BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of	EFSEC Docket No. EF-170823
TUUSSO ENERGY-Columbia Solar Project	APPLICANT'S LEGAL MEMORANDUM RE LAND USE

Legal Memorandum in Support of the Columbia Solar Photovoltaic Projects' Consistency and Compliance with Land Use Plans and Zoning Ordinances

I. INTRODUCTION

On October 16, 2017, TUUSSO Energy, LLC ("TUUSSO") submitted to the Energy Facility Site Evaluation Council ("EFSEC") an Application for Site Certification ("ASC") to develop, construct, and operate the Columbia Solar projects (the "Projects"). The Projects consist of five solar photovoltaic ("PV") generating facilities and two generation tie lines, all located in unincorporated portions of Kittitas County. In accordance with RCW 80.50.075 and WAC chapter 463-43, TUUSSO requested that EFSEC use its expedited review process for review and approval of the ASC. To be eligible for expedited review, EFSEC must find "that the project is consistent with and in compliance with city, county, or regional land use plans or zoning ordinances." RCW 80.50.075(1). TUUSSO submits this Legal Memorandum to support the Projects' consistency and compliance with Kittitas County Code.

II. BACKGROUND

The Columbia Solar Projects are proposed to be located at five site locations in Kittitas County. Each Project site is on privately-owned agricultural land, located within five miles of the center of the City of Ellensburg. The Project sites range in size from roughly 35 to 55 acres. The area surrounding Ellensburg where the Projects are located generally consists of scattered

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houses and farm buildings, flat agricultural fields, irrigation ditches, county roads and major highways.

TUUSSO undertook a multi-stage process to identify the proposed Project sites. At the outset, Kittitas County was identified as being uniquely situated among other Washington counties for solar development. Kittitas County has high solar insolation, available large land parcels, and is located within Puget Sound Energy's ("PSE") service territory (one of the only utilities in Washington with tariffs that support utility-scale solar). TUUSSO then applied criteria to identify potential sites within Kittitas County. First, TUUSSO specifically sought out land that was *already disturbed* (e.g., agricultural land). Additional criteria included: whether the land was zoned for utility-scale solar; whether the land was flat; degree of solar insolation; proximity to PSE's distribution lines and/or substations; and proximity to existing roads. Application of these criteria identified more than 100 sites. TUUSSO approached the landowners of those sites, and then eliminated sites as possibilities based on any number of the following factors: landowner disinterest; unusual site risks (e.g., flooding, protected species); high landowner lease rates; distribution lines not owned by PSE; or, over-utilized distribution lines.

The above-described selection process led to the identification of the five Project sites identified in the ASC: Camas, Fumaria, Penstemon, Typha, and Urtica. The Camas, Penstemon, and Typha sites are on land zoned as Commercial Agriculture ("CA"). The Fumaria and Urtica sites are on land zoned as Rural Working – Agriculture 20 ("A-20"). The Camas, Penstemon, and Urtica sites are currently actively managed for agriculture. The Fumaria site was previously heavily grazed, but is now fallow and dominated by weeds and non-native plant species. The Typha site consists of irrigated and grazed pasture, but is likewise now dominated by weeds and non-native plant species.

III. APPLICABLE STANDARDS

Under Kittitas County Code (cited as KCC), each of the Projects qualifies as a "major alternative energy facility."[1] KCC 17.61.010(9). Major alternative energy facilities are

[1] "Major alternative energy facility" means "a hydroelectric plant, solar farm, or wind farm that is not a minor alternative energy facility." KCC 17.61.010(9).

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permitted as a "conditional use" in the A-20 and CA zones.[2] KCC 17.61.020. Kittitas County Code requires that a conditional use satisfy the following criteria:

1. The proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood.
2. The proposed use at the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that:
   A. The proposed use will be adequately serviced by existing facilities such as highways, roads, police and fire protection, irrigation and drainage structures, refuse disposal, water and sewers, and schools; or
   B. The applicant shall provide such facilities; or
   C. The proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment.
3. The proposed use complies with relevant development standards and criteria for approval set forth in this title or other applicable provisions of Kittitas County Code.
4. The proposed use will mitigate material impacts of the development, whether environmental or otherwise.
5. The proposed use will ensure compatibility with existing neighboring land uses.
6. The proposed use is consistent with the intent and character of the zoning district in which it is located.
7. For conditional uses outside of Urban Growth Areas, the proposed use:
   A. Is consistent with the intent, goals, policies, and objectives of the Kittitas County Comprehensive Plan, including the policies of Chapter 8, Rural and Resource Lands;
   B. Preserves "rural character" as defined in the Growth Management Act (RCW 36.70A.030(15));
   C. Requires only rural government services; and
   D. Does not compromise the long term viability of designated resource lands.

KCC 17.60A.015.

