NO. 52975-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

REC SOLAR GRADE SILICON, LLC

Appellant,

v.

MELISSA MCKNIGHT, Grant County Assessor,

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Chris Lanese)

APPELLANT'S OPENING BRIEF

Norman J. Bruns, WSBA #16234
Michelle DeLappe, WSBA #42184
GARVEY SCHUBERT BARER, P.C.
1191 Second Avenue, 18th Floor
Seattle, Washington 98101-2939
(206) 464-3939
seasalt@gsblaw.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Court Rules

Washington Board of Tax Appeals Decisions

Other Authorities

I. INTRODUCTION

This case involves the property tax valuation of a manufacturing facility ("Facility") in Moses Lake. The Facility, which is owned by REC Solar Grade Silicon, LLC ("REC"), produces polysilicon for use in solar panels. The Respondent is the Grant County Assessor (Melissa McKnight, successor to Laure Grammer), who is responsible for determining the Facility's value for tax purposes. The date of valuation is January 1, 2012.

The Assessor initially relied on an appraisal by two employees of the State Department of Revenue ("Klingeman-Brewer appraisal"). The Assessor subsequently obtained four more appraisal reports from two other appraisers. REC presented an appraisal report by Stancil & Co. ("Stancil"). The parties presented their evidence to the Board of Tax Appeals ("BTA") in an adjudicative proceeding under the Administrative Procedure Act ("APA") (RCW 34.05.410 et seq.) and the BTA's rules of practice and procedure (WAC 456-09-001 et seq.). The BTA rejected all six appraisal reports presented by the parties and, instead, performed its own valuation.

The case is now subject to judicial review for a second time. Judge Wilson of the Thurston County Superior Court conducted the first review in 2015. She reversed the BTA's original decision and remanded with detailed instructions for resolving critical inconsistencies within the

decision. Clerks Papers ("CP") at 247-249 ("Judge Wilson's Order"). Neither party appealed Judge Wilson's Order. The BTA then issued a Final Decision on Remand ("Decision"). CP 498-531. REC's appeal of the Decision was assigned to Judge Wilson once again, but when her duties changed the case was reassigned to Judge Lanese. CP 347. Judge Lanese affirmed the Decision. CP 466 ("Judge Lanese's Order"). REC now asks this Court to reverse the Decision under RCW 34.05.570(3)(c), (d), (e), (f), and (i), and to remand with instructions that the BTA follow Judge Wilson's Order and resolve other new internal conflicts in the Decision.

II. ISSUES AND ASSIGNMENTS OF ERROR

A. Issues

Issue 1. The BTA's unchallenged findings are verities. The BTA must also respect unrebutted and inherently credible evidence underlying expert opinions. After Judge Wilson first reviewed this case, the BTA was obligated to follow her instructions for resolving conflicts within its original decision. On remand, the BTA largely ignored Judge Wilson's Order and again rejected REC's appraisal for reasons in direct conflict with its own findings and unrebutted evidence. Did the BTA err in rejecting REC's appraisal? (Assignments of Error 1-17.)

Issue 2. Washington case law presumes that chattels (items of tangible personal property) remain such unless three factors are met. The BTA, by

disregarding and misinterpreting case law and unrebutted and inherently credible evidence, concluded that REC's machinery and equipment ("M&E") met all three factors and thereby became real property. Did the BTA make legal errors and arbitrarily disregard necessary surrounding facts and circumstances in the record? (Assignments of Error 18-22.)

B. Assignments of Error

REC assigns error to the following conclusions of law and findings of fact. The full text of the BTA's Decision is at CP 498-531; a redline version appended to this brief shows the BTA's changes on remand. The erroneous findings listed below conflict with other unchallenged findings and with evidence that was so clear, credible, and uncontradicted that the errors rise to the level of legal errors and are arbitrary and capricious.

1. Conclusion of Law 6 errs in stating, "In the present case, because the Board concludes that market events occurring after 2012 and the summations of REC Solar performance for the entirety of 2012 were likely unknowable as of the January 1, 2012, assessment date, they are more appropriately considered in setting values for January 1, 2013, and later years, in accordance with RCW 84.40.020." This conflicts with the proper test set forth in the first part of Conclusion of Law 6 and in Finding of Fact 60 and with Judge Wilson's Order.
2. Conclusion of Law 9 errs in stating, "The parties' income approaches

are unreliable estimates of the value of the subject; consequently, the cost approach is the best indicator of value in the present case."

3. Conclusion of Law 11 errs in stating, "External obsolescence applicable to REC Solar on January 1, 2012, is 45 percent of replacement cost new less physical depreciation and functional obsolescence, based on a range of 24 percent to 50 percent indicated by the following evidence and with emphasis on the 2011 fourth quarter price drop of prime grade polysilicon," followed by a list of factors based on Findings of Fact 27, 30, 34, 36.3, and 58, of which 30, 34, and 36.3 are incorrect.
4. Conclusion of Law 12 errs in applying a 45-percent adjustment for external obsolescence based on the erroneous range of percentages presented in Conclusion 11.
5. Conclusion of Law 13 presents the BTA's erroneous conclusion of value.
6. Conclusion of Law 14 presents the BTA's erroneous conclusion of value for the real property parcel.
7. Finding of Fact 30, citing a graph in the record, errs in stating, "The polysilicon industry graduated from a severe undersupply in 2006 to 2008 to an extreme oversupply situation, with 32 percent excess capacity in 2011 and an estimated 46 percent excess capacity in 2012."

The cited graph in fact shows 60 and 82 percent excess capacity. Administrative Record ("AR") Ex. A1-65, Fig. IV-5.

8. Finding of Fact 34, citing Exhibit A1-72, errs in stating, "From the fourth quarter of 2010 to the fourth quarter of 2011, polysilicon prices fell 40 percent, according to GTMRESEARCH.com." Actual prices fell 60 percent in 2011. AR Ex. A1-72 to -73, Fig. IV-9.
9. Finding of Fact 36.3 errs in stating, "As of January 2012, the cost for solar energy is $4.53 per megawatt, with an estimated cost needed for grid parity of $3.00 per megawatt." The cost for residential solar systems (not solar energy) was $4.53 per watt (not megawatt). AR Ex. A1-36.
10. Finding of Fact 38, with no citation, errs in stating, "Rumors began in 2011 that the Chinese would seek tariffs on polysilicon." This is a half-truth. Developments in 2011, including calls within China to retaliate with tariffs against U.S. actions, amount to more than mere rumors. AR Exs. A1-66 to -68, A17; AR Transcripts Verbatim Report of Proceedings ("VRP") (4/1/14) at 289-290. As early as August, 2011, REC recognized "a high probability that Chinese protectionism would favor polysilicon producers in China" according to the BTA's Finding of Fact 55. CP 509.
11. Finding of Fact 39.3, with no citation, errs in stating, "Ultimately a 57

percent tariff was established, although REC Solar has been able to work around it." This is a half-truth. The work-around was always understood as temporary. AR Transcripts VRP (4/1/14) at 291, 331-32, (4/3/14) at 871. Both the tariff and work-around occurred after the valuation date. AR Transcripts VRP (4/1/14) at 291, 331-32, (4/3/14) at 871; AR Ex. A18-7.

12. Finding of Fact 40 errs in stating, "The 2011 operating profit was entirely due to first-half results, with second-half results suffering from the drop in polysilicon prices from $50 to $30 per kilogram." This conflicts with the $17.55 price stated in Finding of Fact 41.
13. Finding of Fact 51, including its subparts, none of which contains any citations to evidence, erroneously describes impairment analysis for accounting purposes—erroneous in general and as applicable to REC.
14. Finding of Fact 61 errs in stating, "A buyer, anticipating a purchase on January 1, 2012, would begin due diligence between six and nine months prior for a plant similar to REC Solar." Assuming any period of due diligence so as to ignore events shortly before the valuation date is an error of law.
15. Finding of Fact 76, which is erroneous in its entirety, starts by stating, "No evidentiary weight is accorded to the value determined by the Stancil appraisal's DCF analysis for the following reasons," followed

by the flawed reasons in Findings 76.1-76.7. Finding 76.1 states, "There is a significant difference between its revenue forecast and the revenue forecast in the REC Solar budget, as shown in the table below." The table compares REC's intentionally aggressive *prime*-grade price forecasts, created before the crash in prices and qualified by known risks that became more serious by the end of 2011, with Stancil's *mixed*-grade price forecasts (see Findings 40, 41, 54, 55, 58, 67, and Conclusion 11.5). Findings 76.2 and 76.3, based on the BTA's same table, shows the Stancil revenue and production forecasts as a percentage of the REC internal budget. Finding 76.4 criticizes Stancil's flat projection for production as "inconsistent with the forecast" in REC's 2011 annual report while ignoring that same report's projection that sales prices "are expected to decrease significantly in 2012 compared to the average for 2011" and never "return to the average 2011 level." AR Ex. R22-88. Finding 76.5 repeats the reasons previously listed. Citing a report by Mr. Beaton (whose analysis the BTA roundly rejected in Findings 88 and 95) and 24 pages of transcript of his testimony, Finding 76.5 also erroneously concludes that Stancil's "15 percent discount rate is inaccurate and unreliable and contradicts the Taxpayer's public financial disclosures." Finding 76.6 criticizes Stancil for "accord[ing] only 10 percent weight

to the price forecast" in REC's internal budget while according 90 percent "to third-party industry surveys." With no citation, Finding 76.7 illogically compares "Stancil's business enterprise value of $360,000,000" to "REC Solar's operating profit of $356,884,000 in the first half of 2011."

16. Finding of Fact 101, citing Finding 76, errs in stating, "Because the Stancil appraisal's income shortfall calculation of external obsolescence is based on the Stancil appraisal's flawed DCF analysis, the Stancil appraisal's cost approach is given little or no weight." Finding 101.1 errs in stating that one of the methods Stancil used to quantify external obsolescence is inaccurate and "a matter of significant controversy within the appraisal community." This criticism conflicts with (a) the unrefuted testimony provided by both parties' experts, (b) Washington Department of Revenue guidance, (c) prior BTA decisions, (d) other jurisdictions' court decisions, and (e) all authority from the appraisal profession (including the appraisal authorities cited by the BTA for this finding). It also disregards other methods Stancil used to determine external obsolescence.

17. Finding of Fact 105.2 incorrectly states, "External obsolescence is indicated by the decline in price from REC Solar's polysilicon assumption of $35 to $50 per kilogram for Silicon 3.0 and 4.0 in 2006

and 2007 to a reasonable average selling price forecast of $24.83 per kilogram for 2012." In conflict with numerous unchallenged findings, the BTA here assumes for REC's full mixed-grade output a higher price than REC's aggressive internal budget for prime grade only.

18. Conclusion of Law 17 erroneously states that "the Taxpayer has the burden of proving, by a preponderance of the evidence, that the Assessor erroneously classified the M&E as fixtures."
19. Conclusion of Law 21 errs in relying on the description in WAC 458-20-010(3) of "various types of property that come within the statutory definition of 'real property' in RCW 84.04.090" rather than on the statute and case law.
20. Conclusion of Law 22 errs in concluding that REC failed to show that its M&E did not meet the factors for classification as fixtures.
21. Conclusion of Law 23 errs in stating that REC met one of the three criteria—the owner's intention that the M&E be fixtures—based on the BTA's misunderstanding of the accounting term "fixed asset."
22. Conclusion of Law 24 errs in stating that REC's evidence does not prove, under Washington law, that its M&E is personal property.

III. STATEMENT OF THE CASE

Of three issues decided by the BTA, two remain for judicial review: (1) the Facility's value on January 1, 2012, and (2) classification of its

M&E as personal or real property. CP 500. For the most part, the facts in the Decision are correct. As most of the findings have never been challenged, they are verities and cited where possible below.[1]

A. Factual Background

The factual background for this case breaks down into four main periods: (1) the period before August, 2011; (2) August to October, 2011, when REC prepared an aggressive internal budget, qualified by a "risk matrix," for 2012 and beyond; (3) the remainder of 2011 when the industry experienced major market changes; and (4) the period after January 1, 2012.

1. The Facility's situation before August, 2011

REC's Facility in Moses Lake converts metallurgical-grade silicon into silane gas, which it in turn converts into polysilicon that REC's customers use to manufacture components for solar panels. CP 502-503. The Facility has a sister plant in Butte, Montana, that primarily makes electronics-grade polysilicon. CP 422 (AR Ex. R23-89). The Moses Lake Facility can only make solar-grade polysilicon, which sells at lower prices in a more volatile market. CP 503.

When originally built in 1984, the Facility produced a chunk form of

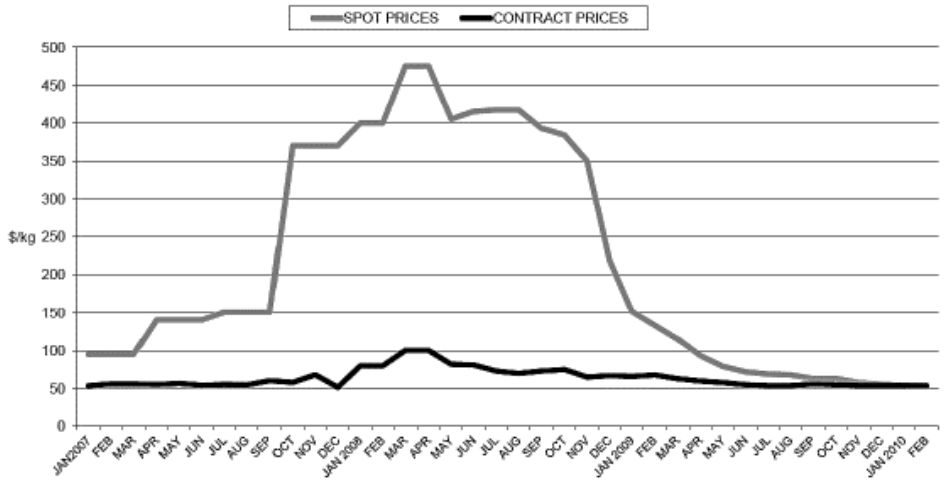
[1] *Chandler v. Office of Ins. Comm'r*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007), *review denied*, 163 Wn.2d 1056 (2008).

polysilicon using a well-established technology known as the Siemens process. CP 503; AR Ex. A1-29, -99. During a time of strong demand for solar-grade polysilicon in 2006 and 2007, REC decided to make a massive investment at the Facility by constructing new silane units and a new polysilicon unit based on an innovative fluidized-bed reactor ("FBR") technology. CP 503. REC's FBR unit, the world's first full-scale unit using FBR technology, offered the prospect of significant gains in efficiency over the traditional Siemens process. CP 503; AR Ex. A1-99. But FBR technology has two drawbacks. It yields a lower percentage of prime-grade material and hence a greater proportion of secondary grades, fines, and powder. CP 503. Customers also must modify their facilities to use the granular FBR product instead of the familiar Siemens chunk form. AR Ex. A1-99; AR Transcripts VRP (4/1/14) at 234. REC based its major investment in the Facility on a contract with an affiliate, REC Wafer, which promised to pay $35 to $50 per kilogram for everything the Facility could produce, even the lowest quality fines and powder. CP 504.

After REC committed to the investment, a series of colossal misfortunes beset the Facility. Final construction costs swelled to 50 percent more than planned. Ex. A1-159. Then, just as REC completed construction, prices for solar-grade polysilicon collapsed due to massive oversupply. CP 504-505. REC was not the only company that had been

adding capacity in the years leading up to this market collapse. CP 504-505. The following graph shows solar-grade polysilicon prices in the industry from 2007-2010:

Figure IV-7. Polysilicon Prices



AR Ex. A1-70. Distress struck the entire industry: the stock prices of solar companies fell by 80 percent and then fell another 80 percent. AR Ex. A3-2 to -4; AR Transcripts VRP (4/8/14) at 1461. Many solar companies began shutting down or abandoning their polysilicon plants. CP 505. The closed plants had little to no value. CP 505. REC's own Siemens unit at Moses Lake was operating at a loss. AR Transcripts VRP (4/2/14) at 545-546.

In mid-2011 REC Wafer responded to these conditions by narrowing what it would buy from the Facility to only the better grades for a reduced price of $30 per kilogram. CP 506. The Facility suddenly had to find

customers for the balance of its mixed-grade FBR products, with a granular form that still lacked general market acceptance. AR Transcripts VRP (4/1/14) at 234-235. The customers REC found were primarily in China. AR Transcripts VRP (4/1/14) at 322-323. But the Chinese government had started signaling that it would take measures to protect its own manufacturers as part of a looming trade war in the solar industry. AR Ex. A1-65 to -66; AR Transcripts VRP (4/1/14) at 286-287.

2. The Facility's internal budgeting in August to October, 2011

In late summer and early fall of 2011, REC prepared a combined internal budget for Moses Lake and Butte. CP 508. The budget reflected REC's goals for prime-grade polysilicon production quality, volume, and sales. CP 508. The budget showed price goals for REC's prime-grade products at $24.64-$33.51 per kilogram for 2012-2016. CP 508, 512 (noting that the budget showed "prime price forecasts"); AR Exs. R1-67, R26-4. The prices were based on goals for REC's contract sales price, not spot prices (i.e., not market prices outside of long-term contracts). AR Exs. A1-43, -78, A16-6 ("The budget assumes that REC Wafer will take its committed 35% of all of [the Facility's] polysilicon sales volume in 2012."); AR Transcripts VRP (4/1/14) at 249. These prices did not reflect the Facility's actual mixed-grade FBR production. CP 515 (finding that prime price forecasts can never apply to the Facility's entire production);

AR Transcripts VRP (4/1/14) at 270-271, (4/3/14) at 744-745.

