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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

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

**PETITION TO REVIEW
ORDER ON MOTION FOR
PROTECTIVE ORDER**

Cat Creek Energy, LLC (“Cat Creek”) hereby moves the Director of the Idaho Department of Water Resources (the “Department”) pursuant to Rule 711 of the Department’s Rules of Procedure to review and amend the *Order on Motion For Protective Order* (“Order”) entered on July 14, 2020. Cat Creek respectfully requests that the Order be amended to require that the unredacted attachments to the *Second Declaration of James Carkulis* and the *Declaration of John L. Faulkner* be made available only to legal counsel and retained experts of parties under a signed protective agreement.

BACKGROUND

At a pre-hearing conference held February 25, 2020, the Director instructed Cat Creek to produce the information prescribed under Rule 40.05. Cat Creek subsequently produced most of the information. Cat Creek declined to produce a certain financial information due to its proprietary and confidential nature. Cat Creek proposed to disclose confidential information to parties signing a protective agreement pursuant to a protective order issued by the Department.

On May 28, 2020, the Director issued an Order Establishing Protective Order Procedure (“Order”) instructing Cat Creek to “file complete Rule 40.05.f information regarding financial resources or, in the alternative, file a motion for protective order, along with the claimed protected or confidential information, for the Director’s in camera review.” The Order instructs that a motion for protective order “shall be accompanied by a comprehensive financial summary showing a reasonable probability that financing will be available to appropriate the water,” “shall

describe each component of the proposed project, whether a physical component, or a nonphysical component related to design, consultation, right of way, contracts, permitting, etc.,” “shall describe the timing of the completion of each component,” and “shall estimate a monetary cost of each of these project components.” *Id.* The Order further instructs Cat Creek to “describe how each of the component costs will be financed and the timing of the financing.” *Id.* Finally, the Order states that “[i]ndividual justification for protection must be submitted for each component cost and the financing for each component cost,” and that “each claim of confidentiality must be accompanied by an attorney’s certificate that the material is protected by law from public disclosure.” *Id.*

On June 16, 2020, Cat Creek submitted the following: (1) *Motion for Protective Order* with attached protective Agreement; (2) *Second Declaration of James Carkulis* with a partially redacted construction Budget and a redacted Project Finance Process Narrative; (3) *Declaration of John L. Faulkner* with a redacted itemized accounting of Cat Creek’s \$18 million investment in the project; (4) *Notice of Amended Rule 40.5 Disclosure*; and (5) *Attorney’s Certificate Claim of Confidentiality Relating to Motion for Protective Order*. On June 16, 2020, Cat Creek also submitted under seal to the Director unredacted versions of the *Second Declaration of James Carkulis* and the *Declaration of John L. Faulkner*.

On July 13, 2020 Cat Creek filed *Cat Creek’s Reply Brief in Support of Motion for Protective Order* (“Cat Creek’s Reply Brief”). The Director did not consider Cat Creek’s Reply Brief, instead indicating that it would be addressed as part of the Director’s forthcoming order on SBar Ranch and District at Parkcenter’s renewed *Motion for Rule 40.05.b Order for Application to Submit Complete Rule 40.05 Information*.

The Order denied Cat Creek’s *Motion for Protective Order* and ordered that Cat Creek disclose and place on its ShareFile site the unredacted versions of the *Second Declaration of James Carkulis* and *Declaration of John L. Faulkner*. The Order did not address Cat Creek’s proposed protective agreement attached as appendix A to the *Motion for Protective Order*. The Order instead requires Cat Creek to disclose its confidential information publicly, for the world to see, without restricting it to the parties to this case.

ANALYSIS

The Order denies Cat Creek’s *Motion for Protective Order* on the basis that Cat Creek’s itemized construction budget, itemized investment in the project, and financing strategy narrative do not qualify as trade secrets under the Idaho Trade Secrets Act. Cat Creek disagrees. Notwithstanding, Cat Creek has, in the interest of moving this proceeding forward, elected to publicly disclose its itemized investment accounting and its financing strategy narrative, both of which have been posted to Cat Creek’s ShareFile portal (bates numbers CCE-D-00036 and CCE-D-00037). Cat Creek will reluctantly accept the risk that this information may be misappropriated by third parties.

Cat Creek is not willing to accept the risk of misappropriation of its detailed construction budget. For the reasons set forth below and stated previously in Cat Creek’s *Motion for Protective Order* and its *Reply Brief in Support of Motion for Protective Order*, Cat Creek’s itemize construction budget is not necessary to the Department’s application of Idaho Code 42-

203A(5); therefore, its confidentiality should be preserved by not requiring Cat Creek to disclose it. Alternatively, should the Department require Cat Creek to disclose its detailed construction budget, the disclosure must be limited to legal counsel and retained experts of parties under a protective agreement signed pursuant to a protective order issued by the Department.

1. Cat Creek's detailed construction budget is entitled to protection under the Idaho Trade Secrets Act.

Under the Idaho Trade Secrets Act, the Department is required to “preserve the secrecy of an alleged trade secret by reasonable means.” The Act defines “trade secret” as information that “[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.” Idaho Code 48-801(5).

The Order refuses to protect Cat Creek's itemized construction budget on the basis that it “is not confidential or a trade secret,” reasoning that it does not reflect “actual costs, nor is it part of a proprietary program or formula that might give Cat Creek some competitive advantage.” (Order, p. 4.) This conclusion is mistaken.

