

Dana L. Hofstetter, ISB No. 3867
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5943
Email: dhofstetter@hawleytroxell.com

RECEIVED
JUN 30 2020
DEPARTMENT OF
WATER RESOURCES

Attorneys for Protestors SBar Ranch, LLC and The
District at ParkCenter, LLC

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

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

SBAR RANCH, LLC AND THE
DISTRICT AT PARKCENTER, LLC's
RESPONSE TO MOTION FOR
PROTECTIVE ORDER AND RENEWED
MOTION FOR RULE 40.05.b. ORDER
FOR APPLICANT TO SUBMIT
COMPLETE RULE 40.05
INFORMATION

COME NOW, Protestors SBar Ranch, LLC and The District at ParkCenter, LLC (hereinafter, "these Protestors"), and hereby respectfully respond to the Applicant, Cat Creek Energy, LLC's ("Cat Creek" or "CCE") Motion for Protective Order and renew their Motion for the Director to issue an order pursuant to Water Appropriation Rule 40.05.b. for CCE to submit all information required pursuant to Idaho Water Appropriation Rule 40.05. The Declaration of Anthony M. Jones ("Jones Declaration") is contemporaneously filed in support of this Response.

In its Motion for Protective Order, CCE requests that the Director issue, "an order that (i.) Cat Creek has satisfied the disclosure required under Rule 40.05.f.i of the Water Appropriation Rules, and (ii) protects from disclosure the confidential information redacted from the *Second Declaration of James Carkulis* and the *Declaration of John L. Faulkner*." Motion for Protective Order at 9. As discussed more fully below, CCE has neither satisfied the Rule 40.05 information requirements nor justified the requested protective order and CCE's Motion should be denied.

I. **CCE's Motion for Protective Order Should Be Denied as it Proposes Overbroad Protection of Financial Information and Would Protect Non-Proprietary Information from Disclosure in Violation of Idaho Code 42-203A's Financial Resources Criterion.**

CCE provides a general itemization of estimated project development costs but declares virtually every other aspect of project financing to be trade secret and proprietary. There are certain kinds of non-confidential information concerning project financing that can and should be provided pursuant to Rule 40.05. Thus, CCE's proprietary claims are overbroad and threaten to unnecessarily interfere with the parties' ability to ensure the financial resources criterion in Idaho Code 42-203A is satisfied.

The Declaration of energy economist Anthony M. Jones submitted herewith explains that at this stage (which by CCE's own timeline is approximately 5 years from project operation), substantial non-proprietary economic information about project financing should be available:

At approximately 5 years away from operation, as I understand Cat Creek Energy claims to be based on a review of its project timeline provided as CCE-X-00039, it should be able to provide the full terms of its capital funding arrangements, including the amount and terms of debt commitments, the amount and terms of equity commitments, and the interest rates, amortization schedules, provisions for default, anticipated cash flows, prospective balance sheets, the cost and income relationships associated with CCE's wind, solar, pump-storage, irrigation, municipal water, and irrigation district operations, *etc.*, for the life of the project. The only potentially confidential items that may need redaction would be the identity of the parties committing to provide the capital. This redacted information should be provided to the Hearing Officer, however.

Jones Declaration at. ¶12.

While at this stage, significant project financing commitments should be in place and the key financing terms would be non-confidential, CCE has claimed wholesale all such information to be proprietary and has withheld this information from the parties. Although there may be a

basis to protect the identities of the providers of debt and equity commitments from public disclosure, no good proprietary reason is provided for CCE withholding the existence of such commitments and their basic terms or for CCE withholding information from disclosure substantiating the economic viability of the proposed project.

