

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

FIRST REQUEST FOR RECONSIDERATION – S BAR RANCH: 2-16-18

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 “**Approval**”) five conditional use permit applications (“**Applications**”) 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**”). The conditional use permits approved in the Initial Findings shall be individually, a “**CUP**” and collectively the “**CUPs**.” One of those Conditions 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 Development Agreement, and following public hearings on the matter, the Board approved certain changes to the Approval and the Conditions. The Board issued Findings of Fact, Conclusions of Law and Order – CUP Amendments, on March 16, 2018 (“**CUP Amendment Findings**”) approving those changes to the Approval and Conditions. The record for the Approval, the Initial Findings, the CUP Amendment Findings, the CUPs, the Development Agreement and as augmented by the record for this Matter shall be referred to herein as the “**Record**.” All capitalized words used and not defined herein shall have the meanings given to them in the Initial Findings.

Request for Reconsideration:

On February 16, 2018, **S Bar Ranch, LLC** (“**S Bar Ranch**”), filed a “**Request for Reconsideration**” of the Approval and the Development Agreement (the “**Matter**”) with the Elmore County Land Use and Building Department (the “**Department**”). The Department presented it to the Board, and the Board reviewed the request on March 2, 2018 and set the Matter for a public hearing on March 23, 2018. These Findings of Fact, Conclusions of Law and Order Request for Reconsideration – S Bar Ranch (“**Reconsideration Findings**”) are made and pertain to the Matter. The Board conducted a public hearing following published notice of the hearing on the Matter, and accepted written and verbal testimony. Following the hearing, the Board closed the Record and took the Matter under advisement. The Board conducted deliberations on April 6, 2018 and issued these Reconsideration Findings.

Findings of Fact:

If any of these Reconsideration 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 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 Matter:

- 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.
- C. On February 9, 2018, pursuant to a public hearing with notice, the Board approved, executed, along with the Applicant and the Landowners, and recorded the Development Agreement. The Development Agreement was approved by 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.
- D. The Development Agreement contained certain changes to the Approval and the Conditions as further set forth in the Development Agreement.
- E. On February 16, 2018, S Bar Ranch filed the Request for Reconsideration of the Approval and the Development Agreement with the Department, and paid the required fees.
- F. The Department presented the Matter to the Board on March 2, 2018, and the Board agreed to hear the Matter and set the hearing for March 23, 2018.
- G. At the reconsideration hearing on March 23, 2018, a statement was made that notice was posted on the Property for the hearings on the Development Agreement and that statement was incorrect.
- H. A draft of the Development Agreement was submitted to the Elmore County Planning and Zoning Commission (the "**Commission**") for its review and recommendation on September 20, 2017.
- I. 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.
- J. 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 Approval.
- K. 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 4th and 11th, 2017, and notice was given to all agencies and property owners within one mile of the Property.
- L. 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.

- M. 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.
- N. 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 within one mile of the Property and agencies on December 4, 2017. Copies of the then-current draft of the Development Agreement were distributed and/or available for all in attendance at the hearing.
- O. 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 the property owners within one mile of the Property and agencies on January 8, 2018. Copies of the then-current draft of the Development Agreement were distributed and/or available for all in attendance at the hearing.
- P. 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 then-current draft of the Development Agreement were distributed and/or available for all in attendance at the hearing.
- Q. The Department published notice of the hearing for the Matter on March 7, 2018 and mailed notices to the property owners within one mile of the project and the agencies on March 8, 2018.
- R. The Board on March 16, 2018 approved and issued the CUP Amendment Findings, approving the changes to the Approval and the Conditions.
- S. The Board conducted a hearing on the Matter on March 23, 2018, accepted written and verbal testimony pertaining to the Matter.
- T. On April 6, 2018, the Board deliberated the Matter and issued these Reconsideration 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. Issues Raised for Reconsideration.

A. S Bar Ranch's Standing to File Request for Reconsideration.

A.1. The Board finds that S Bar Ranch's first issue for reconsideration is whether it is an affected party under Idaho Code § 67-6521(1)(a)(i). Request for Reconsideration, page 1.

The Board finds that Idaho Code § 67-6521(1)(a)(i) provides: "an affected person shall mean one having a bona fide interest in real property which may be adversely affected by: (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter;..."

The Board finds that S Bar Ranch owns property adjacent to the location of the proposed wind farm for which CUP-2015-06 was approved. Request for Reconsideration, page 1.

The Board finds that S Bar Ranch is an affected party under Idaho Code § 67-6521(l)(a)(i) for CUP-2015-06.

