

**SUPPLEMENT TO SECOND REQUEST FOR RECONSIDERATION**  
of the Elmore County Board of County Commissioners

Cat Creek Energy, LLC – Conditional Use Permits and Development Agreement  
[CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06 and CUP-2015-07]

**Basis for Reconsideration of Cat Creek Energy, LLC, an Idaho limited liability company (“Applicant”), [Conditional Use Permits 2015-03, 2015-04, 2015-05, 2015-06 and 2015-07 (collectively, the “CUPs”), as well as the Development Agreement Relative to Cat Creek Energy, LLC (“Development Agreement”) associated therewith].**

The basis for this Supplement to the Second Request for Reconsideration is failure of the Elmore County Board of County Commissioners (“Commissioners”) and Elmore County (“County”) in general, to comply with the requirements of the Local Land Use Planning Act, Idaho Code Section 67-6501, *et seq.*, as well as Elmore County Code, Title 6, including without limitation, Section 6-8-94, Electrical Generating Facilities with respect to exceeding the building height restrictions from Table 6-8-12(c) and the fact that the proposed siting of the wind turbines will diminish the value of the real estate that comprises the S Bar Ranch in Elmore County, Idaho in violation of the Constitutional and statutory rights of S Bar Ranch LLC and its owners. The basis, as further explained below, deal with substantive and procedural due process errors, as well as lack of compliance with specific county and state procedural requirements relating to notice, opportunity to be heard at a meaningful time and place, substantial changes to the matters being addressed without adequate notice to the public, as well as failure to address significant requirements of the CUPs.

The requesting party, S Bar Ranch, LLC, an Idaho Limited Liability Company (“requesting party”), is an affected party in accordance with Idaho Code Section 67-6521(1)(a)(i). Specifically, the requesting party is the owner of real property which is located less than one (1) mile from the location of the proposed wind farm (wind turbine electrical generating facility), which was approved for a conditional use permit. It should be noted that while some of the conditional use permits may not be adjoining the requesting party’s property, the CUPs are to be, and have been considered as one application. To quote the Commissioners Findings of Fact, Conclusions of Law and Order, dated February 10, 2017 (“Findings of Fact/Order”),

The Commission finds that based on testimony from the Applicant, that all five (5) applications are dependent upon each other and cannot exist separately. [Page 6, Bates No. 008266].

The Commissioners subsequently adopted Findings of Fact, Conclusions of Law and Order, dated March 16, 2018 (Modified Findings of Fact/Order), in which the Commissioners materially modified the Findings of Fact/Order in response to requesting party’s first Request for Reconsideration and in support of the adoption of the Development Agreement. One such modification was to find that the five CUPs are not dependent upon each other.

As the CUPs were previously deemed consolidated and dependent upon each other and could not exist separately, the requesting party sought reconsideration of all of the CUPs under a Request for Reconsideration filed February 16, 2018 (“Original Request”). However, as the Commissioners would not permit requesting party to include the Modified Findings of Fact/Order as part of the Original Request, requesting party is required to submit this Request for Reconsideration and, as

requesting party disputes the separation of the CUPs, as stated in the Modified Findings of Fact/Order, requesting party continues to seek reconsideration of all of the CUPs.

**I. Basis for Request for Reconsideration.**

A. Idaho Code. This Request for Reconsideration is made in accordance with Idaho Code Section 67-6535(2)(b) and is hereby submitted within the fourteen (14) days required by Idaho Code. As required in Idaho Code 67-6535(2)(b):

The 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.

B. Elmore County Code. Further, the requesting party seeks reconsideration in accordance with Elmore County Code 6-3-2: J as stated in the Modified Findings of Fact/Order, pg. 16. Elmore County Code Title 6, Chapter 3, purports to require requests for reconsiderations to be filed within ten (10) days of the final Findings of Fact/Order. Specifically, Elmore County Code 6-3-2: K. states,

A request for reconsideration shall include supporting information and may be made at any time prior to the deadline for filing an appeal as provided in this section.

