

**BEFORE THE ELMORE COUNTY BOARD OF COMMISSIONERS  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER – CUP AMENDMENTS**

**In Re: CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07: Cat Creek Energy, LLC**

**Background:**

On February 10, 2017, the Elmore County ("**County**") Board of Commissioners ("**Board**") approved (the "**Approvals**") five conditional use permit applications (individually, a "**CUP**" and collectively the "**CUPs**") from **Cat Creek Energy, LLC**, an Idaho limited liability company (the "**Applicant**"), with conditions (the "**Conditions**"), all as further set forth in those Findings of Fact, Conclusions of Law and Order dated February 10, 2017 by the Board ("**Initial Findings**"). One of those Conditions, as defined in the Initial Findings, was the execution and recordation of a Development Agreement by and between the County, the Applicant and the "**Landowners:**" **Sawtooth Grazing Association, Inc.** and **Wood Creek Ranch, LLC**. The Development Agreement was executed by the parties thereto and recorded on February 9, 2018. The Development Agreement was approved by the Board through Resolution No. 652-18 and Ordinance No. 2018-01 both dated February 9, 2018, both the resolution and the ordinance were amended and restated on March 2, 2018, as Ordinance No. 2018-02 and Resolution No. 653-18. In connection with the negotiation and execution of the Development Agreement, the Applicant and Board agreed to certain changes to the Approvals and the Conditions. Pursuant to the terms of the Development Agreement and under the Local Land Use Planning Act, Idaho Code §§ 67-6501 through -6538 ("**LLUPA**"), the Development Agreement is not an Idaho Code §67-6511A development agreement and is therefore not subject to LLUPA. Changes made under the Development Agreement to the Approvals and the Conditions are subject to LLUPA.

These Findings of Fact, Conclusions of Law and Order ("**Supplemental Findings**") pertain to those changes and additions to the Approvals and the Conditions which were made by the Development Agreement (the "**Matter**"). All capitalized words used and not defined herein shall have the meanings given to them in the Initial Findings.

Following the issuance of the Initial Findings, representatives from the Applicant, the County and the Landowners met on several occasions to draft, discuss and negotiate the terms of the Development Agreement, a Condition, and as a result in approving the Development Agreement, the Board approved changes to the Approvals and Conditions. On or about October 20, 2017, the Applicant requested the Board, pursuant to a public hearing with notice, to extend the amount of time it had to complete the Development Agreement from November 15, 2017 until May 15, 2018, as such extension was permitted in Condition No. 2 of the Initial Findings. The Board on October 20, 2017, approved the extension request and issued an Extension Order, extending the period of time the Applicant had to obtain an approved and recorded development agreement from November 15, 2017 to May 15, 2018. On December 1, 2017, the Applicant came before the Board in a public meeting to request a future hearing for approval of the Development Agreement, which the Board granted. On December 22, 2017, the Board, pursuant to a public hearing with notice, conducted a hearing on the Development Agreement, which hearing was continued until January 26, 2018. Additionally, at the December 22, 2017 hearing on the Development Agreement, the Applicant requested for one Board member to participate in the negotiations for the Development Agreement. The Board determined that Albert Hofer, the Chairman, should assist in the negotiations and as a result, Mr. Hofer has recused himself from deliberations and decisions on the Development Agreement. On January 26, 2018, pursuant to a public hearing with notice, the Board continued the hearing on the Development Agreement which hearing was again continued until February

9, 2018. On February 9, 2018, pursuant to a public hearing with notice, the Board continued the hearing on the Development Agreement and received verbal testimony from the Applicant and parties in opposition as well as other testimony and information for the Matter, which is part of the record for the Matter. Additionally, copies of the current drafts of the Development Agreement, which contained changes made to the Initial Findings, Approvals and Conditions, were distributed at the public hearings on December 22, 2017, January 26, 2018 and February 9, 2018. Deliberations for the Matter were conducted on February 9, 2018 following which the Development Agreement was executed by the Applicant, the County and the Landowners, and recorded in the County land records. Deliberation of these Supplemental Findings were held on March 2, 2018 and continued on March 16, 2018 when the Board approved these Supplemental Findings.

