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# Gardiner v. Boundary County Bd. Of Com'rs Intervenor Dckt. 35007

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICK GARDINER AND ADA  
GARDINER, husband and wife,  
Plaintiffs/Respondents,

vs.

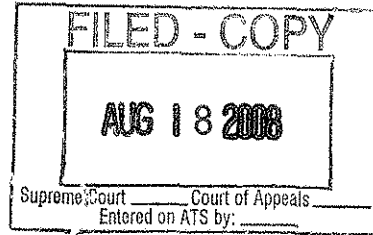
BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,  
Defendants/Appellants,

and

TUNGSTEN HOLDINGS, INC., a Montana  
corporation,  
Intervenor.

)  
)  
)  
) SUPREME COURT NO. 35007

)  
) District Court No. CV-2006-339



**INTERVENOR'S BRIEF ON APPEAL**

Appeal from the District Court of the First Judicial District for Boundary County  
Honorable James R. Michaud, Senior District Judge, presiding.

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## I. STATEMENT OF THE CASE

### A. Factual and Procedural History.

Tungsten Holdings, Inc. ("Tungsten") is the owner of two adjoining parcels totaling more than 185 acres, located approximately one and one-half miles south of Porthill in Boundary County, Idaho (the "Tungsten Property"). (AR, p.0002)<sup>1</sup> The Tungsten Property<sup>2</sup> is zoned Agriculture/Forestry under the Boundary County, Idaho Zoning and Subdivision Ordinance 99-06 (the "Zoning Ordinance"). (AR, p. 0225).

In March 2005, Tungsten applied for a special use permit to operate a gravel pit and rock quarry on seven (7) acres of the Tungsten Property, adjacent to County Road # 46 (the "Pit Site"). The Pit Site is located approximately 0.8 miles from a gravel pit owned and operated by Dennis and Pam Ponsness, and approximately 0.5 miles from a gravel pit owned and operated by Thomas and Sherry Bushnell. The Plaintiffs/Respondents Patrick Gardiner and Ada Gardiner, husband and wife (the "Gardiners") own real property located approximately 0.25 miles away from the Pit Site (the "Gardiner Property"). (AR, p. 0002).

The Boundary County Planning and Zoning Commission (the "Planning Commission") held a public hearing on May 19, 2005, on Tungsten's application. On a four to three vote, with one abstention, the Planning Commission recommended that the application be denied (AR p.

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<sup>1</sup> References to the "AR" are to the *Administrator's Record in the matter of Patrick Gardiner and Ada Gardiner vs. Boundary County Commissioners*, filed March 14, 2007 in Case No. CV -2006-339, included in the record on this appeal as an exhibit.

<sup>2</sup> Tungsten actually owns in excess of 300 acres in the vicinity, only 185 acres of which are subject to this application and of course only seven acres of which are actually proposed for the rock crushing and quarry operations.

0224). Subsequent public hearings were held by the Boundary County Board of County Commissioners (the "Board") on July 26, 2005 and August 8, 2005, with the Board ultimately granting the application on September 6, 2005 (the "2005 Permit"), (AR, pp. 0060 – 0070).

The Gardiners filed a *Petition for Judicial Review of the 2005 Permit*, under Boundary County Case No. CV-2005-380. Prior to that appeal being heard, however, the parties stipulated to the application being remanded to the Board for consideration without participation by County Commissioner Dan Dinning, the brother of a principal in Tungsten. A new public hearing took place on July 24, 2006, before the non-interested members of the Board. On August 7, 2006, County Commissioners Smith and Kirby granted the application for a special use permit, adopting findings of fact and conclusions of law as set forth in the "Findings and Decision" (AR, pp. 0224 – 0260), a true copy of which is attached hereto as Appendix "A" and by this reference incorporated herein. The Findings and Decision defines the extent and scope of the gravel pit and quarry operations.

The Gardiners again filed a *Petition for Judicial Review of the Special Use Permit*, under Boundary County Case No. 2006-339. (R, Vol. I, pp. 3-8). By Memorandum Opinion and Order Setting Aside Special Use Permit (Corrected) filed April 4, 2008, the District Court reversed the Board's decision, and declared the Special Use Permit invalid *sua sponte*, without remand to the Board. (R, Vol. II, pp. 264-281). By subsequent Memorandum Opinion and Order Awarding Attorney Fees and Costs, the District Court further awarded the Gardiners costs and attorney fees incurred in their prosecution of the appeal, finding that the Board had acted, "without a reasonable basis in fact or law." (R, Vol. II, pp. 282-287). The Board timely filed

this appeal (R, Vol. II, pp. 229-232). Tungsten was thereafter given leave to Intervene in these proceedings.

B. Applicable Law.

Idaho Code § 67-6512 allows counties to provide for the processing of applications for special or conditional use permits, as part of their zoning ordinances. Such uses may be allowed with conditions, to the extent provided in the local ordinances, subject to the ability of local government to provide services for the proposed uses, and when the proposed uses are not in conflict with the comprehensive plan. I.C. § 67-6512(a). That section goes on to say that, “A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance.” *Id.* Conditions may be attached to the granting of a special use permit in order to mitigate the potential for adverse impacts on other development. I.C. § 67-6512(d).

Chapter 7, Section 1.E. of the Zoning Ordinance provides, “Any use not specified as a use by right or conditional use is eligible for consideration as a special use, subject to the provisions of Chapter 13.” (AR, p.0256). Chapter 13 of the Zoning Ordinance recognizes that special uses can be more intensive than those permitted outright in a zoning district, but that with safeguards and conditions of use or operation such uses can be carried out in a way that makes them either compatible with surrounding land uses or at least no more invasive than other permitted uses in the relevant zoning district. Chapter 13 then enumerates the procedural and substantive safeguards employed in the processing of an application for a special use permit.



C. Standard of Review.

The Local Land Use Planning Act (“LLUPA”) allows an affected person to seek judicial review of a land use decision in accordance with the Idaho Administrative Procedure Act (“IDAPA”). I.C. § 67-6521(1)(d); Neighbors v. Valley County, \_\_\_ Idaho \_\_\_, 176 P.3d 126, 131 (2007); Cowan v. Fremont County, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006); Evans v. Cassia County, 137 Idaho 428, 429, 50 P.3d 443, 444 (2002). The Board is treated as an administrative agency for purposes of judicial review of land use decisions under the IDAPA. Cowan, 143 Idaho at 508, 148 P.3d at 1254; South Fork Coalition v. Board of Commissioners, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990). Furthermore, as recently summarized in Neighbors v. Valley County, *supra*:

In an appeal from district court, where the court was acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court’s decision. As to the weight of the evidence on questions of fact, this Court will not substitute its judgment for that of the zoning agency. The Court defers to the agency’s findings of fact unless they are clearly erroneous and the agency’s factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record. Planning and zoning decisions are entitled to a strong presumption of validity, including the agency’s application and interpretation of its own zoning ordinances. (*Emphasis added; citations omitted*).

The Court shall affirm the zoning agency’s action unless the Court finds that the agency’s findings, inferences, conclusions or decisions are: (a) in excess of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); Cowan, 143 Idaho at 508, 148 P.3d at 1254. The party attacking the agency’s action must first illustrate that it erred in the manner specified therein and must then show that a substantial right of the party has been prejudiced. *Id.*

## II. ISSUES PRESENTED ON APPEAL

- A. Was the decision of the Boundary County Board of Commissioners in violation of constitutional or statutory provisions?
- B. Was the decision of the Boundary County Board of Commissioners supported by substantial evidence in the record?
- C. Did the “Findings and Decision” contain the requisite information to support the decision of the Boundary County Board of Commissioners?
- D. Has the error, if any, adversely affected substantial rights of the Gardiners?
- E. Did the District Court err in awarding costs and attorney fees to the Gardiners?

## III. ATTORNEY'S FEES AND COSTS ON APPEAL

Under Idaho Code § 12-117, the prevailing party is entitled to an award of reasonable attorney’s fees, witness fees and reasonable expenses, “if the court finds that the party against whom the judgment is rendered acted *without a reasonable basis in fact or law.*” (Emphasis added).

Tungsten, of course, did not participate in the proceedings below. However, as the Intervenor it is appearing in these proceedings as a party appellant, along with Boundary County. Such intervention is necessary to protect its property and economic interests. It is apparent from the record, taken as a whole and as discussed more fully below, that the District Court decision was in error, and there was no reasonable basis in fact or law for the Gardiners’ appeal from the decision of the Board. Tungsten, therefore, would join with Boundary County in seeking an award of its reasonable attorney’s fees and expenses incurred herein in accordance with Idaho

Code § 12-117.

#### IV. ARGUMENT

A. **Chapter 7 of the Boundary Counting Zoning Ordinance, as interpreted and applied by the Boundary County Board of Commissioners in relation to special use permits, is consistent with the authority granted to local governments under Idaho Code § 67-6512.**

Idaho Code § 67-6512(a) provides:

**As part of a zoning ordinance** each governing board may provide by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the **processing** of applications for special or conditional use permits. A special use permit **may be** granted to an applicant if the proposed use is **conditionally permitted** by the terms of the ordinance, **subject to conditions** pursuant to specific provisions of the ordinance, *subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.* (*Emphasis added*).

1. Chapter 7, Section 1.E. of the Zoning Ordinance is in conformance with Idaho Code § 67-6512(a).

Chapter 7, Section 1 of the Zoning Ordinance prescribes four (4) categories of uses that are allowed in the Agriculture / Forestry zone district: (1) uses by right, (2) permitted uses, (3) conditional uses, and (4) special uses. The Zoning Ordinance also contains procedures for processing applications for special and conditional use permits, and the circumstances and conditions under which special or conditional use permits may be granted. In particular, Chapter 7, Section 1.E provides that, “Any use not specified as a use by right or conditional use is eligible for consideration as a special use, subject to the provisions of Chapter 13.” In other words, otherwise unscheduled uses are to be processed as applications for special use permits.

Under Chapter 13, an application for a special use permit is to include a written description of the proposed use, including the type of activity, hours of operation, vehicular activity that may be generated, and actions planned to reduce the effects of the activity on surrounding properties. The decision maker is then to consider, and make findings:

1. That the site plan and other information included in the application provide sufficient detail to provide a clear description of the nature of the use to be allowed under the terms of the special use permit.

2. That there is sufficient land area to accommodate the proposed special use and that the use and accessory structures are so arranged as to minimize adverse effects on surrounding properties.

3. That the proposed special use will not have any substantial adverse effects on adjacent properties or to the general public, and will not create hazards to adjacent property owners.

4. The proposed special use will not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district.

5. That adequate public services, including water, sewage disposal, roads, fire protection, etc., exist or will be built to accommodate the proposed use.

6. Written and oral comments and testimony submitted by interested persons who would be affected by the special use.

(AR, pp. 0258-0260). Furthermore, the Board may impose conditions to a special use permit “designed to minimize potential adverse impacts created by the special use. Conditions may include, but are not limited to:

- A. Minimize adverse impact on other development;
- B. Control the sequence and timing of development and use.
- C. Control the duration of the development or use.

- D. Assure the development or use is properly maintained.
- E. Designate the exact location and nature of the use.
- F. Require on or off site public facilities or services.
- G. Require more restrictive standards than those required in the zone district in which the use or development is to be established.
- H. Require measures to mitigate effects of the use upon service delivery by any political subdivision, including school districts, providing services within Boundary County.
- I. Require improvements to roads or transportation systems serving the use or development to provide for safe and efficient movement of vehicles to and from the site and to reduce impact on normal traffic patterns.
- J. Require specific measures for revegetation, restoration or reclamation of disturbed portions of the site.
- K. Require security measures, such as fencing or limited access, to protect users of the site or the general public.
- L. Bind the applicant into specific agreements with Boundary County to guarantee construction or maintenance improvements, to ensure that operations are carried out with minimal risk to public health and safety, or to minimize public or county liability which might result from the issuance of a special use permit.

In other words, special use permits are “conditionally permitted” under the Zoning Ordinance. (*Id.*).

The District Court’s finding that the decision of the Board was “in excess of constitutional or statutory provisions,” (I.C. § 67-5279(a)) was based upon its reading of Idaho Code § 67-6512(a) that a “conditional use” was synonymous with “conditionally permitted.” As one walks through the Zoning Ordinance as discussed above, however, it is clear that they can be

two different things. A special use permit for an otherwise undefined use is “conditionally permitted” under the Zoning Ordinance upon compliance with the criteria in Chapter 13. To read it otherwise would result in a situation where only specifically defined uses are allowed in any zone. That reading would be particularly onerous in the context of gravel pits and rock quarries in Boundary County, simply because they are not listed anywhere as a “conditional use”, or any other kind of use for that matter, in the Zoning Ordinance. The Boundary County Comprehensive Plan specifically identifies mining -- particularly non-metallic mining for gravel and sand -- as an important natural and economic resource. (AR, pp. 0252-0254). To read the Zoning Ordinance as not allowing gravel pits and rock quarries is simply unwarranted.