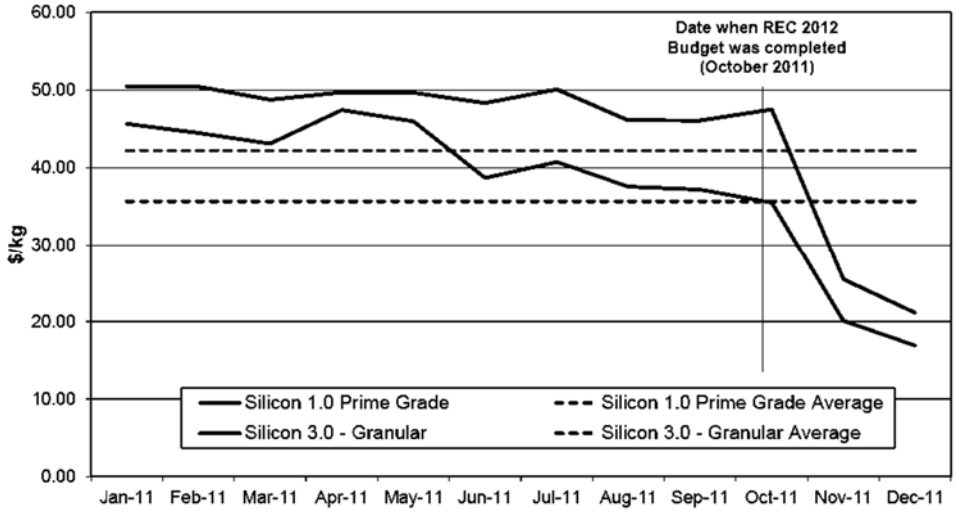
The budget's purpose was to set goals to drive personnel behaviors and performance measures, so it was intentionally aggressive. CP 508. A "risk matrix" in the same budget document identified the risks associated with REC's aggressive goals. CP 509. As of August, 2011, REC recognized the following threats to its budget, as explained in the BTA's own words:

- a 90 percent chance of losing the contract with REC Wafer;
- a high probability that external customers would be unable to take all volumes produced by [the Facility];
- a high probability that the average sales prices for prime-grade polysilicon would drop to $30 per kilogram or below;
- a high probability that Chinese protectionism would favor polysilicon producers in China;
- a critical risk of [FBR and new silane unit] production issues;
- a critical risk of problems related to the financial health of [the Facility's] customers; and
- a critical risk of issues with quality and market acceptance for the FBR products.

CP 509.

3. The remainder of 2011 when the industry experienced further major changes

Soon after REC completed the budget and risk matrix, polysilicon prices plummeted to a December average of $17.55. CP 506, 509. Company employees said the price "was in a free fall." AR Transcripts VRP (4/3/14) at 734-735. The following graph shows the precipitous drop in the Facility's product prices after REC completed its internal budget:



AR Ex. A38-5. (The higher solid and dotted lines represent the Siemens product; the lower lines represent the FBR mixed-grade product.) In early fall, REC considered shutting down its Siemens unit. CP 507. At the same time, solar-panel makers in the U.S. sought tariffs against their Chinese competitors, and China was preparing to retaliate with tariffs on U.S. polysilicon sold into China. CP 506-507, 509; AR Ex. A17; AR Ex. A1-66 to -68; AR Transcripts VRP (4/1/14) at 287-290, 322-323. As the BTA points out, if REC had prepared its risk matrix in December rather than August, "a number of the risks would have increased in probability." CP 509. In short, by January 1, 2012, the outlook was grim. CP 505. In its 2011 Annual Report, REC's parent company explained, "Sales prices for REC Silicon are expected to decrease significantly in 2012 compared to the average for 2011"; REC never expects the prices "to return to the

average 2011 level." CP 420 (AR Ex. R22-88). Had REC known in 2006 and 2007 what it knew by January 1, 2012, it would not have invested in the Facility. AR Transcripts VRP (4/1/14) at 295.

4. The Facility's situation after January 1, 2012

Major risks that REC identified in August, 2011, ultimately came to pass:

- REC lost the remaining contract with REC Wafer. First, in the beginning of 2012 REC Wafer reduced its orders to only 30 percent of the Facility's production at a further reduced price of $25 per kilogram for only the best quality grades. CP 506-507; AR Transcripts VRP (4/1/14) at 269, (4/2/14) at 543. By mid-2012, REC Wafer closed and filed for bankruptcy. AR Ex. R23-97; CP 421 (AR Ex. R23-15).
- Prime-grade prices in the industry dropped well below $30 before 2012. During 2012, polysilicon prices continued to fall: the Facility's average price in 2012 was $14.71 per kilogram, and its average price for December, 2012, was $10.27. AR Transcripts VRP (4/1/14) at 565. Because the Facility's expenses are not tied to the price of the finished product, the Facility operated at a loss in 2012. *Id.* at 538-539, 565.
- Starting in 2013, China imposed a 57-percent tariff on REC's products, subject to a work-around that was uncertain and no better than temporary. CP 506; AR Transcripts VRP (4/1/14) at 291, 331-32,

(4/3/14) at 871; AR Ex. A18-7.

Furthermore, the Facility's Siemens unit continued to lose money, so REC shut it down in the beginning of 2013. CP 421 (AR Ex. R23-15); AR Transcripts VRP (4/2/14) at 545-546. As an example of the losses solar-grade polysilicon manufacturers continued to suffer, a new polysilicon plant in Idaho, built for $600-$700 million, sold in October, 2013, for $8.3 million. CP 505.

B. Procedural Posture

This case began in 2012 when REC received notice of the Assessor's estimate of the January 1, 2012, market value of REC's taxable property. CP 500. REC appealed the 2012 property tax assessment of the portion of the Facility identified as Grant County real property tax account 91759600, which consists of land, buildings, yard improvements, and M&E. CP 499-500. REC's personal property tax account was not at issue in the BTA case, so its assessed value must be subtracted from the appraisers' full-Facility values to conclude the value of the property under appeal. CP 527.

After hearing the evidence and accepting proposed findings and conclusions from the parties, the BTA issued its first decision, which REC asked the superior court to review. CP 4-36. Judge Wilson reversed the BTA's first decision for several errors and remanded it with detailed

instructions. CP 247-249. Neither party appealed Judge Wilson's Order. With no hearing or other input from the parties, the BTA issued its Decision on remand. CP 498-531. A redline showing the revisions made on remand is appended to this brief. REC's appeal of the Decision was assigned to Judge Wilson once again, but when her duties changed the case was reassigned to Judge Lanese. CP 347. Judge Lanese affirmed the Decision. CP 466.

Both parties presented appraisals on the valuation issue to the BTA. REC's appraisal, by Stancil & Co., is Exhibit A1 (tab 32 in the BTA Sealed Evidence binder). The Assessor submitted five appraisals. She based her assessment on the Klingeman-Brewer appraisal (AR Ex. R1). AR Transcripts VRP (4/1/14) at 362. She then offered two appraisals by Neil Beaton (AR Ex. R17, reviewing the Klingeman-Brewer income approaches; and AR Ex. R18, reviewing the Stancil income approach), and two by John Lifflander (AR Ex. R27, reviewing the Klingeman-Brewer cost approaches, and AR Ex. R28, reviewing the Stancil cost approach).

Appraisers for both parties considered three approaches to value: the sales comparison approach, income approach, and cost approach. CP 510-522. All agreed that the sales comparison approach did not apply to REC's Facility. CP 512, 525. That left two approaches. The income approach

values the business based on the estimated future earnings and then subtracts the value of exempt property and property not under appeal. AR Ex. A1-115. Both parties performed a discounted cash flow ("DCF") form of income approach; Klingeman-Brewer also used two other forms of income approach. CP 512. The cost approach represents the cost to reproduce or replace the property and then subtracts physical depreciation and obsolescence affecting the Facility. AR Ex. A1-115. The largest difference between the parties' cost approaches was external obsolescence, which is loss in value due to causes external to the Facility itself. CP 519. Ultimately, the BTA rejected all of the appraisals; it instead performed its own valuation based on its own replacement cost new less depreciation and obsolescence. CP 525-527. The Assessor never appealed the BTA's rejection of her appraisals. Thus, in judicial review, the BTA's rejection of REC's appraisal (both the income approach and the cost approach) is the sole focus for the valuation issue.

For the issue of whether the Facility's M&E is real property or personal property, REC presented testimony by its director of operations and its corporate controller that the Facility's M&E can be and has been moved; the M&E has a shorter useful life than the buildings at the Facility; and REC replaces or reconfigures the M&E due to wear and safety considerations, as changes occur in technology and efficiency, or as

needs arise to use the buildings for other purposes. AR Transcripts VRP (3/31/14) at 117-134, (4/2/14) at 535-536. None of this testimony was rebutted or contradicted. Nevertheless, the BTA concluded that the M&E was real property. Judge Wilson's Order faulted the BTA's first decision for not explaining how the record supported the conclusion that REC's M&E is real property and required detailed findings explaining application of factors under which chattels become fixtures. CP 248-249. On remand the BTA, with new findings and conclusions on the issue, again concluded that the M&E was real property. CP 522-524, 527-530.

IV. STANDARD OF REVIEW

The *de novo* standard of review for legal errors applies to both issues in this appeal. This Court performs its review without regard to Judge Lanese's Order affirming the Decision. But Judge Wilson's earlier Order, issued in the superior court's appellate capacity under RCW 34.05.570, is part of the law of this case. The Assessor agrees. CP 370. Under law of the case doctrine, including RAP 2.5(c)(2), courts may at the instance of a party reconsider a legal issue already decided in a previous appeal in the same case only if the legal issue was clearly erroneous, the doctrine's application would result in manifest injustice, and reconsidering it would

cause no injustice to the other party.[2] Because Judge Wilson's Order is law of this case, the BTA's failure to comply with it is a legal error.

De novo review applies for several reasons. First, both issues are questions of law and of correctly applying the law to the facts.[3] Much of the BTA's original decision and Decision on remand was never challenged: findings not subject to challenge become verities in the case.[4] Because the Assessor appealed neither of the BTA's decisions, the only findings challenged are those REC has challenged. Judge Wilson's Order required the BTA to reexamine several challenged findings in light of the unchallenged findings that had become established facts in the case. CP 244-245. Thus internal inconsistencies in the Decision must be resolved in favor of the unchallenged portions.[5] Second, only when facts are in dispute can they present a question of fact; when the facts are unrebutted, uncontradicted, and inherently credible, *de novo* review applies to determine whether the decision draws the correct inferences from the evidence.[6] Third, RCW 34.05.461(3) requires the BTA to enter "findings

---

[2] *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988); *Hogan v. Sacred Heart Medical Center*, 122 Wn. App. 533, 543, 94 P.3d 390 (2004), *review denied*, 153 Wn.2d 1026 (2005).
[3] *Tapper v. State Employment Security Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).
[4] *Chandler*, 141 Wn. App. at 648.
[5] *See, e.g., R. R. Gable, Inc. v. Burrows*, 32 Wn. App. 749, 753, 649 P.2d 177 (1982), *review denied*, 93 Wn.2d 1008, *cert. denied*, 461 U.S. 957 (1983) (noting that the Court is "bound by the unchallenged findings" as "established fact[s]" in the case).
[6] *Peeples v. Port of Bellingham*, 93 Wn.766, 771-72, 613 P.2d 1128 (1980), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 861 n.2, 676 P.2d 431 (1984);

and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record" to ensure the parties and Court are fully informed as to the bases of the decision.[7] A failure to explain "what evidence was persuasive and why, and which expert was most credible and why" is therefore also a legal error.[8] This is all the more true where a reviewing court (Judge Wilson) has already decided that the BTA's decision reflected deficient reasoning and findings in conflict with one another and has instructed the BTA on how to correct the deficiencies.

In addition to legal errors subject to RCW 34.05.570(3)(d), both issues involve errors warranting reversal under RCW 34.05.570(3)(c) (for failure to follow a prescribed procedure), RCW 34.05.570(3)(e) (for an order unsupported by substantial evidence), RCW 34.05.570(3)(f) (for failure to decide all issues), and RCW 34.05.570(3)(i) (for an order that is arbitrary and capricious). For the arbitrary and capricious standard, this Court recently explained that it applies *de novo* review to determine whether the decision is "willful and unreasoning or does not consider the facts and circumstances underlying the decision."[9]

Krivanek v. Fiberboard Corp., 72 Wn. App. 632, 636-37, 865 P.2d 527 (1993), *review denied*, 124 Wn.2d 1005 (1994).
[7] *Weyerhaeuser Co. v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994).
[8] *Boeing Co. v. Gelman*, 102 Wn. App. 862, 870, 10 P.3d 475 (2000).
[9] *Karanjah v. Dep't of Social & Health Services*, 199 Wn. App. 903, 924-25, 401 P.3d 381 (2017).

V. SUMMARY OF ARGUMENT

The first of the two issues before this Court involves the BTA's rejection of REC's appraisal. The BTA rejected all of the parties' appraisals in favor of its own valuation of the Facility. The Assessor has accepted the rejection of her five appraisals, while REC continues to contest the rejection of its appraisal. On the superior court's first review, Judge Wilson agreed that the BTA erred in rejecting Stancil's appraisal because the stated reason for doing so conflicted with unchallenged findings in the BTA's decision and lacked substantial evidentiary support. The BTA's Decision on remand mostly ignored Judge Wilson's detailed instructions requiring the BTA to reexamine the evidence and REC's appraisal in light of the unchallenged findings. Instead, the BTA rejected the appraisal again for the same reasons, plus a new conclusory criticism of Stancil's discount rate. Rather than resolving the internal inconsistencies as ordered, the BTA's changes on remand only compounded them. The BTA's reformulation of its own valuation is untested by the rigors of the adversarial litigation process and cannot be reconciled with the unchallenged findings, other uncontested evidence from both parties, case law (including the BTA's own prior decisions), and generally accepted appraisal practices.

The second issue in this case involves the misclassification of REC's manufacturing machinery and equipment ("M&E") as fixtures. Judge Wilson reversed the BTA for failing to explain how the evidence supported the conclusion that the M&E ceased to be chattels (personal property) and became real property. On remand, the BTA reached the same conclusion by misinterpreting and misapplying the common law fixtures test to the facts in this case.

VI. ARGUMENT

A. The BTA rejected Stancil's appraisal for reasons in direct conflict with verities in this case and without following the superior court's instructions.

Washington's property tax laws require assessing property at its market value.[10] This requires determining "the amount of money which a purchaser willing, but not obliged, to buy would pay an owner willing, but not obligated, to sell, taking into consideration all uses to which the property is adapted and might in reason be applied."[11] Statutory criteria in RCW 84.30.040 govern the valuation; failure to follow these criteria is a serious legal error.[12] The statutory valuation criteria harmonize with generally accepted appraisal practices, which are valuation methods based

[10] RCW 84.40.030(1); *Cascade Court Ltd. P'ship v. Noble*, 105 Wn. App. 563, 568, 20 P.3d 997 (2001).
[11] *Cascade Court*, 105 Wn. App. at 568.
[12] *Folsom*, 111 Wn.2d at 270-72.

on the "accepted standards of professional appraisal practice as described in the Uniform Standards of Professional Appraisal Practice issued by the Appraisal Standards Board of the Appraisal Foundation or the accepted standards of other nationally recognized professional appraisal organizations."[13] In deciding a property tax case, the BTA should not perform its own appraisal: "Normally, clear, cogent and convincing proof of a correction includes evidence of both the assessor's error and the correct value. Once the taxpayer meets the standard of proof, the reviewing tribunal substitutes the taxpayer's value for the assessor's."[14] That is the typical decision. If the BTA decides to do otherwise and undertakes to perform its own valuation, the BTA must explain itself fully and is still constrained by the evidentiary record.

1. The BTA's original decision rejected all the appraisals by both parties and substituted the BTA's own untested estimate of external obsolescence.

REC met its burden in establishing the Assessor's error in valuing the Facility. CP 31. The BTA specifically rejected the Assessor's appraisals by Mr. Klingeman, Ms. Brewer, and Mr. Beaton; it ignored Mr. Liff-lander's appraisals. CP 22-25, 27-28. As the Assessor did not appeal, nothing remains of her appraisals in the case. For evidence of the correct

[13] WAC 458-50-170(3).
[14] *Weyerhaeuser Co. v. Easter*, 126 Wn.2d 370, 381, 894 P.2d 1290 (1995).

value, REC presented Stancil's appraisal. But the BTA did not substitute REC's value for the Assessor's. Rather, in findings and conclusions that REC challenged, the BTA rejected Stancil's DCF income approach in its entirety and the external obsolescence portion of Stancil's cost approach. CP 21, 26-27, 30. The BTA instead concluded a value based on the BTA's own estimate of external obsolescence. CP 31. In its original decision, the BTA estimated external obsolescence at only 35 percent, in contrast with Stancil's estimate of 85 percent. CP 31; AR Ex. A1-163 to -164.

The BTA based its rejection of both Stancil's approaches on one major premise: the notion that Stancil somehow erred in limiting its reliance on the revenue goals in REC's October, 2011, budget. CP 21, 26. The BTA's original decision rejected Stancil's DCF income approach "due to the significant difference between its revenue forecast and the revenue forecast in the REC Solar budget." CP 21. It rejected Stancil's external obsolescence analysis as "based on the Stancil appraisal's flawed DCF analysis," citing the same finding that faulted Stancil's DCF for differing from REC's budget. CP 26.