### **Findings of Fact:**

If any of these Supplemental Findings are deemed to be conclusions of law, they are incorporated into the Conclusions of Law section. The following findings are based upon the record ("**Record**") before the Board as well as those facts which are commonly known or of which there is general public awareness.

#### **1. Procedural Process.**

**The Board finds** the following as to the procedural matters pertaining to the submission of the Development Agreement to the Board and the Commission:

- A.** The Board approved the Initial Findings on February 10, 2017.
- B.** The Initial Findings contained certain Conditions, one, Condition No. 2, of which was for the Applicant and Elmore County to enter into a recorded development agreement by November 15, 2017.
- C.** A draft of the Development Agreement was submitted to the Commission for its review and recommendation on September 20, 2017.
- D.** Notice of the hearing before the Commission, specifying the reason for the hearing, the time, date and place of the public hearing was placed on the agenda for the September 20, 2017 meeting.
- E.** On or about October 20, 2017, the Applicant requested the Board, pursuant to a public hearing with notice, to extend the amount of time it had to complete the Development Agreement from November 15, 2017 until May 15, 2018, as such extension was permitted in Condition No. 2 of the Approvals.
- F.** Notice of the hearing, specifying reason for the hearing, the time, date and place of the public hearing was published once in the Mountain Home News on October 4<sup>th</sup> and 11<sup>th</sup>, 2017, and notice was given to all agencies and property owners within one mile of the Property.
- G.** On December 1, 2017, the Applicant came before the Board in a public meeting to request a future hearing for approval of the Development Agreement. The Board agreed to hear the matter on December 22, 2017.
- H.** Notice of the December 22 hearing, specifying reason for the hearing, the time, date and place of the public hearing was published once in the Mountain Home News on

December 6, 2017, and notice was sent to agencies and property owners within one mile of the Property on December 4, 2017.

- I. On December 22, 2017, the Board, pursuant to a public hearing with notice, conducted a hearing on the Development Agreement, which hearing was continued until January 26, 2018. Notice was given to all in attendance of the continuation of the hearing until January 26, 2018, notice was published in the Mountain Home News on December 6, 2017 and mailed to the property owners and agencies on December 4, 2017. Copies of the current draft of the Development Agreement were distributed and/or available for all in attendance at the hearing.
- J. On January 26, 2018, pursuant to a public hearing with notice, the Board continued the hearing on the Development Agreement which hearing was continued until February 9, 2018. Notice was given to all in attendance of the continuation of the hearing until February 9, 2018 and notice was published in the Mountain Home News on January 10, 2018 and notices were mailed to property owner and agencies on January 8, 2018. Copies of the current draft of the Development Agreement were distributed and/or available for all in attendance at the hearing.
- K. On February 9, 2018, pursuant to a public hearing with notice, the Board continued the hearing on the Development Agreement, and following the hearing held deliberations and approved the Development Agreement. Copies of the current draft of the Development Agreement were distributed and/or available for all in attendance at the hearing.
- L. The Board now makes these Supplemental Findings.

**2. Applicable Law.**

**The Board finds** the following as the applicable law for consideration of the Development Agreement:

A. The Elmore County Zoning and Development Ordinance, which was adopted on March 21, 2012, as Ordinance 2012-01; amended on September 19, 2012, as Ordinance 2012-03, and July 23, 2014, as Ordinance 2014-01 (collectively, the "**Zoning Ordinance**") and

B. The Local Land Use Planning Act, Idaho Code §§ 67-6501 through -6538 ("**LLUPA**").

**3. The Development Agreement is not an Idaho Code §67-6511A Development Agreement, but an agreement between the parties as a condition to the approval of the conditional use permits.**

**The Board finds** that Idaho Code §67-6511A provides in part that: "[e]ach governing board may,....,require or permit as a condition of rezoning that an owner or developer make a written commitment concerning the use or development of the subject parcel." (emphasis added)

**The Board finds** that the Applications were for conditional use permits and not for rezoning of the Property.

**The Board finds** at Section 13.2 of the Development Agreement that the parties intend for the Development Agreement not to be an Idaho Code § 67-6511A agreement since there is no rezone of the Property, but an agreement as a condition of the conditional use permits.