A.2. The Board finds that S Bar Ranch claims as a related issue that its interest also extends to the other four CUPs (CUP-2015-03, CUP-2015-04, CUP-2015-05 and CUP-2015-07) because the Board found that the five CUPs "are dependent upon each other and cannot exist separately" in its Initial Findings. Initial Findings, page 6.

The Board finds that S Bar Ranch did not present any evidence of how it might be adversely affected by CUP-2015-03, CUP-2015-04, CUP-2015-05 and CUP-2015-07.

The Board finds that it separated the CUPs, to enhance the success of the project, to stand alone conditional use permits in its CUP Amendment Findings. CUP Amendment Findings, page 12.

The Board finds that S Bar Ranch is not an affected party under Idaho Code § 67-6521(l)(a)(i) for CUP-2015-03, CUP-2015-04, CUP-2015-05 and CUP-2015-07.

B. Timeliness of Filing of the Request for Reconsideration.

B.1. The Board finds that S Bar Ranch's next issue for reconsideration is whether S Bar Ranch filed its Request for Reconsideration in accordance with Idaho Code § 67-6535(2)(b). Request for Reconsideration, page 1.

The Board finds that Idaho Code § 67-6535(2) requires that approvals or denials of applications authorized under LLUPA, including applications for special or conditional use permits under Idaho Code § 67-6512, be in a writing "that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record."

The Board finds that under Idaho Code § 67-6535(2)(b), an affected person objecting to the Board's compliance with the writing required under Idaho Code § 67-6535(2) must

“seek reconsideration of the final decision within fourteen (14) days” before it may seek judicial review.

The Board finds that S Bar Ranch filed its Request for Reconsideration on February 16, 2018. Record, page 9904.

B.1.1. Initial Findings and Approval.

The Board finds that it approved the Initial Findings on February 10, 2017 as a final decision of the Board pertaining to the CUPs subject to the Conditions. Initial Findings, page 46.

The Board finds that the Conditions placed on the CUPs were in accordance with Idaho Code § 67-6512(d), which provides: “upon the granting a special use permit, conditions may be attached to a special use permit”

The Board finds that, Idaho Code § 67-6512(d) required the Applications for the CUPs be granted in order for conditions to be placed on the CUPs. Failure to satisfy the conditions would result in revocation of the Board’s approval of the CUPs. Initial Findings, Condition No. 7.

The Board finds that S Bar Ranch’s time to seek reconsideration of the Approval expired on February 24, 2017 under Idaho Code § 67-6535(2)(b) and February 20, 2017 under Elmore County Code § 6-3-2.F. and therefore its Request for Reconsideration of the Approval was not made timely.

B.1.2. Development Agreement.

The Board finds that it approved and executed of the Development Agreement on February 9, 2018. Record, page 9867.

The Board finds that the Development Agreement was recorded on February 9, 2018. Record, page 9867.

The Board finds that the Development Agreement as a Condition of the Approval, was not reviewable, as it is not an approval or denial of an application under Idaho Code § 67-6535, or a decision to affirm, reverse, or modify a decision of the Commission under Zoning Ordinance § 6-3-2.I & J, except to the extent of the amendment of the Approval and the Conditions.

B.1.3. Approval and Conditions Amendments.

The Board finds that it approved amendments to the Approval and the Conditions as part of its approval and execution of the Development Agreement on February 9, 2018. CUP Amendment Findings, page 15.

The Board finds that it approved the CUP Amendment Findings on March 16, 2018 setting forth, in writing, the basis and standards upon which is based its decision to approve amendments to the Approval and the Conditions. CUP Amendment Findings, page 15.

The Board finds that the Idaho Supreme Court in *Krempasky v. Nez Perce County Planning and Zoning*, 245 P.3d 983, 990 (Idaho 2010), Idaho Code § 67-6535(2) does not mandate when Board must issue its written statement.

The Board finds that the Idaho Supreme Court has held, in *White v. Bannock County Commissioners*, 80 P.3d 332 (Idaho 2003), that the time period for an aggrieved landowner to appeal a decision begins to run on the date of the written findings and order, not the date the decision was initially announced in a conditional use matter.

The Board finds that the Board's approval of the Development Agreement had the effect of announcing its approval of the amendments to the Approval and Conditions, but that the Board, did not amend the Approval and the Conditions until March 16, 2018, when it adopted the CUP Amendment Findings.

The Board finds that the CUP Amendment Findings comply with Idaho Code § 67-6535(2), setting forth the basis for which Approval and Conditions amendments complied with applicable law and the factual information in the Record.

