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BEFORE THE HEARING EXAMINER  
FOR KITSAP COUNTY

	)	
	)	<b>No. 07-44975</b>
In Re:	)	
	)	<b>BRIEF OF APPLICANT</b>
<b>UELAND TREE FARM MINERAL</b>	)	
<b>RESOURCE DEVELOPMENT</b>	)	<b>FEIS APPEAL</b>
	)	
	)	Ueland Tree Farm, LLC
	)	
	)	
_____	)	

**I. INTRODUCTION**

Ueland Tree Farm filed the pending Hearing Examiner Conditional Use Permit Application (“Hearing Examiner CUP”) in December 2007, proposing development of commercial sand, gravel and basalt mineral surface mines on portions of the 1,716-acre property owned by UTF and located west of the City of Bremerton and Kitsap Lake (the “UTF Project”). A Final Environmental Impact Statement (“FEIS”) was issued on August 25, 2009. An Addendum to the FEIS was issued on October 6, 2009.<sup>1</sup>

Concerned Citizens of Chico Creek Water Basin, a neighborhood opposition group (“Appellants”), filed a timely appeal to the adequacy of the FEIS on September 8, 2009.

<sup>1</sup> Due to the numerous issues on appeal, general project factual information has not been included in the brief. Submitted for the CUP Approval hearing is UTF’s permit approval brief that sets forth in more detail project information. See also, Exhibit 34, DEIS, Chapter 1.

1 No appeals have been filed by any governmental agencies, state or federal, conservation  
2 entities or tribes. The Hearing Examiner CUP approval hearing and FEIS appeal are  
3 scheduled for November 9, 2009.

## 4 **II. SEPA<sup>2</sup> PROCESS**

5 A Determination of Significant and Scoping Notice for the Project was issued by  
6 the County on June 23, 2008. Approximately 10 people attended the scoping meeting, and  
7 the County received 13 comment letters.<sup>3</sup> Three alternatives were considered, namely: (1)  
8 No Action Alternative; (2) Proposed Development Alternative; and (3) Reduced Scale  
9 Alternative.<sup>4</sup>

10 The DEIS was issued on February 27, 2009, and consisted of approximately 291  
11 pages of text, plus appendices. Every “probable” environmental impact, and many  
12 unlikely or “improbable” environmental impacts, were evaluated in the DEIS. The  
13 environmental elements evaluated included the following: (1) Geology/Soils Impacts; (2)  
14 Air Quality Impacts; (3) Wetlands/Surface Water Impacts; (4) Ground Water Impacts; (5)  
15 Vegetation/Habitat Impacts; (6) Noise/Vibration Impacts; (7) Land Use Impacts; (8)  
16 Transportation Impacts; (9) Aesthetic Quality Impacts; (10) Cultural Resources Impacts;  
17 (11) Recreational Impacts; and (12) Public Services and Utilities Impacts (collectively  
18 referred to as “Environmental Elements”). There are myriad engineering and consulting  
19 reports identified in the DEIS and FEIS, and included in the Exhibits to this Appeal  
20 hearing.  
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24 <sup>2</sup> SEPA refers to the State Environmental Policy Act of 1971, RCW 43.21C.

25 <sup>3</sup> Exhibit 34, DEIS, Section 1.4.

<sup>4</sup> Exhibit 34, DEIS, Section 1.5.

1 A public meeting on the DEIS was held on March 25, 2009. Twenty-nine written  
2 comment letters regarding the DEIS were submitted from individuals, organizations,  
3 agencies and tribes. These comment letters were addressed in the FEIS.<sup>5</sup> The FEIS was  
4 issued on August 25, 2009, and included responses to comments received on the DEIS,  
5 updated project information, and further discussion of a potential south access route. On  
6 October 6, 2009, the County issued an Addendum to the DEIS and FEIS.

7 Due to the nature of surface mining, there were identified “probable”  
8 environmental impacts to most of the Environmental Elements, which will be mitigated by  
9 imposition of approximately 160 mitigation conditions. The County and UTF mutually  
10 agree on 157 of these mitigation conditions and only three will require further  
11 consideration by the Hearing Examiner at the CUP hearing. Of these three, two are CUP  
12 conditions, not SEPA mitigation conditions.

13 The mitigation conditions include extensive project related environmental  
14 mitigations as well as monitoring requirements for all natural systems, including surface  
15 water, groundwater and wetlands, and protection of vegetation and wildlife by  
16 incorporation of an adaptive management plan.<sup>6</sup> In addition to the mitigation conditions,  
17 UTF will be required to comply with all County ordinances including, without limitation,  
18 the County Stormwater Design Manual, Critical Areas Ordinance and Transportation  
19 Ordinance, and will further be subject to State agency regulation by DOE, DNR and  
20 WDFW. It is doubtful that any other project in Kitsap County has undergone as extensive  
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25 <sup>5</sup> Exhibit 36, FEIS, Appendix A (Response to Comments).

<sup>6</sup> Exhibit 34, DEIS, Section 1.7.

1 environmental review or had as many mitigation conditions imposed to protect the  
2 environment as the UTF Project.

