



# Board Agenda Item 40

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DATE: August 23, 2022

TO: Board of Supervisors

SUBMITTED BY: Steven E. White, Director  
Department of Public Works and Planning

SUBJECT: Reclamation Agreement with RE Scarlet, LLC, and related Escrow Agreement and easements, to implement Project Mitigation Measures and Conditions of Approval of Unclassified Conditional Use Permit No. 3555 which permit the development, operation, and reclamation of a solar energy collection and storage facility.

RECOMMENDED ACTION(S):

- 1. Approve and authorize the Chairman to execute a 35-year Solar Project Reclamation Agreement (Reclamation Agreement), including the Reclamation Plan, Exhibit A thereto, with RE Scarlet, LLC, the project applicant (Applicant), to implement project mitigation measures and specific conditions of approval placed on Unclassified Conditional Use Permit (CUP) No. 3555 for a solar photovoltaic electricity generating and energy storage facility, encompassing approximately 2,070 acres, which is the first phase of a multiphase solar energy project;**
- 2. Approve an unexecuted form of an Escrow Agreement with the Applicant and United Security Bank, located in Fresno, as the Escrow Agent to accept a cash deposit of \$1,437,246.00 as the Applicant's initial security to the County for the Reclamation Agreement, and to identify the County's designated representatives who are authorized on behalf of the County to initiate and approve transactions of all types for the escrow account established under the Escrow Agreement (each, initially, a County Representative, and each subsequently, a Replacement County Representative, as the case may be);**
- 3. Authorize the Director of the Department of Public Works and Planning (the Director) to approve and execute the Escrow Agreement following your Board's approval of Recommended Action 1;**
- 4. Authorize the Director to give any notice on behalf of the County, under the Escrow Agreement, including but not limited to providing any revised form of Sight Draft (Exhibit A-1 to the Escrow Agreement) (the Revised Form of Sight Draft) and/or any revised Certificate as to Authorized Signatures-County of Fresno (Exhibit A-2 to the Escrow Agreement) (the Revised Form of Authorized Signatures), as applicable, to the Escrow Agent with respect to any County Representative and/or any Replacement County Representative having a title change or erroneous signature, or to identify any Replacement County Representative or any County Representative who has been replaced, as the case may be;**
- 5. Authorize each Replacement County Representative who may be identified by the Director in any notice given to the Escrow Agent, and in any related Revised Form of Sight Draft and/or Revised Form of Authorized Signatures, in Recommended Action 4, to execute any**

**supplemental certificate substantially in the form of the Revised Form of Authorized Signatures, and to provide any of their identifying information, including any updated or corrected information, as the case may be; and**

- 6. Authorize the Director, following your Board's approval of Recommended Action 1, to accept grants of limited access easements to the County from the Applicant (a form of which is Exhibit C-1 to the Reclamation Agreement) and from the Westlands Water District, (a form of which is Exhibit C-2 to the Reclamation Agreement), the owners of the properties upon which the Project will be situated for purposes of any Reclamation (defined in the Reclamation Agreement) by the County including its contractors, officers, agents, employees, and representatives, if and to the extent the County elects to do so.**

**The Project is located in the unincorporated area of Fresno County, approximately 3.5 miles west-southwest of the community of Tranquility, 6.5 miles east of Interstate 5 (I-5).**

On September 9th, 2021, the Planning Commission approved CUP No. 3555 for the Project and certified Environmental Impact Report (EIR) No. 7230 for a 400-megawatt (MW) solar photovoltaic generating and 400-MW / 1,600-megawatt hour (MWh) energy storage facility on 4,089 acres. As a condition of those approvals, the Planning Commission required the Applicant's compliance with a reclamation plan, subject to approval of the Director.

The Applicant is initially pursuing a first phase of development (*i.e.*, the Project), consisting of a 200-MW solar photovoltaic generation facility with a 40-MW / 160-MWh energy storage system on an approximate 2,070-acre portion of the 4,089 area under CUP No. 3555. Therefore, the Recommended Actions do not cover all the area of the CUP No. 3555, only the first phase of development.

