IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

JAMES BROSE, a married man; and PAIGE GREEN DUNN, a married woman,

Petitioners,

vs.

KITTITAS COUNTY, a Washington State County Government; TEANAWAY SOLAR RESERVE LLC, a Wyoming Corporation, and HOWARD TROTT, as its Managing Partner; AMERICAN FOREST HOLDINGS LLC, a Washington Limited Liability Company; and MORTON LAND & TIMBER, INC., a Wyoming Corporation,

Respondents.

NO. 10-2-00389-37

PETITIONERS' PETITION FOR REVIEW UNDER THE LAND USE PETITION ACT

INTRODUCTION

Petitioners James Brose and Paige Green Dunn (Petitioners), by and through their undersigned counsel, file this Petition pursuant to the Land Use Petition Act ("LUPA"), for judicial review of the following decisions of the Kittitas County Board of Adjustment (Board): 1) Findings of Fact and Decision, Teanaway Solar Reserve - SEPA Appeal (SEPA

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

Decision), attached hereto as Exhibit 1; and 2) Notice of Decision - Conditional Use Permit, Teanaway Solar Reserve (CUP Decision), attached hereto as Exhibit 2.

The Board's decisions raise two issues: (1) Did the Board err by denying the Petitioner's appeal under the State Environmental Policy Act (SEPA)? (2) Did the Board err by granting a CUP when it had not properly applied the SEPA appeal factors and procedures as required under state law, and when it failed to meet the necessary CUP criteria?

Petitioners respectfully request the Court to invalidate the Board's SEPA Decision and CUP Decision, and remand the matter to Kittitas County (County) with direction that the County issue a Determination of Significance (DS) and require preparation of an Environment Impact Statement (EIS). Further, Petitioners request that the Court invalidate the CUP until such time as the County properly prepares and issues an EIS. Only after the issuance of the EIS and the proper environmental evaluation of the project should the CUP application be determined by the County.

I. PARTIES

1.1 **Name and Mailing Address of Petitioners:** James Brose, PO Box 177 Cle Elum Washington, 98922; and Paige Green Dunn, 24488 SE 179th Street, Maple Valley, Washington, 98038.

1.2 **Name and Mailing Address of Petitioner's Attorney:** David Lawyer and Inslee, Best, Doezie & Ryder, P.S., 777 108th Avenue N.E., Suite 1900, Bellevue, Washington, 98009.

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

1.3 **Name and Mailing Address of Local Jurisdiction Whose Land Use Decision Is At Issue & Identification of Decision-Making Officer:**

The County is the local jurisdiction whose land use decision is at issue, specifically the Board's Decision, attached as Exhibit 1. The mailing address for the County is identified as 411 N. Ruby St., Suite 2, Ellensburg, WA 98926. In addition, the Board lists its address as the same as the County listed above.

1.4 **Identification of Parties Pursuant to RCW 36.70C.040 (2) (b) - (d):**

(a)(i). Teanaway Solar Reserve, LLC (TSR) and Howard Trott, its managing director, are identified as the "Applicant" on the Decision. The address given is 218 East First Street, Suite B, Cle Elum, Washington 98922.

(a)(ii). American Forest Holdings LLC, 660 Madison Ave., 14th Floor, New York, NY 10065; and Morton Land & Timber Inc., c/o WLS & Assoc. Inc., 965 Grand Blvd., Bellingham, WA 98229, are the names and addresses identified in the records of the county assessor as the taxpayers for the property at issue, based upon the description of the property in the application.

(b) The following Petitioners are Kittitas County land owners and taxpayers who reside adjacent to the proposed site:

(i) James Brose, mail address listed above: Property address is 931 Loping Lane, Cle Elum, Washington, 98922.

(ii) Paige Green Dunn, mail address listed above: Property address is 1307 Loping Lane, Cle Elum, Washington, 98922

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
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II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over this controversy pursuant to RCW 2.08.010, *et seq.* (superior court jurisdiction), and Chapter 36.70C RCW (authorizing judicial review of land use decisions of local jurisdictions).

2.2 Venue is proper under RCW 4.12.025 and Chapter 36.70C RCW.

III. STANDING & EXHAUSTION OF ADMINISTRATIVE REMEDIES

3.1 Petitioners have standing to seek judicial review under RCW 36.70C.060(2) in that they each own property which directly abuts the property that is the subject of the CUP under review. Petitioners are aggrieved and adversely affected by the Decision in that it allows for the destruction of more than a square mile of working forest land adjacent to their properties, to be replaced by a commercial/industrial facility that will impact the environment and the Petitioners. The CUP provides that up to 450 workers per day would cross each of the petitioners' land, without the permission or consent of the Petitioners, to build the proposed solar installation.

3.2 Petitioners have exhausted their administrative remedies because they properly filed an appeal of the County's SEPA threshold determination and participated at the CUP hearing. The Board heard Petitioners' SEPA appeal, and denied it. Further, the Board granted the CUP. Therefore, a LUPA action before this court is procedurally and jurisdictionally proper.

IV. FACTS DEMONSTRATING PETITIONER IS ENTITLED TO JUDICIAL REVIEW

4.1 Petitioners incorporate paragraphs 1.1 through 3.2 herein.

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

4.2 On August 18, 2009, TSR filed a 1,400 page CUP Application and Draft Development Agreement with the Kittitas County Community Development Services. The application seeks to place the nation's largest solar facility on the forested hills above Cle Elum at an elevation of up to 2,600 feet—a location that regularly sees three feet of snow in the winter. The site would require the clearing of nearly one square mile of working forest and would cover the ground with reflective and impervious solar panels, visible at locations up to 8 miles away. The CUP Application has been assigned Project File Number CU-09-00005. After many exchanges of public comment, many of which requested that the County Issue a DS and require the preparation of an EIS, the County issued a Mitigated Determination of Non-significance (MDNS) on July 15, 2010. The Petitioners timely filed a SEPA appeal on July 25, 2010. Before the application was even deemed complete, the County decided to hold the SEPA Appeal and CUP hearing before the Board just two weeks later, on August 11, 2010.

