

COMMISSIONERS MINUTES

MARCH 23, 2018

The Elmore County Commissioners met in regular session on the above date in the Commissioners Room, basement of the Elmore County Courthouse, 150 South 4th East, Mountain Home, Idaho.

Present at the meeting were Chairman Wes Wootan, Commissioners Bud Corbus and Al Hofer, Civil Attorney Buzz Grant, Clerk Barbara Steele, and Deputy Clerk Shelley Essl.

Motion by Wootan, second by Hofer, to approve the minutes for February 9, 2018 and February 16, 2018.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER..... -AYE **Motion carried and so ordered.**

Motion by Wootan, second by Corbus, to approve the expenses in the amount of \$137,826.25.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER..... -AYE **Motion carried and so ordered.**

Motion by Wootan, second by Corbus, to go into Executive Session pursuant to I.C. 74-206(d) – 31-874 to discuss indigent applications. Roll call vote was taken.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER..... -AYE **Motion carried and so ordered.**

Regular session resumed. The following decisions were made as a result of the Executive Session:

K-06-15-10 Motion by Hofer, second by Corbus, to deny as Medicaid was approved dating back to 5/1/15.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER..... -AYE **Motion carried and so ordered.**

K-01-18-08 Motion by Hofer, second by Corbus, to amend the approval and order of reimbursement to correct a data entry error.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER..... -AYE **Motion carried and so ordered.**

K-02-18-12 Motion by Hofer, second by Corbus, to deny as applicant is able bodied and appears to have the ability to work and therefore is not indigent.

WOOTAN..... **-AYE**
CORBUS..... **-AYE**
HOFER..... **-AYE**

Motion carried and so ordered.

K-03-18-03 Motion by Hofer, second by Corbus, to deny as the applicant did not complete the interview and has moved to California.

WOOTAN..... **-AYE**
CORBUS..... **-AYE**
HOFER..... **-AYE**

Motion carried and so ordered.

K-03-18-05 Motion by Hofer, second by Corbus, to approve with a reimbursement order of \$25.00 per month.

WOOTAN..... **-AYE**
CORBUS..... **-AYE**
HOFER..... **-AYE**

Motion carried and so ordered.

Julie Lisle, Fair Director, appeared and reviewed the proposed upgrade to the power and sewer in the vendor and recreational vehicle areas.

Prosecuting Attorney Daniel Page, Tom Ducharme and Traci Lefever, E911 Board appeared to discuss the use of E911 funds to purchase radios and repeaters. Attorney Page feels that the E911 funds should not be used to purchase the equipment. Commissioner Corbus and Allan Roberts did some research with other counties on what they use E911 funds to purchase. Attorney Page stated according to statute, the equipment needs to be purchased using county funds, not the E911 funds. They will discuss the matter further before making a decision.

Sheriff Hollinshead and Lieutenant Shauna Gavin appeared regarding the contracts for jail food services and commissary services.

Motion by Wootan, second by Corbus, to approve and sign the extensions to the Jail Food Service and Jail Commissary Service contracts with Summit Food Service, LLC.

WOOTAN..... **-AYE**
CORBUS..... **-AYE**
HOFER..... **-AYE**

Motion carried and so ordered.

Motion by Wootan, second by Hofer, to approve and sign the ground lease with CVF Legacy, LLC for the Hammett trash receptacles.

WOOTAN..... **-AYE**
CORBUS..... **-AYE**
HOFER..... **-AYE**

Motion carried and so ordered.

Motion by Wootan, second by Hofer, to approve and sign the Data Tel agreement for a county phone system.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER -AYE

Motion carried and so ordered.

Courtney Lewis, Mountain Home Economic Development Director and Steve Fultz, appeared to discuss a Foreign Trade Zone proposal.

Motion by Hofer, second by Corbus, to adjourn for lunch.

WOOTAN..... -AYE
CORBUS..... -AYE
HOFER -AYE

Motion carried and so ordered.

Regular session resumed.

A public hearing was held regarding a request for reconsideration of the Cat Creek Energy, LLC Conditional Use Permits (CUP) and Development Agreement from S Bar Ranch, LLC.