The BTA recognized that "evidence and testimony" supported capitalization of income loss as a valid method for quantifying external obsolescence. CP 26. The method, as Stancil explained, is to compare "the earnings that would be needed to justify the value placed on the property

before remaining obsolescence, to the actual earnings from the subject property." AR Ex. A1-157. Stancil cited the Washington Department of Revenue Property Tax Division's County Boards of Equalization Manual as one of the authorities supporting this method for measuring external obsolescence. *Id.*[15] The Department's guidance is based on its general supervisory role in the state's property tax system. RCW 84.08.010(1). The Legislature gave the Department this role "to the end that all taxable property shall be . . . valued and assessed according to the provisions of law . . . so that equality of taxation and uniformity of administration shall be secured." *Id.* But the BTA tried to buttress its rejection of Stancil's external obsolescence by claiming the method is "a matter of significant controversy within the appraisal community." CP 26. To generate this claim of controversy, the BTA went outside the record, without invoking the procedures for judicial notice.[16] The BTA disregarded the five other textbook-approved methods Stancil used to identify and quantify external obsolescence. AR Exs. A1-160 to -163, A38.

But at the same time, the BTA's original decision, in unchallenged findings, stated factors that clearly made it impossible to expect any

[15] The current version of the manual on the Department's website also supports the method as valid for measuring external (or economic) obsolescence: https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/Prop_Tax/BOE_Manual.pdf.
[16] ER 201; WAC 456-09-755(3).

appraiser (or hypothetical buyer) to simply adopt REC's revenue goals. Those findings established that REC created its budget to be intentionally aggressive to drive and measure personnel performance; REC recognized a number of "significant risks" that threatened its ability to achieve the budget; REC had never met its budget for quality of FBR products; REC completed the budget and risk analysis before the crash in prices; and, "[h]ad the risk analysis been performed at the end of 2011, rather than in August 2011, a number of the risks would have increased in probability." CP 16-18. The fact that so many of the anticipated risks came to pass, as part of trends in place as of the valuation date, confirms the validity of these unchallenged findings. The BTA recognized that the appraisal profession considers evidence of later events in retrospective appraisals if the events confirm trends and expectations as of the valuation date. CP 30. And yet, the BTA concluded that events after "mid-year 2012" could not be considered. CP 30.

2. Judge Wilson instructed the BTA to reexamine its rejection of Stancil's income approach and external obsolescence.

In light of all this, on the valuation issue, Judge Wilson reversed the BTA for errors under RCW 34.05.570(3) subsections (c) (for the BTA's failure to explain the basis for rejecting Stancil's appraisal in light of unchallenged findings), (d) (for improperly applying the test to determine

the admissibility of evidence of events occurring after the assessment date), and (e) (because the rejection of Stancil's income approach and external obsolescence analysis were unsupported by substantial evidence). CP 247-248. Specific to the rejection of Stancil's appraisal, Judge Wilson ordered the BTA to follow these detailed instructions:

(1) identify how market circumstances changed after REC prepared its October, 2011, budget;

(2) redetermine whether placing only limited weight on that budget was justified;

(3) if the experts should have placed more than ten percent weight on REC's budget, "explain how much weight would have been appropriate, particularly in light of Findings 49 and 50 [54 and 55 on remand], which recognize that market conditions changed by the end of 2011 and that [REC's] revenue forecast was intentionally aggressive to drive personnel and performance";

(4) reexamine Stancil's income and cost approaches in light of this reevaluation of the evidence;

(5) use Stancil's cost approach external obsolescence if the evidence supports it as valid; and

(6) reconsider accordingly Conclusions 10 through 13 (11-13 on remand, involving the valuation and amount of external obsolescence).

It should be noted that the fourth instruction inherently required the BTA to also reconsider its Conclusion 9 (10 on remand), which had characterized the income approaches as "unreliable." CP 30. Despite these very specific instructions, the BTA made only slight changes to its decision on remand. It did not follow these instructions.

3. On remand, the BTA's continued rejection of Stancil's income approach suffers from the same serious legal error regarding the limited weight Stancil placed on REC's outdated budget.

Judge Wilson's first directive was to identify how market circumstances changed after REC prepared its October, 2011, budget. As an apparent nod to that instruction, the BTA added a new finding: "From the time [REC's] budget forecast was developed in early fall 2011, the market price for prime grade silicon dropped approximately 50 percent by 2011 year end." CP 509. Recognizing this drastic decline in price only further undermined the BTA's original finding that Stancil erred in placing only limited weight on REC's quickly outdated budget.

The BTA's next task was to redetermine whether placing only limited weight on that budget was justified. On remand, the BTA reasserted that Stancil's ten percent weight to price goals in REC's budget, versus 90 percent to independent industry sources, was sufficient reason to reject Stancil's income approach. CP 515 (Finding 76.6). The BTA also reasserted its other criticisms of Stancil's departure from the budget,

including based on the BTA's flawed comparison of the budget's prime-grade price goals to Stancil's mixed-grade price goals. CP 514-515. Either the BTA redetermined the issue and decided the same thing—that Stancil should have placed more than ten percent weight on the budget—or the BTA ignored this instruction.

If the BTA again decided that Stancil should have placed more than ten percent weight on REC's budget, Judge Wilson's Order required it to explain how much weight given verities undermining the validity of that budget. The BTA unquestionably ignored this third imperative. The most that can be said for the BTA is that it apparently tried to smooth over the direct conflicts between its findings by deleting its prior Finding 53, which found that REC's budget revenue goals "provide[d] credible evidence of expected future performance." CP 18, 508-509. In possibly a similar effort, the BTA deleted the word "significant" modifying the risks that qualified REC's budget, even though this directly changed an unchallenged finding (Finding 50, which is 55 on remand) that should have remained untouched. CP 18, 509. But nothing in the BTA's Decision explains how much weight REC's budget deserved even though Judge Wilson's remand order explicitly required this. One is left with the distinct impression that the BTA saw no way to both follow Judge Wilson's Order and still reach the result it desired.

Testimony from one of the Assessor's own experts and unchallenged findings in the BTA's original decision provide several perspectives on the weight to accord REC's budget—none of which supports what the BTA decided. First, one of the Assessor's own experts, Mr. Beaton, testified that a buyer should never rely entirely on a seller's forecast and should do its own due diligence (as Stancil did). AR Transcripts VRP (4/8/14) at 1452. Mr. Beaton also testified that a paradigm shift in the overall market or drop in product prices would cause a buyer to reexamine a forecast for a potential transaction (as Stancil did). *Id.* at 1419-1421. REC's corporate controller testified that by January 1, 2012, it was clear there was "no way" the company would meet its projections due to the drop in prices (as Stancil concluded). AR Transcripts VRP (4/2/14) at 560-561. Two of the Assessor's appraisals placed 30 percent weight on REC's budget revenue goals. Klingeman-Brewer gave 30 percent weight to REC's budget and 70 percent to its own projection. AR Ex. R1-89. Mr. Beaton's Appraisal No. 1 agreed with Klingeman-Brewer's weighted revenue forecast "as reasonable, relative to the forecast in [REC's] budget." CP 517. Though Mr. Beaton's Appraisal No. 2 gave full weight to REC's budget, the BTA, in an unchallenged finding, determined that contradictory evidence about the forecast undermined his appraisal. CP 518. Another finding experimented with full weight to REC's budget forecast, but the BTA

rejected the resulting value. CP 519.

In this whole case, Stancil is the only one to have provided a thorough and mathematically accurate explanation of its weighting based on an evaluation of the reliability of REC's budget and each independent industry source. AR. Ex. A1-75 to -78. The BTA has not criticized any aspect of that evaluation—only the end result of Stancil's decision not to adopt REC's budget. According to other verities in the BTA's decisions and the record, Stancil was absolutely correct in limiting the weight it placed on REC's outdated budget goals.

Later events further confirm that Stancil's decision was correct. On remand, the BTA expanded on the appraisal profession's test for considering evidence of later events in a retrospective appraisal. Under that test, appraisers should not use evidence of later events only where no evidence exists that later events confirmed market expectations as of the valuation date. CP 510-511. Restated in the affirmative, "With market evidence that data subsequent to the [valuation] date was consistent with market expectations as of the effective date, the subsequent data should be used."[17] The BTA also added to its findings about events occurring after January 1, 2012,[18] and relied on two of those findings in its external

[17] Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice (USPAP)* 194 (The Appraisal Foundation, 2016-2017 ed.) (Advisory Opinion 34).
[18] CP 504-508 (Findings 27, 30, 33.3, 39.2, 39.3, 51, 51.2, 51.3, 51.4).

obsolescence determination in Conclusion of Law 11.2 and 11.3. CP 526. Though Judge Wilson ordered the BTA to apply the test to the specific events that occurred, it did not do so. CP 248. Instead, without any analysis of specific events and with a wrong interpretation of the test as limiting evidence to what was "knowable" on the valuation date, the BTA rolled back the date after which it said it would not consider evidence by six months: from mid-2012 to January 1, 2012. CP 30, 525. The BTA failed to address these critical errors identified in Judge Wilson's Order.

4. On remand, the BTA added a criticism of the discount rate Stancil used. That criticism only adds to the Decision's self-contradictory findings.

Judge Wilson's fourth directive was to reexamine Stancil's income approach in light of the BTA's reevaluation of the evidence. The BTA's sole change concerning Stancil's income approach was to add a criticism of the discount rate. A "discount rate," also known as the cost of capital, is essentially an interest rate used to convert future income into present value.[19] A lower rate leads to a higher value; a higher rate leads to a lower value. The BTA's full critique was this: Stancil's "15 percent discount rate is inaccurate and unreliable and contradicts [REC's] public financial disclosures." CP 515 (Finding 76.5). For this sweeping statement, the BTA cites as its sole support an entire report by Mr. Beaton—the very

[19] Appraisal Institute, *The Dictionary of Real Estate Appraisal* 84 (4th ed. 2002).

same "Mr. Beaton's Appraisal No. 2" that the BTA rejected in another unchallenged finding—and 24 pages of transcript of Mr. Beaton's testimony. CP 510, 515, 518. That report and testimony favored a 10.6-percent rate based on flawed assumptions about REC's discount rates for financial accounting purposes, as discussed below.

Stancil's discount rate was supported by a separate report and testimony by an eminent expert (Hal B. Heaton, Ph.D.) whose sole focus was determining the correct discount rate. AR Ex. A1-242 to -270; AR Transcripts VRP (4/4/14) at 940-967. The BTA did not refer to any of that analysis. A broad statement that the analysis was "inaccurate and unreliable" (CP 515) is a legal error because it does not explain "what evidence was persuasive and why, and which expert was most credible and why."[20]

Indeed, that conclusion runs counter to the BTA's own comment at the hearing that Dr. Heaton's testimony helpfully clarified the differences between REC's discount rates for financial accounting purposes and the discount rate for the property tax case. AR Transcripts VRP (4/4/14) at 1011. The BTA said the explanation left it with no further questions on the subject. *Id.* The BTA volunteered that it "truly appreciate[d Dr. Heaton's]

[20] *Boeing*, 102 Wn. App. at 870.

experience and knowledge." *Id.* These comments were consistent with the absence of any criticism of Dr. Heaton's discount rate in the BTA's first decision. If the BTA truly believed that Dr. Heaton's discount rate was "inaccurate and unreliable," surely the BTA would have pressed him on that subject at the hearing and mentioned it in its first decision. The sweeping mention in the second Decision should not distract from the real problem—the BTA's failure to follow Judge Wilson's remand instructions.

Nor is the allegation valid that the rate contradicts REC's public financial disclosures. First, nothing supports the BTA's implied premise that a current owner's disclosures to shareholders have any bearing on what a buyer and seller would negotiate for a price for physical assets. On the contrary, Mr. Beaton's own testimony conflicts with that premise: just as he testified that a buyer should never rely on a seller's forecast and should do its own due diligence, a buyer would not rely on a seller's discount rate either. AR Transcripts VRP (4/8/14) at 1452. Nor do generally accepted appraisal practices teach that an appraiser calculating property value can simply adopt the current owner's discount rate for shareholder investment value. Without evidence buyers would accept a seller's rate or that appraisers would accept a current owner's rate, treating

REC's discount rate for financial accounting purposes as though it somehow impeaches Stancil's appraisal is an impermissible leap of logic.

This is even more true given that inherently credible evidence presented by both parties shows that REC did not make any financial disclosures of a discount rate for only the physical property at the Moses Lake Facility. AR Ex. R23-89 to -90; AR Transcripts VRP (4/4/14) at 976-977. Rather, the discount rate REC published was for the cash generating unit for the combined entity of two plants: the one in Butte and the one in Moses Lake. CP 508 (recognizing that REC considered the Butte and Moses Lake plants in the same cash generating unit for financial accounting purposes). The Butte plant sells primarily into the electronics semiconductor market, which is much more stable than the solar market that the Moses Lake plant sells into. CP 503 ("Electronics-grade polysilicon sells at higher prices in a more mature and stable market than solar-grade polysilicon."); CP 422 (AR Ex. R23-89). The published discount rate included the Butte plant's "substantially lower risk," reflected share price liquidity (not the physical property that was the focus for the property tax case), and reflected a different definition of value (value in use or value to the current owner for financial accounting purposes, not value in exchange or market value for a hypothetical sale). AR Transcripts VRP (4/4/14) at 976-977, (4/8/14) at 1518-1520. For these

reasons, REC's published 10.6-percent rate did not "contradict" a 15-percent rate for the Moses Lake Facility's physical property. *Id.* Findings recognizing the difference in the Butte plant's market undermine the BTA's rejection of the discount rate even if the BTA did not recognize the other differences established by the evidence. CP 503, 508-509.

Additional findings rejecting the Assessor's other appraisals further erode the BTA's critique of Stancil's discount rate. Klingeman-Brewer concluded a discount rate of 11.07 percent based on stocks of large, diversified companies (mostly fertilizer companies) in healthy, stable industries. R1-103 to -110; AR Ex. A3-1, -20; AR Transcripts VRP (4/4/14) at 984. The BTA recognized Klingeman-Brewer's reliance on data for companies in stable industries, unlike the highly stressed solar industry, as a major error in their appraisal: "the economics and risks of the subject property are not similar to the economics of general chemical plants in a stable, mature industry"—a fact Mr. Beaton also noted. CP 516. Thus, according to the BTA's own unchallenged findings, the correct discount rate must be higher than Klingeman-Brewer's 11.07 percent. This makes the 10.6 percent and 10.2 percent rates used by Mr. Beaton in reports the BTA rejected that must less credible—and certainly not valid as support for criticizing Stancil's discount rate. CP 517-518; AR Ex. R17-7, -9. Without directly addressing the specifics of the discount rate

analysis Stancil relied on, the BTA cannot reject it in a conclusory fashion based on analysis the BTA roundly rejected.

Unrebutted evidence established that buyers and sellers rely on a DCF income approach when valuing complex industrial properties. AR Ex. A1-20 to -21, -119, -129, -166; AR Transcripts VRP (4/2/14) at 661, (4/3/14) at 769, 772, (4/4/14) at 1024, 1103-05. In light of this and the verities in this case, the BTA should change its Conclusion 9 (10 on remand) and related findings to recognize the validity of Stancil's income approach.

5. The BTA's external obsolescence analysis on remand also still suffers from serious legal errors.

On remand, in Conclusion of Law 11, the BTA increased its estimated external obsolescence from 35 to 45 percent—still far below Stancil's estimate of 85 percent. CP 526; AR Ex. A1-163 to -164. That Conclusion is wrong because (a) the BTA failed to follow Judge Wilson's Order with respect to external obsolescence; (b) the BTA's rejection of Stancil's external obsolescence analysis was wrong; (c) the BTA should not have devised its own methods unsupported by generally accepted appraisal practices (and, unsurprisingly, unsupported by any expert testimony in this case); and (d) several of the findings underlying the BTA's calculation of external obsolescence were wrong.

The BTA utterly ignored Judge Wilson's instruction to reexamine Stancil's cost approach in light of its reevaluation of the evidence, to use Stancil's cost approach external obsolescence if the evidence supports it as valid, and to reconsider its Conclusions 11-13 accordingly. The BTA's original Finding of Fact 95 (including 95.1 and 95.2) rejected Stancil's external obsolescence as based on a "flawed DCF analysis"—thus incorporating all the errors in the BTA's rejection of Stancil's income approach. CP 26. The BTA tried to buttress its rejection of Stancil's external obsolescence by claiming that capitalization of income loss (also called income shortfall method) is "a matter of significant controversy within the appraisal community" and ignoring Stancil's other methods for determining external obsolescence. CP 26-27. Judge Wilson's Order resulted in no change: on remand, this finding simply became Finding 101 and 101.1. CP 520.