4.3 With only 3 short weeks between the issuance of the MDNS and the appeal hearing before the Kittitas County Board of Adjustments, Petitioners were forced to wade through a file that now contains thousands of pages of data, reports and legal documents. Nonetheless, the SEPA appeal and the CUP hearing took place before the Board on August 11, 2010. Even though more citizens spoke in opposition to the project than those

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

5

who supported it, the Board denied the SEPA appeal by a vote of 5 to 0. The Board further granted the CUP by a vote of 4 to 1.[1]

4.4 According to TSR's recent press release, TSR intends to "break ground" and start construction as soon as permits are issued by the County. TSR has already entered into a memorandum of agreement with a construction company to begin the site work.

4.5 With the CUP now granted by the County, TSR has stated that it would immediately commence the construction of the nation's largest solar installation generating up to 75 megawatts of electricity per year. The installation would cost approximately $350 million to construct, and would span nearly one and one half miles in width. TSR proposes to place 400,000 solar panels, 90 inverter buildings and a six-acre substation within 477 acres of a 960-acre site owned by the American Forest Land Company (hereinafter "AFLC") in the forested hills above Cle Elum.

4.6 The testimony and record before the Board demonstrated that the SEPA Expanded Checklist, and supporting reports and materials that the County staff and Board relied upon were in error, were incomplete and were insufficient to adequately review and mitigate the project's probable or assured environmental impacts to the following elements of the environment (WAC 197-11-444):

a. Natural environment: earth, geology, soils, topography, unique physical features, erosion/enlargement of land area (accretion);

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[1] Paradoxically, the Board member who voted against the CUP did so upon remarks that she was concerned about environmental impacts of the project, after voting to deny the SEPA Appeal, challenging the issuance of the MDNS!

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
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777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

b. Air: Air quality, odor, climate;

c. Water: surface water movement/quantity/quality; runoff/absorption; flooding; ground water movement/quantity/quality; and public water supplies;

d. Plants and animals: Habitat for and numbers of diversity of species of plants, fish or other wildlife; unique species; fish or wildlife migration routes;

e. Energy and natural resources: Amount required/rate of use/efficiency; source/availability; scenic resources;

f. Built environment: noise, risk to public health;

g. Land use: light and glare; aesthetics, recreation, historic and cultural preservation;

h. Transportation: vehicular traffic; parking, movement; circulation of people or goods; traffic hazards;

i. Public services and utilities: fire; water/storm water; other governmental services or utilities.

4.7 Petitioners seek only to have the environmental impacts of this project properly studied and evaluated. The project will have probable significant, adverse environmental impacts to the environmental elements noted in Paragraph 4.6 above, that will not be mitigated to a level of non-significant, and that require the preparation of an EIS. RCW 43.21C.031 An order remanding this matter to the County and requiring the County to issue a threshold Determination of Significance is warranted. The project's

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

significant impacts must be considered in light of an EIS, which must occur prior to the issuance of a decision on the CUP application.

4.8 The project also fails to meet the necessary County CUP criteria, and should therefore be invalidated.

V. STATEMENT OF ERRORS COMMITTED

5.1 Petitioners incorporate paragraphs 1.1 through 4.8 herein.

5.2 The County failed to properly evaluate the fire protection plan: The County has not properly considered the increased likelihood of fire due to the Applicant's proposed use, nor the potential for harm due to lack of appropriate evacuation routes during a wild or man-made fire, fire hazards and other fire safety issues. It has, therefore, ignored the precedent set out in *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wash. App. 408, 225 P.3d 448 (2010).[2]

5.3 The County failed to conduct and alternate site analysis as required by RCW 43.21C.030.

5.4 The County failed to ensure that the project is consistent with its Critical Areas Ordinance, and failed to mitigate the environmental impacts to those critical areas regulated under the County's code, such as wetlands, wildlife habitat areas and geologically hazardous areas. In addition, the project's negative environmental impacts will not be sufficiently mitigated to avoid probable significant adverse environmental

[2] The County also erred in one of the Board of Adjustment's members declining to recuse herself in the SEPA appeal when it was revealed that she is the Fire Marshall, who signed the Fire Protection Plan that is being challenged as insufficient for purposes of mitigating impacts related to fire hazards.

INSLEE BEST
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777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

impacts to regulated critical areas, as the County had not by the time of consideration of Applicant's CUP application, updated its Critical Areas Ordinance, as required by state law.

5.5 The County has failed to consider and mitigate the probable significant adverse environmental impacts from light, glare and aesthetics. The County failed to follow its own code provisions regarding reflective materials on roof surfaces. The County expressly prohibits reflective roof materials on single family dwellings but will allow a square mile of reflective solar panels to be placed on the Cle Elum Ridge visible in most directions for eight miles. According to the record, solar panels have the same reflectivity as water. The Board relied upon the expanded SEPA Checklist and supporting documentation, which fail to adequately or accurately evaluate the significant impacts that will be caused by the light, glare and aesthetics of the project.

5.6 The proposed project will have probable significant adverse environmental impacts on multiple special and sensitive areas in the vicinity. These include the Teanaway River, Cle Elum Ridge, Yakima River Gorge and related watersheds. In addition, the County has failed to ensure that environmental impacts to these areas have been thoroughly analyzed. *See Swift v. Island County*, 87 Wn. 2d 348, 552 P.2d 175 (1976).

5.7 The County failed to properly consider and adhere to various wildlife laws including, but not limited to, The State Bald Eagle Protection Act, the Federal Bald Eagle and Golden Eagle Protection Act, The Endangered Species Act and the Migratory Bird

INSLEE BEST
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Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

Treaty Act. The project will have probable significant adverse environmental impacts to wildlife, plants, unique species and wildlife migration routes.