3 **III. STANDARD OF REVIEW and CONTROLLING SEPA PRINCIPLES**

4 The Appellants have appealed the adequacy of the FEIS. The appeal documents  
5 are quite general and broad-brush in nature, with very little specific elaboration, nor any  
6 evidence, expert or otherwise, and it is difficult to anticipate the precise issues of concern.  
7 However, it appears that the Appellants generally raise the following contentions in  
8 challenging the adequacy of the FEIS:

- 9 1. The Transportation element of the FEIS is based upon an inadequate traffic  
10 study and failed to mitigate traffic and safety concerns;
- 11 2. The Transportation element of the FEIS failed to sufficiently evaluate  
12 potential utilization of the U.S. Navy railroad track for transportation of  
13 mining materials;
- 14 3. The Surface Water, Wetlands and Groundwater elements of the FEIS failed  
15 to adequately avoid, minimize or mitigate the impacts to Dickerson Creek,  
16 the Dickerson Creek sub-basin, and the identified wetlands;
- 17 4. The Vegetation and Wildlife element of the FEIS failed to avoid, minimize  
18 or mitigate the impacts to wildlife, specifically including salmon, bald  
19 eagles and blue heron; and
- 20 5. The Noise and Vibration element of the FEIS is either inadequate or failed  
21 to adequately address noise issues (although there was no further  
22 elaboration in the appeal document).

23 **A. Standard of Review.**

24 Determination of the adequacy of an environmental impact statement (“EIS”) is a  
25 question of law, reviewed *de novo*.<sup>7</sup> EIS adequacy refers to the legal sufficiency of the

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<sup>7</sup> *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993); *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990); *Glasser v. City of Seattle*, 139 Wn. App. 728, 162 P.3d 1134 (2007); *Frye Inv. Co. v. City of Seattle*, 14 Wn. App. 702, 544 P.2d 125 (1976).

1 environmental data contained in the document.<sup>8</sup> Although the review is *de novo*,  
2 “substantial weight” must be given to the responsible official’s determination that the EIS  
3 is adequate under SEPA.<sup>9</sup> In this case, Kitsap County was the lead agency and responsible  
4 for preparation of the EIS.<sup>10</sup> David Greetham, the Kitsap County responsible official  
5 (“Responsible Official”), was required to be satisfied that it complied with the  
6 requirements of KCC 18.04 and SEPA.<sup>11</sup> This decision is entitled to “substantial weight”  
7 on appeal.<sup>12</sup>

8 EIS adequacy is reviewed under the “rule of reason,” which requires that the EIS  
9 include a “reasonably thorough discussion of the significant aspects of the probable  
10 environmental consequences” of an agency’s decision.<sup>13</sup> Under the “rule of reason”,  
11 agencies are not required to review “every remote and speculative consequence of an  
12 action. Accordingly, in this case, the Hearing Examiner reviews the Responsible Official’s  
13 decision regarding the adequacy of the EIS *de novo*, giving “substantial weight” to the  
14 County’s decision, and applying the “rule of reason.”<sup>14</sup>

15  
16 **B. Controlling SEPA Principles.**

17 An EIS must provide impartial discussion of significant environmental impacts and  
18 must inform decision makers and the public of reasonable alternatives, including  
19 mitigation measures that would avoid or minimize adverse impacts or enhance  
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23 <sup>8</sup> *Glasser v. City of Seattle*, 139 Wn. App. at 739.

<sup>9</sup> *Glasser v. City of Seattle*, 139 Wn. App. at 740; KCC 18.04.210(6).

<sup>10</sup> KCC 18.04.130.

<sup>11</sup> KCC 18.04.130.

<sup>12</sup> See, footnote 7, *supra*.

<sup>13</sup> *Glasser v. City of Seattle*, 139 Wn. App. at 740.

<sup>14</sup> *Glasser v. City of Seattle*, 139 Wn.2d at 741.

1 environmental quality.<sup>15</sup> An EIS need analyze only the reasonable alternatives and  
2 probable<sup>16</sup> and significant<sup>17</sup> adverse environmental impacts.<sup>18</sup> An EIS must be used by  
3 agency decision makers, along with other relevant considerations or documents, in making  
4 final decisions on a proposal.<sup>19</sup> The EIS provides a basis upon which the responsible  
5 agency and officials can make the balancing judgment mandated by SEPA, because it  
6 provides information on the environmental costs and impacts.<sup>20</sup>

7 Mitigation<sup>21</sup> measures must be related to specific, adverse environmental impacts  
8 clearly identified in an environmental document on the proposal and must be stated in  
9 writing by the decision maker.<sup>22</sup> The decision maker must cite the agency SEPA policy  
10 that is the basis of any condition or denial under the SEPA regulations.<sup>23</sup> Mitigation  
11 measures are to be reasonable and capable of being accomplished.<sup>24</sup> Responsibility for  
12 implementing mitigation measures may be imposed upon an applicant only to the extent  
13 attributable to the identified adverse impacts of its proposal.<sup>25</sup> Voluntary additional  
14 mitigation may occur.<sup>26</sup> In order to deny a proposal under SEPA, an agency must find  
15 that: (1) The proposal would be likely to result in significant adverse environmental  
16 impacts identified in a final or supplemental environmental impact statement prepared  
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20 <sup>15</sup> WAC 197-11-400(2).

<sup>16</sup> WAC 197-11-782 (“probable” means likely or reasonably likely to occur).

<sup>17</sup> WAC 197-11-794 (“significant” means reasonable likelihood of more than a moderate adverse impact on  
21 environmental quality).

<sup>18</sup> WAC 197-11-402.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> WAC 197-11-768.

<sup>22</sup> WAC 197-11-660(b).

<sup>23</sup> *Id.*

<sup>24</sup> WAC 197-11-660(c).

<sup>25</sup> WAC 197-11-660(d).

