

FILED

HEARING EXAMINER

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FILE NO. APL2017-063, APL2017-004

Public Services (v)

NOV 17 2017

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Harold Lisa Carmen

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**BEFORE THE HEARINGS EXAMINER
IN AND FOR YAKIMA COUNTY**

**In the matter of the Consolidated
Appeals of:**

No. APL2017-00003

No. APL2017-00004

**CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA NATION, a sovereign
Nation of the United States,**

APPELLANT'S OPENING BRIEF

Appellant,

and

**SELAH MOXEE IRRIGATION
DISTRICT, a Washington State irrigation
district organized pursuant to Chapter 87.03
RCW,**

Appellant,

v.

**YAKIMA COUNTY, a political subdivision
of the State of Washington,**

Respondent,

and

**GRANITE NORTHWEST, INC, a
Washington corporation; FRANK
ROWLEY and/or the ROWLEY FAMILY
TRUST c/o Frank Rowley,**

Respondents.

APPELLANT'S OPENING BRIEF - 1

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1 **I. INTRODUCTION**

2 The following principal matters remain at issue in this appeal¹:

3 **A. Yakima County Failed To Identify Significant Impacts.**

4 Washington law requires counties to identify significant impacts a permit application is
5 likely to cause before issuing a threshold determination, and relying on that determination for a
6 land use decision (Land Use Decision).² Here, Yakima County issued its threshold
7 determination regarding the above-referenced Land Use Decision³ without identifying significant
8 impacts to cultural resources within the affected archaeological site and dedicated historical
9 cemetery. Yakima County’s Land Use Decision and the associated threshold determination
10 therefore violates applicable law and the Land Use Decision should be reversed.

11 **B. Yakima County’s Authorization Permits Mining In A Historical Cemetery.**

12 Washington law protects historical cemeteries and prohibits destruction or injury to any
13 dedicated historical cemetery. Dedication of a historical cemetery is automatic when, as an
14 example, a Yakama burial ground (Burial Ground) meets the statutory definition of a cemetery.⁴
15 Here, Yakima County has authorized mining (*i.e.*, destruction or injury) to a historical cemetery.
16 This is a separate ground under which Yakima County’s Land Use Decision violates applicable
17 laws and should be reversed.

18 **C. Respondents’ Arguments Do Not Resolve The Legal Deficiencies Of The
19 Land Use Decision.**

20 Yakima County and Granite Northwest, Inc. (Granite) will argue that an exhaustive

21 ¹ With respect to the issue of authorizing excavation of an archaeological site without a requisite permit from the
22 Washington State Department of Archaeology and Historic Preservation (DAHP), the Hearing Examiner ruled on
23 this matter and ordered that to the extent this matter is not remanded or reversed, the required DAHP excavation
24 permit be revised to clearly indicate that no excavation may be undertaken unless and until Granite Construction Co.
25 Hearing Examiner’s Rulings on Preliminary Motions re APL 2017-00003 and APL 2017-00004 (August 23,
26 2017)(Hearing Examiner’s Rulings on Preliminary Motions), pp. 2-4. Yakama Nation hereby preserves this issue
for any further appeal necessary on this matter.

² RCW § 43.21C.030.

³ Specifically Yakima County’s Mining Site/Operation Expansion Final Decision (PRJ2014-000216/CUP2015-
00037/SEP2015-00016).

⁴ RCW § 68.60.040; RCW § 68.60.020.

1 years-long process was undertaken to identify significant impacts, and that all such impacts were
2 properly mitigated leading to a legally sufficient Land Use Decision. But neither Yakima
3 County nor Granite can ignore the fact that Yakima County knew that a complete archaeological
4 and cultural resources survey was needed before any threshold determination could be made, and
5 correspondingly, before any land use decision could be made based on that threshold
6 determination. Yakama Nation and DAHP—both of which are acknowledged as the leading
7 entities with the expertise and capacity to advise Yakima County on the remaining issues in this
8 appeal—both repeatedly called Yakima County’s attention to the problems with Granite’s permit
9 application and advised Yakima County on how to resolve those problems properly. Yakima
10 County disregarded those concerns ultimately, and decided instead to embrace Granite’s self-
11 serving analysis that cultural resource concerns could be deferred or punted to DAHP. Why
12 Yakima County decided to reverse course and permit Granite’s plans to expand its mining
13 operations within an archaeological site and historical cemetery (*i.e.*, the Burial Ground) is
14 unknown. What is known is that Yakima County’s decision to reverse course and issue a
15 threshold determination and corresponding Land Use Decision without the facts and analysis
16 necessary to determine significant impacts is not permitted under applicable law. Put simply,
17 Yakima County must identify the significant impacts before it can issue its Land Use Decision.
18 And the County failed to do so when it came to the Burial Ground that Granite now seeks to
19 mine. Those failures render the mitigation measures underpinning Yakima County’s Land Use
20 Decision virtually meaningless; how can you mitigate for impacts you have failed to identify?

21 Yakima County and Granite will also posit that there is no dedicated historical cemetery
22 in the proposed mining expansion area because Yakama Nation cannot prove—by some exacting
23 arbitrary standard of their choosing—that this burial ground meets the statutory criteria for a
24 historical cemetery (*i.e.*, “any burial site or grounds which contain within them human remains
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26

1 prior to November 11, 1889”).⁵ But this argument is wholly dependent on the central problem
2 raised in this appeal: the fact that Yakima County has not required Granite to furnish adequate
3 information to determine the likely impacts of Granite’s proposed mine expansion. In effect, the
4 argument against Yakama Nation’s position on the issue of destroying a historical cemetery is
5 that, according to Granite, Yakama Nation is unable to prove that its Burial Ground is, in fact, a
6 burial ground containing human remains. Yakama Nation’s response to that is that the historical
7 record, the archaeological studies, and the publicly available imagery related to this site furnishes
8 adequate proof; but beyond this, Granite will not permit Yakama Nation to ascertain the
9 definitive nature of the Burial Ground, and, furthermore, Yakima County will not require Granite
10 to perform adequate surveys within the mining expansion area to determine the nature and extent
11 of the Burial Ground. Even Granite’s own commissioned archaeologist concedes this point, as
12 demonstrated further below. He admits there are probably human burials among the talus
13 features found throughout the site at issue. In short, Yakima County cannot permit excavation
14 and mining of a historical cemetery by claiming it does not know whether it is a historical
15 cemetery when its ignorance or “lack of proof” springs from Granite’s refusal to do the legally
16 required analysis of the burial ground and the County’s acquiescence to that refusal.

17 Based on the foregoing and other facts, evidence, and argument identified in this Opening
18 Brief, Yakima County’s Land Use Decision must be reversed.

19 The Yakama Nation expressly reserves and does not waive its arguments or defenses
20 available at law or equity in this administrative appeal, including but not limited to the Yakama
21 Nation’s sovereign immunity from suit and all rights, privileges, remedies, and services
22 guaranteed by the Treaty with the Yakamas of 1855.⁶ The Yakama Nation’s sole intent in
23 bringing this appeal is to protect the Yakama Nation’s ancestors and cultural resources from
24 destruction, desecration, or injury as a result of Yakima County’s Land Use Decision and, as

25 _____
⁵ RCW 68.60.010; *See also* RCW § 68.04.040 (definition of “cemetery”).

26 ⁶ Treaty with the Yakamas of 1855, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951 (ratified March 8, 1859).

1 incorporated by reference, its Final MDNS.

2 II. FACTUAL BACKGROUND

3 A. Background of The Yakama Nation and The Mine At Issue

4 The Yakama Nation is a sovereign, federally recognized Nation pursuant to the Treaty of
5 1855.⁷ The Yakama Nation's cultural resources are situated throughout its territory, including
6 territories beyond the exterior boundaries of its Reservation. These resources, including the
7 Burial Ground and other resources at issue here, are the foundation for the Yakama Nation's
8 culture, heritage, and religion, and the Yakama People's spiritual relationship to their land and
9 ancestors. The Yakama Nation has never ceded rights to its ancestors' burial grounds or to any
10 of its cultural resources, and retains usufructuary rights in the same.