CCE requests that the parties be required to execute a certain Protective Agreement in order to have access to the financial information CCE is required by Rule 40.05 and Idaho Code 42-203A(5)(d) to disclose. In a number of ways, the Protective Agreement proposed by CCE is too overbroad to protect the limited confidential information that may be in CCE's financial disclosures:

1. CCE, not IDWR, decides what is protected information and what is not. IDWR, not the applicant, should be in the position of deciding whether information is legally protected.
2. Every person involved in this proceeding must execute the Protective Agreement to obtain access to virtually all project financial information, although the Applicant statutorily is required to establish its *prima facie* case and meet its burden of proof under Idaho Code 42-203A regarding financial resources.
3. What about the public nature of this proceeding and how would the public's right to access information, including financial information, about these Applications be safeguarded? Would parties' experts also be required to sign the Protective Agreement to be able to review the protected documents?
4. Paragraph #2 of the proposed Protective Agreement concerning who could have access to the documents could preclude any law firms who have ever been involved with any energy project transactions in this State from participating in this proceeding, including, likely, CCE's own counsel
5. With only in camera review and no ability to copy protected information except upon specific request and IDWR order, discovery and other preparations for hearing would be severely impaired.

IDWR is in the best position to determine whether certain information actually is proprietary and trade secret. However, even if certain aspects of CCE financial information may be proprietary, much of it would not be. IDWR can decide what is the right balance between public disclosure of information and the protection of any truly proprietary information. CCE's concerns about law firms' unnamed clients are unfounded speculation. Hawley Troxell is not representing any other client in connection with this matter other than SBar Ranch and The District at Parkcenter. These Protestors have water rights that could be impacted by these applications. These Protestors have no other use for the Rule 40.05 information other than protecting their own interests. These Protestors will comply with the Director's Order on this matter entered into in accordance with applicable Idaho law.

II. Although CCE Has Added 11 Additional Documents to its Repository Since these Protestors Last Filed their Motion for Rule 40.05 Information, the Rule 40.05 Information CCE Has Disclosed Remains Woefully Inadequate.

These Protestors, in the chart prepared by Spronk Water Engineers attached as Exhibit B to their May 1, 2020, Motion for Rule 40.05.b. Order, detailed the informational insufficiencies of CCE's initial Rule 40.05 information submission. On June 16, 2020, in connection with its Motion for Protective Order, CCE updated its repository, deleting 9 documents and adding the following 11 documents:

CCE-C-00343 – List of Surrounding Groundwater Wells (1 pg.)
CCE-C-01217 – June 4, 2020, USFS comment letter to IDWR (2 pgs.)
CCE-D-00015 – Civil Site Plan (1 pg.)
CCE-D-00016 – Electrical Diagram – Not for Construction (1 pg.)
CCE-D-00029 – Conceptual General Arrangement Substation (1 pg.)
CCE-D-00021 – Preliminary – Not for Construction-General Arrangement Substation (1 pg.)
CCE-D-00022 – Preliminary-Not for Construction Switching Diagram Substation (1 pg.)
CCE-D-00023 – Financing Sources (2 pg.)
CCE-D-00025 – Preliminary Transmission Line Sketches (10 pgs.)
CCE-D-00035 – Preliminary Plan 115kv lines (1 pg.)
CCE-X-00039 – Timeline – Major Milestone Dates (3 pgs.)

Unfortunately, as reflected in the updated Spronk Water Engineers chart attached hereto as Exhibit A, the addition of these 11 documents do little, if anything, to address the inadequacies in CCE's Rule 40.05 submission. The chart in Exhibit A details the significant gaps in CCE's Rule 40.05 information that remain unsatisfied.

CONCLUSION

For the foregoing reasons, these Protestors respectfully request that the Director deny CCE's Motion for Protective Order and issue an order requiring CCE's compliance with Rule 40.05's information requirements within thirty (30) days.

Dated: June 30, 2020

HAWLEY TROXELL ENNIS & HAWLEY LLP

By


Dana L. Hofstetter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below I caused to be served a true copy of the foregoing SBAR RANCH, LLC AND THE DISTRICT AT PARKCENTER, LLC'S RESPONSE TO MOTION FOR PROTECTIVE ORDER AND RENEWED MOTION FOR RULE 40.05.B. ORDER FOR APPLICANT TO SUBMIT COMPLETE RULE 40.05 INFORMATION with Exhibit by pre-paid U.S. Mail and email addressed to the following:

