



Land Use and Building Department

520 East 2nd South Street
Mountain Home, Id. 83647
Phone: (208) 587-2142 ext. 1256
Fax: (208) 587-2120
www.elmorecounty.org

Mitra Mehta-Cooper
Director

Johnny Hernandez
Building Official

Colton Janousek,
Building Inspector

Kacey Ramsauer
Planner

David Abrahamson
Planner

James Roddin
*Code Enforcement/
Admin Manager*

Vacant
Permit Technician

Alyssa Nieto
Admin Assistant

Board of County Commissioner Staff Report

Public Hearing Date: 06/21/2024

Date Report Completed: 07/10/2024

Agenda Item: Third Amendment to Cat Creek Energy LLC's Development Agreement

Case Number(s): Development Agreement Amendment 2024-04 (DA-2024-04) for CUP 2015-03, CUP 2015-04, CUP 2015-05, CUP2015-06, and CUP 2015-07 ("CUPs")

Applicant: Cat Creek Energy, LLC

Elmore County Staff:

Mitra Mehta-Cooper, AICP, CFM

Elmore County Consulting Staff:

Abbey Germaine, Consulting Counsel with Elam and Burke for Elmore County
Dylan Lawrence, Consulting Counsel with Varin Thomas for Elmore County

EXECUTIVE SUMMARY:

The Elmore County Board of County Commissioners (the "Board") entered into a 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) on February 9, 2018 (the "Development Agreement"). As part of the Development Agreement, the parties agreed to defer negotiations and agreement on certain CUP provisions related to water diversion and delivery to a later date, not to exceed December 31, 2018. CUP 2015-04, in turn, also provides specific water delivery requirements discussed in more detail below in Section 1 of the Staff Comments.

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. The Board approved the second amendment to the Development Agreement on February 16, 2024, and the first addendum to the second amendment to the Development Agreement after reconsideration on May 17, 2024. Accordingly, the currently adopted version of the Development Agreement says the following for Section 2.2.

“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 July 28, 2024 or the CUP related to water (CUP-2015-04) shall lapse.”

On June 10, 2024, Cat Creek Energy LLC applied for the Third Amendment to the Development Agreement (DA-2024-04), to amend Section 2.2 in order to satisfy the aforementioned requirement (Exhibit 1).

APPLICABLE CODES:

The Cat Creek Energy LLC’s Development Agreement with the Board 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. The following procedures are followed to date for this application and this public hearing:

1. On June 21, 2024, staff conducted a public workshop for the Board of County Commissioners and Cat Creek Energy LLC representatives to discuss the details of the Third Amendment proposal in a public forum prior to a future formal public hearing on the proposal.
2. Today’s Public Hearing was advertised in the Mountain Home News on June 26, 2024, and July 3, 2024 (Exhibit 2).
3. The Site was posted on June 28, 2024, at four locations (Exhibit 3).
4. The Agency and Neighborhood Notifications within one (1) mile radius were mailed on July 2, 2024 (Exhibit 4).
5. On July 5, 2024, staff reached out to CCE team to determine how they want to proceed forward for the public hearing on DA-2024-04.
6. On July 8, 2024, staff received an email and letter from Ms. Terri Pickens in response (Exhibit 5).
7. On July 9, 2024, staff received additional email and information from Mr. James Carkulis in response (Exhibit 6).

STAFF COMMENTS:

Elmore County Land Use and Building Department Staff and Consulting Counsels have reviewed the proposed DA-2024-04, and provided the following information at the aforementioned public workshop on June 21, 2024:

- 1) Current Approvals with Elmore County: Cat Creek Energy LLC (“CCE”) has received approval of CUP-2015-04 for a Hydroelectric Facility in Elmore County. That original application listed development of a new reservoir – Cat Creek Reservoir – with water storage of 50,000 acre-feet to pump water for generation of electricity in the vicinity of Anderson Ranch Reservoir in Basin 63 of the Idaho Department of Water Resources (IDWR).