Elmore County Code 6-3-1: A. states, the timeframe for filing an appeal is ten (10) days after the date of such decision.

While this ten (10) day period appears to conflict with the aforementioned Idaho Code, this Request for Reconsideration is brought within the required ten (10) day period.

**II. The Request for Reconsideration is Timely.**

This Request for Reconsideration is timely filed, as the CUPs were not complete and were not subject to reconsideration until March 16, 2018, the date upon which the Commissioners approved the Modified Findings of Fact/Order and materially modified the prior approval of and conditions imposed on the Project, as were set forth in the Findings of Fact/Order. While the Findings of Fact/Order may incorrectly be considered final by the Applicant and/or the County as of February 10, 2017, such reliance is misplaced as the conditions of approval in the Findings of Fact/Order clearly require that a development agreement be entered into by the County and Applicant. See **Exhibit A** to the Findings of Fact/Order, specifically General Condition 2, on page 48, Bates No. 00838. As stated in Idaho Code Section 67-6521(1)(c),

After a hearing, the commission or governing board may:

...

(ii) Delay such a decision for a definite period of time for further study or hearing. Each commission or governing board shall establish by ordinance or resolution a time period within which a recommendation or decision must be made.

General Condition 2: to the Findings of Fact/Order clearly delays approval of the CUPs until a development agreement is entered into between the County and Applicant. Because the Finding of Fact/Order continued/delayed the final approval of the Findings of Fact/Order until a development agreement had been entered, the time to file a request for reconsideration was stayed pending that final action. Therefore, the Findings of Fact/Order, as well as the Development Agreement, required thereby, are both effective as of the date of the Development Agreement, February 9, 2018, and therefore this Request for Reconsideration is timely and appropriate for all approvals and agreements entered into by and all action taken by the County, in connection with the CUPs.

Even if the time for seeking reconsideration on the Findings of Fact/Order has passed, clearly the time for seeking reconsideration on the Development Agreement has not and to the extent that the Commissioners choose not to allow reconsideration and thereby ratify their below noted errors, the issues relating to the Development Agreement may still be addressed. Further, the Development Agreement itself is arguably not complete as Section 2.2 has been delayed further until as late as December 31, 2018. To the extent that the Commissioners find that a final decision has not yet been made based upon the language contained in Section 2.2 of the Development Agreement, the requesting party specifically reserves its right to subsequently address the outstanding issues when and if a final decision is reached by the Commissioners.

### **III. Due Process Violations in the conditional use permit granting process.**

Conditional use permits are controlled by Idaho Code Section 67-6512, which require that the notice and hearing procedures provided under Idaho Section 67-6509 must be followed.

#### **A. Planning and Zoning Commission of Elmore County.**

Pursuant to the Findings of Fact, Conclusions of Law and Order rendered by the Planning and Zoning Commission of Elmore County, Idaho on August 17, 2016 (“P&Z Findings”) it is stated that public hearings, pursuant to Zoning Ordinance Section 6-4-5 on the five (5) Conditional Use Applications were held on June 15, 2016 and July 13, 2016 and that the Planning and Zoning Commission (“P&Z Commission”) mailed notice of the public hearing to neighboring property owners within one mile of the Site on March 24, 2016 (Page 2, Bates No. 007294). Attached hereto marked as EXHIBIT “A” is a copy of the mailing lists used by Elmore County, Idaho in sending notices of the public hearings to be held by the P&Z Commission on the applications for the five (5) CUPs for each CUP application [Bates Nos. 000050-000061 (CUP-2015-03)], [Bates Nos. 000154-000165 (CUP-2015-04)], [Bates Nos. 000260-00271 (CUP-2015-05)], [Bates Nos. 000365-000376 (CUP-2015-06)], and [Bates Nos. 000469-000480 (CUP-2015-07)] (collectively “County Mailing Lists”). The requesting party and Mr. and Mrs. Allen R. Thompson, both of whom (i) own property within one (1) mile of the Site, (ii) have owned their real property since 2015, and (iii) were assessed taxes in 2015 on their Elmore County real property were not mailed the required notices of the public hearings before the P&Z Commission on the five (5) CUPs applications. Their names and addresses are not included on the County Mailing Lists.

