

**BEFORE THE CROOK COUNTY COURT**

**IN THE MATTER OF APPEAL No. 217-22-000540-PLNG RE: APPLICATION 217-21-000573-PLNG FOR CONDITIONAL USE – AGGREGATE MINING OPERATION**

**FINAL DECISION  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**FINAL DECISION**

After a hearing on Wednesday, June 15, 2022, and having decided to reverse the March 31, 2022 decision of the Crook County Planning Commission, the Crook County Court (the “Court”) adopts this final decision with supporting Findings of Fact and Conclusions of Law on this 6th day of July, 2022.

*This Final Land Use Decision may be appealed to the State of Oregon Land Use Board of Appeals (LUBA) within twenty-one (21) days from the date of this Decision.*

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. FACTS**

The subject property is located at the following map tax lot numbers:

<u>Map</u>	<u>Section</u>	<u>Tax Lots:</u>
14S 15E	14	103

The applicant, Knife River Corporation – Northwest, is also the appellant, referred to hereinafter as “Knife River.”

The Crook County Planning Commission approved a comprehensive plan amendment (217-21-000436-PLNG) to add the subject property to the County’s inventory of Significant Mineral and Aggregate Resources under Statewide Planning Goal 5. This plan amendment was approved by the Crook County Court via Ordinance No. 328 on February 2, 2022. Ordinance No. 328 designated the subject property as a “3B” site, which means that there would be no protection for the mine site and no limits on conflicting uses within the 500-foot impact area of the proposed mine. Ordinance No. 328 also adopted an “ESEE analysis” (an analysis of the

economic, social, environmental, and energy impacts) and a Program to Achieve Statewide Planning Goal 5 (hereinafter the “Program”). The Program included conditions regarding nine separate aspects of aggregate extraction operations to reduce impacts to conflicting uses in the mine’s impact area.

Knife River then applied for a conditional use permit to allow mining of the subject property (217-21-000573-PLNG). On March 16, 2022, this matter came before the Crook County Planning Commission for final deliberations. On March 31, 2022, the Crook County Planning Commission issued a final decision denying the requested Conditional Use Permit.

## II. PROCEDURAL STATUS

On April 6, 2022, Knife River filed this appeal to the Crook County Court. Knife River stated that the Planning Commission’s decision to deny the application “was conclusory and neglects to acknowledge substantial evidence in the record which clearly demonstrates consistency with Ordinance No. 328 and all applicable provisions of the Crook County Code.” The Crook County Court scheduled an on-the-record public hearing for Wednesday, June 15, 2022, to consider the appeal. The hearing before the County Court was originally noticed and scheduled for June 1, 2022. The hearing was continued to June 15, 2022.

The County Court opened the public hearing by making the announcements required by ORS 197.763(5). No party objected to the procedural status of the hearing or the Court’s jurisdiction. There were no objections regarding ex parte contact or conflicts of interest.

Crook County Code (CCC) 18.172.110(12) establishes the standards for a review of an appeal. The hearing was conducted on the record including all evidence and testimony considered by the Planning Commission. The County Court allowed those parties to appear who participated in the Planning Commission’s decision pursuant to CCC 18.172.081(4). No new evidence was allowed.

John Eisler, Assistant County Counsel, summarized the May 25, 2022 staff report (the “Staff Report”), incorporated herein by reference and available on the County’s website or by contacting Community Development. The Staff Report described the project background and procedural history of the application, including the Court’s previous conclusions in Ordinance No. 328. The Staff Report also identified the provisions of CCC 18.144 as the applicable criteria for reviewing requests for mining of significant aggregate and mineral resources in the County’s exclusive farm use (EFU) and forest zones. This determination is based on an extensive review of the relationship between sections of the Crook County Code, specifically chapters 18.16 (Exclusive Farm Use zones), 18.144 (Aggregate Resource Sites) and 18.160 (Conditional Uses). The Staff Report noted that the plain, unambiguous language of chapter 18.144 limits the review and processing of such applications to the confines of chapter 18.144. The Staff Report also reviewed the relevant provisions in their proper context, to determine that the requirements found within chapter 18.160 were either addressed in other provisions or contradicted the purpose of the Program. The Staff Report’s conclusion was that the Planning Commission’s decision found the application satisfied all relevant approval criteria, after excluding the inappropriate application CC 18.160.020(2).

Will Van Vactor, Crook County Community Development Director, summarized the written comments received on the appeal. Comments provided by Knife River (exhibit 81), Monique Davis (exhibit 82), Mona and Don Pomraning (Exhibit 83), and Richard Zimmerlee (exhibit 84). In addition, Knife River and opponents, Jim Newton and Adam Mikulski, offered argument before the County Court at the June 15, 2022 hearing.

