AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

AgendaTitle:
CCCenterSeven, LLC Lease at Gold Basin Industrial Park

Action Requested: Motion

Parties to the Agreement:

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:
See attached memo from Art Trezise

Fiscal Impact: None

Submitted by: Katherine Haase for CAO **Submitter's Email Address:** khaase@gunnisoncounty.org

Finance Review: ○ Required ◉ Not Required

Comments:

Reviewed by: Discharge Date:

County Attorney Review: ◉ Required ○ Not Required

Comments:

Reviewed by: GUNCOUNTY1\atrezise Discharge Date: 10/23/2014 Certificate of Insurance Required

Yes ○ No ◉

County Manager Review:

Comments:

Reviewed by: GUNCOUNTY1\mbirnie Discharge Date: 10/23/2014

○ Consent Agenda ◉ Regular Agenda ○ Worksession Time Allotted:

Agenda Date: 10/28/2014 Follow Up Agenda Date:

Revised April 2013

Office of the Gunnison County Attorney
David Baumgarten, County Attorney
Art Trezise, Deputy County Attorney
Rachel Magruder, Paralegal
Brenda Wiseman, Legal Assistant

TO: Gunnison County Board of County Commissioners

FROM: Art Trezise, Deputy County Attorney

RE: CCCenterSeven lease at Goldbasin Industrial Park

DATE: 10/28/2014

Background

As you are aware, the ground lease signed with CCCenterSeven LLC for the construction and operation of a commercial marijuana grow operation at the Goldbasin Industrial Park has hit a significant impediment. The Gold Basin Industrial Park sits on land contaminated by uranium mill tailings. The property was acquired by quit claim deed from the CDPHE (I have attached a copy of the deed for your reference).

As you'll note from the deed, there is an express reservation of rights for the US Department of Energy ("DOE") to complete activities under the Uranium Mill Tailings Radiation Control Act ("UMTRCA"). Additionally, the deed requires Gunnison County "not to perform construction and/or excavation or soil removal of any kind on the property without permission from the Grantor *(i.e. the CDPHE)* and the U.S. Department of Energy unless prior written approval of construction plans (e.g. facilities type and location), is given by the Grantor and the U.S. Department of Energy." There are additional requirements that the structures have a radon ventilation system and that they not impact ground water quality or groundwater remediation under UMTRCA.

After submission of the construction plans to both the CDPHE and DOE for the necessary approval, the DOE became aware through the applicants' engineer that the intended use of the structure involved a marijuana cultivation facility. The disclosure of the intended use caused an immediate stall to the review process by the DOE. We first received notice of the problem on August 19, 2014 by way of an email from Deborah Steckley, the DOE employee who reviews these applications. Ms. Steckley indicated that she would have to seek legal advice from the DOE to determine if she could review the building plans given the intended use of the property.

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On September 22, 2014, after significant persistence from Marlene Crosby, Ms. Steckley provided Marlene with the contact information to the DOE attorney evaluating the situation, William S. Grant II. I emailed Mr. Grant in hopes of inspiring some progress on the approval. Mr. Grant responded to me on September 24, 2014 to state, among other things, that:

> "As I'm sure you appreciate, part of my office's review of this request is ensuring that any Federal official issuing such an approval does not inadvertently run afoul of other Federal laws such as the Controlled Substances Act of 1970. Part of that will mean determining whether and to what extent the DOE is approving just the construction of a structure on the site (and the accompanying disturbance of the soil), versus the business venture which will be occupying the completed structure."

Since that date, I have called and emailed Mr. Grant repeatedly and have gotten no response. Earlier today I discussed the matter with the Deputy Colorado Attorney General who represents the CDPHE, Dan Miller. Dan indicated that the CDPHE was ready to approve the construction plans pending a minor revision to the radon mitigation plan. However, the CDPHE "prefers" to coordinate their approval with the DOE approval, and he was going to attempt to contact Mr. Grant in hopes of securing the necessary DOE approval. If Dan cannot secure approval from the DOE he expects the CDPHE will issue its approval irrespective of the DOE stance.

Recommendation

My evaluation of the deed is that the DOE has no legal standing to approve the proposed uses of this property which is owned by Gunnison County. By failing to timely respond to our requests for approval of the construction plans, they are tacitly trying to control the use of County property. Assuming the CDPHE approves the construction plans, the BOCC is faced with three choices:

1. Take no action. This will place us at odds with the tenant, CCCenterSeven LLC, and will create tension with the recently adopted marijuana regulations that identify the Goldbasin Industrial Park as an approved location for commercial marijuana activities.

2. Approve the CCCenterSeven LLC's application for a building permit even though the DOE has not issued its approval.

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3. File legal suit to compel the DOE to approve the plans pursuant to the terms of the deed.

In my estimation, option #2 is the recommended alternative. Practically speaking, by issuing a building permit, we will force the DOE to take action if they are so inclined. From the legal perspective, they have withheld approval for over two months and have no legitimate basis to do so. Further, if we were to file suit against the DOE, we would likely be faced with a request for an injunction pending conclusion of the legal suit, which could take the better part of a year if not longer, and would stall CCCenterSeven LLC's plans. Conversely, by approving construction, it is likely that the building would be completed and operational well before the DOE took any action. In such a scenario, the likelihood of the DOE obtaining an injunction against use of the building is greatly reduced.

I don't expect that the DOE will file suit on this matter, but there are no guarantees. However, in the event they do file suit, the facts and law are on our side, particularly if the construction plans have CDPHE approval.

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RECEIVED
DEC 30 1999
HAZARDOUS MATERIALS
AND WASTE MANAGEMENT

QUIT CLAIM DEED

The Colorado Department of Public Health and the Environment ("Grantor"), whose address is 4300 Cherry Creek Drive South, Denver, Colorado, 80222-1530, City and County of Denver, State of Colorado, pursuant to 42 U.S.C § 7914 (e) (1) (B) and C.R.S. § 25-11-303, hereby donates and quit claims to the County of Gunnison ("Grantee"), whose address is 200 E. Virginia, Gunnison, Colorado, 81230, City and County of Gunnison, State of Colorado, the following real property in the County of Gunnison, State of Colorado, to wit: A parcel of land in Gunnison County, State of Colorado, containing Sixty and ninety two hundredths (60.92) acres, more or less, described as follows:

Township 49 North, Range 1 West, N.M.P.M.

A tract of land situated in the S½SW¼ of Section 2 and the NE¼NW¼ of Section 11 more particularly described as follows:

Commencing at the North quarter corner of said Section 11; thence South 89°34'00" West along the North line of said Section 11, a distance of 30.91 feet to the Westerly right-of-way line of the existing county road; thence North 00°07'00" West along said right-of-way line 742.17 feet ; thence North 53°22'00" West, 231.90 feet, to the POINT OF BEGINNING; thence Southeasterly along said right-of-way along a curve to the right, having a radius of 144.71 feet, 268.98 feet, chord bearing South 53°22'00" East, 231.90 feet; thence South 00°07'00" East along said right-of-way line, 742.17 feet, to the North line of said Section 11; thence South 00°08'00" East along said right-of-way line, to the South line of said NE¼NW¼; thence South 89°41'00" West along said South line, 1,271.72 feet ; thence North 01°06'00" West, 1320.03 feet to said North line of Section 11; thence North 89°34'00" East along said North line, 112.00 feet ; thence North 00°31'00" East, 219.42 feet ;thence North 89°09'00" West, 166.32 feet ; thence North 13°56'00" West 99.16 feet ; thence North 06°14'00" West, 211.88 feet to the Southerly right-of-way line of said existing county road; thence Northeasterly along said right-of-way line, to the POINT OF BEGINNING

Subject to: (i) any coal, oil, gas, or other mineral rights in any person; (ii) existing rights-of-way for roads, railroads, telephone lines, transmission lines, utilities, ditches, conduits, or pipelines on, over, or across said lands; (iii) court liens, judgments, or financial encumbrances such as deeds of trust for which a formal consent or order has been obtained from a court for the lien holder; (iv) other rights, interests, reservation or exceptions of record; and the following terms, conditions, rights, reservations and covenants:

Grantor reserves to: (i) itself, the U. S. Department of Energy, their employees, agents and contractors the right of access to the property as may be necessary to complete activities under the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 7901 et seq. ("UMTRCA") and for other lawful purposes, until such time as Grantor and the U.S. Department of Energy determine that all remedial activities are complete; and (ii) to itself any non-tributary groundwater underlying this parcel, the right to develop tributary groundwater, and the right to surface access for groundwater development.

Grantee covenants to hold harmless the Grantor and the Department of Energy for any liability associated with disruption of any public purpose ventures on the property conveyed by this deed, the disruption of any improvement on said property made by the Grantee, its successors and assigns, and any temporary or permanent limitations to the use of the property, should the Grantor and the Department of Energy be required to perform additional surface remedial activities on the property conveyed by this deed.

Grantee covenants (i) to comply with the applicable provisions of UMTRCA, 42 U.S.C. #7901 et. seq., as amended; (ii) not to use ground water from the site for any purpose; and not to construct wells or any means of exposing ground water to the surface unless prior written approval for such use is given by the Grantor and the U.S. Department of Energy; (iii) not to sell or transfer the land to anyone other than a governmental entity within the state; (iv) that any sale or transfer of the property described in this deed shall have prior written approval from the Grantor and the U.S. Department of Energy; and that any deed or other document created for such sale or transfer and any subsequent sale or transfer will include information stating that the property was once used as a uranium milling site and all other information regarding the extent of residual radioactive materials removed from the property as required by Section 104(d) of the Uranium Mill Tailings, 42 U.S.C. sec. 7014(d), and as set forth in the Annotation attached hereto; (v) not to perform construction and/or excavation or soil removal of any kind on the property without permission from the Grantor and the U.S. Department of Energy unless prior written approval of construction plans (e.g., facilities type and location), is given by the Grantor and the U.S. Department of Energy; (vi) that any habitable structures constructed on the property shall employ a radon ventilation system or other radon mitigation measures; and (vii) that its use of the property shall not adversely impact groundwater quality, nor interfere in any way, with groundwater remediation under UMTRCA activities; and (viii) to use the

property and any profits or benefits derived therefrom only for public purposes as required by UMTRCA sec. 104(c)(1)(C), 42 U.S.C. 7914(c)(1)(C).

These covenants are made in favor and to the benefit of Grantor, shall run with the land and be binding upon Grantee and its successors and assigns, and shall be enforceable by Grantor, and its successors and assigns;

Grantee acknowledges that the property was once used as a uranium milling site, and that the Grantor makes no representations or warranties that the property is suitable for Grantee's purposes;

IN WITNESS WHEREOF:

GRANTOR:

APPROVED AS TO FORM:

David Kreutzer - Assistant Attorney General

STATE OF COLORADO
Bill Owens, Governor
Acting by and through
The Department of Public Health and Environment

By: _____
Executive Director

By: _____
Program Approval

ACCEPTANCE OF DEED
AND COVENANTS

GRANTEE:
Board of County Commissioners
Gunnison County, CO
(Full Legal Name or Agency)

By: _____
(Name)

Title: Chairperson, Gunnison County Commissioners

(Affix Seal)

ATTESTATION:

City/County Clerk

Signed this 6th day of December, 19 99

STATE OF COLORADO. }
County of Denver } ss.

The foregoing instrument was acknowledged before me this 19th day of January, 2000, by Maria S. Zepeda-Sanchez

My commission expires April 14, 2003

Witness my hand and official seal

Notary Public.

No. _____

QUIT CLAIM DEED

TO

STATE OF COLORADO, } ss.
County of

I hereby certify that this instrument was filed for record in my office, at _____ o'clock .M., _____, 19_ and is duly recorded in book _____ page _____.

Film No. _____ Reception No. _____

_____
Recorder.

By _____
Deputy.