General Conditions 2(b) and 2(c) of CUP-2015-04 approval specifically require CCE to “develop methods of furthering water delivery in the county for the transfer of county

water to Little Camas Reservoir” and to “construct necessary water development projects in the Boise River drainage system in order to transfer water into arid portions of Elmore County.” Since the approval of the CUPs in 2017, the proposed size of the upper reservoir has increased multiple times in different filings by CCE, and its use has expanded beyond hydroelectric generation to releasing water for beneficial purposes downstream.

According to the Third Amendment to the Development Agreement, DA-2024-04, and proposed Memorandum of Understanding (MOU), CCE anticipates a total of 140,000 acre-feet of water storage in Cat Creek Reservoir for hydropower, irrigation, municipal, groundwater recharge, and other beneficial purposes of use. Of the anticipated 140,000 acre-feet, CCE suggests that approximately 20,000 acre-feet of water is necessary for the approved pump storage for hydroelectric project, along with 120,000 acre-feet of water storage available for releasing downstream for other beneficial purposes.

CCE does not currently have approval from the County to expand Cat Creek Reservoir to 140,000 acre-feet. During the Second Amendment discussions, the Staff and Board suggested to CCE that such a major reservoir expansion should first be evaluated by the Elmore County Planning and Zoning Commission in the context of the Conditional Use Permit. Should CCE wish to use this reservoir for additional uses, to include storage for additional beneficial uses, staff recommends that that proposal also be reviewed in light of the Conditional Use Permit by the Planning and Zoning Commission.

- 2) Status of CCE’s Water Rights: CCE currently does not have any water rights. This includes water to support the use approved in CUP-2015-04, or its proposed expansion in DA-2024-04 and MOU. Instead, it has five pending water-right applications. Generally speaking, the first water right application CCE filed is for the operation of the pump storage for hydroelectric project, and the other four applications would allow CCE to send storage water downstream for beneficial use by contractors in Basin 63.

Staff has seen little data from CCE, indicating how often water will be available to fill Cat Creek Reservoir and, therefore, how often water could potentially be provided to the County. Normally, this type of data would be generated in the context of the water right proceedings. However, the proceedings before IDWR have mostly been on hold since CCE's first permit application was filed in 2017. CCE requested IDWR to put the water right proceedings on hold pending further developments in its Federal Energy Regulatory Commission (FERC) licensing proceedings, but FERC has placed its proceedings in abeyance as of May 19, 2023. Even if both of those proceedings are to resume immediately, CCE is still several years away from having final, non-appealable permits from IDWR and FERC.

In light of all of this uncertainty and lack of information, Staff fails to recognize a need for the Board of County Commissioners to engage in extensive water diversion and delivery discussions at this time, prior to CCE receiving the necessary approvals from the state and federal agencies.

- 3) Benefit to Elmore County Citizens: CCE's proposal for DA-2024-04 is to provide the County with the right to lease up to 10,000 acre-feet of storage under CCE's application for permit 63-35522. This is the most junior of CCE's water right applications and is associated with CCE's proposal to expand the size of Cat Creek Reservoir from 100,000 acre-feet to 140,000 acre-feet.

CCE's current pending water right applications do not include the Mountain Home Irrigation District (MHID) system as authorized place of use. Staff understand that this means that approval from IDWR will be required before any CCE water can be put into the MHID system. CCE's current proposal for DA-2024-04 does not address issues such as when that approval will be sought and what the parties' respective responsibilities are in pursuing such approval and paying the associated legal expenses.

CCE's current proposed language for DA-2024-04 states that water will be made available to the County "upon similar terms and conditions as other lessees of storage water under such water right." CCE has not provided any detail regarding such "terms and conditions," and the use of the term "similar" renders this language even more open-ended and vague. Elmore County is the land use agency granting CCE's use in its jurisdiction through CUP-2015-04 and is not aware of "similar" lessees of the storage water. Staff do not support such vague language in a Development Agreement or Memorandum of Understanding without clearly outlining the County taxpayer's obligations under these terms and conditions.