The Board finds that while the Request for Reconsideration was made on February 16, 2018 before the Board's issuance of the CUP Amendment Findings on March 16, 2018, the Board considered the Request for Reconsideration as timely and held the hearing on March 23, 2018¹.

The Board finds that even though the Request for Reconsideration was filed before the Board's issuance of the CUP Amendment Findings, the Board considered the Request for Reconsideration for amendment to the Approval and the Conditions, timely filed under Idaho Code § 67-6535(2).

B.2. The Board finds that S Bar Ranch's next issue for reconsideration is whether S Bar Ranch filed its Request for Reconsideration in accordance with Zoning Ordinance § 6-3-2. (Request for Reconsideration, pages 1-2.

The Board finds at § 6-3-2.J of the Zoning Ordinance, aggrieved party may be permitted to seek reconsideration of the Board's decision if such request is made within 10 days of the final action of the governing board under Zoning Ordinance as generally shown in the Zoning Ordinance at § 6-3-2.F&K.

The Board finds that the Request for Reconsideration was made with the Department on February 16, 2018, prior to this issuance of the CUP Amendment Findings.

The Board finds that under the Zoning Ordinance, the Request for Reconsideration, as discussed above, to the extent it applies to an amendment of the Approval and the Conditions, was timely filed.

The Board finds that under the Zoning Ordinance, the Request for Reconsideration, as discussed above, to the extent it pertains to the Initial Findings is not timely filed.

¹ While not a part of the record for these Reconsideration Findings and not a part of these Reconsideration Findings, the County has received a second request for consideration from S. Bar Ranch on March 26, 2018.

C. Reconsideration Issues Properly Before the Board.

C.1. The Board finds that the next issue of S Bar Ranch is whether the Initial Findings are subject to reconsideration, as they are not final until satisfaction of Condition No. 2, which requires the County, the Applicant and the Landowners enter into a development agreement. Request for Reconsideration, page 2.

C.2. The Board finds that another issue of S Bar Ranch is that Condition No. 2 was satisfied on February 9, 2018, when the Development Agreement was signed, making the Initial Findings and Development Agreement final at that time and therefore subject to a Request for Reconsideration. Request for Reconsideration, page 2.

C.3. The Board finds that in the alternative to the issue above in C.2., S Bar Ranch claims the Development Agreement is not final until the requirements for the hydroelectric generating project as set forth in Section 2.2 of the Development Agreement are satisfied on or before December 31, 2018. Request for Reconsideration, pages 2 & 4 and Development Agreement Section 2.2.

The Board finds that Initial Findings were a final decision of the Board when issued on February 10, 2017.

The Board finds that the effect of the Conditions was that the Board could revoke its approval if the Conditions were not satisfied. Initial Findings, Condition No. 7.

The Board finds that Idaho Code § 67-6535(2) permits S Bar Ranch to object that the amendments to the Approval and Conditions fail to comply with applicable law and the Record.

The Board finds that Idaho Code § 67-6535(2) does not give S Bar Ranch the right to object to the terms of the Development Agreement beyond those which amend the Approval and the Conditions.

The Board finds that Zoning Ordinance § 6-3-2.J permits S Bar Ranch to ask for reconsideration of the Board's decision to amend the Approval and Conditions.

The Board finds that the Zoning Ordinance, Title 6, Chapter 3 does not give S Bar Ranch the right to object to the terms of the Development Agreement beyond those which amend the Approval and the Conditions.

D. Alleged Idaho Code Violations.

D.1. Idaho Code § 67-6509.

The Board finds that the next issue S Bar Ranch raises is whether material modifications to the Applications proposed during the November 16 and 17, 2016 Board appeal hearing on the Applications violated Idaho Code § 67-6509 by failing to further coordinate with regulatory agencies and provide notice to the public of the materially modified Applications in advance of the hearing. Request for Reconsideration, page 3.

The Board finds that Idaho Code § 67-6509 governs the "adoption, amendment, or repeal of the [comprehensive zoning] plan," not applications for conditional use permits, which are governed by Idaho Code § 67-6512.

The Board finds that the incorporation by reference of Idaho Code § 67-6509 into Idaho Code § 67-6512 is limited to requiring the notice and hearing requirements of Idaho Code § 67-6509 be satisfied when a board adopts, amends, or repeals a zoning ordinance for the processing of conditional use permit applications.

The Board finds that while changes to the Applications were proposed during the November 16 and 17, 2016 Board appeal hearing, the public was given notice of the hearing, the public was permitted to provide written and verbal testimony concerning the matter and review changes to the site plan as proposed by the Applicant. Record, page 8056.