**4. The Development Agreement is not a Title 6, Chapter 29 Zoning Ordinance Development Agreement.**

**The Board finds** that Section 6-29-1 of the Zoning Ordinance provides, in part: “[t]he Purpose of this ordinance is to: 1. Provide for the creation and administration of development agreements, as provided in Idaho Code § 67-6511A;”

**5. The Development Agreement complies with several of the Conditions set forth in Condition No. 2 and any changes to Condition No. 2 are approved as changes to the Initial Findings, the Approvals and the Conditions.**

**The Board finds** that the Initial Findings contain several conditions as set forth in Exhibit A to the Initial Findings.

**The Board further finds** that, and restates herein for convenience, a portion of Condition No. 2 of the conditions pertaining to the Development Agreement to be:

“2. A **“Development Agreement”** between the Applicant, the landowner of the Property and Elmore County which shall be recorded against the Property on or before November 15, 2017, which date may be extended by the Board for one additional six month period, and shall following ongoing discussions and draft reviews with county staff, be presented to the Board in a public hearing subject to the Zoning Ordinance and the LLUPA, and shall include, among other things, the following terms and conditions: ...”

**The Board further finds** that the amount of time the Applicant had to obtain approval of the Development Agreement was extended from November 15, 2017 to May 15, 2018. Extension Order of the Board dated October 20, 2017.

**The Board further finds** from Condition No. 2 that “[t]he failure to complete [Condition No. 2] on or before the date set forth herein shall result in the termination of the approval to which this Condition is attached.”

**The Board further finds** that the Development Agreement was approved by the Board, executed by the Applicant, the County, and the Landowners and recorded in the Elmore County land records on February 9, 2018.

**The Board further finds** that with the Board's approval, execution by the parties thereto, and the recordation of the Development Agreement, that Condition No. 2, as modified by these Supplemental Findings, has been satisfied and a new condition, for CUP-2015-04 (hydro project) only, has been created, extending the time the parties have to satisfy Conditions No. 2 b and c until December 31, 2018.

**Condition No. 2 a.**

**The Board finds**, and restates herein for convenience, Condition No. 2 a of the conditions pertaining to the Development Agreement to be:

"a. clear definition of the project based upon the site plan presented to the Board at the November 16 and 17, 2016 hearings and such site plan and project description shall be added to and included into the Application;" Initial Findings, Exhibit A, p. 48, Condition No. 2 a.

**The Board further finds** that the site plan presented to the Board at the November 16 and 17, 2016 hearings and project description were attached to the Development Agreement as Exhibit C and pursuant to the terms of the Development Agreement were added to the Application under Section 2.1.5 of the Development Agreement.

**The Board further finds** that the Applicant further revised the site plan and project description and such site plan and project description were attached to the Development Agreement as Exhibit D.

**The Board further finds** that such revisions to the site plan and project description is contemplated by Condition No. 2 a and is permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

#### **Conditions No. 2 b and c.**

**The Board finds**, and restates herein for convenience, Conditions No. 2 b and c of the conditions pertaining to the Development Agreement to be:

"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;" Initial Findings, Exhibit A, p. 48, Conditions No. 2 b and c.

**The Board further finds** that Conditions No. 2 b and c were deferred under the terms of Section 2.2 of the Development Agreement until on or before December 31, 2018 to permit further discussion and negotiation between the Applicant and the County.