Elmore County’s failure to provide proper notice of the June 15, 2016 and July 13, 2016 public hearings to be held by the P&Z Commission on the five (5) CUP applications violated the requesting party’s and other affected parties due process rights due to the fact that these parties were not afforded the opportunity to give their input as required by Idaho Code Section 67-6512.

#### **B. Board of County Commissioners of Elmore County.**

At the November 16, 2016, Board of County Commissioners Appeal Hearing on the applications for the CUPs, new additional evidence was presented without proper notice given to the affected parties; thereby, violating the requesting party's and other affected parties due process rights to know what actions were being considered at the public hearing. Those individuals harmed included, but were not limited to, the requesting party. Further, by modifying the application during the public hearing, the public agencies that regulate such activity were not afforded the opportunity to give their input, as required by Idaho Code 67-6512(e). The modification to the request is evidenced many times throughout the Findings of Fact/Order, including, but not limited to pages 20, 24-25, 30, 33, 36-37, 39-40 and 44, which state, in pertinent part:

The Board finds that Applicant submitted a new master site plan . . . which moved the pump storage hydro powerhouse to a new location. [Page 20, Bates No. 008280].

The Board finds the Applicant submitted a new master site plan . . . which has moved the PV solar site. [Page 20, Bates No. 008280].

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. [Page 20, Bates No. 008280].

Similar quotes are mentioned numerous times in the fifty (50) plus pages of the Findings of Fact/Order. Clearly, the Commissioners were aware of these changes to the application.

Furthermore, given the complexity and the specific nuances of this project, these modifications constituted material changes to the application, which warranted further coordination with the associated regulatory agencies, as well as the need to provide notice to the public of the new location and configuration of the projects, as required by Idaho Code Section 67-6509. By continuing forward with new information and subsequently reaching a decision without additional notice or public hearings, the Commissioners violated Idaho Code and resulted in violations of the requesting party's constitutionally protected property rights.

C. Failure to Provide Notice and Provide Opportunity to Testify Violated Due Process.

As the Commissioners are surely well aware, Idaho law requires notice and an opportunity to be heard at a meaningful time and location, as well as a transcribed, verbatim record. The failure to properly provide the required notices of the public hearings which were held by the P&Z Commission, and the failure to provide adequate notice of the public hearings before the Commissioners and by approving a materially modified Application and Development Agreement, the requesting party and other affected parties' due process rights were violated and opportunity to be heard and therefore constitutes reversible error. The requesting party specifically requests that the Commissioners rectify this situation by remanding the Application back to the P&Z Commission in order to, as will be discussed further below, address the Development Agreement's shortfalls, as well as allowing the requesting party, other affected parties and the interested and affected regulatory agencies the opportunity to comment on the revised site plans and newly adopted Development Agreement.

D. Removal of Water Diversion and Delivery from Development Agreement was Improper.

The lack of addressing the water storage and delivery issue in the Development Agreement by not specifically agreeing upon and approving the Water Diversion and Delivery section, as required in the Findings of Fact/Order, materially changes the Application, which, as previously noted, requires that all five (5) CUPs either be approved or denied *in totum* as the five (5) CUPs are dependent upon each other and cannot exist separately.

The hydro project (“CUP-2015-04”) is the primary element of the combined projects and supposedly will contribute 400 megawatts of electricity as opposed to 110 megawatts for the wind project and 40 megawatts for the solar project as stated by the Developer. [Findings of Fact/Order, page 41, Bates No. 008301.] Additionally, the Development Agreement makes clear that the benefits to the County that offset the harm to the public are primarily related to the benefits of the hydro project. Without the hydro project, which has not been approved as of this date, the project cannot go forward. Due to the fact that the hydro project (“CUP-2015-04”) has not been approved, all five (5) CUPs must be denied in accordance with the Findings of Facts/Order.