<sup>26</sup> *Id.*

1 under SEPA; and (2) Reasonable mitigation measures are insufficient to mitigate the  
2 identified impact.<sup>27</sup>

3 In *Maranatha Mining, Inc. v. Pierce County*<sup>28</sup> the Court provided additional  
4 guidance regarding consideration of citizen challenges to EIS adequacy. A number of  
5 citizen-opponents testified concerning expected adverse environmental impacts associated  
6 with a surface mining project proposed by Maranatha. Many of the opponents spoke  
7 against the project, challenging many of the expert conclusions, but offering little concrete  
8 evidence and no expert testimony of their own.<sup>29</sup> The Court stated as follows:

9 The final EIS ... listed several significant adverse impacts  
10 that cannot be mitigated. Before listing these impacts,  
11 however, the EIS listed the proposed measures that would  
12 alleviate many of them. The law does not require that all  
13 adverse impacts be eliminated; if it did, no change in land  
14 use would ever be possible. Cf, *Cougar Mountain*, 111  
15 Wn.2d at 753 (“SEPA seeks to achieve balance, restraint and  
16 control rather than to preclude all development  
17 whatsoever.”). The only expert testimony in the record  
18 shows that the mitigation measures would prevent  
19 groundwater contamination.... **The only opposing evidence**  
20 **was generalized complaints from displeased citizens.**  
21 **Community displeasure cannot be the basis of a permit**  
22 **denial.** *Kenart & Assocs. V. Skagit Cy*, 37 Wn. App. 295,  
23 303, 680 P.2d 439, *review denied*, 101 Wn.2d 1021 (1984).  
24 [Emphasis Supplied].<sup>30</sup>

19 The Court concluded that the decision to deny the permit was based upon  
20 community displeasure and not on reasons backed by policies and standards as the law  
21 requires. Furthermore, the Court stated:

22  
23 <sup>27</sup>WAC 197-11-660(f).

24 <sup>28</sup> *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 801 P.2d 985 (1990).

25 <sup>29</sup> *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. at 798.

<sup>30</sup> *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. at 804; *Anderson v. Pierce County*, 86 Wn. App. 290, 305, 936 P.2d 432 (1997) (“community displeasure and preference for EIS are inadequate grounds for overturning the decision of a Hearing Examiner”).

1 [I]f the Council is concerned with Maranatha’s ability to  
2 comply with the 31 conditions that the examiner placed on  
3 the permit, the proper remedy is to monitor the operation (for  
4 which the conditions provide) and to withdraw the permit in  
5 the event of noncompliance. **It is improper to deny the  
6 permit to an applicant who, throughout the application  
7 process, has demonstrated a willingness to mitigate any  
8 and every legitimate problem.**<sup>31</sup>

#### 6 IV. ARGUMENTS

7 The Appellants appear to challenge the adequacy of the FEIS in the following  
8 areas: (1) Transportation and Safety; (2) Railroad Spur; (3) Critical Areas; (4) Wildlife;  
9 and (5) Noise.

##### 10 A. Transportation and Safety.

##### 11 1. Overview.

12 The Appellants contend that the FEIS is inadequate, because the traffic study  
13 associated with the UTF Project did not adequately address adverse traffic and safety  
14 impacts. The Transportation Element of the DEIS<sup>32</sup> and FEIS<sup>33</sup>, and the Parametrix traffic  
15 study, were adequate. The traffic study was performed by Parametrix in compliance with  
16 all County requirements. The scope of the traffic study was approved by the County and  
17 included evaluation of impacts associated with traffic volumes, the Lebers Land/Grover  
18 Lane/ Northlake Way intersection (“Impacted Intersection”), transit system, school bus  
19 service, bicycle and pedestrian facilities, railroad system, nuisance gravel and alternative  
20 access routes. In addition, the County performed a concurrency test, as required by GMA,  
21

24 <sup>31</sup> *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. at 805.

25 <sup>32</sup> Exhibit 34, DEIS, Chapter 9.

<sup>33</sup> Exhibit 36.

1 determined the UTF Project passed the concurrency requirement, and issued a Capacity  
2 Reservation Certificate for 186 average daily trips.<sup>34</sup>

3 Access to and from the UTF Project will occur via State Route 3 (“SR-3”), which is  
4 approximately one mile away. The impacted roadways within this one mile are Lebers  
5 Lane, Grover Lane, Northlake Way and Chico Way. The Impacted Intersection was  
6 determined to be the only intersection expected to be directly impacted by the UTF  
7 Project.<sup>35</sup> A traffic analysis was conducted, in accordance with the standards imposed by  
8 the County and based upon the relatively low number of average daily trips (186) and very  
9 low PM peak hour trips (35)<sup>36</sup> associated with the UTF Project, to identify deficiencies in  
10 the existing operating conditions. The Impacted Intersection was evaluated to ensure that  
11 appropriate design features were provided for the site. The existing PM peak hour traffic  
12 volumes at the Impacted Intersection was determined to be LOS B<sup>37</sup> in the PM peak hour  
13 and will continue to operate at LOS B after the UTF Project.<sup>38</sup> The amount of traffic  
14 expected on the roadways, even with the conservative trip generation assumptions, is well  
15 below the capacity of the roadway, and much lower than the County plans for on typical  
16 residential roadways.<sup>39</sup>

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19 <sup>34</sup> The Capacity Reservation Certificate, Exhibit 97, was issued on May 6, 2008. The average daily trips will  
20 be 186, but will include only 48 round trips by aggregate hauling trucks, and there will only be 35 PM Peak  
21 Trips.

21 <sup>35</sup> Exhibit 34, DEIS, Section 9.2.3.

22 <sup>36</sup> Because of the low number of PM Peak Trips associated with the UTF Project, the County does not require  
23 off-site analysis. However, the Lebers Lane/Grover Land/Northlake Way intersection was evaluated,  
24 because it was determined to be the only intersection directly impacted by the UTF Project.

23 <sup>37</sup> LOS refers to “Level of Service”. The County establishes LOS goals for all transportation facilities in  
24 accordance with GMA requirements. LOS A through LOS C implies that traffic flows with minimal delay.  
25 Exhibit 36, FEIS, *Appendix A, Comment Letter 5, Section 5-2*. The UTF Project will not adversely impact  
the LOS standards applicable to the roadways impacted. See, Exhibit 34, DEIS, Section 9.2.3.