Cat Creek Energy LLC
398 S. 9th St., Suite 240
Boise, ID 83701

Racine Olson PLLP
Randall C. Budge
PO Box 1391
Pocatello, ID 83204

Allen Thompson
406 N. Thompson Rd.
King Hill, ID 83633

Barker Rosholt & Simpson
ATTN John Simpson
ATTN Albert P Barker
1010 W. Jefferson St., Suite 102
PO Box 2139
Boise, ID 83701 – 2139

Boise City Attorney's Office
ATTN Abigail Germaine
150 N. Capitol Blvd
PO Box 500
Boise, ID 83701

US Dept. of Interior
Bureau of Land Management
ATTN Fredric Price
1387 S. Vinnell Way
Boise, ID 83709

Idaho Dept. of Fish and Game
Craig White
Magic Valley Region
324 S. 417 E., Suite 1
Jerome, ID 83338

Idaho Dept. of Fish and Game
Tom Bassista
600 S. Walnut
Boise, Idaho, 83707

Idaho Water Engineering
ATTN David R. Tuthill, Jr.
2918 N. El Rancho Pl.
Boise, ID 83704

Wendi Combs
704 Lindenwood Dr.
Nampa, ID 83638

Gwinn Rice Ranch LLC
ATTN Jim Rice
2851 W. Balata Ct.
Meridian, ID 83646

Honsinger Law PLLC
ATTN Charles Honsinger
PO Box 517
Boise, ID 83701

Idaho Conservation League
ATTN Matt Nykiel
PO Box 2308
Sandpoint, ID 83864

Idaho Conservation League
ATTN Marie Callaway Kellner
PO Box 844
Boise, ID 83701

State of Idaho
Office of Attorney General
ATTN Ann Vonde
PO Box 83720
Boise, ID 83720-0010

Idaho Dept. of Lands
ATTN Michele Anderson
3284 W. Industrial Loop
Coeur d'Alene, ID 83815

Givens Pursley LLP
ATTN Michael Lawrence
ATTN Christopher Meyer
ATTN Charles Baser
601 W. Bannock St.
PO Box 2720
Boise, ID 83701-2720

Tree Top Ranches LP
ATTN Bill Mulder
101 S. Capitol Blvd., Suite 1801
Boise, ID 83702

Wildlands Defense
ATTN Katie Fite
PO Box 125
Boise, ID 83701

US Department of Interior Office of the Solicitor
ATTN Lisa Lance
960 S. Broadway Ave., Suite 400
Boise ID 83706

Dated: June 30, 2020

Sawtooth Law Offices PLLC
ATTN Daniel Steenson
ATTN Bryce Farris
ATTN Andrea Waldera
1101 W. River Street, Suite 110
PO Box 7985
Boise, ID 83707

US Department of Interior Bureau of
Reclamation
ATTN E. Gail McGarry
1150 N. Curtis Rd., Suite 100
Boise, ID 83706

Trout Unlimited
ATTN Peter Anderson
910 W. Main St., Suite 342
Boise, ID 83702



Dana L. Hofstetter

Summary of Documents Provided by Cat Creek Energy Pursuant to Rule 40.05

Rule 40.05	Subsection	Document(s)	Notes
40.05. Additional Information Requirements.			
c. The following information shall be submitted for applications to appropriate unappropriated water or trust water...			
i. For applications appropriating springs or surface streams with five (5) or fewer existing users...		Unnumbered documents ^A	More than 5 water users on South Fork Boise River – CCE claims provision doesn't apply.
ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.			CCE claims provision does not apply. However, no information provided to establish that storage pond will not intercept or appropriate ground water.
iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights.		CCE-X-00001 - 00028, CCE-D-00003 - 00007	General documents on project concept. No design, construction, or operation specifics.
		CCE-X-00001 - 00028	Claims no impact on water rights without supporting information.
		Unnumbered documents ^A	Claim diversions only in high flows and that Water Master will ensure no injury but no information on how CCE Project will be designed, constructed, operated or administered on a real-time basis to protect other water rights.