Because the Projects satisfy the conditional use criteria at KCC 17.60A.015, they are "consistent and in compliance" with Kittitas County's applicable land use plans and zoning ordinances.

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[2] A conditional use is a "use which may be permitted in a zone classification following review under the provisions of KCC Chapter 17.60A." KCC 17.08.550.

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Criteria 1. The proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood. KCC 17.60A.015(1).

Essential and Desirable to the Public Convenience

The State of Washington has enacted aggressive legal and policy standards in pursuit of more renewable energy generation within its borders, and the Projects advance that pursuit. First, the State's Renewable Portfolio Standards ("RPS") mandates that 9 percent of the State's electricity be generated from renewable sources by 2016, increasing to 15 percent by 2020. The Projects would help the State meet the RPS by producing up to 25 MW of clean, locally produced renewable energy.

The Projects also align with the State's policy to increase renewable energy use by focusing on local sources. RCW 82.16.110 in its findings and intent conveys:

> "The legislature finds that the use of renewable energy sources generated from local sources such as solar and wind power benefit our state by reducing the load on the state's electrical energy grid, by providing nonpolluting sources of electricity generation, and by the creation of jobs for local industries that develop and sell renewable energy products and technologies."

Likewise, the State's Energy Independence Act declares:

> "Increasing energy conservation and the use of appropriately sited renewable energy facilities builds on the strong foundation of low-cost renewable hydroelectric generation in Washington state and will promote energy independence in the state and the Pacific Northwest region. Making the most of our plentiful local resources will stabilize electricity prices for Washington residents, provide economic benefits for Washington counties and farmers, create high-quality jobs in Washington, provide opportunities for training apprentice workers in the renewable energy field, protect clean air and water, and position Washington state as a national leader in clean energy technologies."

RCW 19.285.020.

Finally, the Projects are consistent with the State's findings that it is in the public interest to "[e]ncourage private investment in renewable energy resources" and "[e]nhance the continued diversification of the energy resources used in this state." RCW 80.60.005. The Projects are consistent with this policy because they would be funded by private money, with an estimated

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total cost of $40 to $50 million, which should stimulate economic growth and would diversify energy resources by increasing the availability of solar power.

EFSEC has previously found that these mandates and polices alone demonstrate that wind energy generation facilities are essential and desirable, and implement the public benefit and need for increased renewable energy projects. Today, the current pressing need to address climate change impacts, the declining interest in new fossil fuel generation facilities, competitive pricing of renewable energy generation, and the rising demands of major customer choice for renewable energy within utility service areas have pushed Washington and the region to a much enhanced obligation to reduce reliance on high carbon-emitting energy generation resources, and toward an abundance of renewable energy facilities that are diverse in geography and in "fuel" source. Just a few very current examples include the following:

Colstrip Retirement: Following on the March 17, 2016 WUTC approval of PSE's petition to implement a strategy to retire Colstrip Units 1 and 2, on December 6, 2017, the WUTC approved a settlement to establish a financing mechanism for the decommissioning and remediation needed after the shut-down of PSE's coal-fired Colstrip Units 1 and 2. Colstrip supplies around 20% of the power for PSE's customers. The shut-down is scheduled for July 2022 at the latest. The settlement also sets aside funding to pay for shut-down and cleanup costs for Units 3 and 4 at Colstrip, although no shut-down dates have been established for those newer units.[3]

PSE's Green Direct Program: According to PSE's newsroom information, "PSE is teaming up with cities, government institutions and major commercial customers to provide them with renewable energy. It's a ground-breaking product where customers, in an effort to use energy that meets their financial and carbon reduction goals, have agreed to a long-term service agreement in order to make this project viable." (April 18, 2017). This program is above and beyond PSE's RPS commitments, and is intended to bolster its renewable generation resources in order to sell clean energy "direct" to commercial, industrial and municipal entities.[4]

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[3] https://pse.com/aboutpse/PseNewsroom/NewsReleases/Pages/Settlement-reached-in-PSE-general-rate-case.aspx

[4] https://pse.com/aboutpse/PseNewsroom/NewsReleases/Pages/Governments-and-corporations.aspx

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Coalition Supporting Major Expansion of Solar PV Facilities: *Solar Plus* is a regional effort led by a broad coalition of stakeholders that are working towards tripling the amount of solar energy installed in Washington and Oregon by 2019. The Solar Plus project brings together agencies and organizations representing utilities, environmental justice, renewable energy advocates, government, and the solar industry. While the role and participation of utility participants is not identical and is evolving, project members plan to collaborate to develop and implement strategies that enhance solar adoption as well as to build energy equity and resiliency. This coalition includes several of Washington's largest utilities, including PSE, Seattle City Light, Snohomish PUD and Avista, along with state agencies, including the WUTC and Department of Commerce. (2017).[5]

Not detrimental or injurious to the environment

As discussed in detail in the ASC and the State Environmental Policy Act ("SEPA") Environmental Checklist, the Projects would have minimal effects on the surrounding environment. First, to demonstrate that the projects would not have a detrimental effect on soils, TUUSSO completed a geologic study and mapped soils at the Project sites. *See* ASC, Chapter 3.1; Appendices G-4, H-4, I-4, J-4, K-4 (Geotechnical Engineering Studies). Because the Project sites are relatively flat, the risk of erosion is low. In addition, best management practices ("BMPs") would be employed during construction to control and reduce erosion.