<sup>38</sup> LOS B will continue to exist at the Impacted Intersection with the UTF Project, but the average  
delay/vehicle will be increased by two seconds.

<sup>39</sup> Exhibit 34, DEIS, Section 9.4.2.

1 Traffic generation estimates were developed using a conservative 25-year mineral  
2 extraction timeline (as opposed to the 50-year extraction timeline proposed by UTF).<sup>40</sup>  
3 Actual trip generation is expected to be lower due to the anticipated longer extraction  
4 period than was assumed in the trip generation estimates. The Staff Report miscalculated  
5 (mathematical error) the actual number of trips associated with trucking of aggregates on  
6 Northlake Way north of Lebers Lane.<sup>41</sup> At maximum capacity, it is contemplated that  
7 there will be 48 aggregate truck round trips from the UTF Project on average per day. 90%  
8 of these trips are proposed along Northlake Way to Chico Way then to SR-3. The mining  
9 operations will occur for nine (9) hours/day. Thus, at full maximum capacity, aggregate  
10 trucks will be making runs every 12 ½ minutes, nine hours/day, five days/week, 51  
11 weeks/year from the UTF Project. At maximum capacity, there will be only 4-5 aggregate  
12 truck round trips/hour, as opposed to the 12 aggregate truck round trips calculated by the  
13 County. The Staff's miscalculation results in more than doubling the projected number of  
14 aggregate truck trips per hour on Northlake Way north of Lebers Lane. This significant  
15 overstatement of aggregate truck round trips per hour has likely influenced the County's  
16 request for significant improvements along Northlake Way, which will be addressed  
17 during the CUP approval hearing.  
18

19 The FEIS process resulted in 30 mitigation conditions being imposed with regard to  
20 transportation issues.<sup>42</sup> These mitigation conditions generally include: (1) Roadway  
21 improvements to Lebers Lane, Grover Lane, the Impacted Intersection (including  
22

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23 <sup>40</sup> Exhibit 34, DEIS, Section 9.4.2.

24 <sup>41</sup> This has been discussed with Staff. The Staff Report stated “[a]s proposed, 33 ton aggregate loads on  
approximately 55 ton trucks will be making runs every five minutes, 8 hours a day, 5 days a week, 51 weeks  
a year from the mine and go north, up Northlake Way and Chico Way for the better part of a generation.”

25 <sup>42</sup> The transportation related Mitigation Conditions are numbered 20, 22, 24, 25, 78, 101, 102, 103, 104, 105,  
106, 107, 108, 109, 110, 111, 121, 122, 123, 138, 139, 141, 143, 144, 145, 146, 147, 148, 159 and 160.

1 realignment of the intersection) and portions of Northlake Way; (2) limiting average daily  
2 trips; (3) imposing grade and roadway geometry requirements; (4) railroad crossing  
3 improvements on Lebers Lane; (4) widening and adding sidewalks, gutters, curbs and  
4 wheelchair access ramps along Lebers lane, Grover Lane and the Impacted Intersection to  
5 enhance pedestrian and child safety and facilitate safe routes to and from school and transit  
6 system bus stops; (5) reduction techniques for potential impacts from nuisance gravel,  
7 including mandatory tarping, wheel wash facilities, inspection requirements, and periodic  
8 cleaning of Lebers Lane; (6) preventative techniques to control silt loading on roadways;  
9 (7) imposition of restricted speed limits; (8) incorporation of emission BMPs; (9) use of  
10 dust suppressants; (10) limitations on the hours of truck hauling operations; and (11)  
11 proportionate contribution toward resurfacing of impacted paved roadways. The FEIS  
12 does adequately address traffic and safety impacts associated with the UTF Project and  
13 establishes mitigation conditions to mitigate the adverse impacts.

## 14 2. Traffic Generation.

15  
16 The Appellants contend that the UTF Project will result in too much traffic for the  
17 area. The 186 average daily trips and 35 PM peak hour trips generated from the UTF  
18 Project can readily be accommodated by the local roadway system, including Northlake  
19 Way and Chico Way. Northlake Way is classified as a “minor arterial” and has an existing  
20 total daily volume of 6,145 (October 2007). The existing daily volume of trucks with three  
21 or more axles is 104, or 1.7% of the total volume.<sup>43</sup> With the added traffic from the UTF  
22 Project, the total daily volume on Northlake Way is anticipated to increase to 6,312, of  
23

24  
25 <sup>43</sup> Exhibit 98, Letter from P. Struck, Parametrix, regarding truck traffic on representative minor arterials in Kitsap County.

1 which 226 will be trucks with three or more axles or 3.6% of the total volume. This total  
2 daily volume on Northlake Way is only about half of its estimated daily capacity of  
3 12,160.<sup>44</sup>

4 Parametrix evaluated traffic volumes on other minor arterials in the County.<sup>45</sup> The  
5 average daily volume of nine (9) minor arterials is 6849 with 263 trucks with three or more  
6 axles, or 3.8 % of the total.<sup>46</sup> Therefore, daily traffic and truck volumes on Northlake Way  
7 with traffic generated from the UTF Project will be lower than the averages for nine (9)  
8 similar minor arterial roadways in the County.

