

## NOTICE OF OBJECTIONS

### By S BAR RANCH, LLC

To: Board of Commissioners of Elmore County, Idaho  
% Elmore County Land Use and Building Department  
520 East 2<sup>nd</sup> South Street  
Mountain Home, Idaho 83647

**NOTICE IS HEREBY GIVEN** that S Bar Ranch, LLC (“S Bar Ranch”) has objections for the hearing on August 24, 2018 (the “Hearing”) and the proposed actions of the Board of County Commissioners (the “Board”) with respect to the Cat Creek Energy, LLC Project—Conditional Use Permit CUP-2015-04 (the “hydro project”) and First Amendment to the Development Agreement that is the subject of the hearing.

- 1) S BAR RANCH CONTINUES TO OBJECT TO THE CONFLICT OF INTEREST THAT THE BOARD HAS IN THIS MATTER, WHICH PREVENTS THE BOARD FROM BEING NEUTRAL

The Board of Commissioners of Elmore County has a significant and irreconcilable conflict of interest/bias in this matter.

Under I.C. § 67-6506, a conflict of interest exists when a county grants a conditional use permit for the benefit of the county. The rule barring conflicts of interest in zoning matters is codified in I.C. § 67-6506:

A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has *an economic interest* in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term “participation” means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor. I.C. § 67-6506 (emphasis added).

Idaho courts have interpreted the term “economic interest” broadly; any kind of direct or indirect pecuniary benefit qualifies. *Martin v. Smith*, No. 2008 WL 4727843 (Idaho Dist. Apr. 2, 2008) (order granting preliminary injunction). Idaho courts have also interpreted “participation” broadly, holding that it includes any action involved in the deliberation process. *Manookian v. Blaine County*, 735 P.2d 1008, 1012 (Idaho 1987) (“I.C. § 67–6506 prohibits a member...from participating even if he or she will not vote.”). A conflict of interest can also arise if the person participating in the proceeding is employed by an entity that is economically interested in the

proceeding, *Gooding Cnty. v. Wybenga*, 46 P.3d 18, 22 (Idaho 2002), even if the person participating is not directly receiving any pecuniary benefits.

In addition to the case law construing the statute, the underlying policy and legislative intent of I.C. § 67-6506 is broad in its attempt to ferret out any conflicts of interest that could compromise the zoning process. In applying I.C. § 67-6506, the Idaho Supreme Court has stated that the legislature intended to prohibit economic conflicts of interest and that in adopting Idaho Code § 67-6506 the legislature acted “to assure that, consistent with our democratic principles, only impartial and objective persons make decisions affecting other person’s liberty and property.” *Manookian v. Blaine County*, 735 P.2d 1008, 1012 (Idaho 1987). Additionally, Idaho is one of few states that fully classifies rezoning actions as “quasi-judicial”, which affords the challenging party in a zoning dispute greater procedural rights. *See Cooper v. Board of County Comm’rs*, 614 P.2d 947 (Idaho 1980); *see also Walker-Schmidt Ranch v. Blaine County*, 614 P.2d 960 (Idaho 1980). This indicates that Idaho takes special interest in ensuring that the zoning process is fair and impartial.

Furthermore, Idaho law provides that the “Due Process Clause entitles a person to an impartial and disinterested tribunal. This requirement applies not only to courts, but also to state administrative agencies . . .” *Davisco Foods Int’l, Inc. v. Gooding County*, 141 Idaho 784, 794, 118 P.3d 116, 123 (2005) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) and *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004)).

Idaho law flatly forbids biased decision-makers from participating in zoning applications where they have or display a bias. *Bowler v. Board Of Trustees of Sch. Dist. No. 392*, 101 Idaho 537, 543, 617 P.2d 841, 846 (1980) (“It is well established that ‘actual bias of a decisionmaker is constitutionally unacceptable.’”); *Floyd v. Bd. of Comm’rs of Bonneville County*, 137 Idaho 718, 725, 52 P.3d 863, 870 (2002).

In this matter, the process has not been fair and impartial. Exhibit A to the Findings of Fact, Conclusions of Law, Order, dated February 10, 2017 (FoF/CoL) sets forth conditions to the approval of Cat Creek Energy, LLC’s Conditional Use Permits (CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07). Condition No. 2 requires that a Development Agreement between Cat Creek Energy, LLC (“Applicant”), the County and the landowner of the Property (as that term is defined in the FoF/CoL) be entered into and include, in pertinent part (the “Conditions”):

(b) develop methods of furthering water delivery in the county for the transfer of county water to Little Camas Reservoir or other county water diversion or storage areas based upon county needs and the county’s water rights, which may include the storage of water for the county until such time as the county water may be needed;

(c) in conjunction with IDWR approval, construct necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County.

The inclusion of the Conditions in the FoF/CoL, the Development Agreement (and the proposed First Amendment) has impermissibly biased the Board and created a conflict of interest because the Board has an economic interest in securing the diversion and delivery of the County's water which is not sufficiently related to the Project nor intended to mitigate the impact of the Project. .

S Bar Ranch does not dispute that a governing board may impose conditions on the approval of a conditional use permit under Idaho law. Idaho Code §67-6512. However, there must be a nexus between a legitimate state interest and the condition imposed by the governmental entity when approving the development (*Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987)) and there must be a rough proportionality between the condition imposed and the projected impact of the proposed development (*Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994)). See, *KMST, LLC v. Cty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003). There is no nexus nor proportionality between the Conditions set forth above and the Project.