**The Board further finds** that such deferral is permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

#### **Condition No. 2 d.**

**The Board finds**, and restates herein for convenience, Condition No. 2 d of the conditions pertaining to the Development Agreement to be:

"d. obligation and time frame to develop a Community and Stakeholder Board ("**Stakeholder Board**"), to: (a) oversee the expenditure of the required the annual contribution of \$330,000 by the Applicant to the Stakeholder Board for management,

conservation and enhancement of plants, animals, fish and birds that inhabit the project area, (b) oversee development of wetlands mitigation due to the project which is the subject of the Applications; (c) provide oversight and approval of the visual audio screening and minimization of impact to the surrounding areas of the solar array, substation and transmission lines which shall be designed using best practices to minimizing visual and audio impact; The number, backgrounds, stakeholder groups for members of the Stakeholder Board will be established by the Applicant and the Board as a part of the Development Agreement and shall consist of members from different agencies such as Mountain Home Irrigation District, Idaho Department of Fish and Game, Glens Ferry Highway District, a member or the chairman of the sage grouse conservation group for Elmore County, a Pine-Featherville resident, one or more representatives of Elmore County government, as well as other interested parties as determined by the Applicant and the Board." Initial Findings, Exhibit A, p. 48 and 49, Condition No. 2 d.

**The Board further finds** that under Section 2.3 of the Development Agreement, the stakeholder board's "purpose is to oversee the expenditure of funds (the 'Contribution') by the Developer, in the amount to be based upon a formula set forth herein in Section 2.3.3 for (a) environmental mitigation as determined by federal and state permitting for the management, conservation and enhancement of plants, animals, fish and birds that inhabit the Project area, (b) review of the development of wetlands mitigation due to the Project; (c) review and recommendation to the Board of the visual and audio screening and minimization of impact to the surrounding areas of the solar array, substation and transmission lines which shall be designed using best practices to minimizing visual and audio impact." Development Agreement, Section 2.3. The purpose statement of Section 2.3 of the Development Agreement substantially complies with the purposes of the stakeholder board set forth in Condition No. 2 d.

**The Board further finds** that annual funding in the amount of \$300,000 for the stakeholder board for funding for the management, conservation and enhancement of plants animals, fish and birds that inhabit the project area is changed by the Development Agreement to provide for initial funding in an amount not to exceed \$1,345,000 to fund federal mitigation requirements and offsets. Additional annual funding would be pursuant to a formula as set forth in the Development Agreement with a cap and floor of \$300,000 and \$100,000, respectively. Development Agreement, Section 2.3.2. and 2.3.3.

**The Board further finds** that the number, backgrounds and stakeholder groups for membership of the stakeholder board were established by the Applicant and County representatives and approved by the Board on February 9, 2018, which changed Condition No. 2 d as further set forth in Section 2.3.1. of the Development Agreement.

**The Board further finds** that such changes to Condition No. 2 d as described above are permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

#### **Condition No. 2 e.**

**The Board finds**, and restates herein for convenience, Condition No. 2 e of the conditions pertaining to the Development Agreement to be:

"e. the Applicant's obligation to fund annual fish stocking in Anderson Ranch Reservoir to compensate for any net loss of game fish due to entrainment into the hydropower penstocks and working with Idaho Fish and Game to develop the details of this program;" Initial Findings, Exhibit A, p. 49, Condition No. 2 e.

**The Board further finds** that Section 2.4 of the Development Agreement substantially complies with Condition No. 2 e, except that funding is restricted to the stakeholder board funding and is subject to priority for federal and state mitigation requirements.

**The Board further finds** that such restriction on the funding is permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

#### **Condition No. 2 f.**

**The Board finds**, and restates herein for convenience, Condition No. 2 f of the conditions pertaining to the Development Agreement to be:

"f. the Applicant's obligation to fund conservation efforts affecting areas of sage-grouse habitat surrounding wind turbine areas 2 and 3, in the eastern part of Wood Creek Ranch, where evidence of sage-grouse usage exists and the best sage-grouse habitat is found. The conservation effort would be a cost-share with the Sage-Grouse Initiative and may include measures such as prescribed grazing, fence marking and water tank escape ramps;" Initial Findings, Exhibit A, p. 49, Condition No. 2 f.