D.2. Idaho Code § 67-6511A.

The Board finds that S Bar Ranch claims that the County did not give proper public notice when it negotiated and approved the Development Agreement during the February 9, 2018 Board hearing and further claims that such actions violated Idaho Code § 67-6511A by failing to give public notice of the terms in advance of the hearing. Request for Reconsideration, page 5.

The Board finds that it determined in the CUP Amendment Findings, at pages 3 & 4, that the Development Agreement is not governed by Idaho Code § 67-6511A but the Development Agreement is an agreement between the parties as a condition to the approval of the conditional use permits.

The Board finds that it conducted four hearings on the Development Agreement, on October 20, 2017, December 22, 2017, January 26, 2018 and February 9, 2018; that on December 22, 2017, January 26, 2018 and February 9, 2018, the Department distributed copies of the working drafts of the Development Agreement to all those in attendance who wanted a copy. The site plan was attached to the working draft of the Development Agreement made available on December 22, 2017 and February 9, 2018. Representatives for S Bar Ranch attended the hearings on January 26, 2018 and February 9, 2018 and provided comments to the Development Agreement, many of which were implemented into the final Development Agreement. CUP Amendment Findings, pages 1 & 2, Record 8757-8796, 9493-9530 and 9823-9860.

The Board finds that in response to requests by S Bar Ranch, that the Department provided a copy of the then-current draft of the Development Agreement and the site plan on January 16, 2018 to representatives of S Bar Ranch. Record, page 9355.

D.3. Idaho Code § 67-6512.

D.3.1. The Board finds that S Bar Ranch claims that the failure to mail written notice to S Bar Ranch for the June 15, 2016 and July 13, 2016 hearings of the Commission violated Idaho Code § 67-6512 by failing to give S Bar Ranch the opportunity submit either written or verbal testimony at the hearings. Request for Reconsideration, page 3.

The Board finds that whether or not S Bar Ranch had received notice by the mail for the June 15, 2016 and July 13, 2016 hearings of the Commission, the hearing notice was published in the Mountain Home News on May 26, 2016 and posted on the Property on June 6, 2016. Record, page 6817, 6822, 6827, and 6838.

The Board further finds that S Bar Ranch did not suffer any harm because the Applications were denied 6-0 by the Commission and S Bar Ranch could not have provided further input which would have caused the Commission to deny the Applications. Initial Findings, page 3.

The Board further finds that S Bar Ranch was mailed notice of the Board hearings on the Applications, which were held on November 16 and 17, 2016, such notice was posted on the Property and published in the Mountain Home News. Record, page 7758.

The Board further finds that the public was permitted to submit verbal and written testimony concerning the Applications at the November 16 and 17, 2016 Board hearings. Record, page 7758.

The Board further finds that Idaho Code § 67-6535(3) requires a party appealing a final decision related to a conditional use permit application to “demonstrate[] actual harm or violation of fundamental rights.”

The Board finds that S Bar Ranch did not allege actual harm or violation of fundamental rights in the Request for Reconsideration.

The Board further finds that the Board held appeal hearings on November 16 and 17, 2016, on the Applications and such review by the Board is a *de novo* review pursuant to Zoning Ordinance §§ 6-3-2.H and 6-29-3.

D.3.2. The Board finds that S Bar Ranch’s next claim is that there was no additional notice prior to the Applicant’s modification of the Applications during the November 16 and 17, 2016 Board appeal hearing and that taking such additional evidence violated Idaho Code § 67-6512(e) by failing to give the agencies and public the opportunity to give their input. Request for Reconsideration, page 3.

The Board finds that Idaho Code § 67-6512(e) provides that: “[p]rior to granting a special use permit, studies may be required of the social, economic, fiscal, and environmental effects and any aviation hazard as defined in section 21-501(2), Idaho Code, of the proposed special use. A special use permit shall not be considered as establishing a binding precedent to grant other special use permits. A special use permit is not transferable from one (1) parcel of land to another.”

The Board further finds that Idaho Code § 67-6512(e) does not contain any public notice or hearing requirements or requirements related to agency review.

The Board further finds that by comparison, Idaho Code § 67-6509(b) provides: “Following consideration by the governing board, if the governing board makes a material change in the recommendation or alternative options contained in the recommendation by the commission concerning adoption, amendment or repeal of a plan, further notice and hearing shall be provided before the governing board adopts, amends or repeals the plan.”

The Board further finds that the requirements from Idaho Code Idaho Code § 67-6509(b) are not contained in Idaho Code § 67-6512(e) or any other part of Idaho Code § 67-6512.