By its adoption of the language in Chapter 7, Section 1.E, Boundary County intended to allow for consideration of unspecified uses which may not have been anticipated at the time of adoption of the Zoning Ordinance, or which could be allowed with conditions of use and operation to mitigate potential adverse impacts on neighboring properties, and allow them to be “conditionally permitted” in accordance with Chapter 13. The language used in the Zoning Ordinance for unspecified or unanticipated uses is comparable to that used in many jurisdictions’ zoning ordinances, and consistent with a fair reading of the intent of Idaho Code § 67-6512, leaving room for future uses and needs which could be accommodated in a variety of zoning districts. The Board’s application and interpretation of its Zoning Ordinance is not only entitled to a strong presumption of validity, it is fair, reasonable and in accordance with Idaho Code § 67-6512. The Special Use Permit was “conditionally permitted” by the Board; subject to restrictions and conditions imposed pursuant to Chapter 13 of the Zoning Ordinance. Under

these circumstances, the decision of the Board was not “in excess of constitutional or statutory provisions,” (I.C. 67-5279(3)(a)), and therefore should be affirmed on appeal.

2. The Board’s decision to grant the Special Use Permit was not in conflict with the Comprehensive Plan.

The Board's decision is in conformance with both the Comprehensive Plan and the Zoning Ordinance. The policy of Boundary County is to "advocate the rights of property ownership, recognizing the primacy of private property rights and the sanctity of private property ownership as enunciated in the Fifth Amendment of the United States Constitution and Articles 1 and 14 of the Idaho Constitution." (AR, p. 0243). The Comprehensive Plan further provides that the County planners must recognize that "property owners have the right to enjoy the use of their property in pursuit of their own best interests, both social and economic, yet recognize also that the ownership of property confers responsibilities." *Id.*

In this case there are competing private property interests. Tungsten has a right to use its property to economically pursue its own best interests, but at the same time has a responsibility to do so in a manner so as not to unreasonably interfere with neighboring landowners uses. As succinctly stated in Chapter 13, section 1 of the Zoning Ordinance:

Special uses are uses which, by their nature, are significantly more intensive than the permitted uses in a zone district, but which can be carried out with particular safeguards to insure compatibility with surrounding land uses. Special uses are, therefore, subject to restrictions, requirements and conditions more stringent than those applying generally within the zone district.

(AR, p. 0258).

It is the responsibility of the Board to determine whether Tungsten's proposed use,

subject to restrictions, requirements, and conditions, can be carried out so as to minimize adverse effects on surrounding properties. The proposed use may not create noise, traffic, odors, dust or other nuisances *substantially in excess of permitted uses within the zone district*. (Zoning Ordinance Chapter 13, Section 4.C.4, AR p. 0259). Uses in the Agriculture / Forestry zone district can include farming, livestock production, logging, packaging and processing facilities, and a variety of other uses and structures, including commercial activities, associated therewith. (AR p. 0256).

The Board determined that Tungsten's proposed use is in conformance with the Comprehensive Plan, as detailed in the Findings and Decision. (AR, pp. 0226-0227). Its determination in that regard reflects a balancing of the competing interests inherent in an analysis of compliance with a comprehensive plan, and should be affirmed on appeal.

**B. The decision of the Boundary County Board of Commissioners was supported by substantial evidence in the record as a whole. The Boundary County Board of Commissioners did not improperly apply or shift the burden of persuasion to the Gardiners.**

In its Memorandum Opinion and Order, the District Court held that the Board had improperly failed to hold Tungsten to the "burden of persuasion" as to all of the requirements for a special use permit, citing *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3<sup>rd</sup> 1091 (2005). A closer reading of the *Fischer* case, however, reveals that it involved an incomplete application, where the applicant had wholly failed to submit, and the City Planning and Zoning Commission had failed to request, an Idaho engineer's certification prior to granting the conditional use permit at issue in that case. Furthermore, the Supreme Court in the *Fischer* case then cited to



Howard v. Canyon County Bd. Of Comm'rs, 128 Idaho 479, 481, 015 P.2d 709, 711 (1996) for the proposition that, "The burden of persuasion is upon the applicant . . . to show that all of the above requirements were satisfied." However, a close reading of the Howard case reveals that the Canyon County ordinance in that case specifically provided that the person or persons requesting relief under the Zoning Ordinance shall have the burden of persuasion. *Id.* In the instant case, there is no similar provision in the Boundary County Zoning Ordinance. Thus, the purported "shifting of the burden of persuasion" was not appropriately assigned as error by the District Court, and did not establish a basis for reversal of the Board's decision to grant the Special Use Permit.

The applicable standard is instead whether the Board's decision is "supported by substantial evidence on the record as a whole." I.C. 67-5729(3)(d). When considering the evidence presented during the course of the proceedings, the Board had to balance the conflicting evidence and testimony. In relation to the issue of impacts of the gravel pit and quarry operations on the Gardiner's property and cattle operations, the Board did consider the report of the Gardiner's expert, Kristine Uihman, who had opined as to the possibility that blasting and crushing operations might have an impact on the supply of water at irrigation wells maintained by the appellants. (AR, pp. 0079-0086). The Board concluded, however, that based on the distance of the pit to those wells, testimony from the applicant, and the permit and reclamation plan under the jurisdiction of the Idaho Department of Lands, it was "reasonable to determine that direct threat to these wells is a remote possibility, and the threat can be further mitigated with additional restriction requiring that those conducting the blasting be licensed, certified and

insured.” (*Findings and Decision p. 9, AR, pp. 0234*).

The Gardiners had also submitted a report from the Michigan State University Extension. (AR, pp. 0125-0134). Contrary to the Gardiners’ assertion, there is nothing in that report that would cause anyone to draw the conclusion that rock crushing would cause infertility or spontaneous abortions in cattle. The report merely provides general information with regard to stress levels and artificial insemination of cattle.

A parade of feared potential adverse consequences is common in any proceeding involving a land use activity which someone may prefer not to have located nearby. It is entirely appropriate for a decision maker to question the source and authority of those fears, just as it is appropriate for a decision maker to question the applicant as to the source and authority for his assertions that those fears are unfounded. At the end of the day, the issue is not one of “shifting burdens of persuasion,” but rather whether there is substantial evidence in the record as a whole to support the findings and conclusions of the decision maker.

Both written documentation and oral testimony substantially support the Board’s decision to approve the Special Use Permit. The Board took into consideration all information which was available to them, and imposed conditions to mitigate potential adverse consequences, including the following eleven (11) conditions of approval which the Board found would be “sufficient . . . to assure public safety and to mitigate potential adverse effects”:

- (1) All surface mining operations, including crushing, loading, material storage, etc., shall be conducted on the site and shall not encroach onto County Road 46 except as normal traffic. Access shall be by private drive approved by Boundary county Road and Bridge.

(2) Dust abatement measures shall be applied as needed so as to minimize dust.

(3) All operations shall follow "Best Management Practices for Mining in Idaho," published by the Idaho Department of Lands November 16, 1992, or as updated.

(4) Blast [sic] shall occur on no more than twelve(12) days per calendar year. Blasting shall be conducted on a weekday between the hours of 8 a.m. and 5 p.m. Boundary County Planning and Zoning and property owners within five hundred (500) feet of the boundaries of parcels RP65N01W172211A and RP67N01W200012A shall be notified, in writing, at least fifteen (15) days in advance of the proposed date of blasting, specifying the date, time and length of time the blasting is expected to occur.

(5) All blasting shall meet OSHA requirements established at 29 CFR Subpart U.

(6) Crushing operations shall be allowed from 8 a.m. to 5 p.m. Monday through Friday between the dates of February 15 and May 2 each year.

(7) Prior to establishing the permitted surface mining operation, the applicant shall comply with all requirements established by the Idaho Department of Lands, to include filing a reclamation plan and posting the required bond. A copy of those documents shall be provided [sic] the Boundary County Planning and Zoning office prior to the onset of mining operations.

(8) The Planning and Zoning office shall be notified, in writing, when the reclamation bond is redeemed or in the event bond is forfeited. This special use permit shall lapse upon bond redemption or forfeiture, and no further mining operations may take place without issuance of a new special use permit.

(9) The seven acre portion of parcels RP65N01W172211A and RP65N01W2000012A depicted in the site plan of application SUP 0505 shall be formally identified by record of survey filed and recorded with the Recording Clerk of Boundary County.

(10) Any person or persons employed to conduct blasting operations shall be notified prior to blasting of concerns expressed during the hearing process over the potential for damage to area water systems, including Trow Creek Water Association.

(11) Any person employed to conduct blasting operations [sic] be qualified, licensed and insured.

(AR, pp. 0232-0233).

This Court is not to substitute its judgment for that of the Board, and should defer to the Board's findings of fact unless they are clearly erroneous. *Neighbors v. Valley County*, 176 P.3d at 131. There is, furthermore, a strong presumption in favor of the validity of the actions of zoning authorities. *Id.*; *Howard*, 128 Idaho at 480. The decision of the Board in this matter is supported by substantial evidence in the record as a whole, and should be affirmed on appeal.

**C. The "Findings and Decision" contains the requisite information to support the decision in accordance with Idaho Code § 67-6535**

Idaho Code § 67-6535 requires that the approval or denial of a land use application be in writing and:

Accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

I.C. 67-6535(b).

Attached hereto as Appendix A is a complete copy of the Board's Findings and Decision entered August 7, 2006. The Findings and Decision demonstrate that the Board did indeed apply the criteria prescribed by the law, and did not act arbitrarily or on an ad-hoc basis. *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32 (1982). When considering the proceedings as a whole, in light of practical considerations and an emphasis on fundamental

fairness (I.C. § 67-6535(c)), the Findings and Decision approving the Special Use Permit is in conformance with the requirements of Idaho Code.

The Board's findings specifically draw attention to the concerns expressed by surrounding landowners, most notably regarding the potential adverse effects of blasting on surrounding water wells and the Trow Creek Water Association, as well as the increased dust and noise. Taking into consideration these factors and more, the Board imposed restrictions and conditions to mitigate the effects of the operations on the surrounding public. As required, the Board adopted findings and placed them in writing, set forth reasons for their decisions, and referenced the applicable county ordinance sections. Therefore, the Board's actions were in accordance with I.C. § 67-6535, as well as the Zoning Ordinance.

**D. Error, if any, has not adversely affected substantial rights of the Gardiners.**

Even if there had been error in one or more of the ways identified in Idaho Code § 67-5279(3), the Board's decision is to be affirmed "unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). In this context the issue is NOT whether the Gardiners' property or cattle might be affected by the gravel pit and rock quarry operations, but whether the *error* by the Board in one or more of the ways specified in Idaho Code § 67-5279(3) resulted in a deprivation of procedural or substantive rights which would justify reversing the Board's decision, and sending the matter back for further proceedings. If, for example, this Court were to find procedural error resulting in the lack of fair notice and opportunity to be heard, a substantial right could be deemed to have been deprived, and the matter should be remanded for further proceedings. No such error and concomitant right has been identified, however.

Similarly, Idaho Code § 67-6535 provides that, “Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision.”

## V. CONCLUSION

Boundary County’s Zoning Ordinance does not attempt to identify or define every possible or conceivable use of real property in the County. Boundary County instead allows property owners to petition the County for a special use permit for uses which are not otherwise described or defined in the Zoning Ordinance, including gravel pits and rock quarries.

An application for a special use permit is not automatically approved. It is a “conditionally permitted” use in that, if approved, conditions may be imposed which are designed to minimize potential adverse impacts created by the special use. Not all potential adverse impacts are required to be eliminated, but only minimized to ensure the proposed special use will not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district. Boundary County’s Zoning Ordinance is in accordance with the authority granted to it under Idaho Code § 67-6512.

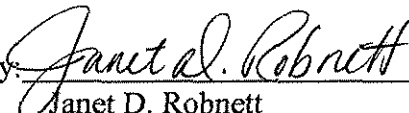
The Special Use Permit issued by Boundary County for Tungsten Holdings, Inc. to conduct its gravel operations on its property located near Porthill, Idaho includes conditions which will minimize the potential for adverse impacts on surrounding properties. The Board’s decision to grant the Special Use Permit is supported by substantial evidence in the record as a whole. The Board’s Findings and Decision includes a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and

explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record, in conformance with Idaho Code § 67-6535.