Fees, $ _____

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ATTACHMENT A

LAND ANNOTATION

GUNNISON, COLORADO PROCESSING SITE

The Uranium Mill Tailings Radiation Control Act (Public Law 95-604), Section 104, requires that the State notify any person who acquires a designated processing site of the nature and extent of residual radioactive materials removed from the site, including notice of the date when such action took place, and the condition of the site after such action. The following information is provided to fulfill this requirement.

The Gunnison, Colorado processing site consists of two separate land parcels. The northern parcel contained the tailings pile, while the southern parcel contained the mill building and associated structures. However, since the two sites are contiguous and physically similar, the remainder of this annotation will address the mill site as a whole.

Approximately 734,000 cubic yards of contaminated materials which included 1) tailings; 2) subpile soils; 3) surficial materials in the mill yard; 4) windblown materials; and 5) mill demolition debris were removed from the mill site from 1993 to 1995. The remediation was conducted in accordance with regulations promulgated by the U.S. Environmental Protection Agency, in 40 CFR 192. These regulations require that the concentration of radium-226 in land averaged over any area of 100 square meters shall not exceed the background level by more than: 5 pCi/g (picocuries per gram), averaged over the first 15 cm (centimeters) of soil below the surface, and 15 pCi/g averaged over 15 cm thick layers of soil more than 15 cm below the surface. Verification measurements were conducted at the site by dividing the site into approximately 2,900 30-foot by 30-foot grids. A soil sample was collected and analyzed for contaminants from each grid to verify that the standards had been met.

After remediation was complete the site was backfilled with approximately 450,000 cubic yards of clean fill material, graded for drainage and revegetated. Backfill materials were routinely analyzed for radium-226 and were determined to have concentrations near background. Material with radium-226 concentrations less than 5 pCi/g were used for surface backfill.

Excavation of residual radioactive material was also conducted for thorium-230 beneath the tailings pile in the subpile soils which consisted mainly of large cobbles, sands and gravels. For thorium-230, the cleanup standard was determined as a projected 1,000 year radium-226 concentration based on the eventual decay of the thorium to radium. Because the material contained large cobbles, a mass correction factor was applied which allowed for the averaging of the thorium concentration throughout the soil mass. This resulted in a bulk thorium-230 concentration of approximately 35 pCi/g as the clean-up standard.

