

Glenwood Springs – Main Office
201 14th Street, Suite 200
P. O. Drawer 2030
Glenwood Springs, CO 81602

Aspen
323 W. Main Street
Suite 301
Aspen, CO 81611

Montrose
1544 Oxbow Drive
Suite 224
Montrose, CO 81402

mjs@mountainlawfirm.com
Direct: 970.928.2118
Office: 970.945.2261
Fax: 970.945.7336
*Direct Mail to Glenwood Springs

June 3, 2021

Garfield County Planning Division
Attn: Glenn Hartmann, Senior Planner
108 8th St., Suite 401
Glenwood Springs, CO 81601
Sent via email to ghartmann@garfield-county.com

RE: IHC Scott, Inc. Land Use Change Permit for a Gravel Operation on Parcel No. 217908300103 – Garfield County File Number MIPA-05-20-8788.

Dear Glenn:

This firm represents Island Park LLC (“Island Park”) and Colorado River Ranch, LLC (“River Ranch”). We have reviewed the Land Use Change Permit Application submitted by IHC Scott, Inc. (“Scott”) for the Rife Pit #1 (the “Project”). Island Park owns property to the west of the Scott property and River Ranch owns property to the north. Portions of both these properties are protected under two conservation easements held by Aspen Valley Land Trust (“AVLT”). A map showing the locations of the Scott property, the Island Park property, and the River Ranch property is attached as **Exhibit A**.

It is clear after reviewing the Scott submittal that Scott does not meet the strict requirements for the issuance of a land use change permit for the proposed industrial use. As Scott’s own application materials demonstrate, the only way Scott can implement the gravel pit use for which it seeks approval is to cause significant, irreparable damage to both the Island Park and River Ranch properties. This includes destroying many of the conservation values protected under the AVLT Conservation Easements. Because Scott fails to meet requirements of the Garfield County Land Use and Development Code (LUDC) (the “Code”) its request for a land use change permit must be denied.

The materials reviewed for this letter include the application dated March 30, 2021 and Appendices A through G (collectively, the “Application”). The Application is subject to a Major Impact Review by Garfield County. Applications subject to a Major Impact Review must comply with (a) *all applicable standards* of the LUDC, (b) the Comprehensive Plan, and (c) must not alter the basic relationship of the development to adjacent property. See LUDC 4-105(C), 4-106(C) and 4-203(G). Further, a waiver of standards may be approved *only if* the Applicant demonstrates that the proposed alternative (a) achieves the intent of the subject standard to the same or better degree than the subject standard, *and* (b) *imposes no greater impacts on adjacent properties* than would occur through compliance with the specific requirements of the Code. See LUDC 4-118(C). If the Application fails to satisfy any one of the applicable requirements and compliance cannot be

achieved through conditions of approval, the Planning Commission must recommend, and the Board of County Commissioners must ultimately deny the application. See LUDC 4-101(F)(2).

After considerate review of the Application, both Island Park and River Ranch have significant concerns about the Rifle Pit #1, impacts that the proposed Project will have on the economic use and environmental conditions of adjoining properties, impacts that will be imposed upon private property rights, and non-compliance with the LUDC requirements. An articulation of these concerns follows.

- I. The Scott Application must be denied because Scott has not obtained or submitted to Garfield County the applicable local, State, and Federal permits that are required to operate its gravel pit.

As a threshold matter, the LUDC precludes the issuance of a Land Use Change Permit until all required local, State, and Federal permits have been obtained and submitted to Garfield County including, but not limited to, approvals for the municipal watershed permit, CDPHE, USACE, NPDES, Division of Water Resources, etc. See LUDC 7-1002(I). According to the Application, Scott has neither obtained, and in all but one case has not yet even applied for, the applicable local, State and Federal permits. For example, Scott states that it “*will apply* for coverage under Permit No. COR400000, CDPS General Permit (for) Stormwater Discharges Associated with Construction Activity at least 10 days prior to the commencement of construction activities disturbing greater than or equal to 1 acre.” See Application 1-7, (emphasis added). Second, Scott states that it “*will also apply* for coverage under Permit No. COG603000 (Discharges Associated with Subterranean Dewatering or Well Development) *or* Permit No. COG608000 (Discharges to Surface Water from Well Development and Pumping Test Activities) to manage dewatered water.” See Application 1-7, (emphasis added). Next, Scott states “[a]n aquatic resources report and wetland delineation *will be submitted* to the Army Corps of Engineers (ACOE) in support of a nationwide permit application 39 (NWP 39) for Commercial and Institutional Developments. See Application 1-7, (emphasis added). Further, “[c]overage under a Nationwide Permit No. 7 *will also be obtained* for the outfall to the Colorado River.” See Application 1-8, (emphasis added). Neither has Scott obtained a Watershed Permit from the City of Rifle to address the dewatering discharge (which will include runoff from a crusher, concrete truck washout and likely flocculants that will be dumped into the Colorado River) within its Watershed Protection Area. See Application 1-8. Finally, Scott has not obtained decreed water rights or a plan for augmentation and merely states that it is “preparing a water court application for this project.” See Application 2-4 and 2-7.