The BTA's reasons for rejecting Stancil's external obsolescence are erroneous. First, the BTA reached this result only by brushing aside a fact that the BTA itself recognized in Finding 101.1: "evidence and testimony were presented to support the validity of the income shortfall method for quantifying external obsolescence." CP 520. This understates the force of that evidence. The Assessor's witnesses Mr. Klingeman, Ms. Brewer, and Mr. Lifflander each testified that the income approach can show external

obsolescence, with the latter testifying specifically that income shortfall is a "very common" and appropriate method to determine external obsolescence. AR Transcripts VRP (4/2/14) at 466-468, (4/7/14) at 1164-1165, 1275. No evidence supports the BTA's finding to the contrary. As a matter of law, the BTA was bound by that unrebutted, uncontradicted evidence from both parties' experts favoring this method as a generally accepted appraisal practice. In fact, the BTA admitted it did not understand the calculation of the method and was unfamiliar with it. AR Transcripts VRP (4/4/14) at 1090-1098 (discussing AR Ex. A1-159). The BTA agreed to accept additional evidence explaining the method when the appropriate expert (Kathy Spletter of Stancil & Co.) returned to provide rebuttal testimony. AR Transcripts VRP (4/4/14) at 1099. But when Ms. Spletter started to provide the explanation responsive to the BTA's question about the calculation, the BTA declined to receive a proposed exhibit showing the steps and rationale for the calculation and deferred it to post-hearing briefing. AR Transcripts VRP (4/7/14) at 1527-1536. Then, on the hearing's final day, the BTA announced, "we have determined that we don't need any post-hearing briefing from the parties" and that the BTA was withdrawing its question about its lack of familiarity with Stancil's method. AR Transcripts VRP (4/9/14) at 1600-1601. Counsel for REC asked for clarification to ascertain whether the BTA had

any remaining concern on its question about external obsolescence, to which the BTA responded "no concern." AR Transcripts VRP (4/9/14) at 1601. And yet, the BTA apparently still had a concern and had resolved to perform its own research about the method rather than accept the additional clarification offered from the experts in this case.

Even if casting about outside the record were proper, the BTA's research came up empty. Its finding that Stancil's method is controversial conflicts with (a) guidance from the Washington Department of Revenue discussed above, (b) prior decisions by the BTA,[21] (c) case law from other jurisdictions,[22] and (d) all authority from the appraisal profession[23]

---

[21] *See, e.g.*, *Hara v. South Fork 2 Associates*, BTA Docket No. 68848 at 24, 27-28, 32 (2010), (discussing this method at length and with approval); *Chehalis Power, Inc. v. Dorey*, BTA Docket Nos. 61647, 64648, 64659 at 34 (2007); *Twin City Foods, Inc. v. Wagner*, BTA No. 49573 (1998) (holding that a taxpayer's use of income loss to determine external obsolescence was "well informed, consistent, and free of apparent bias or methodological error"); *Simpson Timber Co. v. Easter*, BTA Nos. 94-2 and 94-3 (1997) (holding that "measuring the income loss associated with the investment decision considers all the risk involved in the investment and all the additional obsolescence associated with the cost approach"); *IBP, Inc. v. Shelley*, BTA Docket Nos. 45250-45253 (1995); *Stevenson Co-Ply v. Kimmel*, BTA Docket No. 38526 (1991) (citing Appraisal Institute, *The Appraisal of Real Estate* 395 (9th ed. 1987), in support of capitalizing income loss to measure external obsolescence).

[22] *See, e.g.*, *Pacificorp v. State Tax Comm'n*, 291 P.3d 442 (Ida. 2012) (affirming use of income loss to measure external obsolescence); *Airtouch Communications, Inc. v. Dep't of Revenue*, 76 P.3d 342 (Wyo. 2003) (holding that the Department's rules authorize determination of external obsolescence by capitalizing income loss); *Meadowbrook North Apartments v. Conner*, 854 N.E.2d 950 (Ind. Tax Ct. 2005) (recognizing capitalization of income loss as a valid method to measure external obsolescence).

[23] *See, e.g.*, Mark Pomykacz & Chris Olmsted, *The Appraisal of Power Plants*, Appraisal J. 223 (Summer 2014) (discussing "the capitalization of income shortfalls" as a common technique for measuring external obsolescence); Michael J. Remsha & Kevin S. Reilly, *Economic Obsolescence: Real Life Stories*, Machinery & Tech. Specialties J. 44, 47 (Spring 2010) (calculating external obsolescence based in part on an "income shortfall analysis"); Richard D. Wincott, *The Myth of Three Independent Approaches to Value*,

including the same authors cited to the contrary by the BTA.[24] The BTA cites one court decision that rejected the method but acknowledged in the citation that the Alaska court based its decision on the specific evidence in that case. CP 520, n.73. One appraisal text quoted by the BTA in fact states that this is an "economic obsolescence method commonly used by valuation analysts" and recommends "this capitalization procedure [as] one way to measure economic obsolescence."[25] The only other text the BTA cites in support of its claim is a student handbook that states that "capitalized rent losses" do not work well for indicating obsolescence for "houses or owner-occupied commercial properties" for which there is no rent. CP 520, n.73. That has nothing to do with appraising an industrial

---

Real Est. Issues 5 (Summer 2001) ("[T]he ultimate estimate of value is based upon an inseparable interrelation of the three traditional approaches to value. These interrelationships are critical in arriving at a reliable estimate of value. Assumptions derived from one approach form the basis for the analysis in another."); Jeffry D. Fisher & Robert S. Martin, *Income Property Valuation* 227 (1994) ("[M]any of the adjustments made in the cost approach for . . . functional and external obsolescence are calculated using techniques presented in the income approach."); Arlo Woolery, *Valuation of Railroad and Utility Property* 63, 274 (1990) ("The capitalized value of the differences between actual net operating income and the net income prudent investors would expect provides a measure of obsolescence that meets the requirements of professional appraisal organizations.").

[24] *See, e.g.*, Robert P. Schweihs & Robert F. Reilly, *Issues Related to the Unit Valuation Principle*, Willamette Mgmt. Associates Insights J. 76 (Spring 2014); Robert F. Reilly, *The Unit Valuation of Taxpayer Assets for Property Tax Purposes*, Machinery & Tech. Specialties J. 17 (2nd Qtr 2014); Robert F. Reilly & Robert P. Schweihs, *Economic Obsolescence Is an Essential Procedure of a Cost Approach Valuation of Industrial or Commercial Properties*, Willamette Mgmt. Associates Insights J. 5 (Spring 2006).

[25] Robert F. Reilly & Robert P. Schweihs, *Guide To Property Tax Valuation* 104, 267 (2008).

facility being valued by reference to its business income, which is precisely the way buyers and sellers value such property.

The BTA's rejection of Stancil's external obsolescence analysis was also wrong because it disregarded Stancil's other methods for determining external obsolescence. Stancil describes and applies five other textbook-approved methods that confirm the external obsolescence determined by capitalizing income loss. AR Exs. A1-160 to -163, A38. For example, the crash in solar company stock prices indicated at least 80 percent external obsolescence. Ex. A1-162, -250; Ex. A38-3. REC's atypically low market-to-book-value ratio indicated a similar percentage of external obsolescence. Ex. A3-5; Ex. A4-6; Ex. A38-3; AR Transcripts VRP (4/8/14) at 1464. This was hardly an unusual instance of obsolescence in the industry. The BTA itself found a 99 percent loss of value in a newly constructed Idaho polysilicon plant and closures of many others. CP 505, 521.

In contrast to the authoritative appraisal literature supporting Stancil's methods, the BTA devised its own methods to conclude only 45 percent (initially 35 percent) obsolescence. CP 526. It cited nothing to show that its methods conform with generally accepted appraisal practices. CP 526. As discussed above, Washington law requires use of generally accepted appraisal practices in property tax assessments. A Florida appellate court

recently rejected a valuation in which no evidence existed in the record that the "methodology [the tax assessor] utilized in calculating obsolescence complied with professionally accepted appraisal practices," mirroring laws that, like Washington's, require determining market value according to accepted appraisal practices.[26]

By devising its own methods, the BTA's valuation circumvents the testing our adversarial legal system subjects the parties' appraisals to through discovery (including depositions), cross-examination, and expert rebuttal testimony. As observed by the United States Supreme Court, "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence . . . ."[27] Here, the BTA took an inquisitorial tack "without the corrective benefit of investigation and presentation of evidence by active adversaries."[28]

The BTA's methods suffer from serious logical flaws. For example, the BTA ignored obsolescence indicated by $585 million in cost overruns compared with REC's planned investment in the Facility. AR Ex. A1-159. It underestimated market decline by failing to consider the relevant

[26] *Darden Restaurants, Inc. v. Singh*, No. 5D16-4049 (Fla. 5th Dist. Ct. App. Mar. 1, 2019) (not a final decision "until time expires to file motion for rehearing and disposition thereof if filed").
[27] *Alderman v. United States*, 394 US 165, 184, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969).
[28] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 Chapman L. Rev. 57, 75 (1998).

timeframe for several of its methods. CP 526 (considering, for example, market decline starting in late 2010 in one instance and in early fall, 2011, in another); AR Transcripts VRP (4/3/14) at 769 (explaining that the relevant starting point was the market at the time of decision to construct the Facility). And yet Finding 105.2 considered the correct timeframe but the wrong price: it used a prime-grade price that exceeded even REC's aggressive budget for prime pricing and ignored lower pricing for other grades. CP 521. And contrary to the requirements of textbook-approved methods, the BTA focused on the drop in price instead of the much greater decline in gross margins.[29]

Even if the BTA's methods passed theoretical muster, three of its five underlying findings were wrong. According to the BTA, Finding 27 indicated obsolescence of 24-25 percent; Finding 30 indicated 32-46 percent; Finding 34 indicated 40 percent; Finding 36.3 indicated 33 percent; and Finding 58 indicated 50 percent. CP 526. As detailed above in Assignments of Error 7, 8, and 12, Findings 30, 34, and 36.3 conflict with the very sources the BTA cites for them. Once corrected, Findings 30

[29] *See* AR Exs. A1-161, A38-2 (quoting American Society of Appraisers, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets* 79 (3d ed. 2011), on the need to focus on declining *margins* to measure external obsolescence). *See also* Hal B. Heaton, *Determining Discount Rates for Valuing Properties in Distressed Industries*, J. Prop. Tax Assessment & Admin. 55 (Fall 2006) (explaining that adjusting only for the decline in price, instead of the much more drastic effect on margins, is a mistake that "seriously underestimates the effect of a downturn on value").

and 34 indicate 60-82 percent—well above the range in Conclusion 11.

The final valuation must fully account for all forms of obsolescence affecting the property.[30] The BTA underestimated the obsolescence in this case by devising its own methods. Nothing in the law, appraisal literature, or record supports its methods.

B. The BTA misapplied controlling law in classifying REC's manufacturing machinery and equipment as fixtures.

Also at issue in the case was whether REC's manufacturing machinery and equipment ("M&E") was real property (fixtures) or personal property (chattels). REC must pay assessments for mosquito control based on the value of assets that the Assessor classifies as real property, but not on personal property. Thus this issue poses a real cost to REC.

As discussed in REC's briefing before the BTA, Washington has an extensive body of case law explaining the three-factor test for fixtures. AR 658-660. In short, as applied to this case, manufacturing M&E is presumed to remain chattels unless it meets all three factors: (1) the property is actually annexed to land or buildings, (2) the property's use or purpose is integrated with land or buildings, and (3) the annexing party intended a permanent attachment.[31] The case law presents numerous

---

[30] *Weyerhaeuser*, 126 Wn.2d at 385-836.
[31] *See, e.g., Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 668, 538 P.2d 505 (1975).

examples of large industrial M&E remaining chattels under this test.[32] Consistent with the facts in many of those cases, unrebutted, inherently credible testimony showed that REC's M&E did not meet any of the three factors. Remarkably, the BTA disregarded those key facts or failed to give them any weight. It also largely ignored the controlling case law and its implications for REC's M&E.

One of the most glaring examples was the BTA's treatment of the third required factor: it assumed REC's intent of a permanent attachment based on one fact—that REC listed the M&E in a "fixed asset list." The accounting profession defines "fixed assets" as simply "tangible" (in contrast, for example, with intellectual property); it says nothing about whether they are fixtures or chattels. Eric L. Kohler, *A Dictionary for Accountants* 215 (3rd ed. 1963). Because the BTA's decision on this issue is riddled with such errors, the Court should reverse and remand with instructions to address REC's unrebutted evidence based on controlling case law on manufacturing M&E.

---

[32] *See, e.g., id.*; *Lipsett Steel Products, Inc. v. King County*, 67 Wn.2d 650, 409 P.2d 475 (1965); *Zimmerman v. Bosse*, 60 Wash. 556, 111 P. 796 (1910); *Sherrick v. Cotter*, 28 Wash. 25, 68 P. 172 (1902); *Neufelder v. Third Street & Suburban Railway*, 23 Wash. 470, 63 P. 197 (1900); *Washington Nat'l Bank v. Smith*, 15 Wash. 160, 45 P. 736 (1896); *Chase v. Tacoma Box Co.*, 11 Wash. 377, 382, 39 P. 639 (1895); *Cherry v. Arthur*, 5 Wash. 787, 32 P. 744 (1893); *Union Elevator & Warehouse Co. v. Dep't of Transp.*, 144 Wn. App. 593, 183 P.3d 1097 (2008).

VII. CONCLUSION

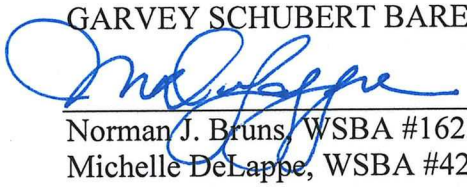
REC has suffered a great loss due to dramatic and sustained changes in market conditions. REC should not have to suffer an additional loss due to property taxes based on value that had vanished and mosquito assessments based on a misclassification of its M&E. Rejecting REC's eminent experts and other carefully prepared evidence for the superficial and inconsistent reasons offered by the BTA further compounds the loss.

The parties agree that Judge Wilson issued clear and binding remand instructions in the first judicial review of this case. CP 390. According to those instructions, the BTA was supposed to reexamine Stancil's income approach and external obsolescence, as well as the classification of REC's M&E as real property or personal property. CP 247-249. The failure to follow the remand instructions, which the parties agree are the law of the case, constitutes a legal error. The BTA largely ignored Judge Wilson's direction to reconcile the numerous internal inconsistencies in its original decision; rather, it added to the inconsistencies and errors on remand. Its Decision should be reversed and remanded for further proceedings in

which the BTA follows Judge Wilson's detailed instructions and corrects the BTA Decision's 22 erroneous findings and conclusions.

Respectfully submitted this 21st day of March, 2019.

GARVEY SCHUBERT BARER, P.C.



Norman J. Bruns, WSBA #16234
Michelle DeLappe, WSBA #42184
Attorneys for Appellant

GSB:9729776.4

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 21, 2019, I caused to be served on the person(s) listed below the foregoing Appellant's Opening Brief, via e-mail and U.S. First Class Mail, postage prepaid:

Sean P. Boutz
Christopher J. Kerley
Evans Craven & Lackie PS
818 West Riverside, Suite 250
Spokane, WA 99201-0910
sboutz@ecl-law.com
ckerley@ecl-law.com
Attorneys for: Respondent

DATED AT SEATTLE, WASHINGTON this 21st day of March, 2019.

Bonnie Rakes

Bonnie Rakes
Legal Assistant to Michelle DeLappe
and Norman J. Bruns

VIII. APPENDIX

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

REC SOLAR GRADE SILICON, LLC, Appellant, v. ~~LAURE GRAMMER~~ MELISSA MCKNIGHT, Grant County Assessor, Respondent.	)	Docket No. 13-030 RE: Property Tax Appeal FINAL DECISION ON REMAND

This matter came before the Board of Tax Appeals (the Board) on remand from the Thurston County Superior Court. Having reviewed the record in light of the remand order, the Board now amends its September 12, 2014, Final Decision.

This matter came before the Board of Tax Appeals on March 31, April 1-4, and April 7-9, 2014, for a formal hearing pursuant to the rules and procedures set forth in chapter 456-09 WAC (Washington Administrative Code) and chapter 34.04 RCW (Revised Code of Washington). Marta B. Powell, Chair, presided. Attorneys Norman J. Bruns and Michelle DeLappe, of Garvey Schubert Barer, represented the Appellant, REC Solar Grade Silicon, LLC (the Taxpayer, or REC Solar). Attorneys Hugh T. Lackie and Heather C. Yakely, of Evans, Craven and Lackie, PS, represented the Respondent, Laure Grammer, Grant County Assessor (the Assessor).

The Taxpayer called the following witnesses: Jeffrey Johnson, the Taxpayer's Director of Operations; Kurt Levens, the Taxpayer's Vice President of Commercial Development and Planning; Laure Grammer,[1] Grant County Assessor; Carl Klingeman, Appraiser for the Washington State Department of Revenue; Michael VanSlyke, the Taxpayer's Corporate Controller; Kathy Spletter, Vice President of Stancil and Company; Hal Heaton, Professor in the Department of Finance at the Marriott School of Management, Brigham Young University;

[1] Laure Grammer was the Grant County Assessor at the time of the hearing and testified for the County. Melissa McKnight has since succeeded Ms. Grammer in the position.

Robert Clark, Partner, Stancil and Company; and Timothy Landolt, President and CEO of Vista Valuations, Incorporated.

The Assessor called, in addition to Ms. Grammer, three witnesses: Lisa Brewer, Valuation Specialist for the Washington State Department of Revenue; John Lifflander, President of Covenant Consultants, Incorporated; and Neil J. Beaton, Managing Director at Alvarez and Marsal Valuation Services.

The record in this matter was closed on May 9, 2014, following the parties' submission of proposed findings of fact and conclusions of law, pursuant to WAC 456-09-915.

