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Board of County Commissioner Staff Report

Meeting/Hearing Date: 04/19/2024

Date Report Completed: 04/17/2024

Agenda Item: Reconsideration of Board's Decision for Second Amendment to Cat Creek Energy LLC's Development Agreement

Case Number(s): Reconsideration of DA-2024-01 for CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP2015-06, and CUP 2015-07 ("CUPs")

Applicant/Developer: Cat Creek Energy, LLC ("CCE")

Elmore County Staff:

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Elmore County Consultants:

Dylan Lawrence, Consulting Counsel for Board with Varin Thomas
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EXECUTIVE SUMMARY:

The Elmore County Board of County Commissioners (the "Board") entered into a Development Agreement on February 9, 2018 ("Development Agreement") with Cat Creek Energy, LLC (the "Developer") relative to five Conditional Use Permits (CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07 collectively referred to as "CUPs"). As part of the Development Agreement, the parties agreed to defer negotiations and agreement on certain provisions related to water diversion and delivery to a later date, not to exceed December 31, 2018.

The Board approved the first amendment to the Development Agreement on December 14, 2018, amending Section 2.2, specifically related to water diversion and delivery, extending the deadline for negotiating terms for water storage and delivery to June 30, 2019.

As a result of pending litigations, CCE filed for an extension of approvals for the CUPs as envisioned in Section 1.1 of the Development Agreement on January 12, 2022, and requested that the fees for the application be waived by the Board. In that request, CCE specifically represented to the County: "Once the [SBar Ranch] appeal process is complete, **Cat Creek Energy, LLC is ready to commence**

development.” (Emphasis added). The Board held a duly noticed public hearing on February 4, 2022, and granted a two-year extension per Section 1.1 of the Development Agreement as well as waiver of fees on February 11, 2022.

After the completion of litigation, CCE proposed a second amendment to the Development Agreement, DA-2024-01, on December 1, 2023, requesting three major revisions to the Development Agreement:

1. Extend the validity of the CUPs in Section 1.1 within the Development Agreement, to reflect litigation delays;
2. Increase the water storage capacity of the new Cat Creek Reservoir in Section 2.2 from 100,000 acre-feet to 140,000 acre-feet of water; and
3. Amend the terms of the Development Agreement in connection with the water diversion and water delivery to Elmore County in Section 2.2.

The Board held a duly noticed public hearing on February 9, 2024, for DA-2024-01, and upon conclusion of the public hearing, the Board continued the public hearing to February 16, 2024, and asked staff to provide a detailed timeframe breakdown of the prior extensions, litigation stay, and development delays related to the Development Agreement and how it relates to the requested 5-year extension period. On February 16, 2024, the Board held the continued public hearing and ordered the following for DA-2024-01 (“February 2024 Decision”, Exhibit 10):

1. Amend Condition No. 1 of Section 1.1 of the Development Agreement in the following manner:
“The Conditional Use Permits shall be valid until October 17, 2026. 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 timeframes may be terminated as to those CUPs.”
2. Allow CCE to withdraw the proposal for increasing water storage capacity of the proposed Cat Creek Reservoir; and
3. Deny the proposed revised Section 2.2 and keep the existing language of Section 2.2 of the Development Agreement for CUPs.

On February 27, 2024, CCE filed for a reconsideration (“Request for Reconsideration” Exhibit 1) of this decision based on the following:

1. CCE alleges that the first condition of the Board’s February 2024 Decision should be reconsidered because the Board allegedly did not correctly calculate the timeline and the delays caused by litigation. i.e., an additional 240 days (approximately 8 months) from the extension already approved by the Board. (For context, the CUPs were initially approved by the Board on February 10, 2017. The extension to October 17, 2026 provides CCE with a total development period of 9 years, 8 months, and 7 days (3,536 days total).
2. It appears CCE attempts to argue that the two-year extension provided by the the Board on February 4, 2022, was not an extension provided for by the plain

terms of Section 1.1 of the Development Agreement, and therefore CCE may request an additional extension under Section 1.1 of the Development Agreement for an additional two-year period.

3. CCE argues that Section 2.2 of the Development Agreement should be amended to extend the deadline therein to June 14, 2027.

APPLICABLE CODES:

The Development Agreement was not required pursuant to Idaho Code Section 67-6511A, but instead, as a condition of approval for CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP2015-06, and CUP 2015-07. In the SBar Ranch appeal, the district court held the Development Agreement constitutes amended CUPs.

The following outlines the procedure related to this reconsideration filed pursuant to Idaho Code 67-6535(2)(b) and Elmore County Code 7-3-12.