Your Board's approval of the Recommended Actions, if approved, would satisfy Project mitigation measures and specific conditions of approval placed on CUP No. 3555 for the Project. Upon the recordation of both of the easements, and the Escrow Agent's confirmation to the County of the receipt of the initial cash security, the County would issue construction permits for the Project.

Your Board's approval of Recommended Actions, taken together, would (1) authorize the County to enter into the recommended Reclamation Agreement, which includes the Reclamation Plan; (2) approve the proposed unexecuted form of an Escrow Agreement with the Applicant and the Escrow Agent to accept an initial cash deposit of \$1,437,246.00, as cash security for the recommended Reclamation Agreement, and to identify the County's initially-designated representatives under recommended the Escrow Agreement; (3) authorize the Director to approve and execute the Escrow Agreement; (4) authorize the Director to give any notice on behalf of the County to the Escrow Agent with respect to any County Representatives or Replacement County Representatives; (5) authorize each County Representative or Replacement County Representative who may be identified by the Director in any such notice, to execute any supplemental certificate substantially in the form of the Revised Form of Authorized Signatures; and (6) authorize the Director to accept grants of limited access easements to the County from the Applicant and from the Westlands Water District (Westlands), for purposes of any reclamation by the County including its contractors, officers, agents, employees, and representatives, if and to the extent the County elects to do so.

The recommended Reclamation Agreement provides that, within twelve months of any Event of Project Cessation (defined below), as reasonably determined by the Director, the Applicant, shall, at its own cost, fully perform and comply with all of the provisions of the Reclamation Plan, and decommission, dismantle, and remove the entire Project, and reclaim all of the Project site to its pre-Project condition pursuant to the Reclamation Plan. If the Applicant or its successor-in-interest defaults on its obligations under the recommended Reclamation Agreement, and the County pursue its remedies under the recommended Reclamation Agreement, the easements would give the County access to the Project site, and the cash

security under the recommended Escrow Agreement would give the County access to funds, to enable the County, if and to the extent the County elects, to undertake such reclamation of the Project site to their pre-Project conditions.

As discussed below, the recommended Westlands' easement contains heavily-negotiated provisions that Westlands requires, based on Westlands' representations (e.g. Westlands does not have any interest in or obligations with respect to the management, operation, or reclamation of the Project). The recommended Westlands easement also requires the County to indemnify and defend Westlands arising out of or connected in any manner with the use of the Westlands easement by the County, and its agents, employees, and contractors.

This item pertains to a location in District 1.

ALTERNATIVE ACTION(S):

Your Board may reject the recommended actions and provide staff with further direction.

FISCAL IMPACT:

No fiscal impact to the County is anticipated.

The Applicant has a reimbursement agreement and funds on deposit with the County to pay for all staff costs associated with processing the Project.

The Applicant is required to provide a cash deposit, as its initial security to the County for the recommended Reclamation Agreement, pursuant to the recommended Escrow Agreement. As required by the recommended Reclamation Agreement, the initial minimum amount of the cash deposit shall be equal to a licensed professional engineer's written cost estimate, which is made part of the Reclamation Plan (See Addendum to Reclamation Plan). Specifically, the cash deposit is initially in the amount of \$1,437,246.00, and the Applicant is required under the recommended Reclamation Agreement to make annual cash deposits into the escrow account for the Escrow Agreement based on the Construction Cost Index reported in the Engineering News-Record. At the end of the 35-year Project life, if the Project is decommissioned, dismantled, and removed by the Applicant, and the Project site is returned to pre-Project condition as determined by the Department of Public Works and Planning, the funds under the recommended Escrow Agreement will be released to the Applicant.