9 3. **Traffic Impact Analysis.**

10 The Appellants contend that the FEIS is inadequate because no traffic impact  
11 analysis (“TIA”) was conducted. The Appellants are correct that no TIA was conducted,  
12 but it was not required by the County and the absence thereof does not render the FEIS  
13 inadequate. Because the UTF Project had a minimal impact to the overall traffic corridor,  
14 generating only 35 PM peak hour trips, it was below the County threshold of 50 PM peak  
15 hour trips for requiring a TIA under County regulations at the time of the vested CUP  
16 Application. No expert testimony has been presented to challenge or refute in any way the  
17 capacity of the roadways to accommodate the minimal traffic generated from the UTF  
18 Project. Moreover, even though a TIA was not required, a traffic study was prepared as  
19 part of the SEPA review to address capacity and safety issues at the Impacted  
20 Intersection.<sup>47</sup> This traffic analysis resulted in significant mitigation conditions and  
21

22  
23 \_\_\_\_\_  
24 <sup>44</sup> Exhibit 98. A two-lane major city/county roadway in an area over 5,000 population not in an urbanized  
25 area.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See, Section IV(A)(1) above.

1 improvements to Lebers Lane, Grover Lane, the Impacted Intersection and Northlake  
2 Way.<sup>48</sup> The study area and level of analysis in the traffic study was reasonable for the  
3 number of trips generated by the UTF Project.<sup>49</sup>

4 4. **South Access Option.**

5 The Appellants contend that a south access route to the UTF Project should be  
6 required in order to avoid impacts to homes along Lebers Lane and the surrounding  
7 neighborhood. The FEIS evaluated the south access options and determined they were  
8 infeasible.<sup>50</sup> ESM Consulting Engineers, LLC (“ESM”) prepared a report in conjunction  
9 with the environmental review analyzing the feasibility of the south access options (“ESM  
10 Report”).<sup>51</sup> ESM identified two potential south access options and analyzed both using  
11 AASHTO<sup>52</sup> criteria with the KCC. The ESM Report, and the County, concluded that  
12 neither of the alternative south access routes was feasible.<sup>53</sup>

13  
14 Common to both of the south access options were significant adverse  
15 environmental impacts. There are extensive critical areas in the south portion of the UTF  
16 property and along the south access options considered. These include very steep slopes  
17 on either side of a valley that would require extensive cut and fill, wetlands, streams,  
18 watershed corridors, and a very significant wildlife corridor which connects Kitsap, Heinz  
19 and Alexander Lakes.<sup>54</sup>

20  
21 <sup>48</sup> *Id.*

22 <sup>49</sup> For example, the UTF Project will only result in an additional two second delay at the Impacted  
Intersection, which is the only intersection deemed to be adversely impacted by the UTF Project.

23 <sup>50</sup> Exhibit 36, FEIS, Section 1.7.

24 <sup>51</sup> Exhibit 36, FEIS, Appendix B, *Ueland Tree Farm Mineral Resources Development Access Feasibility  
Analysis* (ESM, May 2009).

25 <sup>52</sup> American Association of State Highway and Transportation Officials.

<sup>53</sup> FEIS, Section 1.7, pg. 1-24.

<sup>54</sup> Exhibit 106, Email from Keith Fokerts, County Natural Resources Coordinator, and Wildlife Corridor  
Elevation Maps showing high value wildlife corridor which connects Kitsap, Heinz and Alexander Lakes.

1 In addition to the environmental impacts, the first south access option (denoted as  
2 “Option 1 in the ESM Report) was infeasible for the following reasons: (1) UTF would  
3 have to purchase eight properties totaling approximately 236 acres in order to provide  
4 right-of-way access; (2) the length of the roadway would be approximately 1.5 miles; (3)  
5 the roadway would require a maximum road grade of approximately 15% within steep  
6 slope areas, which exceeds County 12% maximum grade requirements, and would require  
7 50 to 60 feet of cut in areas near the railroad tracks; and (4) stormwater drainage  
8 management for this first south access option would be difficult and expensive because of  
9 the steep slopes surrounding the roadway and additional land would need to be acquired to  
10 accommodate required detention and water quality facilities.

11 In addition to the environmental impacts, the second south access option (denoted  
12 as “Option 2” in the ESM Report) was likewise infeasible for the following reasons: (1)  
13 UTF would have to purchase six properties totaling approximately 175 acres in order to  
14 provide right-of-way access; (2) UTF would need permission from the City of Bremerton  
15 to cross its City Watershed, which Bremerton has refused to provide;<sup>55</sup> (3) the length of the  
16 roadway would be approximately 2.5 miles; (4) the roadway would require maximum road  
17 grade of approximately 15% within steep slope areas, which exceeds County maximum  
18 grade; and (5) stormwater drainage management would be difficult and expensive due to  
19 the steep slopes.  
20

21 The Appellants point to the Kitsap County Sub-Area Plan - Port Blakely Joint  
22 Planning Area (“PB Sub-Area Plan”) as support for their argument that access to the UTF  
23 Project should come from the south. There is no merit to that contention. First, the PB  
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25 <sup>55</sup> Exhibit 54, Letter from P. Williams, Director of Public Works, City of Bremerton.

1 Sub-Area Plan has been rescinded by the County. Second, the development magnitude  
2 (based on traffic generation estimates) of the PB Sub-Area Plan was exponentially higher  
3 and not even remotely comparable to the traffic generation estimates for the UTF Project.  
4 Trip generation from the PB Sub-Area Plan was estimated to be 18,130 average daily trips  
5 and 2,541 PM peak hour trips.<sup>56</sup> There is no comparison between those numbers and the  
6 UTF Project 186 average daily trips and 35 PM peak hour trips.