Having heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties, the Board now makes its decision as follows:

VALUATION FOR ASSESSMENT-YEAR 2012

DOCKET NO. PARCEL NO.	VALUATION OF THE ASSESSOR	CONTENDED MARKET VALUE OF THE TAXPAYER	VALUATION OF THE BOARD OF TAX APPEALS
13-030 91759600	Land: $ 2,572,325 Impr: $1,117,679,595 Total: $1,120,251,920	Land: $ 2,000,000 Impr: $ 172,065,000 Total: $ 174,065,000	Land: $ 2,572,325 ~~Impr: $ 901,492,675~~ Impr: $ 771,427,675 ~~Total: $ 904,065,000~~ Total: $ 774,000,000

NATURE OF THE CASE

The Taxpayer owns and operates a polysilicon manufacturing facility in Moses Lake, Grant County, Washington. The facility is assessed under two Grant County tax accounts, one for real property (Parcel No. 91759600) and another for personal property (Parcel No. 4806886). The Taxpayer petitioned the Grant County Board of Equalization (the County Board) for review of the Assessor's January 1, 2012, valuation of Parcel No. 91759600 (the subject property in this appeal). In light of the amount at issue and the complexity of the industrial property, the Taxpayer requested that the matter be heard by this Board on direct appeal, without a prior hearing before the County Board. The Assessor and a majority of the County Board agreed, and this Board granted direct appeal on February 12, 2013.

The primary issue in this appeal is the fair market value of the subject property. As shown in the valuation table, above, the Taxpayer contends that the Assessor has overvalued the subject property by approximately 85 percent. The Taxpayer also maintains that the subject property's machinery and equipment (M&E), which represents 94 percent of the value of the

subject property, should be reclassified as personal property, a reclassification that would not affect the Taxpayer's tax obligation (since the tax rates for real and personal property do not differ), but would enable the Taxpayer to avoid payment of a special assessment imposed by Grant County's mosquito control district. Finally, the Taxpayer asks that the six percent of real property remaining after reclassification be assessed at 88 percent, the real property assessment ratio for Grant County. In sum, were the Taxpayer to prevail on the three issues brought before the Board, the Taxpayer's contended assessed value for the subject property would be $172,811,732.[2]

ISSUES

1. Has the Taxpayer met its burden of proving that the Assessor overvalued the subject property for assessment-year 2012? If so, based on the evidence presented, what is the most likely market value of the subject property on January 1, 2012?

2. Did the Assessor properly classify the subject property's M&E as real property, rather than personal property?

3. Under Washington law, must the value of the subject property be equalized to the general level of assessment in Grant County?

FINDINGS OF FACT

PROCEDURAL MATTERS

1. For assessment-year 2012, the Assessor assigned the subject property the values shown in the ~~chart~~ table on page two, above.

2. The Taxpayer petitioned the Grant County Board of Equalization for review and subsequently sought transfer of the matter to this Board on direct appeal. The Assessor and a majority of the County Board supported the Taxpayer's "Request for Direct Appeal to the State Board of Tax Appeals."

3. On February 12, 2013, the Board issued its "Order Granting Direct Appeal."

4. On December 23, 2013, the parties filed a "Stipulation Regarding Amended Notice of Direct Appeal" and an "Amended Notice of Direct Appeal," modifying the Taxpayer's contended values to those shown in the ~~chart~~ table on page two, above.

[2] The Taxpayer's reclassification of M&E as personal property leaves $10,443,900 as the market value of Parcel No. 91759600's real property; applying the assessment ratio of 88 percent produces an assessed value of $9,190,632 for the real property. *See* Appellant's Trial Brief, Appendix B.

5. On May 24, 2013, the City of Moses Lake submitted its "Motion to Intervene," along with a "Memorandum in Support." On June 12 and 13, 2013, the Board received from the Taxpayer and the Assessor, respectively, their briefs in opposition to the motion. On January 17, 2014, the Board issued its "Order Denying City of Moses Lake's Motion to Intervene." On January 29, 2014, the City of Moses Lake petitioned for reconsideration and clarification. On March 4, 2014, the Board issued its "Order Denying City of Moses Lake's Petition for Reconsideration."

6. On March 18, 2014, the Assessor filed "Respondents' Motion to Amend Exhibits," along with an "Affidavit of Joseph G. Winkler in Support of Motion to Amend Exhibits." The Taxpayer did not file a response. On March 24, 2014, the Board issued its "Order Granting Respondent's Motion to Amend Exhibits."

7. On February 24, 2014, the Assessor filed "Respondents' Motion to Compel Discovery or in the Alternative Strike the Testimony of Kathy Spletter," and an "Affidavit of Heather C. Yakely in Support." On March 10, 2014, the Taxpayer filed a Response and Declaration. On March 13, 2014, the Board issued its "Order Dismissing Respondent's Motion to Compel Discovery (Corrected)."

8. On February 24, 2014, the Assessor filed "Respondent's Motion to Strike Appellants Exhibits." On March 10, 2014, the Taxpayer filed "Appellant's Response to Motion to Strike Exhibits," along with a "Declaration of Michelle DeLappe in Support." On March 18, 2014, the Assessor filed "Respondent's Reply to Appellant's Response to Motion to Strike Appellants Exhibits." On March 13, 2014, the Board issued its "Order Denying Respondent's Motion to Strike Exhibits and Appellant's Request for Attorney Fees and Costs."

9. On March 10, 2014, the Taxpayer filed "Appellant's Motion to Amend Disclosure of Witnesses," along with a "Declaration of Michelle DeLappe in Support." On March 18, 2014, the Assessor filed "Affidavit of Hugh T. Lackie in Support of Response to Appellant's Motion to Amend Witness Disclosures." On March 24, 2014, the Board issued its "Order Granting Appellant's Motion to Add Fact Witness and Permitting Respondent to Depose Witness Prior to Hearing."

10. On February 24, 2014, the Taxpayer filed "Appellant's Motion for Order Regarding Missing Evidence," along with a "Declaration in Support" and exhibits. On March 11, 2014, the Assessor filed a "Response to Appellant's Motion on Missing Evidence," along

with Affidavits of Hugh T. Lackie, Laure Grammer, and Carl Klingeman in Opposition. On March 17, 2014, the Taxpayer filed "Appellant's Reply in Support of Motion for Order Regarding Missing Evidence." On March 26, 2014, the Board held a telephonic hearing on the motion. On March 26, 2014, the Board issued its "Order Denying Appellant's Motion for Order Regarding Missing Evidence." On March 28, 2014, the Taxpayer filed a "Petition for Reconsideration of Order Denying Appellant's Motion for Order Regarding Missing Evidence," along with the "Declaration of Michelle DeLappe" and Exhibits A-H. At the evidentiary hearing on March 31, 2014, the Board issued an oral ruling, denying and striking the Appellant's Petition for Reconsideration. The Assessor was permitted to file a request for attorney fees and costs no later than April 4, 2014, with a deadline for a response by the Taxpayer on April 18, 2014. On April 23, 2014, the Board issued its "Order Denying and Striking Appellant's Petition for Reconsideration of Order and Denying Respondent's Request for Fees and Costs."

11. On March 5, 2013, the Board issued its "Second Prehearing Order Establishing Procedural Dates," which summarized the law applicable to motions for protective orders governing discovery, motions for orders sealing filed documents or closing the hearing room, and requests made pursuant to the Public Records Act, ~~RCW 42.56~~ chapter 42.56 RCW. On March 12, 2014, the Taxpayer filed "Appellant's Motion for Protective Order for Evidence at Hearing," along with a "Declaration of Michael VanSlyke." On March 18, 2014, the Assessor filed the "Affidavit of Hugh T. Lackie in Support of Response for Protective Order for Evidence at Hearing." The Board held a hearing on the motion on March 31, 2014, prior to the start of the evidentiary hearing. On March 31, 2014, the Board issued its "Protective Order for Evidence at Hearing."

12. Both parties submitted trial and reply briefs prior to the hearing, and the Board admitted the Taxpayer's Exhibits A1–A52 and A56, and the Assessor's Exhibits R1–R11, R17–R34, and R40–R42.

13. The names and titles of the witnesses called at the hearing are set forth on pages one and two, above.

BACKGROUND

The Subject Property

14. The subject property (Parcel No. 91759600) is a polysilicon manufacturing facility located at 3508 Northeast Road North in Moses Lake, Washington. In its manufacturing

process, the Taxpayer converts metallurgical-grade silicon into silane gas, which is in turn converted into solid solar-grade polysilicon (prime-grade material) and other grades (secondary material, fines, and powders).

15. Union Carbide built the oldest portion of the REC Solar facility, referred to as Silicon 1.0, in 1984.

16. Union Carbide sold the facility to Komatsu, which expanded Silicon 1.0 in 1995, and began building a sister plant in Butte, Montana (Silicon 2.0), starting in 1996. Silicon 1.0 and 2.0 use an established technology for the production of polysilicon known as the Siemens process. The Siemens process is a batch process that yields approximately 92 to 97 percent prime-grade product.

17. Komatsu also built a small pilot plant at Moses Lake for the purposes of developing a continuous process that would provide a more cost-effective alternative to the Siemens process. This continuous process is based on fluidized-bed reactor (FBR) technology. FBR technology produces a greater volume of polysilicon at a lower cost because it is a continuous process, but it yields a lower percentage of prime-grade products and produces a certain volume of low-value fines and powders.

18. REC Solar's parent company acquired full ownership of the Moses Lake and Butte facilities in 2005 and converted the facilities from the production of electronics-grade polysilicon (for use in making semiconductors) to solar-grade polysilicon.

19. As a producer of solar-grade polysilicon, REC Solar performs the first step in a value chain (a series of five separate manufacturing processes that each add value to the product of the prior process) that ultimately results in photovoltaic (PV) module systems that convert sunlight into electricity.

20. REC Solar produces polysilicon solely for the PV market. ~~Though~~ Although Silicon 1.0 originally produced electronics-grade polysilicon, which requires higher purity, REC Solar no longer produces a grade pure enough for the semiconductor market.[3]

21. Electronics-grade polysilicon sells at higher prices in a more mature and stable market than solar-grade polysilicon.[4]

[3] Exhibit A1-24; Transcript at 686-87 (Testimony of K. Spletter).
[4] Transcript at 292 (Testimony of K. Levens), 552 (Testimony of M. VanSlyke).

22. In 2006, at a time when the solar industry was experiencing strong demand and very limited supply of polysilicon, REC Solar decided to make a massive investment in the facility to construct what is now referred to as "Silicon 3.0," consisting of a silane production unit. The facility's FBR polysilicon unit was the first FBR unit of its size in the world.[5]

23. In 2007, REC Solar decided to make an investment to construct what is now referred to as "Silicon 4.0," consisting of another silane production unit.[6]

24. The 2006 and 2007 investment decisions were based on assumed prices of $35 to $50 per kilogram for REC Solar's full production (including fines and powders) under a take-or-pay contract with an affiliate, REC Wafer, that was set up to use the granular FBR product.[7]

The Status of the Polysilicon Industry

25. PV worldwide demand increased from 1,603 megawatts in 2006 to 21,700 megawatts in 2011, representing an average annual increase of 77 percent.[8]

26. PV worldwide supply increased from 2,459 megawatts in 2006 to 28,800 megawatts in 2011, representing an average annual increase of 67 percent.[9]

27. The PV industry oversupply was 25 percent in 2011 and an estimated 24 percent in 2012.[10]

28. Polysilicon worldwide demand increased from 45,000 metric tons in 2006 to 130,000 metric tons in 2011, for an average annual increase of 25 percent.[11]

29. Polysilicon worldwide supply increased from 40,000 metric tons in 2006 to 190,000 metric tons in 2011, for an average annual increase of 37 percent.[12]

30. The polysilicon industry graduated from a severe undersupply in 2006 to 2008 to an extreme oversupply situation, with 32 percent excess capacity in 2011 and an estimated 46 percent excess capacity in 2012.[13]

31. In 2006, polysilicon spot prices increased from $65 per kilogram to $90 per kilogram. In 2007, due to the severe undersupply, spot prices reached $200-$400 per kilogram.[14]

---

[5] Exhibit A1-28, 85; Transcript at 234 (Testimony of K. Levens).
[6] Exhibit A1-85; Transcript at 225-26, 232 (Testimony of K. Levens).
[7] Transcript at 226-27 (Testimony of K. Levens).
[8] Spletter, 704-709. A1-37 through A1-42.
[9] Spletter, 708-9. A1-42.
[10] Exhibit R1-73.
[11] Exhibit A1-65.
[12] *Id.*
[13] Indicated in Figure IV-5 in Exhibit A1-65.
[14] Exhibit A1-70.

32. By the time Silicon 3.0 began production in 2009 and Silicon 4.0 in 2010, a major market change had occurred ~~as~~ due to a ~~result of~~ market-wide oversupply of solar-grade polysilicon ~~and a resultant~~ that resulted in a collapse in spot-market polysilicon prices. By the end of 2010, the industry was restructuring and subject to lower margins.[15]

33. In 2009 and 2010, many companies in the solar industry were shutting down or abandoning their polysilicon plants.

33.1. Competitors started constructing two polysilicon plants in Tennessee in 2008 and 2009; one never completed construction, and the other never started production due to the collapse of the solar-grade polysilicon market.[16]

33.2. In 2011, over 30 plants closed in the United States, Europe, and China; approximately 50 additional plants closed after 2011.[17]

33.3. The closed plants evidence little to no salvage or liquidation value. For example, the Hoku polysilicon plant in Pocatello, Idaho, was built for $600-$700 million, but sold in bankruptcy in October 2013 for $8.3 million.[18]

34. From the fourth quarter of 2010 to the fourth quarter of 2011, polysilicon prices fell 40 percent, according to GTMRESEARCH.com.[19]

35. By early 2012, the outlook for the solar-grade polysilicon industry was discouraging, and solar-grade polysilicon prices were dropping rapidly.[20]

36. In addition to the industry's overcapacity problem, the need for grid parity exerts additional downward pressure on polysilicon prices.

36.1. *Grid parity* [Italics added] refers to the point at which solar power or solar electricity is generated at a cost that, measured in dollars per megawatt hour, is comparable to other energy costs, such as hydroelectric, natural gas, wind, coal, or other alternative sources.[21]

---

[15] *Id.*
[16] Transcript at 1538-40 (Testimony of K. Spletter).
[17] Transcript at 245, 248 (Testimony of K. Levens).
[18] Transcript at 1044-45 (Testimony of R. Clark).
[19] Exhibit A1-72.
[20] Transcript at 262 (Testimony of K. Levens), 734-35 (Testimony of K. Spletter).
[21] Spletter, 700.

36.2. For PV solar energy to compete with other means of generating electricity, all steps in the PV value chain must lower costs to yield electricity generation at the same price as what is currently on the grid.[22]

36.3. As of January 2012, the cost for solar energy is $4.53 per megawatt, with an estimated cost needed for grid parity of $3.00 per megawatt.[23]

37. The industry has relied on government subsidies and incentives to drive demand, and by January 1, 2012, governments were under pressure to cut back dramatically on these programs.[24]

38. Rumors began in 2011 that the Chinese would seek tariffs on polysilicon. The Chinese have retaliated in other markets, including chicken parts.

39. In October 2011, Solarworld filed a case in the US seeking tariffs on imports of Chinese solar cells.

39.1 In December 2011, a preliminary determination of harm was made by the United State Department of Commerce (USDOC), and an investigation was launched.

39.2 In May 2012, a preliminary tariff was determined against Chinese manufacturers.

39.3 Ultimately a 57 percent tariff was established, although REC Solar has been able to work around it.

The Status of the Subject Property on January 1, 2012

40. ~~38.~~ The Taxpayer had a profitable year in 2011.[25] For 2011, REC Solar reported an operating profit, or EBITDA (earnings before interest, taxes, depreciation, and amortization), of $356,884,000.[26] The 2011 operating profit was entirely due to first-half results, with second-half results suffering from the drop in polysilicon prices from $50 to $30 per kilogram.[27]

41. ~~39.~~ The December 2011 average selling price of REC Solar's products (for all grades) was $17.55 per kilogram.[28]

---

[22] Transcript at 242-45 (Testimony of K. Levens).
[23] Spletter, 703. A1-36.
[24] *Id.*; Transcript at 954-7 (Testimony of H. Heaton).
[25] Levens, 260-1.
[26] R18-48. EBITDA is Earnings Before Interest, Taxes, Depreciation, and Amortization, also known as Operating Profit.
[27] Transcript at 260-61 (Testimony of K. Levens),
[28] Transcript at 541, 560 (Testimony of M. VanSlyke).

42. ~~40.~~ As of January 1, 2012, REC Solar was operating at full capacity.[29]

43. ~~41.~~ As of January 1, 2012, approximately 30 percent of REC Solar's production was being sold to its internal customer, REC Wafer, at $30 per kilogram.[30]

44. ~~42.~~ By mid-2011, REC Wafer, was experiencing a downturn.