5.8 The County failed to adequately consider potential impacts to water resources, surface water movement, run-off/absorption, groundwater movement in a flood prone area. The Environmental Checklist and MDNS fall far short of evaluating the potential impacts of the proposed action on water resources and the County's approach violates SEPA. The project will have probable significant adverse environmental impacts to the water resources identified herein. Just by way of example, the County's hydrology report indicates that the project will cause a 67% increase in peak storm water flows in one of the affected basins.

5.9 The County failed to adequately consider the cumulative impacts of the project, and establish a precedent for future actions with significant impacts. For example, if the County approves the project as proposed, it will establish a precedent that large-scale quasi-industrial solar facilities may be constructed in other counties without any significant environmental review for impacts to scenic resources.

5.10 Under SEPA, the lead agency is specifically required to consider whether several marginal impacts when considered together may cumulatively result in a significant adverse impact. WAC 197-11-792(2)(c)(iii). The likelihood of an accumulation of adverse impacts of solar energy and industrial development in this region has been identified by Petitioners at the appeal, and should have been included in the County's SEPA analysis.

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

5.11 The project will have probable significant adverse environmental impacts to historic and cultural preservation. Further, the County has not properly demonstrated whether it has consulted with tribal governments in the region—particularly tribes, such as the Yakama Nation, with ceded lands in the affected area. There are three specific claims that the Yakama Nation has regarding the project which include the following:

(a). Treaty Rights Marginalized.

The subject clear-cutting/power-generating project adversely impacts the rights and interests of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") related to the entire area encompassing and surrounding the so-called Teanaway Solar Reserve. The Yakama Nation is a federally recognized sovereign Indian Tribe under the Treaty of June 9, 1855 12 Stat. 951.

Upon information and belief, Petitioners understand that the Yakama Nation's Treaty memorializes certain rights throughout the Yakama Nation's Ceded Lands – lands which include all of Kittitas County. The Treaty with the Yakamas, 12 Stat. 951, is the supreme law of the land. U.S. Const. Art. VI, Cl. 2. No state, or political subdivision thereof, may violate the Yakama Nation's Treaty of 1855. Among the rights guaranteed to the Yakama are the right to take fish in all streams and usual and accustomed places in the Nation's Ceded Lands; together with the right to hunt, gather roots and berries, and pasture horses and cattle upon open and unclaimed land within the Nation's Ceded Lands. The subject clear-cutting/power-generating project will directly violate the Treaty rights and resources guaranteed to the Yakima and continue what has been an unfortunate incremental erosion of the Yakama Nation's rights as unnecessary and reckless development irreparably damages

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

the natural habitat essential for the Yakama Nation's hunting, fishing, gathering rights, and the Yakama Nation's way of life.

(b). Cultural Rights Ignored.

In addition, the alleged archeological analysis undertaken for the subject clear-cutting/power-generating project was severely deficient and failed to account for the potential disturbance to the Yakama Nation's cultural artifacts, particularly considering there was a lack of any sub-surface sampling of the project area that is largely covered with dense vegetation and other foliage. As a result, the County's authorization, and the project itself, violates Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq., SEPA's protection of cultural resources, and other applicable federal, state, and local laws and ordinances. Upon information and belief, an ancient Native American village site lies within 2.5 miles of the clear-cutting/power-generating project, which evidences a high probability that the area was used by the Yakamas and other historical Tribes with significant cultural resources preserved. Arrowheads and other items of historical significance to the Nation have been found even closer to the proposed project. Without proper survey and monitoring for the potential archeological resources in the area, the proposed project could result in permanent further destruction and desecration of the Nation's and this state's archeological and cultural resources.

(c) Failure to Conduct Proper Consultation with the Yakama Nation.

Finally, the Yakama Nation is a sovereign entity. As a legal subdivision of the state pursuant to the Washington State Constitution, Art. XI, Sec. 1, the County is bound by the Centennial Accord, which requires at least government-to-government relations and respect

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

12

for tribal sovereignty. The Yakama Nation issued comments on this project which were essentially ignored and overruled or disregarded. This is an express violation of the Centennial Accord and spirit of government relations. As a sovereign nation, the County has the obligation to meaningfully consult and collaborate with the Yakama Nation on a government-to-government level before proceeding blindly and/or recklessly with a project that could cause significant damage and continue an unfortunate trend of development that serves to erode the Yakama Nation's rights and privileges under its Treaty of 1855. The County failed in this regard. Such a failure is, on its own, sufficient to require the County to revisit the process it undertook in issuing its approval for this potentially harmful project.

5.12 The Board's reliance on the expanded SEPA checklist and the applicant's supporting documentation was in error in that the materials did not adequately or accurately consider or evaluate the environmental elements identified in Paragraph 4.6 above. The testimony and evidence at the hearing demonstrated that the County's environmental evaluation of the project was inadequate and inaccurate, and it was error for the Board to rely on the same.

5.13 The project should be invalidated as it failed to meet the necessary CUP criteria set forth in the County's code, including: Chapter 17.60A KCC (Conditional Uses); Chapter 17.61 KCC (Utilities); KCC 17.60A.010; KCC 17.61.020.4; KCC 17.61.020.6; and KCC 17.61.030

5.14 The CUP must be invalidated because it is based on insufficient and inadequate SEPA review. Because the County should have issued a DS for the project

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

and required the applicant to prepare an EIS, the CUP Decision is based on inadequate and flawed environmental review.

5.15 The Court should invalidate the Board's Decision as:

(a) The Board engaged in unlawful procedure or failed to follow a prescribed process, and the error was not harmless;

(b) The Decision is an erroneous interpretation of the law;

(c) The Decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The Decision is a clearly erroneous application of the law to the facts;

(e) The Decision is outside the authority or jurisdiction of the body or officer making the decision; and

(f) The Decision violates the constitutional rights of Petitioners.