7 The much higher trip generation associated with the PB Sub-Area Plan was the  
8 only reason why a south access roadway was required for the urban mixed-use project.  
9 Traffic analysis determined that the north access (Northlake Way) could only safely  
10 accommodate up to 1500 PM peak hour trips from the proposed Port Blakely project.<sup>57</sup>  
11 The UTF Project is only anticipated to generate 35 PM peak hour trips, which is miniscule  
12 in comparison to the 1500 PM peak hour trips contemplated for Northlake Way in the PB  
13 Sub-Area Plan. Accordingly, the rescinded PB Sub-Area Plan, and the discussion therein  
14 relating to a south access, has no relevance to the UTF Project given the huge discrepancy  
15 in traffic generation.  
16

#### 17 5. Nuisance Gravel.

18 The Appellants contend that gravel on the roadway will damage vehicles, which is  
19 always a concern with surface mining operations and truck hauling. UTF has agreed to  
20 virtually every practical mitigation condition that could be suggested for reducing the  
21 impacts associated with nuisance gravel. As set forth above, in Section IV(A)(1),  
22 reduction techniques for potential impacts from nuisance gravel include paving of access  
23

24  
25 <sup>56</sup> PB Sub-Area Plan, Exhibit B, Volume II, Technical Memorandum 3, September 5, 1997, pg. 7

<sup>57</sup> PB Sub-Area Plan, Exhibit B, Volume I, July 26, 2000, pg. 46.

1 roads, mandatory tarping of truck loads, load inspections, truck wheel wash facilities, and  
2 periodic street sweeping of Lebers Lane.

3 **B. Railroad Spur.**

4 The Appellants contend that railroad spur and railroad use has not been sufficiently  
5 analyzed. The railroad spur was included as “optional” in the CUP Application, because it  
6 is dependent upon many factors that are beyond the control of UTF and economically  
7 speculative at this time. These factors include: (1) Future cost of rail transport; (2) market  
8 demand for aggregates; and (3) suitable arrangements with the U.S. Government and  
9 operator regarding use of the railroad. That is why UTF utilized the worst case scenario  
10 for the traffic study and analysis, which did not contemplate moving any aggregate mining  
11 materials by railroad. UTF is simply not in a position today to provide any certainty with  
12 regard to these issues and, accordingly, it will request that the optional railroad spur be  
13 voluntarily eliminated from the CUP approval. In the event that a railroad alternative is  
14 subsequently determined to be viable, then UTF will submit for any necessary permits and  
15 engage in the necessary SEPA environmental impact analysis associated therewith.  
16

17 **C. Critical Areas.**

18 1. **Wetlands.**

19 The Appellants contend that the FEIS is inadequate because the wetland analysis  
20 was not sufficient. There is no merit to this contention. Wetlands were a critical element  
21 in the evaluation of the UTF Project and a great deal of expert evaluation was undertaken  
22 to address specific environmental impacts associated with wetlands. The DEIS, FEIS and  
23 supporting technical documents describe the extensive process that was used to delineate  
24 and classify wetlands and streams, as well as characterize potential impacts. The wetland  
25

1 and stream delineation encompassed over 500-acres of UTF property and identified 19  
2 separate wetlands and 14 streams. All wetland and stream related work was undertaken in  
3 accordance with the County Critical Areas Ordinance, KCC 19.100 (“CAO”) and is  
4 documented in the Wetland Delineation and Stream Identification Report (Parametrix  
5 2009)<sup>58</sup>. All wetland evaluations were performed under the supervision of a qualified  
6 wetland scientist and wetland boundaries were surveyed by a Professional Licensed  
7 Surveyor in accordance with methods required by the County CAO.

8 As a result of the extensive wetlands evaluation, wetland impacts have been  
9 avoided in part by utilization of buffer averaging.<sup>59</sup> Buffer averaging is consistent with  
10 both the specific requirements and the intent of the KCC and provisions that require habitat  
11 functions and values equal to or greater than would be provided under the standard buffer  
12 requirements. Even though adverse wetland impacts have been avoided, there are still 17  
13 mitigation conditions imposed that directly relate to wetlands in order to further protect  
14 any potential adverse impacts that may arise in the future as a result of unintended mining  
15 consequences.<sup>60</sup> This includes detailed monitoring and contingency plans to be  
16 implemented to provide on-going protection to the wetlands, as well as all other natural  
17 systems located on the UTF Project site. In addition virtually all of the myriad mitigation  
18 conditions relating to stormwater, surface water runoff, topographical contouring,  
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22 <sup>58</sup> Exhibit 89.

23 <sup>59</sup> Exhibit 36, FEIS, Appendix A, Comment Letter Nos. 1, Section 1-3 (“proposed buffer averaging has been  
24 demonstrated to reflect avoidance measures, does not adversely effect habitat, meets buffer widths necessary to  
25 protect water quality and hydrologic functions, provides more net total buffer area, and preserves a greater  
amount of the highest quality buffer area that otherwise would not be protected”). Comment Letter Nos. 1  
and 2 provide extensive comments with regard to protection of the wetlands.

<sup>60</sup> The Mitigation Conditions that directly refer to wetland protection and monitoring are numbered 36, 37,  
38, 39, 40, 41, 42, 61, 62, 63, 66, 74, 75, 76, 125, 154 and 158.

1 revegetation, habitat, mine reclamation, infiltration/retention facilities, groundwater and  
2 surface water monitoring and mining operations are all designed to protect wetlands.  
3 There simply is no merit in the Appellants' contention that the FEIS is inadequate with  
4 regard to wetland evaluation and mitigation of impacts.