**E. Improper Extension Period Granted in Development Agreement.**

Section 1.1 of the Development Agreement provides that the validity of the CUPs may be extended for one 2-year period upon application to the Elmore County Land Use and Building Department. Such extension is contrary to Elmore County Code Section 6-27-6 which limits extensions to unexpired conditions use permits to one (1) year. Approving an extension beyond the permitted one (1) year is beyond the Commissioner’s authority.

**F. Improper Adoption of Modified Master Site Plan.**

Section 2.1.5 of the Development Agreement states that the Master Site Plan for the Project was modified as show on Exhibit D to the Development Agreement. The modifications to the Project and adoption of the revised Master Site Plan is contrary to Elmore County Code Section 6-27-2(B) which provides that any modification to expansion of a previously approved conditional use that would generate a need for a new master site plan shall require a new conditional use approval. The modifications to Project, as evidenced by the Development Agreement and the Modified Findings of Fact/Order, and the modified Master Site Plan, as provided in Section 2.1.5 of the Development Agreement, are material changes to the Project and, therefore, necessitate a new conditional use approval. Public notice of the material changes, which requesting party does not concede was proper, does not satisfy the requirements of Elmore County Code 6-27-2(B), and therefore approval of the CUPs and Development Agreement was improper.

**IV. Additional standards required for Electric Generating Facilities.**

The record does not reflect that the required processes were followed, specifically the procedures under Elmore County Code 6-8-94: .A. 7, which is the requirement that two (2) public meetings be held by the Applicant prior to the matter going forward. See Findings of Fact/Order page 2 (Bates 8262) 3.B. The neighborhood meeting conducted to satisfy Elmore County Code 6-4-3 is only one meeting, and is not adequate for Elmore County Code 6-8-94. These additional meetings are required for Electrical Generating Facilities to inform surrounding property owners, as well as other potentially affected parties, including the requesting party, of the impacts of the proposed project. These additional procedures were put in place to avoid the type of “surprise” modifications that the current matter is fraught with.

Assuming that the two meetings did take place and the record does contain the required documentation, then this should be placed properly within the Findings of Fact/Order. If, as is believed, the actions were not taken, then this matter was not properly before the Commissioners and therefore should be remanded back to the Applicant to rectify this error and begin the process anew.

**V. Due Process Violations in the Development Agreement.**

The February 10, 2017 Findings of Fact/Order is not complete without the Development Agreement, as noted in Exhibit A, General Conditions, No. 2, to the Findings of Fact/Order. While the Findings of Fact/Order have errors, as noted above, the Development Agreement itself also suffers from errors that necessitate further action and remand of this matter back to the P&Z Commission to correct these errors.

**A. Improper Notice.**

As an initial matter, development agreements are controlled by Idaho Code Section 67-6511A, which requires, in addition to other things, notice and hearing on the development agreement. Because the Development Agreement was negotiated at the February 9, 2018 hearing and approved at the same hearing, the requisite notice was not afforded to the requesting party or other affected parties and therefore is invalid and requires further action to remedy this procedural defect.

While the Applicant may believe that the negotiations taking place in an open public meeting afforded the public that opportunity, the notice requirement is in place to let the public know what the decision is that is being contemplated. Clearly, because the terms of the Development Agreement had not yet been reached prior to the February 9, 2018 hearing, they could not have been available for the public to review in advance of the February 9, 2018 hearing. Therefore, the notice was inadequate and deprived interested parties, including the requesting party, of their due process right to notice and an opportunity to be heard.