VI. PRAYER FOR RELIEF

Wherefore, Petitioners request the following relief:

1. An order that invalidates the Board's Decision, which denied Petitioners' SEPA Appeal and granted the CUP.

2. A remand and order to the County that the Responsible Official issue a Determination of Significance for the project, and require the Applicant to prepare the necessary Environmental Impact Statement for the Teanaway Solar Reserve.

3. For such further and additional relief as is considered necessary or appropriate.

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

4. For Petitioners' reasonable costs and attorneys' fees incurred herein, including any costs and attorneys' fees pursuant to RCW 4.84.350.

DATED this 1st day of September, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By: _____
David J. Lawyer, WSBA # 16353
Attorneys for Petitioners

INSLEE BEST
INSLEE, BEST, DOEZIE & RYDER, PS
Attorneys at Law
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, WA 98009-9016
425.455.1234

KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES
411 N. Ruby St., Suite 2, Ellensburg, WA 98926
CDS@CO.KITTITAS.WA.US
"Building Partnerships – Building Communities"
Office (509) 962-7506
Fax (509) 962-7682

Findings of Fact and Decision
Teanaway Solar Reserve - SEPA Appeal
CU-09-00005

Applicant: Teanaway Solar Reserve, LLC

Project: Teanaway Solar Reserve

Location: The project site is located approximately 4 miles northeast of Cle Elum, Washington, in Township 20N, Range 16E, within Sections 22, 23, and 27. The site is located on the eastern slopes of the Cascade Mountains on Cle Elum Ridge, which runs generally from east to west at elevations ranging from approximately 2,200 to 2,600 feet. The Teanaway River is approximately 1 mile to the northeast of Cle Elum Ridge. The site is accessed from Highway 970 by way of County roads such as Red Bridge Road, and private roads such as Loping Lane. The site is also accessed via Wiehl Road, which is a dedicated public road but is not maintained by the County; it is maintained privately. The property is located in all of Section 22; the North Half of the Northeast Quarter, the Northwest Quarter and the North Half of the Southwest Quarter of Section 23; and Parcel 2 of that certain Survey as recorded May 6, 2003 in Book 28 of Surveys, pages 234, 235 and 236, under Auditor's File No. 200305060025, records of Kittitas County, Washington, being a portion of the Northeast Quarter of Section 27; All in Township 20 North, Range 16 East, W.M., in the County of Kittitas, State of Washington.

This matter having come before the Kittitas County Board of Adjustment upon the above referenced Conditional Use Application from Teanaway Solar Reserve, LLC, land lessee, the Board of Adjustment makes the following Findings of Facts, Conclusions at Law and Decision related to the above referenced matter:

I. FINDINGS OF FACT

General Description of Proposal

1. Teanaway Solar Reserve LLC ("the applicant" or "TSR"), has submitted a Conditional Use Permit application to construct and operate the Teanaway Solar Reserve ("the project"). The project includes the following key components: solar modules; field inverters; field transformers; electrical conductors; electrical substation and switchyard; operations and maintenance (O&M) building and supervisory control and data acquisition (SCADA) system; overhead interconnection transmission line; and access and maintenance roads.

2. The Teanaway Solar Reserve will be constructed on an approximately 982 acre site, though only up to 477 acres will be involved in land disturbance and development. The remaining acres are currently undeveloped open space. Approximately 193 acres onsite will be preserved with a conservation easement as part of the Applicant's wildlife mitigation plan, and an open corridor will be maintained to allow for wildlife migration through the site.

3. The project will be completed over a period of 2 to 3 years, with 7-to 9-month construction periods each year, weather dependent.

EXHIBIT I

4. The project is proposed to generate up to 75MWdc of PV solar energy for distribution to utilities and communities in the region.

5. The Comprehensive Plan's Land Use Element designates the subject parcel as Rural.

6. The subject property is zoned Forest and Range. The surrounding properties are zoned Commercial Forest, Forest and Range, and Rural-3.

7. The purpose and intent of the Forest and Range zone is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged.

8. The solar farm is considered a "Major Alternative Energy Facility," (KCC 17.61.010.9) and certain components of the solar farm (overhead transmission line and substation) considered "special utilities" (KCC 17.61.010.2). According to the KCC, a "Major Alternative Energy Facility" (KCC 17.61.010.9) and "Special Utilities" (KCC 17.61.020.6) are allowed with a Conditional Use Permit in the Forest and Range zoning district, subject to the conditions set forth in Chapter KCC 17.60A Conditional Uses and KCC 17.61 Utilities.

9. An administrative site analysis was completed by the staff planner in compliance with Kittitas County Code Title 17A, Critical Areas. Limited amounts of wetlands, wildlife habitat areas, and geologically hazardous areas were identified onsite.

Procedural Background for the Subject Application

10. On August 18, 2009 Teanaway Solar Reserve, LLC ("TSR" or "the applicant") submitted to Kittitas County Community Services Department ("CDS") an application for a Conditional Use Permit ("CUP"), a draft Development Agreement ("DA") for the project, and an expanded *SEPA Environmental Checklist* dated August 14, 2009. The expanded *SEPA Checklist* included a *Sensitive Species Report*; a *Wetland Delineation Report*, a *Cultural Resources Report*, and a *Zone of Visual Influence Memorandum*.

11. On August 22, 2009 the County deemed the application complete and sent a letter to the application stating this conclusion.

12. On September 3, 2009 a Notice of Application was issued. This notice was mailed to government agencies, adjacent property owners, and the applicant. The public notice period lasted from September 3, 2009 to September 18, 2009. A notice of application was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. Written comments were received and included in the record for consideration.