5 **2. Dickerson Creek.**

6 As described in the FEIS, DEIS and Staff Report, the proposed use of the UTF  
7 Project site is consistent with land use designations of the Kitsap County Comprehensive  
8 Plan. The UTF Project is also consistent with good environmental practices and exceeds  
9 County standards for stormwater management and mine reclamation. The UTF Project  
10 design uses best management practices (BMPs) that reflect the most current design  
11 guidelines, which include (1) Stormwater facility design using the 2005 Department of  
12 Ecology Stormwater Manual instead of the 1997 Kitsap County Stormwater Manual; (2)  
13 mine reclamation in accordance with DNR BMPs; and (3) voluntary operational practices  
14 that reduce impacts and are identified in the more than 155 mitigation conditions that have  
15 been agreed to by UTF.  
16

17 Stream buffers between the mines and Dickerson Creek are over 400 feet in width,  
18 which is over double the County 150 feet buffer requirement. All buffers will be marked  
19 in the field prior to start of operations with permanent markers. There are also monitoring  
20 conditions imposed so that any potential impacts to Dickerson Creek are identified and  
21 evaluated to determine if the impacts are likely related to mining activities in the UTF  
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1 Project.<sup>61</sup> Contingency plans will be implemented to mitigate any such unlikely  
2 occurrence.<sup>62</sup>

3 The Appellants contend that the UTF Project is somehow impacted by reference to  
4 the “Special Flood Hazard Area” designated for Dickerson Creek, which is a “100 year  
5 flood zone” established in the Flood Insurance Rate Map (FIRM) prepared by the by the  
6 Federal Emergency Management Agency (FEMA). The UTF Project will not alter or  
7 affect the flood zones designated by FEMA. Design of the stormwater system for the  
8 project reflects the requirements of both the 1997 Kitsap County Stormwater Design  
9 Manual and the Department of Ecology 2005 Stormwater Design Manual. Both of these  
10 manuals have design requirements for stormwater detention and infiltration that are  
11 intended to address downstream flood-related issues.

12 The Appellants cite a study that was prepared for the PB Sub-Area Plan, which  
13 relates to an urban mixed-use development of significant magnitude that had been  
14 proposed by Port Blakely, entitled *Recommendations for the Protection of Aquatic*  
15 *Resources for the Kitsap Lake Joint Planning Area* (AES 1999). Each of the appellants’  
16 specific points is addressed as follows:  
17

- 18 1. **Appellants’ Position:** The UTF Project needs to minimize development  
19 within the Dickerson Creek basin similar to the Port Blakely proposal.  
20 **UTF Response:** Comparing the Port Blakely proposal to the UTF Project  
21 is not appropriate or valid due to differences in size, intensity and duration.  
22 Port Blakely proposed 440-acres of permanent urban commercial,  
23 residential and industrial development as opposed to the UTF Project,  
24 which includes only 152-acres of temporary mine use wherein disturbance  
25 is in 10-acre segments. Potential risks to aquatic resources from permanent  
urban mixed-use development are significantly greater than the temporary  
risks that may be associated with segmented sand, gravel and basalt mining.

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<sup>61</sup> Mitigation Condition 158.

<sup>62</sup> *Id.*

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2. **Appellants' Position:** UTF proposes too large of an area for development in the Dickerson Creek sub-basin. **UTF Response:** The Appellants inaccurately state that the 152-acres comprising the UTF Project proposed for development is located in the Dickerson Creek sub-basin. As shown in the Preliminary Drainage Plan (Parametrix 2009),<sup>63</sup> approximately one-third of Gravel Mine A (11-acres), one-quarter of Basalt Quarry C (9-acres), one-quarter of Basalt Quarry A (5-acres) and all of Gravel Mine B (34-acres) are located in the Dickerson Creek sub-basin. Total UTF Project acreage in the Dickerson Creek sub-basin is therefore approximately 59-acres, not 152-acres. All of the mines within the Dickerson Creek sub-basin will be subject to segmental clearing, excavating and reclamation. Moreover, at the end of the operational period, projected to be 50-years, all of the mine sites will be reclaimed as habitat and working forest – similar to existing conditions. That portion of the UTF Project within the Dickerson Creek sub-basin represents less than five percent (5%) of the total Dickerson Creek sub-basin. None of the reclaimed mine sites would be impervious surfaces, and incremental development and reclamation would ensure that no more than 20-acres (10-acres in one gravel mine, and 10-acres in one basalt quarry) would be in operation at any one time. Therefore, the UTF Project footprint would be less than two percent (2%) of the total Dickerson Creek sub-basin at any given time (20-acres of disturbance within the UTF Project versus 1,200 total acres within the Dickerson Creek sub-basin).

3. **Appellants' Position:** UTF should avoid any new discharges to Dickerson Creek similar to the Port Blakely proposal. **UTF Response:** No new discharges to Dickerson Creek will be created by the UTF Project. Stormwater within Gravel Mines A and B will be 100% infiltrated, and stormwater from Basalt Quarries A and B will be detained in accordance with the requirement of the 2005 Ecology Manual – which requires much higher detention volumes compared to the existing 1997 Kitsap County Stormwater Manual.

4. **Appellant's Position:** UTF should meet the *Recommendations for the Protection of Aquatic Resources for the Kitsap Lake Joint Planning Area* (AES 1999). **UTF Response:** The UTF Project meets or exceeds all of the recommendations of the referenced report.<sup>64</sup> This includes minimizing development footprint, maintaining infiltration to the maximum extent feasible, treating stormwater from vehicle access surfaces, monitoring hydrology and water quality, and limiting vegetation and chemical use.

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<sup>63</sup> Exhibit 88.

<sup>64</sup> PB Sub-Area Plan, Volume II, Exhibit B, July 26, 2000, Section 3, pg. iv.