The decision of the Board of County Commissioners for Boundary County granting Tungsten Holdings, Inc. a Special Use Permit should be affirmed.

DATED this 14<sup>th</sup> day of August, 2008.

PAINE HAMBLEN LLP

By:   
Janet D. Robnett  
Attorney for Intervenor

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14<sup>th</sup> day of August, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Phillip H. Robinson  
P.O. Box 1405  
Sandpoint, Idaho 83864  
Attorney for Defendants/Appellants

U.S. MAIL  
 HAND DELIVERED  
 OVERNIGHT MAIL  
 FACSIMILE

Paul William Vogel  
P.O. Box 1828  
Sandpoint, Idaho 83864  
Attorney for Plaintiffs/Respondents

U.S. MAIL  
 HAND DELIVERED  
 OVERNIGHT MAIL  
 FACSIMILE

BY: Janet D. Robnett  
Janet D. Robnett  
Paine Hamblen, LLP  
Attorney for Intervenor

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## **Appendix "A"**

**Boundary County, Idaho**  
**SPECIAL USE**  
**PERMIT**

SUP # 05-05

**This is to certify that**  
**TUNGSTEN HOLDINGS, INC.**  
**Has met the requirements of the**  
**Boundary County Zoning and Subdivision Ordinance**  
**to allow special use of real property located at:**

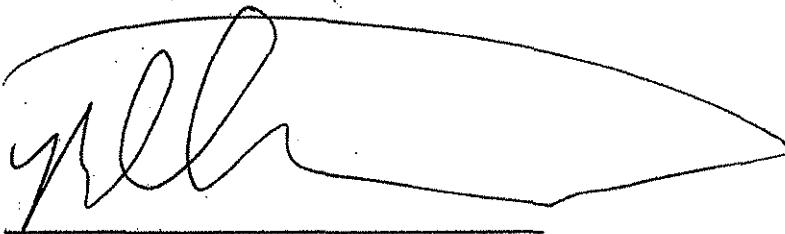
**RP65N01W177211A RP65N01W200012A**

**To wit:**

**To establish and operate a gravel pit and rock quarry on a seven-acre portion of the above named parcel.**

**Subject to the following terms and conditions:**

**As defined in Boundary County Commissioners Findings and Decision, attached hereto.**



**Mike Weland**  
**Zoning Administrator**

Issued: August 14, 2006

This special use permit shall be deemed to run with the land on which it is attached, and shall remain the valid controlling plan for the above-referenced parcel for the duration of the use hereon described. Should the use not be established within twenty four (24) this of the date of issuance, this permit shall be deemed to lapse. This Special Use Permit shall not be changed or amended except application for a new Special Use Permit. This permit does not waive additional permit requirements established by the Boundary County Zoning and Subdivision Ordinance nor from any applicable state or federal law.

Boundary County Commissioners  
FINDINGS AND DECISION

August 7, 2006

SUP 0505 – Tungsten Holdings Inc.

**1) Application:**

- a) The applicants are the owners of 122-acre parcel RP65N01W172211A and 63.25-acre parcel RP65N01W200012A, which are adjoining, both located on County Road 46 approximately 1 ½ mile south of Porthill.
- b) The applicants are seeking to establish and operate a gravel pit and rock quarry on a seven-acre portion of these two parcels, with regular operating hours from 8 a.m. to 5 p.m. Monday through Friday with no weekend operations. Crushing operations would not exceed 60 non-contiguous days per calendar year, with material stockpiled on site for year-around hauling. Estimated vehicle traffic resultant from proposed use is five trips per day, dependent on season and demand. Blasting may be required. Water would be used during crushing operations and on the access road to control dust. If established, the pit would be permanent. No structures are planned for the site.
- c) The parcel upon which the use is proposed is zoned agriculture/forestry.
- d) Utilities are provided by: Water: private well. Sewage: septic tank and field regulated by Panhandle Health District; Fire: Hall Mountain Volunteer Fire Association; Power, Northern Lights.
- e) Consideration of this application as a special use is permitted pursuant to Chapter 7, Section E, Boundary County Zoning and Subdivision Ordinance.
- f) The applicant owns approximately 300 acres surrounding the location of the proposed gravel pit.

**2) Planning and Zoning Commission Proceedings:** On May 19, 2005, following public notification as established at Chapter 16, Boundary county Zoning and Subdivision Ordinance, the Boundary County Planning and Zoning Commission did hold public hearing on this application and caused to be drafted findings and a recommendation, approved with three member voting in favor, two voting opposed and one abstention, did forward to the Board of County Commissioners a recommendation that application SUP 0505 be disapproved, establishing the following findings:

- a) That this application does not meet the provisions of the Boundary County Comprehensive Plan as weighed against the potential adverse impacts which could occur as a result of this use in that:
  - i) **Section I:** Property owners have the right to enjoy the use of their property in pursuit of their own best interests, but that such use should not interfere with the health or safety of neighboring property owners or occupants nor deny them the same inherent rights.
  - ii) **Section III:** The priority of Boundary County policy and planning decisions will be the promotion of economic growth and to influence multiple uses of the county's natural resources, including mineral, but that such may not pose undue risk.
  - iii) **Section V: Minerals:** Non-metallic mineral resources in the county have a great economic potential than that of metallics and are produced at minimal cost at locations throughout the county. However, the development of such resources

must be accomplished with due consideration of surrounding property uses and with sufficient consideration for the potential impact of such extraction.

- iv) **Section VII: Adequate public services exist to accommodate the proposed use.**
- b) That the application does not meet the criteria of the Boundary County Zoning and Subdivision Ordinance in that:
  - i) The site plan and application provide sufficient detail to depict the scope of the proposed use.
  - ii) There is sufficient land area to accommodate the proposed use.
  - iii) There is insufficient assurance or indication that potential adverse effects to surrounding property owners can be mitigated or prevented as a result of blasting and its effect on water and livestock production.
  - iv) The proposed special use will create noise, odors and dust substantially in excess of permitted uses in the zone district.
  - v) Adequate public services exist to accommodate the proposed use.
- 3) **Board of County Commissioner Proceedings:**
  - a) On July 26, 2005, Boundary County Commissioners held public hearing on application SUP 0505 and did take into consideration the materials in the application file, the recommendation of the Boundary County Planning and Zoning Commission and testimony provided at hearing, including concerns expressed regarding the potential adverse impact of blasting on adjacent wells and to the Trow Creek water system.
  - b) As a result of the testimony received and the material contained in the application, discussion was held on methods to mitigate potential adverse affects potentially resulting from the proposed use. After establishing ten (10) terms and conditions, Commissioner Walt Kirby made motion to approve application SUP 0505 by Tungsten Holdings Inc., subject to review and approval of written findings, with terms and conditions as set forth during hearing. Commission Chair Ron Smith ceded the chair to second and the motion carried unanimously. Commissioner Dan Dinning, who took part in the discussion, abstained from voting as he is the brother and former business partner of the applicant.
  - c) As part of that decision, Boundary County Commissioners disagreed with the findings and recommendation submitted by the Planning and Zoning Commission, and rendered the following findings, signed September 6, 2005:
    - i) That SUP 0505 meets the provisions of the Boundary County Comprehensive Plan in that:
      - (1) **Private Property Rights:** The goal of the Boundary County Comprehensive Plan is to advocate the rights of property ownership, to recognize the sanctity of private property rights and to recognize that property owners have the right to enjoy the use of their property in pursuit of their own best interests while not interfering with the health or safety of surrounding property owners. While there have been concerns expressed by surrounding property owners, most notably regarding the potential adverse effects of blasting on surrounding water wells and the Trow Creek water system and increased dust and noise, the Board of Boundary County Commissioners find that these concerns can be mitigated by establishing terms and conditions set forth herein.
      - (2) **Economic:** Agriculture, forestry and related enterprises have historically been the economic mainstays in Boundary County, and surface mining operations, most notably gravel pits, have long existed side by side with these activities.

The parcels on which this operation is proposed possesses rock of sufficient quality and quantity to provide a needed natural resource to the community in a manner that promotes economic growth and encourages enterprise to make the best use of the county's natural resources.

- (3) **Land Use:** Boundary County planners recognize they have a limited scope in the development of private land, and that the goal of the comprehensive plan is to encourage free enterprise to allow property owners the best use of their land and its resources. The use proposed in this application can be conducted in a manner that will not deprive surrounding property owners of these same rights, and terms and conditions can be established to allow the use while protecting surrounding property owners from potential adverse impacts which have been raised as concerns.
  - (4) **Natural Resources:** Non-metallic mineral resources in the county have historically had more of an economic impact in Boundary County than metallics. Mining of any and all materials must be done with respect for and recognition of its impact on adjacent land, water resources and public services. By establishing terms and conditions, these provisions can be met.
  - (5) **Hazardous Areas:** The site proposed for this use does not lie in a floodplain or other identified hazardous area.
  - (6) **Public Utilities:** The proposed use does not place undue burden on the provision of public utilities, and sufficient public services exist to facilitate the operation.
  - (7) **Transportation:** Increased traffic as a result of approval of this application will not place undue burden on the county road system, especially County Road 46, which will provide main access to the site. Allowing this proposal would benefit the transportation network and reduce costs of road maintenance and upgrades by providing a local supply of suitable grade material for road use.
  - (8) **Community Design:** The goal of the Boundary County Comprehensive Plan is to insure the best possible use of the land and its resources, to encourage private free enterprise and to encourage the initiative of property owners to use their land to further their own economic interests. Approval of this application accomplishes those goals, and terms and conditions are available to mitigate any potential adverse effects.
- ii) That the application meets the provisions of the Boundary County Zoning and Subdivision Ordinance in that:
- (1) **Chapter 7, Section 1:** The purpose of the agriculture/forestry zone district is to enhance and promote the continuity and continued productivity of agriculture and forestland in Boundary County. The property upon which this use is proposed is of limited value for either of these uses.
  - (2) **Chapter 7, Section 7:** The proposed use meets the general standards for commercial and industrial uses as established in that there will be no permanently installed exterior lighting, explosive materials will be stored and handled in compliance with all regulations of the United States and Idaho, dust from roads, parking areas and commercial activities will be controlled by the use of dust suppression materials as required by the Idaho Department of Lands, and no toxic or corrosive fumes will result from the proposed use.
  - (3) **Chapter 13, Section 4C:**

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- (a) The site plan and other information included with the application provides sufficient detail so as to provide a clear description of the use proposed.
  - (b) There is sufficient land area to accommodate the proposed use, and the use is so designed as to minimize potential adverse effects on surrounding properties.
  - (c) The proposed use has the potential to create possibly adverse effects on adjacent property owners, but terms and conditions can be implemented to reduce this impact.
  - (d) The applicant owns more than 300 acres around and adjacent to the proposed site, and the use is situated so as to minimize potential adverse effects on surrounding property.
  - (e) Terms and conditions to mitigate or eliminate potential adverse or hazardous impacts are available to reasonably assure the public safety.
  - (f) Terms and conditions are available to reduce noise, traffic, and dust to levels commensurate with permitted uses in the agriculture forestry zone district.
  - (g) Adequate public services exist to accommodate the proposed use.
- (4) **Chapter 13, Section 5:** That Boundary County has the authority to establish terms and conditions to a special use to minimize potential adverse impacts created by that use. The Board of Boundary County Commissioners concur that the following conditions will provide sufficient restriction to assure public safety and to mitigate potential adverse effects, and do hereby adopt them as conditions for approval of application SUP 0505:
- (a) All surface mining operations, including crushing, loading, material storage, etc., shall be conducted on the site and shall not encroach onto County Road 46 except as normal traffic. Access shall be by private drive approved by Boundary County Road and Bridge.
  - (b) Dust abatement measures shall be applied as needed so as to minimize dust.
  - (c) All operations shall follow "Best Management Practices for Mining in Idaho," published by the Idaho Department of Lands November 16, 1992, or as updated.
  - (d) Blast shall occur on no more than twelve (12) days per calendar year. Blasting shall be conducted on a weekday between the hours of 8 a.m. and 5 p.m. Boundary County Planning and Zoning and property owners within five-hundred (500) feet of the boundaries of parcels RP65N01W172211A and RP65N01W200012A shall be notified, in writing, at least fifteen (15) days in advance of the proposed date of blasting, specifying the date, time and length of time the blasting is expected to occur.
  - (e) All blasting shall meet OSHA requirements established at 29 CFR, Subpart U.
  - (f) Crushing operations shall be allowed from 8 a.m. to 5 p.m. Monday through Friday between the dates of February 15 and May 2 each year.
  - (g) Prior to establishing the permitted surface mining operation, the applicant shall comply with all requirements established by the Idaho Department of Lands, to include filing a reclamation plan and posting the required bond. A copy of those documents shall be provided the Boundary County Planning and Zoning office prior to the onset of mining operations.