11 The Rowley Quarry is an active gravel mine located entirely within the Burial Ground,⁸
12 which lies at the confluence of the Yakima River and Naches River at Selah Gap. The Burial
13 Ground sits on the talus slope above *Wanapine*,⁹ a historic Yakama fishing village near a section
14 of what used to be fast water on the Yakima River before the Roza Dam was constructed.¹⁰
15 *Wanapine* is associated with two other significant burial sites in the immediate area: YA110 and
16 YA610.¹¹

17 The Burial Ground has been identified as a burial site since the mid-19th century. The
18 earliest written account of the Burial Ground is from Mr. George Gibbs, as excerpted by Mr.

19
20 ⁷ *Id.*

21 ⁸ Letter from Gretchen Kaehler, Assistant State Archaeologist, to Lynn Deitrick, Yakima County Planning Manager
(Aug. 11, 2015) (on file with Yakima County Planning Division) (stating "The proposed mind [sic] expansion is
22 completely encompassed by archaeological site 45YA109 . . ."); Email from Gretchen Kaehler, Assistant State
23 Archaeologist, to Tommy Carroll, Yakima County Planning (Aug. 18, 2015) (stating "The project area is within
archaeological site 45YA109. The site boundaries have not changed. We have not agreed to any protective
measures or buffers and are not sure how the [sic] anything would be buffered since the project area is encompassed
by the archaeological site.").

24 ⁹ Letter from Johnson Meninick, Yakama Nation Cultural Resources Program Manager, to Byron Gumz, Yakima
County Planning Department (Aug. 10, 2015) (on file with Yakima County Planning Division).

25 ¹⁰ YAKAMA NATION CULTURAL RESOURCES PROGRAM, ARCHAEOLOGICAL SITE INVENTORY FORM: 45YA109 (2016)
(on file with Washington State Department of Archaeology and Historic Preservation).

26 ¹¹ *Id.*

1 Henry Rowe Schoolcraft, in 1854.¹² Mr. Gibbs was a geologist and member of Captain George
2 B. McClellan’s expedition to scout paths for roads, trails, and railroad passes across the West,
3 which brought him within the general area of *Wanapine* for two weeks.¹³ During his time there,
4 Mr. Gibbs recorded:

5 “At many points on these [valley] walls there were also many
6 graves, generally made in regular form, covered with loose stones
7 to protect them from cayotes [sic], and marked by poles decorated
8 with tin cups, powder-horns, and articles of dress . . .”¹⁴

9 In fact, Mr. Gibbs noticed a complex of talus-pit burials along the hillsides throughout the
10 *Wanapine* area—including the Burial Ground—dating the identified graves to well before
11 Washington’s statehood in 1889.

12 In 1910, Archaeologist Harlan Smith confirmed Mr. Gibbs’ documentation of talus-pit
13 burials in the Burial Ground and surrounding areas.¹⁵ Specifically, Mr. Smith noted “a number
14 of scattered graves covered with rock-slide material,” some of which had already been disturbed
15 with remains scattered nearby.¹⁶ Mr. Smith also identified intact burials within the Burial
16 Ground, and excavated at least one talus pit burial that held the remains of two individuals.¹⁷

17 In support of Mr. Smith’s findings, in 1958 Archaeologist Bruce Stallard identified the
18 Burial Ground as a burial site.¹⁸ In 1966 and 1969, Archaeologist David Rice likewise identified
19 the Burial Ground as a burial site.¹⁹ In 1999 by Yakama Nation Archaeologist Greg Cleveland

20 ¹² H.R. SCHOOLCRAFT, HISTORICAL AND STATISTICAL INFORMATION RESPECTING THE HISTORY, CONDITION AND
21 PROSPECTS OF THE INDIAN TRIBES OF THE UNITED STATES (1854).

22 ¹³ *Id.*

23 ¹⁴ *Id.*

24 ¹⁵ H.I. SMITH, THE ARCHAEOLOGY OF THE YAKIMA VALLEY (1910).

25 ¹⁶ *Id.*

26 ¹⁷ *Id.*

¹⁸ B. STALLARD, ARCHAEOLOGICAL SITE INVENTORY FORM: 45YA109 (1958) (on file with Washington State Department of Archaeology and Historic Preservation).

¹⁹ D. RICE, ARCHAEOLOGICAL SITE INVENTORY FORM: 45YA109 (1966) (on file with Washington State Department of Archaeology and Historic Preservation); D. RICE, ARCHAEOLOGICAL RECONNAISSANCE SOUTH-CENTRAL CASCADES (Washington Archaeological Society 1969) (on file with Washington State Department of Archaeology and Historic Preservation).

1 followed suit.²⁰ And in 2016 the Yakama Nation Cultural Resources Program again identified
2 the Burial Ground as a site containing human remains.²¹ On August 11, 2015, the Washington
3 State Department of Archaeology and Historic Preservation (“DAHP”) notified Yakima County
4 by letter that the Burial Ground contains “talus pits and human burials.”²² Archaeological
5 Investigations Northwest (“AINW”)—Granite’s contracted archaeologist—also surveyed limited
6 portions of the Burial Ground in 2000 and 2008. In its recent Archaeological Excavation Permit
7 Application, AINW recognized that “[o]verall, the talus features at 45YA109 are considered
8 likely to have been used for human burials as well as for food storage.”²³

9 Granite’s expert archaeologist, Dr. Michael Fagan—who is also AINW’s principal and its
10 president—has worked on this site for Granite and its predecessor for well over a decade.²⁴
11 During this time, he witnessed the destruction of a known recorded archaeological site and,
12 despite state laws to the contrary, apparently sanctioned the removal of artifacts from that
13 archaeological site before the area was mined and the site was destroyed.²⁵ On the question of
14 the talus features, which was one method of burial Yakamas used to bury their ancestors, Dr.
15 Fagan acknowledges that he has “seen numerous talus features on almost every slope” within
16 archaeological site 45YA109.²⁶ On the question of whether those talus features are human
17 burials within the Burial Ground here, Dr. Fagan equivocates, but concedes at his deposition
18 nonetheless that at least some of the talus features within the Burial Ground are “probably”
19 burial sites:

20 ²⁰ G. CLEVELAND, ARCHAEOLOGICAL SITE INVENTORY FORM: 45YA109 (1999) (on file with Washington State
21 Department of Archaeology and Historic Preservation).

22 ²¹ YAKAMA NATION CULTURAL RESOURCES PROGRAM, ARCHAEOLOGICAL SITE INVENTORY FORM: 45YA109 (2016)
(on file with Washington State Department of Archaeology and Historic Preservation).

23 ²² Letter from Gretchen Kaehler, Assistant State Archaeologist, to Lynn Deitrick, Yakima County Planning Manager
(Aug. 11, 2015) (on file with Yakima County Planning Division).

24 ²³ JOHN L. FAGAN, ARCHAEOLOGICAL INVESTIGATIONS NORTHWEST, INC., DEPARTMENT OF ARCHAEOLOGY AND
25 HISTORIC PRESERVATION ARCHAEOLOGICAL SITE EXCAVATION AND REMOVAL PERMIT APPLICATION (May 27,
2016) (on file with the Yakima County Planning Division).

26 ²⁴ Deposition of John Fagan, September 28, 2017 (Fagan Dep.), p. 43, l. 16 – p. 44, l. 9.

²⁵ *Id.*, p. 43, l. 4 – p. 44, l. 9.

²⁶ *Id.*, p. 31, ll. 7-8.