TUUSSO also demonstrated that there would be no impacts to water resources. *See* ASC, Chapter 3.3. To protect against impacts to water resources, TUUSSO delineated streams and other water types at the Project sites and then used avoidance measures in project design. Minimum protection buffers would also be used to ensure that water resources are not impacted. TUUSSO also prepared drainage reports for each Project site and conducted hydrologic modeling to ensure that surface waters would not be impacted. *See* ASC, Appendices G-5, H-5, I-5, J-5, K-5 (Drainage Reports). TUUSSO would implement stormwater BMPs to control runoff from the Project sites.

Similar analysis was undertaken for wetlands. *See* ASC, Chapter 3.5. Biologists conducted field visits and prepared Critical Areas Wetland and Waters Delineation Reports for

[5] http://solarplusnw.org/partners

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each Project site. *See* ASC, Appendices G-1, H-1, I-1, J-1, K-1. Project design avoidance measures were undertaken to prevent impacts to wetlands. With the exception of the Typha site, no impacts are proposed to any wetlands at the Project sites. The Typha site has one proposed wetland crossing, which would impact less than 0.1 acre of wetland.

TUUSSO further demonstrated that there will not be a substantial impact to habitat, vegetation, fish, or wildlife. *See* ASC, Appendix C (Habitat, Vegetation, Fish, and Wildlife Assessment Report). TUUSSO coordinated site visits with Washington Department of Fish and Wildlife ("WDFW") staff, and completed natural resources field surveys from April 3 to 12, 2017, to document flora and fauna in the vicinity of the Project sites. No special-status plant species are known to occur within the Project site areas. The Projects have the potential to affect two special-status animal species: the bald eagle and Columbia spotted frog. No bald eagles nests have been identified near the Project sites. However, if construction may occur during the bald eagle's critical use period, local U.S. Fish and Wildlife Service biologists would be consulted. To avoid impacts to the spotted frog, setback distances from aquatic habitats would be incorporated into site layouts, and appropriate erosion and sediment control measures would be implemented.

TUUSSO's in-depth evaluation of potential impacts to all aspects of the environment, summarized in detail in the ASC, demonstrate that the Projects will not be detrimental to the environment.

Not detrimental or injurious to the character of the surrounding neighborhood

Webster's dictionary defines detrimental as "causing damage or injury; obviously harmful." Neighborhood character might be described as 'the look and feel' of an area. The Projects would not be harmful to the 'look and feel' of the surrounding neighborhood for the following reasons:

- the Projects would not substantially change visual landscape of the surrounding area;
- the Projects would not constrain or otherwise negatively affect neighboring agricultural operations; and
- the Projects would not result in the permanent conversion of agricultural land.

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Visual Landscape. The Projects would not have a substantial impact on the visual landscape, and therefore would not compromise the look of the area. At maximum height, the solar panels would not exceed 8 feet from grade. In addition, the solar panels would be designed to absorb the maximum amount of sunlight hitting the panel (two-thirds of sunlight hitting the panels is absorbed). Each Project would be secured using 6- to 8-foot-high perimeter fencing. To lessen the visual impact of fencing for neighbors, the Projects would be landscaped at the perimeters with trees and shrubs.

In an effort to objectively and systematically evaluate the visual effect of the proposed Projects, TUUSSO applied the U.S. Bureau of Land Management's Visual Resource System. As explained in detail at ASC, Appendix D (Visual/Aesthetic Assessment Report), the Visual Resource System identifies "key observation points" ("KOPs") that represent views that an array of users would see, with the focus on the views of sensitive viewers. Sensitive viewers include those living or working in the area, travelers along major transportation routes, and recreational users of public lands.

To complete the visual analysis, TUUSSO identified three KOPs for each of the Project sites, collected field data at the KOPs (including panoramic photographs), and then superimposed digital renderings on the KOPs photographs. *See* ASC, Appendix D (containing original and digitally altered panoramic photos). To evaluate the degree of contrast between the existing environment and the environment after the Projects are constructed, the elements of "form," "line," "color," and "texture" were compared in the original panoramic photos and the digitally altered photos. Worksheets were used to rate the contrast in form, line , color, and texture between the current and proposed viewsheds.