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- (h) The Planning and Zoning office shall be notified, in writing, when the reclamation bond is redeemed or in the event bond is forfeited. This special use permit shall lapse upon bond redemption or forfeiture, and no further mining operations may take place without issuance of a new special use permit.
  - (i) The seven acre portion of parcels RP65N01W172211A and RP65N01W200012A depicted in the site plan of application SUP 0505 shall be formally identified by record of survey filed and recorded with the Recording Clerk of Boundary County.
  - (j) Any person or persons employed to conduct blasting operations shall be notified prior to blasting of concerns expressed during the hearing process over the potential for damage to area water systems, including Trow Creek Water Association.
- d) Based on the above, the Zoning Administrator on September 6, 2005, after receiving record of survey establishing the boundaries of the proposed quarry and notice of approval from the Idaho Department of Lands, did issue a special use permit allowing the establishment and operation of the gravel pit.
- 4) **Legal Action:**
- a) On August 13, Pat and Ada Gardiner did file a request for a takings analysis. Despite being premature, County Commissioners conducted analysis and on September 27, 2005, issued findings that the action did not constitute a legal taking pursuant to Idaho Code.
  - b) On October 3, 2005, the Gardiners' filed request for judicial review.
  - c) On May 30, 2006, based on stipulation between attorneys representing both parties, Judge Stephen Verby issued an order of remand, nullifying the special use permit. This was not done on the merit of the findings, but as a result of the participation in the commissioners discussion by Commissioner Dan Dinning, and the potential for an appearance of conflict of interest.
- 5) **Staff Analysis:** Prior to conduct of final public hearing, staff analyzed the general contention by the Gardiners that because a gravel pit/rock quarry is not specifically mentioned in Chapter 7, Section 1, as a permitted or conditional use, it is therefore a prohibited use in the agriculture/forestry zone district and submitted to County Commissioners the following:
- i) Based on their analysis, a gravel pit/rock quarry would be classed as a commercial or industrial use, and restricted to areas zoned for commercial or industrial use. Based on the structure of the zoning ordinance and the provisions of the Comprehensive Plan, this analysis is unreasonable.
  - ii) The Agriculture/Forestry Zone District encompasses over 85-percent of the land area in Boundary County and is by far the most predominant zoning in Boundary County. Rural Community/Commercial Zoning, which allows both residential and commercial development, comprises less than one percent of the land area in Boundary County, situated primarily in community centers and in areas zoned for higher density development. Industrial Zoning comprises a fraction of one percent of the land area in Boundary County, currently situated solely at the Boundary County Airport and at two locations in the Three Mile area.
  - iii) Further, the Boundary County Zoning and Subdivision Ordinance defines a commercial use as "a use or structure intended primarily for the conduct of retail trade in goods and services," and an industrial use as "use of a parcel or

development of a structure intended primarily for the manufacture, assembly or finishing of products intended primarily for wholesale distribution.”

- iv) The Boundary County Comprehensive Plan identifies minerals as a natural resource, and notes that “non-metallic mineral resources in the county may have an economic potential greater than that of metallics. Sand, gravel and crushed rock are produced at minimal cost at various locations in the county. Deposits of sand and gravel are found in abundance at lower elevations and within the valleys. Crushed rock is obtained from crushing operations at rock quarry sites, with deposits found in various locations throughout the county. Mining of any and all materials should be done with respect for and recognition of its impact on adjacent land, water resources and public services.”
- v) Further, Appendix I of the Comprehensive Plan, “Histories of Boundary County,” page 18, establishes “Whatever can’t be grown must be extracted from the earth, and minerals are vital to the health and prosperity not only of our area, but to the nation as a whole. From the first road and building, rock, gravel, sand and related materials have been mined here in abundance. Pits and quarries can be found throughout the area and are too numerous to list. Because of the cost of roads and materials for building, whatever materials were found on federal land and close to the area they were to be used, they were mined. The mining of sand and gravel for road building and construction has been and remains of huge economic importance to Boundary County. Every road has gravel pits that were use during construction, and remain in use as needed through the years.”
- vi) The Boundary County Zoning and Subdivision Ordinance does not specifically refer to “mining,” “gravel pit,” or “rock quarry” in any zone district, therefore, such use may be considered as a special use in any zone district. Based on references made on the importance of mining in the Comprehensive Plan, it is unreasonable to assume that mining would be a prohibited use in all zone districts based simply on specific mention.
- vii) It is recognized that mining is a commercial use, as are agriculture and forestry, but it is also recognized that mining is the extraction of a natural resource, and mining can only be accomplished where the resource exists.

**6) Final Hearing:**

- a) Based on the order of remand, a new public hearing was set for July 24, 2006, with legal notice published in the county newspaper of record June 29, 2006, and letters sent to affected property owners June 21, 2006.
- b) As a result of this notice, written comment was delivered by appellant Ada Gardiner to the office of the zoning administrator July 20, 2006, consisting of two letters citing objections to issuance of the permit and eight attachments providing supporting documentation.
- c) Boundary County Commissioners held public hearing on application SUP 0505 at the time set, with Commissioners Ron Smith and Walt Kirby in attendance. Commissioner Dan Dinning, citing potential conflict of interest, did not attend the hearing and did absent himself from the meeting room.
- d) Boundary County Commissioners did, during public hearing, accept testimony from the applicant as well as from the general public as required pursuant to Chapter 13, Boundary County Zoning and Subdivision Ordinance. The tenor of the objections cited were generally the same as those raised during previous public hearings with the exception of a hydrological report prepared at the request and expense of the appellants by geologist Kristine Uhlman, RG.



- e) On conclusion of public hearing, Commissioner Walt Kirby made motion to take the materials received under advisement to allow further study, and the motion carried unanimously. Following review of these documents and the materials in the file, Boundary County Commissioners did cause to be drafted these findings.

7) **FINDINGS:**

- a) That SUP 0505 meets the provisions of the Boundary County Comprehensive Plan in that:

- i) **Private Property Rights:** The goal of the Boundary County Comprehensive Plan is to advocate the rights of property ownership, to recognize the sanctity of private property rights and to recognize that property owners have the right to enjoy the use of their property in pursuit of their own best interests while not interfering with the health or safety of surrounding property owners. While there have been concerns expressed by surrounding property owners, most notably regarding the potential adverse effects of blasting on surrounding water wells and the Trow Creek water system and increased dust and noise, the Board of Boundary County Commissioners find that these concerns can be mitigated by establishing terms and conditions set forth herein.
- ii) **Population:** Not applicable as this application does not affect population growth or decline.
- iii) **Economic:** Agriculture, forestry and related enterprises have historically been the economic mainstays in Boundary County, and surface mining operations, most notably gravel pits, have long existed side by side with these activities. The parcels on which this operation is proposed possesses rock of sufficient quality and quantity to provide a needed natural resource to the community in a manner that promotes economic growth and encourages enterprise to make the best use of the county's natural resources.
- iv) **Land Use:** Boundary County planners recognize they have a limited scope in the development of private land, and that the goal of the comprehensive plan is to encourage free enterprise to allow property owners the best use of their land and its resources. The use proposed in this application can be conducted in a manner that will not deprive surrounding property owners of these same rights, and terms and conditions can be established to allow the use while protecting surrounding property owners from potential adverse impacts which have been raised as concerns.
- v) **Natural Resources:** Non-metallic mineral resources in the county have historically had more of an economic impact in Boundary County than metallics. Mining of any and all materials must be done with respect for and recognition of its impact on adjacent land, water resources and public services. By establishing terms and conditions, these provisions can be met.
- vi) **Hazardous Areas:** The site proposed for this use does not lie in a floodplain or other identified hazardous area.
- vii) **Public Services, Facilities and Utilities:** The proposed use does not place undue burden on the provision of public utilities, and sufficient public services exist to facilitate the operation.
- viii) **Transportation:** Increased traffic as a result of approval of this application will not place undue burden on the county road system, especially County Road 46, which will provide main access to the site. Allowing this proposal would benefit the transportation network and reduce costs of road maintenance and upgrades by providing a local supply of suitable grade material for road use.

- ix) **Recreation:** Not applicable as this proposal does not add to or detract from recreational use in Boundary County.
  - x) **Community Design:** The goal of the Boundary County Comprehensive Plan is to insure the best possible use of the land and its resources, to encourage private free enterprise and to encourage the initiative of property owners to use their land to further their own economic interests. Approval of this application accomplishes those goals, and terms and conditions are available to mitigate any potential adverse effects.
- b) That the application meets the provisions of the Boundary County Zoning and Subdivision Ordinance in that:
- i) **Chapter 7, Section 1:** The purpose of the agriculture/forestry zone district is "to enhance and promote the continuity and continued productivity of agriculture and forestland in Boundary County." This application does meet this specification.
  - ii) **Chapter 7, Section 7:** The proposed use meets the general standards for commercial and industrial uses as established in that there will be no permanently installed exterior lighting, explosive materials will be stored and handled in compliance with all regulations of the United States and Idaho, dust from roads, parking areas and commercial activities will be controlled by the use of dust suppression materials as required by the Idaho Department of Lands, and no toxic or corrosive fumes will result from the proposed use.
  - iii) **Chapter 13, Section 4C:**
    - (1) The site plan and other information included with the application provide sufficient detail so as to provide a clear description of the use proposed.
    - (2) There is sufficient land area to accommodate the proposed use, and the use is so designed as to minimize potential adverse effects on surrounding properties.
    - (3) The proposed use has the potential to create possibly adverse effects on adjacent property owners, but terms and conditions can be implemented to reduce this impact.
    - (4) The applicant owns more than 300 acres around and adjacent to the proposed site, and the use is situated so as to minimize potential adverse effects on surrounding property.
    - (5) Terms and conditions to mitigate or eliminate potential adverse or hazardous impacts are available to reasonably assure the public safety.
    - (6) Terms and conditions are available to reduce noise, traffic, and dust to levels commensurate with permitted uses in the agriculture forestry zone district.
    - (7) Adequate public services exist to accommodate the proposed use.
  - iv) **Chapter 13, Section 5:** That Boundary County has the authority to establish terms and conditions to a special use to minimize potential adverse impacts created by that use. The Board of Boundary County Commissioners concurs that the following conditions originally established will provide sufficient restriction to assure public safety and to mitigate potential adverse effects, and do hereby adopt them as amended with the addition of item 11 as conditions for approval of application SUP 0505:
    - (1) All surface mining operations, including crushing, loading, material storage, etc., shall be conducted on the site and shall not encroach onto County Road 46 except as normal traffic. Access shall be by private drive approved by Boundary County Road and Bridge.
    - (2) Dust abatement measures shall be applied as needed so as to minimize dust.

- (3) All operations shall follow "Best Management Practices for Mining in Idaho," published by the Idaho Department of Lands November 16, 1992, or as updated.
  - (4) Blast shall occur on no more than twelve (12) days per calendar year. Blasting shall be conducted on a weekday between the hours of 8 a.m. and 5 p.m. Boundary County Planning and Zoning and property owners within five-hundred (500) feet of the boundaries of parcels RP65N01W172211A and RP65N01W200012A shall be notified, in writing, at least fifteen (15) days in advance of the proposed date of blasting, specifying the date, time and length of time the blasting is expected to occur.
  - (5) All blasting shall meet OSHA requirements established at 29 CFR, Subpart U.
  - (6) Crushing operations shall be allowed from 8 a.m. to 5 p.m. Monday through Friday between the dates of February 15 and May 2 each year.
  - (7) Prior to establishing the permitted surface mining operation, the applicant shall comply with all requirements established by the Idaho Department of Lands, to include filing a reclamation plan and posting the required bond. A copy of those documents shall be provided the Boundary County Planning and Zoning office prior to the onset of mining operations.
  - (8) The Planning and Zoning office shall be notified, in writing, when the reclamation bond is redeemed or in the event bond is forfeited. This special use permit shall lapse upon bond redemption or forfeiture, and no further mining operations may take place without issuance of a new special use permit.
  - (9) The seven acre portion of parcels RP65N01W172211A and RP65N01W200012A depicted in the site plan of application SUP 0505 shall be formally identified by record of survey filed and recorded with the Recording Clerk of Boundary County.
  - (10) Any person or persons employed to conduct blasting operations shall be notified prior to blasting of concerns expressed during the hearing process over the potential for damage to area water systems, including Trow Creek Water Association.
  - (11) Any person employed to conduct blasting operations be qualified, licensed and insured.
- v) Based on the above, Boundary County hereby affirms each of the findings established by their signature September 6, 2005, to include each condition and restriction as set forth above.
  - vi) In addition to the eight sections of the considerations given to the Boundary County Comprehensive Plan, commissioners note that the sections "Population" and "Recreation" are not applicable as the proposed use does not impact population growth and because the proposed use neither affords a recreational use nor infringes on any currently afforded recreational area. Under the Public Services and Transportation components of the Comprehensive Plan, it is noted that notice was sent to the Trow Creek Water Association, Mission Creek Water Association, Northern Lights, and Boundary County Road and Bridge. Only the Trow Creek Water Association expressed concern, and it is the determination of this commission that those concerns have been addressed.
  - vii) In interpreting the provisions of the Boundary County Zoning and Subdivision Ordinance, the Board of County Commissioners concurs with the analysis by

staff, and determines that mineral extraction is a conditionally permitted use within the zone district, thus allowable as a special use. A special use is defined at Chapter 13, Section 1, Boundary County Zoning and Subdivision Ordinance, as "... uses which, by their nature, are significantly more intensive than the permitted uses within a zone district, but which can be carried out with particular safeguards to insure compatibility with surrounding land uses. Special uses are, therefore, subject to restrictions, requirements and conditions more stringent than those applying generally within the zone district." By this interpretation, the Board of County Commissioners find that under the provisions of this ordinance, extraction of minerals, sand, gravel and rock may be considered as a special use within any zone district, with the determination of approval or disapproval to be based on the merits of each individual application.