1 Fagan: But I don't think they're all burials. I think there are probably are some burials
2 but...

3 Counsel: Within the site that we're talking about, site 45YA109 as it exists today?

4 Fagan: Yes, there probably are.²⁷

5 Accordingly, although Dr. Fagan does not believe that *all* of the more than 50 talus features
6 identified in the Burial Ground—features, again, Dr. Fagan describes as being on “almost every
7 slope” in the Burial Ground—are “necessarily” burial sites, he concedes there “probably are
8 some burials” within the Burial Ground. Similarly, Yakima County official Tommy Carroll
9 acknowledges that there are likely human burials within the Burial Ground.²⁸ Neither Dr. Fagan
10 nor Granite know which of these talus features contain human burials.

11 **B. Current Activity at the Burial Ground**

12 Today, Granite is actively mining the Burial Ground as it has done since at least 2007.²⁹
13 Granite is a California-based publicly traded construction and construction-materials corporation
14 with approximately 5,000 employees and \$2.3 billion in annual revenue.³⁰ Moreover, Granite
15 has failed to secure, as of the date of this brief, the Archaeological Site Alteration and Removal
16 Permit from DAHP for the necessary archaeological and cultural resource survey, its current
17 mining operations, or its proposed mine expansion. Its continued mining without said permit
18 violates Washington State law.³¹ Granite is also in violation of its reclamation permit for failing
19 to mine within its permitted area, maintain adequate setbacks, comply with its plan and permit
20 conditions, and pay its annual fees, according to the Washington State Department of Natural
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22 ²⁷ *Id.*, p. 32, ll. 1-5.

23 ²⁸ Deposition of Thomas Carroll, October 5, 2017 (Carroll Dep.), p. 62, ll. 12-14.

24 ²⁹ SUPERIOR ASPHALT & CONCRETE CO., REQUEST FOR TRANSFER OF SURFACE MINE RECLAMATION PERMIT (FORM
SM-2B) (approved June 5, 2007) (transferring Reclamation Permit No. 70-012774 to Granite Northwest, Inc. for the
Rowley Quarry).

25 ³⁰ Granite Construction Co., Granite Construction Overview (last visited Aug. 16, 2016)

<https://www.graniteconstruction.com/sites/default/files/2016-03/2016%20Granite%20Fact%20Sheet.pdf>.

26 ³¹ Email from Gretchen Kaehler, Assistant State Archaeologist, to Thomas Carroll, Yakima County Planning
Division (Aug. 18, 2015) (on file with Yakima County Planning Division).

1 Resources.³²

2 **III. PROCEDURAL HISTORY**

3 **A. Conditional Use Permit Application and SEPA Process**

4 On April 10, 2015, Granite submitted a conditional use permit application and State
5 Environmental Policy Act (“SEPA”) Checklist with Yakima County to expand its gravel mining
6 operation within the Burial Ground.³³ The Yakama Nation Cultural Resources Program and
7 DAHP each filed letters raising concerns about Granite’s application, which expressly noted
8 Granite’s failure to obtain an Archaeological Site Alteration and Excavation permit.³⁴

9 As a result, on September 18, 2015, Yakima County sent Granite a letter requesting proof
10 that Granite obtained the necessary permits from DAHP for its current mining operation and
11 proposed expansion of its mining operation.³⁵ Granite then requested and received an extension
12 on its conditional use permit application so that it could work with DAHP to obtain
13 Archaeological Site Alteration and Excavation Permits.³⁶ Roughly five months later, Yakima
14 County informed Granite by letter that Yakima County placed Granite’s conditional use permit
15 application on hold.³⁷ The County stated “Once DAHP’s process is complete . . . Yakima
16 County will continue processing your permit applications.”³⁸

17 On March 11, 2016, the Yakama Nation requested by letter that Yakima County first
18 require Granite to update its SEPA Checklist to accurately reflect the complex of talus burial pits
19

20 ³² BRYAN MASSEY, WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, SURFACE MINE RECLAMATION
21 INSPECTION REPORT (January 20, 2016) (on file with the Washington State Department of Natural Resources).

22 ³³ JAMES ESSIG, YAKIMA COUNTY PUBLIC SERVICES’ GENERAL APPLICATION FORM FOR LAND USE ACTIONS (filed
23 April 10, 2015).

24 ³⁴ Letter from Johnson Meninick, Yakama Nation Cultural Resources Program Manager, to Byron Gumz, Yakima
25 County Planning Dept. (Aug. 10, 2015); Letter from Gretchen Kaehler, Assistant State Archaeologist, to Lynn
26 Deitrick, Yakima County Planning Manager (Aug. 11, 2015).

³⁵ Letter from Noelle Madera, Yakima County Senior Project Planner, to Granite Construction (Sept. 18, 2015).

³⁶ Letter from Noelle Madera, Yakima County Senior Project Planner, to James Essig, Granite Construction (Nov. 4,
2015).

³⁷ Letter from Byron Gumz, Yakima County Senior Project Planner, to Granite Construction Company (March 3,
2016).

³⁸ *Id.*

1 located within the Burial Ground, and then to issue a determination of significance triggering an
2 environmental impact statement for Granite’s proposal.³⁹ Granite filed a revised SEPA Checklist
3 on July 20, 2016, with updated historic and cultural preservation information describing the
4 archaeological investigations that Granite would complete in the future in consultation with
5 DAHP and the Yakama Nation.⁴⁰ No such consultation has occurred. And to date, Granite has
6 still never obtained an Archaeological Site Alteration and Excavation Permit for either its current
7 mining operations or its plans to expand mining within the Burial Ground.

8 **B. County’s First MDNS for Granite’s Mining Expansion At The Burial Ground**

9 Despite Granite’s failure to engage DAHP and the Yakama Nation, and its failure to
10 secure the requisite permits and archaeological analysis for its mine expansion plans, on August
11 3, 2016, Yakima County issued its Mitigated Determination of Non-Significance (“First
12 MDNS”) for Granite’s conditional use permit application and SEPA Checklist.⁴¹ The First
13 MDNS stated, in pertinent part, that “[t]he extraction of mineral resources from this area has the
14 potential to disturb cultural resources.”⁴² Yakima County provided one mitigation measure and
15 one mitigation measure only.⁴³ This measure required Granite to obtain an Archaeological Site
16 Alteration and Excavation Permit from DAHP prior to any ground disturbing activities within
17 the mine expansion area.⁴⁴

18 The Yakama Nation submitted a public records request with Yakima County on August
19 5, 2016, seeking “[a]ny and all records that Yakima County relied on . . . when making its
20

21 ³⁹ Letter from JoDe L. Goudy, Yakama Nation Tribal Council Chairman, and Gerald Lewis, Yakama Nation Tribal
22 Council Cultural Committee Chairman, to Byron Gumz, Yakima County Senior Project Planner (March 11, 2016).

23 ⁴⁰ JAMES ESSIG, YAKIMA COUNTY PUBLIC SERVICES’ SEPA ENVIRONMENTAL REVIEW SUBMITTAL CHECKLIST (July
24 20, 2016) (stating “[i]n order to assess and mitigate the potential impacts of the proposed action, AINW will conduct
25 additional archaeological investigations of 45YA109 within the Expansion Area . . . [t]his work will be done in
26 consultation with DAHP and the Yakama Indian [sic] Nation.”).

⁴¹ LYNN DEITRICK, MITIGATED DETERMINATION OF NON-SIGNIFICANCE (Aug. 3, 2016).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

1 threshold determination on CUP2015-00037/SEP2015-00016.”⁴⁵ Yakima County responded to
2 the public records request prior to the August 18th comment deadline. Thereafter, the Yakama
3 Nation timely submitted two objection letters—one from the Yakama Nation Cultural Resources
4 Program and one from the Yakama Nation Tribal Council—opposing Yakima County’s First
5 MDNS because it failed to meet SEPA’s procedural and substantive requirements.⁴⁶ DAHP also
6 timely submitted its objection letter to Yakima County opposing Yakima County’s First
7 MDNS.⁴⁷ DAHP’s objection provided unequivocally that Yakima County’s MDNS “is not
8 sufficient, has not fully identified areas of cultural value and importance and therefore does not
9 contain mitigation measures for those areas.”⁴⁸

10 On October 7, 2016, the Yakama Nation submitted a revised Archaeological Site Form
11 for Archaeological Site 45YA109 to DAHP.⁴⁹ DAHP, in turn, recorded the revised
12 Archaeological Site Form and uploaded it to DAHP’s database on November 9, 2016.⁵⁰ On
13 November 29, 2016 Granite’s archaeological contractor, AINW, provided a Cultural Resource
14 Survey of the Burial Ground to Yakima County in support of its conditional use permit
15 application.⁵¹

19 ⁴⁵ ETHAN JONES, PUBLIC RECORDS REQUEST FORM RCW CHAPTER 42.56 PUBLIC RECORDS ACT (submitted Aug. 5,
20 2016).

21 ⁴⁶ Letter from JoDe Goudy, Yakama Nation Tribal Council Chairman, and Gerald Lewis, Yakama Nation Tribal
22 Council Cultural Committee Chairman, to Lynn Deitrick, Yakima County SEPA Responsible Official (Aug. 18,
23 2016); Letter from Johnson Meninick, Yakama Nation Cultural Resources Program Manager, to Tommy Carroll,
24 Yakima County Planning Section Manager (Aug. 2, 2016).

25 ⁴⁷ Letter from Gretchen Kaehler, Assistant State Archaeologist, to Byron Gumz, Yakima County Senior Project
26 Planner (Aug. 18, 2016).

⁴⁸ *Id.*

⁴⁹ YAKAMA NATION CULTURAL RESOURCES PROGRAM, STATE OF WASHINGTON ARCHAEOLOGICAL SITE UPDATE
INVENTORY FORM FOR SITE 45YA109 (transmitted Oct. 7, 2016).

⁵⁰ Email from Morgan McLemore, Dept. of Archaeology and Historic Preservation, to Jessica Lally, Yakama Nation
Cultural Resources Program (November 9, 2016) (on file with the Yakama Nation Cultural Resources Program).

⁵¹ ARCHAEOLOGICAL INVESTIGATIONS NORTHWEST, INC., CULTURAL RESOURCE REPORT FOR THE PROPOSED
ROWLEY QUARRY PROJECT AREA, YAKIMA COUNTY, WASHINGTON (Nov. 29, 2017).

1 This Cultural Resource Survey failed to account for the revised Archaeological Site Form
2 for Archaeological Site 45YA109, and it expressly disregarded the recorded site boundary for
3 Archaeological Site 45YA109, amongst other identified technical deficiencies.

4 Despite Granite’s failure to either obtain a permit from DAHP or provide a cultural
5 resources survey adequately identifying human burials and other archaeological and cultural
6 resources that would be impacted in its expanded mining, in January 2017, Yakima County
7 issued⁵² a revised Mitigated Determination of Non-Significance (“Second MDNS”) for Granite’s
8 conditional use permit application and SEPA Checklist.⁵³ In response, the Yakama Nation
9 submitted a second public records request with Yakima County seeking “[a]ny and all records
10 that Yakima County relied on . . . when making its threshold determination on CUP2015-
11 00037/SEP2015-00016, and which were not previously disclosed in response to the Yakama
12 Nation’s August 5, 2016 public records request.”⁵⁴

13 Based on Yakima County’s Second MDNS and administrative record, the Yakama
14 Nation submitted two more objection letters—one from the Yakama Nation Cultural Resources
15 Program and one from the Yakama Nation Tribal Council—opposing Yakima County’s Second
16 MDNS for many of the same reasons raised in the Yakama Nation’s prior objection letters. In
17 short, although significant time had passed due to Granite’s failure to do the work necessary to
18 properly complete its permit process, and although cursory efforts were made to perform an
19 updated cultural resources survey, the issues DAHP and the Yakama Nation repeatedly raised
20 regarding human burials and archaeological and cultural resources remained unaddressed.
21 Namely, Yakama Nation objected to the technical deficiencies of Granite’s Cultural Resources
22 Report (a report that repeated previous deficiencies), and Yakama Nation objected to Yakima
23 County’s new mitigation measures for cultural resources because they violate SEPA and

24 ⁵² On February 2, 2017, Yakima County re-issued its Second MDNS.

25 ⁵³ LYNN DEITRICK, MITIGATED DETERMINATION OF NON-SIGNIFICANCE (Feb. 2, 2017).

26 ⁵⁴ ETHAN JONES, PUBLIC RECORDS REQUEST FORM RCW CHAPTER 42.56 PUBLIC RECORDS ACT (submitted Jan. 31, 2017).

1 LUPA.⁵⁵ DAHP also timely submitted its objection letter opposing Yakima County’s Second
2 MDNS.⁵⁶ DAHP requested an environmental impact statement, and, like Yakama Nation, noted
3 insufficiencies in Granite’s draft cultural resources report.⁵⁷

4 Despite the significant and repeated objections of the Yakama Nation Tribal Council,
5 Yakama Nation Cultural Resources Program, DAHP, and other interested parties, on April 7,
6 2017, Yakima County issued its Land Use Decision and Final MDNS authorizing Granite’s
7 conditional use permit to expand Granite’s gravel mine within the Burial Ground. To date,
8 Granite has not submitted to DAHP a complete application for an Archaeological Site Alteration
9 and Excavation Permit, or received such a Permit for either its active mining operations or
10 proposed mine expansion as of the date this Land Use Petition was filed.

11 IV. LEGAL ARGUMENT

12 The Yakama Nation objects to Yakima County’s ‘substantive determinations’ in its Land
13 Use Decision and Final MDNS because they violate SEPA and LUPA. In addition, the Yakama
14 Nation challenges Yakima County’s authority to issue its Land Use Decision and Final MDNS in
15 violation of RCW 27.53, RCW 68.60, and RCW 27.44. Given the significant deficiencies in
16 Yakima County’s Land Use Decision, the Yakama Nation seeks its reversal with an order
17 directing Yakima County to, *inter alia*, work with the Yakama Nation and DAHP to determine
18 the actual impacts to the Burial Ground and ensure compliance with all applicable laws and
19 regulations prior to re-issuing any permit for Granite’s proposed expanded mining operations.

20 The Yakama Nation is mindful of the Hearing Examiner’s August 23, 2017 Order
21 specifying that challenges to the County’s substantive, rather than procedural, determinations are

23 ⁵⁵ Letter from JoDe Goudy, Yakama Nation Tribal Council Chairman, and Gerald Lewis, Yakama Nation Tribal
24 Council Cultural Committee Chairman, to Lynn Deitrick, Yakima County SEPA Responsible Official (Feb. 15,
25 2017); Letter from Johnson Meninick, Yakama Nation Cultural Resources Program Manager, to Tommy Carroll,
26 Yakima County Public Services, and Byron Gumz, Yakima County Public Services (Feb. 1, 2017).

⁵⁶ Letter from Gretchen Kaehler, Assistant State Archaeologist, to Byron Gumz, Yakima County Senior Project
Planner (Feb. 15, 2017).

⁵⁷ *Id.*

1 properly before the Hearing Examiner. While many of the following arguments qualify as
2 challenges to both procedural or substantive determinations, the Yakama Nation’s intention is
3 that such arguments address the County’s substantive determinations under RCW 43.21C.060’s
4 standard requiring mitigation measures to be “reasonable and capable of being accomplished.”