- On February 27, 2024, CCE submitted the reconsideration application to the Department along with required fees which was within 14 days of the Board signing their final decision on DA-2024-01 (Exhibit 1).
- The Director conferred with the Board at the public meeting on April 5, 2024, and the Board granted a reconsideration hearing to CCE on April 19, 2024, at 1:30pm.
- On April 3, 2024, and April 10, 2024, the Mountain Home News published a Notice of Public Hearing (Exhibit 2).
- On April 9, 2024, the Department notified affected agencies and properties within a 1-mile radius of the CUPs (Exhibit 3).
- On April 12, 2024, the site was posted at five (5) locations in and around the site to provide additional notifications to the neighboring properties (Exhibit 4).
- As of the writing of this staff report, the Department has received two (2) written comments (Exhibit 5a & 5b).

Pursuant to Elmore County Code 7-3-12, reconsideration before the Board “may be granted for good cause.” “Good cause.” is defined in Elmore County Code 7-3-12 as:

1. The party requesting reconsideration has relevant information; and
2. The relevant information was not previously presented and is in response to something brought up at the previous hearing; and
3. The information was not previously available.

In addition, Idaho Code 67-6535(2)(b) requires that a written request for reconsideration, “must identify specific deficiencies in the decision for which reconsideration is sought.” “Upon reconsideration, the decision may be affirmed, reversed or modified after compliance with applicable procedural standards.” *Id.*

STAFF COMMENTS:

As outlined above, CCE requests three changes to the February 2024 Decision by the Board. Staff reviews each request and the applicable standards below:

1. CCE does not present any relevant information not previously presented and not previously available that demonstrates a specific deficiency in the Board's decision to extend the validity of the CUPs and amend Section 1.1 of the Development Agreement to October 17, 2026.

- a. The Board's extension of the CUPS and Section 1.1 of the Development Agreement provides more time than was required under the terms of the Development Agreement or the Court ordered Stay.

Pursuant to the Board's February 2024 Decision, the Board requested that Department staff and consulting counsel provide a timeline outlining the previous extension granted, the litigation court ordered stay, and development progress ("Timeline of Events")(Exhibit 6). All scenarios under the Timeline of Events provide CCE a more generous extension timeline than is legally required.

What is undisputed is that the CUPs were issued on February 10, 2017. Pursuant to the Development Agreement, Section 1.1, the CUPs were valid for a period of five years from February 10, 2017 (Exhibit 7). This meant the CUPs, under the terms of the Development Agreement were valid until February 10, 2022, unless otherwise extended. On February 4, 2022, the Board provided a one-time, two-year extension of the CUPs. (Exhibit 8, Findings of Fact Conclusion of Law, and Order). The premise and authority of this extension is disputed and will be discussed below, but the fact that a two-year extension was granted by the Board is not disputed by the parties. With this two-year extension in 2022, the CUPs new deadline was February 10, 2024.

On May 17, 2019, the District Court issued an Order Granting Intervenor Cat Creek Energy, LLC's Motion to Stay Proceedings (Exhibit 9, "Stay"). This stay was expressly related to only Section 2.2 of the Development Agreement related to CUP-2015-04. Therefore, by the plain language of the Stay, the Stay only applied to Section 2.2 and did not otherwise provide for an extension of Section 1.1 or the CUPs.

The deadline for CUPs in Section 1.1 after the two-year extension provided in 2022 was February 10, 2024, this was extended by the continuation of the public hearing on CCE's most recent request to amend the Development Agreement to February 16, 2024.

Related to Section 2.2, the Development Agreement required that prior to December 31, 2018, the Board and CCE execute all Water Diversion and Delivery Agreements. The First Amendment to Development Agreement extended the date until June 30, 2019.

Pursuant to the Stay issued by the Court on May 17, 2019, the Court found "the stay of deadlines in the underling proceedings before Elmore County regarding **section 2.2 of the Development Agreement for CUP-2015-04** for a pump storage and hydro electrical facility is warranted under the circumstance and for other good cause existing." (Emphasis added). This Court issued Stay only applied to Section 2.2 of the Development Agreement and CUP-2015-04.

Both parties agree that the litigation ended on June 14, 2022. Therefore, as applicable in any other stayed proceeding or tolling arrangement, the Stay was effective from the date of the issuance of the Order granting the Stay, until the termination of the litigation. This equals 1,124 days. CCE provides no authority for the proposition that a court issued stay is back dated or “retroactive” to the date of filing the lawsuit, and this certainly was not the case regarding this Stay. Therefore Section 2.2 of the Development Agreement was stayed for 1,124 days which made the new deadline for Section 2.2 July 28, 2022.

The Board’s decision on February 4, 2022 was silent as to its effect on Section 2.2. Previously, staff recommended resolving that ambiguity in CCE’s favor by also applying the two-year extension to Section 2.2, which the Board adopted. This brought the deadline for satisfaction of Section 2.2 to July 28, 2024.