The County cannot condition approval of the Application upon obtaining these permits in the future because the regulatory analysis associated with the permits and approvals is essential to determining whether Scott meets the applicable Code requirements. For example, before the County can affirmatively determine that Scott meets the requirements of LUDC 7-203 (concerning the protection of waterbodies), the County must, at a minimum, consider the expert input of the various regulatory agencies, including the CDPHE, ACOE, EPA and Division of Water Resources, from whom such permits and approvals are sought. River Ranch and Island Park have decreed water rights, including the Bernudy ditch, Island Ranch Lake Nos. 1, 2 and 3, Park Lake,

Centennial Lake, and Weller Lake. Scott misrepresents its compliance with LUDC 7-104 by this false statement: “The project has a legal and adequate water supply plan.” See Application 2-7. Scott has not filed a water court application. Water Court approvals and the consultations with the Division of Water Resources will demonstrate the extent that the Rifle Pit #1 will injure vested water rights, including those held by River Ranch and Island Park. Further, Scott’s dewatering plan predicts the pit will drawdown groundwater on the River Ranch property by over 8 feet, which will create impacts to wetlands, water features and sub-irrigated meadows on River Ranch property. As a result, the County cannot evaluate Scott’s request for various waivers of County standards until all impacts on adjacent lands are fully known and fleshed out by the applicable regulatory agencies. The Application cannot inform the County of the full extent of such impacts and the County cannot evaluate whether the Project complies with the Code until Scott obtains the requisite permits and approvals. Accordingly, the Application must be denied.

II. Scott’s Application fails to meet its burden with respect to its requests for waiver of standards.

Scott seeks a waiver from the standards found in both LUDC 7-203 and 7-1001. First, LUDC 7-203 requires the protection of waterbodies. The Code defines a “waterbody” as an accumulation of water and includes lakes, ponds, wetlands, rivers, streams, and other geological features where water moves from one place to another at least 10 months per year. See Application 15-38. LUDC 7-203 requires a minimum setback of 35 feet from the typical and ordinary high water mark on each side of a waterbody and prohibits certain structures and activity in the setback, including the disturbance of existing natural surface drainage characteristics, sedimentation patterns, flow patterns, or flood retention characteristics by any means. See LUDC 7-203. Though the Code requires the Applicant to achieve the same intent of the subject standard *to the same or better degree* than the subject standard, Scott provides no evidence that its proposal can meet this threshold. In fact, the information presented by Scott demonstrates that its gravel pit will destroy private water features and wetlands and injure decreed water rights on the River Ranch property.

As identified by LRE Water Engineers (**Exhibit B**), the dramatic draw down of the aquifer on the River Ranch and to a lesser degree the Island Park properties caused by the Rifle Pit #1 will lower or dry up wetlands and water features on these properties. These are wetlands and water features that River Ranch and Island park have invested in and cultivated to promote wildlife habitat and hunting opportunities. Scott concedes that the Rifle Pit will substantially depress groundwater tables in the area. See Application 2-3 (“Dewatering operations are expected to drop the water level such that a well would not be able to operate”); Application 2-7 (“Mining of an aggregate deposit like the Rifle Pit will involve affecting local groundwater”); Application 1-4 (“The nature of development and dewatering of the gravel pit does not facilitate the drilling of a well for potable water use.”). In fact, the Hahn Water Report goes on to conclude “to the extent that the on-site wetlands are dependent on the underlying groundwater system, it is likely that these wetlands will disappear in a relatively short period of time (months to years) following the onset of dewatering.” As such, the Scott application does the opposite of what is required by the Code. Scott’s proposed land use change would literally *impose greater impacts on adjacent properties* as opposed to proposing ways to reduce and eliminate such impacts. See LUDC 4-118(C).