5 **A. Yakima County’s Substantive Determinations in its Land Use Decision and Final**
6 **MDNS are Clearly Erroneous.**

7 Section 16B.09.045 of the Yakima County Code requires appellants to address whether
8 the appellant is concerned with Yakima County’s substantive determinations, procedural issues,
9 or both, as those terms are defined in YCC § 16.04.040. Pursuant to the Hearing Examiner’s
10 August 23, 2017 Order, the scope of this appeal includes substantive, rather than procedural,
11 determinations. ‘Substantive determinations’ are defined to include “any decision to require
12 particular mitigation measures or to deny a proposal based on this Chapter.”⁵⁸

13 Based on this definition, the Yakama Nation challenges Yakima County’s Substantive
14 Determinations as being deficient because the identified mitigation measures for cultural
15 resources are insufficient, unreasonable, and not capable of being accomplished insofar as they
16 are meant to protect the Burial Ground, the human remains located therein, and archaeological
17 and cultural resources located throughout 45YA109.

18 Given these deficiencies, Yakama Nation submits that the Hearing Examiner should
19 reverse the Land Use Decision and, to the extent incorporated by reference therein, the Final
20 MDNS and order Yakima County to comply with all applicable laws and regulations.

21 1. Yakima County’s Mitigation Measures Are Insufficient, Unreasonable, And
22 Impossible To Perform.

23 Yakima County’s proposed mitigation measures are insufficient to mitigate the
24 significant harm that Granite’s proposed mine expansion will have on the Yakama Nation’s
25 ancestors and cultural resources. RCW 43.21C.060 assumes that a determination of significance

26 ⁵⁸ YCC § 16.04.040(8).

1 will be issued where “reasonable mitigation measures are insufficient to mitigate the identified
2 impact.”⁵⁹ In this case, Yakima County’s identified impact is “the potential to disturb cultural
3 resources . . .”, which Granite will purportedly mitigate with buffers, and by stopping work when
4 they hit something, such as a human burial or irreplaceable cultural and archaeological
5 resources.⁶⁰

6 Yakama Nation’s experts both have submitted reports and have been deposed in this
7 matter. Jessica Lally and Noah Oliver are both practicing archaeologists working for the
8 Yakama Nation Cultural Resources Program. They not only work on behalf of the Yakama
9 Nation, the majority of their program’s work is to provide contracting services to people and
10 entities requiring cultural resources surveys or other assistance from archaeologists. Jessica
11 Lally finds Mitigation Measures F1, F2, and F3 inappropriate and inadequate considering the
12 circumstances.⁶¹

13 With respect to Mitigation Measure F1, Ms. Lally notes the pervasive failure of Granite’s
14 archaeological expert to acknowledge that Site 45YA109 is one, contiguous archaeological site
15 recorded pursuant to Washington State law.⁶² This failure arises, as revealed in Dr. Fagan’s
16 deposition, from his professional disagreement with the site boundaries.⁶³ Dr. Fagan’s
17 disagreement notwithstanding, he is not the arbiter of what is or is not a proper archaeological
18 site in the State of Washington, and he was forced to acknowledge that despite his opinion on the
19 matter, the entirety of 45YA109 is one single archaeological site and subject to applicable state
20 law protections of archaeological sites in its entirety.⁶⁴ Ms. Lally notes that Mitigation Measure
21 F1 requires “pre-contact non-significant isolates” to be “documented, collected, and identified in
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23 ⁵⁹ RCW § 43.21C.060.

24 ⁶⁰ Yakima County, Preliminary Mitigated Determination of Non-Significance for SEP2015-00016 § (7)(F) (Feb. 2,
2016).

25 ⁶¹ Expert Report of Jessica Lally (Lally Report), pp. 2-3.

26 ⁶² *Id.*

⁶³ Fagan Dep. p. 16, l. 25 – p. 18, l. 3.

⁶⁴ *Id.*

1 accordance with best practices.”⁶⁵ But, noting that artifacts found within an archaeological site
2 are generally not “isolates,” Ms. Lally observes that Mitigation Measure F1 is not reflective of
3 “best practices” in archaeology, and may actually prescribe violations of state law.⁶⁶ Ms. Lally
4 further observed that, notwithstanding the fundamental problem in Dr. Fagan’s refusal to
5 recognize 45YA109 as a recorded archaeological site (something that is not and cannot be
6 contested in the context of the instant litigation), Mitigation Measure F1 is unreasonable and
7 generally incapable of being accomplished. Specifically, she observes that “artifacts cannot be
8 reliably identified by individuals who lack formal training in the archaeological field,” and the
9 measure does not indicate that anyone with formal training would be on site in order to ensure
10 archaeological and cultural resources, or even human burials, aren’t damaged or entirely
11 destroyed by normal mining operations.⁶⁷

12 With respect to Mitigation Measures F2 and F3, Ms. Lally identified similar deficiencies.
13 As she observed regarding Mitigation Measure F2, requiring individuals to stop work as a
14 mitigation measure when unanticipated discoveries of cultural or archaeological resources occur
15 is not reasonable or capable of being accomplished without ensuring there is someone on site to
16 identify those resources when they are not obvious.⁶⁸ And, as noted below and reiterated by
17 Yakama archaeologist witness Noah Oliver, the 75-foot buffer prescribed in Mitigation Measure
18 3 is likewise unreasonable and incapable of being accomplished because of the steep slope of
19 most of the mining area, the mining methods Granite uses and will likely continue to use in its
20 mining expansion area, and, again, the lack of training that would enable Granite’s employees to
21 identify archaeological or cultural resources.⁶⁹

22 In general, all of the proposed mitigation measures ignore the actual landscape, the
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24 ⁶⁵ Lally Report, p. 2.

25 ⁶⁶ *Id.*

26 ⁶⁷ *Id.*, p. 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

1 proposed project, the wherewithal of a mining company being able to identify cultural and
2 archaeological resources, and the efficacy of a mining operation being able to stop and preserve,
3 for example, a burial site, before doing irreparable harm. As noted in Noah Oliver’s expert
4 report, and further discussed below, talus rock slopes are unstable and constantly shift towards a
5 given angle of repose. Talus pit burials use this natural feature to constantly cover and protect
6 the ancestors buried within, which means there could be numerous burials on the hillside that
7 have already been covered over time. Mr. Oliver observes that “[b]eyond the susceptibility of
8 the slope and the upslope impacts of mining at all phases of excavation, other logistical variables
9 have not been considered.”⁷⁰ Those “other logistical variables” include impacts of explosives
10 used for mining, which would “likely render human remains both historic and pre-historic
11 unrecognizable or unidentifiable.”⁷¹ Put simply, Mitigation Measure F3 is not reasonable
12 considering the known presence of human burials within 45YA109, including “probably” within
13 the proposed expanded mining area. And, again, considering the nature of mining steep slopes,
14 this measure is incapable of being actually accomplished with any reasonable degree of certainty.
15 For both identified and unidentified talus pit burials within the Burial Ground, Yakima County
16 failed to explain how Granite can detonate explosives, use heavy machinery, or excavate
17 materials anywhere near such talus pits without damaging them. Narrow buffers and self-
18 reporting requirements are not sufficiently protective of such important cultural resources and are
19 not appropriate for this site.

20 In addition, all of these mitigation measures appear impossible to perform. RCW
21 43.21C.060 and WAC 197-11-660(1)(c) require that “Mitigation measures shall be reasonable
22 and capable of being accomplished.”⁷² Here, Yakima County failed to explain how Granite will
23 be able to identify whether talus pit burials “reveal evidence of human remains” without
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25 ⁷⁰ Expert Report of Noah Oliver (Oliver Report), p. 4.

26 ⁷¹ *Id.*

⁷² RCW § 43.21C.060; WAC § 197-11-660(1)(c).

1 excavating those talus pits.⁷³ If Yakima County intends for Granite to dig up the Yakama
2 Nation’s ancestors and cultural resources to confirm their presence—to which the Yakama
3 Nation strongly objects—it is unclear how Granite or its archaeological contractor can dig into
4 such a steep slope of unstable rock without destroying the talus pit burials they are supposed to
5 protect. For those talus pit burials that have already been covered, it is unreasonable to assume
6 that Granite’s employees are capable of identifying talus pit burials, human remains, and cultural
7 resources as they detonate and mine the hillside. Yakima County’s mitigation measures are
8 unreasonable and impossible, which dictates that Yakima County’s Land Use Decision and Final
9 MDNS should be reversed and replaced with a determination of significance.

10 2. Yakima County Failed to Determine Impacts on Cultural Resources, Making
11 the Resulting Mitigation Measures Insufficient.

12 When enacting SEPA, the Washington State Legislature provided a brief policy statement
13 recognizing the preservation of “important historic, cultural, and natural aspects of our national
14 heritage,” as a principal goal of SEPA.⁷⁴ To that effect, lead SEPA agencies are required to issue
15 mitigation measures in a threshold determination along with their land use decision that accounts
16 for a proposed project’s significant impacts on the environment—defined to include cultural
17 resources⁷⁵—to the extent such impacts can be adequately mitigated in the first place.⁷⁶

18 Here, Yakima County failed to make a threshold determination on whether Granite’s
19 proposed mine expansion will have a significant impact on the Yakama Nation’s cultural
20 resources, thereby making it impossible to issue sufficient mitigation measures addressing any
21 undetermined impacts. This failure renders Yakima County’s Land Use Decision in derogation
22 of SEPA’s very purpose. Yakima County’s Final MDNS states that “[t]he extraction of mineral

23 ⁷³ Yakima County, Preliminary Mitigated Determination of Non-Significance for SEP2015-00016 §
24 (7)(F)(Mitigation Measure F2) (stating “All archaeological resources that reveal evidence of human remains shall be
protected with a 75-foot buffer.”).

25 ⁷⁴ RCW § 43.21C.020(2).

26 ⁷⁵ WAC § 197-11-740 (defining ‘Environment’ to include those elements described in WAC § 197-11-444); WAC §
197-11-444(2)(b)(vi) (including “Historic and cultural preservation” as an element of the environment).

⁷⁶ WAC § 197-11-350(2).

1 resources from this area has the potential to disturb cultural resources.” Yakima County does not
2 state whether cultural resources are present in the Burial Ground. Nor does it state whether
3 mining an archaeological site and burial ground will impact cultural resources.

4 Granite’s archaeological expert concedes there are “numerous Talus features on almost
5 every slope” within the Burial Ground and Granite’s mining expansion area.⁷⁷ He also
6 acknowledges that one of the Yakamas’ ancestors’ uses for such talus features was to bury their
7 deceased.⁷⁸ Moreover, Granite’s expert archaeologist identifies only two potential uses for these
8 talus features he indicates are located throughout the Burial Ground: “refrigeration pits . . . for
9 food and other materials” and “burials.”⁷⁹ He opines that there are probably human burials
10 among the numerous talus features he concedes are located on the site and remain unexamined.⁸⁰
11 Dr. Fagan further concedes that it would be important, in his professional opinion, to “seek and
12 obtain tribal input regarding the cultural practices” of those Yakama ancestors who lived in and
13 around the Burial Ground and Granite’s current and proposed future mining operations.⁸¹
14 Granite has failed to seek the Yakama Nation’s input in any meaningful way and has not
15 permitted Yakama Nation to survey the various talus features and other cultural resources and
16 artifacts found within the Burial Ground and 45YA109 in order that the Yakama Nation’s
17 ancestors and cultural resources may be adequately protected. And finally, Dr. Fagan concurs
18 with DAHP’s conclusion on Yakima County’s MDNS and the mitigation measures contained
19 therein; namely, that it is “not sufficient, has not fully identified areas of cultural value and
20 importance and therefore does not contain mitigation measures for those areas.”⁸² Specifically
21 with respect to DAHP’s conclusion that the mitigation measures relative to 45YA109 and the
22 Burial Ground were inadequate, Fagan asked for clarification with respect to the area being

23 ⁷⁷ Fagan Dep., p. 31, ll. 7-8.

24 ⁷⁸ *Id.* p. 28, ll. 17-25.

25 ⁷⁹ *Id.*

26 ⁸⁰ *Id.* p. 32, ll. 1-5.

⁸¹ *Id.* p. 39, l. 24 – p. 40, l. 3.

⁸² *Id.* p. 19, l. 16 – p. 21, l. 10.

1 discussed before agreeing with DAHP that further study of the site is necessary:

2 Counsel: When I, again, when I say site in general and site 45YA109, I'm talking about
3 that site as it's presently recorded with the state of Washington today as we sit
4 here. Is that okay?

4 Fagan: Yes.

5 Counsel: Okay. So in your professional opinion as an archaeologist, do you agree that
6 further study is necessary with respect to site 45YA109 –

7 Fagan: Yes.

8 Counsel: --to determine its significance?

9 Fagan: Yes.

10 Counsel: You agree with that?

11 Fagan: Yes.⁸³

12 Therefore, Granite's archaeological expert joins with the Yakama Nation and DAHP in
13 concluding that:

- 14 1. The talus features within the Burial Ground and 45YA109 (which includes the
15 entirety of Granite's proposed mining expansion area), were used for either food
16 storage or burials.
- 17 2. The Burial Ground and 45YA109 probably contain human burials.
- 18 3. It is important to seek Yakama Nation's input with respect to the cultural
19 practices of the people who laid their deceased to rest within these talus features
20 in the Burial Ground.
- 21 4. And, therefore, the aforementioned agree with DAHP's conclusion that further
22 study is necessary with respect to 45YA109 and the burial ground .

23 Yakima County's decision merely points to an unspecified likelihood that cultural
24 resources will be disturbed. Put simply, Yakima County did not determine whether Granite's

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26 ⁸³ *Id.*

1 mine expansion will have a significant impact on the Yakama Nation’s cultural resources.
2 Instead, it chose to punt the issue because of the perceived “Catch 22” Granite claimed it was in.
3 Thus, Yakima County failed to fulfill its obligation to make a threshold determination as the lead
4 agency under SEPA, and thereby issued mitigation measures that are not sufficient.

5 3. Yakima County Failed to Rely on Sufficient Information, Making the
6 Resulting Mitigation Measures Insufficient.

7 In issuing its MDNS, a lead SEPA agency must demonstrate that its decision was based
8 on “information sufficient to evaluate a proposal’s environmental impact . . . ,”⁸⁴ and any
9 resulting mitigation measures must also be sufficient.⁸⁵ Yakima County failed to meet this
10 standard because, *inter alia*, the mitigation measures in its MDNS were not based on sufficient
11 information as demonstrated by Yakima County’s failure to seek comments from DAHP or the
12 Yakama Nation, failure to consider a technically sufficient cultural resources survey, Yakima
13 County’s failure to present a worst-case scenario in its threshold determination, and Yakima
14 County’s implicit admission that it lacked sufficient information to issue its threshold
15 determination.

16 Yakima County cannot have considered sufficient information when issuing its
17 mitigation measures where it disregarded DAHP’s archaeological expertise and the Yakama
18 Nation’s archaeological and cultural expertise on the environmental impacts of Granite’s
19 proposal to expand its mining operations within the Burial Ground. SEPA explicitly requires
20 lead SEPA agencies to “consult with and obtain the comments of any public agency which has
21 jurisdiction by law or special expertise with respect to any environmental impact involved”
22 in a proposed project.⁸⁶ These specialized agency statements must be made available to the
23 public for review, and it is logical to conclude that such publication is required during the

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25 ⁸⁴ WAC § 197-11-335; *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 423 (Div. III 2010),
(citing RCW 43.21C.030(2)(c)); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000).

26 ⁸⁵ RCW 43.21C.060.

⁸⁶ RCW § 43.21C.030(2)(d).

1 public’s SEPA-provided comment period.⁸⁷ To be clear, lead SEPA agencies *must* engage
2 specialized agencies, *must* obtain their formal comments, and *must* make those comments
3 available for public review. These are not optional guidelines left to the discretion of lead
4 agencies under the applicable law. There is no evidence in the administrative record that Yakima
5 County fulfilled these legal requirements by seeking and obtaining formal comments from
6 DAHP and the Yakama Nation before issuing its mitigation measures. Instead, DAHP and
7 Yakama Nation submitted comments on their own initiative. And Yakima County ultimately
8 disregarded those comments and concerns.

9 Further, a technically sufficient cultural and archaeological survey of the Burial Ground
10 does not exist at present. This renders it impossible for Yakima County to issue sufficient
11 mitigation measures in its MDNS. The elder testimony, historical research, and site visits to the
12 Burial Ground dating back to 1854 have generally identified the wealth of cultural resources and
13 archaeological resources in the Burial Ground, but the Yakama Nation is unaware of any
14 intensive field-tested cultural resource survey of the proposed mine expansion area or the
15 immediate surrounding land. Absent from Yakima County’s administrative record is a
16 technically sufficient field-tested archaeological survey of Granite’s proposed mine expansion
17 area. And DAHP’s communications with Yakima County suggest Granite still has not
18 completed a sufficient Archaeological Site Excavation and Removal Permit *application* for
19 either its current mining activities or its proposed mine expansion.⁸⁸ Without a technically
20 sufficient cultural and archaeological survey of the Burial Ground, Yakima County does not
21 know with any specificity what cultural resources will be impacted by Granite’s proposal—much
22 less its ongoing mining within the Burial Ground—and therefore, Yakima County does not have
23 sufficient information to have lawfully issued the mitigation measures in its MDNS.

24 ⁸⁷ *Id.*

25 ⁸⁸ Letter from Dr. Lance Wollwage, Assistant State Archaeologist, to Dr. John Fagan, Archaeological Investigations
26 Northwest, Inc. (June 10, 2016) (on file with the Washington State Department of Archaeology and Historic
Preservation) (rejecting AINW’s Archaeological Site Excavation and Removal Permit Application as incomplete).

1 Given Yakima County issued mitigation measures without sufficient information,
2 Yakima County also failed to meet its obligation to present a worst-case analysis when
3 considering the applicability of mitigation measures. If information relevant to assessing
4 significant adverse project impacts is not known, SEPA generally *requires* the responsible
5 agency to obtain the information.⁸⁹ Alternatively, if such information cannot be obtained, SEPA
6 requires the responsible agency to present a worst-case analysis in its threshold determination
7 (*i.e.*, where the mitigation measures are issued),⁹⁰ which here would require the reasonable
8 assumption that the entire proposed project site contains significant archeological resources and
9 human remains. Accordingly, Yakima County failed to comply SEPA when it did not obtain
10 sufficient information and offered no such worst-case analysis when issuing its mitigation
11 measures.

12 Yakima County itself indicated it did not have sufficient information to make an adequate
13 threshold determination before Granite satisfied Yakima County's information requests. Yakima
14 County's September 18, 2015 Request for Information to Granite provides that Granite must
15 satisfy its permitting requirements with DAHP *prior to* Yakima County issuing its threshold
16 determination, not after.⁹¹ DAHP's permitting requirements include, among other things,
17 conducting a cultural resource survey of the proposed mine expansion area.⁹² Yakima County's
18 letter appears to be based on DAHP's August 11, 2015 letter to Yakima County, which states, in
19 part:

20 The proposed mine expansion is completely encompassed by
21 archaeological site 45YA109, a large archaeological site
22 containing talus pits and human burials . . .

23 The expansion [area] also contains two additional archaeological

24 ⁸⁹ WAC § 197-11-080.

25 ⁹⁰ WAC § 197-11-080.

26 ⁹¹ Letter from Noella Madera, Yakima County Senior Project Planner, to James Essig, Granite Construction (Sept. 18, 2015) (on file with Yakima County Planning Division).

⁹² *Id.*

1 sites 45YA694 and 45YA693 a talus burial and a grouping of talus
2 pits which are likely burials . . .

3 There are likely to be additional archaeological sites and human
4 burials in the expansion [area] which have not been identified
5 because the project area has not been completely surveyed.⁹³

6 Thus, nearly two years ago, DAHP identified archaeological resources and human burials that
7 will be impacted or are likely to be impacted by Granite’s proposed mine expansion. This
8 assumedly prompted Yakima County to require additional information from Granite before
9 Yakima County could issue sufficient mitigation measures for the project in its threshold
10 determination.

11 Notwithstanding DAHP’s unequivocal position on this issue, and Yakima County’s
12 September 2015 acknowledgment that no threshold determination would be issued unless and
13 until Granite satisfied DAHP’s permitting requirements, according to DAHP there has been no
14 technically sufficient cultural resource survey of the proposed mine expansion area.⁹⁴ Granite
15 therefore failed to satisfy DAHP’s permitting requirements for its proposed mine expansion area.
16 DAHP’s permitting requirements here are aimed, in part, at gathering a minimum threshold of
17 information so that an actual information-based determination regarding the impacts of Granite’s
18 plans to detonate and excavate the Burial Ground can be made to support Yakima County’s
19 threshold determination. Granite has still failed to provide Yakima County with the information
20 Yakima County indicated was necessary for a threshold determination in September 2015.

21 Yet, over a year later, with no more information than it had in 2015, Yakima County
22 issued the mitigation measures in its threshold determination.

23 ⁹³ Letter from Gretchen Kaehler, Assistant State Archaeologist, to Lynn Deitrick, Yakima County Planning Manager
24 (Aug. 11, 2015) (on file with Yakima County Planning Division); *see also* Email from Gretchen Kaehler, Assistant
25 State Archaeologist, to Thomas Carroll, Yakima County Planning Division (Aug. 18, 2015) (on file with Yakima
26 County Planning Division) (stating “The project area is within archaeological site 45YA109 . . . [w]e have not
agreed to any protective measures or buffers and are not sure how the [sic] anything would be buffered since the
project area is encompassed by the archaeological site.”)

⁹⁴ Letter from Gretchen Kaehler, Assistant State Archaeologist, to Byron Gumz, Yakima County Senior Project
Planner (Feb. 15, 2017).

1 If Yakima County didn't have sufficient information to make its threshold determination
2 in September 2015, and Granite failed to take the basic and legally required steps Yakima
3 County itself indicated were necessary before a threshold determination and corresponding Land
4 Use Decision could be properly issued, then the mitigation measures in Yakima County's Final
5 MDNS cannot be supported by information sufficient to evaluate a proposal's environmental
6 impact and are, therefore, unlawful.

7 The deposition of Yakima County's planning department's lead official working on this
8 matter demonstrates that Yakima County believed, wholesale, Granite's position that it was
9 caught in a "Catch 22" position with respect to DAHP's required permit and the county's SEPA
10 requirement.⁹⁵ On close examination, however, it becomes clear that this "Catch 22" is fiction.
11 The sole architect of Granite's woes that it incorrectly characterizes as a "Catch 22" is Granite
12 itself, and seems to arise from Granite's failure to simply do the work necessary to adequately
13 identify the impacts its proposed expanded mining will have on the Burial Ground and the
14 Yakama Nation's cultural and archaeological resources. And unfortunately, Granite persuaded
15 Yakima County to simply issue mitigation measures in a deficient permit to avoid the legally
16 required responsibility for thorough analysis given the significance of the lands at issue and their
17 potential to contain numerous burials of Yakama ancestors, among other archaeological and
18 cultural resources.