Knife River objected to the inclusion of written and oral arguments from other parties in both its final written argument (Ex. 81) and during the hearing. Knife River’s objection is based on the language in CCC 18.172.110(12)(v), which states that the appeal hearing is an “on the record review” limited to “Argument (without introduction of new or additional evidence) by the applicant, appellants or their agents.” Knife River also argued for an interpretation of CCC chapters 18.160 and 18.144 consistent with the Staff Report, meaning that the criteria in CCC chapter 18.160 were inapplicable. Finally, Knife River argued that four of the conditions of approval—numbers 5, 10, 12, and 16—were not clear and objective.

Two parties in opposition to the application presented arguments. Jim Newton, from Cascade Geoengineering, LLC, reiterated previous arguments regarding the certifications of the professionals that prepared the hydrogeologic report and the validity of the report itself. Adam Mikulski presented arguments regarding enforcement of the conditions of approval, precedent for future aggregate locations, and public comment opportunity for the groundwater protection guarantee to be executed by Knife River and Crook County.

The Court then heard from staff addressing the arguments presented during the hearing. The Court also asked clarifying questions of staff before closing the public hearing. After hearing arguments based on the record established before the Planning Commission and reviewing written and oral arguments based on the record, the County Court closed the public hearing for deliberations.

### III. APPLICABLE APPROVAL CRITERIA

#### Crook County Code

##### Title 18 Zoning

Chapter 18.08	Definitions
Chapter 18.16	Exclusive Farm Use Zones, EFU-1 (Post-Paulina Area), EFU-2 (Prineville Valley-Lone Pine Areas), and EFU-3 (Powell Butte Area)
Chapter 18.144	Aggregate Resource Sites
Chapter 18.172	Administrative Provisions
Chapter 18.180	Transportation

### IV. CONCLUSIONS OF LAW

Per CCC 18.172.110(13), the appellate body may affirm, overrule, or modify the decision and shall set forth findings showing compliance with applicable standards and criteria. The appellate body may also remand the decision with instructions to the planning commission,

hearing officer or director who made the original decision to consider additional facts, issues or criteria not previously addressed.

After consideration of the Staff Report and evidence and testimony in the record, the Court finds that:

1. The Appeal meets the criteria in CCC 18.172.110(9). The Appeal request was timely filed and complete. The appeal hearing was an “on the record review.”
2. The Court finds that CCC 18.172.110(12)(a) governs the scope and standard of review for appeal hearings; the section does not control who may participate in such hearings. Subsection (iv) is intended to refine the issues considered under appeal to those raised by the applicant, the appellant, or their agents. This is clear by the preamble in the parent subsection (a), which states that “the review of the final decision shall be confined to the record of the *proceedings below*, which shall include ....” (Emphasis added).
3. The Court finds that CCC 18.172.081(4) governs who may appear at appeal hearings. The section plainly states that for “on-the-record hearing[s],” such as our appeal hearings, those persons who provided written comments or testified during the original proceedings “may appear.” An “Appearance” is defined as “the submission of testimony or evidence in the proceeding, either oral or written.” CCC 18.172.005(2).
4. The Court finds that the application qualifies as “mining of aggregate and other mineral and other subsurface resources” under CCC 18.144.030. Thus, the application “shall be allowed” if it meets the criteria in CCC 18.144.040. The Court adopts and incorporates the interpretation of the relevant code language provided in the Staff Report. Specifically, the unambiguous language in sections 18.144.040 and 18.144.050 describes the process by which such applications should be reviewed, and that process involves an analysis wholly under chapter 18.144 and the Program, to the exclusion of CCC 18.160.020.
5. The Planning Commission included a review of the ESEE analysis developed in the Program through Crook County Ordinance No. 328. The Planning Commission addressed all the criteria in CCC 18.144.040 and processed the application in accordance with the remaining provisions of CCC chapter 18.144. The Planning Commission correctly found that the application satisfied the relevant criteria in 18.144.
6. The Planning Commission’s decision was flawed only in that it also applied the general conditional use criteria of CCC 18.160.020 to the application. As stated above, CCC 18.160.020 is not a proper approval criterion for applications qualifying under CCC 18.144.030. The concerns addressed by the Planning Commission in its analysis of CCC 18.160.020(2) were addressed to the best of the Court’s ability in its development of the Program. As such, the Court’s earlier decision on those matters “shall be binding until changed by amendment to the plan.” CCC 18.144.40(3).
7. The Court finds that by removing the Planning Commission’s conclusions under the inapplicable criterion of CCC 18.160.020(2), the application satisfies its burden on all remaining criteria and should be approved. The Court hereby adopts and incorporates all findings of the Planning Commission’s decision (available on the County’s website or

by contacting Community Development), excepting the section on CCC 18.160.020(2) and the final conclusion. The Planning Commission's analysis regarding impacts to surrounding farm practices under the EFU conditional use criteria of CCC 18.16.020, demonstrates the sufficient evidence in the whole record to satisfy the criteria of CCC 18.144.040(1)(c)-(d).