1                   **D.     Wildlife**

2                   The Appellants have raised very broad contentions with regard to potential adverse  
3 impacts on salmon, bald eagles and blue heron, without any specifics or expert testimony  
4 challenging the adequacy of the FEIS evaluation. Because the UTF property, including the  
5 UTF Project site, is relatively large, the potential for a wide variety of birds, mammals,  
6 reptiles and amphibians to occur on the property is high.<sup>65</sup> UTF retained Parametrix to  
7 prepare an extensive Habitat Management Plan for the UTF Project site.<sup>66</sup>

8                   The DEIS,<sup>67</sup> and FEIS, conclude:

- 9                   • No streams or stream buffers occur in any areas proposed for mine or  
10 quarry development;
- 11                   • No documented records of any listed species are known for the UTF  
12 Project site, and none of the proposed development sites provide suitable  
13 breeding habitat for any of these species;
- 14                   • No documented records of any candidate or monitored species are known  
15 for the UTF Project site; No areas targeted for preservation by the federal,  
16 state and/or local government that provide fish and wildlife habitat  
17 benefits have been identified on the UTF Project site or on the remainder  
18 of the UTF property; and
- 19                   • None of the proposed mine development sites currently contain cliffs,  
20 talus, or wetlands, although such features would be developed as part of  
21 the reclamation plan.

22                   Population numbers of some species may decline in the UTF Project site due to direct  
23 mortality, noise and vibration disturbance, operational impacts (blasting, vehicles, mining,  
24 etc.), visual disturbance and habitat loss.<sup>68</sup> However, no adverse effects are anticipated to  
25 endangered, threatened, or sensitive species because none are found within the UTF

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24 <sup>65</sup> Exhibit 34, DEIS, Section 6.2.3 (detailed discussion of wildlife at UTF Project site).

24 <sup>66</sup> Exhibit 91, Revised Habitat Management Plan (Parametrix, 2009).

25 <sup>67</sup> Exhibit 34, DEIS, Section 6.4.

25 <sup>68</sup> Exhibit 34, DEIS, Section 6.4.2.

1 property boundary or near any of the proposed mineral resource development sites.<sup>69</sup>  
2 Moreover, none of the proposed development sites supports seasonal range areas or habitat  
3 elements that, if altered, may reduce the likelihood of any particular species persisting and  
4 reproducing in the UTF Project over the long term.<sup>70</sup>

5 The Impact Mitigation is described in detail in the DEIS and is comprehensive.<sup>71</sup>  
6 Most of the 160 mitigation conditions imposed on the UTF Project directly or indirectly  
7 (stormwater conditions, natural systems monitoring, reclamation requirements, vehicle  
8 speed limitation, noise and vibration limitations, chemical use avoidance, restoration plans,  
9 surface and groundwater quality, vegetation conditions, limitations on commercial  
10 forestry, incremental mining and reclamation, etc.) reduce, alleviate or minimize impacts  
11 to wildlife. Approximately 12 mitigation conditions have been imposed that directly relate  
12 to wildlife.<sup>72</sup> The DEIS, and FEIS, have thoroughly analyzed the impacts to wildlife and  
13 properly mitigated these impacts by imposition of many conditions.  
14

15 **E. Noise.**

16 One Appellant stated “noise” as a basis for appeal. There was nothing further  
17 provided. Given the mining activities contemplated, noise factors were comprehensively  
18 evaluated during the EIS process.<sup>73</sup> The technical analysis was extensive and included:  
19 (1) Identification of existing sound levels at potentially affected receivers (i.e., residences);  
20 (2) identification of local noise standards to enable assessment of compliance; (3)  
21 identification of state/federal noise impact criteria; (4) characterization of potential noise  
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23 <sup>69</sup> *Id.* at pg. 6-16.

24 <sup>70</sup> Exhibit 34, DEIS, Section 6.4.2.

25 <sup>71</sup> Exhibit 34, DEIS, Section 6.5.2.

<sup>72</sup> Wildlife mitigations conditions are numbered 61, 62, 63, 67, 68, 73, 74, 75, 76, 85, 154 and 158.

<sup>73</sup> Exhibit 34, DEIS, Chapter 7.

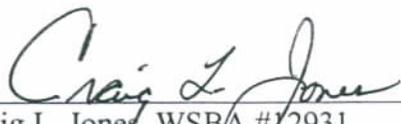
1 sources, both on and off-site; (5) prediction of sound levels from on-site noise sources; (6)  
2 prediction of off-site truck noise; (7) assessment of compliance with County's noise limits;  
3 (8) assessment of potential noise impacts due to cumulative increases in sound levels; and  
4 (9) analysis of noise mitigation.

5 Noise and Vibration impacts were mitigated with conditions imposed to restrict  
6 operating hours, construct berms, maintain 20' high stockpiles near processing and wash  
7 plants, govern the placement of the concrete batch plant, and incorporate noise reduction  
8 techniques in trucks and equipment (i.e., mufflers, back-up signals, etc.). Specifically,  
9 there are approximately 15 mitigation conditions directed to noise and vibration.<sup>74</sup> The  
10 FEIS thoroughly evaluated potential noise impacts and imposed many mitigation  
11 conditions to reduce, alleviate or minimize the impacts.

#### 12 V. CONCLUSION

13 UTF respectfully submits that the DEIS and FEIS were abundantly adequate in  
14 identifying, evaluating and mitigating probable significant environmental impacts involved  
15 with the UTF Project. Imposition of 160 mitigation conditions, coupled with requirements  
16 imposed by federal, state and local laws, ordinances and regulations, will provide the  
17 necessary environmental protection associated with the mineral resource development.  
18

19 **RESPECTFULLY SUBMITTED** this 14<sup>th</sup> day of November, 2009.

20  
21   
22 \_\_\_\_\_  
23 Craig L. Jones, WSBA #12931  
24 Attorneys for Ueland Tree Farm, LLC

25 <sup>74</sup> Noise and vibration mitigation conditions are numbered 63, 77, 78, 79, 80, 81, 82, 83, 88, 90, 96, 98, 99,  
100 and 112.