Therefore, prior to the Board’s decision on February 16, 2024, the deadlines at that time were as follows:

Section 1.1 of the Development Agreement related to CUPs 2015-03, 2015-04, 2015-05; 2015-06; and 2015-07	<u>February 10, 2024</u>
Section 2.2 of the Development Agreement Related to CUP 2015-04	<u>July 28, 2024</u>

The Board’s decision on February 16, 2024, to extend the deadline of Section 1.1 of the Development Agreement to October 17, 2026, was above and beyond what was necessary or required, and was done so in a showing of good faith to accommodate CCE’s development delays specifically related to the SBar Ranch appeal, since that was the express basis of CCE’s request.

Section 2.2’s deadline of July 28, 2024, takes into consideration the previously provided two-year extension by the Board and the Court issued Stay. Furthermore, in its December 1, 2023, request for amendment to Section 2.2, CCE did not request any specific time extension for Section 2.2, but instead requested to satisfy Section 2.2 with a proposed agreement the Board concluded was insufficient and unacceptable.

- b. CCE provides no new information to show how CCE is entitled to an extension of the CUPs until June 14, 2027.

In CCE’s Request for Reconsideration, CCE fails to articulate how the Board erred in providing an extension until October 17, 2026 for Section 1.1.

CCE claims in its Request for Reconsideration that its application for a second amendment to the Development Agreement on December 1, 2023, requested that Section 1.1 be extended for a period of five (5) years from June 14, 2022, with the possibility of another two-year extension. CCE provides literally zero basis for the request of a five-year extension from the date the litigation ended. Staff struggles to comprehend what this request is even based on. The CUPs were clearly issued on February 10, 2017, with a five (5) year timeframe, as plainly outlined in Section

1.1 of the Development Agreement. The validity of the CUPs found in Section 1.1 was then extended by the Board in 2022 for a two-year period. The date the litigation ended has nothing to do with the deadline in Section 1.1. The date the litigation ended only relates to Section 2.2 and the Stay that was issued by the Court. Merely initiating litigation or an appeal does not automatically impose a stay on other related deadlines or timelines. A court must expressly stay certain proceedings or deadlines for there to be an extension for such aspects. The Court did not stay Section 1.1 of the Development Agreement.

CCE has failed to articulate any basis for a five (5) year extension from the date the litigation ended.

2. CCE provides no relevant information not previously presented and not previously available that demonstrates a specific deficiency in the Board's decision to affirm that the extension provided in 2022 was pursuant to Section 1.1 of the Development Agreement.

a. CCE provides no evidence that the extension provided by the Board in 2022 was not pursuant to Section 1.1 of the Development Agreement.

CCE appears to argue that it should be entitled to an additional two-year extension above and beyond the requested deadline of June 14, 2027, for Section 1.1 of the Development Agreement and CUPs. CCE argues that it should be entitled to an additional two-year extension because the extension provided by the Board in 2022 was not pursuant to Section 1.1 of the Development Agreement, and therefore, they are still entitled to a one-time, two-year extension pursuant to the terms of Section 1.1.

This is incorrect. At the outset, it is important to note that the granting of a two-year extension pursuant to Section 1.1 is in the "discretion" of the Board, and is premised on the requirement that CCE has demonstrated "significant progress in obtaining federal permits...." Therefore, CCE's apparent assumption that it would be *entitled* to a two-year extension under Section 1.1 if it has not already been utilized is misplaced. Moreover, the findings of facts for the February 4th, 2022, hearing where the Board considered CCE's request for a two-year extension clearly establishes that the request was provided to CCE pursuant to the terms of Section 1.1 of the Development Agreement.

CCE points to no evidence to support its statement that "[a]s the Board of Commissioners concluded, the extension was not an exercise of the one two-year time extension under the Development Agreement." Request for Reconsideration, pg. 3.

It seems CCE attempts to argue that Conclusion No. 3 somehow indicates that the Board's two-year extension was not utilized. However, this is a misrepresentation of the language of Conclusion No. 3. Conclusion No. 3 reads, "**[a] time extension may be moot, depending on the scope of the stay resulting from judicial review and appeal.** Therefore, **if a stay or other legal function is judicially determined to render the extension of approvals moot,** it shall not count as exercise of the one two-year time extension provided for in

the Development Agreement.” (emphasis added) The Stay issued by the Court clearly did not render the Board’s two-year extension moot, as the Stay issued by the Court only related to Section 2.2 of the Development Agreement and CUP 2015-04. Therefore, it is not possible to conclude that the Stay rendered the Board’s two-year extension of Section 1.1 moot, as the Stay only related to Section 2.2. Therefore, the language of Conclusion No. 3, clearly confirms that the two-year extension would count as the one-time extension pursuant to Section 1.1. Moreover, County Staff and Counsel were present at the February 4, 2022, hearing and distinctly recall Commissioners Corbus and Hofer invoking the two-year extension provision of Section 1.1.

b. The evidence in the record supports that the extension provided by the Board in 2022 was pursuant to Section 1.1 of the Development Agreement.