DISCUSSION:

Overview - The Project's Anticipated Generation of Electricity:

The totality of the project identified in CUP No. 3555 would, if and when fully built out, consist of a 400-MW solar photovoltaic generation facility with a 400-MW / 1,600 MWh energy storage facility on approximately 4,089 acres in western unincorporated Fresno County, 3.5 miles west-southwest of the community of Tranquility. The Applicant has informed the Department that RE Scarlet, LLC, will be developing the first phase of the solar energy project, consisting of a 200-MW solar photovoltaic generation facility with a 40-MW / 160-MWh energy storage facility on an approximate 2,070 acres (the Project).

Planning Commission Approvals:

On September 9, 2021, the Planning Commission approved CUP No. 3555 and certified EIR No. 7230 to construct, operate, maintain, and ultimately decommission a photovoltaic electricity generating facilities, energy storage facilities and their associated infrastructure.

The recommended agreements listed under Recommended Actions relate only to the construction of the

first phase of the solar energy project. The remaining second phase of the solar energy project described in CUP No. 3555 is to be developed in the future. Any future development of the solar energy project described in CUP No. 3555 beyond the scope of the Project (*i.e.*, the first phase) will necessitate a subsequent set of agreements (or amendments to the currently-recommended agreements) and deposits of funds for your Board's consideration and requested action (*e.g.*, reclamation agreement (or possibly amendment to the currently-recommended Reclamation Agreement, if entered into) and security escrow agreement.

Planning Commission's Conditions of Approval - Key Conditions:

The Planning Commission approval of CUP No. 3555 includes conditions that require the Applicant or its successor-in-interest to adhere to a Reclamation Plan submitted to and approved by the County, and require the Applicant to enter into a Reclamation Agreement and provide financial assurances, in the form of cash security, and to ensure restoration of the property on which the Project is situated back to agricultural uses when the Conditional Use Permit expires, or the Project is abandoned. Conditions of Approval (COA) Nos. 5, 6, and 7 read as follows:

5. *Prior to the County of Fresno's issuance of the grading or any development permit, the project developer must enter into a reclamation agreement with the County of Fresno on terms and conditions acceptable to the County of Fresno, which reclamation agreement will require the project owner to (1) decommission, dismantle, and remove the project and reclaim the site to its pre-project condition in accordance with the approved Reclamation Plan, and (2) maintain a financial assurance to the County of Fresno, to secure the project owner's obligations under the reclamation agreement, in an amount sufficient to cover the costs of performing such obligations, as [EXHIBIT 1 - Page 19] provided herein. Such financial assurance shall be in the form of cash and maintained through an escrow arrangement or other form of security acceptable at the discretion of the Board of Supervisors.*

*The amount of the financial assurance under the reclamation agreement shall (1) initially cover the project owner's cost of performing its obligations under the reclamation agreement, as stated above, based on the final County of Fresno-approved design of the project, which cost estimate shall be provided by the project owner to the County of Fresno, and be subject to approval by the County of Fresno, and (2) be automatically increased annually, due to increases in costs, using the Engineering News-Record construction cost index. This initial cost estimate will consider any project components, other than Improvements, that are expected to be left in place at the request of and for the benefit of the subsequent landowner as long as the improvements are directly supportive restoring the site to a viable agricultural use. (*e.g.*, access roads, electrical lines, O&M building).*

6. *The project shall substantially adhere to the provisions in the Draft Reclamation Plan as submitted to the Planning Commission and prepared for the decommissioning of the facility when operation ceases. Reasonable modifications may be made to the Plan to address changes of scope and configuration of the final Site Plan and improvements. The draft reclamation Plan shall be reviewed and approved as final by the County of Fresno, Department of Public Works and Planning prior to the issuance of any development permits.*
7. *The Reclamation Plan shall be revised to provide for an annual increase in costs at 3%, or tied to the Engineering News-Record construction cost index, or other mechanism acceptable to the Fresno County Department of Public Works and Planning.*

The Reclamation Plan

On October 28, 2021, the Director accepted and approved the Applicant's draft reclamation plan. On June 30, 2022 the Director accepted and approved the Applicant's addendum to the reclamation plan, which addendum provided information concerning the location of third party easements that may impact any future reclamation activities under the recommended Reclamation Agreement. Collectively, the October 28, 2021

reclamation plan and June 30, 2022 addendum are referred to in this agenda item as the “Reclamation Plan” and are attached as an exhibit to the recommended Reclamation Agreement.