Rule 40.05	Subsection	Document(s)	Notes
	d. Information relative to sufficiency of water supply		
	i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.	CCE-E-00001 - 00171	Report on municipal water use projections and future demands in the Treasure Valley/Boise area.
		CCE-E-00191 – 00311 - CCE-E-00312	Feasibility studies of additional storage by raising Arrowrock and Anderson Ranch Dams.
		Unnumbered documents ^A	Claims water not consumptively used for power generation, but may be consumptively used by the downstream users. Claims maximum diversion is 10,000 cfs, but that there is no diversion rate required for operation.
		CCE-B-00001 - 00058	Calculation of annual reservoir evaporation with hydro water right application.
		Omitted	No analysis to determine timing and frequency of water availability, timing and amount of water needed for hydropower and timing and amounts of water needed and consumptively used by downstream users.
		Omitted	Inadequate documentation on seepage and other losses. No documentation on reservoir accounting and daily evaporation calculations.

Rule 40.05	Subsection	Document(s)	Notes
	ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source.	CCE-A-00001 - 00003	Analysis of in-priority water availability 2000-2019 (volume and number of days) (Hal Anderson report). No results on flow rates available and dates of water availability. No information on peak and average project water demand. No information about availability and ability to divert claimed rate (9,996 cfs). Does not consider effect of Elmore County Permit 63-34348 diversion from South Fork Boise River. Study spreadsheets not provided.
		CCE-E-00172 - 00185	Annual analysis of in-priority water availability 2000-2019 (volume, number of days, water in Anderson Ranch Reservoir, and snowpack percent of average).
		CCE-B-00207 - 00287	Proposed place of use legal descriptions for CCE water rights.
		CCE-B-00288 - 00306 - CCE-B-00307	Water availability for Anderson Ranch Reservoir and Boise Basin snowpack information
		CCE-B-00308 - 00342	IDWR Water Right Accounting Data – South Fork Boise River near Featherville.
		CCE-B-00343 ^B	Summary of static ground water levels for wells near CCE property. No location map, measurement dates, or units for the water levels.

Rule 40.05	Subsection	Document(s)	Notes
	e. Information relative to good faith, delay, or speculative purposes of the applicant		
	i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.	CCE-C-00001 - 00012	Memoranda of Energy Project Leases with Sawtooth Grazing Association and Wood Creek Ranch. Actual Leases not provided.
		CCE-X-00001 - 00028	Public land ownership map. Map does not show Sawtooth Grazing Association and Wood Creek Ranch lands.
		CCE-B-00059 - 00140 - CCE-B-00183 - 00206	Copies of Memoranda of Understandings to sell water to downstream users. The amounts of water and timing are not specified in MOUs. No MOUs provided for the places of use listed in Application #4 (CCE-B-00183 - 00206).
		Unnumbered documents ^A	Conclusory statements regarding compliance with Idaho Code Sections 42-205 and 42-206.
		Omitted	No information on ownership/authority to use lands west of the Proposed Cat Creek Reservoir and including parts of the Reservoir (Big Sky Farms Limited), as shown in Application #3 (CCE-B-00141 - 00182).
		Omitted	No information on the authorization to use US Forest Service lands that are within the identified CCE Project area.
	ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.	CCE-C-00013 - 00015 - CCE-C-01009 - 01109	County Conditional Use Permitting documents. CUPs are currently subject to Idaho Supreme Court Appeal.
		CCE-C-01110 - 01120 CCE-C-01213 - 01216	FERC documents (application for preliminary permit for power generation).
		CCE-C-01217 - 01219 - CCE-C-01491 - 01545	BOR documents (preliminary lease of power privilege application).
		CCE-C-01217 - 01218 ^B	Letter requesting USDA Forest Service comments on CCE water rights applications.
		Omitted	Information on other permits that may be needed (e.g., NPDES, CWA 404?).

