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District at Park Center, LLC

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

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

SBAR RANCH, LLC AND THE
DISTRICT AT PARKCENTER, LLC'S
REPLY IN SUPPORT OF PETITION
FOR REVIEW OF ORDER RE:
RENEWED MOTION FOR RULE
40.05.B ORDER FOR APPLICANT TO
SUBMIT COMPLETE RULE 40.05
INFORMATION

SBar Ranch, LLC and The District at ParkCenter, LLC (hereinafter, "Protestors") hereby respectfully submit this Reply in support of their Petition for Review of 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, filed November 3, 2020 ("Petition for Review"). This Reply addresses Cat Creek Energy, LLC's ("CCE") Response to SBar Ranch, LLC and The District at ParkCenter, LLC's Petition for Review ("Response"). As described more fully below, despite CCE's assertions to the contrary, CCE's Rule 40.05 information submissions, including CCE's latest November 19, 2020, submissions, remain woefully inadequate, continuing to fail to satisfy the requirements of Idaho Department of Water Resources ("IDWR") Rule 40.05 and IDWR's October 20, 2020, Order Re: SBar and The

SBAR RANCH, LLC AND THE DISTRICT AT PARKCENTER, LLC'S REPLY IN SUPPORT
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District at ParkCenter, LLC's Renewed Motion for Rule 40.05.b Order for Applicant to Submit Complete Rule 40.05 Information ("IDWR Order").

1. **CCE's Applications Should Be Dismissed Pursuant to Rule 40.05(b) Since the two Declarations of Anthony M. Jones, the Only Competent Evidence in the Record on the Adequacy of CCE's Financial Submissions, Establish: 1. The Primary Energy Letter Is Not a "Financial Commitment Letter" Within the Meaning of Rule 40.05(f); and 2. It Is Not "Reasonably Probable that Financing Will Be Available to Appropriate the Water and Apply It to the Beneficial Use Proposed," as Rule 40.05(f) Requires.**

After carefully reviewing and analyzing the Rule 40.05(f) financial information submitted by CCE, including the September 8, 2020, Primary Energy letter ("PE Letter"), energy economist Anthony Jones provided the following two expert opinions:

- a) The PE Letter is not an actual financial commitment letter, nor has CCE provided "the financial statement of the lender," as required by IDAPA 37.03.08.40.05.f(i) ...; and
- b) The PE Letter together with the other financial information CCE has posted to date on its repository actually support the conclusion that CCE's pumped storage hydro ("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.

Second Declaration of Anthony M. Jones at 2.

CCE's Response does not contest Mr. Jones' expert qualifications in the field of energy project economics, nor does it offer any contrary opinions of similarly qualified experts on the subject. CCE had the opportunity to submit opinions of its own expert economists to provide alternative analysis and conclusions; yet, for some reason, it failed to do so. Indeed, the underlying basic principles in Mr. Jones' analysis, involving historical energy pricing trends and the laws of thermodynamics (more energy required to pump water back uphill than can be generated by running it down), are difficult, if not impossible, to refute. Nevertheless, in

submitting its Response, CCE had its opportunity to controvert Mr. Jones' opinions with the opinions of its own experts but failed to do so. Thus, at this point, the two Declarations of Anthony M. Jones are the only qualified evidence in the record assessing the adequacy of the PE Letter and the probability of project financing with respect to Rule 40.05(f) requirements. Thus, as an evidentiary matter, Mr. Jones' expert opinions on the failure of CCE's information submissions to satisfy the Rule 40.05(f) requirements are uncontroverted and CCE's applications should be dismissed pursuant to Rule 40.05(b), as matter of law. *See, e.g., Coombs v. Curnow*, 148 Idaho 129, 137, 219 P.3d 453, 461 (2009) ("Once an expert's opinion is admitted, it is up to the trier of fact to weigh the opinion against any conflicting testimony.").

2. CCE's Other Rule 40.05 Information Submissions Also Do Not Satisfy the Requirements of Rule 40.05 or the IDWR Order, Necessitating Dismissal Pursuant to Rule 40.05(b).

The IDWR Order required that CCE submit within 30 days, certain specific information "required by Rule 40.05.c, d and e":

Rule 40.05.c Effect on Existing Water Rights

Cat Creek shall submit documents analyzing and discussing how water diversions, releases, storage retention, and losses will be measured. Cat Creek should also analyze and discuss how data will be gathered, downloaded, and transmitted, including the employment of telemetry. Finally, Cat Creek should evaluate the possibility of remote control over pumps, gates, release valves, and the like, in order to ensure the watermaster can control and regulate diversion and release of water in real time.

Rule 40.05.d Sufficiency of Water Supply

Cat Creek shall submit documents containing specific information about how much water will be daily pumped to the reservoir and stored to generate power, and the timing of the pumping and subsequent releases of water for power generation.