The Reclamation Plan details the steps to be taken by Applicant or its successor-in-interest to decommission and dismantle the Project at the end of its useful life and return the underlying Project site to its pre-project condition. As required by the recommended Reclamation Agreement, the Reclamation Plan contains an engineer’s cost estimate for such work, expressed in 2022 dollars in the amount of \$1,437,246.00. (See Addendum to Reclamation Plan).

The Recommended Actions:

Your Board’s approval of the Recommended Actions would authorize the approval and execution of the recommended Reclamation Agreement, and to authorize a financial assurance for the recommended Reclamation Agreement in the form of a cash deposit under the recommended Escrow Agreement in the initial amount of \$1,437,246.00, which provides funds to be available to the County in the event that the Applicant does not perform the provisions called for in the Reclamation Plan and recommended Reclamation Agreement, and the County elects to perform those provisions.

Initially the amount of the cash deposit under the recommended Escrow Agreement will be \$1,437,246.00, and the Applicant is required under the recommended Reclamation Agreement to make annual cash deposits into the escrow account under the recommended Escrow Agreement based on the Construction Cost Index reported in the Engineering News-Record.

The term of the recommended Reclamation Agreement is based on the anticipated operational period of the Project; as stated below, that is presently expected to be approximately 35 years. Any extension beyond that time would require application for and approval of additional entitlements, conditions of which may require entry into additional agreements governing reclamation and financial security.

Recommended Action 1 - Approve and execute the Reclamation Agreement:

The primary purposes and benefits of the recommended Reclamation Agreement are:

1. To give the County and the Applicant an agreed-upon process for the Applicant to complete the Reclamation of the Project and Project site under the Reclamation Plan.
2. For the Applicant to maintain a financial assurance to the County, in the form of cash deposits, in case of “Project Cessation” (defined below) and a default of the Applicant or its successor-in-interest under the recommended Reclamation Agreement; in such case, within twelve (12) months of the any Project Cession, as reasonably determined by the Director, and the County undertaking the default remedies under the recommended Reclamation Agreement, the County may elect to draw upon such financial assurance and perform the Applicant’s Reclamation obligations using the amount of funds available to the County under such financial assurance.

“Project Cessation” is defined in the recommended Reclamation Agreement as any of the following: (i) there has not been substantial development of the Project within two (2) years following the County Planning Commission’s approval of, and issuance to the Applicant, CUP No. 3555; (ii) the Project, or a substantial portion thereof, has not, following completion of construction of the Project, produced electricity for at least six (6) consecutive months within a twelve (12) month period, or for three hundred sixty five (365) non-consecutive calendar days within any twenty four (24) month period, during the term of the Reclamation Agreement; (iv) the expiration or early termination of CUP No. 3555; or (v) thirty-five (35) years from the commencement of operation of the Project, in its entirety.

3. Provide for easements for the County to access the Project site for such County reclamation, if

undertaken by the County.

The recommended Reclamation Agreement allows the Applicant, without the County's consent, to transfer the Reclamation Agreement, but only in its entirety, to any entity or person that becomes the sole permittee under CUP No. 3555, provided that certain conditions are met, such as the Applicant giving the County at least 30 days' prior notice of the transfer, and the transferee executes an assignment and assumption agreement in a form and substance reasonably satisfactory to the County.

In the event of default under the recommended Reclamation Agreement by Applicant or its successor-in-interest (for example, if the Applicant fails to reclaim the Project and Project site after the end of its useful life, declares bankruptcy, or abandons the Project), the County may, if it elects, undertake the default remedies under the recommended Reclamation Agreement and draw on the cash under the recommended Escrow Agreement and undertake reclamation of the Project and Project site in substantial conformity with the Reclamation Plan. The County's drawing on the funds under the recommended Escrow Agreement, however, will not obligate the County to continue or complete the Reclamation Plan beyond the amount of such funds so drawn. The County may also use a portion of such proceeds for the County's reasonable administrative and overhead costs in connection with such Reclamation of the Project and Project site pursuant to the Reclamation Plan, as well as for the County's reasonable costs, if any, that the County needs to incur to obtain immediate, reasonable access to the Project and/or the Project site.