Scott seeks a waiver from setback standards associated with industrial uses. LUDC 7-1001 requires a 100-foot setback from an adjacent property line for all activity associated with an industrial use, unless the use is on an industrially zoned property, or located within a building. The Scott property is not zoned for industrial use and the proposed activity will not occur in a building. The 100-foot setback is required to protect neighboring properties from harm by industrial activities. With every foot that the proposed Rifle Pit #1 is located closer to the Island Park and River Ranch properties, the more egregious its impacts are on these adjoining lands. It appears that the Scott property is not appropriately sized to accommodate the proposed large-scale gravel mining operation without harming adjoining lands. It is not the role of the County to accommodate an industrial use to the detriment of adjacent property owners. As such, the Code does not permit a waiver from the 100-foot industrial setback for Scott's operations.

III. Scott's proposal generates numerous off-site impacts to wildlife, agricultural lands, water rights and wetlands that harm private property rights and injure the values protected by the conservation easements.

Scott's application imposes numerous off-site impacts on surrounding properties, including harm to areas that have been protected by conservation easements. AVL T holds the two conservation easements on the Island Park and Colorado River Ranch parcels. The first conservation easement, dated December 11, 2003, encumbers a portion of the Colorado River Ranch property (the "2003 CE"). **Exhibit C.** The second conservation easement, dated December 30, 2005, encumbers a portion of the Island Park property (the "2005 CE"). **Exhibit D.** Under Colorado law C.R.S. § 38-30.5-101 *et seq.*, conservation easements represent bona fide real property interests in land and water. Both properties comprise a significant stretch of the Colorado River associated ecology that provides superior riparian and wetland habitat for a wide range of resident wildlife and migrating waterfowl. As confirmed in the Scott Application, these lands serve as critical habitat for Native Threatened and Endangered Species. See Application 2-9. Wetlands are abundant on both properties. Further, both properties host harmonious agricultural activities that occur in conjunction with the wildlife and environmental uses. The high-value environmental and agricultural conditions on both properties were cause for them to be protected with conservation easements to ensure that the unique natural conditions are preserved for future generations.

Pursuant to both conservation easements, Island Park and River Ranch have affirmative obligations to protect and preserve the conservation values identified in the easement documents in perpetuity. The 2003 CE strictly prohibits "[t]he degradation, pollution, or drainage of any surface or sub-surface water." 2003 CE at 4. Under the 2005 CE, activities may not "manipulate, divert, dam, pollute, drain, dredge or otherwise alter the naturally-occurring streams, wetlands, springs, lakes, ponds, or other surface or subsurface water features on the Property in a manner that degrades or destabilizes their natural banks or shorelines, or otherwise is inconsistent with the preservation and protection of the Conservation Values of the Property." 2005 CE at 7. As discussed in both the LRE Water Engineers letter (**Exhibit B**) and in Scott's own Hahn Water Report, the Rifle Pit #1 will devastate the wetlands and water bodies protected by the conservation easements.

The protected conservation values under both conservation easements also include agricultural soils and ranch land. The agricultural productivity of the Island Park and River Ranch properties are significantly implicated by the Scott proposal. Both the Island Park and the River Ranch properties are the site of on-going agricultural operations, including irrigated and sub-irrigated pastures and grazing. LUDC 7-201 and LUDC 1-301 prohibit land use changes if the new land use activity will harm or otherwise limit the viability of existing agricultural operations. As such, the Applicant must avoid contributing to a loss of agricultural land and minimize impacts to irrigation water, water delivery systems, and irrigation schedules. The Scott Application threatens agricultural operations on the Island Park and River Ranch properties by dewatering sub-irrigated “wet” meadows that will harm grazing and forage production. Garfield County is obligated to minimize the impacts of development on existing agricultural operations and maintain the opportunity for continued agricultural production.

An integral part of Scott’s dewatering plan requires burying a pipeline on its neighbor’s land to convey water to the Colorado River. Scott cites to a temporary license agreement it negotiated with Shidelerosa LLLP (“Shideler”), which Scott claims will enable dewatering of the pit. The license agreement, however, is insufficient to permit Scott to implement its proposed activities through the duration of the mining and reclamation operations because the license is temporary and is revocable by either party at any time upon 60 days’ notice. The Application, however, does not address the potential termination of the license and that fact that without it Scott has no legal means of dewatering its Project.