DISCUSSION ON THREE PROPOSALS:

For this Public Hearing, the Board currently has three potential options in amending Section 2.2 of the Development Agreement with CCE:

- 1) Third Amendment to Development Agreement, DA-2024-04:

CCE has submitted a request for a Third Amendment to the Development Agreement and accompanying MOU. CCE disagrees with Staff's conclusion at the Public Workshop that the expansion of the reservoir is an issue that must be addressed before the Elmore County Planning and Zoning Commissioners through a CUP-2015-04 amendment. Staff disagrees with CCE's assertions that the Development Agreement and Findings of Fact and Conclusions of Law specifically assigns exclusive jurisdiction over the Development Agreement and CUPs to the Board. Therefore, Staff cannot recommend approval of the Third Amendment to DA-2024-04 as proposed due to the following:

- Exhibit C – Memorandum of Understanding, which states that "the Reservoir Project is anticipated to have a total storage capacity of the approximately 140,000 acre-feet"; and
- Exhibit D – Master Site Plan, and "modifications into the Maste Site Plan according to the Approval, Conditions, and this Agreement" which increases the maximum size of the proposed Cat Creek Reservoir to "1,700 surface acres and 140,000-acre feet volume".

This approach — significantly expanding the size of the reservoir only through amendment of the DA — is the same path that Judge Baskin warned Elmore County against, in her November 7, 2019 Memorandum Decision — that the Development Agreement should not be used to circumvent the typical LLUPA/CUP process for “material modifications” of the project. Idaho Supreme Court Chief Justice Bevan, as well as Justices Brody, Stegner, and Moeller affirmed Judge Baskin, in their amended order on June 14, 2022. In short, bypassing the Planning and Zoning Commission for major project modifications creates unnecessary appeal risk from project opponents, and CCE’s apparent willingness to expose the County and its own project to additional judicial review seems short-sighted and at odds with its prior extension requests resulting from the SBar Ranch appeal.

2) Staff Proposal from Public Workshop:

Staff appreciates Ms. Pickens confirming CCE’s commitment to 10,000-acre feet of storage to the County from an expansion of the reservoir to 140,000-acre feet. And Staff acknowledges the clarity that Ms. Pickens and Mr. Carkulis have provided to the County by committing to revising CCE’s water right application for the additional 50,000-feet. However, Staff fails to support these quantitative water delivery and diversion discussions, because CCE neither has any available water rights nor does it know how much water would be appropriated. Therefore, staff had proposed a proportionate share of water storage for beneficial use (along with CUP-20215-04 amendment) to be delivered to Elmore County at the workshop:

Section 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 that, upon completion of construction of Cat Creek Reservoir by the Developer, the Developer will grant storage of the County’s water and make an acre foot of water available to the County under water rights 63-34652, 63-34897, 63-34900, and 63-35522, at no cost to the County, for every acre foot of water released downstream for beneficial purposes pursuant to those same rights.

At the workshop, CCE objected to the proposed 1:1 ratio of water released downstream to water made available to the County. Regardless of the specific ratio adopted, staff still believes that, as a practical matter, this overall approach is the only logical way to satisfy Section 2.2 substantively at this time, while there is still so much uncertainty about the CCE project and its water rights.

3) CCE Alternative of Extension of Time for Section 2.2:

As stated in Ms. Pickens’ letter, CCE does not wish to amend the proposed DA-2024-04 as presented by Staff at the public workshop. Alternatively, the letter states that “if the Commissioners are not comfortable with the language we proposed, we will be asking for an extension of time of the expiration of Section 2.2 of the Development Agreement”. This alternative was not provided with the Third Amendment application (DA-2024-04). Therefore, Staff does not know what timeframe CCE requests for this extension or what benefits it would have for Elmore County’s residents. Staff cannot take a position on a proposal that is lacking such important details.