The Reclamation Plan further requires that the Applicant furnish grants of limited access easements from all record owners of property upon which the Project is to be situated in favor of the County. These easements will allow the County, including its contractors and representatives, access to any property upon which the Project is constructed for the purpose of performing reclamation of the Project and Project site, should the County elect to do so upon a default by Applicant or its successor-in-interest.

The Director's requested authority by your Board to approve and execute the recommended Escrow Agreement (Recommended Action 3) and to accept limited access easements (Recommended Action 6) are conditioned on your Board's approval of the recommended Reclamation Agreement (Recommended Action 1) because the recommended Escrow Agreement and those easements reference the Reclamation by its specific date. Therefore, if your Board approves the recommended Reclamation Agreement, the Department will issue the execution-ready forms of those documents to the other parties for their execution and return to the Department, and the Department's recording of those easements.

Recommended Actions 2 and 3 - Approve the form of the Escrow Agreement and authorize the Director to approve and enter into the Escrow Agreement with the Applicant and the Escrow Agent to accept an initial deposit of \$1,437,246.00 as security to the County for the Reclamation Agreement:

If Recommended Action 1 is approved, the Applicant is required to enter into an escrow agreement with the County and a qualified financial institution (*i.e.*, an Escrow Agent). The Applicant has proposed United Security Bank to serve as Escrow Agent, and to receive the deposit of the financial assurances in an initial amount of \$1,384,746.00 to be held in an escrow account governed by the recommended Escrow Agreement. The Escrow Agreement provides funds that the County could, per the recommended Reclamation Agreement, draw upon to perform reclamation of the Project and Project site in the event of a default under the recommended Reclamation Agreement by Applicant or its successor-in-interest.

Recommended Actions 4 and 5 - Authorize the Director to give any notice on behalf of the County to the Escrow Agent and authorize each County Representative who may be identified by the Director in any such notice, to execute any supplemental certificate substantially in the form of the Revised Form of Authorized Signatures:

Your Board's approval of Recommended Action 4 would permit the Director to identify County Representatives and Replacement County Representatives having a title change or erroneous signature, or

to identify any Replacement County Representative or any County Representative who has been replaced, as the case may be. Your Board's approval of Recommended Action 5 would authorize those County Representatives and Replacement County Representatives to provide appropriate identifying information and to execute the appropriate document to accomplish such notice by the Director. Initially, such County Representatives are:

- Director of the Department of Public Works and Planning;
- Planning and Resource Management Officer of the Department of Public Works and Planning;
- County Administrative Officer; and
- Auditor-Controller/Treasurer-Tax Collector.

Recommended Action 6 - Authorize the Director to accept grants of access easements:

Your Board's approval of Recommended Action No. 6 would authorize the Director to accept the Grants of Limited Access Easements (Easements) from the owners of the Project site. The Easements would allow the County, including its contractors and representatives, a nonexclusive access easement over, under, on, and across the property for the purpose of carrying out Reclamation of the Project and Project site in substantial conformity with the Reclamation Plans, in the event of a default under the recommended Reclamation Agreement by Applicant or its successor-in-interest, if the County elects to undertake such reclamation.

Under the Easements, the property owners of the Project site consist of Applicant and Westlands Water District (Westlands).

The properties for the Project Site are covered by numerous pre-existing third-party easements for roadway use, electrical transmission, and water distribution, among other things. In performing any reclamation under the Easements, the County will be expected to respect the pre-existing rights of other interest-holders and not damage any infrastructure and improvements installed by those interest-holders under their pre-existing easements. The Applicant has warranted under the recommended Reclamation Agreement it has identified all such pre-existing third-party easements in Reclamation Plan attached to the recommended Reclamation Agreement.