The Project is, as was frequently represented by Applicant, a unified renewal energy project intended to combine wind, solar and hydro power generation. Furthermore, the Project would have little or no impact on the public services offered by the County, including the County's ability to provide sufficient water as no water service was requested by Applicant for the Project. Lacking a nexus or proportionality with the Project, the Conditions have no place in the Project but as a condition/proposal to insure the approval of the Project.

This bias created by the adoption of the Conditions is evidence by the County's conduct in approving the CUPs and the Development Agreement. This bias is evidenced by the following conduct:

- The County rejected its legal counsel's plain advice that approving the Development Agreement was contrary to the FoF/Col at the public hearing on February 9, 2018 and proceeded to approve and sign the Development Agreement;
- The County failed to comply with the requirements of the Elmore County Code and Idaho Code in the approval of the CUPs and Development Agreement, refused to acknowledge said failure, yet took remedial steps to cure the errors presented to it;
- The County has failed to question the reversal of Applicant's position on multiple aspects of the Project, except for Applicant's attempt to require the County to pay for the infrastructure to delivery the County's water.

The foregoing are only examples of the conduct evidencing the County's unlawful bias to approve the Project.

Due to the impermissible conflict of interest/bias created by including the Conditions in the FoF/CoL, the Development Agreement and the proposed First Amendment, the approval of the CUPs and the Development Agreement is invalid.

2) S BAR RANCH OBJECTS TO THE PROPOSED AMENDMENT TO THE DEVELOPMENT AGREEMENT BECAUSE IT DOES NOT PROVIDE OR REQUIRE CAT CREEK ENERGY, LLC. TO POST A PERFORMANCE BOND FOR THE CONSTRUCTION AND COMPLETION OF THE HYDRO PROJECT AND FOR THE PERFORMANCE OF THE DEVELOPMENT AGREEMENT

3) S BAR RANCH CONTINUES TO OBJECT TO THE PARTICIPATION OF COMMISSIONER ALBERT HOFER IN THESE PROCEEDINGS BECAUSE HE HAS A CONFLICT OF INTEREST BASED UPON HIS PARTICIPATION IN THE PRIVATE NEGOTIATIONS BETWEEN THE COUNTY AND THE DEVELOPER RELATING TO THE DEVELOPMENT AGREEMENT AND THE PROPOSED AMENDEMENT TO THE DEVELOPMENT AGREEMENT

The civil attorney for the County, Buzz Grant, recommended that Albert Hofer not participate in the deliberations and decision of the Board because of his participation in the negotiations for the Development Agreement.

S Bar Ranch continues to object to the participation of Albert Hofer in these proceedings.

4) S BAR RANCH RESERVES ITS RIGHT TO PRESERVE ALL OBJECTIONS THAT HAVE BEEN MADE IN: i) ITS FIRST REQUEST FOR RECONSIDERATION, AND IT'S SECOND REQUEST FOR RECONSIDERATION THAT WERE SUBMITTED TO THE BOARD; ii) ITS INITIAL PETITION; iii) ITS AMENDED PETITION FOR JUDICIAL REVIEW THAT HAVE BEEN FILED WITH THE DISTRICT COURT FOR ELMORE COUNTY; and iv) THE NOTICE OF OBJECTIONS THAT WAS SUBMITTED TO THE BOARD FOR THE HEARING HELD ON JULY 26, 2018.

DATED THIS 22<sup>nd</sup> day of August, 2018

Hawley Troxell Ennis & Hawley, LLP

  
Merlyn W. Clark  
Attorneys for S Bar Ranch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ~~7<sup>th</sup>~~<sup>2<sup>nd</sup></sup> day of August, 2018, I caused to be served a true copy of the foregoing Notice of Objections by the method indicated below, and addressed to each of the following:

L. W. (Buzz) Grant III  
246 S. Cole Road  
Boise, Idaho 83709  
P. O. Box 872, Boise, ID 83701  
*(ATTORNEY FOR THE COUNTY)*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail:
- Telecopy: 208.336.0388
- iCourt e-serve

Scott D. Hess  
Claire C. Rosston  
Holland & Hart, LLP  
800 W. Main Street, Suite 1750  
P.O. Box 2527  
Boise, ID 83701  
*(Attorney for the County)*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: sdhess@hollandhart.com;  
ccrosston@hollandhart.com
- Telecopy: 208.343.8869
- iCourt e-serve

Edward A. Lawson  
Heather E. O’Leary  
Lawson Laski Clark & Pogue, PLLC  
675 Sun Valley Road, Suite A  
P.O. Box 3310  
Ketchum, ID 83340  
*(Attorney for Cat Creek)*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: eal@lawsonlaski.com  
heo@lawsonlaski.com  
efiling@lawsonlaski.com
- Telecopy: 208.725.0076
- iCourt e-serve

Terri Pickens Manweiler  
Pickens Law, P.A.  
398 S. 9th Street, Ste. 240  
Boise, ID 83702  
*(ATTORNEY FOR CAT CREEK)*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: Terri@pickenslawboise.com
- Telecopy: 208.954.5099
- iCourt e-serve

  
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Merlyn W. Clark