Rule 40.05	Subsection	Document(s)	Notes
	f. Information Relative to Financial Resources		
	i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed.	CCE-D-00008 - 00012	Ballpark total cost figure provided without any itemization or supporting information. General assertion about project being financed "through both debt and equity" without any particulars. States "the Project's sales of energy and water will provide revenues for operations, debt amortization, taxes and returns to investors" without any further detail.
		CCE-D-00001 - 00002 - CCE-D-00003 - 00007 ^B	Preliminary and conceptual CCE Project drawings. No financial information provided.
		CCE-D-00013 - 00014 - CCE-D-00022 ^B	
		CCE-D-00025 - 00034 - CCE-D-00035 ^B	
		CCE-D-00023 - 00024 ^B	General financing sources and uses for the Cat Creek Energy Project.
		CCE-X-00039 - 00041 ^B	Permitting work milestones and timeline.
		Unnumbered documents ^{C,D}	Redacted declarations on financial resources from CCE (James Carkulis and John Faulkner).
		Omitted	No financial statement or commitment letter provided or other evidence that to show probable financing.
	ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications.	Unnumbered documents ^C	Partially redacted construction plan.
		Omitted	No cost/return on investment analysis.

Rule 40.05	Subsection	Document(s)	Notes
	g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the Director.	Unnumbered documents ^A	CCE claims it met this requirement by statewide advertisement of water right permit applications and IDWR letters requesting comments from certain State and local entities. No comments in addition to Protests filed with IDWR provided.
		CCE-E-00001 - 00171 - CCE-E-00313	Documents on Treasure Valley water demands - not specific to CCE Project.
		CCE-E-00190, CCE-E-00314 - CCE-E-00316 - 00324	Documents on renewable energy demands in the region. However, these documents are not relevant to the local public interest since CCE has stated that its hydro component will be independent from the wind and solar components of CCE's project and will use conventional power from the grid, resulting in net negative power production.
		CCE-E-00325 - CCE-E-07983 - 08022	Information on fish or biological impacts (journal articles, non-Project specific reports, studies for Anderson Ranch Reservoir) prepared by other parties for other purposes.
		Omitted	Specific local public interest analysis for this project not provided.
	h. The following information Relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by an applicant seeking reallocation of trust water for a project which the Director determines will reduce the flow of the Snake River by more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. The Director may request any or all of the following information for any filing seeking the reallocation of trust water.	Unnumbered documents ^A	CCE claims that this is not applicable since the application do not seek to appropriate trust water.

Notes:

- A. Reference to the following documents (documents not assigned bates numbers):
 - a. "Cat Creek Energy, LLC - Water Rules Compliance"
 - b. "Notice of Additional Information"
 - c. "Notice of Amended Rule 40.05 Disclosure"
- B. New documents provided in a June 16, 2020 Amended Rule 40.05 Disclosure including the following:
 - a. CCE-B-00343 "Surrounding Groundwater Wells "
 - b. CCE-C-01217 - 01218 "Ltr from USDA to ID Dept Water Resources re No Protest"
 - c. CCE-D-00015 "Cat Creek Reservoir Preliminary Design Modification SE"
 - d. CCE-D-00016 "Electrical System Single Line Consolidated - CCE-D-S001-1 Rev 0B (1)"
 - e. CCE-D-00020 "Powerhouse Substation - CCE-D-P003-1 (2)"
 - f. CCE-D-00021 "PSH Substation General Arrangement - SLS-D-P003-1 - Not For Construction"
 - g. CCE-D-00022 "PSH Switching Diagram - CCE-D-S001-6 Rev 0A (1) - Not For Construction"
 - h. CCE-D-00023 - 00024 "Sources & Uses - Cat Creek Energy"
 - i. CCE-D-00025 - 00034 "Transmission Pole - Single Circuit - 230 kV Exhibit Drawings - Not For Construction"
 - j. CCE-D-00035 "Transmission Structure Design - Parallel 230 kV & 115 kV - Exhibit Drawing - Not For Construction"
 - k. CCE-X-00039 - 00041 "Major Activities Timeline Breakdown - Cat Creek Energy"
- C. Redacted declaration from Mr. Carkulis provided on June 16, 2020 ("20200616 Second Carkulis Declaration (Redacted)"). The redacted letter contains a partially redacted construction budget with a brief narrative explanation of redacted items. The redacted declaration does not contain the following financial information attachments:
 - a. Construction Budget
 - b. Project Finance Process Narrative
- D. Redacted declaration from Mr. Faulkner provided on June 16, 2020 ("20200616 Faulkner Declaration (Redacted)"). The redacted declaration does not contain the following financial information attachments:
 - a. Itemized accounting of Cat Creek's investment (June 16, 2020)