44.1. ~~42.1.~~ REC Wafer reduced its orders to prime and secondary grades only.[31]

44.2. ~~42.2.~~ REC Wafer renegotiated its contract to a price of $25 per kilogram by the beginning of 2012.[32]

45. ~~43.~~ Industry-wide, customers were negotiating their long-term agreements downward in 2011, so it became clear that long-term agreement pricing and spot pricing would converge in the future.[33]

46. ~~44.~~ In 2012, REC Solar had long-term volume agreements with two Chinese companies, Eging and Hareon.[34]

47. ~~45.~~ The Siemens technology at REC Solar is old and outdated compared to Siemens technology used at other plants. In the fall of 2011, REC Solar was looking into whether to shut down the Siemens unit in Silicon 1.0 because it was not breaking even.[35]

48. ~~46.~~ REC Solar has a strong position in its FBR technology, which is state-of-the-art in the industry.[36] REC Solar and MEMC are the only companies successfully implementing FBR technology; they hold many patents that limit the implementation of FBR technology by other companies.[37]

49. ~~47.~~ As a result of its FBR technology, ~~the Taxpayer~~ REC Solar is the low-cost producer in the industry, with a cash cost[38] of less than $14 per kilogram.~~2[FN: The "cash cost" is the true variable cost of producing a kilogram of polysilicon, including raw materials, electricity, and labor, and eliminating the fixed costs such as depreciation.]~~39

50. As of January 1, 2012, Moses Lake was working to increase production; improving duration of making prime product; making more prime product, thus reducing

[29] Levens, 328
[30] Levens, 269, 281.
[31] Transcript at 234, 269 (Testimony of K. Levens), 543, 549-50 (Testimony of M. VanSlyke).
[32] Transcript at 261 (Testimony of K. Levens); 543 (Testimony of M. VanSlyke).
[33] Transcript at 243-49 (Testimony of K. Levens).
[34] Levens, 334-5.
[35] Transcript at 543-47 (Testimony of M. VanSlyke).
[36] Spletter, 694.
[37] *Id.*
[38] Cash cost is defined as the true variable cost of producing a kilogram of polysilicon including raw materials, electricity, and labor and eliminating the fixed costs such as depreciation. Transcript at 539 (Testimony of M. VanSlyke).
[39] Exhibits A36-7, R22-9, 2011 Annual Report.

secondary product; operating Silicon 1.0, 3.0 and 4.0; and focusing technological development on the FBR process.

51. As of January 1, 2012, no evidence was offered indicating that REC Solar Moses Lake made an impairment write-down. An impairment write-down was made for combined Moses Lake and Butte facilities in fourth quarter of 2012.

51.1. Impairment actions are required by GAP (generally accepted accounting principles), and IFRS (International Financial Requirements Standards) must be looked at when they occur and, at a minimum, annually. If assets are impaired, it is the company's duty to write them down because investors and others are counting on that information. Failure to do so potentially puts the company in trouble with the SEC (Security and Exchange Commission).

51.2. Impairment testing looks at the carrying value on the financial statement: not just book value, but also goodwill. Impairment testing is done for intangibles, fixed assets, and whole units. Management did not make that charge until the fourth quarter of 2012.

51.3. REC Solar considered cash flows in total for both facilities. The Butte facility brought the impairment amount down in early years and prevented an impairment when Moses Lake and Butte were looked at it in total. The result would have been different if Moses Lake was considered on a standalone basis for 2012 and 2011 and there had been an impairment write-down at Moses Lake at year-end 2011.

51.4. VanSlyke did not perform an impairment study at REC Solar Moses Lake until mid 2012.

51.5. Impairment is not an element in REC's risk matrix.

52. As of January 1, 2012, no tariffs were imposed against REC Solar or its customers.

The Taxpayer's Five-Year Budget Plan for 2012 to 2016[40]

53. ~~48.~~ REC Solar is required by its board of directors to perform a budget plan on an annual basis.[41]

[40] Exhibits A-16 and R-26.
[41] Transcript at 550-54 (Testimony of M. VanSlyke).

54. ~~49.~~ In late summer through early fall of 2011, REC Solar produced a five-year budget for 2012 through 2016, covering both the Moses Lake and Butte facilities. The purpose of the budget is to set goals for REC Solar's ~~the Taxpayer's~~ production volume and quality. Intended to drive personnel behaviors and performance measures, the budgets are aggressive. The table ~~chart~~ below presents REC Solar management's ~~the Taxpayer's~~ five-year budget for Moses Lake.[42]

	Base Year 2012	***2013***	***2014***	***2015***	***2016***
Solar Price Forecast	$24.64	$29.57	$31.54	$32.53	$33.51
Total Production Forecast	100%	102%	105%	107%	110%
Total Revenues	100%	123%	134%	141%	149%
Total Operating Expenses	100%	102%	103%	107%	109%
Total EBITDA	100%	207%	258%	276%	307%

55. ~~50.~~ The 2012 budget includes a risk matrix that reflects the ~~significant~~ risks perceived as of August 2011. Had the risk analysis been performed at the end of 2011, rather than in August 2011, a number of the risks would have increased in probability. The risk matrix shows a number of subjective vulnerabilities applicable to REC Solar's ability to achieve the budget, including the following:

- a 90 percent chance of losing the contract with REC Wafer;
- a high probability that external customers would be unable to take all volumes produced by REC Solar;
- a high probability that the average sales prices for prime-grade polysilicon would drop to $30 per kilogram or below;
- a high probability that Chinese protectionism would favor polysilicon producers in China;
- a critical risk of Silicon 3.0 and 4.0 production issues;
- a critical risk of problems related to the financial health of the Taxpayer's customers; and
- a critical risk of issues with quality and market acceptance for the FBR products.

[42] For purposes of confidentiality, the budget is presented with the 2012 forecast as the base year.

56. ~~51.~~ REC Solar has never met its annual budget projections for production quality for the FBR process.

57. ~~52.~~ REC Solar has successfully met its annual budget projections for production volume every year.[43]

58. From the time REC Solar's budget forecast was developed in early fall 2011, the market price for prime grade silicon dropped approximately 50 percent by 2011 year end.[44] ~~53. The income projections in REC Solar's budget provide credible evidence of expected future performance.~~

ISSUE 1: VALUATION OF THE SUBJECT PROPERTY

The Parties' Appraisal Evidence

59. The parties offer four retrospective appraisal reports to determine an effective date value on January 1, 2012.

59.1 ~~54.~~ Ms. Spletter, Mr. Clark, and Mr. Landolt, together with Larry Mott, also of Stancil and Company, performed an appraisal for the Taxpayer (the Stancil appraisal). The Stancil appraisal report is dated September 26, 2013, 19 months after the January 1, 2012, assessment date.

59.2 ~~55.~~ Mr. Klingeman and Ms. Brewer performed an appraisal for the Assessor (the Department's appraisal). The Department's appraisal report is dated September 11, 2012, 9 months after the January 1, 2012, assessment date.

59.3. ~~56.~~ Mr. Beaton performed two appraisals for the Assessor (Mr. Beaton's Appraisal No. 1 and Mr. Beaton's Appraisal No. 2). Mr. Beaton's Appraisal No. 1 is dated September 27, 2013. Mr. Beaton's Appraisal No. 2 is dated October 14, 2013.

60. Uniform Standard of Professional Appraisal Practice (USPAP) addresses retrospective value opinions in their Statement on Appraisal Standards No. 3 (Statement 3).

60.1. Statement 3 begins with the following issue statement:

> The Issue:
>
> Two dates are essential to an appraisal report. Standards Rules 2-2(a)(vi), (b)(vi), and (c)(vi), and 8-2(a)(vi), (b)(vi), and (c)(vi) require that each appraisal report specify the effective date of the

[43] Exhibit A16; Transcript at 555 (Testimony of M. VanSlyke).
[44] Exhibit A38-5.

appraisal and the date of the report. The date of the report indicates the perspective from which the appraiser is examining the market. The effective date of the appraisal establishes the context for the value opinion. Three categories of effective dates – retrospective, current, or prospective – may be used, according to the intended use of the appraisal assignment.

When a retrospective effective date is used, how can the appraisal be prepared and presented in a manner that is not misleading?

60.2. Statement 3 includes the following statement:

A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date. The appraiser should determine a logical cut-off because at some point distant from the effective date, the subsequent data will not reflect the relevant market. This is a difficult determination to make. Studying the market conditions as of the date of the appraisal assists the appraiser in judging where he or she should make this cut-off. In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as the effective date, the effective date should be used as the cut-off date for data considered by the appraiser.

60.3. Statement 3 makes the following conclusions:

Conclusions:

- A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal.
- Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends.

- The appraiser should determine a logical cut-off.
- Use of direct excerpts from then-current appraisal reports prepared at the time of the retrospective effective date helps the appraiser and the reader understand market conditions as of the retrospective effective date.
- In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date.

61. A buyer, anticipating a purchase on January 1, 2012, would begin due diligence between six and nine months prior for a plant similar to REC Solar.[45]

62. REC Solar was not offered for sale.

The Sales Comparison Approach

63. ~~57.~~ Both the Stancil appraisal and the Department's appraisal consider the sales comparison approach, but both agree that it is inapplicable due to the absence of comparable sales.[46]

The Income Approach

64. ~~58.~~ The Stancil appraisal, the Department's appraisal, and both of Mr. Beaton's appraisals include a discounted cash flow (DCF) form of the income approach. The Department's appraisal also includes two other income-based approaches: a direct-capitalization approach and a market multiples approach.

The Stancil Appraisal's DCF Analysis

65. ~~59.~~ The Stancil appraisal's income approach uses a 16-year DCF analysis. The first 5 years (2012 to 2016) are a discrete forecast. The following years (2017 to 2027) are the same as the final year of the discrete forecast period, except for depreciation expense.[47]

66. ~~60.~~ The DCF analysis forecasts the subject property's total production at a constant amount over the 16-year forecast period.

[45] Transcript at 1416, (Testimony of N. Beaton)
[46] Exhibit A1-116, 145, 166; Exhibit R1-122.
[47] Exhibit A1-119 to 140, 231 to 240.

67. ~~61.~~ The revenue in the DCF analysis includes both prime- and secondary-grade products at blended prices of approximately $25 per kilogram.[48]

67.1. ~~61.1.~~ The blended prices used in the revenue forecast are based on a weighted average of prime price forecasts from the REC Solar budget (10 percent weight) and three third-party industry sources: Sage Concepts (40 percent weight), Raymond James (10 percent weight), and Greentechmedia Research (40 percent weight).[49]

67.2. ~~61.2.~~ The appraisal applies a 93 percent factor separately to each of the four sources of prime price forecasts. The 93 percent factor reflects REC Solar's ~~the Taxpayer's~~ experience and expectations in terms of (a) the percentage of total production that meets specifications for prime-grade materials (yield to prime) and (b) the lower prices received by the Taxpayer for sales of material that fails to meet prime specifications.[50]

67.3. ~~61.3.~~ The 2016 weighted average price forecast is held constant at $24.83 per kilogram for the 11 years after 2016 in the DCF analysis because of the industry's long-term need to attain grid parity.[51]

68. ~~62.~~ The depreciation expense is based upon an iterative calculation in which the price paid by a hypothetical buyer of the subject property establishes its new basis for depreciation purposes. [52]

69. ~~63.~~ The appraisal includes the annual capital expenditures that are necessary to maintain the estimated income from the property at $40,000,000 per year based upon REC Solar's projection of sustaining capital and Stancil and Company's experience with the level of sustaining capital required for complex process facilities.[53]

70. ~~64.~~ The discount rate is 15 percent.[54] The capitalization rate for the reversionary value is the same as the discount rate because there is no reason to think there will be growth in cash flows due to the long-term need to achieve and sustain grid parity.[55]

---

[48] Exhibits A1-79, A1-124, & A1-238.
[49] Exhibit A1-79.
[50] *Id.*; Transcript at 745-46 (Testimony of K. Spletter).
[51] Exhibit A1-123; Transcript at 911 (Testimony of K. Spletter). *See also* Exhibit A1-32, 36, 51, 75, 110.
[52] Transcript at 774 (Testimony of K. Spletter).
[53] Exhibit A1-127 to 128.
[54] Exhibit A1-129.
[55] Transcript at 242 (Testimony of K. Levens).

71. ~~65.~~ The DCF analysis produces a business enterprise value of $364,000,000.[56]

72. ~~66.~~ The deduction for exempt business inventories, or working capital, is $27,800,000, based upon REC Solar's actual inventory value on January 1, 2012.[57]

73. ~~67.~~ The appraisal quantifies values for the following types of exempt intangible personal property:

73.1. ~~67.1.~~ "Intellectual property" related to ~~the Taxpayer's~~ REC Solar's proprietary silane and FBR-A technology ~~(the technology at REC Solar)~~, based on the income approach for the value of royalty fees for licensing the technology,[58]

73.2. ~~67.2.~~ "Custom software" based on a replacement cost, with an adjustment for functional obsolescence, but before consideration of economic obsolescence,[59]

73.3. ~~67.3.~~ "Assembled and trained workforce" based on the cost of training the workforce to operate and maintain REC Solar before consideration of economic obsolescence~~.~~ And,[60]

73.4. ~~67.4.~~ "Proprietary engineering drawings" based on a replacement cost new for creating the drawings needed to operate and maintain REC Solar, less an adjustment for functional obsolescence, but before consideration of economic obsolescence.[61]

74. ~~68.~~ After deducting $27,800,000 for working capital, $96,100,000 for the intellectual property, and $2,000,000 for land value from the business enterprise value, a balance of $238,100,000 remains to allocate to other tangible and intangible assets.[62] The allocation of this value between tangible and intangible property is based on the relative cost approach values before economic obsolescence, which allows a 90 percent allocation of the total value to tangible property and 10 percent of the remaining total value to intangible assets. The value allocated to these intangible assets is approximately $25,000,000.[63]

75. ~~69.~~ The $213,466,000 value allocated to tangible assets, plus the land value, results in a total taxable property value (rounded) of $215,000,000.

---

[56] Exhibit A1-131, 238; Transcript at 783 (Testimony of K. Spletter).
[57] Exhibit A1-132.
[58] Exhibit A1-285 to 289.
[59] Exhibit A1-280 to 285.
[60] Exhibit A1-275 to 276.
[61] Exhibit A1-277 to 280.
[62] Exhibit A1-136.
[63] Exhibit A1-139.

76. ~~70.~~ No evidentiary weight is accorded to the value determined by the Stancil appraisal's DCF analysis~~, due to the significant difference between its revenue forecast and the revenue forecast in the REC Solar budget, as shown in the chart below.~~[4] for the following reasons:

76.1 There is a significant difference between its revenue forecast and the revenue forecast in the REC Solar budget, as shown in the table below.[64]

	2012	***2013***	***2014***	***2015***	***2016***
REC Solar Budget's Solar ASP Forecast	$24.64	$29.57	$31.54	$32.53	$33.51
Stancil's Solar ASP Forecast	$25.58	$25.23	$24.65	$24.74	$24.83
Stancil's Production as % of Production in REC Solar Budget	91%	89%	87%	85%	83%
Stancil's Revenues as % of Revenues in REC Solar Budget	95%	76%	68%	65%	62%

76.2. ~~70.1~~ The Stancil appraisal's revenue forecast declines from 95 percent of the REC Solar budget's forecast in 2012 (Year 1) to 62 percent in 2016 (Year 5).

76.3. ~~70.2~~ The Stancil appraisal's production forecast declines from 91 percent of the REC Solar budget's forecast in 2012 (Year 1) to 83 percent in 2016 (Year 5).

76.4. ~~70.3~~ The Stancil appraisal's flat production forecast is inconsistent with the forecast of REC Solar's management in its 2011 Annual Report: "Production volumes are expected to increase, through improved utilization of the assets, especially for the granular polysilicon production (FBR)."~~5~~[65]

76.5. The Stancil appraisal's revenue forecast underestimates the projected levels of production and product prices and the forecast is inconsistent with the Taxpayer's internal budget projections. The Stancil appraisal's 15 percent discount rate is inaccurate and unreliable and contradicts the Taxpayer's public financial disclosures.[66]

[64] For purposes of confidentiality, certain Taxpayer items are considered proprietary business information and are presented in a relative comparison manner.
[65] Exhibit R22–88.
[66] Exhibit R18. Transcript at 1426- 50 (Testimony of N. Beaton).

76.6. ~~70.4~~ The appraisal accords only 10 percent weight to the *price forecast* [italics added] in the REC Solar budget, with 90 percent weight accorded to third-party industry surveys.

76.7. ~~70.5 The~~ Stancil's business enterprise value of $360,000,000 is basically equal to REC Solar's operating profit of $356,884,000 in the first half of 2011.

The Income Approach in the Department's Appraisal

77. ~~71.~~ The Department's appraisal includes three income-based approaches: (1) a DCF analysis, (2) a direct capitalization approach, and (3) a market multiples, or guideline company, approach.

78. ~~72.~~ All three income-based approaches rely on the same revenue forecast.

79. ~~73.~~ The Department developed its revenue forecast by multiplying estimated polysilicon kilograms sold by an estimated average price of the product.

80. ~~74.~~ The revenue forecast contains several errors:

80.1. ~~74.1~~ The forecast prices for prime-grade products are applied to the entire production of the subject property, despite the mix of grades produced ~~at the subject property~~ there. The subject property is not capable of producing 100 percent prime grade~~,~~ due to the characteristics of its FBR technology.

80.2. ~~74.2~~ The sales volume exceeds Mr. Klingeman's own opinion of the subject property's productive capacity. Despite estimating the subject property's total productive capacity at 18 million kilograms, the Department's appraisal uses a total production forecast of 20 to 21 million kilograms for the last three years of its five-year forecast, which was capitalized into perpetuity in the terminal value. This production volume significantly exceeds the REC Solar budget's forecasted volume for the same periods.

80.3. ~~74.3~~ The Department's appraisal distinguishes spot pricing from long-term contract pricing and assigns to contract pricing a per kilogram premium of $5 to $6. This is contrary to the nature of the market in which spot and contract pricing will more likely stabilize and converge.

80.4. ~~74.4~~ In all three of its income approaches, the Department's appraisal derives its estimates for operating expenses, depreciation, income tax rate, growth rate,

and working capital from the general financial characteristics of publicly traded companies that are categorized by *Value Line* as chemical processing companies.

80.5. ~~74.5~~ Only one of the companies relied upon in the Department's appraisal has any involvement with solar-grade polysilicon. The other companies relied upon in the Department's appraisal (Agrium, CF Industries, DuPont, FMC, Cytec Industries, Olin, PPG Industries, and Air Products) have no involvement with production of solar-grade polysilicon.