E. Alleged Zoning Ordinance Violations.

E.1. Zoning Ordinance § 6-8-94A.7.

The Board finds that S Bar Ranch claims that one neighborhood meeting held by the Applicant pursuant to Zoning Ordinance § 6-4-3 was insufficient to satisfy the two public meetings requirement of Zoning Ordinance § 6-8-94.A.7. Request for Reconsideration, page 4.

The Board finds that Zoning Ordinance § 6-8-94.A.7 provides that: “[b]efore a zoning permit is granted, the applicant shall hold at least two (2) public meetings.” A zoning permit under the Zoning Ordinance is a building permit. Zoning Ordinance, § 6-2-1.

The Board finds that the Applicant did not violate of § 6-8-94.A.7 of the Zoning Ordinance as claimed by S Bar Ranch.

E.2. Zoning Ordinance § 6-29-3.B.

The Board finds that S Bar Ranch claims that the Director failed to forward a draft of the Development Agreement to the County Prosecuting Attorney in violation of Zoning Ordinance § 6-29-3.B. Request for Reconsideration, page 5.

The Board finds that the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance.

The Board finds that the Zoning Ordinance at § 6-29-3.B provides: “[t]he Director shall forward the draft development agreement to the Prosecuting Attorney of Elmore County for review.”

The Board finds that notwithstanding the fact the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance, since the contract civil attorney for the County, as an agent for the Prosecutor, was handling the negotiations for the County, it was unnecessary to submit the draft of the Development Agreement to the County Prosecutor prior to submission to the Commission.

E.3. Zoning Ordinance § 6-29-3.C.

The Board finds that S Bar Ranch claims that the Commission did not review the draft development agreement and make a recommendation in violation of Zoning Ordinance § 6-29-3.C. Request for Reconsideration, page 5.

The Board finds that the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance.

The Board finds that the Zoning Ordinance at § 6-29-3.B&C provides: “[t]he Commission shall not make a recommendation upon the draft development agreement prior to review by the prosecuting attorney. C. The Commission shall review the development agreement and make a recommendation upon the draft development agreement, which has been initially reviewed by the Director, and the Prosecuting Attorney of Elmore County, with the attached conditions of approval as deemed necessary.”

The Board finds that notwithstanding the fact the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance, a draft of

the Development Agreement was submitted to the Commission on or about September 20, 2017. Record, page 8588.

The Board further finds that notwithstanding the fact the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance, the Commission reviewed the draft of the Development Agreement and issued the following response: "The Planning and Zoning Commission has reviewed the Development Agreement from Cat Creek Energy, LLC and feels it is unable to make any specific comments and recommends the Board carefully review the Development Agreement before approving it." Memo to the Board from the Commission dated September 20, 2017, Record, page 9973.

E.4. Zoning Ordinance § 6-29-3.D.

The Board finds that S Bar Ranch claims that the Board's failure to have the Application executed the Development prior to the Board action on the Development Agreement at February 9, 2018 hearing violated the Zoning Ordinance at § 6-29-3.D. Request for Reconsideration, page 5.

The Board finds that the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance.

The Board finds that "D. The applicant or owner shall sign the development agreement prior to the Board action on the final development agreement." Zoning Ordinance, § 6-29-3.D.

The Board finds that notwithstanding the fact the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance, at the hearing on February 9, 2018, the Applicant, the Landowners and the Board executed the Development Agreement and that as such substantially complied with the above requirement.

E.5. Zoning Ordinance § 6-29-5.

The Board finds that S Bar Ranch claims that the Board's failure to include findings in the Development Agreement violated the Zoning Ordinance at § 6-29-5. Request for Reconsideration, Page 6.

The Board finds that the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance.

The Board finds that notwithstanding the fact the Development Agreement is not a development agreement under Title 6, Chapter 29 of the Zoning Ordinance, the Board issued finds of fact, conclusions of law and order to those changes to the Initial Findings and the Conditions in the CUP Amendment Findings.

E.2.6. Zoning Ordinance, Title 6, Chapter 29.

The Board finds that notwithstanding that the Development Agreement is not an Idaho Code § 67-6511A Development Agreement or a Development Agreement under Title 6, Chapter 29 of the Zoning Ordinance, the Development Agreement substantially complies with the regulations of Title 6, Chapter 29 of the Zoning Ordinance, as follows:

The Board finds that the Zoning Ordinance provides that “[a]n application and fees, as set forth in this Title, shall be submitted to the Director on forms provided by the [Department].” Zoning Ordinance, § 6-29-3.A.