**The Board further finds** that Section 2.5 of the Development Agreement modifies and amends Condition No. 2 f, as follows: (i) funding is restricted to the stakeholder board funding; (ii) funding is further subject to the priority of federal mitigation requirements; (iii) the cost-sharing requirement is eliminated; and (iv) the Applicant's funding obligation set forth in Condition No. 2 f is restricted to affecting areas of the sage-grouse habitat on the Property where evidence of sage-grouse usage exists.

**The Board further finds** that such changes to Condition No. 2 f as described above are permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

#### **Condition No. 2 g.**

**The Board finds**, and restates herein for convenience, Condition No. 2 g of the conditions pertaining to the Development Agreement to be:

"g. the Applicant's obligation to fund annual fish stocking in Anderson Ranch Reservoir to compensate for annual net loss game fish due to entrainment into the hydropower penstocks and that the Applicant would work with Idaho Department of Fish and Game to develop the details of this program on or before commencement of the operation of the project with is the subject of the Applications;" Initial Findings, Exhibit A, p. 49, Condition No. 2 g.

**The Board further finds** that Section 2.4 of the Development Agreement substantially complies with Condition No. 2 g, except that funding is restricted to the stakeholder board funding and is subject to priority for federal and state mitigation requirements.

**The Board further finds** that such restriction on the funding is permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

**Conditions No. 2 h and i.**

**The Board finds**, and restates herein for convenience, Conditions No. 2 h and i of the conditions pertaining to the Development Agreement to be:

"h. the Applicant's plan to implement erosion control measures, which would include minimizing ground disturbance areas during construction, stabilizing soils and installing barriers to prevent runoff, and contouring and revegetating all disturbed areas when construction is complete, including erosion control measures and revegetation activities which will meet all industry standards and would prevent water quality impacts due to erosion/sedimentation, prevent the proliferation of noxious weeds and promote re-development of quality wildlife habitat;" Initial Findings, Exhibit A, p. 49, Condition No. 2 h.

"i. the Applicant's erosion control plan for all aspects of the construction effort to minimize disturbance of reservoir shoreline and vegetated upland areas during construction of the hydroelectric intake, powerhouse and penstock has the potential to increase erosion and sedimentation, which could adversely affect water quality in Anderson Ranch Reservoir. Construction of roads and wind tower pads for the wind turbine project element has the potential to cause erosion and sedimentation into Castle Creek, Cat Creek, or other streams located downslope of disturbed areas;" Initial Findings, Exhibit A, p. 49, Condition No. 2 i.

**The Board further finds** that under Section 2.6 of the Development Agreement, the Applicant has those additional obligations of submitting applications for, and receiving permits from, and complying with all US Army Corps of Engineers and Environmental Protection Agency regulations that are administered by the Idaho Department of Environmental Quality and utilize best industry practices to implement erosion control measures, and as a result substantially complies with Conditions No. 2 h and i.

**The Board further finds** that such additional obligations are permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

**Condition No. 2 j.**

**The Board finds**, and restates herein for convenience, Condition No. 2 j of the conditions pertaining to the Development Agreement to be:



"j. the solar array, substation and transmission lines shall be designed using best practices for minimizing visual impact and shall be subject to oversight and approval by the Stakeholder Board;" Initial Findings, Exhibit A, p. 49, Condition No. 2 j.

**The Board further finds** that Section 3 of the Development Agreement provides:

**"Section 3. Additional Visual Mitigation Measures.**

Developer shall utilize best industry practices to implement visual mitigation surrounding the water pumping stations, pipelines, penstocks, solar array, substation, and transmission lines as prescribed by federal permitting rules set forth by the Bureau of Reclamation and FERC. Wind turbines do not qualify for visual mitigation. Developer shall provide visual elevations of the water pumping and diversion lines, solar array, substation and transmission lines to the Board, for the County's review, demonstrating visual mitigation efforts and options prior to construction of these portions of the Project. The Board acknowledges and agrees that there shall be no further oversight by the Board on any additional visual mitigation measures beyond what is established, conditioned, or required under any federal or state procedures or permits."