The Application also fails to address impacts to the Bernudy ditch that crosses the Shideler and River Ranch properties. The Bernudy ditch, including First and Second Enlargements, is decreed for 7 c.f.s. and is owned by River Ranch. The proposed dewatering pipeline intersects with the Bernudy ditch as depicted by Photo Point 16 in the Scott application. Pursuant to LUDC 7-201(E), land use changes shall not interfere with ditch rights-of-way. Where irrigation ditches cross or adjoin the land proposed to be developed, as is the case here, the developer shall insure that the use of those ditches can continue uninterrupted. See LUDC 7-201(E)(4). No structures, such as a pipeline, shall be placed within the right-of-way without written permission from the appropriate ditch owner. See LUDC 7-201(E)(5). Further, ditch crossings, such as the one proposed by the Application, shall respect the rights of the ditch owner to operate and maintain their ditch without increased maintenance or liability. See LUDC 7-201(E)(6). *At a minimum*, all irrigation ditch crossings shall require the crossing be sized to not interfere with ditch operations or change existing hydraulic flow characteristics. See LUDC 7-201(E)(6)(a). *Prior to permit application*, the Applicant shall provide a letter from the ditch company regarding agreement with standards contained in the proposed crossing. See LUDC 7-201(E)(96)(c). Scott did not reach out to River Ranch regarding the proposed ditch crossing. Pursuant to LUDC 7-201(E)(7), applications that may affect or impact any ditch right-of-way shall include the name and mailing address of the ditch owner. Scott’s Application did not identify River Ranch as the owner of the Bernudy ditch. The Code correctly directs applicants to obtain information related to ditch ownership from the Division of Water Resources. See LUDC 7-201(E)(7). Notably, the Application does not identify the Bernudy ditch as a ditch but rather as an intermittent stream. This is inaccurate and intentional by Scott in attempt to avoid complying with the Code. River Ranch has not granted any consent for Scott to interfere with its ditch easement right. Further, applications that include any

improvements located adjacent to or below grade of an irrigation ditch shall address and mitigate potential impacts to the irrigation ditch in a drainage plan. See LUDC 7-201(E)(8). The drainage plan shall demonstrate that the drainage will not impair operation of the ditch. See LUDC 7-201(E)(8). The Application does not consider the Bernudy ditch in its drainage plan. Under LUDC 7-201(E), the County cannot approve the Scott application utilizing the pipeline without consent from River Ranch.

Wildlife habitat on the Island Park and River Ranch properties is similarly protected by the conservation easements and must also be protected under the Code. See LUDC 7-202. Despite these requirements under the Code, Scott continues to refuse to address the impact of its activities on the private property rights and conservation values associated with impacted wetlands and wildlife habitat on neighboring properties. Accordingly, the Application fails to meet the threshold requirement that the application contain “an explanation of all functional aspects of the proposed facility such as the processes, activities, function operations and maintenance that will occur as part of the project.” LUDC 4-203(B)(5). The wetlands on the Island Park and River Ranch properties are recharged and maintained not only by surface water but also by groundwater. See the LRE Water Engineers Letter, **Exhibit B**. Scott’s activities degrade the wetlands on adjoining properties. This not only harms the wildlife that rely on the wetlands, but it potentially creates legal liability for Island Park and River Ranch under the conservation easements.

The burden of proof is on Scott to prove that wetlands are either: (a) supported entirely by irrigation water and therefore non-jurisdictional, or (b) no longer meet the regulatory definition of wetlands. This includes impacts to all wetlands, not just those on its property. Under the Code, “[a]ny development impacting a Waterbody shall comply with all applicable state and federal laws, including, but not limited to, CDPHE water quality control division regulations and the Army Corp of Engineers regulations and permitting for waters of the U.S.” See LUDC 7-203(D). In its January 26, 2021 Referral Comment, the ACOE determined that “all on-site wetlands are assumed jurisdictional until proven otherwise.” The ACOE requires that every effort be made to avoid project features that harm wetlands. Until Scott submits a single proposal that considers all of its impacts, including alternatives that avoid impacts to wetlands or mitigation plans to compensate for unavoidable losses, the County cannot evaluate the impacts to wetlands under the LUDC.

Scott’s “Impact Analysis” glosses over these destructive impacts and simply states that the Rifle Pit #1 is somehow compatible with the use of adjoining properties. The Code requires that the nature, scale, and intensity of a proposed gravel operation be compatible with surrounding land uses. LUDC 7-1002(F). The Island Park and River Ranch properties are used for agricultural, conservation and hunting purposes. The owners of these properties have invested in conservation improvements to promote aquatic and riverine wildlife enhancements that critically include ponds and wetlands. The Scott Application hides and obscures the detrimental impacts of Rifle Pit #1 on neighboring properties. The Hahn Water Report concedes that Scott’s Application utterly fails to address impacts to water features and water rights on the Island Park and the River Ranch properties. The wildlife habitat, ponds, wetland enhancements and decreed water rights promote both the personal use of theses properties and the economic value of the land as an investment. The Scott Application will be devastating to the private property rights of its neighbors and the perpetual conservation values protected by the conservation easements.