- viii) In considering the hydrological report prepared by Kristine Uhlman, RG, the Board of County Commissioners concur that it is a possibility that operation of the proposed quarry may affect the supply of water at irrigation wells maintained by the appellants. However, based on the distance of the pit to those wells and testimony from the applicant, as supported in the permit and reclamation plan issued the applicant by the Idaho Department of Lands, as established at ix), below, it is reasonable to determine that direct threat to these wells is a remote possibility, and the threat can be further mitigated with additional restriction requiring that those conducting the blasting be licensed, certified and insured.
  - ix) The previously cited reports indicate that final depth of excavation of the pit will be 1,760 feet mean sea level. The hydrological report specifies that wells maintained by the appellant include a 440-foot deep irrigation well, located approximately 2,700-feet (approximately 1/2 mile) from the proposed pit, this being closest to the proposed gravel pit, at an elevation of 2,047 feet mean sea level with a static water level at 1,977 feet mean sea level; a 380-foot deep house well adjacent to the Gardiner home at an elevation of 1,920 feet msl with a depth to water of 1,815 feet msl, and three additional wells with data not provided. While the hydrological report indicates that there may be a chance of hydrological disruption, it provides no specific prediction or likelihood that such failure will occur, merely conjecture. In addition, based on documentation in the file, initial blasting at the pit was conducted in late March, 2006, and the hydrological study was conducted July 17, 2006. No evidence is incorporated into the report to indicate that the initial blasting affected these wells, adversely or otherwise.
  - x) Based on the distance from the proposed gravel pit to the wells and the difference in depths, commissioners feel that the condition 5(4)j (above) that "any person or persons employed to conduct blasting operations shall be notified prior to blasting of concerns expressed during the hearing process over the potential for damage to area water systems, including Trow Creek Water Association," is reasonable to ensure that those conducting the demolition are aware of these concerns and take adequate measures to deploy the explosives in the least impactful manner available. In addition, we hereby add as a condition to approval that any person employed to conduct blasting operations be qualified, licensed and insured.
- 8) **Conclusion:** Based upon the foregoing findings, which includes review of the application, review of the Planning and Zoning Commission process, review of the prior County Commission process, review of all applicable provisions of the Boundary County Zoning and Subdivision Ordinance and the Comprehensive Plan, and review of all

evidence submitted up to the time of final hearing July 24, 2006, and all testimony provided at that hearing, including all objections filed or raised by interested parties, review of the staff report and staff analysis, the following conclusions is adopted:

- a) This proposal was reviewed for compliance with criteria and standards established by the Boundary County Zoning and Subdivision Ordinance and the Boundary County Comprehensive Plan, and it is determined that this proposal does comply with general and specific provisions established.

**9) Decision Narrative:**

Boundary County Commissioners determine that the establishment of a gravel pit/rock quarry in the Agriculture/Forestry zone district is a lawful use of land and that the proper venue for considering the establishment of such use within this zone district is as a special use.

It is our interpretation of the Boundary County Zoning and Subdivision Ordinance in association with this application that this use is conditionally permitted in the Agriculture/Forestry zone district as the construction of roads and protecting against flood are two critical factors necessary to promote the continuity and continued productivity of agriculture and forest use in Boundary County. As such, mineral extraction meets the *definition of a commercial business supplying products and services for agricultural and forestry activities*, as established at Chapter 7, Section 1D1.

Establishment of a rock quarry/gravel pit in the location defined is a compatible use within the Agriculture/Forestry Zone district generally as well as in that area in particular based on testimony confirming that mineral extraction has been an established use both historically and currently, and that such operations have been conducted side by side with uses by right, predominantly agricultural production and harvest, for decades. The existence of at least two other operating gravel pits in that area provide sufficient proof that rock and gravel can be mined without undue adverse impact on surrounding land uses.


Further, commissioners find that the specific location of this proposed pit, which is situated in an area furthest removed from established residences on properties totaling 308.5 acres owned by the applicant, has ready access to an established county road capable of handling additional truck traffic. Its distance to existing residential structures further minimizes the potential for adverse impact through special use provisions, and additional conditions and restrictions can be attached that are more strict than applicable to permitted or conditional uses within the zone district to further reduce the impacts such use may impose.

Due to the need for mineral products, to include rock of suitable grade for road construction and for protecting dikes and levies, made critical in the wake of recent flooding that caused significant damage to over 55-miles of dikes protecting agricultural ground from flooding, with a significant amount of the damage in that specific area, having a locally available source of these materials confers a public benefit in providing an essential resource at reduced cost.

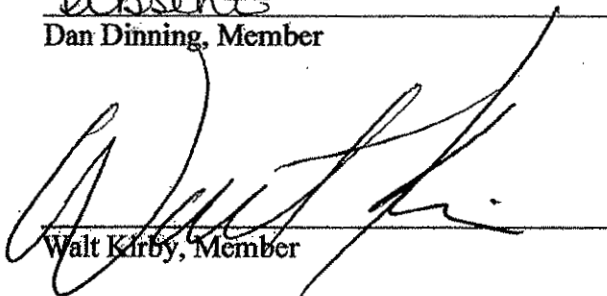
It is the determination of this Board that approval of this application, with limiting conditions significantly more stringent than those required for permitted or conditional uses in the zone district, does not constitute "a selective or discriminatory application of the zoning ordinances," nor constitute "spot zoning," but instead represents a prudent compromise to safely and economically obtain a useable natural resource that is crucial to the conduct of

uses within the zone district in particular and to the public safety and well being of Boundary County in general.

**10) Motion:** Based on the facts, findings and conclusion as discussed and established herein, Commissioner Walt Kirby made motion that Application SUP 0505, by Tungsten Holdings Incorporated, to establish and operate a gravel pit/rock quarry, subject to the terms and conditions established, be approved, seconded by Commission Chair Ron Smith; and as amended following discussion to include reaffirmation of the validity of the September 6, 2005, findings, and instruction to staff to include as part of these findings, as exhibits, excerpts referenced herein from the Boundary County Zoning and Subdivision Ordinance, the Comprehensive Plan and cited appendices. The motion carried unanimously.

  
Ron Smith, Chairman

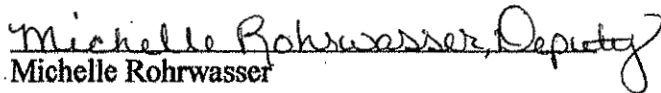
Absent  
Dan Dinning, Member

  
Walt Kirby, Member



August 14, 2006  
Date

ATTEST:

  
Michelle Rohrwasser  
Deputy Clerk of Court

**Findings and Decision, SUP 0505  
August 7, 2006  
Tungsten Holdings, Inc.**

**EXHIBIT 1  
Findings and Decision, SUP 0505  
September 6, 2005**

Boundary County Commissioners  
FINDINGS AND DECISION  
SUP 0505 – Tungsten Holdings Inc.

**Motion:** It was moved by Commissioner Walt Kirby and seconded by Commission Chair Ron Smith to approve SUP 0505 by Tungsten Holdings, Inc., with terms and conditions as set forth herein, subject to review of these findings.

**Vote:** Commissioner Dan Dinning abstained, Commission Walt Kirby “aye,” Commission Chair Ron Smith “aye.”

**FACTS:**

1. The applicants are the owners of 122-acre parcel RP65N01W172211A and 63.25-acre parcel RP65N01W200012A, which are adjoining, both located on County Road 46 approximately 1 ½ mile south of Porthill.
2. The applicants are seeking to establish and operate a gravel pit and rock quarry on a seven-acre portion of these two parcels, with regular operating hours from 8 a.m. to 5 p.m. Monday through Friday with no weekend operations. Crushing operations would not exceed 60 non-contiguous days per calendar year, with material stockpiled on site for year-around hauling. Estimated vehicle traffic resultant from proposed use is five trips per day, dependent on season and demand. Blasting may be required. Water would be used during crushing operations and on the access road to control dust. If established, the pit would be permanent. No structures are planned for the site.
3. The parcel upon which the use is proposed is zoned agriculture/forestry.
4. Utilities are provided by: Water: private well. Sewage: septic tank and field regulated by Panhandle Health District; Fire: Hall Mountain Volunteer Fire Association; Power, Northern Lights.
5. Consideration of this application as a special use is permitted pursuant to Chapter 7, Section E, Boundary County Zoning and Subdivision Ordinance.
6. The applicant owns approximately 300 acres surrounding the location of the proposed gravel pit.
7. On July 26, 2005, Boundary County Commissioners held public hearing on application SUP 0505 and did take into consideration the materials in the application file, the recommendation of the Boundary County Planning and Zoning Commission and testimony provided at hearing, including concerns expressed regarding the potential adverse impact of blasting on adjacent wells and to the Trow Creek water system.

**FINDINGS**

1. Boundary County Commissioners find that SUP 0505 meets the provisions of the Boundary County Comprehensive Plan in that:
  - a. **Private Property Rights:** The goal of the Boundary County Comprehensive Plan is to advocate the rights of property ownership, to recognize the sanctity of private property rights and to recognize that property owners have the right to enjoy the use of their property in pursuit of their own best interests while not interfering with the health or safety of surrounding property owners. While there have been concerns expressed by surrounding property owners, most notably regarding the potential adverse effects of blasting on surrounding water wells and the Trow Creek water system and increased dust and noise, the Board of Boundary County Commissioners find that these concerns can be mitigated by establishing terms and conditions set forth herein.