Chairman Wootan called the meeting to order. He asked that anyone wishing to submitted written testimony give it to the clerk at this time. He also asked if the commissioners had any disclosures they would like to make. Commissioner Hofer wanted to state for the record that he has been working with Cat Creek Energy on negotiations for the water provisions in the development agreement and he will be recusing himself from today’s hearing.

Beth Bresnahan, Land Use and Building Department Director, read a summary of the rules for the hearing.

Attorney Rick Goodson, Holley Troxell, representing S Bar Ranch was first to speak. He questioned whether S Bar Ranch would need to submit an additional request for reconsideration for the Finding of Facts and Conclusion of Law and Order that where approve by the board last week and would they be charged an additional application fee of \$4,800.00. Attorney Grant stated that they are entitled to do so and they would need to pay an additional application fee but amount would be \$800.00. It is his opinion that as the application was presented to the county, the main component was the hydro project and how it would benefit the citizens of Elmore County. They feel some citizens would benefit, and others would not, such as S Bar Ranch, adjoining land owners and recreationalists. He stated that county ordinance section 6-1-4 states that this title shall be interpreted equally, to equally protect each citizen from undue encroachments on such citizens’ private property by his or her neighbors or the neighbors use of their own private property. He feels that the approval of the CUP’s and the development agreement for this project will undoubtedly effect the surrounding property owners, such as his client and impact the citizens of

Elmore County and due to the impact of this project, it is imperative that the commissioners see to it that the approvals of this project and development agreement were properly done in accordance with the ordinance and the rules and regulations of the state. It is the position of S Bar Ranch's position that the commissioners' approval of the project and the development agreement did not comply with county ordinances and state law. He stated all land owners that will be effected by the application for a CUP from another land owner are entitled to notice of the public hearings and given the opportunity to attend the hearing and present testimony, which is due process. He stated that S Bar Ranch was not given notice of the public hearings on June 15, 2016 and July 13, 2016, which were conducted by the Planning and Zoning Commission (P&Z) in regard to Cat Creek's application for the CUP's, as the initial mailing list of effected landowners was not up to date and S Bar Ranch was not on the mailing list. He feels that the project needs to be sent back to P&Z so everyone has an opportunity to the hearing and present their side. He also feels that there are numerous instances throughout the record where there was improper action taken in approving the project. At the November 16, 2016 appeal hearing, a new master site plan was submitted, which moved the pump storage house to a new location, moved the solar site and illuminated the wind area and no one ever received notice of the changes prior to the hearing, once again violating the right to notice. There were four subsequent commissioner meetings held where the public was not entitled to speak or make comment on the revised master site plan. So again, he is requesting that the project get sent back to P&Z so the commissioners can make an informed decision once everyone who wants to has an opportunity to attend the meetings and present testimony. Also, the responsive memorandum states that they cannot object to the development agreement and there is an argument that this is not "one project", that each element is separate. He also believes that as presented to the county, the only way this project will work is if all three elements come into being. Based on testimony from the applicant at a prior public hearing, all five CUP applications are dependent on each other and cannot exist separately. The CUP's were approved subject to conditions. One of the conditions was that a development agreement would be entered into that would include the developing methods for water delivery and storage within Elmore County. At the public hearing held on February 9, 2018, it was stated that after a year of negotiations between the county and Cat Creek, they could not agree on the water delivery section of the development agreement. The commissioners agreed to accept a proposal to change the development agreement as it relates to the water provisions. He feels this can lead to the potential elimination of the water project, which he feels is the most intricate part of the project and that was not the way the project was approved. He feels that if the hydro project were to be eliminated, there are other, more suitable areas where the wind and solar projects can be built. He doesn't see how the CUP's can be final if the development agreement wasn't entirely approved, which was one of the main conditions of approval. Another element that was included in the reconsideration request was he doesn't think that the applications themselves were properly filed in the first place. It is his position that before they can be granted or applied for, the applicant needs to hold two public meetings, with notice of these meetings being published in the local newspaper and mailed to all land owners within a one mile radius of the proposed facility. Cat Creek did hold the two public meetings, but they did not give proper notice for the first meeting, which was held in December 2014. His position is that the applications for the CUP's should never even been filed since they did not meet the requirements for the two public meetings, which

is another reason why the applications should be sent back and started over. In closing, one reason S Bar Ranch is requesting a reconsideration is to ask the county to follow its ordinances and state law and allow the effected property owners the due process to which they are entitled and so that the county can make an informed decision.