IV. The Scott Application fails the following additional criteria required to approve a land use change permit.

Applications subject to major impact review must be consistent with the Comprehensive Plan. The Application is inconsistent with the Comprehensive Plan and Scott, as expected, supplies only this brief remark in support: “The property is designated in the County Comprehensive Plan as within the Residential Medium High Density and Silt Urban Growth Area.” See Application at 1-5. Pursuant to Policy #5 of the Comprehensive Plan, the County must direct industrial development to locations which possess the appropriate physical features and community facilities and services. See Plan at 42. A strategy to implement this policy directs the County to ensure that industrial developments are compatible with adjacent land use. Consideration should be given to all potential negative impacts including water quality and wildlife habitat. See Plan at 42. An additional strategy includes ensuring that industrial development preserves the natural environment of the County. The Comprehensive Plan acknowledges that gravel operations can have significant impacts on communities, including impacts to environmental health. See Plan at 57. The Comprehensive Plan affirms that water is essential to all life in the watershed and potential threats to the water supply include industrial uses. See Plan at 49. The Scott Application as currently constituted is not consistent with the Comprehensive Plan.

In several places, the Application perpetuates the inaccurate statement that a tailwater ditch of the Last Chance Ditch runs across the Scott property from east to west and ultimately discharges into the Colorado River. See Application 1-7, 2-8 and 2-11. SMG’s own survey data confirms that this channel ends on the Scott property and does not discharge into the Colorado River – especially across the Island Park property. See Figure 3. Scott continues to rely on this statement to purport compliance with LUDC 7-201 (General Resource Protection Standards – Agricultural Lands) and 7-203 (Protection of Waterbodies). Scott’s repetition of falsehoods contradicted by its own consultant calls into question the veracity of Scott’s other Application statements.

The Rifle Pit #1 is not compatible with adjacent wildlife, conservation, and agricultural uses from a noise standpoint. By its own Application, Scott concedes non-compliance with noise standards set forth in LUDC 7-1002 and § 25-12-103, C.R.S. Pursuant to Table 7-1002, the noise threshold for the Rifle Pit #1 from 7 a.m. to 7 p.m. would be 55 dB(A). Scott collected ambient noise levels on September 30, 2020, between 12:38 p.m. and 12:45 p.m. See Application 2-16. The projected noise level at the property boundary, according to the Application, would be 85.7 dB(A). See Application 2-19. At a point 200 feet from the property boundary, the projected noise levels would still be 70.8 dB(A). These noise levels far exceed state and local limits. The Application purports that “[v]isual and sound impacts will be mitigated with Garfield County Conditions of Approval and DRMS Standards.” See Application 2-6. No sound mitigation has been designed and the Application fails to meet this Code requirement.

Scott has failed to properly notice all nearby property owners as required by the LUDC. Grant Brothers owns property within the mandatory notice distance of the Scott Property. Appendix A to the Scott Application indicates that the Grant Brothers did not receive notice of this application.

Finally, Scott asserts in its Application that “[i]f the wetlands are determined to be non-jurisdictional, Scott intends to submit a minor amendment to the Garfield County Land Use Change Permit to allow for expanded mining in the future.” See Application 1-9. Due to the magnitude of potential impacts to be caused by an expansion, such amendment to the Permit would be a major amendment and not a minor one.

V. Conclusion

Scott’s Application fails because its property is simply too small for the large-scale industrial use that is proposed. The Rifle Pit #1 can only be implemented by imposing devastating, irreparable harm on neighboring property owners. Scott essentially requests County permission to use its property while at the same time destroying private property rights, economic use, personal enjoyment, and environment. A land use change permit cannot be granted under the Code when the proposed use creates such destructive off-site impacts.

Between Garfield County and Colorado DRMS this is now the *fourth* application filed by Scott for the Project. At great cost and expense, Island Park and River Ranch have been required to point out the numerous deficiencies in the Scott Applications four separate times. Scott simply refuses to address the serious concerns articulated by Island Park and River Ranch. The reason should be obvious – Scott can only implement the Rifle Pit #1 by harming its neighbors. This harm extends to property rights protected by conservation easements. The Code simply prohibits such impacts and does not allow the County to grant an approval until all the issues identified in this letter have been properly vetted and mitigated. To that end, the Planning and Zoning Commission and the Board of County Commissioners have no choice but to deny the request for land use approvals.

Very truly yours,

KARP NEU HANLON, P.C.



Michael J. Sawyer

MJS: