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BEFORE THE HEARING EXAMINER
FOR KITSAP COUNTY

)	No. 07-44975
In Re:)	
)	BRIEF OF APPLICANT
UELAND TREE FARM)	
MINERAL RESOURCE DEVELOPMENT)	CONDITIONAL USE PERMIT
)	APPROVAL
)	
)	Ueland Tree Farm, LLC
)	
)	

I. INTRODUCTION

Ueland Farm, LLC (“UTF”) filed the pending Conditional Use Permit Application (“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 threshold Determination of Significance was made by Kitsap County (“County”) on June 23, 2008. The County issued a Draft Environmental Impact Statement (“DEIS”) in February, 2009. A Final Environmental Impact Statement (“FEIS”) was issued on August 25, 2009. An Addendum to the FEIS was issued on October 6, 2009. An FEIS appeal was filed by Concerned Citizens of Chico Creek Water Basin. No appeals have been filed by any governmental agencies, state or federal, conservation entities or tribes. The CUP approval and FEIS appeal are scheduled for hearing on November 9, 2009.

II. FACTS

1
2 UTF is proposing development of commercial sand, gravel and basalt mineral surface
3 mines on portions of the 1,716-acre property owned by UTF located west of the City of
4 Bremerton and Kitsap Lake. The proposal includes development of two sand and gravel
5 mines and three basalt quarries. Optional development may include a concrete batch plant
6 and a topsoil facility. The CUP also proposed an “optional” railroad spur line, but UTF
7 requests that the railroad spur line be deleted from the CUP at this time, because there simply
8 are too many unknown factors with regard to the feasibility of this option, rendering
9 environmental review and permit conditioning overly speculative. If UTF determines in the
10 future that a railroad spur line is feasible, then it will submit for all necessary permits and
11 undertake environmental review.

12
13 Located on “Gravel Mine A” will be a crushing and washing facility, concrete batch
14 plant, topsoil production facility, office, truck scales and maintenance shop. Approximately
15 152-acres of the 1,716 acres will be developed for surface mining and related activities, not
16 including connecting access roads. This amounts to approximately 9% of the UTF property.
17 The mining plan includes an estimated 50-year implementation period. There will only be a
18 single sand and gravel mine and single basalt quarry developed and operating at any given
19 time. At each of the operating mines, an incremental mining program has been developed,
20 resulting in development of only 10-acres at any given time, followed by incremental
21 reclamation, which will significantly reduce the amount of earth disruption and reduce the
22 environmental impacts. Anticipated annual production for the UTF Project is estimated at a
23 maximum of 400,000 tons of aggregate. Following mineral removal, each mine or quarry will
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1 be reclaimed consistent with Kitsap County and Washington Department of Natural
2 Resources (“DNR”) reclamation standards.

3 Opponents to the UTF Project have raised transportation issues, which will be
4 addressed through the FEIS Appeal, but warrant discussion in the CUP approval. Access to
5 and from the UTF Project will occur via State Route 3 (“SR-3”), which is approximately one
6 mile away. The impacted roadways within this one mile are Lebers Lane, Grover Lane,
7 Northlake Way and Chico Way. The only intersection deemed impacted by the UTF Project
8 is the Lebers Lane/Grover Lane/Northlake Way intersection (“Impacted Intersection”).¹ A
9 traffic analysis was conducted, in accordance with the standards imposed by Kitsap County
10 (“County”) and based upon the relatively low number of average daily trips (186) and very
11 low PM peak hour trips (35) associated with the UTF Project, to identify deficiencies in the
12 existing operating conditions.² The Impacted Intersection was evaluated to ensure that
13 appropriate design features were provided for the site. The existing PM peak hour traffic
14 volumes at the Impacted Intersection was determined to be LOS B³ in the PM peak hour and
15 will continue to operate at LOS B after the UTF Project.⁴

17 Traffic generation estimates were developed using a conservative 25-year mineral
18 extraction timeline (as opposed to the 50-year extraction timeline proposed by UTF).⁵ Actual
19

20 ¹ Exhibit 34, DEIS, Section 9.2.3.

21 ² Because the UTF Project had a minimal impact to the overall traffic corridor, generating only 35 PM peak hour
22 trips, it was below the County threshold of 50 PM peak hour trips for requiring a Traffic Impact Analysis
23 (“TIA”) under County regulations at the time of the vested CUP Application. However, even though a TIA was
24 not required, a traffic study was prepared as part of the SEPA review to address capacity and safety issues at the
25 Impacted Intersection.

³ LOS refers to “Level of Service”. The County establishes LOS goals for all transportation facilities in
accordance with GMA requirements. The UTF Project will not adversely impact the LOS standards applicable
to the roadways impacted. See, Exhibit 34, DEIS, Section 9.2.3.

⁴ While remaining LOS B, it is anticipated that there will be an additional two second delay based upon the UTF
Project.

⁵ Exhibit 34, DEIS, Section 9.4.2.

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

17 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 Way
19 and Chico Way. Northlake Way is classified as a "minor arterial" and has an existing total
20 daily volume of 6,145 (October 2007).⁷ The existing daily volume of trucks with three or
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23 _____
24 ⁶ 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 ⁷ Exhibit 98, Letter from P. Struck, Parametrix, regarding truck traffic on representative minor arterials in Kitsap
County.

1 more axles is 104, or 1.7% of the total volume.⁸ With the added traffic from the UTF Project,
2 the total daily volume on Northlake Way is anticipated to increase to 6,312, of which 226 will
3 be trucks with three or more axles or 3.6% of the total volume.⁹ This has been compared to
4 the average daily volume of nine (9) minor arterials in the County, which is 6849 with 263
5 trucks with three or more axles, or 3.8 % of the total.¹⁰ Therefore, daily traffic and truck
6 volumes on Northlake Way with traffic generated from the UTF Project will be lower than the
7 averages for nine (9) similar minor arterial roadways in the County. With the UTF Project,
8 Northlake Way will remain at approximately 50% of its design capacity of 12,160 average
9 daily trips.¹¹

10 The project is intended to fill a need for mineral resources in the County and the
11 surrounding region. At the present time, there are relatively few long-term mineral resource
12 sites in the County that are located in areas that are feasible for development. This is
13 particularly true for basalt quarries, which are relatively uncommon geologic features in the
14 Kitsap Peninsula region. Currently, there are two primary basalt quarries in the County, both
15 of which have finite resources.¹² The UTF project site contains more than 11 million cubic
16 yards of commercial quality mineral deposits and is located on rural property zoned for forest
17 resource development. The location of the site in close proximity to the Bremerton Urban
18 Growth Area will provide a much needed source of sand, gravel and basalt mineral resources
19 for both public and private projects in the vicinity.¹³

22 _____
23 ⁸ *Id.*

24 ⁹ *Id.*

25 ¹⁰ *Id.*

¹¹ Exhibit 98. A two-lane major city/county roadway in an area over 5,000 population not in an urbanized area.

¹² Exhibit 34, DEIS, Section 1.3.

¹³ See, “*The Aggregates Industry of Washington: Economic Impact and Importance*”, Pacific Lutheran School of Business, October 2003 (nearly 52% of all aggregates produced are used for road maintenance, street and

1 General mining use permits are issued by the local jurisdictions, in this case the
2 County, but the Department of Natural Resources (“DNR”) retains authority over reclamation.
3 In addition to the County CUP, SDAP¹⁴ and Right-of-Way Use Permit, mining operations
4 always require additional state and/or federal permits, including a Sand and Gravel General
5 Permit (DOE); National Pollutant Discharge Eliminate System Stormwater Permit (DOE);
6 Section 401 Water Quality Certification (DOE); Surface Mine Reclamation Permit (DNR);
7 Puget Sound Clean Air Agency (Notice of Construction); and Hydraulic Project Approval
8 (WDFW). Thus, there are various local, state and federal agencies involved in the overall
9 permitting of a surface mining operation.

10 **III. CONDITIONAL USE PERMIT APPROVAL**

11 UTF seeks a conditional use permit for the proposed aggregate extraction activities
12 pursuant to Kitsap County Code (“KCC”).¹⁵ Conditional use permits are required for mining
13 activities in Rural Wooded and Forest Resource Lands. The discussion below addresses the
14 consistency of the UTF Project with the criteria set forth in the Hearing Examiner Conditional
15 Use Permit Ordinance.¹⁶

17 **A. Hearing Examiner Conditional Use Permit Criteria.**

18 The Hearing Examiner may approve, approve with conditions, or deny a Hearing
19 Examiner CUP through a Type III process.¹⁷ Approval or approval with conditions may be
20 granted only when all of the following criteria are met:¹⁸

21
22
23 runway construction and bridges, with the remaining aggregates used for residential, commercial and industrial
development).

¹⁴ Site Development Activity Permit.

¹⁵ KCC, Table 17.381.040(E).

¹⁶ KCC 17.421

¹⁷ KCC 17.421.020.

¹⁸ KCC 17.421.030(A)(1-4).

1. The proposal is consistent with the Comprehensive Plan;
2. The proposal complies with applicable requirements of the Kitsap County Code;
3. The proposal will not be materially detrimental to existing or future uses of the property in the immediate vicinity; and
4. The proposal is compatible with and incorporates specific features, condition or revisions that ensure it responds appropriately to the existing character, appearance, quality or development, and physical characteristics of the subject property and the immediate vicinity.

B. The UTF Project is Consistent with the Decisional Criteria.

1. The UTF Project is Consistent with the Comprehensive Plan.

The Kitsap County Comprehensive Plan (“Comprehensive Plan”) has significant provisions that encourage conservation of mineral resource lands to support resource-based industry. There is recognition throughout that natural resource activities, such as forestry, agriculture and mining continue to contribute to the rural character and economy. One of the goals for economic development in rural lands is to preserve opportunities for resource-based economic activities within the County. While these provisions of encouragement and preservation are found throughout the Comprehensive Plan, the provisions of Section 3.24, Resource Lands, and Section 3.25, Mineral Resource Lands, are most pertinent:

3.2.4. **Resource Lands.** The intent of resource lands goals and policies is to direct the use of lands that contain commercial quality resources, such as for forestry, agriculture, mineral extraction and aquaculture. These resource-based uses are often intermixed or occur together with residential development within the County’s rural areas....

Goal 7: Preserve and enhance natural resource-based activities, such as agriculture, forestry, mineral extraction, and aquaculture ... in the rural areas through regulatory means.

Policy RL-34 Protect natural resource lands from incompatible adjacent uses.

1 Policy RL-36 Allow and encourage agriculture,
2 mineral and forestry uses in the rural areas of the County. Such
3 uses should not be considered to constitute a nuisance within
4 rural areas if conducted within generally accepted management
5 practices and in compliance with applicable laws that regulate
6 such activities.

5 Policy RL-37 Require that land use activities
6 within or adjacent to resource lands are sited and designed to
7 minimize conflicts with and impacts on resource lands.
8 Minimization of impacts may be accomplished through the use
9 of setbacks, buffers and other requirements.

8 Policy RL-38 Require the following language on
9 approved plats and building permits in rural areas: “Notice: the
10 subject property is within or near land in which resource
11 activities are permitted and encouraged, including a variety of
12 activities which may not be compatible with residential use for
13 certain periods of limited duration. In addition to other
14 activities, these may include noise, dust, smoke, visual impacts
15 and odors resulting from harvesting, planting, surface mining,
16 quarrying, application of fertilizers, herbicides and associated
17 reclamation and management activities. When performed in
18 accordance with state and federal law, these resource activities
19 are not subject to legal action as a nuisance.”

15 Goal 8: Preserve and enhance natural resource-based activities,
16 such as forestry, mineral extraction, agriculture, and aquaculture
17 in the rural areas through non-regulatory means.

17 Policy RL-39 Identify, evaluate, and pursue
18 incentives for landowners to conserve shorelines and resource
19 lands and to continue resource-based activities. Examples of
20 such incentives include tax reduction, purchase of development
21 rights, TDR and clustering incentives.

21 Policy RL-40 Encourage the use of Best
22 Management Practices (BMPs) for all resource activities.

22 Goal 11. Discourage inappropriate land uses in the vicinity of
23 commercial quality mineral deposits in the County through
24 regulatory means.

24 Policy RL-52 Encourage the preservation of
25 lands identified as mineral deposits.

1 Policy RL-53 Discourage the conversion of
2 identified aggregate lands to uses incompatible with extraction
3 activities.

4 The DEIS includes additional discussion regarding the compatibility of the UTF Project with
5 the Comprehensive Plan.¹⁹

6 **2. The UTF Project Complies with the Requirements of the
7 Kitsap County Code.**

8 The UTF Project complies with all requirements of the KCC. Mineral extraction
9 activities are conditional uses within the Rural Wooded and Forest Resources Lands subject to
10 a Hearing Examiner CUP.²⁰ The UTF Project will be required to obtain CUP approval, an
11 SDAP and a Right-of-Way Permit from the County. UTF will be required to comply with all
12 requirements of the KCC including, without limitation, the Critical Areas Ordinance, the
13 Stormwater Design Manual and the Transportation Ordinance. UTF is not seeking any
14 variances to the KCC requirements. In addition to the KCC, UTF will be required to comply
15 with myriad state and federal regulations that will be applicable to the proposed mining
16 operations.

17 **3. The UTF Project will not be Materially Detrimental to
18 Existing or Future Uses of the Property in the Immediate Vicinity.**

19 The UTF Project is located within 1,716 acres of forested land owned by UTF. No
20 residences or structures are located on the UTF property. The vast forested properties to the
21 west and north of the UTF property are zoned Rural Wooded and Forest Resource Lands and
22 owned by the DNR and the Mountaineers. The City of Bremerton owns property bordering
23 on the west and south of the UTF property, which is zoned either “Watershed” or “City Utility

24 _____
25 ¹⁹ Exhibit 34, DEIS, Chapter 8 (Land Use).

²⁰ See, FN 14, *supra*.

1 Lands.” The closest rural residential development is near the northeast portion of the UTF
2 property and is separated by a U.S. Navy railroad track. This rural residential development is
3 over 600 feet from the nearest proposed gravel mine and over 6,000 feet from the location of
4 the nearest quarry where periodic blasting will occur. There are 15 residences within this
5 area, seven (7) of which are owned by UTF. The DEIS describes in detail the current land
6 uses in the UTF project area.²¹

7 It is likely that development of the UTF Project will result in certain unavoidable
8 impacts to the adjacent area associated with construction activities, traffic, dust and noise.
9 These impacts will likely be noticeable to area residents, but will be mitigated to the extent
10 practicable through the implementation of approximately 160 mitigation conditions, use of
11 Best Management Practices, and compliance with KCC, federal and state laws, regulations
12 and guidelines. These mitigation conditions include, without limitation, the following: (1)
13 limiting harvest units around the mining activities; (2) providing advance notification to
14 surrounding properties of planned forest management activities that may create periodic
15 disturbances; (3) creating berms for noise and visual screens; (4) fencing the periphery of all
16 mining sites; (5) requiring extensive roadway improvements;²² (6) limiting hours of operation
17 (weekdays only); (7) limiting average daily trips; (8) planting tree barriers; (9) reducing noise
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21 ²¹ Exhibit 34, DEIS, Chapter 8 (Land Use).

22 ²² Roadway improvements include paving the entirety of Lebers Lane, portions of Grover Lane and the Impacted
23 Intersection; realignment of the Impacted Intersection; improvements at the existing railroad crossing on Lebers
24 Lane; improvements to the vertical and horizontal alignment on Lebers Lane; addition of both a left turn lane
25 and acceleration lane on Northlake Way to improve sight distance, reduce conflict points, improve safety, and
accommodate anticipated truck traffic; addition of 8-foot paved shoulders on both sides of Northlake Way
(approximately 500 feet south and 650 feet north of the Impacted Intersection) to improve pedestrian safety;
addition of a minimum 4-foot paved shoulders improvement of shoulders along Northlake Way adjacent to the
Impacted Intersection; and construction of sidewalks along Lebers Lane, portions of Grover Lane and the
Impacted Intersection to enhance pedestrian and child safety.

1 of trucks, machinery, crushers and other mining equipment; (10) retaining existing trees
2 around the edge of mining operations as visual screens and vegetative buffers along
3 boundaries of the UTF Project site; (11) monitoring all natural systems and preparation of
4 contingency plans in the event of identified adverse impacts thereto associated with the
5 mining operations; (12) utilization of BMPs to control dust associated with mining operations
6 and use of unpaved roadways on the UTF Project site; and (12) implementing the 10-acre
7 segmental development and reclamation to minimize the amount of disturbed area at any mine
8 or quarry at any given time.

9 **4. The UTF Project is Compatible with and Incorporates Specific Features,**
10 **Condition or Revisions that Ensure it Responds Appropriately to the Existing**
11 **Character, Appearance, Quality or Development, and Physical Characteristics of the**
Subject Property and the Immediate Vicinity.

12 The UTF Project provides a substantial public benefit by providing needed mineral
13 resources to the region. The potential impacts of the UTF Project on existing and anticipated
14 future land uses in the vicinity were thoroughly evaluated in the DEIS.²³ The UTF Project is
15 virtually surrounded by large forested tracts, much of which is owned by UTF, DNR, City of
16 Bremerton and the Mountaineers. No residences or structures are located on the UTF
17 property. The closest residence is over 600 feet from the nearest proposed gravel mine and is
18 separated by a U.S. Navy railroad track. There are 160 mitigation conditions that will be
19 imposed to ensure that any impacts to properties in the vicinity of the UTF Project will be
20 avoided or minimized.²⁴ In addition, UTF will be required to comply with the KCC and
21 federal and state laws, regulations and guidelines relating to the operation of surface mines.
22

23 ²³ Exhibit 34, DEIS, Chapter 8 (Land Use).

24 ²⁴ See, Section III(B)(3), *supra*, for a discussion of the mitigation conditions.

1 IV. REQUESTED MODIFICATION TO MITIGATION CONDITIONS

2 There are 160 mitigation conditions proposed for the UTF Project. UTF and the
3 County have mutually agreed upon imposition of 157 of these conditions. There are three (3)
4 remaining proposed mitigation conditions that warrant further consideration by the Hearing
5 Examiner. One of these mitigation conditions is a SEPA mitigation relating to stream
6 monitoring within Dickerson Creek. The remaining two mitigation conditions are County
7 Staff proposed CUP mitigation conditions relating to (1) Future contributions by UTF toward
8 repaving of roadways impacted by the UTF Project; and (2) construction of 8-foot shoulders
9 by UTF along both sides of the entirety of Northlake Way from Lebers Lane to Chico Way.

10 A. Dickerson Creek Monitoring.

11 This discussion relates to Mitigation Condition 158. While UTF is not opposed to
12 addressing the concern with regard to stream flow levels in Dickerson Creek,²⁵ the
13 methodology and assumptions being proposed by the FEIS mitigation condition and the
14 County Staff's proposed mitigation condition, as described below, impose unreasonable
15 responsibilities on UTF for potential impacts to Dickerson Creek stream flows that may be
16 entirely unrelated to any activities involved with the UTF Project. The FEIS did not "require"
17 the Dickerson Creek flow monitoring mitigation condition, but stated it was an "additional
18 mitigation measure that could be considered."²⁶ Parametrix has recommended an alternative
19 to both the FEIS proposed mitigation condition and the County Staff's proposed mitigation
20 condition that will more precisely monitor groundwater levels adjacent to the mining sites to
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23 _____
24 ²⁵ Even though there is a 400 foot buffer between any mining site and Dickerson Creek, which is more than
double the buffer required by the KCC CAO.

25 ²⁶ Exhibit 34, DEIS, Chapter 4 (Surface Water), Section 4.5.4.

1 pinpoint whether changes associated with the mining operations are likely impacting stream
2 flow within Dickerson Creek. UTF will continue to work with County Staff to address this
3 issue and determine if there is a mutually acceptable means to address potential stream flow
4 impacts to Dickerson Creek.

5 **1. Proposed FEIS Mitigation Condition.**

6 The FEIS included the following potential mitigation condition that “could be
7 considered” with regard to stream flow impacts associated with Dickerson Creek:

- 8 • The project proponent will work with the Kitsap County Public
9 Utility District to continue flow monitoring at the Dickerson
10 Creek gauge. This record will be used to review summer low
11 flows to help determine if mining operations are having an
12 adverse impact on baseflows within Dickerson Creek. The pre-
13 project record will be analyzed for standard low flow statistics
14 and confidence intervals (e.g., seven day minimum average
15 flow, seven day, ten year flow (7Q10), etc.) as appropriate
16 given data quality and record length.
- 17 • If baseflows are determined to be reduced in the period mining
18 has started, the project proponent will attempt to determine the
19 reason, and provide adaptive management of the stormwater
20 infiltration systems to augment streamflows to pre-mining or
21 better levels.

22 This approach contemplates a monitoring program to review summer low flows in
23 Dickerson Creek. The Kitsap County Public Utility District (“PUD”) already has a gauge in
24 Dickerson Creek and is monitoring the flows, but apparently this monitoring is not continuous
25 and is periodic. The approach is to perform the stream flow monitoring and compare this
against baseline data. That sounds like a reasonable approach, but assumes that there is
valuable relatively long-term baseline data for purposes of comparison. Apparently, the
baseline data for Dickerson Creek extends back only a couple of years. Without the necessary
baseline flow data, it will be difficult, if not impossible, to establish the natural range of

1 variation in annual and seasonal flows, such that an “impact” due to land use practice could be
2 reasonably determined.

3 In addition, this potential FEIS mitigation condition requires UTF to act in the event
4 that virtually any downward fluctuation occurs in the stream flow level, even if it relates to
5 inadequate baseline data or has nothing to do with the UTF mining operations. The proposed
6 condition requires UTF to attempt to determine the reason for the negative fluctuation in
7 stream flows, which could include land use practices on third-party owned forest land that is
8 located within the 1,200-acre Dickerson Creek sub-basin, natural and man-made (logging)
9 changes in vegetation within the sub-basin, mining activities, climate changes or some
10 combination of these factors. Furthermore, changes in base flow due to land use typically
11 occur in very small increments over long periods of time and are difficult to discern from
12 normal/natural fluctuations in the water cycle. This will be a daunting task subject to
13 potential differences of opinion.
14

15 Regardless of the perceived “cause” of the downward fluctuation in stream flow
16 levels, UTF is required to provide adaptive management of the stormwater infiltration systems
17 to augment streamflows to pre-mining or better levels. This presumes, without any required
18 proof, that the UTF mining operations have caused surface or groundwater reductions to
19 Dickerson Creek.

20 2. **Proposed County Staff Mitigation Condition.**

21 The County Staff was not satisfied with the above-referenced potential FEIS
22 mitigation condition and proposed its own mitigation condition in substitution. The County
23 Staff proposal has all of the inherent problems identified above with the FEIS mitigation
24 condition and is even more problematic. The County Staff proposal is as follows:
25

- 1 • Maintain Continuous stream low flow monitoring of Dickerson Creek unless such
2 monitoring is accomplished by Kitsap Public Utility District (KPUD). Regardless of
3 who gathers the data, it shall be provided by the Applicant to DCD, KPUD and
4 Suquamish Tribe by December 1st of every year to allow review of summer low flows.
Along with the raw data in electronic format will be hydrographs and an analysis of
standard low flow statistics and confidence intervals (e.g., seven day minimum
average flow, seven day, ten year flow (7Q10, etc.).
- 5 • If baseflow impacts are found, the Applicant shall submit an adaptive management
6 plan to the same parties which outlines steps the Applicant will take to augment
7 streamflows to pre-mining or better levels. Such steps may include direct
8 augmentation of stream flow. The adaptive management plan will be approved by the
9 County and implemented by the Applicant.
- 10 • If the review of the data leads the County to suspect that the stream may be
11 experiencing low flows exacerbated by mining operations, the Applicant shall fund the
12 County hiring an independent firm to analyze the data and provide an opinion as to
13 whether baseflows in the stream are being negatively impacted by mining operations.
14 The standard for this opinion shall be “a preponderance of the evidence.”

15 First, regardless of who performs the stream flow monitoring, UTF is required to
16 somehow obtain the raw data and provide it to the identified entities. UTF has no right to
17 demand this information from the Kitsap County PUD. UTF has no control over how the
18 monitoring is undertaken or how the results thereof are compiled. Nonetheless, UTF is
19 required to turn whatever raw data is provided into electronic format with hydrographs and an
20 analysis of standard low flow statistics and confidence intervals. That may not even be
21 possible if the raw data or baseline data is inadequate.

22 Second, if negative stream flow data is found, regardless of any perceived cause, UTF
23 must submit an adaptive management plan outlining steps it will take to augment
24 streamflows. It presumes the problem is caused by UTF. It also presumes, without any
25 evidence, that UTF has somehow diverted water that would have otherwise flowed into
Dickerson Creek, thus requiring it to augment the flows into Dickerson Creek.

1 Third, if the County decides that the negative stream flow data was “exacerbated” by
2 mining operations, which it will determine by a “preponderance of the evidence,” then UTF
3 must fund the County hiring an independent firm to analyze the data and determine if it was
4 truly caused by the mining operations. This is very expensive and, as mentioned, the negative
5 stream flow could be caused by any number or a combination of man-made or natural
6 phenomena, or perhaps be indicated simply because of inadequate raw data or baseline data.
7 It is unreasonable and over-reaching to impose this mitigation condition on UTF and require it
8 to fund all of this work without any determination that its mining activities have actually
9 caused or contributed to the problem.

10 UTF is not opposed to stream flow monitoring as a mitigation condition, but wants to
11 ensure that (1) the appropriate data is available; and (2) there is a demonstrated nexus between
12 the reduced stream flows and the mining operations before UTF is required to hire or fund
13 consultants or undertake any remediation. It may be possible to work with County Staff to
14 find an agreeable approach to stream flow monitoring prior to the hearing date.