Those in favor of the reconsideration were next to speak.

John Combs stated that he supports the request reconsideration of the development agreement.

Wendi Combs stated that supports the request for reconsideration of the CUP's and the development agreement for all the reasons stated in the request. S Bar Ranch and many stakeholders were not given their due process rights by not receiving sufficient notices of public hearings. She feels that S Bar Ranch, all neighboring landowners and all residents of the Pine and Featherville areas should have received notices as this project would affect the entire community. S Bar Ranch and many stakeholders were not given their due process rights related to changes to the master site plan, including doubling of the upper reservoir, which will further infringement on critical sage grouse, elk, mule deer and prong horn territory. The wind turbine and solar locations were also changed, and notices to S Bar Ranch and other stakeholders were not sent out. It is well documented that this project is dependent on all five CUP's as one project. Since the water storage and delivery were not completed in the assigned development agreement, it will not meet the 2018 deadline. The project should be sent all the way back to P&Z to start anew or be dissolved, due to the fact that Cat Creek Energy has continued to revise every single plan and agreement and the lack of cooperation with Elmore County solicitors, thus wasting county time and resources. Cat Creek Energy has continued to provide misinformation to the public about its timeline, stating it would be up and running in three years. Their total disregard for policies and procedures and regulations for such a massive project should merit the request for reconsideration.

Harry Taggart stated that he supports the request for reconsideration for the reasons stated in the petition as well as for his own concerns about the commissioners' previous decision to overrule the original P&Z recommendations to deny the CUP's based upon noncompliance to county zoning standards. The commissioners' previous approval of a modified development plan presented at a 2016 public hearing, which was a very different development plan from the one submitted to P&Z, should have required another public hearing. Also, the commissioners' decision in February 2018 to approve yet another, even more substantially modified development agreement, without public input, potentially removes a principal source of revenue to the county, and violates all of Cat Creek Energy's claims that the pump storage portion is the keystone element of the entire project, a claim that was presented at all previous public hearings. Lastly, the commissioners' approved this latest development agreement in direct defiance of the county solicitor's advice not to approve it. In conclusion, two years of the manipulative behavior by Cat Creek Energy to get their way with their ill-conceived project should be clear to even the most casual observer. The request for reconsideration is a rare opportunity for the commissioners' to correct some serious mistakes that were made upon placing trust with those who never deserved it.

Nancy Thompson stated that she agrees with everything that has been said. Cat Creek Energy stated all along that the project is all five CUP's or none, then water wasn't agreed upon, so she feels that it needs to go back to square one.

Shelley Davis is an attorney who represents the Boise Project Board of Control. They have been following this process from the beginning, specifically in respect to the CUP for the development of the water storage and pump facility. Her client is the operating agent for the five primary irrigation districts who have the beneficial use title to use the storage water in Anderson Ranch Reservoir as well as Arrowrock Reservoir in the Boise system, a system that the Department of Water Resources has considered fully appropriated since 1977 with very few exceptions as far as surface water is concerned. In Idaho, water rights are treated as real property interests and her client have not been provided proper notice on a regular basis concerning the matters that have come before this board as it has gone through the process of the development agreement and the nearly one year process of deliberations that have taken place. It came as a bit of a surprise to learn that the water storage facility has doubled in size, but also that there have been representations that Cat Creek has some authority to begin construction of the storage facility and also has some authority to provide water for other uses, specifically domestic and/or municipal uses within Elmore County. This project will be developed under the Federal Energy Regulatory Commission (FERC) authority as well as the Bureau of Reclamation, who owns Anderson Ranch Reservoir. To date, Cat Creek has not secured the lease of power privilege with the Bureau of Reclamation that will be needed in order for them to even consider this project. They have also not yet entered into a funding agreement that will allow the Bureau to begin looking at plans and specifications. There a number of additional matters that need to be remedied between Cat Creek and the Bureau before any water issues can be resolved, such as the NEPA process and the environmental impact study process, which will be necessary for the Bureau to do any further investigation into if the water storage facility can be authorized by FERC. She also wanted to note that her client has filed a protest against a water right application that Elmore County has filed with the Department of Water Resources. Cat Creek has also filed a water right application in order to develop their project. To date, that application has not been advertised for protest, it's still in the process of being evaluated, so any representation in the development agreement that the water issues can be resolved within a nine month time frame is sheer fantasy. In her fifteen years of representing clients on water matters and specifically protest proceedings, it's very unlikely that a water right of this magnitude, with this much impact, could be resolved in anything short of a two to three year timeframe. There will undoubtedly be a contested case hearing on this matter, which is essentially the same thing as legal battle, only it takes place in an administrative proceeding instead of a court proceeding. Based on what needs to happen with all of the agencies she has mentioned, there is absolutely no way that any authority to develop any water resources can be done within the timeframe of when the water issues need to be finalized in the development agreement.