Rule 40.05.e Good Faith, Delay, or Speculation

Cat Creek shall submit documentation that it either: (1) owns the proposed generally identified lands where water will be beneficially used; or (2) has consent from the owners of specific parcels of

property to apply the storage water for beneficial use on the generally identified lands; or (3) has the consent of a municipal provider or irrigation district that is authorized to deliver water to the generally identified lands, for the following purposes:

- Irrigation from Storage;
- Municipal from Storage;
- Domestic from Storage;
- Mitigation by Delivery from Storage;
- Industrial from Storage;
- Commercial from Storage; and
- Ground Water Recharge from Storage.

IDWR Order at 12-13.

In its November 19, 2020, Notice of Supplemental Rule 40.05 Disclosure, CCE contends that “[t]his filing provides the requested information.” CCE Notice of Supplemental Rule 40.05 Disclosure at 2 (“CCE Notice”). However, not only does the CCE Notice fail to provide much of the Rule 40.05 information specifically required by the IDWR Order, it also completely fails to address the further Rule 40.05 informational needs identified in the Petition for Review.

The CCE Notice does not adequately address the IDWR Order’s requirements with respect to providing specific Rule 40.05(c) information: 1. “analyzing and discussing how water diversions, releases, storage retention, and losses will be measured....”; or 2. discussing how data will be gathered, downloaded, and transmitted, including the employment of telemetry....” IDWR Order at 12. The CCE Notice indicates that the required Rule 40.05(c) information is in Appendix A, a November 17, 2020, Idaho Water Engineering Memorandum; but a review of that document reveals no analysis of how exactly “water diversions, releases, storage retention and losses will be measured” or “how data will be gathered, downloaded and transmitted,” and, certainly no mention of “telemetry” as required by the IDWR Order. Cat Creek did not analyze and discuss how the diversions from the South Fork Boise River to Cat Creek Reservoir and releases from Cat Creek Reservoir to downstream water users will be measured, including where

the measurements will be taken, types of measurement equipment and structures (i.e., pumps, gates, and release valves) that will be installed and used, and other details on how the data will be gathered, downloaded, and transmitted. Cat Creek proposes to rely on the change of storage in Cat Creek Reservoir to compute the amount of water released to or diverted from Anderson Ranch Reservoir for its pumped hydropower operations, yet Cat Creek provides no analysis and discussion on how this water balance accounting will work, how the diversions and releases can be adequately computed from the change of storage alone given other losses in the system, and how this information will be transmitted to the Watermaster. Cat Creek did not analyze and discuss the losses of its storage water in Anderson Ranch Reservoir. Because there are potential losses on the water stored in Anderson Ranch Reservoir, not accounting for these losses could result in Cat Creek pumping more water from Anderson Ranch Reservoir than its share and thus taking water away from other Anderson Ranch Reservoir water rights.

The CCE Notice also does not address the IDWR Order's requirements with respect to providing Rule 40.05(d) "specific information about how much water will be daily pumped to the reservoir and stored to generate power, and the timing of the pumping and subsequent releases of water for power generation." IDWR Order at 12. Again CCE asserts that this information is in the Appendix A Idaho Water Engineering Memorandum, but a review of this document reveals none of this information, Idaho Water Engineering specifically declining to provide the requested information because "CCE cannot prospectively document the volume and timing of water that will be daily pumped and released to generate power because this is dependent on power prices and contract obligations." CCE Notice, Appendix A at 2.

The CCE Notice also does not address the IDWR Order's requirements with respect to providing Rule 40.05(e) information establishing that it either owns or has consent for the places

of use. Instead of providing the required Rule 40.05(e) information, as required by the IDWR Order, CCE admits it doesn't have the requested consent and contends that IDWR improperly required this consent: "Cat Creek admits that it does not presently own or have contractors with owners of land where storage water released from Cat Creek Reservoir under permit 63-34900 will subsequently be used. However, this does not mean that Cat Creek has not complied with Rule 40.05.e." CCE Notice at 4.

CONCLUSION

For the foregoing reasons, CCE's Rule 40.05 information submissions do not satisfy Rule 40.05's requirements and those of the IDWR Order and IDWR should void CCE's applications, subject to re-filing if and when CCE can provide the required information.

Dated: December 3, 2020

HAWLEY TROXELL ENNIS & HAWLEY LLP



By _____
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served a true copy of the foregoing SBAR RANCH, LLC AND THE DISTRICT AT PARKCENTER, LLC'S REPLY IN SUPPORT OF PETITION FOR REVIEW OF ORDER RE: RENEWED MOTION FOR RULE 40.05.B ORDER FOR APPLICANT TO SUBMIT COMPLETE RULE 40.05 INFORMATION via e-mail addressed to each of the following on the date indicated below:

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Dated: December 3, 2020



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