**The Board further finds** that the Development Agreement changes Condition No. 2 j, requiring the Applicant to utilize best industry practices for visual mitigation as prescribed by federal permitting rules, review by the Board instead of the oversight and approval by the stakeholder board and to clarify that wind towers are not part of the visual mitigation.

**The Board further finds** that this modification of Condition No. 2 j by Section 3 of the Development Agreement is permitted under Condition No. 2 o, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public meetings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

**Condition No. 2 k.**

**The Board finds**, and restates herein for convenience, Condition No. 2 k of the conditions pertaining to the Development Agreement to be:

"k. maintain communications with IDFG and USFWS, as with the other agencies involved, to sustain fish and wildlife habitats necessary to provide quality fish and wildlife recreation;" Initial Findings, Exhibit A, p. 49, Condition No. 2 k.

**The Board further finds** that under Sections 2.4, 2.5 and 2.7 of the Development Agreement, the Applicant shall communicate with the Idaho Department of Fish and Game regarding fish and wildlife habitats and other matters.

**The Board further finds** that under Section 2.7 of the Development Agreement, the Applicant shall communicate with the United States Federal Wildlife Service regarding fish and wildlife habitats.

**The Board further finds** that Sections 2.4, 2.5 and 2.7 of the Development Agreement substantially complies with Condition No. 2 k and any modification of Condition No. 2 k is permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and

the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

**Condition No. 2 l.**

**The Board finds**, and restates herein for convenience, Condition No. 2 l of the conditions pertaining to the Development Agreement to be:

"l. establishment of permissible noise limitations for each aspect of the project under the Applications; Initial Findings, Exhibit A, p. 49, Condition No. 2 l.

**The Board further finds** that Section 2.8 of the Development Agreement complies with Condition No. 2 l by setting forth the following noise standards: "[n]oise Standards shall comply with the Zoning Ordinance. No Noise Standard shall be more restrictive than the standards set forth in the Zoning Ordinance. The Noise Standards do not apply to any component constructed exclusively on federal lands or any component, facility, or technology that require approvals by the federal agencies overseeing the federal process for the Project."

**Condition No. 2 m.**

**The Board finds**, and restates herein for convenience, Condition No. 2 m of the conditions pertaining to the Development Agreement to be:

"m. the Scholarship Fund;" Initial Findings, Exhibit A, p. 49, Condition No. 2 m.

**The Board further finds** that this Condition No. 2 m is removed by Section 2.12.1. of the Development Agreement and the Scholarship Fund is included as a contract provision under Section 2.10 of the Development Agreement.

**The Board further finds** that such removal is permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

**Condition No. 2 n.**

**The Board finds**, and restates herein for convenience, Condition No. 2 n of the conditions pertaining to the Development Agreement to be:

"n. review of the proposed or anticipated coverage of the water transmission lines from the Anderson Ranch Reservoir to the Property storage reservoir; and" Initial Findings, Exhibit A, p. 49, Condition No. 2 n.

**The Board further finds** that Section 2.9 of the Development Agreement complies with Condition No. 2 n by providing that "[p]rior to the issuance of any building permit for the hydro electrical generation portion of the Project, Developer will submit to the Board for review the proposed water transmission lines from the Anderson Ranch Reservoir to the Reservoir, which submission shall include any proposed visual and audio screening."

**Condition No. 2 o.**

**The Board finds**, and restates herein for convenience, Condition No. 2 o of the conditions pertaining to the Development Agreement to be:

"o. Incorporation of the Conditions as may be expanded and refined by the Board and the Applicant." Initial Findings, Exhibit A, p. 49, Condition No. 2 o.

