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Attorneys for Protestors SBar Ranch, LLC and The
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
RESPONSE TO CAT CREEK ENERGY,
LLC'S MOTION TO COMPEL, MOTION
TO DISMISS EXHIBITS E, F AND G TO
THE DECLARATION OF THOMAS J.
BUDGE AND MOTION FOR
SANCTIONS

COME NOW, SBar Ranch, LLC and The District at ParkCenter, LLC (hereinafter, "Protestors"), and hereby respectfully respond to the Applicant, Cat Creek Energy, LLC's ("Cat Creek" or "CCE") Motion to Compel filed November 19, 2020, respectfully move the Idaho Department of Water Resources ("IDWR") to dismiss Exhibits E, F and G to the Declaration of Thomas J. Budge pursuant to IDAPA 37.01.01.600 and I.R.E. 701(c) and 702 and move for sanctions pursuant to IDAPA 37.01.01.520.02 and I.R.C.P. 26(c)(1) and 37(a)(5)(B) for improperly using discovery to annoy and oppress. This Response and these motions are supported by the contemporaneously filed Declaration of Dana L. Hofstetter.

The record reflects that these Protestors are the only of the many protestors in this case to have been served with discovery. Moreover, CCE claims it desperately needs to have this information, although CCE has not yet satisfied its initial Rule 40.05 information submission requirements as the applicant. It is transparently clear that CCE is using the discovery process, not as it should be used to gather information, but as a tool to oppress and annoy. Of course, this use of discovery is expressly prohibited. I.R.C.P. 26(c)(1). Nevertheless, the record reflects that these Protestors tried to respond to CCE's discovery requests, despite having very limited information about CCE's proposal at this early stage of the process. *See* SBar Ranch, LLC and The District at ParkCenter, LLC's Responses to Cat Creek Energy, LLC's First Set of Discovery Requests; and August 26, 2020, letter from Dana L. Hofstetter to Thomas J. Budge (Exhibits B and D, respectively, to the Declaration of Thomas J. Budge). CCE's Motion to Compel not only is ill-founded, but it is a transparent improper attempt to use the discovery process for harassment rather than information gathering.

1. These Protesters' Discovery Responses Were Adequate in that They Provided Available Discoverable Information and the Motion to Compel Should Be Denied on This Basis Alone.

By letter of August 13, 2020, CCE's counsel claimed that Protestors' Discovery Responses were inadequate in the following four respects: (i) Response to Interrogatory No. 1 is inadequate to explain the reasons for denial of the Requests for Admission; (ii) Response to Interrogatory No. 3 offers no explanation as to how impacts to SBar's rights would occur; (iii) each of the Interrogatories and Requests for Productions have unexplained objections; and (iv) nine of the twelve Interrogatories were answered with the comment "Case investigation is in its early stages and the basis for each such contention has not yet been finalized." *See* Declaration of Thomas J. Budge, Exhibit C, at 2-3. Counsel for these Protestors responded by

letter of August 26, 2020, addressing each one of these four claimed deficiencies and stating, “If after reviewing this letter, you continue to desire an opportunity to meet and confer, please contact my assistant, Tina Shull, for an appointment for a telephone conference.” However, prior to filing its Motion to Compel, CCE did not pursue this offer to meet and confer and these Protestors’ counsel believed that each of these four areas of concern had been adequately addressed by the August 26, 2020, letter. Declaration of Dana L. Hofstetter. As detailed below, the August 26, 2020, letter of Protestors’ counsel adequately addressed each of the four areas of concern with the Discovery Responses identified by CCE’s counsel:

a. CCE incorrectly claims that Response to Interrogatory No. 1 is inadequate.

CCE’s Interrogatory No. 1 asked for a “detailed” explanation of the bases for denial of any of the Requests for Admission. All eight of CCE’s Requests for Admission asked for admissions that each of the ultimate application criteria in Idaho Code 42-203A(5) was satisfied, with most of these requests specifically asking whether certain documents Cat Creek disclosed pursuant to IDWR Water Appropriation Rule 40.05 were “sufficient to satisfy” each of the Idaho Code 42-203A(5)(a-g) criteria. For example, most of the Requests for Admission were similar to the following: “Request for Admission No. 2 - Admit that the documents that Cat Creek has produced as Bates #CCE-A-00001-00003 and CCE-B-000001 through 00343 are sufficient to satisfy Idaho Code 42-203A(5)(b).”