- b. **Economic:** Agriculture, forestry and related enterprises have historically been the economic mainstays in Boundary County, and surface mining operations, most notably gravel pits, have long existed side by side with these activities. The parcels on which this operation is proposed possesses rock of sufficient quality and quantity to make provide a needed natural resource to the community in a manner that promotes economic growth and encourages enterprise to make the best use of the county's natural resources.
  - c. **Land Use:** Boundary County planners recognize they have a limited scope in the development of private land, and that the goal of the comprehensive plan is to encourage free enterprise to allow property owners the best use of their land and its resources. The use proposed in this application can be conducted in a manner that will not deprive surrounding property owners of these same rights, and terms and conditions can be established to allow the use while protecting surrounding property owners adverse impacts which have raised concerns.
  - d. **Natural Resources:** Non-metallic mineral resources in the county have historically had more of an economic impact in Boundary County than metallics. Mining of any and all materials must be done with respect for and recognition of its impact on adjacent land, water resources and public services. By establishing terms and conditions, these provisions can be met.
  - e. **Hazardous Areas:** The site proposed for this use does not lie in a floodplain or other identified hazardous area.
  - f. **Public Utilities:** The proposed use does not place undue burden on the provision of public utilities, and sufficient public services exist to facilitate the operation.
  - g. **Transportation:** Increased traffic as a result of approval of this application will not place undue burden on the county road system, especially County Road 46, which will provide main access to the site. Allowing this proposal would benefit the transportation network and reduce costs of road maintenance and upgrades by providing a local supply of suitable grade material for road use.
  - h. **Community Design:** The goal of the Boundary County Comprehensive Plan is to insure the best possible use of the land and its resources, to encourage private free enterprise and to encourage the initiative of property owners to use their land to further their own economic interests. Approval of this application accomplishes those goals, and terms and conditions are available to mitigate any potential adverse effects.
2. Boundary County Commissioners find that the application meets the provisions of the Boundary County Zoning and Subdivision Ordinance in that:
- a. **Chapter 7, Section 1:** The purpose of the agriculture/forestry zone district is to enhance and promote the continuity and continued productivity of agriculture and forestland in Boundary County. The property upon which this use is proposed is of limited value for either of these uses.
  - b. **Chapter 7, Section 7:** The proposed use meets the general standards for commercial and industrial uses as established in that there will be no permanently installed exterior lighting, explosive materials will be stored and handled in compliance with all regulations of the United States and Idaho, dust from roads, parking areas and commercial activities will be controlled by the use of dust suppression materials as required by the Idaho Department of Lands, and no toxic or corrosive fumes will result from the proposed use.
  - c. **Chapter 13, Section 4C:**

- i. The site plan and other information included with the application provides sufficient detail so as to provide a clear description of the use proposed.
  - ii. There is sufficient land area to accommodate the proposed use, and the use is so designed as to minimize potential adverse effects on surrounding properties.
  - iii. The proposed use has the potential to create possibly adverse effects on adjacent property owners, but terms and conditions can be implemented to reduce this impact.
  - iv. The applicant owns more than 300 acres around and adjacent to the proposed site, and the use is situated so as to minimize potential adverse effects on surrounding property.
  - v. Terms and conditions to mitigate or eliminate potential adverse or hazardous impacts are available to reasonably assure the public safety.
  - vi. Terms and conditions are available to reduce noise, traffic, and dust to levels commensurate with permitted uses in the agriculture forestry zone district.
  - vii. Adequate public services exist to accommodate the proposed use.
- d. **Chapter 13, Section 5:** Boundary County has the authority to establish terms and conditions to a special use to minimize potential adverse impacts created by that use. The Board of Boundary County Commissioners concur that the following conditions will provide sufficient restriction to assure public safety and to mitigate potential adverse effects, and do hereby adopt them as conditions for approval of application SUP 0505:

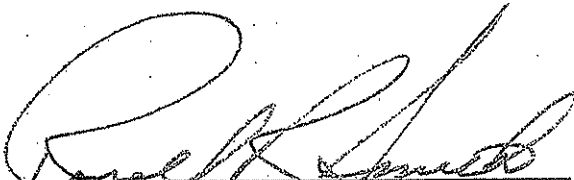
- i. All surface mining operations, including crushing, loading, material storage, etc., shall be conducted on the site and shall not encroach onto County Road 46 except as normal traffic. Access shall be by private drive approved by Boundary County Road and Bridge.
- ii. Dust abatement measures shall be applied as needed so as to minimize dust.
- iii. All operations shall follow "Best Management Practices for Mining in Idaho," published by the Idaho Department of Lands November 16, 1992, or as updated.
- iv. Blasting shall occur on no more than twelve (12) days per calendar year. Blasting shall be conducted on a weekday between the hours of 8 a.m. and 5 p.m. Boundary County Planning and Zoning and property owners within five-hundred (500) feet of the boundaries of parcels RP65N01W172211A and RP65N01W200012A shall be notified, in writing, at least fifteen (15) days in advance of the proposed date of blasting, specifying the date, time and length of time the blasting is expected to occur.
- v. All blasting shall meet OSHA requirements.
- vi. Crushing operations shall be allowed from 8 a.m. to 5 p.m. Monday through Friday between the dates of February 15 and May 2 each year.
- vii. Prior to establishing the permitted surface mining operation, the applicant shall comply with all requirements established by the Idaho Department of Lands, to include filing a reclamation plan and posting the required bond. A copy of those documents shall be provided the Boundary County Planning and Zoning office prior to the onset of mining operations.
- viii. The Planning and Zoning office shall be notified, in writing, when the reclamation bond is redeemed or in the event bond is forfeited. This special use permit shall lapse upon bond redemption or forfeiture, and no further mining operations may take place without issuance of a new special use permit.

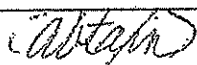
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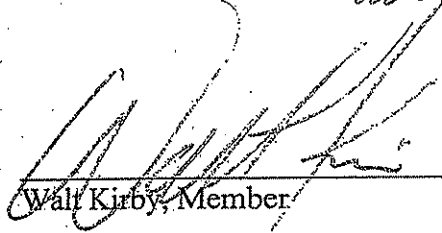
- ix. The seven acre portion of parcels RP65N01W172211A and RP65N01W200012A depicted in the site plan of application SUP 0505 shall be formally identified by record of survey filed and recorded with the Recording Clerk of Boundary County.
- x. Any person or persons employed to conduct blasting operations shall be notified prior to blasting of concerns expressed during the hearing process over the potential for damage to area water systems, including Trow Creek Water Association.

CONCLUSION:

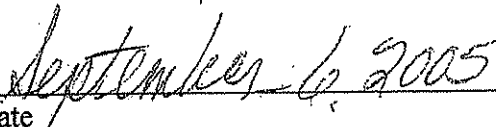
Based on the above facts and findings, and by motion and vote as cited above, the Boundary County Board of Commissioners hereby approves application SUP 0505 by Tungsten Holdings Inc. to establish, develop and operate a gravel quarry on the specified portion of parcels RP65N01W172211A and RP65N01W200012A, subject to the terms and conditions as set forth in paragraph 2D.

  
\_\_\_\_\_  
Ron Smith, Chairman

  
\_\_\_\_\_  
Dan Dinning, Member

  
\_\_\_\_\_  
Walt Kirby, Member

Date



ATTEST:

  
\_\_\_\_\_  
Deputy Clerk of Court

**Findings and Decision, SUP 0505**  
**August 7, 2006**  
**Tungsten Holdings, Inc.**

**EXHIBIT 2**  
**Boundary County, Idaho**  
**Comprehensive Plan**

# **BOUNDARY COUNTY, IDAHO COMPREHENSIVE PLAN**

## **I. PRIVATE PROPERTY RIGHTS**

Boundary County policy will advocate the rights of property ownership, recognizing the primacy of private property rights and the sanctity of private property ownership as enunciated in the Fifth Amendment of the United States Constitution and Articles 1 and 14 of the Idaho Constitution.

Boundary County planners will recognize that property owners have the right to enjoy the use of their property in pursuit of their own best interests, both social and economic, yet recognize also that the ownership of property confers responsibilities. Use of private property should not interfere with the health or safety of neighboring property owners or occupants or deny neighboring property owners those same inherent rights.

Boundary County land use and planning and zoning ordinances will place the minimum level of restriction and administrative requirement necessary to provide for the public weal.

Boundary County planners will not implement any action, ordinance or administrative regulation that constitutes uncompensated deprivation of private property as defined in the state and federal constitutions, and will vigorously support county property owners from any government or agency that attempts to deny their rights of ownership without just compensation.

## **II. POPULATION**

In 1997, Boundary County's growth rate was approximately the same as that of Idaho as a whole, and there is little reason to believe that this growth will slow or reverse in the foreseeable future. County planners should anticipate continued population growth and the impacts growth will have on the county infrastructure, economy, and resource base of the county.

## **III. ECONOMIC**

Agriculture, forestry and related enterprises have historically been the economic mainstays in Boundary County. While this continues to hold true, other factors, such as transportation, wholesaling, retailing, service businesses and governmental service have made advances in contributing to the economy in Boundary County.

The priority of Boundary County policy and planning decisions will be the promotion of economic growth. The goal of this plan is to maintain and enhance the economic condition of Boundary County by influencing the development of policies that encourage enterprise and promote access for multiple uses of the county's natural resources.

## **IV: LAND USE**

Boundary County planners will develop land use regulations that are basic, readily understandable and minimally intrusive in terms of administrative requirements. Zoning and land use regulations covering development should minimize cost to the general public and the taxpayer. Road systems and services for new developments will be provided by the developer.

Boundary County planners recognize that they have a limited scope in the development of private land area. Free enterprise will be encouraged to allow property owners the best use of their land and its resources.

Boundary County planners will not propose or create any regulatory department that is self-supporting.

The following sections provide more detailed guidelines on land use policy:

**Agriculture:** There are currently 62,490 total acres in the county used for agricultural production. Land use policy in Boundary County should encourage agricultural enterprise and the diversity of agricultural products to retain the predominantly rural nature of the community.

**Forestry:** The harvest of timber and other products from forest land in Boundary County is essential to the local economy. Planning decisions should encourage multiple uses of forest resources and promote harvest, thinning and other silvicultural practices to ensure safety and to improve the health and diversity of forest land.

**Commercial:** Commercial planning in Boundary County will encourage the formation of enterprises that add value to the existing economic base. In formulating land use policy governing commercial development, consideration will be given to the impact proposed commercial enterprises will have on the current uses of surrounding lands, the impact on the flow of traffic in the area in which it is located and the demands placed on the Boundary County Landfill.

**Industrial:** Boundary County policy will encourage and promote clean, low-impact industrial development in designated industrial zones. Industrial developments will be located in areas with adequate transportation capacity, sanitation and waste disposal, and water capacity sufficient to provide for business needs and fire suppression. Consideration will be given to the impact proposed industrial development will have on the Boundary County Landfill, and, if necessary to ensure compliance with Subtitle D Landfill regulations, alternate solid waste disposal requirements will be imposed on the developer.

**Residential:** When practical, new residential developments should locate near existing development to provide for the systematic expansion of public services. Boundary County will recognize and protect the inherent right of the property owner to provide gifts of land to children and family members for residential use.

**Housing:** Boundary County will encourage the development of safe, adequate housing for residents, with restrictions limited to the minimum requirements of state and federal law. While recognizing the value of the Uniform Building Code, Boundary County planners will not mandate compliance with the code in the construction of residential structures.

## V. NATURAL RESOURCES

The abundance and variety of natural resources in Boundary County is the foundation of the county's economy and the basis for the quality of life enjoyed by its citizens. All

public policy must be shaped to protect these natural resources to provide for the economic needs of the citizenry while sustaining the health and diversity of the environment to ensure that these resources will be enjoyed and cared for by succeeding generations.

Boundary County has traditionally been home to a proud, independent people who worked with what was available to eke a living in an isolated and often inhospitable land. Their legacy continues today, and people here ask and expect little from government except the freedom and independence to pursue their livelihoods and happiness.

Boundary County policy makers will recognize and respect this spirit of independence.

**Water:** Boundary County receives an average of 24 inches of precipitation annually. Snow fall averages 60 to 70 inches annually in lowland areas, and 12 feet or more annually in some high-elevation areas.

The main body of water in Boundary County is the Kootenai River, which enters the county at its eastern border with Montana and exits on its northern border with Canada. The Moyie River is the second major waterway in Boundary County, entering the county from its northern border and ending at its confluence with the Kootenai River. In addition, there are numerous creeks that feed snowmelt and rain from several mountain drainages, each emptying into the Kootenai River. A number of small lakes round out naturally-occurring surface water.

Development in Boundary County is in most cases dependent on the availability of a reliable source of potable water, and a number of water associations have been formed to provide water to allow expansion.

State standards and regulations will serve as guidelines to preserve the desirable qualities of surface and ground water upon which county citizens and those in surrounding jurisdictions rely; and to prevent pollution of surface and subsurface waters.

**Forests:** Boundary County features an abundance of forested land, much of it located in steep areas difficult to access. Most of Boundary County's land base is forested, and over half the land base in the county is managed by the U.S. Forest Service.

Timber, harvested from both public and private land, has traditionally played a critical factor in the Boundary County economy, and county policy decisions should support and promote sound silvicultural practices to allow continued access to public forest land for the harvest of timber and timber products at the highest sustainable level in areas deemed suitable for logging.

In addition to timber and timber products, the forests also provide a wealth of other products. Boundary County policy shall support and encourage access for such harvest as well as other recreational uses on public lands.

**Soils:** A range of soil types and compositions have been inventoried in Boundary County by the Natural Resources Conservation Service and the findings of this survey should be consulted when making major land use decisions which pose a potential for degrading soil stability and in cases where development would be affected by the quality and stability of the soil.

Boundary County planners will encourage development procedures that protect against soil erosion and slide potential, and promote revegetation of exposed areas to protect water quality and improve the stability of development sites.

**Fish and Wildlife:** The surface waters of Boundary County and the variety of terrain types are host to abundant native fish and wildlife, which contribute immensely to the

quality of life enjoyed in Boundary County, providing quality hunting, fishing and wildlife watching opportunities enjoyed by citizens and tourists alike.

Boundary County promotes maintenance of the health and diversity of species native to the region..