**The Board further finds** that certain Conditions under Condition No. 2 have been revised or modified, as stated above, as permitted under Condition No. 2 o, and to the extent, any changes or modifications may be beyond the scope of Condition No. 2 o, such changes shall be deemed approved by the Board as a modification of the Conditions as any such changes were made pursuant to four public meetings following notice and comment by the public.

**6. The Development Agreement complies with the other Conditions and any changes to the other Conditions are approved as changes to the Initial Findings, the Approvals and the Conditions.**

**The Board finds** that Condition No. 1 has been modified to extend the time the Applicant has to complete the Project from four to five years with the retention of the extension period of two years and such other changes to Condition No. 1 as further set forth in Section 1.1 of the Development Agreement.

**The Board further finds** that Condition No. 1 as modified by the Development Agreement now reads as follows:

"1. The Conditional Use Permits shall be valid for a period of time for five (5) years from February 10, 2017 and may be extended for one 2-year period upon application to the Elmore County Land Use and Building Department ("Department"). The approval of an application for extension shall not be unreasonably withheld and is in the discretion of the Commission, or Board if appealed thereto, provided the Applicant has demonstrated significant progress in obtaining federal permits and it is likely that the Applicant will be in a position to commence regular operations within the two-year extension period. Provided all improvements are completed and the use commences within this timeframe, the CUPs, subject to compliance with the Conditions and this Agreement, shall continue in effect for such time as the Project is in regular operation. In the event that improvements are completed, and use commences within the timeframes provided for some but not all of the CUPs, the Approval for those CUPs that are not built out and operated within the foregoing time frames may be terminated as to those CUPs." Development Agreement, Section 1.1.

**The Board further finds** that Conditions No. 2 m, 30 and 31 have been deleted as Conditions and have been added as contract provisions under Sections 2.10 and 2.11 of the Development Agreement.

**The Board further finds** that Condition No. 15 has been modified to provide that it applies to any single conditional use permit construction and that that the wildlife mitigation plan/environmental impact statement is subject to the review and approval by the Board and not the Commission. Development Agreement, Section 2.12.3. and Condition No. 15.

**The Board further finds** that Condition No. 25 has been deleted as a Condition as the Applicant requested the flexibility of entering into power agreements at such time as it desires to deliver power. Record, page 10017.

**The Board further finds** that Condition No. 24 has been modified to read as "Approval of the Interconnection Application" with the deletion of "by the Bonneville Power Administration," permitting the Applicant greater flexibility to utilize other power grid opportunities. Record, page 10017.

**The Board further finds** that Condition No. 29 has been modified and amended by Section 9 of the Development Agreement regarding the commencement of the annual review and that, with Board approval, the Applicant may seek modification or waiver of the annual review requirement after five years. Development Agreement, Section 9 and Condition No. 29.

**The Board further finds** that Section 13.3 of the Development Agreement adds a new condition to the Approvals, permitting termination rights of the CUPs in certain circumstances as set forth in Section 13.3 of the Development Agreement.

**The Board further finds** that such changes to Conditions as described above are permitted under Condition No. 2 o of the Conditions, or as an amendment to the Initial Findings, the Approvals and the Conditions, as the Board held four public hearings, following notice and the opportunity to be heard, permitting public input and comment regarding any changes to the Conditions and the Development Agreement.

#### **7. Project Phasing.**

**The Board finds** that in the Initial Findings at 5B on page 6 that it adopted the Commission's findings pertaining to the Application:

**"B. The Commission finds** that five (5) separate applications, each for a conditional use permit are required. **The Commission finds** that based on testimony from the Applicant, that all five (5) applications are dependent upon each other and cannot exist separately." Initial Findings, p. 6 from the Commission Findings, page 3.

**The Board finds** that while it adopted the forgoing finding, based upon subsequent comments from the Applicant, that the success of the Project is enhanced by allowing the CUPs for solar, wind and pump storage hydro to be separated and developed in phases. Record, page 611.