Randall Burr stated that he strongly supports the points that Attorney Goodson made in his opening statement. Mr. Burr's property is located at the head of Cat Creek and he never received one bit of information regarding the restructuring of the windmills and solar panels, even though he pays Elmore

County a tremendous amount of property taxes. When he built his cabin on the top of the mountain, he expected to see beauty and nature, not blinking red lights. The wildlife is getting sold out for sheep fences and windmills. He asks that they go back and reconsider this project so they can make sure they dot all of the I's and cross all of the T's.

Those neutral to the reconsideration were next to speak.

Attorney Buzz Grant stated that commissioners have approved three major matters in connection with this project which are the CUP's, approved on February 10, 2017, the development agreement, approved February 9, 2018 and an amendment to the CUP's and conditions, approved on March 16, 2018. The timeframe to seek reconsideration of the CUP approval is twofold. The timeframe expired on February 20, 2017 under the zoning ordinance and February 24, 2017 under the Local Land Use Planning Act (LLUPA). The ability for S Bar Ranch to seek reconsideration expired thirteen months ago. They are also seeking reconsideration of the development agreement. The development agreement is one of several conditions of approval. It's a check the box condition, you either make it or you don't so there are no rights under the statues or the ordinance to seek reconsideration of a condition. The development agreement is not governed by LLUPA or the county zoning ordinance, it was a creation that the board made to further refine conditions and to get agreement in connection with several of the conditions and that was its purpose. As part of the approval of the CUP's, the commissioners built in notice and hearing for the development agreement to provide notice to the public in the event that they needed to change the approval or any conditions, all which was foreseen when the CUP's were approved. S Bar Ranch has not been deprived of their due process rights. They received actual notice of six hearings on this matter, two pertaining to the initial CUP approval, by written notice, published notice and notice posted on the property as well as notices for four hearings pertaining to the development agreement and the change of conditions and approval. The amendment of the CUP, which occurred through the development process is a proper subject of the reconsideration, but the county's response to that is there were four public hearings, two of which were attended by S Bar Ranch representatives, and they clearly had the ability to participate, object and provide input to the commissioners at those hearings, therefore, the county did not deny due process rights to S Bar Ranch. Copies of the development agreement were handed at the last three hearings for the development agreement. Those copies addressed the changes to the CUP and the condition, so the public had more than ample opportunity to know exactly what was going on. Every draft of the development agreement was made part of the record, which is available to the public as well. Attorney Grant next discussed some of the specific issues raised by S Bar Ranch. First, no notice of the P&Z Hearing. From what he understands, the county did use an old list to send out notices, but notice was also published and posted on the property. Even though they were not given mailed notice, any input they would have given at the P&Z hearing wouldn't have made any difference because P&Z denied the project by unanimous decision, so S Bar Ranch was not harmed by not receiving proper notice. The application then came to the commissioners for a de novo review to start anew. S Bar Ranch received written notice, as well as public and posted notice, where they could have come to the commissioners' review hearing and presented their case, but they did not. The next issues pertained to the change to the

