely while successively searching for the financing, ownership, commercial relationships, and even project configuration necessary to make the proposed appropriation viable.

CCE's latest financing coalition therefore does not demonstrate good cause for further delay. It demonstrates the opposite. More than six years after CCE represented that its financial disclosures were sufficient to satisfy Rule 40.05, and more than a year after CCE expressly represented that its then-existing financing plan demonstrated the reasonable probability that financing would be available to place the water to beneficial use, CCE now asks the Department to suspend formal proceedings because another financing arrangement remains unresolved and may materially change the Project itself. At some point, the prior appropriation doctrine requires an applicant to proceed with a sufficiently defined and financially viable project rather than merely preserve its place in line while attempting to develop one.

III. Conclusion

Elmore County respectfully requests that the Department consider the foregoing information in its deliberations on CCE's pending Motion.

Dated: October 8, 2026

VARIN THOMAS LLC

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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