15
16 3. **Proposed UTF Mitigation Condition.**

17 UTF retained Parametrix to propose an alternative mitigation condition to address the
18 concern relating to potential adverse stream flows to Dickerson Creek that may be caused or
19 exacerbated by mining activities. Parametrix recommends the following mitigation condition
20 approach:

21 At least one year prior to initiation of mining operations at the
22 applicable mines or quarries, UTF will establish groundwater
23 monitoring wells in the upper most water table at each of Gravel
24 Mine A, Gravel Mine B and Quarry A at locations that will
25 allow determination of approximate groundwater flow direction
and velocity. UTF will monitor groundwater levels quarterly
for one year prior to start-up of operations, and in each of the
first 5 years of operation, then bi-annually thereafter (once in

1 the February-March wet season, and once in the August-
2 September dry season). Water level monitoring data will be
3 evaluated with respect to pre-operation and previous year's
4 water level data and precipitation trends, and will include
5 appropriate statistical analysis and technical evaluation. Water
6 level monitoring results will be reported annually and will be
7 included in the same report that includes water quality and
8 wetland monitoring results. If groundwater level monitoring
9 results show statistically significant declines in groundwater
10 water levels that are attributed to mining operations, then UTF
11 will develop an adaptive management plan that will be
12 submitted to Kitsap County and implemented after Kitsap
13 County approval. Monitoring requirements will terminate when
14 reclamation of the mine site is complete.

9 Parametrix contends that hydrogeologic data for the UTF Project site shows that
10 disruption of groundwater recharge patterns (and subsequently negative stream flow impacts)
11 is very unlikely. Basin boundaries are being maintained for pre-project and post-project
12 conditions, and infiltration facilities are proposed for all sand and gravel operations. No
13 "basin transfer" is proposed, and best available stormwater quantity BMPs are being used.
14 Furthermore, the mine sites are being mined in 10-acre increments, are temporary land uses,
15 and will be reclaimed to conditions that are consistent with existing conditions (working
16 forest) following completion of mining activities. The existing site information therefore
17 provides no indication that groundwater recharge conditions will change and subsequently
18 create adverse stream flow impacts to Dickerson Creek.

19 Parametrix believes that monitoring of water quantity and potential impact to stream
20 flows in Dickerson Creek would be more appropriately addressed by monitoring groundwater
21 conditions near the mines themselves, similar to the approach that will be used to ensure there
22 are no hydrologic impacts to wetlands. This would consist of installing groundwater
23 monitoring wells downgradient of the mine sites that are in the Dickerson Creek sub-basin
24 (Gravel Mine A and B, and Quarry A) and monitoring water level fluctuations over time.
25

1 Because of the proximity to the mine sites, and elimination of more non-project variables
2 (third party land use, climate changes, etc.), the data from these monitoring wells would more
3 closely reflect hydrologic conditions associated with the mining operations.

4 **B. Roadway Rehabilitation Contribution.**

5 This discussion relates to Mitigation Condition 159. The County Staff has proposed
6 the following CUP condition, unrelated to SEPA mitigation, imposing on UTF responsibility
7 for “future” roadway rehabilitation cost contribution on Northlake Way, Seabeck Highway
8 and Chico Way to SR-3 as a result of utilization of these roadways by the hauling trucks:

- 9
- 10 • Due to the heavy tare weight per axle for the project trucks this
11 land use will generate on county roads, the Applicant shall
12 evaluate the existing pavement structures on Northlake Way
13 NW and Chico Way NW to State Highway 3 to determine what
14 impacts (i.e., premature failure) these loads could cause. This
15 evaluation shall be submitted with the SDAP. If it is
16 determined that premature road failure will occur due to the
17 heavy truck traffic then the Applicant shall contribute a
18 proportional share toward road reconstruction to be determined
19 by the Equivalent Single Axle Load (ESAL) equation. [ESAL
20 (w/development) – ESAL (w/out development) = proportional
21 share (%).
 - 22 • If it is determined that impacts will occur [i.e., premature failure
23 – defined as reaching a TSI (terminal serviceability index) of
24 less than 2.5 prior to the end of the 20-year service life], the
25 owner/Applicant will sign a covenant with this proportional
share condition prior to issuance of the SDAP.

20 To the knowledge of UTF and Parametrix, this condition has never been applied to
21 any other sand and gravel/quarry or other project in Kitsap County utilizing large trucks, there
22 is no traffic impact fee ordinance, this is an illegal tax under RCW 82.02.020, and the County
23 is requesting that UTF pay more than its roughly proportionate share. Furthermore, trucks
24 already pay a significant weight based license fee to the State of Washington to offset impacts
25 associated with heavy loads. For example, a truck and trailer pays about \$1,100 each year, as

1 opposed to \$30 for a passenger vehicle. This license fee generates over \$75,000,000 per
2 year, a portion of which is provided to local governments for road improvements.

3 In the absence of a traffic impact fee ordinance, these roadway extractions violate
4 RCW 82.02.020. Moreover, even if the mitigation could somehow be imposed without
5 violation of RCW 82.02.020, it does not meet the constitutional requirement of imposition of
6 extractions in “rough proportionality” to the identified impacts.²⁷ The County must show the
7 specified improvements are roughly proportional to the impact the proposed development will
8 have on the public problem. As the US Supreme Court has stated, government is barred
9 “from forcing some people alone to bear public burdens which, in all fairness and justice,
10 should be borne by the public as a whole.”²⁸

11 With regard to rough proportionality, the County Staff’s proposal (1) does not
12 adequately define the roadway segments subject to contribution; (2) does not limit the
13 proportionate share to only costs associated with roadway rehabilitation required to address
14 truck use, excluding therefrom costs associated with other road related activities, such as
15 capacity expansion, drainage, signalization, or other road improvements that are not
16 specifically the result of a “nexus” between the UTF Project and the roadway rehabilitation;
17 (3) does not require the County to actually undertake the roadway rehabilitation work within
18 the 20-year life of the roadway paving; (4) does not provide any advance notice to UTF with
19 regard to when the work will be performed or payment will be required; and (5) does not
20 require that the funds actually paid by UTF be expended on the actual roadway rehabilitation
21 project.
22

24 ²⁷ *Benchmark Land Company v. City of Battle Ground*, 103 Wn. App. 721, 14 P.3d 172 (2000), *affirmed* 146
25 Wn.2d 685, 49 P.3d 860 (2002).