13. On September 2, 2009, the applicant's authorized agent signed an Affidavit of Posting, confirming that in accordance with Kittitas County Code 15A.03.110, this project was accurately posed with the "Land Use Action" sign as provided by Community Development Services. The Affidavit of Posting was returned to the planner and is included as part of the record.

14. The County reviewed the comments with TSR and requested that additional studies addressing the public comments be submitted by February 22, 2010.

15. In February 2010, TSR supplemented its Conditional Use Permit Application and Expanded SEPA Checklist with additional reports and information in response to the comments that were received. TSR prepared, reports, including, but not limited to, a Geology and Soils Hazard Evaluation, a Fugitive Dust

17

Control Plan, a Vegetation Management Plan, a Wildlife Mitigation Plan, and a Transportation and Road Plan.

16. TSR submitted additional materials on June 2, 2010, which included additional hydrology and stormwater runoff modeling, and executed agreements between TSR and WDFW and the Kittitas County Fire Protection District #7.

17. On July 15, 2010 the County issued a SEPA Mitigated Determination of Non-significance (MDNS). The Board finds that the notice of said determination was provided to all required parties of record pursuant to 43.21C RCW and that said notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. The last day to appeal this decision was July 29, 2010 at 5:00 PM.

18. On July 26, 2010, a timely SEPA Appeal pursuant to KCC 15A.04 was submitted with $500.00 to the Kittitas County Board of County Commissioners. The appeal was filed by James Brose and Paige Green Dunn, adjacent property owners to the proposed Teanaway Solar Reserve.

Conduct of Hearing

19. On August 11, 2010 a consolidated open record hearing was held to consider the SEPA Appeal and the underlying Conditional Use Permit. Testimony was taken from those persons present who wished to be heard. On July 29, 2010, due notice of this SEPA Appeal public hearing was given as required by law, and the necessary inquiry was made into the public interest to be served by this proposed project.

20. The public hearing was conducted in the standard manner for a Board of Adjustment consolidated hearing to consider a SEPA appeal and application for a conditional use permit. County staff presented an overview of the project and summarized its Staff Report on the SEPA Appeal. SEPA appellants presented their case. The applicants made their presentation opposing the MDNS appeal.

SEPA Appeal

21. As provided in KCC 15.04.210, SEPA threshold determinations issued in conjunction with a project permit application may be appealed following the procedures in Title 15A Project Permit Application Process. Specifically, Title 15A Table A establishes that an open record hearing before the Board of Adjustment shall be required for an appeal of a SEPA threshold determination, and Chapter 15A.07 sets forth procedures for appealing administrative decisions, such as a SEPA threshold determination.

22. A timely appeal of the County's SEPA Determination for the project was filed by two neighboring landowners, James Brose and Paige Green Dunn (appellants) on July 26, 2010. The appellants' request that the MDNS be withdrawn, a Determination of Significance issued, and demand that an environmental impact statement (EIS) be required.

23. The Board of Adjustment must give substantial weight to the County's decision to issue an MDNS. As stated in RCW 43.21C.090, "In any action involving an attack on a determination by a government agency relative to the requirement or absence of the requirement, or the adequacy of a 'detailed statement,' the decision of the governmental agency shall be accorded substantial weight."[1]

24. A governmental agency's threshold determination of "no probable environmental significance" ("DNS")

[1] *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Association v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994).

18

is subject to review under the clearly erroneous standard.[2] In considering the Responsible Official's decision to issue an MDNS and not require an environmental impact statement, the Board shall not substitute its judgment for that of the administrative decision maker (in this case the County's Responsible Official) and will find administrative decision clearly erroneous only if the Board is left with definite and firm conviction that a mistake has been committed based on the record.[3]

25. For a threshold determination to withstand appeal, the Responsible Official must demonstrate that it actually considered relevant environmental factors before reaching a decision.[4] The record must demonstrate that the County adequately considered the relevant environmental elements listed in WAC 197-11-444 "in a manner sufficient to be prima facie compliant with the procedural dictates of SEPA."[5] The decision to issue a determination of nonsignificance must be based on information sufficient to evaluate the proposal's environmental impact.[6]

26. The appellants' statement contained the following claims (in summary):
Issue #1: Failure to properly evaluate the fire protection plan;
Issue #2: Failure to conduct an alternative site analysis is required under RCW 43.21C.030;
Issue #3: Failure to ensure consistency with critical areas ordinance, which has not been updated as required by state law;
Issue #4: Special and sensitive areas not properly mitigated;
Issue #5: Failure to ensure compliance with wildlife laws;
Issue #6: Failure to adequately consider potential impacts to water resources;
Issue #7: Failure to consult with tribal governments;
Issue #8: Failure to consider the project would establish a precedent for future actions with significant effects or unknown risks;
Issue #9: Other concerns—Identified artifacts; carbon sequestration; and
Issue #10: Inadequate analysis of cumulative impacts.

27. The Board of Adjustment heard the appellants' case challenging the SEPA MDNS, including written testimony, presentation of witnesses, and the opportunity to cross examine witnesses of the County and applicant.

28. According to KCC 15.07.030, the Board of Adjustment must issue a written decision on this appeal within 90 days of the appeal being filed. A timely appeal was filed on July 26, 2010; therefore the Board of Adjustment must issue its written decision no later than October 23, 2010.

29. After careful consideration of appellants' case and the record before the Board on this matter, the Board finds that Kittitas County Community Development Services Department, acting as the Responsible Official, did follow and comply with all procedural requirements contained within KCC 15A, WAC 197-11, RCW 43.21C, and RCW 36.70B, and did consider all relevant environmental factors.[7] The appellants failed to meet their burden of demonstrating otherwise. Therefore the Board upholds the Mitigated Determination of Nonsignificance (MDNS) as issued by the Responsible Official. The Board provides the following findings and conclusions with respect to the specific issues raised by appellants.