In their Response to Interrogatory No. 1, after several objections, including one for “premature,” the Protestors referenced Spronk Water Engineers’ Rule 40.05 chart (#SBar-District000013-000019) since it provided detail about all the Rule 40.05 information relating to the Idaho Code 42-203A(5)(a-g) criteria that these Protestors asserted Cat Creek had failed to provide. Thus, in the Discovery Responses, through the Spronk Water Engineers’ chart, these

Protestors did explain in detail, as requested, that at this stage of the proceeding Cat Creek had not provided sufficient information on the Idaho Code 42-203A(5) criteria, to pass the initial Rule 40.05 threshold, much less meet its burden of proof necessary to obtain an unequivocal admission. Since CCE is well aware that SBar and The District have a continuing Renewed Motion for More Complete Rule 40.05 information under a pending Petition for Review, it should have come as no surprise to CCE that SBar and The District did not believe Cat Creek had provided the required Rule 40.05 information on the Idaho Code 42-203A(5) criteria, much less proved its case at that point. As more information becomes available, SBar and The District can and will supplement their Response to Interrogatory No. 1. However, for then and for now, it was entirely appropriate to reference Spronk Water Engineers' Rule 40.05 chart as a basis for denying the CCE Requests for Admission, essentially seeking admissions that Cat Creek has provided adequate information and proved its case. Therefore, CCE cannot continue to legitimately claim that the Discovery Responses were deficient with respect to the Response to Interrogatory No. 1.

b. CCE incorrectly claims that these Protestors' Response to Interrogatory No. 3 is inadequate.

CCE's Interrogatory No. 3 asked for information about "the water right numbers that you contend will have a reduced water supply, [and] explain why you believe the Applications will reduce the quantity of water under such rights..." In his August 13, 2020, letter, CCE's counsel acknowledged that SBar and The District's Response to Interrogatory No. 3 "states that ground water rights could be impacted by the lining of Cat Creek Reservoir" but inconsistently also claimed there was "no explanation as to how SBar contends the impact would occur" or how SBar's rights may be injured. These Protestors believed it readily apparent that CCE's counsel should understand the potential impact of a massive impermeably lined pond on ground water

recharge and believes that the following Response to Interrogatory No. 3 adequately explained potential impacts to their water rights:

INTERROGATORY 3: Your Notice of Protest states that the Applications will reduce the quantity of water under existing water rights. Identify the water right numbers that you contend will have a reduced water supply, explain why you believe the Applications will reduce the quantity of water under such rights, and identify all information that you contend supports your position.

RESPONSE TO INTERROGATORY NO. 3: Objection. Compound. Overbroad. Mischaracterizes Protests. Vague. Ambiguous. Requests legal conclusions. Premature. Requests privileged information and attorney work product. Without waiving these objections and reserving the right to reassert the same, SBar and The District respond as follows: Water Right Nos. 37-23062, 37-14284A, 37-14284B, 37-14284C, and 37-14282, and South Boise Water Company water rights, among others, may be impacted by the proposed diversions and uses in the Applications. Possible impacts include, but are not limited to, reductions in surface water flows and ground water sources. Although, the Applications request the diversion and use of surface water, ground water sources and springs supplied by ground water also may be impacted by the large lined reservoir proposed as part of the Applications. Case investigation is in its early stages and the basis for each such contention has not yet been finalized. The Response to this Interrogatory will be supplemented as appropriate in accordance with applicable case deadlines.

Emphasis added.

The interconnection of surface and ground water sources, as described in this interrogatory response, is well recognized in Idaho where the trend is toward conjunctive management. *See, e.g.,* IDWR Staff Memorandum, “Sufficiency of Water Supply for Water Right Applications and Transfers along the I-84 Corridor,” In the Matter of Applications for Transfer/New Water Rights No. 73811, 73834, 63-32499, 61-12095, 61-12096, 63-32703, 61-12256, and 63-33344 (May 31, 2012) (where IDWR found ground water recharge areas located many miles from well and spring sources). Thus, CCE’s counsel should have understood

the import of Response to Interrogatory No. 3. Nevertheless, in the August 26, 2020, letter, counsel for these Protestors offered to discuss the matter further, if CCE's counsel deemed it necessary:

If you could identify what further needs explanation in this Response about the claim that the applications' proposed diversions of water and impermeable lined reservoir could directly impact surface water sources and also the recharge of the head waters serving The District and SBar's water rights, please let me know. As you know, in this proceeding, it is your client, the applicant, who has both the burden of coming forward with the evidence and the burden of proving that the applications will not reduce the quantity of water under existing rights. Accordingly, at this time it would be more appropriate for SBar and The District to be serving Cat Creek an Interrogatory seeking proof that the applications will not reduce the quantities of water under their rights, rather than vice versa.

Declaration of Thomas J. Budge, Exhibit D at 2-3. However, CCE's counsel never called these Protestors' counsel to meet and confer and, therefore, counsel for these Protestors believed the matter to be resolved. Declaration of Dana L. Hofstetter.

c. CCE incorrectly claims that the Discovery Responses have unexplained objections.