²⁸ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

1 If the Hearing Examiner elects to impose this roadway rehabilitation condition on
2 UTF, then UTF reserves its right to challenge such imposition, but requests that the following
3 language be incorporated in substitution for the County Staff proposed condition:

4 If it is determined that impacts will occur, [i.e., premature
5 failure-defined as reaching a TSI (terminal serviceability index)
6 of less than 2.5 prior to the end of the 20-year service life], the
owner will sign a covenant with this proportional share
condition prior to issuance of the SDAP.

7 The covenant shall specify that:

- 8 • To reflect different traffic and pavement conditions, the
9 ESAL analysis shall consider, at a minimum, the
10 following separate road segments; Northlake Way from
11 Lebers Lane to Seabeck Highway; Northlake Way from
12 Seabeck Highway to Chico Way; Chico Way from
13 Seabeck Highway to Erlands Point Road; and Chico
Way from Erlands Point Road to State Route 3. UTF
may divide the roadway into additional segments if
warranted based on differences in traffic or pavement
conditions.
- 14 • The proportionate share shall be based on costs
15 associated only with road rehabilitation required to
16 address truck use and shall not include additional costs
17 that may be associated with other road related activities
18 such as capacity expansion, drainage, signalization or
any other road improvements that are not specifically
associated with project truck use.
- 19 • The covenant shall specify that the County will notify
20 UTF when all or a portion of a pavement rehabilitation
21 project is placed on the County TIP, and the County will
22 provide a minimum of one year advance written notice
of the County's intent to construct improvements and
implement all or a portion of the covenant.
- 23 • All funds associated with the covenant shall be
24 expended on Northlake Way and Chico Way road
improvements, and shall be paid at the time the project
is constructed.

- Roadway improvements, if warranted, would be constructed within 20 years of the opening year of the project.

C. **Northlake Way Shoulder Construction.**

This discussion relates to Mitigation Condition 160. The County Staff has proposed the following CUP condition, unrelated to SEPA mitigation, imposing on UTF responsibility for constructing shoulders along both sides of Northlake Way from Grover Lane to Chico Way, a distance of approximately one mile. The County Staff proposes the following condition:

Paved shoulders shall be constructed on both sides of Northlake Way NW from NW Grover Lane to Chico Way NW in order to maintain community health, safety and welfare (pedestrians, bicyclists, disabled vehicles, emergency vehicles, and maintenance vehicles and crews). The shoulders shall be constructed per Kitsap County Road Standards, Table 3-6 Design Values for Arterial Roadway Features.

As set forth above in the discussion regarding roadway rehabilitation, this condition appears to be an extraction that violates RCW 82.02.020. Moreover, in *Benchmark Land Company v. City of Battle Ground*, 103 Wn. App. 721, 14 P.3d 172 (2000), *affirmed* 146 Wn.2d 685, 49 P.3d 860 (2002), where the issue was imposition of off-site roadway improvements as conditions of approval, the Court held that the government may not require the developer to address a problem that existed outside the development property – an adjoining street in need of improvement – where the development did not cause this problem, at most, it only aggravated it.²⁹ The government must show (1) that there exists a “nexus” between a legitimate governmental interest and the specified improvements; and (2) the

²⁹ 103 Wn. App. at 726 (relying upon *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987); and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994)).

1 specified improvements are roughly proportional to the impact the proposed development will
2 have on the public problem.³⁰

3 The proposed condition is grossly disproportionate to the UTF Project impacts. It is a
4 condition that, to the knowledge of UTF and Parametrix, has never been applied to any sand
5 and gravel project in the County. There are no special requirements associated with the UTF
6 Project that result in UTF utilizing the shoulders along Northlake Way in any manner that is
7 not normally contemplated by any other vehicle, passenger or otherwise, using the roadway.
8 It is undisputed that there is a current and pre-existing deficiency with the shoulders along
9 Northlake Way. Safety concerns related to students and pedestrians walking, or bicyclists
10 riding, on the west side of Northlake Way exist today without the UTF Project. While safety
11 risk would increase incrementally with the additional traffic generated from the UTF Project,
12 project-generated traffic represents only 3% of total traffic on Northlake Way. The County
13 Staff is attempting to overburden UTF with the “entire” cost of constructing the shoulders
14 without any reference to the “nexus” or determination of “rough proportionality”. At most,
15 the UTF Project should only be required to contribute its proportionate share of the shoulder
16 construction project.
17

18 Moreover, requiring 8-foot shoulders³¹ exceeds the generally accepted width that is
19 considered the minimum safe width for bike and pedestrian use. The County’s own Bicycle
20 Facilities Plan recommends a minimum of 4-foot paved shoulder³² as follows:
21

22
23 ³⁰ *Id.*

24 ³¹ Moreover, requiring 8-foot shoulders would require acquisition of additional land and UTF does not have the
25 power to condemn. The County contends that additional land would not be required if UTF were to place the
related stormwater improvements underground, as opposed to utilization of ditches, but the costs associated with
underground stormwater would be very high.