First, the Board reiterates that the Stay relating to the underlying judicial review and appeal only relates to one of the CUPs at issue and Section 2.2. Finding No. 1, Exhibit 8. Second, Finding No. 3 expressly states, “[a] one (1) time two-year time extension is envisioned for the conditional use permits in the Development Agreement between CCE and the Board.” *Id.* Third, Condition No. 3 states “Based on the foregoing facts and conclusions, the Board concludes that the applicant and/or owner have adequately justified the need for a time extension per Section 7-3-17 of the Zoning Ordinance and the **Development Agreement**.” (emphasis added), *Id.* Condition No. 3, expressly indicates that the extension provided by the Board was pursuant to Elmore County code and the Development Agreement. Finally, the Order itself states, the Board “APPROVES an extension for CUP-2015-03, CUP-2015-04, CUP-2015-05, CUP-2015-06, and CUP-2015-07 **as provided for in the Development Agreement**, subject to the Court’s Orders regarding a stay of proceedings, and/or by other legal function of the Court’s Orders.” *Id.*

There is no confusion in the plain language of the 2022 Findings of Facts, Conclusion of Law, and Order that the Board was providing a one-time, two-year extension pursuant to Section 1.1 of the Development Agreement. The language related to the extension not counting as the one-time extension, applied only in the circumstance that a court stay rendered the Board’s extension moot. The Court’s Stay clearly applied to Section 2.2 only and did not render the Board’s extension of Section 1.1 moot. In fact, both parties, including CCE, still acknowledged the Board’s extension as validly extending the deadline in Section 1.1 until February 16, 2024, not February 16, 2022, which would have been the deadline had the extension been rendered moot.

3. CCE fails to present any information not previously presented and not previously available that demonstrates a specific deficiency in the Board’s decision to retain the current language of Section 2.2 of the Development Agreement.

CCE never even requested an extension to Section 2.2 so there can be no reconsideration of this issue. CCE argues in its Request for Reconsideration that it should be entitled to the following proposed language for Section 2.2 of the Development Agreement:

2.2 Water Storage and Delivery. Given the complexities of water diversion and delivery related to the Project, and in an effort to move the Project forward without further delay, the County and Developer have agreed to defer the negotiations and execution of all Water Diversion and Delivery Agreements to a later date, to be heard after notice and public hearing, but which shall be done prior to June 14, 2027 or the CUP related to water shall lapse.

CCE's December 1, 2023, application for a second amendment to the Development Agreement nowhere contained the above request. Instead, CCE's request related to Section 2.2 was an attempt to satisfy the condition and, therefore, to remove the deadline completely. Because CCE's original application for a second amendment to the Development Agreement did not contain any provision requesting an extension of Section 2.2's deadline to June 14, 2027, the only decision regarding Section 2.2 that is subject to potential reconsideration is CCE's attempt to satisfy that provision with its proposed water delivery agreement.

The Board's Findings of Fact, Conclusions of Law, and Order from February 16, 2024, address CCE's December 1, 2023, request related to Section 2.2. (Exhibit 10) The specific request to extend the deadline to June 14, 2027, was not included in that December 1, 2023, request. In its Findings of Fact, Conclusions of Law, and Order, the Board concluded that CCE's new proposal did not support the intent of the Development Agreement and did not justify the costs to be incurred by the County in order to implement CCE's proposal.

Because the request to extend Section 2.2 to June 14, 2027, was not even before the Board for consideration, CCE cannot now claim in its Request for Reconsideration that there is a specific deficiency in the Board's decision not to grant an extension of Section 2.2 until June 14, 2027.

Therefore, the Board would be justified in maintaining the deadlines of Section 1.1 of the Development Agreement and CUPs as February 16, 2024, and Section 2.2 of the Development Agreement as July 28, 2024.

RECOMMENDATION:

Staff recommends that the Board of County Commissioners DENY the request to revise the Board's February 2024 Decision based on the fact that CCE provided no new evidence not previously available and fails to articulate a specific deficiency in the Board's decision as outlined above. The extension already granted by the Board effectively provides CCE with a development period of nearly 10 years. The Board has already been generous with CCE's requests and has resolved ambiguities in favor of CCE. The Board's February 2024 Decision should be AFFIRMED.