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[2] *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994).
[3] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390, amended on denial of reconsideration.
[4] *See* RCW 43.21C.030(2)(c); *Lassila v. Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978); *Juanita Bay Valley Cnty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140.
[5] *Lassila*, 89 Wn.2d at 814; *see also Anderson v. Pierce County*, 86 Wn. App. 290, 302 936 P.2d 432 (1997).
[6] See *Anderson*, 86 Wn. App. at 302; WAC 197-11-335.
[7] *Anderson*, 86 Wn. App. at 302; *Indian Trail Prop. Owner's Association v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994).

30. Issue #1: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider fire hazards, fire evacuation routes, and other fire safety issues. To the contrary, the record contains letters from the Kittitas County Fire Marshall, a Fire Protection Agreement with Fire District No. 7, and additional analysis in the SEPA Staff Report demonstrating a thorough consideration of this issue.

31. Issue #2: The Board of Adjustment finds that the appellants' claim that an alternative site analysis should have been conducted pursuant to RCW 43.21C.030 is legally incorrect, because this provision applies only to the preparation of an EIS. RCW 43.21C.030; WAC 197-11-440.

32. Issue #3: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider compliance with its critical areas ordinance. To the contrary, the Responsible Official reviewed studies and reports on wetlands and waters, habitat, and geologically hazardous areas contained in the record, and provided an analysis of these impacts in its SEPA Staff Report. Appellants also claim the County's critical areas ordinance is inadequate or outdated. The Board of Adjustment has not jurisdiction to rule on the adequacy of the adopted critical areas ordinance. If such a claim is to be made, it must be made before the Growth Management Hearings Board according to applicable procedures.

33. Issue #4: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly mitigate impacts to special and sensitive areas. To the contrary, in addition to reviewing studies and reports included in the expanded SEPA Environmental Checklist, the Responsible Official relied on a wildlife mitigation agreement Washington Department of Fish and Wildlife, in which the WDFW concludes the mitigation contained within that agreement is sufficient to bring the level of impact to wildlife habitat below a level of significance. Impacts to cultural and historic resources were analyzed in the applicant's *Cultural Resources Report*, and the County has condition approval upon compliance with the recommendations of that plan, which include conducting sub-surface testing in areas likely to contain historic artifacts and halting construction work if ever an artifact is discovered. The Responsible Official has demonstrated in an exhaustive 42-page SEPA Staff Report that special and sensitive areas were carefully considered and probable impacts mitigated below a level of significance.

34. Issue #5: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official failed to ensure compliance with wildlife laws. To the contrary, the Responsible Official has shown the proposal was reviewed closely by the Washington Department of Fish and Wildlife, who have reached a wildlife mitigation agreement with the applicant. Regardless of SEPA determination, the proposal will be required to comply with applicable local, state, and federal laws pertaining to wildlife.

35. Issue #6: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider impacts to water resources. To the contrary, the Responsible Official reviewed stormwater plans, hydrology reports, and stormwater runoff models submitted by the applicant, and relied on review (including site visits) and comments from the Department of Ecology to conclude the probable impacts on water resources, particularly stormwater, would be mitigated below a level of significance.

36. Issue #7: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consult with tribal governments. To the contrary, the record contains letters and emails between the Responsible Official and the Yakama Nation concerning this project and the Yakama Nation is included on the mailing distribution list for all public notices.

37. Issue #8: The Board of Adjustment finds that the appellant has not met its burden of proving the

20

Responsible Official did not properly consider the precedent set by this project. To the contrary, the Responsible Official has shown that the proposal's potential environmental impacts were carefully assessed and considered, and concluded the proposed project did not have a significant impact on the environment, involve unique or unknown risks or affect public health and safety. The KCC requires that each proposal be assessed independently in light of the site-specific factors and the proposal's details. This MDNS does not create a precedent for a future action.

38. Issue #9: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider carbon sequestration. There currently is no federal, state, or county standard determining when a potential impact to carbon sequestration should be considered significant and it is therefore not possible to determine whether the impacts to vegetation as they relate to carbon sequestration can be consider significant.

39. Issue #10: The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official did not properly consider the cumulative impacts of this project. A cumulative impact analysis is required when the project under review will facilitate future development.

40. The Board of Adjustment finds that the appellant has not met its burden of proving the Responsible Official acted in a clearly erroneous manner in its threshold determination of mitigated nonsignificance; and therefore denies this appeal.

II. DECISION

The SEPA Appeal is denied.

Daryl Ackerman, Chairman, Board of Adjustment

08/12/2010
Date

KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES
411 N. Ruby St., Suite 2, Ellensburg, WA 98926
CDS@CO.KITTITAS.WA.US
Office (509) 962-7506
Fax (509) 962-7682
"Building Partnerships – Building Communities"

NOTICE OF DECISION

TO: Applicant
Interested Parties (KCC 15A.06)

RECEIVED
AUG 19 2010
INSLEE, BEST, ET AL.

FROM: Dan Valoff, Staff Planner

DATE: August 17, 2010

SUBJECT: Notice of Decision - Conditional Use Permit
Teanaway Solar Reserve CU-09-00005

Pursuant to RCW 36.70B.130 and KCC 15A.06, notice is hereby given that Kittitas County Board of Adjustment did on August 11, 2010 approved a Conditional Use Permit on an application from Teanaway Solar Reserve, LLC to develop a solar farm generating up to 75 megawatts (MWdc) of photovoltaic (PV) for distribution to utilities and communities through a substation interconnection point on the Pacific Northwest power grid. The project site is 982 acres. The solar farm will use approximately 580 acres of the project site. The subject property is zoned Forest and Range. The site is northeast of the city of Cle Elum off of Highway 970 via County and private roads. All of Section 22; the N ½ of the NE ¼, the NW ¼ and the N ½ of the SW ¼ of Section 23, and a portion of the NE ¼ of Section 27; all in T20N, R16 E, W.M..; Kittitas County map numbers 20-16-22000-0001, 20-16-23000-0002, 20-16-22000-0002, 20-16-27000-0009, and 20-16-22000-00025.