³² Kitsap County Bicycle Facilities Plan, pg. 41.

SHARED ROADWAYS

Shared roadways are defined as roadways with shared use by motor vehicle and bicycle travel. The most serious concern with shared roadways is the available width for these two modes of transportation. If shared roadways are to be signed as designated bike routes, AASHTO advises the provision of paved shoulders or wide outside lanes.

Paved Shoulders: In many instances the addition of paved shoulders may be the most cost-effective solution to improving the roadway for use by cyclists and pedestrians. Paved shoulders also help to protect the edge of the roadway from deterioration and provide room for emergency vehicles and break-downs. AASHTO advises that paved shoulders should be 4' wide at minimum to provide adequate space for use by cyclists. If there is a curb, guardrail or other roadside barrier, then AASHTO advises that a 5' shoulder from the face of the obstacle is necessary to meet safety standards.

In high traffic situations or along roadways with speeds over 50 mph, additional shoulder width is recommended. If funding or right-of-way is not available to meet AASHTO standards, then paving a 2' to 3' shoulder is suggested. Even this much additional shoulder will substantially improve the safety of the roadway for use by cyclists.

Preliminary observations indicate that approximately 50% of Northlake Way between Grover Lane and Chico Way (approximately 4,700 feet) has shoulders 4-feet or wider. Expanding the remaining shoulders to 4-foot minimum along Northlake Way between Grover Lane and Chico Way is estimated to cost in the range of \$250,000, with most cost associated with shoulder and drainage improvements on the west side of Northlake Way between Seabeck Highway and Chico Way. Proportionate share is typically calculated as the project's percent of total traffic at opening year. Average daily traffic in 2007 on Northlake Way at Seabeck Highway was 6,100 vehicles. The project will result in putting 170 daily trips onto Northlake Way north of Grover Lane, or about 2.8% of the total. Thus, UTF should be paying 2.8% of the \$250,000 associated with the shoulder construction project, which equates

1 to \$7,000. A more conservative way to calculate proportionate share is to use the passenger
2 car equivalent (“PCE”) factor from the Highway Capacity Manual, Transportation Research
3 Board (2000).³³ Because the UTF Project has a higher proportion of truck traffic than the
4 existing mix on Northlake Way north of Grover Lane and these trucks have a PCE factor of
5 2.5, this adjustment increases UTF’s proportionate share to 5.9%, which equates to \$14,750.

6 Regardless of which of these methods is used, UTF is willing to voluntarily contribute
7 more than its proportionate share as mitigation. Rather than waiting until a future date when
8 the County elects to improve the deficient shoulders along Northlake Way, UTF proposes to
9 impose a condition increasing the shoulder width between the north end of the Impacted
10 Intersection (where the shoulder is being expanded to 8-feet) and David Road, which is a
11 distance of approximately 350 feet, to a minimum paved width of 4-feet with 2-foot clear zone
12 consistent with the Bicycle Facilities Plan. Including survey, design and coordination with
13 the County, construction of this improvement is estimated to cost approximately \$35/foot to
14 complete, or \$25,000 total. This amount is equivalent to a proportionate share of
15 approximately 10% of the shoulder construction contemplated by County Staff. It also makes
16 additional improvements near the Impacted Intersection, improving safety and traffic
17 concerns. The net result of this additional mitigation, when considered with the other
18 roadway improvements that will be voluntarily made by UTF, is 1,500 contiguous feet of
19 shoulder improvements on both sides of Northlake Way around the Impacted Intersection.
20

21 Accordingly, UTF proposes that the Hearing Examiner substitute the following
22 condition for the condition recommended by County Staff:
23

24 _____
25 ³³ Exhibit 21-8, pg. 21-8, (ET value for rolling terrain).

1 UTF will expand the shoulder on both sides of Northlake Way
2 between the north end of Lebers Lane-Northlake Way
3 intersection improvements (where the shoulder is being
4 expanded to 8-ft) and David Road – a distance of approximately
5 350-ft. to a minimum paved width of 4-ft. with 20ft clear zone
6 consistent with Figure 16c of the Bicycle Facilities Plan. No
7 stormwater mitigation will be required for shoulder
8 improvements.

9 **V. CONCLUSION**

10 UTF respectfully submits that the UTF Project meets the criteria and requirements for
11 approval under the Hearing Examiner CUP Ordinance. UTF has mutually agreed with the
12 County to imposition of approximately 160 mitigation conditions to mitigate identified
13 adverse impacts. UTF requests that the Hearing Examiner carefully consider the three
14 mitigation conditions remaining under contention. UTF is willing to abide by reasonable
15 mitigation conditions with regard to flow monitoring of Dickerson Creek and, if deemed
16 appropriate, UTF is willing to contribute its proportionate share to the roadway rehabilitation
17 and shoulder improvements proposed by County Staff.

18 **RESPECTFULLY SUBMITTED**, this 1st day of November, 2009.

19 

20 Craig L. Jones, WSBA #12931
21 Attorneys for Ueland Tree Farm, LLC