site plan at the November 2016 hearing and making amendments to the development agreement at the February 9, 2018 hearing. The commissioners complied with I.C. 67-6512, the ordinance governing conditional use permits, which entitles the board to make changes during a hearing. The changes to the development agreement are not governed by state law or the county zoning ordinance, so the board is entitled to make changes, pursuant to public hearing. The next issue pertained to the applicant requirement to hold neighborhood meetings. Under the zoning ordinance, the applicant is required to have one neighborhood meeting, which the applicant complied with. If there was a technical defect in connection with that meeting, there was ample time during the six subsequent public hearings where any issues could have been raised and addressed by the board. There was discussion by S Bar Ranch that the conditions limited expansion or change of the conditions to expanding and refining through the CUP amendment. Attorney Grant stated that the amendment that occurred through the development agreement did more than expand and refine, it eliminated several conditions. This was all done subject to four public hearings where all of these things were discussed in varying degrees of detail and were in each draft of the agreement. As to the issue brought up about notice to water right holders, this is the first time Attorney Grant has ever heard that water right holders are entitled to specific written notice like an adjacent landowner is. He is not sure how that would be accomplished, but even so, the county still published notice and posted notice on the property for the hearings. The final point Attorney Grant wanted to make was that S Bar Ranch was not harmed by P&Z's denial of the CUP applications by failure to receive that first written notice. They received notice of the commissioners' hearings and they had the opportunity to attend and participate, but they did not. The time period has passed for S Bar Ranch to challenge the CUP approval and the development agreement is not subject to reconsideration. The commissioner's March 16th decision is subject to reconsideration, but the county has not denied S Bar Ranch their due process rights. In conclusion, with all due respect to S Bar Ranch and their legal counsel, the county does not see any due process violations.

Those opposed were next to speak.

Attorney Pickens-Manweiler, representing Cat Creek Energy, expressed her opposition to the request for reconsideration. She agrees with Attorney Grant that the commissioners complied completely with the county zoning ordinance and with LLUPA. She feels she is well versed in the LLUPA process and feels that they have dotted every "I" and crossed every "T" to a fault. Having six public hearings on the CUP process is quite substantial and that is because this is a big project with a lot of components. The five CUP's that were approved required a lot of time and effort and that is what they put into this process. The perfect example is the entire year it took to draft the development agreement, a thirty page agreement with five or six attorneys working on it, to get it to a point where the commissioners are comfortable with the agreements and representations of the developer. She agrees that the development agreement itself is not subject to reconsideration, but there are some terms of the development agreement that amended the CUP, which were presented at two public hearings. She stated that not only was S Bar Ranch's attorney present at the hearings, he also submitted written comments. S Bar Ranch is claiming that they didn't have an opportunity and a right to be heard during the amendment process, but their attorney was clearly present

and did make comment. They took his comments into consideration and some of his comments were actually incorporated into the development agreement. If he wanted to be heard about other issues pertaining to the amendment process, he should have spoken up during the public hearing, but he didn't. They list several different arguments in the reconsideration that she feels shouldn't be considered by the commissioners, particularly that they can now ask that you reverse the entire CUP approval. They had an opportunity to do that in February 2017, but again, they did not. They also had an opportunity to come to the November hearings, because they did receive written notice, and review the record and look at exactly what Cat Creek was proposing. They also would have had the opportunity to see the conversations and dialogue between the Cat Creek staff and the commissioner, while discussing how the project would look at the end. Yes, Cat Creek made changes, after public comment, that Mr. Sellman didn't want solar panels next to his RV park, so that was a concession the developer made. They also move the wind towers because Fish and Game said they were in an area of critical concern. The people that had objections to the process attended the hearings and spoke their peace, and Cat Creek made those changes as to not impact wildlife or Mr. Sellman's business. The increase in the acre-foot of the reservoir was in conjunction with the possibility that if there was more storage capacity, there were more opportunities to get water into the Elmore County Basin. Everyone had an opportunity to be heard at the two days of hearings. They also had an opportunity, at any time, to contact the Land Use Department and ask if there was anything new entered into the record. She takes issue with the commentary that Cat Creek has pulled one over on the public and now they don't have to build the hydro project. When she proposed plan "B" to the development agreement, it was because of the length of time taken on the water issues. Plan "B" will allow them to get the process started on the other components of the project while finalizing the water issues. Cat Creek never said they were going to bag the whole thing and not build the hydro project, all they were asking is to give them until December 2018 to finalize the terms and conditions of the water provisions. She absolutely disagrees that all the CUP's go away if they don't have the development agreement finalized, but she does agree that the way the development agreement is written, that the water CUP will go away. If that were to happen, they would just apply for another water CUP. She has submitted a written legal opinion as to the validity of the motion for reconsideration and asked that the commissioners deny the request.