19 In reality, the Catch 22 arises because Granite refuses to acknowledge the nature of the
20 areas it seeks to mine within a recorded archaeological site; namely, the fact that it seeks to
21 expand its mine into a Burial Ground. As noted *supra*, Granite's own expert archaeologist
22 agrees with DAHP that further study is necessary of the entire Burial Ground due to the potential
23 for human burials in order to identify those burials and ensure their protection. If further study is
24 necessary, the mitigation measures cannot be adequate.

25 ⁹⁵ See extensive narrative on what led to issuance of MDNS before adequate surveys had been completed, p. 64, l.
26 11 – p. 80, l. 3. Yakama Nation is aware of no evidence that substantiates Granite's supposed "Catch 22" position.

1 This reality is highlighted in the following portion of Mr. Carroll’s deposition, wherein
2 he describes the “Catch 22” narrative Granite was pushing—presumably because Granite did not
3 agree with and wanted to avoid the work DAHP required to both ensure adequate identification
4 of cultural resources and human burials, and to ensure adequate mitigation measures were
5 identified:

6 So Granite was telling us that they’re being shafted by everybody because they
7 can’t go out and do the survey that we are requiring because DAHP won’t issue a
8 permit for them to excavate to do the survey unless we issue SEPA, yet we’re
9 getting comments from DAHP and from the tribe that you can’t issue a SEPA
unless it’s a DS because there’s known human burials. Granite’s saying, we don’t
know if there’s human burials because we can’t excavate it and this whole
winding circle.⁹⁶

10 Thus, Granite did not believe DAHP or Yakama Nation—or apparently the historic record and
11 its own archaeologist expert—that there are probably human burials located within 45YA109.
12 Because of this refusal to acknowledge reality, Granite fabricated or incorrectly believed itself to
13 be in a Catch 22 position where it had no options.⁹⁷ And unfortunately, Yakima County
14 sympathized with the false narrative and gave Granite what it sought all along, a permit without
15 the required analysis necessary to both identify impacts to human burials and cultural resources,
16 and to properly mitigate those impacts. The fact is, DAHP’s enforcement capacity is extremely
17 limited. And Granite knows this. Accordingly, Granite sought the path of least resistance—a
18 toothless and deficient MDNS in which no meaningful mitigation measures are prescribed, and
19 punting to a DAHP permit process by an agency that lacks the same jurisdictional enforcement
20 capacity as Yakima County, and relies on counties roles as lead agencies to consult with them so
21 that adequate mitigation measures are identified at the threshold determination level.

22 Yakima County, in turn, concedes that it would have preferred Granite had obtained the
23

24 _____
25 ⁹⁶ Carroll Dep., p. 65, l. 22 – p. 66, l. 6.

26 ⁹⁷ It bears noting that Yakama Nation has not discovered any evidence suggesting there is any truth to the narrative
Granite fed to Yakima County of a Catch 22 in which DAHP refused to allow an adequate survey until Yakima
County completed its threshold determination.

1 required DAHP permit before Yakima County completed its threshold determination. Mr.
2 Carroll indicated at deposition that “it would have been a lot easier for us, yes. We would prefer
3 that on every applicant.”⁹⁸ Furthermore, Yakima County concedes that it in no way considered
4 “the impacts of blasting on cultural resources” located anywhere within the Burial Ground,
5 including within the proposed mining expansion area.⁹⁹ Yakima County also asserts that it did
6 not reach out to any of its own cultural resources specialists or archaeologists to review the
7 permit application.¹⁰⁰ In defense of its failure to obtain independent support, Yakima County
8 asserts “we got information from the Yakama Nation” and “we got information from DAHP, and
9 the information provided from the applicant.”¹⁰¹ And, ultimately, Yakima County disregarded
10 the information it received from Yakama Nation and DAHP, and instead relied wholly on
11 Granite with its self-interested analysis and its Catch 22 narrative. Consequently, Yakima
12 County gave Granite exactly what it asked for.

13 By any objective measure Yakima County did not rely on sufficient information in
14 issuing its threshold determination and related permit, and therefore could not have identified
15 adequate mitigation measures because it failed to identify, in any reasonable way, the actual
16 impacts to the Yakama Nation’s Burial Ground and the cultural resources situated within and
17 around 45YA109.

18 **B. Yakima County’s Land Use Decision and Final MDNS Violate RCW 68.60 by**
19 **Permitting Granite to Mine a Dedicated Historical Cemetery.**

20 Under RCW 68.60.040, it is illegal for Granite to willfully destroy, cut, mutilate, efface,
21 or otherwise injure any property within a cemetery. It is also illegal to willfully open graves.¹⁰²
22 Cemeteries that contain at least five human remains buried prior to November 11, 1889, are
23

24 ⁹⁸ Carroll Dep., p. 70, l. 22 – p. 71, l. 2.

25 ⁹⁹ *Id.*, p. 94, 21 – p. 95, l. 9.

26 ¹⁰⁰ *Id.*

¹⁰¹ *Id.*, p. 95, ll.6-15.

¹⁰² RCW § 68.60.040(3).

1 considered ‘historical cemeteries’ subject to the protections of RCW 68.60.040.¹⁰³ The Burial
2 Ground was automatically dedicated as a historical cemetery by RCW 68.60.020, which means
3 that nobody can injure the Burial Ground unless and until the Yakima County Superior Court
4 removes any such dedication.

5 Here, the Burial Ground’s longstanding recognition by both the Yakama People and
6 European American settlers as a final resting place for Yakama ancestors prior to November 11,
7 1889, taken together with the recorded presence of large complexes of talus pit burials, indicates
8 that the Burial Ground is a dedicated historical cemetery as a matter of law. Yakima County
9 does not have the authority to issue a permit authorizing Granite to illegally injure a dedicated
10 historical cemetery, and should immediately take steps to halt Granite’s current mining
11 operations within a dedicated historical cemetery.

12 **D. Yakima County’s Land Use Decision and Final MDNS Violate RCW 27.44 by**
13 **Permitting Granite to Mine Indian Graves.**

14 Under RCW 27.44.040, it is illegal for Granite to knowingly remove, mutilate, deface,
15 injure, or destroy Indian graves. In this case, the Yakama Nation has repeatedly informed both
16 Yakima County and Granite that there are Indian graves within the Burial Ground. Granite’s
17 own archaeologist recognized that the talus pit burials are likely to have been used for human
18 burials. Despite these warnings, Yakima County’s Land Use Decision authorizes Granite to
19 continue its injurious mining activities—including significant explosions, ongoing excavation,
20 and the use of heavy machinery—in close proximity to these talus pit burials on an unstable,
21 steep slope covered in loose rock. Yakima County does not have the authority to issue a permit
22 authorizing Granite to illegally injure Indian graves, and should immediately take steps to stop
23 Granite from any further mining activities within the Burial Ground.

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26 ¹⁰³ RCW §§ 68.60.010(2),(3).

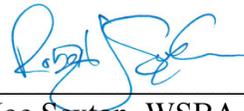
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V. PRAYER FOR RELIEF

The Yakama Nation respectfully requests that the Yakima County Hearings Examiner:

1. Reverse Yakima County's Final Decision (PRJ2014-00021/CUP2015-00037/SEP2015-00016) granting a conditional use permit to Granite Northwest, Inc.;
2. Remand Granite Northwest, Inc.'s conditional use permit application and SEPA Checklist back to the Yakima County Planning Department to comply with all applicable laws and engage in meaningful consultation with both the Yakama Nation and DAHP; and
3. Grant any other relief that the Hearings Examiner deems just and proper.

Respectfully submitted this 17th day of November, 2017.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury that I served a copy of this document on the following parties and their counsel of record on the date below at the email addresses provided:

Yakima County

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Dated this 17th Day of November, 2017



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