The Board finds that an application and the requested fee were presented to the Director of the Department on September 18, 2017, in the amount of a \$500.00 fee and a \$500.00 deposit. Record, page 9971.

The Board finds that the Zoning Ordinance provides that “[t]he application shall include the following materials:

1. An affidavit by the property owner(s) agreeing to the submission of the development agreement; and” Zoning Ordinance, §§ 6-29-3.A and 6-29-3.A.1.

The Board finds that an affidavit by the property owners was not submitted as the development agreement requirement came up as part of the approval of the CUPs and that an affidavit was unnecessary due to the fact that the Development Agreement was required as a Condition of the approval for the CUPs.

The Board finds that the Zoning Ordinance provides that “2. A listing of any proposed modifications to the standards imposed by other regulations of this Title; and ...” Zoning Ordinance, § 6-29-3.A.2.

The Board finds that modifications to the standard imposed by other regulations of this Title were submitted in the Applications. Record, page 601.

The Board finds that the Zoning Ordinance provides that “4. A project description of the uses proposed for the property subject to the development agreement describing the following:

- a. The specific uses proposed for the property; and
- b. The form, and name if available, of the organization proposed to own and maintain any dedicated open space; and
- c. The proposed systems for water supply, sewage systems, and storm water management; and
- d. The substance of the covenants, grants, easements, or other restrictions proposed to be imposed upon the use of property and structures including any proposed easements for public utilities; and
- e. A project schedule and phasing plan showing the proposed times when all other applications subject to the development agreement are intended to be filed, or in the case of a plan which provides for a development over a period of years, the periods within which application for final approval of each phase is intended to be filed; and
- f. Proposed financing of necessary public facilities with or without subsequent reimbursement over time; and
- g. Other terms and conditions related to the proposed project; and” (sic) Zoning Ordinance, § 6-29-3.A.4.

The Board finds that the project descriptions were not necessary as the same were included in the Applications. Record, page 601.

The Board finds that the Zoning Ordinance provides that “5. A draft development agreement prepared by the applicant in conformance with a model agreement provided by the Director.” Zoning Ordinance, § 6-29-3.A.5.

The Board finds that while there is no record of the County delivering a copy of the development agreement form to the Applicant, there is evidence that the Applicant responded with a reply draft and that the parties successfully negotiated the Development Agreement.

The Board finds that the Zoning Ordinance provides that “B. The Director shall forward the draft development agreement to the Prosecuting Attorney of Elmore County for review. The Commission shall not make a recommendation upon the draft development agreement prior to review by the prosecuting attorney.” Zoning Ordinance, § 6-29-3.B.

The Board finds that since the contract civil attorney for the County, as an agent for the Prosecutor, was handling the negotiations for the County, it was unnecessary to submit the draft of the Development Agreement to the County Prosecutor prior to submission to the Commission.

The Board finds that the Zoning Ordinance provides that “C. The Commission shall review the development agreement and make a recommendation upon the draft development agreement, which has been initially reviewed by the Director, and the Prosecuting Attorney of Elmore County, with the attached conditions of approval as deemed necessary. Zoning Ordinance, § 6-29-3.C.

The Board finds that a draft of the Development Agreement was submitted to the Commission on or about September 20, 2017. Record, page 8588.

The Board further finds that the Commission reviewed the draft of the Development Agreement and issued the following response: “The Planning and Zoning Commission has reviewed the Development Agreement from Cat Creek Energy, LLC and feels it is unable to make any specific comments and recommends the Board carefully review the Development Agreement before approving it.” Memo to the Board from the Commission dated September 20, 2017, Record, page 9973.

The Board finds that the Zoning Ordinance provides that “D. The applicant or owner shall sign the development agreement prior to the Board action on the final development agreement.” Zoning Ordinance, § 6-29-3.D.

The Board finds that at the hearing on February 9, 2018, the Applicant, the Landowners and the Board executed the Development Agreement and that as such substantially complied with the above requirement.

The Board finds that the Zoning Ordinance provides that “E. Upon approval by the Board, the development agreement shall be recorded in the Elmore County recorder's office; ...” Zoning Ordinance, § 6-29-3.F.

The Board finds that at the County Clerk recorded the Development Agreement following its execution on February 9, 2018 in the land records of Elmore County.

The Board finds that the Zoning Ordinance provides that “A. The Board is hereby authorized to adopt, by resolution, rules governing the creation, form, recording,

modification, enforcement, and termination of Development Agreements. Zoning Ordinance, § 6-29-4.A.