Boundary County planners will play an active role in the development of public land use policies required by state and federal agencies that will impact Boundary County to assure the lowest level of adverse impact to the local human populace and to the economy of the county, and to provide the highest level of human access to impacted lands.

**Minerals:** With one exception, the Idaho Continental Mine, metallic mineral extraction has had a discouraging history in Boundary County. Small ore bodies, geologic structure and the necessity of large capital investments for plant facilities before sufficient evaluation of mineral properties have been made serve to impede the development of the mineral resources.

The generally favorable geologic environment of the county, however, warrants further exploration using more modern techniques. Minerals found within Boundary County include gold, silver, copper, lead and zinc, along with small amounts of molybdenum, nickel and tungsten.

Non-metallic mineral resources in the county may have an economic potential greater than that of metallics. Sand, gravel and crushed rock are produced at minimal cost at various locations in the county. Deposits of sand and gravel are found in abundance at lower elevations and within the valleys. Crushed rock is obtained from crushing operations at rock quarry sites, with deposits found in various locations throughout the county.

Mining of any and all materials should be done with respect for and recognition of its impact on adjacent land, water resources and public services.

**Agriculture:** Boundary County holds some of the most productive farmland in the nation, producing high yields of cereal grains on a regular basis. The most productive agricultural lands lie in the former flood plain of the Kootenai River, which have been reclaimed by an extensive system of dikes.

In addition to the fertile valley, excellent agricultural land is also situated on the benchlands surrounding the Kootenai Valley, where considerable grain crops are produced each year and which are used for pasture and the production of alfalfa hay and other forage crops.

Hallertau hops have played an important role in Boundary County's agriculture economy in recent years, and the production of nursery stock has also contributed significantly and is growing in importance. In addition, agricultural producers are raising a variety of specialty crops, including horticultural crops, on a smaller scale throughout the county.

The production of livestock and dairy cattle has declined in recent years, but remains a viable use of agricultural land.

Boundary County planners will recognize the importance of agriculture and the role agriculture plays in maintaining the rural lifestyle for Boundary County's citizens.

## VI. HAZARDOUS AREAS



Boundary County planning policy will incorporate provisions to mitigate potential property damage and to protect the public safety by advising citizens of identified hazardous and geologically unstable areas which pose potential threats to private and public interests. Boundary County planners will advise developers of federal and state standards and codes pertinent to construction and development in such areas. Special development requirements will be imposed for subdivisions which affect steep hillside areas or areas prone to erosion and sedimentation.

**Floodplains:** With cooperation from federal officials, flood hazard areas will be identified and proper management policies established to allow participation in the national flood insurance program.

The hazards of development where high water tables or marshy areas prevent the dissipation of waste water, or where ground water interferes with habitation of structures, will be recognized and guarded against.

**Earthquake Zones:** Boundary County is included within Seismic Zone 2 as delineated in the Uniform Building Code. This indicates that a moderate damage risk could be experienced in this area should an earthquake occur. Building methods to minimize potential damage should be used in the construction of all public buildings.

**Hillside areas:** It is difficult to predict when hillside slope failure will occur, but recent experience proves that in years of high precipitation and high ground moisture saturation, slides resulting from slope failure can pose a severe risk to development and the public safety.

Developers considering building on sloped areas will be referred to the Boundary County office of the Natural Resources Conservation Service.

## VII. PUBLIC SERVICES, FACILITIES AND UTILITIES

Boundary County land use regulations and ordinances will coordinate public services to meet the needs of residents at minimal cost to taxpayers.

Public services and facilities provided for and under the direction of specific Boundary County Departments include:

**Boundary County Road and Bridge:** Boundary County Road and Bridge, under the direct supervision of the Boundary County Board of Commissioners and managed by an engineer acting as supervisor, maintains over 300 miles of paved and improved roads in the county. For specific goals, see Transportation Goals and Policies.

**Law Enforcement/Justice:** The Boundary County Sheriffs Department, under the direct supervision of an elected Sheriff, provides law enforcement and emergency first-response service in Boundary County, and operates the Boundary County Jail. The department conducts criminal investigations, bringing cases to the Boundary County Prosecutors office for disposition. Both the sheriffs department and the prosecutors office work closely with other law enforcement agencies working within Boundary County, including the Bonners Ferry Police Department, the Idaho State Police, Customs and Immigration, U.S. Fish and Game and others.

**Solid Waste:** Solid waste collection in Boundary County falls under the purview of the Boundary County Solid Waste Department, which operates and manages the Boundary County Landfill. In recent years, the future of the Boundary County Landfill has been brought into question by Federal Subtitle D laws. Boundary County Commissioners and

solid waste personnel were able to obtain a small-community exemption to avoid the necessity of prematurely closing the landfill.

Planning decisions will take into consideration the impact of development on tonnage limits placed on the Boundary County Landfill under the Subtitle D exemption. Every effort will be made to reduce the volume of solid waste being disposed of to sustain a viable landfill for as long as possible.

**Community Hospital:** Boundary Community Hospital is the main health care facility in Boundary County. The hospital is governed by an administrator and a board of trustees appointed by the Boundary County Board of Commissioners.

**Community Restorium:** Boundary County is one of very few, if not the only, county in Idaho to own and operate a residential senior citizens facility dedicated to providing a comfortable home environment and independent living for this county's senior citizens. The facility is operated and managed by the head of the Restorium Department, a commissioner-appointed board of trustees and a staff funded by Boundary County. Boundary County will remain dedicated to the welfare of the senior citizens of the community.

**Schools:** Boundary County planners will work with administrators of School District 101 to determine and fulfill the needs of the district for essential services at public school facilities located outside incorporated cities in Boundary County and support the best interest of the students attending Boundary County public schools and the will of the citizens of Boundary County as evidenced by their vote in elections called by School District 101.

**Libraries:** Boundary County has one public library which has authority as a taxing district and is administered by a Library Supervisor and an elected board. County policy will support the maintenance of a library responsive to the needs of the community.

**County Fairgrounds and Parks:** Boundary County owns, maintains and operates land and facilities set aside for the enjoyment of the citizens of the community. These include the Boundary County Fairgrounds, managed by an appointed board, a playground, athletic fields for softball, baseball, soccer and other sports, a picnic area, a covered multi-purpose slab and other accouterments, most located immediately west of Bonners Ferry surrounding and including the Boundary County Fairgrounds. A second separate park lies northeast of Bonners Ferry in District 2. The county also owns and maintains three boat launches on the Kootenai River, at Copeland, Porthill and at the confluence of Deep Creek.

**Citizen-formed Associations and Districts:** Many of the services and facilities provided to the citizens of Boundary County are operated and maintained by volunteer associations and taxing districts created to address the specific needs of different areas of the community, and each rely on the initiative of the citizens involved.

The list of such organizations includes but is not limited to: Numerous drainage and water districts, cemetery districts, Boundary Volunteer Ambulance, volunteer fire departments including North Bench, Paradise Valley, Naples, Curley Creek and Mt. Hall, the television translator district, the Boundary County Historical Society, etc.

Such initiative and the spirit of volunteerism among the people of Boundary County has accomplished many essential tasks and objectives throughout the history of Boundary County. County policy will continue to support, assist and promote this spirit of neighbor

helping neighbor and of neighbors working together independently to achieve a common goal for the benefit of the entire community.

## VIII. TRANSPORTATION

**State & Federal Highways:** U.S. 95, U.S. 2 and State Highway 1, which pass through Boundary County, play an important role in international transportation and serve two Ports of Entry. Boundary County planners will work with state transportation policy makers to represent the citizens of Boundary County on issues concerning highway maintenance and safety.

**Boundary County Roads:** The Boundary County Road and Bridge Department maintains over 300 miles of roads. Maintenance priorities will provide for the most efficient methods to accommodate snow removal, road repair and improvement.

Developers of new subdivisions will be required to install durable and serviceable roads meeting county engineering specifications before those roads will be considered for county adoption.

Residents who choose to live on private access roads and who desire the services of emergency and utility vehicles must bear the cost to build and maintain these roads to allow access. Boundary County taxpayers will not be impacted by the cost of building or maintaining private access roads.

Planning and zoning decisions will take into account the impact of proposed development on the county's transportation network.

**Forest Service Roads:** The U.S. Forest Service maintains approximately 1,000 miles of forest service roads.

Boundary County planners will continue to work with the Forest Service to ensure that the interests and expressed will of Boundary County citizens are represented.

**Air:** Two airports provide services for small aircraft; the county-owned Boundary County Airport northeast of Bonners Ferry and the state-owned Porthill Airport, which serves as the International Customs Airport.

Boundary County planners should factor the airport's capacity and capabilities into decisions involving economic development and expansion.

**Rail:** Two railroad lines, the Burlington Northern/Santa Fe and the Union Pacific, pass through Boundary County, though neither line has a depot in the county. County Planners should consider the potential of rail transportation in the economic development of Boundary County. The increased risk posed by higher rail and road traffic should also be considered, and steps taken to ensure safety at railroad crossings.

## IX. RECREATION

Boundary County is endowed with public lands unparalleled for unstructured outdoor recreation, including but not limited to hunting, fishing, hiking, bicycling, climbing, picnicking, camping, horseback riding, rafting, etc. County planning policy will encourage and promote the highest level of access to areas in which these activities have traditionally been enjoyed.

More structured recreation is encouraged by facilities maintained by the county, including parks, playing fields and playgrounds. Additional recreational facilities to meet the needs of the community have been built by private enterprise and by volunteer effort.

Boundary County planners will continue to be responsive to the citizens of the community to ensure a variety of recreational opportunities appealing to people of all ages.

#### **X. COMMUNITY DESIGN**

To insure the best possible use of the land and its resources, private free enterprise will be encouraged and promoted to the fullest extent possible. The initiative of property owners using their land to further their own economic interests will be encouraged.

**Findings and Decision, SUP 0505**

**August 7, 2006**

**Tungsten Holdings, Inc.**

**EXHIBIT 3**

**Appendix I, Boundary County, Idaho  
Comprehensive Plan, Histories of Boundary County;  
Mining in Boundary County**

## MINING IN BOUNDARY COUNTY

### HISTORICAL VIEW

This area's earliest explorers and residents were involved in mining and its exploration.<sup>1</sup>

In the mid 1800s, explorers from Canada made exploration expeditions via the Kootenai River. By the 1860s, gold had been discovered in the Ori Fenó area of Idaho, which brought a gold rush to the territories, however, the Kootenai River area was not extensively explored until the 1880s.<sup>2</sup>

Prior to 1900, recorded mining claims numbered over 2,000 separate claims in what is now Boundary County. During these early days, the majority of the exploration went unrecorded, but judging from the recorded claims of the period, mining activity was extensive. There was unquestionably a tremendous mining boom in process that made a huge impact on the early days of Bonners Ferry and environs.

This volume of mining interest continued through the early 1900s, and by the 1920s another 2,500 claims had been added. The large mines, such as the Continental, Tungsten, Buckhorn and Boulder Creek mines were in full swing, or close to it. Although these mines operated years ago, they utilized the most practical and economical methods to explore, construct roads and build and operate their mining operations to make those operations feasible.

Hydraulic mining was used in the Boulder Creek Mine and boats were used to move the ore. Their financial output was the mainstay of the area's early economic development. The farming and logging economies had not yet developed to the extent that mining had.

Howard Kent wrote in "History of Boundary County: Book One:"

*"One does not have to explore Boundary County far to discover evidence of mining activity. Most evidence is in the state of decayed abandonment, although occasional signs of recent exploration can be found. From it's earliest beginnings to the present, mining has played an important role in the history and development of the area. Many have searched and toiled and were lucky, but most settled for wages or less."*

The discovery of silver and lead in the 1880s-1890s was the beginning of the Continental Mine, which was one of the greatest mines in county history in terms of investment and return on investment.

The Continental employed a sizeable labor force which consisted mainly of local residents, and hundreds of thousands of dollars were spent over the years to develop the mine. It was reported that over \$5 million in smelting receipts were obtained.

The major stockholder of the Continental Mine was A.K. Klockman, who retired from mining in the 1940s.

The mine remained in operation, though on a small scale, through the 1980s. The road leading to the mine was graded and was extensively used for hiking to the mine.

In the 1890s, strikes were made along some streams, including Boundary Creek and the Moyie River and its tributaries. The largest placer operation was the Moyie Hydraulic and Water Power Company in 1912. The two giant hydraulics operated day and night shifts with satisfactory returns. Tests revealed gold in the ore valued at one to seven dollars per yard.

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<sup>1</sup> Boundary County Records/mining claims

<sup>2</sup> *ibid*

\* In 1997, the U.S. Forest Service, which maintains the road, announced their plan to close this road. Local residents and government officials have strongly protested the proposed action.