Although ratings varied, the visual contrast of the Project sites (as digitally rendered) and the Project sites in their current state was generally rated as weak or moderate. Generally, the comparison photos showed that the Projects would not dominate the view, block current view, or change the characteristic landscape. At certain KOPs, where there was a stronger visual contrast between the Project and the existing land use, TUUSSO has proposed vegetative screening to interrupt the line of sight from the KOP to the Project site. For example, the Penstemon site is a roughly square-shaped site, bordered to the east by a creek and an existing line of trees, and to the south and west by fields. A road, Tjossem Road, forms the north border of the site.

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TUUSSO would plant a line of trees and shrubs up to 15 feet in height along the north and west borders of the site, between the Project fence and the road, to interrupt the line of site between travelers along the road and the fence. *See* ASC, Chapter 2.3.3.3. As described in the Vegetation Monitoring Plan, tree and shrub species would be planted in sufficient quantity and density to establish a visual buffer within five years. *See* ASC, Appendix B.

Neighboring Agriculture. The Projects would not negatively impact surrounding farming operations, and would in no way cause or force the conversion to non-farming land uses. Rather than harming neighboring agricultural production, the Projects would help prevent the spread of noxious weeds, including remedying existing weed problems on several of the Project sites. As discussed in depth in the Vegetation Management Plan (ASC, Appendix B), the Projects would be revegetated after construction. Per the recommendation of WDFW, each of the Project sites (except for Fumaria, which has limited water) would be revegetated with low-cover native plant species (or other approved species agreed in consultation with WDFW and affected landowners). To effectively establish the new plant species, mowing, herbicide treatments, tilling, drilling seeds, and irrigation would likely be undertaken during the initial years of operation. Subsequent broadleaf treatments would be undertaken to prevent broadleaf weeds from competing against newly planted vegetation. In field studies completed this year, eleven species of noxious weeds were discovered at the Project sites. Each Project site contained some presence of noxious weeds; the prevalence of noxious weeds ranged from low to medium. TUUSSO's proposed revegetation and post-construction weed management would help reduce the spread of noxious weeds to neighboring agricultural operations.

No Permanent Conversion of Agriculture Land. Finally, the removal of Project sites from agricultural production would be limited to the expected 30-year life of the Projects. The Projects would be constructed, operated, and decommissioned in such a way as to protect the viability of the land for agricultural use after decommissioning. Initially, the solar panels would be installed via post-and-frame systems that could be removed with minimal disturbance. The Projects sites are also relatively flat and therefore require minimal grading. After installation, the Project sites would be revegetated to prevent the erosion of valuable topsoil. For those reasons, the leased properties used to site the Projects would be readily available for agricultural production upon removal of the solar panels at the end of the Projects' life.

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Criteria 2. **The proposed use at the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that:**

(a) The proposed use will be adequately serviced by existing facilities such as highways, roads, police and fire protection, irrigation and drainage structures, refuse disposal, water and sewers, and schools; or
(b) The applicant shall provide such facilities; or
(c) The proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment. KCC 17.60A.015(2).

The Projects would not be detrimental to the economic welfare of Kittitas County or create excessive public costs. Rather, the Projects would benefit Kittitas County's economy. During peak construction, the Projects would employ up to 100 workers per day. Approximately 80 percent of the peak construction workforce is expected to be hired locally. Such employment would likely increase local spending.

Further, the Projects would provide an estimated $4,880,000 in property tax revenues for Kittitas County over the 30-year life of the Projects. This positive tax impact would help expand local services in Kittitas County. The Projects would also provide consistent revenue to the landowners of the leased Project sites, thereby aiding agricultural landowners in weathering variable market and weather events.

Finally, existing services would adequately serve the Projects with no anticipated significant impacts to police, fire, school, irrigation, refuse, water or septic systems, or health care services. Regarding road use, the Projects are expected to have no or minimal impacts on the transportation system. TUUSSO would make facilities available at the Projects to address fire prevention and protection.

Criteria 3. **The proposed use complies with relevant development standards and criteria for approval set forth in this title or other applicable provisions of Kittitas County Code. KCC 17.60A.015(3).**

TUUSSO is Washington developer of ground-mounted solar power projects with a proven history of successful low-impact development of over 100 MW of solar projects. TUUSSO would comply with all relevant development standards and criteria in the Kittitas County Code, including low impact construction and operation and best management practices, as well as:

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KCC Title 8 Health, Welfare, and Sanitation
KCC Title 9 Public Peace, Safety, and Morals
KCC Title 10 Vehicles and Traffic
KCC Title 12 Roads and Bridges
KCC Title 13 Water and Sewers
KCC Title 14 Buildings and Construction
KCC Title 15 Environmental Policy
KCC Title 17 Zoning
KCC Title 17A Critical Areas
KCC Title 20 Fire and Life Safety

Criteria 4. The proposed use will mitigate material impacts of the development, whether environmental or otherwise. KCC 17.60A.015(4).