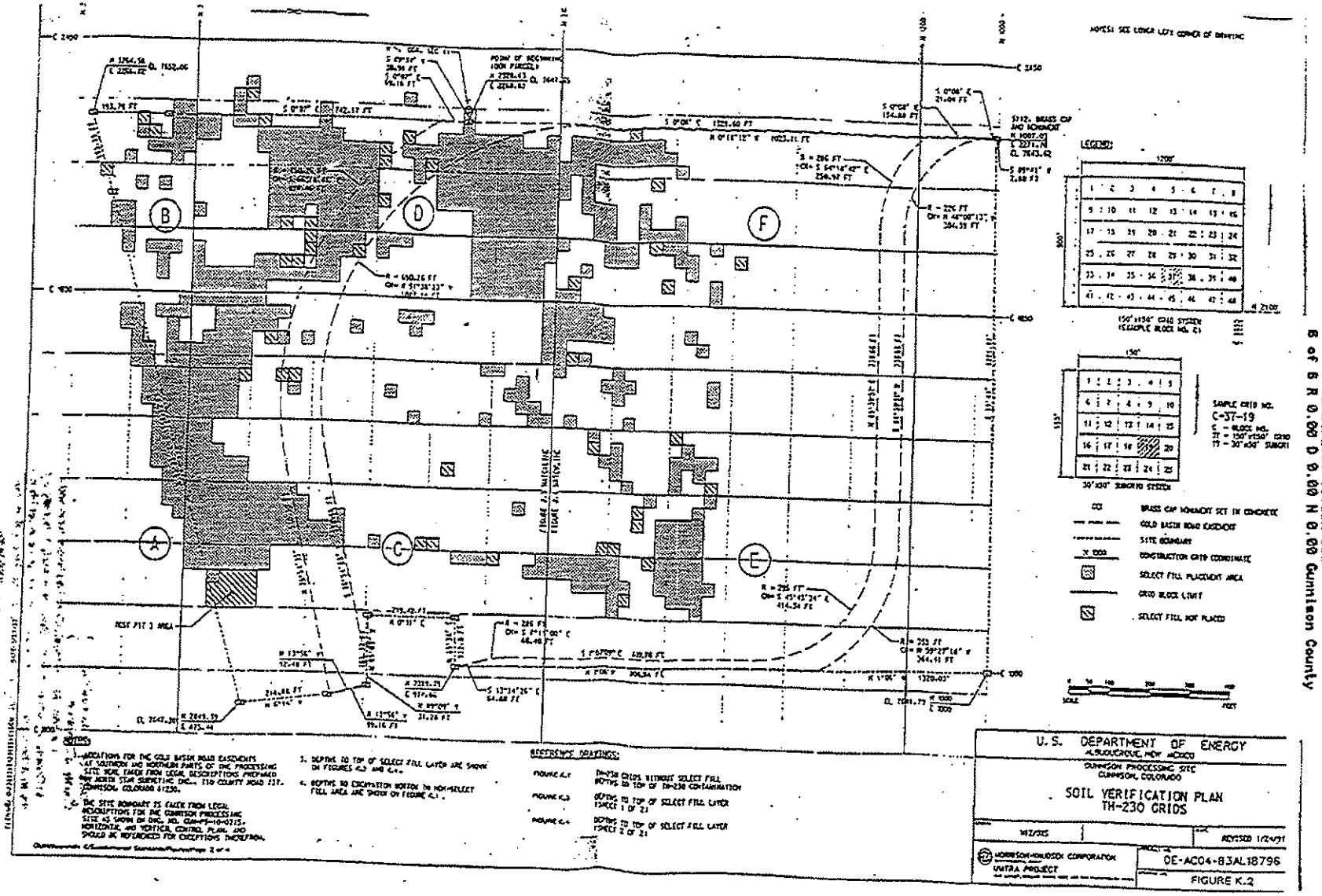
Due to the shallow depth of the water table beneath the tailings pile, complete excavation of all thorium-contaminated material was not feasible without extensive dewatering. Thus, in accordance with the EPA regulations a procedure was developed whereby thorium contamination

was left in place at depth, once the water table was reached in the excavation. Any concentration of thorium above 175 pCi/g that was to remain in place was to receive a cap layer of one foot of fine-grained backfill, called "select fill" as low in the excavation as possible, to reduce the eventual emissions of radon gas from the thorium deposits. (The value of 175 pCi/g was based on a radon emanation model that determined that after backfill, the radon escaping from a deposit of less than 175 pCi/g would be below the EPA standard for radon emanation. Any concentration greater than 175 pCi/g would need to have a cap layer that would minimize the radon emissions.) At the Gunnison site, 596 grids received the select backfill material (approximately 22,000 cubic yards of select fill were used at the site). An additional 41 grids contain thorium deposits in concentrations greater than 175 pCi/g, but are not covered by the select fill material. The locations of the thorium-containing grids are shown on the attached map. Additional information regarding the depth to the thorium deposits and the depth to the select fill is available upon request from Colorado Department of Public Health and Environment and has been provided to Gunnison County. The select fill can be visually distinguished from the general fill by its darker color and fine-grained texture (the general fill was a coarse-grained sand/gravel material).

The groundwater beneath the Gunnison Mill site remains contaminated and will be addressed during Phase II of the uranium mill tailings remedial action project. Several groundwater monitor wells are present on and downgradient of the site and will remain in place until the U.S. Department of Energy determines that they can be removed.

Any person who acquires a designated processing site shall apply for any permits, including U.S. Army Corps of Engineers Section 404 permits regarding construction in or near wetlands, as required by law.

Additional information concerning the remedial action, groundwater conditions, and thorium deposits is available from the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division.



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