The Board finds that the Board's rules regarding development agreements are contained in Title 6, Chapter 29 of the Zoning Ordinance.

The Board finds that the Zoning Ordinance provides that "B. The allowed uses, densities and standards shall be those in effect at the time the development agreement is effective. ..." Zoning Ordinance, § 6-29-4.B.

The Board finds that the Zoning Ordinance shall be the standard for allowed uses and densities.

The Board finds that the Zoning Ordinance provides that "C. A development agreement shall not prevent the Board, in subsequent actions applicable to the property, from adopting new ordinances, resolutions, and regulations that conflict with those ordinances, resolutions and regulations in effect at the time the agreement is made, except that any subsequent action by the Board shall not prevent the development of the property as set forth in the approved development agreement." Zoning Ordinance, § 6-29-4.C.

The Board finds that the Development Agreement provides in Section 1.2: "if the County adopts new ordinances, resolutions, rules or regulations that conflict with, alter, or amend the ordinances, resolutions, rules or regulations in effect at the time the CUPs were approved on February 10, 2017, such actions by the Board shall not prevent Developer from its right to develop and complete the Project as set forth in this Agreement."

The Board finds that the Zoning Ordinance provides that "D. The Board may suspend the issuance of any permits after a noticed public hearing if it finds that a clear and imminent danger to the public health, safety, or welfare requires the suspension or as otherwise directed by this Title." Zoning Ordinance, § 6-29-4.D.

The Board finds that the Development Agreement provides in Section 4 that "[a]ll development of the Project shall be constructed, processed, and approved in accordance with the Zoning Ordinance and federal and state laws as described in this Agreement."

The Board further finds that the Development Agreement provides in Section 5.3 that "[s]hould the Board determine Developer to be in default or partial default, the County, at its option, may institute all remedies available at law or equity; modify, in whole or in part, the permit, specific plan, or amend the Conditions; and/or terminate the Agreement and the Approval, all as the Board may determine in the exercise of its discretion and subject to Idaho law."

The Board further finds that the Development Agreement provides in Section 5.7.4 that "[s]hould a default and termination occur after portions of building permits have been issued for a portion of the Project and such work under the issued building permit has commenced, beyond grading, the Developer or Landowners shall be permitted to complete such work, so long as they otherwise comply with this Agreement, the Zoning Ordinance, federal and state law, and the Board may not terminate this Agreement as to those developed sections that comply with this Agreement."

The Board finds that the Zoning Ordinance provides that “E. In the event that State or Federal laws or regulations, enacted after a development agreement has been entered into, prevent or preclude compliance with one or more regulations of the development agreement, such agreement may be amended or terminated pursuant to this Chapter, as may be necessary to comply with the new State or Federal laws or regulations. Zoning Ordinance, § 6-29-4.E.

The Board finds that the Development Agreement provides in Section 1.5: “This Agreement shall not preclude the application of any law that is specifically mandated and required by changes in state or federal laws or regulations applicable to the Project. In the event such law prevents or precludes compliance with one or more provisions of the Conditions or this Agreement, excluding the Condition that the Project must be substantially complete and operational by that date set forth in the Conditions or this Agreement, the County and Developer shall, following notice and pursuant to a public hearing, meet and confer to determine how the provisions of this Agreement and/or Conditions would need to be modified, extended, or suspended in order to comply with the law and shall prepare and process the necessary amendment or amendments to this Agreement. If no agreement is reached, and federal or state law do not otherwise control, the Board may elect to pursue remedies under the default provisions of this Agreement. In the event federal and state laws in force on the Effective Date are in conflict with the Conditions or this Agreement, the federal and state laws shall control.”

The Board finds that the Zoning Ordinance provides that: “1. That the proposed development agreement complies with the regulations of this Chapter.” Zoning Ordinance, § 6-29-5.

As restated from above, **the Board finds** that notwithstanding that the Development Agreement is not an Idaho Code § 67-6511A Development Agreement or a Development Agreement under Title 6, Chapter 29 of the Zoning Ordinance, the Development Agreement substantially complies with the regulations of Title 6, Chapter 29 of the Zoning Ordinance.

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 it conducted one public hearing, following notice mailed on March 8, 2018 and published in the Mountain Home News on March 7, 2018, and heard any and all parties desiring to present verbal and written testimony regarding the Request for Reconsideration.

2. **The Board concludes** that S Bar Ranch is an affected party under Idaho Code § 67-6521(l)(a)(i) for CUP-2015-06.