As discussed in detail in the SEPA Environmental Checklist, the Projects would mitigate potential impacts through the mitigation plan and measures. The full scope of mitigation measures that would be employed at the Project sites is outlined at ASC, Chapter 1.10. TUUSSO is committed to developing well-sited, well-constructed projects.

Criteria 5. The proposed use will ensure compatibility with existing neighboring land uses.

Webster's dictionary defines "compatible" as "able to exist together without trouble or conflict." Because the Projects would have negligible glare, auditory, and traffic impacts, and for the reasons discussed for Criteria 1, the Projects would ensure compatibility with existing neighboring uses.

First, the Projects would not cause substantial glare. *See* ASC, Appendix E (Solar Glare Hazard Analysis Report). The Projects are designed to absorb sunlight, with an anti-reflective layer to maximize solar absorption, so that only one-third of the sunlight reaching the surface of the solar panel has the opportunity to be reflected. The U.S. Air Force has studied glare impact from flat-panel solar projects to airports, and determined such glare is similar to "weathered white concrete" and poses minimal risk.

The Projects would also create minimal noise. *See* ASC, Chapter 4.1.1–4.1.5. During operation, the Projects would be completely silent at night. During the daytime, the operational noise levels for most of the Projects are estimated to be within permissible levels. The noise

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levels for one Project, the Camas Project, are estimated to be above permissible levels at the property boundary. However, noise levels at the Camas Project's nearest sensitive receptor, which is a commercial facility located 155 feet from the property boundary, are all estimated to be *within* permissible levels. TUUSSO has committed to post-construction monitoring and mitigation to ensure that noise impacts at all Projects, including the Camas Project, are not significant. If necessary, mitigation may include a noise barrier.

Finally, regarding road use, access to the Project sites *during construction* would result in less than a 5 percent increase in average daily traffic ("ADT") volumes on area interstates, highways, and county roads accessing those sites. The exception would be three county roads accessing the Fumaria Project site, with ADT increases on Clarke Road (37.88 percent), Faust Road (12.44 percent), and Hungry Junction Road (9.23 percent). However, that traffic increase would only be for the 3-month period of construction. *During operation*, the Projects would have no negative impact on traffic.

Criteria 6. The proposed use is consistent with the intent and character of the zoning district in which it is located.

The purpose and intent of the A-20 and CA zones are to "preserve fertile farmland from encroachment by nonagricultural land uses" and "protect the rights and traditions of those engaged in agriculture." KCC 17.29.010; KCC 17.31.010. Kittitas County authorized major alternative energy facilities as conditionally permitted uses in the A-20 and CA Agriculture zones. KCC 17.61.020(4) states:

> Major alternative energy facilities may be authorized in the Agriculture-20, forest and range, commercial agriculture, and commercial zones as follows: . . .
>
> b. All other major alternative energy facilities may be authorized as a conditional use.

By adopting KCC 17.61.020(4), Kittitas County acted through its land use planning process to determine that solar facilities *may be consistent with A-20 and CA zones, depending on project- and location-specific considerations*. Other uses that are conditionally permitted in the A-20 and CA zones include airports, shooting ranges, refuse disposal and recycling centers,

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warehouse and distribution centers, mining and excavation, and utilities. KCC 17.15.050.1; KCC 17.15.060.1. Like major alternative energy facilities, the other identified conditional uses may be "consistent with the intent and character" of the A-20 and CA zones depending on the specific characteristics of individual projects.

It is important to emphasize that a conditional use is an *allowed* use. Whereas some uses are prohibited in the A-20 and CA zones (e.g., forest product sales, wastewater treatment), major alternative energy facilities are allowed subject to conditional use review. A leading case explains conditional uses as follows:

> [Conditional uses] are designed to meet the problem which arises where certain uses, although generally compatible with the basic use classification of a particular zone, should not be permitted to be located as a matter of right in every area included within the zone because of *hazards inherent in the use itself or special problems which its proposed location may present*. By this device, certain uses (e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site *depending upon the facts and circumstances of the particular case*.[6]

In this case, there are no hazards inherent in the Projects themselves or special problems with the proposed Project sites that make the Projects inconsistent with the A-20 and CA zones. As discussed previously, TUUSSO undertook a *thorough* site-selection process to identify the Project sites. The Project site areas are generally sparsely populated. To mitigate possible visual impacts for viewers who live, work, or travel by the Project sites, TUUSSO has proposed to

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[6] *Zylka v. City of Crystal*, 283 Minn. 192, 195, 167 N.W.2d 45 (1969) (internal quotation marks and footnote omitted) (emphasis added). Although a Minnesota Supreme Court decision, the *Zylka* opinion was described in a Washington land use treatise as "one of the best discussions distinguishing conditional uses from variances," 17 Wash. Prac., Real Estate § 4.22 n. 3, and has been cited with approval by multiple Washington courts, *see State ex rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 327 n. 3 (1973).

