



May 10, 2018

Mr. Brian Bonlender
Director, Washington State Department of Commerce
PO Box 42525
Olympia, WA 98504-2525

Sent by email to: Brian.Bonlender@commerce.wa.gov

RE: Misuse of Strategic Reserve Funds

Dear Mr. Bonlender:

The Kalispel Tribe of Indians (“Tribe”) recently submitted a Public Records Act request to the Department of Commerce (“Commerce”) regarding HiTest Sands, Inc.’s (“HiTest”) proposal to construct a silicon smelter in Newport, Washington. Although the Tribe has not yet received all responsive records, we are writing to inform you that the records provided to date show that HiTest obtained \$300,000 from the Governor’s Strategic Reserve Fund (“SRF”) by making a factual misrepresentation on its invoices, and that this misrepresentation resulted in part from Commerce’s improper administration of the economic development incentives it provided to HiTest. The Tribe urges Commerce to exercise its right to recapture these funds immediately.

As you know, Commerce utilized two economic development incentives to recruit HiTest into Pend Oreille County. Commerce designated the smelter a project of statewide significance under RCW 43.157,¹ and it awarded the Pend Oreille County Economic Development Commission (“EDC”) a \$300,000 SRF grant from which to reimburse HiTest for eligible expenses.² Both incentives were specific to Pend Oreille County—the designation because of a statutory provision requiring approval from the legislative authority with jurisdiction over the Usk site,³ and the SRF funding pursuant to the terms of the grant between Commerce and the EDC.⁴

HiTest’s factual misrepresentation arose from Commerce’s disregard for these geographic constraints. After Commerce awarded HiTest the incentives in August 2016, HiTest continued to pursue the Northwest Alloy site in Addy as its preferred location for the smelter as it had been prior to receiving the incentives.⁵ Commerce facilitated this effort,⁶ though the smelter’s

¹ August 18, 2016 Letter of Approval from Commerce.

² HiTest Grant Package, pp. 7-17 (Commerce Grant No. SRF15-00015-112).

³ RCW 43.157.030. See also July 25, 2016 Letter of Approval from the Pend Oreille County Commissioners.

⁴ HiTest Grant Package, pp. 8, 14 (Scope of Work).

⁵ See “HiTest Smelter Going to Addy.” *Newport Miner*, February 1, 2017. <http://pendoreillerivervalley.com/hitest-smelter-going-to-addy-p69030-674.htm>

⁶ See e.g., Commerce Emails (“CE”) pp. 194-293 (describing Commerce’s efforts to support HiTest in Addy from January to March 2017).

statewide significance designation was specific to Pend Oreille County. Commerce also offered to reimburse HiTest for expenses incurred at the Addy Site,⁷ despite the fact that Commerce had not entered a SRF funding agreement with the Tri-County Economic Development District (“TEDD”) and may not have received authority from the Governor to expend SRF funds in Stevens County.⁸ On April 24, 2017, HiTest submitted invoices to TEDD seeking reimbursement “for work done in Addy.”⁹

Although TEDD never reimbursed HiTest for these expenses, HiTest later altered the invoices it submitted to TEDD to obtain SRF funds from the EDC. This misrepresentation emerged from the chaos HiTest created after it stopped pursuing the Addy site in March 2017,¹⁰ and signed a letter of intent to purchase the Newport site in early May.¹¹ Having spent months actively supporting HiTest’s efforts at the Addy site, Commerce was not prepared for this change. There were no SRF funding agreements in place even though the effective date of the grant to the EDC was August 4, 2016,¹² and there was very little time to prepare and execute them prior to the expiration of the grant term on June 30, 2017.¹³ Two contractual agreements were executed on or after June 21, 2017—one between Commerce and the EDC, and the other between the EDC and HiTest.¹⁴ The EDC issued a \$300,000 check to HiTest on July 5, 2017 to reimburse it for the same invoiced expenses that HiTest submitted to TEDD.¹⁵

This reimbursement was not consistent with the terms of both the Commerce-EDC agreement and the EDC-HiTest agreement. The scope of work in the former was to help HiTest locate the smelter in Pend Oreille County,¹⁶ and the EDC’s reimbursement obligation in the latter was limited to expenses associated with the Newport site.¹⁷ As the expenses in the invoices were for “work done in Addy” and incurred before HiTest began pursuing the Newport site, they were not reimbursable.

⁷ CE, p. 277.

