

Randall C. Budge (ISB No. 1949)
Thomas J. Budge (ISB No. 7465)
RACINE OLSON, PLLP
201 E. Center St. / P. O. Box 1391
Pocatello, Idaho 83204-1391
(208) 232-6101 – Phone
(208) 232-6109 – Fax
rcb@racinelaw.net
tjb@racinelaw.net

Attorneys 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 AND 63-34900 IN THE NAME
OF CAT CREEK ENERGY, LLC

**Cat Creek Energy, LLC’s Response to
SBar Ranch, LLC and The District at
Parkcenter, LLC’s Petition for Review**

Cat Creek Energy, LLC (“Cat Creek”) submits this response to *SBar Ranch, LLC and The District at Parkcenter, LLC’s Petition for Review October 20, 2020, Order re: SBar Ranch, LLC and The District at Parkcenter, LLC’s Renewed Motion for Rule 40.05.b Order for Applicant to Submit Complete Rule 40.05 Information* (“Petition”) filed November 3, 2020.

Introduction

SBar Ranch, LLC, and The District at Parkcenter, LLC (collectively, “SBar”) have not filed the Petition as a result of some genuine question about Cat Creek’s permit applications. They know exactly what is being proposed—they’ve been fighting it on every front for years—and any unanswered questions could be pursued through discovery. No, the Petition is not about a lack of information about how, where, and when Cat Creek will use water. It is about creating an artificial barrier to approval. SBar’s strategy has always been to delay and obstruct with the hope that Cat Creek will run out of money or be tripped up by some legal roadblock they create.

Toward that end, the Petition is another step in SBar’s crusade to reconstruct Rule 40.05 as a towering hurdle that cannot be cleared. It is SBar’s position that Rule 40.05 should require Cat Creek to prove its entire case and rebut every conceivable defense at the outset. But that is not the purpose of Rule 40.05. It is not some gauntlet that requires applicants to divine every concern that protestants may have, produce expert reports before knowing what issues may require them, and submit evidence that does not exist. The rule is not intended to expand the statutory criteria of

Idaho Code 42-203A(5); it's purpose is simply to require an initial disclosure of information relevant to those criteria to aid interested parties in evaluating the application.

Rule 40.05 is akin to the initial disclosures required under rule 26 of the Federal Rules of Civil Procedure, the purpose of which is to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.” *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012). Rule 40.05 does not replace the rules of discovery and their orderly process for gathering information, though it does jump start and expedite that process.

Interestingly, more than a year after Cat Creek filed its first two permit applications, SBar is asking the Director to make Cat Creek produce highly specific and technical information under Rule 40.05 that SBar could easily request in discovery. SBar has, to date, not submitted a single discovery request to Cat Creek. (Decl. of Thomas J. Budge, ¶ 7.)

What's more, SBar's ironically asks the Director to hold Cat Creek to an extreme standard of initial disclosures while SBar refuses to provide any meaningful disclosure of its own position and supporting evidence in response to discovery requests made by Cat Creek, as set forth in *Cat Creek's Motion to Compel* filed herewith. SBar and its experts and experienced water attorneys have obviously put great thought into how Cat Creek's applications can be defended, yet SBar is playing hide-the-ball with Cat Creek by refusing to explain the basis for its defenses. Instead engaging in a good faith exchange of information, SBar is wasting time and resources of both IDWR and Cat Creek with its string of Rule 40.05 motions.

As set forth below, the Petition should be denied because Cat Creek has in fact produced information that is responsive to each item that SBar complains about, and any further information that SBar would like to obtain can be requested in discovery.

Response

1. The Primary Energy letter is on its face a financial commitment letter.

SBar asserts that the financial commitment letter of Primary Energy dated September 8, 2020, “is not a ‘financial commitment letter’ in that it is not an actual commitment to provide financing.” (Petition, p. 2.) This assertion is perplexing since the plain language of the letter states: “this letter confirms the commitment of Primary Energy Recycling Corp (“Primary Energy”) to provide the necessary credit support, investment, and participation to finance construction of the Cat Creek Energy, LLC (“Cat Creek”) projects for water and energy infrastructure in the state of Idaho with an overall cost estimated at 2.4 billion.” (Emphasis added.)

If SBar questions or wishes to challenge the reliability and sufficiency of Primary Energy's financial commitment, it is welcome to do so through discovery, pre-trial motions, or at trial. With respect to Rule 40.05(f)(i), Cat Creek has complied by producing a letter that does in fact purport to be a financial commitment to finance construction of the project.

2. The Primary Energy letter contains other information to show that it is reasonably probable that financing will be available.