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plant lines of trees and shrubs along Project borders. The Projects would not otherwise have any negative impacts on surrounding land uses.

In addition, the Projects are consistent with the A-20 and CA zones because they preserve agricultural farmland from permanent encroachment by other non-agricultural uses, such as low-density residential sprawl. Unlike other conditional uses permitted in the A-20 and CA zones, the Projects would not permanently remove any farmland from production. Once the Projects are decommissioned, all equipment and materials would be removed. Because of the minimal disturbances to the top soils, the lands would be readily utilized for their former or new agricultural uses. Likewise, the Projects in no way discourage or cause interference with adjacent agricultural uses. The Projects provide added financial security for owners of agricultural land who desire to temporarily lease their property for Project sites. In that way, the Projects "protect the rights" of those engaged in agriculture and are consistent with the A-20 and Commercial Agricultural zones.

Criteria 7. For conditional uses outside of Urban Growth Areas, the proposed use:

a. Is consistent with the intent, goals, policies, and objectives of the Kittitas County Comprehensive Plan, including the policies of Chapter 8, Rural and Resource Lands;

Pursuant to Washington's Growth Management Act, a comprehensive plan serves as a county's "generalized coordinated land use policy statement." RCW 36.70A.030(4). Local development regulations, such as zoning codes, carry out the comprehensive plan's policies and must be consistent with the those policies.[7] The Washington Supreme Court has explained that, "[i]f a zoning code explicitly requires that all proposed uses comply with a comprehensive plan, then the proposed use must comply with both the zoning code and the comprehensive plan."[8] However, because a comprehensive plan is not a document designed for making specific land

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[7] *Woods v. Kittitas County*, 162 Wn.2d 597, 613 (2007); *see also* RCW 36.70B.040 (Local development regulations "must be consistent with and implement the comprehensive plan.").

[8] *Woods*, 162 Wn.2d at 614 (2007); *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 770 (2006).

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use decisions, the Supreme Court has required that "conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor."[9]

The Projects are consistent with the Kittitas County Comprehensive Plan's planning vision and mandates. The Comprehensive Plan specifies land use types and designations. Land in the A-20 zone is classified as a "Rural" land use. Land in the Commercial Agriculture zone is classified as a "Resource" land use. Tables 1 and 2 in Appendix A summarize the GPOs in Chapters 2 (Land Use), 6 (Utilities), and 8 (Rural and Resource Lands) that relate to the lands where the Projects would be located and the Projects generally.

The Kittitas County Comprehensive Plan asks that natural resource industries be enhanced and the local economy diversified while preserving the local rural character.[10] These Projects, which are low impact natural resource developments, serve these dual goals.

Chapter 2's mandate is clear: "[t]he development of resource based industries and processing should be encouraged *in all areas of Kittitas County*." GPO 2.15. However, "[w]hen such uses are located in rural and resource lands, criteria shall be developed to ensure the protection of these lands to ensure compatibility with rural character." Here, as demonstrated below, the Projects are the rare natural resource developments that, combined with comprehensive and thoughtful mitigation, are compatible with the County's rural character (see below). *See id.* Permitting the construction of solar energy facilities enhances the County's natural resource industry base and, particularly during construction, diversifies and broadens Kittitas County's employment base. *See* GPO 2.2, 2.3; *see also* ASC, Chapter 2.22 (sites to avoid impacts to undisturbed lands). Moreover, the Project locations were chosen, in significant part, to avoid or minimize adverse environmental impacts to critical habitats, including forests, streams and wetlands. *See* GPO 2.4. The 30-year dedication of these lands for use in solar production does not represent a permanent conversion of agricultural lands, which allows the County to reassess land use needs over time. *Id.* Accordingly, the Projects serve Kittitas

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[9] *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 874 (1997); *Cingular Wireless*, 131 Wn. App. at 769.

[10] Chapter 2 explains that more than 50 percent of Kittitas County is covered by coniferous forests (mostly designated Commercial Forest), while approximately 30 percent is in pasture or unimproved grazing land. Less than 2 percent of Kittitas County is in urban development.

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County's goal to "maintain a flexible balance of land uses which will protect, preserve, and enhance the rural character, historical forest lands, agricultural industries, mineral lands, and high quality environment." GPO 2.7

Chapter 6 addresses utility uses and contemplates the siting and development of solar resources in Kittitas County. GPO 6.36. The Comprehensive Plan also contemplates the timely review of utility-related permits in a way that is complementary to regional energy demands. GPO 6.9, 6.7. During the County's moratorium on the acceptance of applications for solar facilities, TUUSSO seeks expedited review of its proposed solar energy projects from EFSEC to ensure a timely and fair permitting review process.[11] TUUSSO's solar facilities will feed into the PSE electric grid and serve local and regional energy users—from residences to businesses, including agricultural businesses. The development of new, green energy production is complementary to regional energy demands, which now requires renewable sources to reduce the state's carbon footprint.