In 1912, the Moyie Gold Company reported two shifts with 250 tons of ore averaging \$40 per ton. Mountain Queen, near Snyder, had five claims for mining gold, copper and silver.

In 1896, the "Buckhorn Group;" Housin Boy, Buckhorn, Boston, Keystone, Pucky Three, Scout, Last Chance and Wee Fraction, all east of Deer Creek, had a sampling indicating gold at \$15 per ton. By 1906, the Buckhorn Grays had 1,600 feet of tunnels and 5,000 tons of ore valued at \$60,000. In 1904, fire swept the Buckhorn camp, destroying almost everything. The operation was rebuilt, but no records are available on returns. Bob Causton has kept title to the mine, doing assessment work.

There are several mines in the Crossport/Katka area, including Two Tail Mine, which, in 1896, has copper ore assayed at \$2 per ton. The Montgomery Mine near Porthill had 15 unpatented claims, but no evidence of production. The Idaho Gold and Radium Mine (Idaho Gold and Ruby Mine) developed near Boulder Creek in 1910, managed by J.M. Schnatterly, who reported in 1912 that a crew of 42 men were working 17 claims near Leonia.<sup>3</sup>

There are many other mines and claims recorded in Boundary County, and some placer mining is still being done on some creeks in the county.

From those days to the present, mineral mining has played a smaller role in the area's economic stability, but it's role has not lessened in the cultural heritage of the community. Due to huge capital expenditures required to mine and the ruggedness of the area, mining operations are hesitant to make a financial commitment, but exploration continues and is active.

Kent continues:

*"In recent years, there was a flurry of activity along Boulder Creek. Assessment work had been done on claims above the bridge at the campground.*

*Assessment work also has been done on a claim along the Moyie River between Deer Creek and Skin Creek.*

*Bob Causton has been doing assessment work on the Buckhorn claim for a number of years. Tilley's mine has been taken over by Guy Patchen, who continued to work the claim until his death. William Tilley was working another claim located on the ridge between Buzzard and Tungsten Mountains. Unfortunately, Tilley has also passed on.*

*The Moyie and its feeder streams are panned by individuals with a small amount of color being taken. I'm not aware of any development work being done at the Continental Mine in recent years."*

Idaho has been one of the leading producers of silver and related minerals in the nation for years, mainly from the Mullen/Wallace area. Currently, ASARCO operates a mine just a few miles east of Boundary County in Montana. This area holds the possibility of rich mineral deposits, known and unknown.

These resources need to be forever open, as they were in earlier mining days; to ensure continuation of mining and development by the people of the area.

## **MINING - SAND, GRAVEL AND ROCK**

Whatever can't be grown must be extracted from the earth, and minerals are vital to the health and prosperity not only of our area, but to the nation as a whole.

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<sup>3</sup> Howard Kent

\* The ASARCO Mine closed in 1995, but the company is currently working to open another mining operation nearby.

From the first road and building, rock, gravel, sand and related materials have been mined here in abundance. Pits and quarries can be found throughout the area and are too numerous to list. Because of the cost of roads and materials for building, whenever materials were found on federal land and close to the area they were to be used, they were mined.

The mining of sand and gravel for road building and construction has been and remains of huge economic importance to Boundary County. Every road has gravel pits that were used during construction, and remain in use as needed through the years.

### **PERSPECTIVE**

Federal land has long been viewed by the people of this area to be there for personal and industrial use. The free use and utilization of these resources has been and will continue to be viewed as a right by the people of this area.

The necessary use of public lands for the construction of reservoirs, canals, ditches, flumes or pipes, in order to convey water to the place of use for any useful, beneficial or necessary purpose or for drainage, the drainage of mines and the working of mines, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps or other necessary means to allow for the development of the material and mineral resources of the county for the physical and economic preservation of its inhabitants shall be forever preserved.

This overview is an attempt to document the culture and custom of the people of Boundary County. One should not forget the common mindset of the earliest settlers, as well as the majority of inhabitants today, regardless of the industry in which they are or were employed. The early settlers were, by necessity, industrious, self-sufficient and fiercely independent.

For the most part, these basic beliefs and mindsets have remained intact among the people of Boundary County; the minerals, land, wealth and resources belong to the people.



**Findings and Decision, SUP 0505**  
**August 7, 2006**  
**Tungsten Holdings, Inc.**

**EXHIBIT 4**  
**Chapter 7, Section 1**  
**Boundary County Zoning and Subdivision Ordinance**  
**99-06**

## CHAPTER 7: ZONE DISTRICT SPECIFICATIONS

(AS AMENDED DECEMBER, 2001)

### Section 1: Agriculture/Forestry

**A. Purpose:** To enhance and promote the continuity and continued productivity of agriculture and forest land in Boundary County.

#### **B. Uses by Right:**

1. Agricultural uses including but not limited to farming and related activities, livestock production and animal husbandry, silviculture and forest product cultivation and harvest.
2. Agricultural structures, including but not limited to barns, sheds, non-commercial garages, greenhouses, agricultural storage structures and on-site produce stands.
3. Hiking, skiing or riding trails; unimproved parks or outdoor recreational sites.

#### **C. Permitted Uses**

1. One (1) single family residential structure on a parcel not less than ten (10) acres in size.
2. One (1) single family residential structure on a non-conforming lot of record pursuant to the provisions of Chapter 8.
3. More than one (1) single family residential structures or a duplex residential structure, provided the parcel contains at least ten (10) acres per dwelling unit.
4. Home-based businesses subject to the provisions of Chapter 14, Section 2.
5. Improved public or private parks, not for profit community halls or community service facilities

**D. Conditional Uses:** The following uses are eligible for a Conditional Use Permit subject to the provisions of Chapter 12.

1. Commercial businesses supplying products and services for agricultural and forestry activities.
2. Agricultural auction yards.
3. Retail plant nurseries and greenhouses, off-premises produce stands.
4. Riding and rodeo arenas open to the public, commercial stables, commercial kennels, veterinary clinics.
5. Agricultural packaging and processing facilities.
6. Public cemeteries and churches or structures intended primarily as a place of worship.
7. Public service facilities and wireless communications facilities.

**E. Special Uses:** Any use not specified in this section as a use by right or conditional use is eligible for consideration as a special use, subject to the provisions of Chapter 13.

**F. Setback Requirements:** Setbacks for residential structures, accessory structures and agricultural structures: Front yard, twenty five (25) feet; side yard, ten (10) feet; rear yard, twenty five (25) feet; flanking street on corner lot, fifteen (15) feet.

**Findings and Decision, SUP 0505**  
**August 7, 2006**  
**Tungsten Holdings, Inc.**

**EXHIBIT 5**  
**Chapter 13: Special Uses**  
**Boundary County Zoning and Subdivision Ordinance**  
**99-06**

## CHAPTER 13: SPECIAL USES

### Section 1: General

A. Special uses are uses which, by their nature, are significantly more intensive than the permitted uses in a zone district, but which can be carried out with particular safeguards to insure compatibility with surrounding land uses. Special uses are, therefore, subject to restrictions, requirements and conditions more stringent than those applying generally within the zone district.

B. Once a special use permit is approved, the terms and conditions of the special use permit shall become the controlling plan for the use of the property and shall not be changed or amended except by application for a new special use permit. Any development or use in violation of the terms of the special use permit shall be deemed a violation of this ordinance.

### Section 2. Duration of Permit

A. Special use permits shall be deemed to run with the land to which they are attached, and the terms of such permits shall not be modified, abrogated or abridged by change in ownership of such lands.

B. Should the use for which the special use permit was issued not be established within a period of two (2) calendar years, the special use permit shall be deemed to lapse.

C. The zoning administrator may, upon request from the applicant, issue an extension not to exceed twelve (12) months should hardship or unforeseen circumstance preclude establishment of the special use per Section 2B, above.

### Section 3. Pre-Application Review

A. Prior to submission of an application for a special use permit, the applicant may request a pre-application review to determine whether the proposed special use meets the requirements of this ordinance and the Boundary County Comprehensive Plan and, if not, what measures may be taken to bring about compliance. A request for review shall include all information required by Section 4 of this chapter.

B. Upon receipt of a request for review, the zoning administrator shall consider the facts of the application and provide the applicant a written report of findings based solely on the provisions of this ordinance and the Boundary County Comprehensive Plan. Should the applicant decide to submit an application for a special use permit, this report of findings shall be included in the application documentation.

C. Findings of a pre-application review will not constitute a formal decision and will not waive any of the procedures set forth in this chapter for completion of the application. There shall be no fee for a pre-application review.

### Section 4: Application Procedure

A. Applications for special use permits shall be made on forms provided by the zoning administrator. These applications shall include:

1. The name, address and telephone number of the applicant and the parcel number of the property on which the special use is proposed.

2. A written description of the proposed use, including the type of activity, hours of operation, estimated number of vehicle trips per day expected as a result of the use,

whether the use will be temporary, seasonal or permanent, the size and nature of structures to be built, and actions planned to reduce the effects of the activity on surrounding properties.

3. A site plan showing the property boundaries, general topography, building layout, access, parking, landscaping and other details necessary to clearly depict the nature of the proposed use.

4. An application fee as set forth in Chapter 17.

B. Upon receipt of a completed application for a special use permit, the zoning administrator shall schedule a public hearing on the next available planning and zoning commission agenda, allowing for public notification established at Chapter 16.

C. The commission shall hold public hearing on special use permit applications in accordance with the provisions of Chapter 16. In reaching a decision, the commission will consider the following:

1. That the site plan and other information included in the application provide sufficient detail to provide a clear description of the nature of the use to be allowed under the terms of the special use permit.

2. That there is sufficient land area to accommodate the proposed special use and that the use and accessory structures are so arranged as to minimize adverse effects on surrounding properties.

3. That the proposed special use will not have any substantial adverse effects on adjacent properties or to the general public, and will not create hazards to adjacent property owners.

4. The proposed special use will not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district.

5. That adequate public services, including water, sewage disposal, roads, fire protection, etc., exist or will be built to accommodate the proposed use.

6. Written and oral comments and testimony submitted by interested persons who would be affected by the special use.

D. Upon conclusion of the public hearing, the planning and zoning commission may:

1. Recommend approval, attaching conditions and terms.

2. Table the application pending receipt of additional information or amendment.

3. Recommend disapproval and specify actions, if any, which may be made by the applicant to obtain approval.

E. The recommendation of the commission shall be submitted to the board of county commissioners and a public hearing shall be scheduled on the next available agenda of the board, allowing for public notification per Chapter 16.

F. The board of county commissioners shall hold public hearing in accordance with the provisions of Chapter 16. The board shall consider the facts of the application, the record of public hearing, the recommendations of the planning and zoning commission, the comments and testimony of interested persons and the provisions of this ordinance and the comprehensive plan. Following public hearing, the board may:

1. Approve the special use permit, attaching terms and conditions.

2. Require that specific changes be made to the application prior to approval.

3. Disapprove the application, specifying what actions, if any, the applicant could take to obtain approval.

G. The final decision on any special use permit application shall be made in writing, setting forth the reason for the decision and the ordinance sections referred to. If the decision is made to approve the application, a special use permit shall be issued, specifying terms and conditions.

(ADDED SEPTEMBER 2003)

H. Upon approval of a special use permit, the specifications in the application and the limits specified on the permit shall be the controlling documents for that use, and any expansion or alteration shall require additional permitting processes.

**Section 5: Terms and Conditions:** Terms and conditions to a special use permit shall be clearly designed to minimize potential adverse impacts created by the special use. Conditions may include, but are not limited to:

- A. Minimize adverse impact on other development.
- B. Control the sequence and timing of development and use.
- C. Control the duration of the development or use.
- D. Assure that the development or use is properly maintained.
- E. Designate the exact location and nature of the use.
- F. Require on or off site public facilities or services.
- G. Require more restrictive standards than those required in the zone district in which the use or development is to be established.
- H. Require measures to mitigate effects of the use upon service delivery by any political subdivision, including school districts, providing services within Boundary County.
- I. Require improvements to roads or transportation systems serving the use or development to provide for safe and efficient movement of vehicles to and from the site and to reduce impact on normal traffic patterns.
- J. Require specific measures for revegetation, restoration or reclamation of disturbed portions of the site.
- K. Require security measures, such as fencing or limited access, to protect users of the site or the general public.
- L. Bind the applicant into specific agreements with Boundary County to guarantee construction or maintenance improvements, to ensure that operations are carried out with minimal risk to public health and safety, or to minimize public or county liability which might result from the issuance of a special use permit.