80.6. ~~74.6~~ Although REC Solar's plant and processes resemble those of a chemical plant in some ways, the economics and risks of the subject property and industry are not similar to the economics of general chemical plants in a stable, mature industry. Mr. Beaton acknowledges that companies used in the Department's appraisal are "not entirely comparable to the subject property."~~6~~[67]

81. ~~75.~~ The Department's appraisal calculates a discount rate of 11.07 percent for its DCF analysis and 13 percent for its gross cash flow capitalization rate.

82. ~~76.~~ In the Department's appraisal, the three income-based approaches produce the following value estimates:

Income Approach	***Value Estimate***
DCF	$1,014,100,000
Direct Capitalization	$1,132,300,000
Market Multiples	$1,170,000,000

83. ~~77.~~ The income approaches in the Department's appraisal are fundamentally flawed and are accorded no weight for the following reasons:

83.1. ~~77.1~~ The errors in the appraisal's revenue forecast are applicable to all three income-based approaches.~~7~~[68]

83.2. ~~77.2~~ The estimates for operating expenses, depreciation, income tax rate, growth rate, and working capital are determined as percentages of the erroneous revenue forecast.

83.3. ~~77.3~~ The selection of chemical processing companies in a stable, mature industry are not comparable to the subject's high-growth, high-risk industry.~~8~~[69]

[67] Exhibit R17–14.
[68] ~~*See* Finding of Fact (FF) No. 74.~~ *See* FF No. 80.
[69] *See* FF No. ~~74.6~~ 80.6.

Mr. Beaton's DCF Appraisals

Mr. Beaton's Appraisal No. 1

84. ~~78.~~ Mr. Beaton's Appraisal No. 1 provides a revised DCF analysis based on Mr. Beaton's review of the Department's appraisal.

85. ~~79.~~ Concluding that the revenue and expense forecast in the Department's appraisal is reasonable, relative to the forecast in the REC Solar budget, Mr. Beaton's Appraisal No. 1 assumes the Department's EBIT (earnings before interest and taxes) forecast.

86. ~~80.~~ Mr. Beaton's Appraisal No. 1 applies the following adjustments to the DCF analysis in the Department's appraisal: (1) discount rate, (2) application of the mid-year discounting convention, (3) calculation of net change in non-cash working capital, (4) working capital surplus and selling costs, and (5) long-term earnings growth rate.

87. ~~81.~~ Mr. Beaton's Appraisal No. 1 produces a revised enterprise value of $1,385,600,000.

88. ~~82.~~ Little or no weight is accorded to the enterprise value determined in Mr. Beaton's Appraisal No. 1~~,~~ due to its reliance on the fundamentally flawed revenue and expense forecast in the Department's appraisal.~~9~~[70]

Mr. Beaton's Appraisal No. 2

89. ~~83.~~ Mr. Beaton's Appraisal No. 2 provides a revised DCF analysis based on Mr. Beaton's review of the Stancil appraisal's DCF analysis.

90. ~~84.~~ Mr. Beaton concludes that the Stancil appraisal's revenue forecast underestimates the projected levels of production and product prices and that the forecast is inconsistent with the Taxpayer's internal budget projections.

91. ~~85.~~ Mr. Beaton concludes that the Stancil appraisal's 15 percent discount rate is inaccurate and unreliable and contradicts the Taxpayer's public financial disclosures.

92. ~~86.~~ Mr. Beaton applies two adjustments to the Stancil appraisal's DCF: (1) the EBIT forecast in the REC Solar budget and (2) a 10.6 percent discount rate based on the Taxpayer's public financial disclosures.

93. ~~87.~~ Mr. Beaton's Appraisal No. 2 produces a revised enterprise value of $1,630,418,000.

[70] *See* FF ~~Nos. 74 and 77~~ No. 85.

94. ~~88.~~ Mr. Beaton applies the same deductions as the Stancil appraisal for working capital, intellectual property (FBR technology), land, and an intangible-asset allocation factor to arrive at a value of $1,348,862,000 for the tangible assets.

95. ~~89.~~ The reliability of the tangible-assets value reached in Mr. Beaton's Appraisal No. 2 is undermined by the following: (1) contradictory evidence about the REC Solar budget's EBIT forecast and (2) an inappropriate treatment of depreciation expense in the latter 11 years of his cash flow projection.

95.1. ~~89.1~~ In the REC Advanced Silicon Materials Financial Statements (October 2011 Forecast), the EBIT forecast values from 2012 through 2016, for Silicon 1.0, 3.0, and 4.0, range from $37 million to $48 million per year less than the EBIT values in Mr. Beaton's Appraisal No. 2.

95.2. ~~89.2~~ Mr. Beaton's Appraisal No. 2 holds depreciation expense constant at $115,500,000 and capital expenditures constant at $40,000,000 for the 11 latter forecast years (2017 through 2027), thereby creating an inappropriate non-operating cash flow of $75,500,000 over those forecast years. Mr. Beaton's Appraisal No. 2 abruptly reduces depreciation expense from $115,500,000 in Year 16 (2027) to $40,000,000 for the terminal year cash flow calculation in order to match and offset capital expenditures.

95.3. ~~89.3~~ A tangible-assets value of $970,000,000 (rounded) is indicated by modifying the assumptions of Mr. Beaton's Appraisal No. 2 with the EBIT forecast from the Financial Statements and by assuming a declining 8.5 percent depreciation expense (based on an average useful life of 12 years for M&E).

The Cost Approach

96. ~~90.~~ Both the Stancil appraisal and the Department's appraisal include a cost approach. The appraisals' cost approaches differ primarily with respect to economic, or external, obsolescence—that is, "loss of value due to external causes."~~10~~[71] The cost approach in the Department's appraisal recognizes no external obsolescence. The Stancil appraisal, however, identifies and quantifies external obsolescence.

97. ~~91.~~ An advantage of the cost approach is that it does not capture the subject property's intangible value, as the income approach does by capturing the business enterprise value.

[71] Exhibit R1–38.

The Stancil Appraisal's Cost Approach

98. ~~92.~~ The Stancil appraisal's calculation of external obsolescence is based on a total value for the subject property of $1.638 billion. The total value is the sum of the following:

- $1.55 billion replacement cost new less physical depreciation (RCNLD);
- $1.456 billion RCNLD less functional obsolescence;
- $31 million in personal property value;
- $28 million in working capital value;
- $96 million in intellectual property value;
- $25 million in other intangible assets value; and
- $2 million in land value.

99. ~~93.~~ The Stancil appraisal relies on an income shortfall methodology to quantify external obsolescence.

99.1. ~~93.1.~~ The income shortfall method demonstrates that the cash flow that would be required to support the value of the property if no external obsolescence were present would be $242 million per year.

99.2. ~~93.2.~~ In contrast, the actual projected cash flow of REC Solar averaged $54 million per year, indicating an income shortfall of $188 million per year.

99.3. ~~93.3.~~ The present value of the difference between the required cash flow and the projected expected cash flow is $1.265 million, or 85 percent.

100. ~~94.~~ The Stancil appraisal's cost approach establishes a value of $224,000,000.

101. ~~95.~~ Because the Stancil appraisal's income shortfall calculation of external obsolescence is based on the Stancil appraisal's flawed DCF analysis,[~~11~~72] the Stancil appraisal's cost approach is given little or no weight.

101.1. ~~95.1.~~ Additionally, ~~A~~although evidence and testimony were presented to support the validity of the income shortfall method for quantifying external obsolescence, the method is a matter of significant controversy within the appraisal community.[~~12~~73]

---

[72] *See* FF No. ~~70~~ 76.

[73] "It should be noted that the capitalization method (or any income approach valuation method) is not particularly applicable to the quantification of external obsolescence. Rather, the yield capitalization method is appropriate for identifying the existence of (and not measuring the amount of) external obsolescence." Robert F. Reilly and Robert P. Schweihs, *Guide to Property Tax Valuation* (Willamette Management Associates, 2008), p. 230. *See* Mark R. Rattermann, MAI, SRA, *The Student Handbook to the Appraisal of Real Estate* (Appraisal Institute, 14th ed. 2014), p. 238 (observing that, "[e]stimating losses using capitalized rent losses works well for income-producing properties when the typical buyer is an investor, but it does not work at all for houses or owner-occupied commercial

~~95.2.~~ The cost approach in the Stancil appraisal is inaccurate and is not prepared in accordance with generally accepted valuation practice; it inappropriately relies on the income approach for its economic obsolescence adjustment. Essentially, the cost approach in the Stancil appraisal is an alternative calculation under the income approach.[74]

The Cost Approach in the Department's Appraisal

102. ~~96.~~ The Department's appraisal includes two cost approach values. Cost Approach No. 1 in the Department's appraisal reaches an RCNLD value of $1.48 billion, a value that is five percent less than the Stancil appraisal's RCNLD of $1.55 billion. ~~An~~ It applies an additional 10 percent adjustment for functional obsolescence ~~is applied~~ to arrive at a final corrected value of $1.41 billion, including land value, personal property, spare parts, and supplies.~~13~~[75]

103. ~~97.~~ Cost Approach No. 2 in the Department's appraisal applies a 12 percent adjustment for excess capital costs in lieu of functional obsolescence and establishes a value of $1.38 billion, including land value, personal property, spare parts, and supplies.

104. ~~98.~~ No adjustment is made for economic obsolescence, as of January 1, 2012, in either of the two cost approaches in the Department's appraisal.

105. ~~99.~~ The subject property suffered from economic obsolescence as of January 1, 2012.

105.1. ~~99.1.~~ The Assessor testified that, in her view, the subject property suffered from external (economic) obsolescence.

105.2. ~~99.2.~~ External obsolescence is indicated by the decline in price from REC Solar's polysilicon assumption of $35 to $50 per kilogram for Silicon 3.0 and 4.0 in 2006 and 2007 to a reasonable average selling price forecast of $24.83 per kilogram for 2012.

105.3. ~~99.3.~~ Further confirmation of external obsolescence is found in the evidence of idle and shut-down polysilicon manufacturing plants (approximately 30 in the United States, Europe, and China in 2011), the closure of businesses at later steps in

---

properties"). *See also BP Pipelines. v. State*, 325 P.3d 478, 489 (Alaska 2014) (acknowledging that "the superior court heard ample testimony that [the 'income shortfall'] method of calculating depreciation is not a widely accepted appraisal practice, nor does it appear in any widely accepted appraisal manuals").

[74] Exhibit R18-24. Transcript at 1429- 30 (Testimony of N. Beaton). Transcript at 1247-48 (Testimony of J. Lifflander).

[75] The Department's appraisal inadvertently fails to add $31.1 million for supplies, fuel, tools, and spare parts, resulting in an incorrect value of $1.38 billion. Exhibit R1–48.

the value chain that were polysilicon consumers, the absence of any significant salvage or liquidation value, and the excess capacity of polysilicon.

105.4. ~~99.4.~~ The Department's appraisal notes these challenges as of the valuation date: "The polysilicon manufacturing sector of the solar energy industry has seen unprecedented growth in the recent past," particularly in the time leading up to REC Solar's construction of Silicon 3.0 and 4.0, but "[t]oday [the sector] is challenged with oversupply in the polycrystalline silicon markets and the economic and political uncertainty surrounding the solar industry."~~14~~[76]

106. ~~100.~~ Because the cost approaches in the Department's appraisal do not explicitly identify, or deduct for, external (economic) obsolescence, the cost approaches in the Department's appraisal are given no weight.

107. With the exception of their recognition, or lack thereof, and valuation of economic obsolescence, the parties' cost approach values prior to economic obsolescence are less than eight percent different and considered to be reasonably close.

	DOR[77]	**STANCIL[78]**	**% Difference**
Replacement Cost New (RCN)	$2,014,610,617	$2,150,000,000	6.7%
Less: Physical Depreciation	-$538,378,763	-$600,000,000	
RCN Less Physical Depreciation	$1,476,231,854	$1,550,000,000	5.0%
Less: Functional Obsolesence	-$147,623,185	-$94,000,000	
RCN Less Physical Depreciation & Functional Obosolesence	$1,328,608,669	$1,456,000,000	9.6%
Plus: Personal Property	$48,597,326	$31,000,000	
Plus: Land	$2,258,655	$2,000,000	
Cost Approach Value Prior to Economic Obsolesence	**$1,379,464,650**	**$1,489,000,000**	**7.9%**
Less: Economic Obsolesence	$0	-$1,265,000,000	
Final Cost Approach Values	**$1,379,464,650**	**$224,000,000**	**83.8%**

ISSUE 2: CLASSIFICATION OF M&E AS REAL ~~OR PERSONAL~~ PROPERTY

108. ~~101.~~ The Grant County Assessor is responsible for assessing all real property and all tangible personal property within the ~~County~~ county.

108.1. ~~101.1.~~ There are between 65,000 and 75,000 real property parcels in the ~~County~~ county.

[76] Exhibit R1–27.
[77] Exhibit R1-48.
[78] Exhibit A1-164. Prior to the value revision for personal property.

108.2. ~~101.2.~~ There are approximately 5,000 personal property parcels in the ~~County~~ county.

109. ~~102.~~ The definitions of personal property and real property that are set forth in Washington statutes and regulations ~~(the RCWs and WACs)~~ determine whether a property is placed on the ~~real~~ personal property rolls or ~~personal~~ real property rolls.[79] Because the tax rates for personal property and real property are the same, ~~The~~ the characterization alone~~, however,~~ does not affect the amount of the ~~tax obligation~~ Assessor's total valuation for the subject property.

110. The Taxpayer owns the subject property, which includes the land, buildings, and M&E.

111. ~~103.~~ The subject property is located within the Grant County Mosquito Control District No. 1. Because the operations of the District benefit real property, rather than personal property, the District assesses against the real property accounts in the ~~County~~ county.

112. ~~104.~~ The Assessor has no authority over the ~~Mosquito Control~~ District's ~~assessment rates~~ own assessments.

113. The County Treasurer collects the District's assessments with the general taxes.[80] The 2013 tax statement issued by the County Treasurer to the Taxpayer shows the District's assessment of $363,387.02 against the Taxpayer.[81]

114. ~~105.~~ The market value of the Taxpayer's M&E is 94 percent of the value of the improvements. Consequently, if the Taxpayer's M&E were reclassified as personal property, rather than real property ~~(or fixtures)~~, the ~~Mosquito Control~~ District's assessment against the Taxpayer would be reduced by 94 percent, a significant benefit to the Taxpayer.

~~106. Ms. Brewer, Valuation Specialist with the Department, completed a walk-through of the subject property and received a fixed asset list from the Taxpayer.~~

~~106.1. The Taxpayer's fixed asset list included the asset name, acquisition year, and actual cost, as reported.~~

115. In November 2011, the Assessor asked the Department to perform an advisory appraisal on the subject property for assessment-year 2012. Pursuant to the request, Lisa

[79] For personal property, see RCW 84.04.080 and WAC 458-12-060; for real property, see RCW 84.04.090 and WAC 458-12-010.
[80] *See* RCW 17.28.255.
[81] *See* Exhibit A7-2.

Brewer, a Valuation Specialist with the Department, completed a walk-through of the subject property and received a fixed-asset list from the Taxpayer.

115.1. There were approximately 18,000 items on the Taxpayer's fixed-asset list; the list set forth, for each asset, the asset's name, acquisition year, and actual cost, as reported.

115.2. ~~106.2.~~ Ms. Brewer loaded the fixed-asset list into a Department template and entered the "trend" as provided by the Department.

115.3. ~~106.3.~~ Ms. Brewer's completed template was made available to the Taxpayer for review.

115.4. ~~106.4.~~ In response, the only concern the Taxpayer raised was related to a custom software issue.

115.5. The Assessor testified that the Taxpayer had likewise raised no objections to the fixed M&E placed on the County's real property rolls for assessment-years 2010 and 2011.

116. Jeffrey Johnson, the Taxpayer's Director of Operations, testified that certain items of the subject property's M&E could be moved or replaced without damaging the buildings or land.

117. The polysilicon manufacturing process halts when an item of M&E, such as a pump or a turbine, is removed. Redundancies are built into the system, but not all of the approximately 18,000 parts have redundancies. The system cannot work if one part fails or is removed. If a part and its redundancy fail (or if a part without a redundancy fails), production is interrupted.

118. The FBR building's design accommodates the unique FBR process. The narrow, eight-story building is open in the center to accommodate the FBR reactor, the feed hoppers atop the reactor, and the cooling area beneath the reactor. The FBR process could not be carried out in the Siemens building.

119. The Taxpayer proposes only three facts, based on the testimony of Jeffrey Johnson, to support its conclusion that the approximately 18,000 items of M&E should be classified as real property (fixtures):

119.1. "The Facility's [M&E] can be and has been moved."

119.2. "The Facility's [M&E] has a useful life that is shorter than that of the buildings (on average, 12 years for [M&E] as opposed to 30 years for buildings)."

119.3. "Some of the [M&E] at the Facility has been replaced or reconfigured as technology and efficiency changes have occurred."[82]

~~107. The manufacturing process halts when a piece of equipment, such as a pump or a turbine, is removed. Redundancies are built into the system, but not all of the 17,000 parts have redundancies. The system cannot work if one part fails or is removed. If a part and its redundancy fail (or if a part without a redundancy fails), production is interrupted.~~

ISSUE 3: EQUALIZATION

120. ~~108.~~ The Department's real property ratio for Grant County in 2012 was 88 percent.

121. ~~109.~~ The Department uses equalization ratios for two purposes: to tax utilities and to establish school district levies.

122. ~~110.~~ The Department's equalization ratios do not affect an assessor's determination of a property's fair market value.