In furtherance of the County's goal of ensuring adequate public engagement in the review of utility projects, TUUSSO implemented an intentional and far reaching outreach campaign to parcels directly affected by the Projects, local government officials and staff, Native American Tribes, and community groups. *See* GPO 6.10.

Finally, the Projects are consistent with the policies set out in Chapter 8 of the Comprehensive Plan, which apply to Rural and Resource Lands. Consistent with Kittitas County's code, which permits major solar facilities in rural areas, the Chapter does not contemplate an absence of development or natural resource-based facilities. GPO 8.5, 8.9, 8.16. Rather, Chapter 8 contemplates mixed use development and sets forth the goal of reducing the impact of development and preserving adjacent resource lands, including agricultural lands. *See* GPO 8.8 ("A certain level of mixed uses in rural areas and rural service centers is acceptable and may include limited commercial, service, and rural industrial uses."), 8.9; Comprehensive Plan at 8-3 ("Kittitas County's rural land use designation consists of a balance of differing natural features, landscape types, and land uses. Rural land uses consist of dispersed and clustered

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[11] The County's moratorium on the acceptance of solar facility applications prevents TUUSSO (and the County) from review permits at this time as contemplated in GPO 6.23.

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residential developments, farms, ranches, wooded lots, and agricultural and recreational/commercial and industrial uses that serve local and national and international populations as customers."). Indeed, a specific attribute identified by Kittitas County residents as emblematic of "rural character" is "development away from urban areas." Comprehensive Plan at 8-4. Consistent with this goal, Kittitas County identifies "[p]rovid[ing] rural economic opportunity" as a goal of Chapter 8. Comprehensive Plan at 8-7.

TUUSSO's solar projects are a low-impact natural resource economic opportunity that do not require enhanced services and in no way inhibit or interfere with the function or use of adjacent agricultural resources. *See* GPO 8.1, 8.4, 8.8. Indeed, the Projects harvest a different type of crop—solar energy. Because solar development is a permitted use on applicable zoning districts, the Projects also support the County's interests in intentionally siting such developments. *See* GPO 8.3. And, as the leasing of land for the development of these solar resources supplements the incomes of local farmers, the 30-year use of these lands for energy production furthers the County's "right" and not obligation "to farm." GPO 8.11.

Finally, the Projects have no direct impacts to water resources and avoid impacts to buffers to the extent feasible. *See* GPO 8.14C, 8.21B. Where impacts are unavoidable (estimated to be 0.39 acres impact across all five projects), TUUSSO will implement best management practices to minimize adverse impacts and will fully mitigate impacts consistent with regulatory requirements. Fencing and vegetation screening will also be used to avoid and reduce the potential for aesthetic impacts to adjacent agricultural uses. *See* GPO 8.44. To the extent that the Kittitas County Comprehensive Plan encourages agricultural uses in areas zoned as rural, these provisions must be harmonized with provisions encouraging low impact natural resources development. *Compare* GPO 8.16 with 2.15. The siting of a low impact solar development in the proposed rural areas is an appropriate balance of these provisions.

b. Preserves "rural character" as defined in the Growth Management Act (RCW 36.70A.030(16));

The Growth Management Act defines "rural character" based on the "patterns of land use and development *established by a county in the rural element of its comprehensive plan*:"

> (a) In which open space, the natural landscape, and vegetation predominate over the built environment;

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(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
(c) That provide visual landscapes that are traditionally found in rural areas and communities;
(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
(f) That generally do not require the extension of urban governmental services; and
(g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.

RCW 36.70A.030(16) (emphasis added).

As specified RCW 36.70A.030, the Growth Management Act's definition of "rural character" is intended to guide a county's development of "the rural element of its comprehensive plan."[12] Thus, the inclusion of the statutory definition of "rural character" in Kittitas County's conditional use criteria invites somewhat circular reasoning. Kittitas County's conditional use criteria direct readers to the Growth Management Act, which is intended to guide development of the comprehensive plan, which is intended to guide development of the zoning code.

It should be emphasized that conditional use review must be *standards-based.*[13] Standards are necessary to protect the project applicant from arbitrary action, prevent discrimination, and facilitate judicial review.[14] Standardless conditional use criteria defeat the objective evaluation of project impacts, and disable the conditioning of projects to achieve

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[12] The Growth Management Act requires that counties' comprehensive plans include provisions that protect rural areas, stating in relevant part that, "[t]he rural element shall include measures that apply to rural development and *protect the rural character* of the area[.]" *Id.*; RCW 36.70A.070(5)(c) (emphasis added); *see also Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 770 (2010) (county's comprehensive plan challenged for failure to preserve rural character).