**B. Failure to Comply with Elmore County Code.**

Additionally, Elmore County Code 6-29-1, *et seq.*, lays out in significant and relatively clear detail the requirements and process for a development agreement. As is discussed below, these clearly defined procedures were not followed and therefore the action of the Commissioners was erroneous and this matter needs to be remanded back to the Director as defined in Elmore County Code Title 6 (“Director”) to begin the process of adopting a development agreement in compliance with the county’s development agreement standards and requirements.

Elmore County Code 6-29-3: Process, requires, under 6-29-3: B, that the Director forward the draft development agreement to the Prosecuting Attorney of Elmore County for review. As is clear from the record in this matter, this action was not followed. Further in 6-29-3: B it is stated that the Planning and Zoning Commission is required to review the development agreement and make a recommendation upon the draft development agreement. This process was not followed either. Also, in 6-29-3: D, it states that the applicant or owner shall sign the development agreement prior to the Board action on the final development agreement. As is evidenced by the Minutes, as well as the Development Agreement, the Development Agreement was not signed prior to the

Board's holding of a public hearing to discuss the Development Agreement on February 9, 2018. Therefore, this requirement was not satisfied either.

Additionally, the Development Agreement does not comport with the requirements because it lacks the findings required by 6-29-5, and in fact makes no findings, while at the same time purporting to modify the previously entered Findings of Fact/Order entered by the Commission on February 10, 2017, all without proper notice.

The lack of compliance with Idaho Code Section 67-6511A and Elmore County Code, Title 6, Chapter 29, deprived the requesting party, as well as other affected parties, of their procedural due process rights and therefore this matter should be remanded back to the Director for actions in compliance with the Elmore County Code.

## **VI. Supplemental Requests for Reconsideration.**

These supplemental requests for reconsideration are presented to make a record of these additional violations of law by the Elmore County Board of Commissioners' actions approving the CUP-2015-05, a wind turbine electrical generating facility.

**Elmore County Ordinance Section 6-8-94, Electrical Generating Facilities** at subpart 4, requires that "[t]owers and structures that seek to exceed the building height restrictions from Table 6-8-12 (C) must be compatible with the flight operations of MHAFFB 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." Subpart 5, provides that "[t]owers and height variances shall not be granted within 5 miles of Mountain Home AFB or or along depicted flight corridors."

The maximum height allowed under Table 6-8-12 (C) is eighty (80) feet. To exceed this height restriction requires a height variance that has not been issued by the Board of County Commissioners for the Project. A conditional use permit cannot be used to obtain a waiver of a zoning ordinance provision limiting the height of buildings or structures. *Burns Holdings, LLC v. Teton County Bd. Of Com'rs.*, 152 Idaho 440, 443-45, 272 P.3d 412, 415-17 (2012).

**Elmore County Ordinance Section 6-8-13 (D)(1)(A).** Elmore Ordinance 6-8-13 (D)(1)(A) is void to the extent it provides that only a Conditional Use Permit is necessary for a windmill if it exceeds 70' in height. To the extent that the action of the Board by issuing CUP-2015-05 was intended to waive the height restriction for Electrical Generating Facilities, it conflicted with Idaho law and is void. *Id.*

**Idaho Code § 67-6512(b).** Section 67-6512(b) provides for notice and hearing prior to granting a special use permit. When the peak height of a structure in an unincorporated area is four hundred (400) feet or more, the structure's proposed location and height shall be stated in the notice of application and notice of appeal. The notice of the public hearing for the Application of Cat Creek Energy, LLC and the notice of public hearing for the appeal by Cat Creek Energy, LLC did not include the proposed height of the wind towers, which exceed four hundred (400) feet and did not comply with Idaho Code § 67-6512(b).