SBar argues that the Primary Energy letter should be discarded because it does not include a financial statement of the lender. However, Rule 40.05(f)(i) does not require a financial statement of Primary Energy. It requires “a financial commitment letter along with the financial statement of the lender 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.” (Emphasis added.) The Primary Energy letter includes other evidence to show that it is reasonably probably that financing will be available, including (a) identification of the principals of Primary Energy, (b) the credit ratings of the principals of Primary Energy, (c) a representation that its principals have combined assets under management of over \$1.0 trillion, (d) a representation that Primary Energy owns and operates energy generating projects with a combined capacity of 298 MWs, (e) the corporate organizational chart of Primary Energy, (f) information about how Primary Energy intends to finance the project, and (g) information about the experience of Primary Energy.

Again, if SBar wishes to challenge the financial strength of Primary Energy it is welcome to do so through appropriate means. With respect to Rule 40.05(f)(i) Cat Creek has complied by producing a document that does in fact contain evidence to show that it is reasonably probable that financing will be available.

3. SBar must file a motion for summary judgment if it wishes to obtain a ruling on the merits of Idaho Code 42-203A(5).

SBar asks the Department to make a dispositive ruling “that CCE’s PSH project will not be financially viable as its costs will exceed revenue and, as a result, it is unlikely that CCE ultimately will be able to obtain the kind of private financing described in the PE Letter over the next 20 or more years.” (Petition, p. 2.) This request purports to seek a ruling on Cat Creek’s compliance with Rule 40.05, but it is in effect a request for summary judgment on the merits of Idaho Code 42-203A(5).

Rule 40.05(f)(i) requires the disclosure of “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.” Cat Creek has done this by producing (a) a financial commitment letter of Primary Energy, (b) extensive engineering, planning, permitting and other work undertaken over several years; (c) leases and an agreement to purchase the lands upon which the reservoir and other infrastructure will be constructed; (d) conditional use permits and a development agreement with Elmore County authorizing development of the project; (e) a FERC preliminary permit and order granting authority to Cat Creek to file a FERC license application; (f) a Preliminary Lease of Power Privilege issued by the United States Bureau of Reclamation; (g) a detailed project budget; (h) a narrative explanation of Cat Creek’s financing strategy; and (i) an accounting of Cat Creek’s investment in the project of more than \$18 million to date. Cat Creek contends that this information shows a reasonable probability that financing will be available to complete the project. This satisfies the plain language of Rule 40.05.

. If SBar disagrees with Cat Creek’s position and wishes to obtain a ruling, before trial, on the merits of whether “the applicant has not sufficient financial resources with which to complete the work involved therein,” Idaho Code 42-203A(5)(d), then SBar is welcome to file a motion for summary judgment, where all disputes of fact and reasonable inferences must be construed in Cat Creek’s favor. SBar’s attempt to evade the summary judgment standard by requesting a ruling on the merits under Rule 40.05 is inappropriate and must be rejected.

4. Rule 40.05 does not require Cat Creek to produce the technical information that SBar requests relating to water supply.

Lastly, SBar asks the Department to write into Rule 40.05 a requirement that Cat Creek develop and produce a host of very detailed technical information, including the telemetric reporting of water measurement data in 15 minute increments, backup data used in all analyses, further information about impacts to springs and groundwater rights, evaporative loss calculations, information water released daily, and more. (Petition, pp. 3-4.).

Some of the information requested by SBar has already been produced. For example, Cat Creek has explained that “[t]he reservoir (“Cat Creek Reservoir”) will not intercept groundwater. Water will be impounded in a natural depression with the aid of a berm of variable height. Maximum reservoir depth will be approximately 80 feet. There is no shallow groundwater. The depths of surrounding wells range from 200 to 551 feet (average 438 feet), with static water levels ranging from 42 to 398 feet (average 199 feet). Moreover, Cat Creek Reservoir will be lined and impervious to exfiltration.” (Notice of Amended Rule 40.05 Disclosure (June 16, 2020), p. 2.) Cat Creek has also uploaded to ShareFile a spreadsheet identifying the well ID #, depth to water, and static water level of all groundwater wells in the vicinity of Cat Creek Reservoir (bates nos. CCE-B-343.)

Some of the information requested by SBar is impossible to produce, such as daily water releases of storage water which will be dependent upon water supply conditions and water demands of spaceholders.

Notwithstanding, SBar’s request should be denied for the simple reason that Rule 40.05 does not require the disclosure of such detailed technical information. Again, Rule 40.05 sets forth initial disclosure requirements, which Cat Creek has complied with by filing its *Amended Rule 40.05 Disclosure* along with hundreds of pages of documents uploaded to ShareFile and *Cat Creek Energy, LLC’s Notice of Supplemental Rule 40.05 Disclosure* filed herewith. If SBar would like further information about surrounding springs, evaporative loss calculates, etc., it is welcome to submit a discovery request. SBar’s requests that the Department order Cat Creek to produce such information under Rule 40.05 exceeds to scope and purpose of the rule, undermines the discovery process, and must be denied.

Conclusion

For the foregoing reasons, Cat Creek respectfully requests that the Department summarily deny the Petition.

DATED this 19th day of November, 2020.

RACINE OLSON, PLLP

By: 

Randall C. Budge

Thomas J. Budge

Attorneys for Applicant Cat Creek Energy, LLC