In his August 13, 2020, letter CCE's counsel also claimed that the Protestors' Responses to Interrogatories and Requests for Production had unexplained objections. Declaration of Thomas J. Budge, Exhibit C at 3. To address these concerns and to clarify the objections, in the August 26, 2020, letter, the Protestors' counsel provided the following definitions for each of the objections:

“Compound” means that the Interrogatory or Request for Production asks more than one question or makes more than one request.

“Overbroad” means that the Interrogatory or Request for Production seeks information and/or materials that are privileged, protected, or beyond the scope of discovery, etc.

“Mischaracterizes Protests” means that the language of the Protests are misquoted or misstated in the Interrogatory or Request for Production.

“Vague” means that one or more terms in the Interrogatory or Request for Production are undefined or unclear.

“Ambiguous” means that one or more terms in the Interrogatory or Request for Production are susceptible to more than one interpretation and more specificity is needed.

“Requests legal Conclusions” means that the Interrogatory or Request for Production seeks legal analysis, rather than facts or the application of law to the facts.

“Premature” means that it is too early in the proceeding, applicable case schedule and the case investigation/discovery process to expect a complete answer to the Interrogatory or Request for Production.

“Requests privileged information and attorney work product” means that the Interrogatory or Request for Production covers information that is attorney-client privileged and/or attorney work product.

“Unduly Burdensome” means that the Interrogatory or Request for Production requests voluminous or unnecessarily extensive information.

Declaration of Thomas J. Budge, Exhibit D at 3-4. Also, in the August 26, 2020, letter, to ensure that CCE’s counsel understood these definitions, the Protestors’ counsel offered, “If you need further explanation of the application of any objections to any specific Interrogatory or Request for Production, please call me to discuss.” *Id.* However, CCE’s counsel never called to meet and confer for more clarification and counsel for these Protestors, therefore, believed the issue had been resolved. Declaration of Dana L. Hofstetter.

d. CCE incorrectly claims that these Protesters have improperly claimed that case investigation is in its early stages to avoid providing a legitimate basis for filing Protests.

In the August 13, 2020, letter CCE’s counsel claimed that SBar and The District were either withholding information or have no factual basis for filing Protests, although both SBar and The District’s water rights had been identified and the potential impacts of the applications

on those water rights had been described in the Discovery Responses. *See* Response to Interrogatory No. 3, *supra*.

With the information provided in the Discovery Responses, there can be no question that SBar and The District have legitimate reasons for having concerns with the CCE applications and for filing Protests. In the event that CCE had any remaining concerns, the August 26, 2020, letter of the Protesters' counsel also provided CCE's counsel opportunities to meet and confer to resolve them. However, CCE's counsel chose to file an ungrounded Motion to Compel instead.

2. Exhibits E, F and G to the Declaration of Thomas J. Budge Should Be Stricken as These Maps Were Prepared by CCE's Legal Counsel and There Is No Foundation Establishing His Qualifications, Expertise or Skill in the Areas of GIS and Mapping.

Exhibits E, F and G to the Declaration of Thomas J. Budge are maps and Google Earth images that Mr. Budge, by his own admission, generated. Declaration of Thomas J. Budge at 2. However, Mr. Budge's Declaration provides no foundation establishing his competence or expertise with the mapping and other software he apparently used. IDAPA 37.01.01.600; I.R.E. 701(c) and 702. Accordingly, Exhibits E, F and G to the Declaration of Thomas J. Budge should be stricken.

3. Sanctions Should Be Awarded Against CCE for Submitting This Unfounded Motion to Compel and For Not First Meeting and Conferring, as Required Prior to Filing a Motion to Compel.

Where, as here, discovery is used improperly to oppress or annoy, or a Motion to Compel is filed without first meeting and conferring in good faith to resolve discovery issues, sanctions are appropriate. I.R.C.P. 26(c)(1); 37(a)(1) and 37(a)(5). Accordingly, the costs of responding to CCE's unjustified Motion to Compel should be awarded to these Protestors.

CONCLUSION

For the foregoing reasons, CCE’s Motion to Compel should be denied, Exhibits E, F and G to the Declaration of Randy Budge should be stricken and sanctions should be awarded against CCE for filing the Motion to Compel.

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 RESPONSE TO CAT CREEK ENERGY, LLC'S MOTION TO COMPEL, MOTION TO DISMISS EXHIBITS E, F AND G TO THE DECLARATION OF THOMAS J. BUDGE AND MOTION FOR SANCTIONS via e-mail addressed to each of the following on the date indicated below:

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Dated: December 3, 2020



Dana L. Hofstetter