[13] Courts have explained that, while counties "have very broad legislative powers when they adopt or amend zoning classifications, the authority to issue special permits must be controlled by adequate standards . . . ." *Evergreen State Builders, Inc. v. Pierce County*, 9 Wn. App. 973, 976 (1973).

[14] *See State ex. rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 327, 510 P.2d 647 (1973).

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compliance with conditional criteria. The Washington Supreme Court has previously explained, "the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application."[15] Thus, it is important that "rural character" not be used as a proxy for subjective opinions concerning whether a project is considered aesthetically objectionable.

Notwithstanding potential for subjectivity and the circular nature of this standard, the Projects "preserv[e] 'rural character'" by demonstrating consistency with Chapter 8 of Kittitas County's Comprehensive Plan—which is required by statute to protect the "rural character" of Kittitas County's rural element. The Projects maintain natural landscapes, open space, and the visual landscape. *See* RCW 36.70A.030(16)(a). The panels are quiet, unobtrusive structures with very few moving parts and minimal maintenance requirements that would not significantly impact viewsheds. The panels would have native or other compatible vegetation planted under them, subject to consultation with WDFW and surrounding landowners, and would be surrounded by native habitat, including native plants, where possible. The Projects would also be compatible with current rural uses of the land. The Projects would not impact traditional rural lifestyles, rural-based economies, or opportunities to live and work in rural areas. *See* RCW 36.70A.030(16)(b). Local farming practices can (and would) continue on the properties adjacent to the Projects. The Projects would not in any way interfere with existing, surrounding agricultural practices and would not force or compel any conversions to non-agricultural land uses.

The Projects would not substantially impact the current visual landscape at the Project sites. *See* RCW 36.70A.030(16)(c). As described in the Visual/Aesthetic Impact Report, the areas surrounding the Project sites generally consist of scattered houses and farm buildings, flat agricultural fields, irrigation ditches, county roads and major highways. *See* ASC, Appendix D. Additional elements present at individual Project sites include: signs, utility poles, industrial buildings, scattered trees, overhead irrigation sprinklers, metal gates, and wire fences. In the background, there are rolling hills and distant peaks. TUUSSO utilized the U.S. Bureau of Land

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[15] *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003), *as amended on denial of reconsideration* (Sept. 2, 2003) (citing *Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986)).

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Management's Visual Resource System to complete an objective evaluation of visual impacts of the proposed Projects. That analysis demonstrates that the visual contrast of the proposed Projects to the current Project sites would be *weak or moderate*. Specifically, due to the low-lying nature of the solar panels, the Projects would not interfere with current views and would be less visible at a distance. Moreover, the solar panels would not dominate the view. Finally, TUUSSO would use vegetative screening to lessen the contrast to surrounding areas.

The Projects would inhibit the conversion of undeveloped lands into sprawling residential developments. Given this, the Projects help advance the Growth Management Act mandate that expands economic use of rural areas and strongly discourages and prohibits conversions of rural lands to low-density residential developments. *See* RCW 36.70A.030(16)(e). In sum, the Projects would be temporary and provide an opportunity for diversified farming income that would reduce incentives for low-density residential development. Finally, as discussed in (c) immediately below, the Projects would not require the extension of urban governmental services. *See* RCW 36.70A.030(16)(f).

The Projects would also be compatible with local wildlife habitat. *See* RCW 36.70A.030(16)(d). TUUSSO will continue to work with the Washington Department of Fish and Wildlife to manage existing wildlife habitat. In addition, the Projects will maintain current patterns of surface water and groundwater flow and recharge and discharge areas, as well as surface water and groundwater uses. *See* RCW 36.70A.030(16)(g). The Projects are anticipated to have no stormwater discharges and would use water under existing water allocations or water that is trucked in.

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c. Requires only rural government services; and

The Projects would require only rural government services, such as police and fire services. The Projects would have on-site fire prevention and protection measures. In addition, with minor improvements, the roads and infrastructure would be sufficient to serve the Project's construction and operation. As mitigated, the Projects would not increase the need for police, fire, school, irrigation, refuse, water or septic systems, or health care services, and there would be no costs or detriments to offset.

d. Does not compromise the long term viability of designated resource lands.

Designated resource lands within Kittitas County include Commercial Agriculture, Commercial Forested, and Mineral lands. Kittitas County has designated roughly 357,527 acres as Commercial Agricultural land based on the long-term agricultural commercial significance of those lands. Three of the Projects, Camas, Penstemon, and Typha, would be located on Commercial Agriculture land. These Projects comprise roughly 0.05 percent of the total Commercial Agriculture lands in Kittitas County. As discussed previously, the Projects would *not* cause the permanent removal of lands from agricultural use. Upon decommissioning, the lands would be returned to their original state and able to be returned to agricultural production. For that reason, the Projects would not compromise the long-term viability of Commercial Agriculture lands.

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