8. The Court also finds that Conditions of Approval numbers 5, 10, 12, and 16 could be made more definite and certain, for the benefit of the interested parties.

## V. CONCLUSION

Based upon the above findings of fact and conclusions of law, the Crook County Court overrules the March 31, 2022 decision of the Crook County Planning Commission and approves conditional use application 217-21-000573-PLNG. The County Court also revises the conditions of approval, as depicted on Attachment 1 to this decision.

Dated this 6<sup>th</sup> day of July, 2022.

CROOK COUNTY COURT

unavailable

Seth Crawford  
County Judge

Jerry M. Brummer  
Jerry Brummer  
County Commissioner

Brian Barney  
Brian Barney  
County Commissioner

**Attachment 1 – Final Decision**  
**Conditions of approval 217-21-000573-PLNG**

**1. Site Plan:**

The Applicant shall submit an updated site development plan to the Crook County Community Development Department reflecting required setbacks and berms and consistent with applicable conditions of County land use approval. The updated site plan shall be submitted prior to commencement of any site development. Any modification to the site plan will require review and approval by the Crook County Community Development Department.

**2. Water Rights:**

The Applicant shall submit evidence of water rights for mining and reclamation use to the Crook County Community Development Department prior to such use of water.

**3. Setbacks:**

To minimize impacts to neighboring properties, no active mining shall occur closer than 100 feet from property lines on the north, east and south side of the subject property. Mining shall not extend closer than fifty (50) feet from the adjacent parcel 141415, tax lot 701 (the Porfily property) on the west side of the subject property. No setback is required on the boundary with the Woodward property to the west of the subject property (141514, tax lot 703). Berms and groundwater trenches may be placed within the setback areas subject to the final site plan.

**4. Operating Hours:**

Ordinary operating hours shall be Monday through Friday, June 1 through October 31, from 6:00 a.m. to 9:00 p.m., or sunrise to sunset, whichever time period is shorter. Operating hours shall be Monday through Friday, November 1 through May 31, from 7:00 a.m. to 6:00 p.m., or sunrise to sunset, whichever time period is shorter. No operations shall be conducted on weekends or specific holidays. Crook County Code 18.144.060(8)(c) states that no operations shall be conducted on the following legal holidays: New Year's Day, Memorial Day, July 4<sup>th</sup>, Labor Day, Thanksgiving Day, and Christmas Day.

**5. Traffic:**

Access to the subject property shall be limited to the existing access at the Woodward site. Materials will be transferred from the subject property via an internal haul road. No new access is permitted on Stahancyk Lane or Lamonta Road.<sup>1</sup>

**6. Berms:**

Berms are intended to buffer neighboring properties from noise, dust and visual impacts. The Applicant has proposed a height of 8-feet with a slope no steeper than 2:1. The 2:1 slope is intended to allow for mowing of the berms.

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<sup>1</sup> All of the conditions related to access to the Woodward site continue to apply (e.g., daily truck trips, no trucks shall leave or enter the site between 7 minutes before and 7 minutes after the scheduled Crook County School District bus pickup and drop-off times for NW Elliott Lane). The Applicant is responsible for verifying the times with the Crook County School District prior to the start of each school year. The Operator shall train all drivers, including contract drivers, to use caution when existing onto Highway 26 from Elliott Lane.

Berms shall be placed at the time mining begins in adjacent cells to minimize the amount of disturbed ground. Berms will be hydroseeded, irrigated to maintain vegetation, and managed to prevent the spread of noxious weeds. Berms may be placed within the 100-foot property line setback area. Berms shall be removed upon completion of the mining operation.

**7. Dust Mitigation:**

The Applicant shall control all fugitive dust emissions associated with all extraction operations on the site. The Applicant shall implement provisions in the Dust Management Plan (Exhibit 23). Excepting actively mined areas, the Applicant shall stabilize all disturbed areas to minimize dust using hydroseeding or other soil stabilization methods consistent with the Dust Management Plan. The Applicant shall stabilize all stockpile areas with mulch, vegetation, or chemical binders. During non-operation days, the stockpiles and active mining areas shall be sprinkled with water to limit fugitive dust.