3. **The Board concludes** that S Bar Ranch is not an affected party under Idaho Code § 67-6521(l)(a)(i) for CUP-2015-03, CUP-2015-04, CUP-2015-05 and CUP-2015-07.

4. **The Board concludes** that S Bar Ranch did not seek timely reconsideration of the Approval under the Initial Findings under Idaho Code § 67-6535(2).

5. **The Board concludes** that S Bar Ranch is not entitled to seek reconsideration of the Development Agreement, except to the extent that it contains amendments to the Approval and Conditions under Idaho Code § 67-6535(2).
6. **The Board concludes** that S Bar Ranch was timely in its Request for Reconsideration of the amendments to the Approval and Conditions under Idaho Code § 67-6535(2).
7. **The Board concludes** that S Bar Ranch did not seek timely reconsideration of the Initial Findings under the Zoning Ordinance § 6-3-2.
8. **The Board concludes** that S Bar Ranch is not entitled to seek reconsideration of the Development Agreement, except to the extent that it contains amendments to the Approval and Conditions under the Zoning Ordinance, Title 6, Chapter 3.
9. **The Board concludes** that S Bar Ranch was timely in its Request for Reconsideration of the amendments to the Approval and Conditions under the Zoning Ordinance § 6-3-2.
10. **The Board concludes** that the Initial Findings were final on February 10, 2017 and the time has passed to seek reconsideration of the Initial Findings under Idaho Code § 67-6535(2)(b) and the Zoning Ordinance § 6-3-2.F.
11. **The Board concludes** that the Development Agreement, as a Condition, was final on February 9, 2018, and that to the extent that the Development Agreement contained amendments to the Approval and the Conditions, such amendments are reviewable under the Board's reconsideration under Idaho Code § 67-6535(2) and Zoning Ordinance § 6-3-2.J.
12. **The Board concludes** that changes to the Applications made during the November 16 and 17, 2016 hearings appeal hearings were not in violation of Idaho Code § 67-6509 or § 67-6512(e).
13. **The Board concludes** that the Development Agreement is not an agreement subject to Idaho Code § 67-6511A, but in the event it would be determined to apply, then the Board did not violate S Bar Ranch's public notice and hearing rights.
14. **The Board concludes** that the Development Agreement is not an agreement subject to the Zoning Ordinance under Title 6, Chapter 29, but in the event it would be determined to apply, then the Board did not violate S Bar Ranch's public notice and hearing rights.
15. **The Board concludes** that the failure by the Commission to give mailed notice to S Bar Ranch did not violate Idaho Code § 67-6512, as notice was provided by other means, S Bar Ranch did not incur actual harm or a violation of its fundamental rights, as the Commission unanimously denied the Applications and the Board held subsequent *de novo* hearing on the Approval.
16. **The Board concludes** that the Applicant did not violate of § 6-8-94.A.7 of the Zoning Ordinance.
17. **The Board concludes** that the County did not violate the Zoning Ordinance in connection with its approval of the Development Agreement.
18. **The Board concludes** that notwithstanding that the Development Agreement is not a Development Agreement under Title 6, Chapter 29 of the Zoning Ordinance, the Development

Agreement substantially complies with the regulations of Title 6, Chapter 29 of the Zoning Ordinance.

19. **The Board concludes** that S Bar Ranch's due process rights under LLUPA and the Zoning Ordinance were not violated in connection with the Approval, the Initial Findings, the Development Agreement or the CUP Amendment Findings.

ORDER

Based upon the foregoing Findings of Fact and Conclusion of Law and this Order, the Board hereby **denies** the Request for Reconsideration by S Bar Ranch.

Dated this 6th day of April 2018.

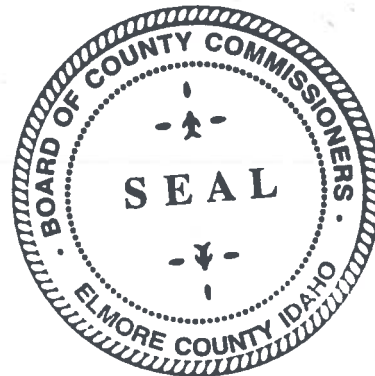
ELMORE COUNTY BOARD OF COMMISSIONERS:

By: 
Wesley R. Wooten, Chairman

By: 
Franklin L. Corbus, Commissioner

By: [recusal]
Albert Hofer, Commissioner

Attest:
By: 
Barbara Steele, Clerk



NOTICE PURSUANT TO ZONING ORDINANCE § 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.

NOTICES PURSUANT TO IDAHO CODE §§ 67-6512 and 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 § 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.