**The Board finds** that in the Development Agreement the phasing of the Project is permitted. Development Agreement, Sections 1.1, 2.2, 2.12.3, 4, 7, 8.1.

**The Board finds** that the change of the Project to permit phasing of the CUPs is approved by the Board as a modification or amendment of the Initial Findings and the Approvals as any such changes were made pursuant to four public meetings following notice and comment by the public.

#### **8. Changes to Conditions or Initial Findings.**

**The Board finds** that to the extent any changes, deletions or modifications of the Conditions, Approvals or Initial Findings occurred and are beyond the scope of Condition No. 2 o, such changes, deletions and modifications shall be deemed approved by this Board as

amendments to the Initial Findings, Approvals and Conditions, as any such changes were pursuant to four public meetings following notice and the opportunity for comment by the public.

**9. Idaho Code § 67-6519(4)(c) what actions, if any, that the Applicant could have taken to obtain approval?**

**The Board finds** that it approved the Development Agreement on February 9, 2018, and as a result the changes to the Approvals and Conditions as set forth, and for the reasons stated, herein.

## **CONCLUSIONS OF LAW**

If any of the conclusions of law are deemed to be findings of fact, they are incorporated in the Findings of Fact section.

1. The Board concludes that the public hearing notice and hearing requirements of the Zoning Ordinance have been met.
2. The Board concludes that the public hearing notice and hearing requirements of LLUPA have been met.
3. The Board concludes that the Development Agreement is not a development agreement subject to Idaho Code §67-6511A, since the Development Agreement was required by the County as a condition to a conditional use permit and not as a part of a rezone.
4. The Board concludes that the Development Agreement is not a development agreement under Section 6-29-1 of the Zoning Ordinance, since the Development Agreement was required by the County as a condition to a conditional use permit and not a part of a rezone and is therefore not an Idaho Code §67-6511A development agreement.
5. The Board concludes that the changes, deletions or modifications of the Conditions, Approvals or Initial Findings under the Development Agreement are permitted under Condition No. 2 o of the Conditions, and any modifications beyond those permitted by Condition No. 2 o are hereby approved by the Board as modifications of the Initial Findings, the Approvals or Conditions, following four public meetings, with notice and the opportunity to be heard by the public.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusion of Law and the Record, the Board hereby **approves** the foregoing changes to the Initial Findings, the CUPs, the Approvals and Conditions.

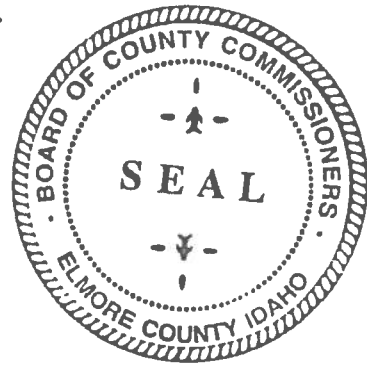
Dated this 16th day of March 2018.

**ELMORE COUNTY BOARD OF COMMISSIONERS:**

By: Wesley R. Wootan  
Wesley R. Wootan, Chairman

By: [Signature]  
Franklin L. Corbus, Commissioner

By: [recusal]  
Albert Hofer, Commissioner



Attest:

By: Barbara Steele  
Barbara Steele, Clerk

**NOTICE PURSUANT TO ZONING ORDINANCE SECTION 6-3-2 J**

A decision made by the Elmore County Board of Commissioners (the "Board") may be reconsidered by the Board provided the reconsideration application is complete and reconsideration fee is submitted to the Land Use and Building Department within ten (10) calendar days of Board's action. The reconsideration may be granted upon a determination of a "good cause." Questions concerning reconsideration or deadlines should be asked of the Elmore County Land Use and Building Department.

**NOTICE PURSUANT TO IDAHO CODE § 67-6519(4)(C)**

The Applicant shall have the right to request a regulatory taking analysis pursuant to Idaho Code § 67-8003. An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by Idaho Code title 67, ch. 52.