A copy of the Kittitas County Board of Adjustment Findings of Fact and Decision is attached, other related file documents may be examined at Kittitas County Community Development Services, 411 N. Ruby Suite 2, Ellensburg, WA 98926. (509) 962-7506.

Issuance of these land use decisions may be appealed by parties with standing, by filing a land use petition in Superior Court, and serving said petition on all required parties pursuant to RCW 36.70C and KCC 15A.08, within twenty-one days of the issuance of the land use decision.

If you have any questions, please do not hesitate to contact our office at (509) 962-7506.

EXHIBIT 2

KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES
411 N. Ruby St., Suite 2, Ellensburg, WA 98926
CDS@CO.KITTITAS.WA.US
"Building Partnerships – Building Communities"
Office (509) 962-7506
Fax (509) 962-7682

Findings of Fact and Decision
Teanaway Solar Reserve - Conditional Use Permit
CU-09-00005

Applicant: Teanaway Solar Reserve, LLC

Project: Teanaway Solar Reserve

Location: The project site is located approximately 4 miles northeast of Cle Elum, Washington, in Township 20N, Range 16E, within Sections 22, 23, and 27. The site is located on the eastern slopes of the Cascade Mountains on Cle Elum Ridge, which runs generally from east to west at elevations ranging from approximately 2,200 to 2,600 feet. The Teanaway River is approximately 1 mile to the northeast of Cle Elum Ridge. The site is accessed from Highway 970 by way of County roads such as Red Bridge Road, and private roads such as Loping Lane. The site is also accessed via Wiehl Road, which is a dedicated public road but is not maintained by the County; it is maintained privately. The property is located in all of Section 22; the North Half of the Northeast Quarter, the Northwest Quarter and the North Half of the Southwest Quarter of Section 23; and Parcel 2 of that certain Survey as recorded May 6, 2003 in Book 28 of Surveys, pages 234, 235 and 236, under Auditor's File No. 200305060025, records of Kittitas County, Washington, being a portion of the Northeast Quarter of Section 27; All in Township 20 North, Range 16 East, W.M., in the County of Kittitas, State of Washington.

This matter having come before the Kittitas County Board of Adjustment upon the above referenced Conditional Use Application from Teanaway Solar Reserve, LLC, land lessee, the Board of Adjustment makes the following Findings of Facts, Conclusions at Law and Decision related to the above referenced matter:

I. FINDINGS OF FACT

General Description of Proposal

1. Teanaway Solar Reserve LLC ("the applicant" or "TSR"), has submitted a Conditional Use Permit application to construct and operate the Teanaway Solar Reserve ("the project"). The project includes the following key components: solar modules; field inverters; field transformers; electrical conductors; electrical substation and switchyard; operations and maintenance (O&M) building and supervisory control and data acquisition (SCADA) system; overhead interconnection transmission line; and access and maintenance roads.

2. The Teanaway Solar Reserve will be constructed on an approximately 982 acre site, though only up to 477 acres will be involved in land disturbance and development. The remaining acres are currently undeveloped open space. Approximately 193 acres onsite will be preserved with a conservation easement as part of the Applicant's wildlife mitigation plan, and an open corridor will be maintained to allow for wildlife migration through the site.

3. The project will be completed over a period of 2 to 3 years, with 7-to 9-month construction periods each year, weather dependent.

4. The project is proposed to generate up to 75MWdc of PV solar energy for distribution to utilities and communities in the region.

5. The Comprehensive Plan's Land Use Element designates the subject parcel as Rural.

6. The subject property is zoned Forest and Range. The surrounding properties are zoned Commercial Forest, Forest and Range, and Rural-3.

7. The purpose and intent of the Forest and Range zone is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged.

8. The solar farm is considered a "Major Alternative Energy Facility" (KCC 17.61.010.9) and certain components of the solar farm (overhead transmission line and substation) are considered "Special Utilities" (KCC 17.61.010.2). According to the Kittitas County Code a "Major Alternative Energy Facility" and "Special Utilities" are allowed with a Conditional Use Permit in the Forest and Range zoning district, subject to the conditions set forth in Chapter KCC 17.60A Conditional Uses and KCC 17.61 Utilities. KCC 17.61.020.4; 17.61.020.6.

9. An administrative site analysis was completed by the staff planner in compliance with Kittitas County Code Title 17A, Critical Areas. Wetlands, wildlife habitat areas, and geologically hazardous areas were identified onsite.

Procedural Background for the Subject Application

10. On August 18, 2009 Teanaway Solar Reserve, LLC ("TSR" or "the applicant") submitted to Kittitas County Community Services Department ("CDS") an application for a Conditional Use Permit ("CUP"), a draft Development Agreement ("DA") for the project, and an expanded SEPA Environmental Checklist dated August 14, 2009. The expanded SEPA Checklist included a *Sensitive Species Report*; a *Wetland Delineation Report*, a *Cultural Resources Report*, and a *Zone of Visual Influence Memorandum.*

11. On August 22, 2009 the County deemed the application complete and sent a letter to the applicant stating this conclusion.

12. On September 3, 2009 a Notice of Application was issued. This notice was mailed to government agencies, adjacent property owners, and the applicant. The public notice period lasted from September 3, 2009 to September 18, 2009. A notice of application was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. Written comments were received and included in the record for consideration.

13. On September 2, 2009, the applicant's authorized agent signed an Affidavit of Posting, confirming that in accordance with Kittitas County Code 15A.03.110, this project was accurately posted with the "Land Use Action" sign as provided by Community Development Services. The Affidavit of Posting was returned to the planner and is included as part of the record.