Michael Arkoosh agreed with statements made by Attorney Grant and Attorney Pickens-Manweiler. Having been present for most of this process, he finds it hard to believe that Cat Creek or the commissioners violated any portions of LLUPA or the zoning ordinance. He stated that Attorney Grant has held the commissioners' and Cat Creek's feet to the fire throughout the process to make sure everything was done correctly. He asked that the request for reconsideration be denied.

Attorney Gary Slette, representing Cat Creek Energy, referenced Idaho Code 67-6535, which states that only an application for a permit under LLUPA that has been approved can be subject to reconsideration. Idaho Code 67-6512, subsection D, specifically states upon the granting of a special use permit, conditions can be attached, so the only plausible thing that is subject or amenable to reconsideration under the LLUPA, is a permit, one that has been specifically identified, and again that is the special use permit.

Having sought and been granted several special use permits in many counties throughout the state, he has seen where governing bodies have attached conditions. These conditions are to be performed in the future. The contemplation is that under the statute the commissioners, as the governing board, can specify those conditions, but those conditions do not extend the time periods by which everyone is governed, whether it be the applicant or an effected person. What IC 67-6535 expressly states is you have fourteen days from the date of the approval or denial of the permit in which to make a reconsideration request. According to that, as Attorney Grant has also stated, S Bar Ranch is one year too late in filing their request for reconsideration. As a matter of law, the request for reconsideration must be denied. In regards to comment made by Shelley Davis about the finalization of water issues, they never said the water right approval will be approved in nine months. He agrees with Ms. Davis that there could be a contested case with regard to the water right, but what is to be resolved within nine months is the section of the development agreement that deals with water delivery. But to suggest that the water right must be approved within nine months, or that all FERC and Bureau of Reclamation matters must be approved within nine months is simply incorrect. He once again stated that the request for reconsideration must be denied.

Attorney Goodson gave his rebuttal. As to Attorney Grant's position that notice was given to S Bar Ranch, that was constructive notice. The ordinance states that the county has to give notice, not constructive notice. Call it what you want, but S Bar Ranch was not given notice according to the county ordinance or state law. Pertaining to due process, Attorney Grant made a comment that S Bar Ranch has not been harmed, therefore, there was no violation of due process. Attorney Goodson does not believe that the only element necessary to show a violation of due process is harm. He feels that factors which are to be taken into consideration in determining whether or not there has been a violation of due process is whether or not the aggrieved party's rights were violated. In this case, they were. It is true that S Bar Ranch did not receive notice for the P&Z hearing, so no one knows what testimony S Bar Ranch would have presented at the P&Z hearing. To say that they had a chance to speak at subsequent hearings is all well and good, but what if they were now deceased, their rights just went out the window. He feels that this project needs to go back to P&Z to resolve these issues and then move forward.

Chairman Wootan stated that the hearing is complete and the record is now closed. The board will take the matter under advisement and hereby request that county legal counsel draft finding for review by the board based upon today's hearing. The board will deliberate the matter and review the proposed findings on April 6, 2018 at 11:15 a.m.

The hearing was closed.

A short recess was taken. Regular session resumed.

Motion by Wootan, second by Corbus, to go into Executive Session pursuant to I.C. 74-206(d) to discuss records exempt from disclosure. Roll call vote was taken.

WOOTAN..... -**AYE**
CORBUS..... -**AYE**
HOFER -**AYE**

Motion carried and so ordered.

Regular session resumed. No decision was made as result of the Executive Session.

Motion by Hofer, second by Corbus, to adjourn.

WOOTAN..... -**AYE**
CORBUS..... -**AYE**
HOFER -**AYE**

Motion carried and so ordered.

/S/ WESLEY R. WOOTAN, Chairman

ATTEST: /S/ BARBARA STEELE, Clerk