In addition, the Westlands easement contains heavily-negotiated provisions that Westlands requires. Under the Westlands easement, Westlands represents to the County that:

- Only the Applicant owns the Project;
- Westlands does not have any interest in the Project, and
- Westlands' only obligations with respect to the Project are under the Westlands easement to the County and a certain recorded transmission easement from Westlands to the Applicant.

Based on such representations, the County acknowledges that any of the Applicant's obligations under the Reclamation Plan or recommended Reclamation Agreement are not binding on Westlands as long as Westlands does not have:

- Any interest in the Project;
- Any obligations with respect to the management, operation, or reclamation of the Project; or
- Any rights or obligations (in addition to the obligations under the Westlands easement and the

foregoing transmission easement) with respect to the Reclamation Plan, or the recommended Reclamation Agreement.

The Westlands easement further therefore provides so long as all of such circumstances exist, the County shall not have any rights to bring legal action against Westlands due solely to any actions taken by the Applicant with regard to the Project and Applicant's obligations under the Reclamation Plan or recommended Reclamation Agreement, except as may be necessary for the County, in its determination, to join or name Westlands, as sole fee owner of Westlands' Property (or as owner of any portion of any of the Westlands Property if Westlands is not then the sole fee owner of the Westlands Property), in the filing of any legal action involving the County and the Applicant with respect to the Project, the recommended Reclamation Agreement, or the Reclamation Plan.

Furthermore, the Westlands easement provides that it does not impose any obligation, liability, or responsibility on Westlands to carry out or fund any reclamation of the Project or Project site on Westlands' property.

The recommended Westlands easement also requires the County to indemnify and defend Westlands Water District arising out of or connected in any manner with the use of the Westlands Water District easement by the County, and its agents, employees, and contractors.

Westlands is neither a party to the recommended Reclamation Agreement, nor the Applicant. Therefore, Westlands is providing its easement as an accommodation to the Applicant based on the foregoing required provisions. In light of those circumstances, and Westlands' representations (e.g. Westland's does not have any interest in or obligations with respect to the management, operation, or reclamation of the Project), the foregoing provisions required by Westlands are not unreasonable.

Future Action - Road Repair Agreement:

Condition of Approval No. 16 of CUP No. 3555 states:

*16. Prior to granting occupancy to the use, the developer shall enter into a financially secured agreement to ensure that any County roads which are demonstrably damaged by project related traffic are repaired, paved, and/or slurry-sealed, as is determined by the Fresno County Public Works and Planning Department's Road Maintenance and Operations Division.*

To fulfill this condition, the County and Applicant must enter into what is typically known as a "Road Repair Agreement". Therefore, the Department will return to your Board, in the future, at the appropriate time prior to the occupancy and operation of the Project, to seek your Board's requested approval of such a recommended Road Repair Agreement.

Environmental Review:

On September 9, 2021, the Planning Commission certified EIR No. 7230 under the California Environmental Quality Act (California Public Resources Code, Division 13, section 21000 *et seq.*), including the implementing CEQA Guidelines thereunder (Title 14, Division 6, Chapter 3, California Code of Regulations, section 15000 *et seq.*) (collectively, the California Environmental Quality Act, including such CEQA Guidelines thereunder are "CEQA"). Mitigation measures adopted pursuant to that EIR required that the Applicant take measures, including the Recommended Actions, to mitigate impacts from the Project on transportation, agricultural, and other resources. The Recommended Actions are in the furtherance of those mitigation measures and are within the scope of the Project's EIR.

Westlands was one of the "responsible agencies" under CEQA in the County's environmental review of EIR No. 7230. On April 5, 2022, the Westlands filed its notice of determination, under CEQA, with the County Clerk, reflecting Westlands' review of EIR No. 7230 and approval of the project described in CUP No. 3555.

ATTACHMENTS INCLUDED AND/OR ON FILE:

Attachment A - Location Map  
On file with Clerk - Reclamation Agreement  
On file with Clerk - Escrow Agreement

CAO ANALYST:

Salvador Espino