14. The County reviewed comments with the Applicant and requested that additional studies addressing issues raised by the comments be submitted by February 22, 2010.

15. In February 2010, TSR supplemented its CUP application and Expanded SEPA checklist with additional reports and information per the County's request including, but not limited to, a Geology and Soils Hazard Evaluation, a Fugitive Dust Control Plan, a Vegetation Management Plan, a Hydrologic Analysis, a Wildlife Mitigation Plan, and a Transportation and Road Plan.

16. The Applicant submitted additional hydrology and stormwater modeling as well as executed agreements between the Applicant and WDFW and the Kittitas County Fire Protection District 7 in June of 2010.

17. Based upon a review of these materials, on July 15, 2010 the County issued a SEPA Mitigated Determination of Non-significance (MDNS). The Board finds that the notice of said determination was provided to all required parties of record pursuant to 43.21C RCW and that said notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. The last day to appeal this decision was July 29, 2010 at 5:00 PM.

Conduct of Hearing

18. On August 11, 2010 a consolidated open record hearing was held to consider the SEPA Appeal and the underlying Conditional Use Permit. Testimony was taken from those persons present who wished to be heard. On July 15, 2010, due notice of the CUP public hearing was given as required by law, and the necessary inquiry was made into the public interest to be served by this proposed project.

19. The public hearing was conducted in the standard manner for a Board of Adjustment consolidated hearing to consider an application for conditional use permit. County staff presented an overview of the project and summarized its Staff Reports on the CUP, including the recommended conditions of approval. The applicant made their presentation requesting approval of the CUP. Public testimony was taken from 18 citizens.

Conditional Use Permit

20. The Board of Adjustment finds that the proposed development has met the requirements of KCC 17.60A.010 Review criteria—Conditional uses, which include the following:

> 1. The Board of Adjustment shall determine that the proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood.
>
> 2. The Board of Adjustment shall determine that the proposed use at the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that (1) it will be adequately serviced by existing facilities such as highways, roads, police and fire protection, irrigation and drainage structures, refuse disposal, water and sewers, and schools; or (2) that the applicant shall provide such facilities or (3) demonstrate that the proposed use will be of sufficient economic benefit to offset additional public cost or economic detriment. (Ord. 2007-22, 2007; Ord. 88-4 § 11 (part), 1988: Res. 83-10, 1983)

21. The Board of Adjustment finds that the proposed development has met the requirements of KCC 17.61.030 Review Criteria—Special utilities and associated facilities, which include the following:

> 1. The board of adjustment shall determine that adequate measures have been undertaken by the proponent of the special utility and/or associated facility to reduce the risk of accidents caused by hazardous materials.

25

2. The board of adjustment, as required by existing statutes, shall determine that the proposed special utility and/or associated facilities are essential or desirable to the public convenience and/or not detrimental or injurious to the public health or safety, or to the character of the surrounding neighborhood.

3. The board of adjustment shall determine that the proposed special utility and/or associated facilities will not be unreasonably detrimental to the economic welfare of the county and/or that it will not create excessive public cost for public services by finding that: (a) It will be adequately serviced by existing services such as highways, roads, police and fire protection, emergency response, and drainage structures, refuse disposal, water and sewers, and schools; or (b) The applicant shall provide such services or facilities.

4. Special utilities and/or associated facilities as defined by this chapter shall use public rights-of-way or established utility corridors when reasonable. Although Kittitas County may map utility corridors, it is recognized and reaffirmed that the use of such corridors is subject to conditional use approval and just compensation to the landowner for the use of such corridor. While a utility corridor may be used for more than one utility or purpose, each utility or use should be negotiated with the landowner as a separate easement, right-of-way, or other agreement, or other arrangement between the landowner and all owners of interests in the property. Any county map which shows utility corridors shall designate such corridors as "private land closed to trespass and public use" where such corridors are on private land. Nothing in this paragraph is intended to conflict with the right of eminent domain.

5. The board of adjustment shall consider industry standards, available technology, and proposed design technology for special utilities and associated facilities in promulgating conditions of approval.

6. The construction and installation of utilities and special utilities may necessitate the importation of fill material which may result in the displacement of native material. The incidental generation of earthen spoils resulting from the construction and/or installment of a utility or special utility, and the removal of said material from the development site shall not require a separate zoning conditional use permit.

7. The operation of some utilities and special utilities identified within this chapter may necessitate unusual parcel configurations and/or parcel sizes. Such parcels: (a) Need not conform with applicable zoning requirements; provided, they comply with the procedures provided in KCC Title 16, Subdivisions, and so long as used for a utility or special utility; (b) Are not eligible for any other use or any rights allowed to nonconforming lots in the event the utility or special utility use ceases; (c) Shall continue to be aggregated to the area of the parent parcel for all other zoning and subdivision requirements applicable to the parent parcel. (Ord. 2001-12)

22. According to KCC 17.60A.020, in permitting conditional uses the Board of Adjustment may impose such conditions as it deems necessary to protect the best interests of the surrounding property or neighborhood or the county as a whole. The Board of Adjustment grants this Conditional Use Permit subject to the following conditions are required for approval of the Conditional Use Permit.

    1. All development, design and construction shall comply with Kittitas County Code, Kittitas County Zoning and the 2006 International Fire and Building Codes, including those mitigation measures listed as "Code Mitigation" in the SEPA Staff Report, dated July 14, 2010.
    2. All development, design and construction shall comply with those mitigation measures listed as "Voluntary Mitigation" in the SEPA Staff Report, dated July 14, 2010.

3. All development, design and construction shall comply with the SEPA mitigation measures listed in the MDNS, dated July 15, 2010.
4. The applicant shall enter into a Development Agreement with the Kittitas County Board of County Commissioners.

II. DECISION

The Conditional Use Permit is approved.

Daryl Akkerman, Chairman, Board of Adjustment

08/12/10
Date