

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 63-34403, 63-34652, 63-34900
AND 63-34897 IN THE NAME OF CAT
CREEK ENERGY LLC

**ORDER RE: CAT CREEK ENERGY,
LLC'S PETITION TO REVIEW
ORDER ON MOTION FOR
PROTECTIVE ORDER**

BACKGROUND

On July 14, 2020, the Director of the Idaho Department of Water Resources ("Department") issued an *Order on Motion for Protective Order*. That order denied Cat Creek Energy, LLC's ("Cat Creek") *Motion for Protective Order* and ordered Cat Creek to post: (1) the unredacted version of the *Second Declaration of James Carkulis* along with "Appendix A: Construction Budget" and "Appendix B: Project Finance Process Narrative"; and (2) the unredacted version of the *Declaration of John L. Faulkner* along with "Appendix A: Itemized accounting of Cat Creek's investment (June 16, 2020)" to its ShareFile site.

On July 23, 2020, Cat Creek filed a *Petition to Review Order on Motion for Protective Order* ("Petition to Review Order"). In the interest of moving the proceeding forward, Cat Creek agreed to publicly disclose its itemized investment accounting and its financing strategy narrative and posted these documents to its ShareFile site. *Petition to Review Order* at 2.

However, Cat Creek stated it is "not willing to accept the risk of misappropriation of "Appendix A: Construction Budget" to the *Second Declaration of James Carkulis (Unredacted)* ("Unredacted Construction Budget"). *Id.* at 2-3. Cat Creek alleged its Unredacted Construction Budget is a trade secret and sought a protective order prior to any required disclosure by the Department. *Id.* at 2-5.

ANALYSIS

First, Cat Creek argued its Unredacted Construction Budget is a trade secret under the Idaho Trade Secrets Act ("ITSA"). *Id.* at 3. Cat Creek argued the Unredacted Construction Budget contains actual projected costs to construct the project, some of which are based on bids provided by suppliers and subcontractors, and some based on experience and market rates. *Id.*

As a result, Cat Creek argued the budget "lays the foundation upon which Cat Creek will compete for power purchase agreements and financing in [the energy] market" and "Cat Creek's ability to generate power at lower rates than the competition depends directly upon the cost to construct the project." *Id.* Therefore, disclosure of such information would provide Cat Creek's competitors economic value and advantage in the development of competing bids, thereby prejudicing Cat Creek's project. *Id.*

Next, Cat Creek argued the ITSA does not require it to prove the Unredacted Construction Budget actually qualifies as a trade secret. Rather, Cat Creek interprets the ITSA to only require that it allege the Unredacted Construction Budget is a trade secret for protection under thereunder. *Id.* at 3-4.

Finally, Cat Creek argued “[b]ecause line item construction costs are not necessary for the Department to evaluate the Cat Creek water right applications, Cat Creek requests that the Department preserve the confidentiality of its itemized construction budget by protecting it from disclosure” pursuant to a protective order. *Id.* at 4.

THE DIRECTOR’S CONCLUSION

The Director disagrees with Cat Creek’s interpretation of the ITSA. Nonetheless, the Director does not need to determine whether the Unredacted Construction Budget is a trade secret, nor determine the applicability of the ITSA at this time.

Cat Creek, per IDWR’s Water Appropriation Rules, and the Director’s prior orders in this matter, “shall submit plans and specifications along with *estimated construction costs for the project works*.” Idaho Code § 42-203A(5)(d); IDAPA 37.03.08.40.05.f.ii (emphasis added).

The Director concludes Cat Creek’s redacted Construction Budget—“Appendix A: Partially Redacted Construction Budget” to the *Second Declaration of James Carkulis (Redacted)*—which shows construction categories broken out by task with a total cumulative estimated cost per task or category, is sufficient to show estimated construction costs pursuant to IDAPA 37.03.08.40.05.f.ii.¹ The redacted line item cost estimates of the unredacted Construction Budget need not be disclosed.

As a result of this conclusion, it is unnecessary for the Director to determine whether the unredacted Construction Budget is a trade secret under the Idaho Public Records Act. Likewise, it is unnecessary for the Director to determine the necessity of a protective order as Cat Creek has made no other claim(s) for trade secret protection or confidentiality at this time.

¹ For further information related to the sufficiency of Cat Creek’s financial disclosures see the Director’s *Order re: SBar Ranch, LLC and the District at ParkCenter, LLC’s Renewed Motion for Rule 40.05.b; Order for Applicant to Submit Complete Rule 40.05 Information*, issued contemporaneously with this order.

ORDER

IT IS HEREBY ORDERED that Cat Creek is not required to disclose its Unredacted Construction Budget ("Appendix A: Construction Budget" to the *Second Declaration of James Carkulis (Unredacted)*) to the parties.

Copies of "Appendix A: Construction Budget" to the *Second Declaration of James Carkulis (Unredacted)* maintained by the Director or the Department shall be returned to Cat Creek.

The redacted Construction Budget ("Appendix A: Partially Redacted Construction Budget" to the *Second Declaration of James Carkulis (Redacted)*) is sufficient to show estimated construction costs pursuant to IDAPA 37.03.08.40.05.f.ii.

This order does not find or conclude whether "Appendix A: Construction Budget" to the *Second Declaration of James Carkulis (Unredacted)* is a trade secret under the Idaho Trade Secrets Act, the Idaho Public Records Act, or otherwise deserves confidential protection.

DATED this 20th day of October, 2020.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 20th day of October, 2020, the above and foregoing was emailed and sent to the following by United States Postal Service:

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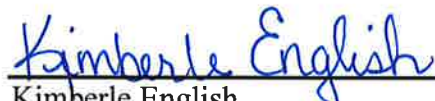
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