**Unlawful Amendment of CUPs:** By adoption of the Board of Commissioners Findings of Fact, Conclusions of Law and Order – CUP Amendments, dated March 16, 2018, the Board of

Commissioners purported to amend the CUPs by approving changes to the CUPs in the Development Agreement. The amendment of the CUPs, which included a new condition for CUP-2015-04 (hydro project), a revised site plan and project description, deferral of water delivery in the county, changes in the obligation and time frame to develop a Community and Stateholder Board, changes in the obligation to fund annual fish stocking in Anderson Ranch Reservoir, changes in the obligation to fund conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas, changes in the obligation to fund annual fish stocking in Anderson Ranch Reservoir, changes in the obligation to implement erosion control measures, changes in the obligation to implement visual mitigation measures to exclude wind towers, changes in the permissible noise limitations for each aspect of the project, removal of the obligation to provide the Scholarship Fund, changes of the obligation to submit to the Board for review the proposed water transmission lines from the Anderson Ranch Reservoir to the Reservoir, and changes of the Project to permit phasing of the CUPs by adoption of the Development Agreement is a violation of the Local Land Use Planning Act.

**Unlawful Taking.** The reasonable investment-backed expectations of S Bar Ranch LLC and the owners of S Bar Ranch LLC will be substantially diminished by the actions of the Elmore County Board of Commissioners' issuance of the CUP-2015-05 and the making of the Development Agreement that authorizes the construction of wind turbines that will diminish the value of the real estate that comprises S Bar Ranch. If the Board refuses to reconsider the issuance of CUP-2015-05, S Bar Ranch LLC and its owners will bring an action pursuant to Idaho Code § 67-6521(2)(b) for just compensation in conformance with the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code. The Elmore County Board of Commissioners' actions constitute an unlawful and uncompensated taking of the S Bar Ranch LLC in the real estate that comprises the S Bar Ranch in violation of the Fifth and Fourteenth Amendments of the United States Constitution. S Bar Ranch LLC is entitled to recover damages in an amount that is sufficient to fully and fairly compensate the S Bar Ranch LLC for the taking of its property, together with costs and attorney fees.

## **VII. Conclusion.**

The Findings of Fact/Order was not a final order, as it was conditioned upon the entry of the parties into a development agreement, which did not occur until February 9, 2018, and therefore the time to request reconsideration did not begin to toll until February 9, 2018. All of the five (5) CUPs are dependent upon each other and cannot exist separately. Because the issues of the water (Water Storage and Delivery) has not been addressed in the Development Agreement, the CUPs must be denied in accordance with the Findings of Fact/Order. The Development Agreement (i) does not comply with the Findings of Fact/Order; (ii) materially modifies the Findings of Fact/Order; (iii) does not meet the requirements of the Idaho Local Land Use Planning Act; or the Elmore County Code; and (iv) fails to address the outstanding water (Water Storage and Delivery) issues which is the main focus of the project. The aforementioned all impact the requesting party and its procedural and substantive due process rights, as well as the rights of other affected parties, including but not limited to regulatory agencies that the record does not reflect to have been afforded the opportunity to address these changing circumstances.

Furthermore, as set forth above under the subtitle, Supplemental Requests for Reconsideration, the Board has failed to comply with Elmore County Ordinance 6-8-94 and Idaho



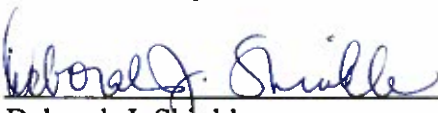
law governing variances, Idaho Code § 67-6512(b), and is committing an unlawful taking of the property of S Bar Ranch LLC.

Due to the myriad of errors and irregularities, this matter needs to be remanded back to the Director to begin the process anew to correctly address the requirements of the Elmore County Code, the Idaho Local Land Use Planning Act and the constitutional and statutory rights of S Bar Ranch LLC. To do otherwise would deprive all interested parties of their rights under Idaho law, the US Constitution, and the county's adopted process.

Dated this 31<sup>th</sup> day of April, 2018.

S BAR RANCH, LLC, an Idaho limited liability company

By: 5B Investments, Inc., an Idaho corporation, Manager

By:   
Deborah J. Shinkle  
Vice-President Finance