⁸ Commerce has not yet provided the Tribe with a copy of the Governor’s authorization of the SRF award. If that authorization is specific to Pend Oreille County, as Commerce’s August 19, 2016 press release indicates, then Commerce did not have authority to authorize the expenditure of funds in Stevens County. RCW 43.330.250(2). Conversely, if the Governor’s authorization was limited to Addy as requested in the April 27, 2016 briefing document supporting the grant, then Commerce’s expenditure of funds in Pend Oreille County would have been *ultra vires*.

⁹ CE, p. 307 and attachment (submitting invoices for “work done in Addy”).

¹⁰ CE, p. 294 (setting forth HiTest’s “wish list” for an alternate site following its inability to negotiate an acceptable power contract with Avista; interestingly, this list includes several attributes not present at the existing Newport site: industrial zoning, a minimum buffer of 1 mile from residential areas, availability of 144,000 gallons per day of water, and rail access).

¹¹ CE, p. 308.

¹² HiTest Grant Package, p. 7 (box 2).

¹³ See December 12, 2016 Letter from Commerce to HiTest (notifying HiTest that it needs to select a location for the smelter by February 15, 2017 in order for SRF funds to be distributed by the end of the grant period).

¹⁴ HiTest Grant Package, pp. 7-17 (Commerce Grant No. SRF15-00015-112); 18-20 (June 21, 2017 Agreement Between Pend Oreille County Economic Developmental Council and HiTest Sand Inc. for Transfer and Use of Strategic Reserve Funds).

¹⁵ HiTest Grant Package, pp. 21-24; EDC Check No. 5885.

¹⁶ HiTest Grant Package, pp. 8, 14.

¹⁷ HiTest Grant Package, p. 18 (Section 1).

In light of this contractual limitation, HiTest altered the invoices it had submitted to TEDD before submitting them to the EDC.¹⁸ The two sets of invoices are identical in every respect with the exception of a change in the site location on Invoice No. 17063 from Addy/Usk on the TEDD version to Newport on the EDC version. The EDC had no reason to be aware of this change due to its lack of involvement at the Addy site, but Commerce did.¹⁹ As a result of HiTest's misrepresentation and Commerce's failure to exercise due diligence in its review of the invoices, HiTest deceived the EDC into paying for its efforts to locate the smelter in Stevens County.

It is worth noting that HiTest's misrepresentation emerges from the lone detail provided in its invoices. If Commerce is in the practice of authorizing the distribution of SRF funds on the basis of such limited information, one has to wonder how this economic development incentive has been abused over time. In any event, Commerce's carelessness on this project has been systemic. In addition to being complicit in HiTest's misrepresentation, Commerce did not appropriately vet the smelter's pollution footprint prior to recommending its designation as a project of statewide significance;²⁰ did not consult with the Tribe prior to supporting the smelter's location directly upwind of our Reservation;²¹ and did not complete cultural review before authorizing distribution of SRF funds to HiTest as required by Executive Order 05-05.²²

While Commerce can help remedy HiTest's misrepresentation by recapturing the SRF funds through the EDC,²³ it has a broader duty to revoke all state support for HiTest. In its brief time in Washington, HiTest has demonstrated a character for recklessness, if not deceit. Its rap sheet to date includes doctoring invoices, using federal easements without authorization, and attempting to use improper meteorological data to model the smelter's air quality impacts. This is not the type of company that belongs in Washington, much less at the controls of a pollution source as large as the smelter.

Regards,



Deane Osterman
Executive Director, Kalispel Natural Resources

Cc: Rob Duff, Governor's Office
Charles Knutson, Office of Financial Management
Pat McCarthy, Washington State Auditor
Norm Semanko, Counsel for CANSS
Rick Eichstaedt, Counsel for RG*NEW

¹⁸ Compare CE, p. 307 and attachment (TEDD invoices) with HiTest Grant Package, pp. 22-24 (EDC invoices).

¹⁹ *Supra*, n.9 (Commerce copied on HiTest's email submitting invoices for "work done in Addy").

²⁰ See e.g. HiTest Sand SRF Memo Addendum (failing to consider the smelter's adverse environmental effects); see also CE, p. 301 (noting HiTest's concern over the Department of Ecology's Clean Air Rule).

²¹ See September 26, 2016 Letter from the Kalispel Tribe to Governor Inslee.

²² See HiTest Grant Package, p. 4 ("For private projects where funding will assist with permitting, environmental analysis, design/engineering, etc. of a private construction project *that will ultimately result in ground disturbance*, EO 05-05 compliance must be completed before funds can be released.") (emphasis added).

²³ HiTest Grant Package, p. 10 (Section 12(A)); p. 19 (Section 5).