When constructing an internal haul road, the Applicant shall construct said road between the subject property and the Woodward processing site with an all-weather surface and aggregate base sufficient to support heavy vehicles and equipment. The surface shall be treated regularly to minimize fugitive dust.<sup>2</sup>

A contact person representing the aggregate operator shall be named and all appropriate contact information shall be provided to Crook County Community Development and to any neighbor that requests such information so the aggregate operator can be contacted if dust is being released. The contact information for the regional office of the Oregon Department of Environmental Quality – Air Quality Division, shall also be provided.

**8. Noise:**

Noise is an impact that has been identified as an issue by surrounding property owners. The berms proposed by the Applicant and limits on operating hours are intended to help minimize noise impacts.

The County has no noise ordinance, but noise is regulated by the Oregon Department of Environmental Quality. To the extent authorized by law, the Applicant agrees to replace existing backup “beepers” on mining equipment and vehicles with directional “white noise” back-up alarms.

**9. Reclamation:**

No more than 10 acres of ground shall be disturbed by mining at any time. The “disturbed area” refers to the active mining area (5 acres) and reclamation cells and does not include the stockpile area or the berm areas. The site will be reclaimed concurrently with mining as cells are completed. Prior to reclamation, the mine operator shall stabilize disturbed areas

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<sup>2</sup> The County Roadmaster provided comments suggesting that the internal haul road shall be constructed to meet the gravel road standards in Crook County Code 17. 36. Although such roads are typically 20’ wide, the Crook County Roadmaster recommends a travel width of 24’ wide to allow for passage of two trucks at the same time.

using hydroseeding or other soil stabilization products to help minimize dust from disturbed areas.

Upon completion of mining cells, the Applicant agrees to remove standing water. Overburden will be replaced and ripped and disked to reduce compaction. Topsoil will be replaced. Reseeding will occur in the next planting season, but soil will be stabilized until planting can occur. The site will be reclaimed concurrently with mining as cells are completed.

All reclamation activities shall be subject to a reclamation plan approved by the Oregon Department of Geology and Mineral Industries (DOGAMI). The Applicant shall work with the property owner to ensure that reclamation is carried out in a manner that restores the property to its current use for grazing and hay production.

**10. Groundwater:**

The Applicant acknowledges that groundwater may be encountered while mining the Subject Property. If water is encountered, it will be pumped out of the mining area and infiltrated on-site into recharge trenches as described in the Hydrogeologic Characterization report and in Exhibit 33. Groundwater concerns pose economic, social and environmental issues for neighboring properties within the impact area. It is understood that requirements of groundwater monitoring and remediation may have economic consequences for the mine operator. Table 3 of the Aggregate Mine Hydrogeologic Characterization report identifies wells that have potential to be influenced by mining activities on the Vanier property in the absence of mitigation.

The Applicant has identified properties within the 500-foot buffer area for baseline testing. These properties identified by the Applicant primarily have relatively shallow wells (drilled above 40-feet) that are in the same aquifer and similar depth to the area proposed for mining.

Baseline data shall be collected for said wells within the 500-foot buffer area prior to mining, and information collected shall be provided to the respective property owner and Crook County Community Development Department.<sup>3</sup> Baseline testing will consist of water level measurements for the wells and discharge measurements of spring flow, as appropriate. Baseline water quality testing will consist of GRO (Gasoline Range Organics), DRO (Diesel Range organics), turbidity, total dissolved solids, iron, manganese, pH, conductivity and temperature.<sup>4</sup>

The Operator shall collect on-site monitoring of well water quantity data continuously and on-site well water quality data quarterly and shall share all collected data quarterly with designated well/spring owners who have granted access and sampling permission. Prior to

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<sup>3</sup> The Applicant has proposed baseline water quality and quantity testing of three wells (shallow wells on the Vanier property and wells on the Mikulski and Johnson properties) and two springs on the Davis property (page 2, Exhibit 24).

<sup>4</sup> The Hydrologic Report (Table 3) also identifies an additional thirty-nine (39) wells within 1/2 mile of the subject property that share the same aquifer and could have "possible adverse impacts" in the absence of mitigation measures.



mining through a trench or a monitoring well, all previously collected groundwater data will be reviewed by a licensed professional geologist or engineer. This data analysis shall consider the relocation and placement of the next infiltration trench and monitoring wells as well as any potential adverse impacts to surrounding properties. The Operator shall adjust the Mine Plan to minimize or eliminate any mine-related adverse impacts. All data shall be maintained on file for the duration of the mining operation (or 6 (six) months after reclamation has been completed and the reclamation bond released by DOGAMI.

The Applicant has proposed a groundwater protection guarantee. The Applicant will work with the Crook County Community Development Department and Crook County Counsel to finalize the groundwater protection guarantee. Such guarantee shall be reviewed by the Crook County Court during a regular Count Court meeting as a discussion item with opportunity for public comment.

Said groundwater protection guarantee will ensure, at a minimum, that any injury to the quality or quantity of water is promptly and completely compensated through the interim measures by the Applicant for the period of the appropriate state agency's reviews, and that should causation for said injury be determined by the state agency to be attributed to operator, said injury shall be remedied in a complete and permanent manner. The Applicant shall be responsible for reimbursing property owners for any expenses to address groundwater quality and quantity impacts. Any violation of the groundwater protection guarantee by the Applicant shall be prosecuted by the County under CCC 18.144.070, in addition to other remedies or penalties under law. The Groundwater Protection Guarantee Agreement shall remain in force until 6 (six) months after reclamation has been completed and/or the reclamation bond has been released by DOGAMI.

### **Additional Conditions**

The following conditions are proposed to address specific criteria in CCC 18.144.

#### **11. Security:**

Crook County Code 18.144.050(6) requires the Applicant to include a security plan. All vehicles and equipment shall be parked in a secure area on the Woodward processing site. No vehicles or equipment shall be parked on the subject property. No lights shall be placed on the site.

#### **12. Surface water:**

Crook County Code 18.144.060(10) Development Standards Surface and Ground Water Management. Surface water shall be managed to provide protection against ground or surface water contamination and sediment discharge into streams, rivers and lakes. All equipment and vehicles operating near exposed water will be inspected daily for possible oil leaks and repaired if necessary prior to use. A spill kit for containing hydrocarbon releases will be kept with the equipment operating near exposed water should it be needed. The Applicant shall maintain a spill log onsite. The Applicant shall report any incidents that would impose a reporting requirement to a state agency to Crook County Community Development and the Crook County Fire and Rescue Department by the next business day.

The Applicant shall work with Crook County's Vector Control District to develop a mosquito control plan and provide a copy to the Crook County Community Development Department prior to commencing mining operations.

**13. Weed Control:**

The Applicant consulted with the County Weedmaster who agreed that the noxious weed control plan for the Woodward site could be extended to the subject property. Crook County Code 18.144.070(13) requires that the operator shall document compliance with the noxious weed control plan on a yearly basis by submittal of a written report to the Crook County Weedmaster. The report shall be submitted not later than December 15th of each year.

**14. Emergency Management:**

The final site plan shall be provided to the Crook County Fire and Rescue District's Fire Marshall. Contact information for the on-site operations manager shall be provided to the Fire Marshall

**15. Archaeological and Cultural Resources:**

The Applicant shall engage with Oregon's State Historic Preservation Office as part of the development process to ensure that requirements related to cultural and historic resources are met. This may require the Applicant to provide on-site surveys of the property. The Applicant will adopt an "inadvertent discovery plan" to address best management practices for archaeological and cultural discoveries during operations. <sup>5</sup>

**16. Modifications:**

Any modification of operations beyond the scope of this Conditional Use Permit Approval or the Comprehensive Plan Amendment shall be subject to County Planning Commission review and amendment of the Crook County Comprehensive Plan.

**17. State Permits:**

The Applicant shall provide a copy of the department of Geology and Mineral Industries operation and reclamation plan to the Crook County Community Development Department. If a stormwater management permit is required by the Department of Environmental Quality, a copy of that permit shall also be provided to the Department.

**18. ESEE Analysis:**

The ESEE Analysis and Program to Achieve the Goal applied only to sand and gravel extraction. No processing, crushing, blasting or asphalt production will be allowed on the subject property. All processing activities will take place on the Woodward property (tax lot 1415140000702) and will be located more than 500 feet from existing residences.

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<sup>5</sup> In reviewing the plan amendment to add the site to the Goal 5 inventory of significant mineral and aggregate resources, the decision identified potential conflicts with other Statewide Planning goals. Specifically, Goal 5 includes protection of historic and cultural resources (OAR 660-015-0000(5)). The Plan Amendment included the following: "The Applicant will be required to submit an "inadvertent discovery plan" regarding notification to the State Historic Preservation Office in the event of discovery of any natural or cultural resources. This will be addressed in the review of the conditional use permit."

Processing activities are subject to conditions in the 2015 conditional use permit for the Woodward property (217-15-000115-PLNG).