Cat Creek's budget contains the actual projected costs to construct the project. Some of these costs are based on bids provided by suppliers and subcontractors. Others are estimated based on experience and current market rates. While these costs have not yet been incurred, they nonetheless reflect Cat Creek's best estimates of actual project construction costs.

Critically, the construction budget lays the foundation upon which Cat Creek will compete for power purchase agreements and financing in a highly competitive energy development market. Cat Creek's ability to generate power at lower rates than the competition depends directly upon the cost to construct the project. As explained by Cat Creek's expert energy project developers, the disclosure of such information would provide competitors of Cat Creek with economic value and advantage in developing competitive bids, thereby prejudicing Cat Creek's project. (Decl. of James Carkulis; Decl. of Lawrence Leib.)

There is no evidence in the record to contradict the sworn testimony of Cat Creek's expert energy project developers. Moreover, Cat Creek has cited a real-world example where this very type of information was misappropriated and used to the disadvantage of the project developer. *USA Power, LLC v. PacifiCorp*, 372 P.3d 629 (Utah 2016). The court in that case recognized such information as a protectable trade secret. *Id.*

Considering that the Department does not operate in the world of private energy project development and financing, and presumably has little or no expertise in that area, it is troubling that it would simply discard the sworn testimony of Cat Creek's experts and declare such information to not be confidential or a trade secret.

Importantly, the Idaho Trade Secrets Act does not require the Department to judge whether Cat Creek's construction budget qualifies as a legitimate trade secret. Under the Act, the Department is to preserve the secrecy of *alleged* trade secrets. Idaho Code 48-804. While some degree of scrutiny of purported secrets may be appropriate, the bar is low for qualifying for protection under the Act. So long as the proponent provides a reasonable basis for alleging that a trade secret exists, protection is warranted.

Cat Creek has reasonably explained that it is in a competitive market, that its itemized construction budget has been kept confidential, and that disclosure of its itemized construction budget could provide competitors with economic value in developing competitive bids or be misappropriated for other reasons. (Carkulis Decl., ¶¶ 9-11; Leib Decl., ¶ 8.) Cat Creek has also cited a real-world example where this has occurred. This is a reasonable basis for alleging that such information qualifies as a trade secret. Therefore, Cat Creek's itemized construction budget is entitled to protection under the Act.

2. Line item construction costs are not necessary to this action.

The Idaho Trade Secrets Act requires the Department to preserve the secrecy of an alleged trade secret "by reasonable means." Idaho Code 48-804. The party requesting a protection "must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful." *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981). Once that requirement is met, "the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action." *Id.*

Cat Creek has reasonably alleged that its line item construction costs qualify as a trade secret, and that the disclosure of such information may be harmful to Cat Creek. Therefore, the burden shifts to SBar to demonstrate that itemized construction costs are necessary to the action. SBar has not met this burden.

As explained in Cat Creek's *Reply in Support of Motion for Protective Order*, itemized construction costs are not necessary because it is not the role of the Department to analyze the market economics of the Cat Creek project compared to the dozens of competing energy projects in the Western Grid. What would SBar do upon with line item construction costs? Hire an economist to challenge projected costs, spend weeks in a hearing listening to experts debate projected cost estimates, then ask the Department to deny Cat Creek's applications on the basis that the projected construction cost is more likely \$1.5 billion than \$1.3 billion?

Instead of analyzing market competitiveness, the Department can apply Idaho Code 42-203A(5)(d) by evaluating whether Cat Creek's own actions demonstrate an unscrupulous scam or a genuine project with reasonable probability of success. This analysis may require a good faith estimate of total construction costs, but it does not require disclosure of line item construction costs. The most important factor is whether Cat Creek's own actions demonstrate competence and capability to successfully complete this type of project.

Because 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.

3. A protective agreement is a reasonable means of protecting Cat Creek's alleged trade secrets.

Should the Department determine that itemized construction costs are necessary to this matter, Cat Creek requests that access to such information be strictly limited to counsel and retained experts of the parties. The Idaho Trade Secrets Act requires the Department to preserve the secrecy of Cat Creek's alleged trade secrets "by reasonable means." Idaho Code 48-804. Under I.R.C.P. 26(c), this may include

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

A protective agreement (a/k/a non-disclosure agreement or confidentiality agreement) is a widely accepted and commonly used commercial business practice to protect economic value of confidential information from competitors and other sinister uses. Such agreements are also commonly required in judicial and administrative proceedings involving confidential information. Typically a protective order will be issued that limits access to confidential information to parties, counsel, and retained experts who sign a protective agreement. This allows the parties to the case to review all information upon which the Department decision may rest while protecting against misappropriation by outside interests.

A protective agreement will avoid the need for repetitive motions for protective orders. Under the current Order, Cat Creek will be forced to file motions for a protective order each time additional financial or other confidential information comes into existence. A better process is for the Director to enter an order enabling Cat Creek to designate confidential information by marking it as such. Cat Creek can immediately make such information available via ShareFile to persons who have signed the approved protective agreement. Should a party identify a legitimate need to make such information to persons outside this proceeding, which is very unlikely, a motion could be filed with the Director to explain why.

This process would make confidential information readily available to all parties for legitimate use within this proceeding while protecting against sinister uses of such information. No party can be harmed or disadvantaged by this process.

Dated this 23rd day of July, 2020.

RACINE OLSON, PLLP

By: 
Randall C. Budge
Thomas J. Budge

CERTIFICATE OF MAILING

I certify that on this 23rd day of July, 2020, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

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