123. ~~111.~~ The Taxpayer is neither a utility nor a school district.

Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as such.

From these findings, this Board comes to these

CONCLUSIONS OF LAW

ISSUE 1: VALUATION OF THE SUBJECT PROPERTY

1. Pursuant to RCW 82.03.130(1)(k) and RCW 84.40.038(3), the Board has jurisdiction to hear and decide this direct appeal.

2. Under RCW 84.40.0301, an assessor's original valuation of the property is presumed to be correct.

3. To overcome ~~the~~ an assessor's presumption of correctness, a taxpayer must provide "clear, cogent and convincing evidence."~~15~~[83] Washington courts have explained that the "clear, cogent, and convincing" standard of proof means "a quantum of proof that is less than

[82] Appellant's Proposed Findings of Fact and Conclusions of Law, p. 27.
[83] RCW 84.40.0301.

'beyond a reasonable doubt,' but more than a mere 'preponderance'"; evidence is "clear, cogent, and convincing" if it shows "that the fact in issue is 'highly probable.'"~~16~~[84]

4. Former RCW 84.40.030(1) provides that "[t]he true and fair value of real property for taxation purposes . . . shall be based upon . . . [a]ny sales of the property being appraised or similar properties with respect to sales made within the past five years."

5. Former RCW 84.40.030(2) requires that, in the absence of a sale in the prior five years of the subject property or of "a significant number of sales of similar property in the general area," the sales comparison approach gives way to the cost approach or the income capitalization approach.

6. As a matter of appraisal practice, evidence about events that occur after the assessment date may be considered in developing a retrospective value; events occurring after the assessment date may confirm trends that a buyer or seller would reasonably consider on the assessment date.~~17~~[85] In the present case, because the Board concludes that market events occurring after ~~mid-year~~ 2012 and the summations of REC Solar performance for the entirety of 2012 were likely unknowable as of the January 1, 2012, assessment date, ~~the Board accords little or no weight to the testimony and evidence about events that occurred after mid-year 2012.~~[18] they are more appropriately considered in setting values for January 1, 2013, and later years, in accordance with RCW 84.40.020.[86]

7. RCW 84.40.020 requires that "all real property in this state subject to taxation shall be listed and assessed every year, with reference to its value on the first day of January of the year in which it is assessed."

8. ~~7.~~ The sales comparison approach is inapplicable because there were no comparable sales.~~19~~[87]

9. ~~8.~~ The parties' income approaches are unreliable estimates of the value of the subject; consequently, the cost approach is the best indicator of value in the present case.~~20~~[88]

---

[84] *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562, 242 P.3d 936 (2010) (quoting *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980), and *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)).

[85] THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE U-85 (SMT-3) (2012-13 ed.).

[86] This includes evidence and testimony about subsequent events such as subject impairment actions, polysilicon market supply/demand/pricing data, government subsidies, Chinese retaliatory and tariff actions, and other polysilicon market events.

[87] *See* FF No. ~~57~~ 63.

[88] *See* FF Nos. ~~70 and 77~~ 76, 83, 88, and 95.

10. ~~9.~~ The Taxpayer has met its burden of establishing, by clear, cogent, and convincing evidence, that the Assessor overvalued the subject property by not plainly identifying and deducting for external obsolescence.

11. ~~10.~~ External obsolescence applicable to REC Solar on January 1, 2012, is ~~35~~ 45 percent of ~~RCNLD,~~ replacement cost new less physical depreciation and functional obsolescence, based on a range of 24 percent to ~~46~~ 50 percent indicated by the following evidence and with emphasis on the 2011 fourth quarter price drop of prime grade polysilicon:

11.1. ~~10.1.~~ As of January 2012, the all-in solar energy cost of $4.53 per megawatt was 33 percent higher than the estimated cost needed for grid parity of $3.00 per megawatt.[~~21~~89]

11.2. ~~10.2.~~ The PV industry oversupply was 25 percent excess capacity in 2011 and an estimated 24 percent in 2012.[~~22~~90]

11.3. ~~10.3.~~ The polysilicon industry oversupply situation in 2011 was 32 percent excess capacity and an estimated 46 percent in 2012.[~~23~~91]

11.4. ~~10.4.~~ From 4th Quarter 2010 to 4th Quarter 2011, polysilicon prices fell 40 percent according to GTMRESEARCH.com.[~~24~~92]

~~10.5. In the first half of 2011, REC Solar earned over $360 million in operating profit with polysilicon spot prices between $50 and $70 per kilogram. In the second half of 2011, the polysilicon spot price declined 40 percent from $50 per kilogram to $30 per kilogram.~~[~~25~~[FN: *See* FF No. 38.]]

11.5. From early fall 2011 through year end, the prime grade market price fell approximately 50 percent.[93]

12. ~~11. With the 35 percent~~ Applying the 45 percent adjustment for external obsolescence ~~and a deduction of $45,935,000 for the personal property (Parcel No. 4806886),~~[~~26~~[FN: The parties agree that the value of the personal property is not under appeal. The personal property value was subsequently revised by the Assessor to $45,935,000 as a result of a deduction for exempt custom software.]] ~~the Department's cost approach value for the subject property (Parcel No. 91759600) is $912,000,000 (rounded).~~ to the parties' cost approaches results in the following value indications:

---

[89] *See* FF No. 36.3.
[90] *See* FF No. 27.
[91] *See* FF No. 30.
[92] *See* FF No. 34.
[93] *See* FF No. 58.

	DOR	STANCIL[94]
Replacement Cost New (RCN)	$2,014,610,617	$2,150,000,000
Less: Physical Depreciation	-$538,378,763	-$600,000,000
RCN Less Physical Depreciation	$1,476,231,854	$1,550,000,000
Less: Functional Obsolesence	-$147,623,185	-$94,000,000
RCN Less Physical Depreciation & Functional Obosolesence	$1,328,608,669	$1,456,000,000
Plus: Personal Property	$48,597,326	$31,000,000
Plus: Land	$2,258,655	$2,000,000
Cost Approach Value Prior to Economic Obsolesence	$1,379,464,650	$1,489,000,000
Less: 45% Economic Obsolesence	**-$597,873,901**	**-$655,200,000**
Final Cost Approach Value	**$781,590,749**	**$833,800,000**

~~12. With the 35 percent adjustment for external obsolescence and a deduction of $45,935,000 for the personal property (Parcel No. 4806886), the Stancil appraisal's cost approach value for the subject property (Parcel No. 91759600) is $994,000,000 (rounded).~~

13. The Board concludes that the total market value of the subject's tangible property (Parcel Nos. 4806886 and 91759600) is ~~$950,000,000~~ $820,000,000.

14. ~~The~~ Subtracting the tangible personal property value, the Board concludes that the market value of the subject real property (Parcel No. 091759600) is ~~$904,065,000~~ $774,000,000, rounded.

ISSUE 2: CLASSIFICATION OF M&E AS REAL ~~OR PERSONAL~~ PROPERTY

15. ~~To prevail on its contention that the Assessor has misclassified the subject property's M&E, the Taxpayer must prove by a preponderance of the evidence that the M&E is personal property, not real property~~ "The term 'real property' for the purposes of taxation shall . . . mean and include the land itself . . . and all buildings, structures or improvements or other fixtures of whatsoever kind thereon."[95]

16. ~~The determination of what is or is not a fixture (*i.e.*, real or personal property) is a mixed question of law and fact.[27][FN: *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975); *W. Ag. Land Partners v. Dep't of Revenue*, 43 Wn. App. 167, 170, 716 P.2d 310 (1986).]~~ Because the Assessor's classification of the M&E as real property, rather than personal property, does not affect the total assessed value of the subject property,[96] the Assessor's classification of the M&E does not produce an erroneous

[94] Stancil's value would be approximately $850,000,000 with the revised personal property value of $48,597,326.
[95] RCW 84.04.090.
[96] *See* FF No. 109.

assessed value of the subject property.[97] Consequently, the statutory presumption of correctness, which applies to the Assessor's "*valuation* of property for purposes of taxation,"[98] does not apply to the Assessor's classification of the M&E as real property (or fixtures).[99]

17. Challenging the Assessor's classification of the M&E as real property, the Taxpayer has the burden of proving, by a preponderance of the evidence, that the Assessor erroneously classified the M&E as fixtures.[100] The preponderance of the evidence standard requires evidence that is sufficient to make a fact "more probably true than not true."[101] ~~As defined in WAC 458-12-010(3), "real property" includes "[a]ny fixture permanently affixed to and intended to be annexed to land or permanently affixed to and intended to be a component of a building, structure, or improvement on land, including machinery and equipment which becomes fixtures." As the rule explains,~~

> ~~[s]uch items shall be considered as permanently affixed when they are owned by the owner of the real property and … they are securely attached to the real property; or … although not so attached, the item appears to be permanently situated in one location on real property and is adapted to use in the place it is located. For example, a heavy piece of machinery or equipment set upon a foundation without being bolted thereto could be considered as affixed.~~[28][FN: WAC 458-12-010(3)(a)(i) and (ii).]

18. "[T]he determination of what is a fixture is a mixed question of law and fact."[102]

19. ~~18.~~ An item of personal property becomes a fixture (or real property) if, according to "the oft-repeated common-law principle," there is "'(1) [a]ctual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.'"~~[29][FN: *Dep't of Revenue v. Boeing Co., supra* (quoting *Lipsett Steel Prods. v. King Cy.*, 67 Wn.2d 650, 652, 409 P.2d 475 (1965)).~~[103] In other words, under the common

---

[97] *See Columbia River Door Co. v. Cowlitz County*, 125 Wash. 603, 606, 216 P. 875 (1923) (observing that "it is immaterial whether the property was assessed as real or personal property, so long as the valuation and rate of taxation is the same," and finding that "[t]here was, therefore, no error in assessing the machinery as personal property").

[98] RCW 84.40.0301 (emphasis added).

[99] *Cf. Trans West Co. v Klickitat County*, 22 Wn. App. 798, 807, 591 P.2d 469 (1979) (not[ing] that the presumption favors the assessor's *valuation* of the property, not his *classification* of the property's highest and best use," but preserving the presumption because the assessor's misclassification affected the assessor's valuation).

[100] *Ziv v. Knight*, 121 Wash. 539, 541, 209 P. 685 (1922).

[101] *In re Welfare of Sego*, 82 Wn.2d 736, 739 n.2, 513 P.2d 831 (1973).

[102] *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975).

[103] *Id.* (quoting *Lipsett Steel Prods. v. King Cy.*, 67 Wn.2d 650,652, 409 P.2d 475 (1965)).

law fixture text, an item of personal property becomes a fixture if "(1) it is actually annexed to the realty, (2) its use or purpose is applied to or integrated with the use of the realty it is attached to, and (3) the annexing party intended a permanent addition to the freehold."[104]

~~19. The Board concludes that the Taxpayer's M&E meets the three criteria set forth in Conclusion of Law No. 18. The Taxpayer's evidence does not establish that, more likely than not, the M&E should have been characterized as personal property.~~

20. "Each prong of [the preceding] test must be established before an article may properly be deemed to be a fixture."[105]

21. WAC 458-12-010 describes various types of property that come within the statutory definition of "real property" in RCW 84.04.090. Subsection (3) of the rule addresses fixtures:

> 21.1. WAC 458-12-010(3) explains that "[i]ntent is to be gathered from all the surrounding circumstances at the time of annexation or installation of the item, including consideration of the nature of the item affixed, the manner of annexation and the purpose for which the annexation is made and is not to be gathered exclusively from the statements of the annexor, installer, or owner as to his or her actual state of mind."[106]
>
> 21.2. WAC 458-12-010(3) includes, among the items of personal property that satisfy the fixture test, those that are "*permanently affixed to* and *intended to be a component of* a building, structure, or improvement on land, including machinery and equipment which become fixtures." (Emphasis added.) Such items thus satisfy the fixture test's annexation, adaptation, and intent prongs.[107]
>
> 21.3. Under WAC 458-12-010(3)(a), an item is *permanently affixed* if it meets the following two criteria:
>
> > [1] it is "owned by the owner of the real property,"[108] and
> >
> > [2] it is either "securely attached to the real property" or, if not "securely attached," "appears to be permanently situated in one

---

[104] *Glen Park Assoc., LLC v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.3d 664 (2003) (citing *Boeing*, 85 Wn.2d at 667-68).
[105] *Boeing*, 85 Wn.2d at 668.
[106] For the source of the statement in the rule, see *Boeing*, 85 Wn.2d at 668.
[107] *See* CL No. 19.
[108] WAC 458-12-010(3)(a)(i); *see also Boeing*, 85 Wn.2d at 669 (noting that, "since Boeing is the owner of the freehold, it arguably could be presumed that the intent of the annexation was to benefit the freehold and not to preserve the [M&E] as personalty").

> location on real property and is adapted to use in the place it is located. For example, a heavy piece of machinery or equipment set upon a foundation without being bolted thereto could be considered as affixed."[109]

21.4. As WAC 458-12-010(3)(a)(ii) shows, Washington law recognizes, as an alternative to actual, physical annexation, "constructive annexation": "Even though the article may not be physically affixed to the realty, it may be *constructively annexed* because it is specially fabricated for installation or because it is a necessary functioning part of or accessory to an object which is a fixture."[110] For example, in *Boeing*, the Washington Supreme Court identified, as one factor supporting the status of the movable M&E as fixtures, that the M&E was "necessary to" the manufacturing operation.[111]

22. The Taxpayer's burden is to show that the M&E failed to satisfy at least one of the three criteria: actual or constructive annexation, integrated or adapted use, or the intent to maintain the M&E on the site. The Taxpayer does not meet its burden. The Taxpayer fails to analyze the items of M&E—individually or generally—in light of the common law criteria of actual or constructive annexation, integrated or adapted use, and intent to continue the M&E's use on the site.[112]

22.1. The Taxpayer attempts to support its first proposed fact—that the approximately 18,000 items of M&E may be removed without damaging the underlying buildings or land—with Mr. Johnson's general testimony about some items of M&E.[113] Implicit in the Taxpayer's approach is the incorrect assumption that, under Washington law, an item of M&E can only be a fixture if it is physically attached in such a way that its removal will damage the underlying real property. Contrary to the Taxpayer's theory, the Taxpayer's items of M&E are "permanently affixed," as that term is defined in WAC 458-12-010(3)(a).[114] The Taxpayer's M&E is owned by the Taxpayer,[115] and it is either "securely attached to the real property" or has been "constructively annexed."[116] In the

---

[109] WAC 458-12-010(3)(a)(ii).
[110] *Western Ag Land Partners v. Dep't of Revenue*, 43 Wn. App.167, 172, 716 P.2d 310 (1986).
[111] *Boeing*, 85 Wn.2d at 668-69.
[112] *See* FF No. 119; CL Nos. 19-21.
[113] See FF No. 119.1.
[114] *See* CL No. 21.3.
[115] See FF No. 110; CL No. 21.3.
[116] *See* CL No. 21.3 and 21.4.

specially designed FBR building,[117] for example, the FBR M&E "appears to be permanently situated in one location on real property and is adapted to use in the place it is located."[118]

22.2. Further, the Taxpayer's other two proposed facts—that items of M&E may have a shorter useful life than the buildings and may be removed for repair or replacement[119]—do not undermine the status of the M&E as fixtures. Rather, the two proposed facts actually support the classification of the M&E as fixtures by showing that the items are essential components of the manufacturing plant.[120] Repairing, replacing, and upgrading items of M&E indicate that the items are adapted to and essential to the overall manufacturing operation.

23. That the Taxpayer submitted its fixed-asset list and did not object to the Department's characterization of the approximately 18,000 items as fixtures indicates that the Taxpayer "intended [the property] to be a permanent benefit to the freehold."[121] In *Boeing*, the Washington Supreme Court concluded that Boeing's decision to list certain items of M&E as personal property was evidence that Boeing "considered the [items] to be personalty" and did not intend for the items to be fixtures.[122] Likewise, in the present case, the Taxpayer's listing of the 18,000 items as fixtures, without objection, is evidence that the Taxpayer considered the items to be fixtures, not personal property.

24. The Taxpayer's proposed findings and cited evidence do not support a conclusion that, more likely than not, the approximately 18,000 items on its fixed-asset list should have been classified by the Assessor as personal property, rather than as fixtures. The Taxpayer has not met its burden of proving that, under Washington law, the M&E are items of personal property, rather than real property.

ISSUE 3: EQUALIZATION

25. ~~20.~~ Because the Taxpayer is neither a utility nor a school district, the Department's equalization ratio is inapplicable to the Taxpayer.

---

[117] *See* FF No. 118.
[118] *See* CL No. 21.3.
[119] *See* FF Nos. 119.2 and 119.3.
[120] *See* CL No. 21.4; *see also Strain v. Green*, 25 Wn.2d 692, 701, 172 P.2d 216 (1946) (observing that the removal and replacement of a chandelier was "an implied admission" that the chandelier was an essential part of the house and thus a fixture, not personal property) (cited in 8-57 Richard R. Powell, *Powell on Real Property* § 57.05[5][b] (2015)).
[121] *Boeing*, 85 Wn.2d at 669; *see* FF Nos. 115.4 and 115.5.
[122] *Boeing*, 85 Wn.2d at 670.

26. ~~21.~~ The Taxpayer's equalization argument finds no support in the Washington Supreme Court's decision in *Inter Island Telephone Company v. San Juan County*.[~~30~~123] At issue in *Inter Island Telephone* was the Department's valuation of a utility under RCW 84.12.350, not an assessor's valuation of real property under RCW 84.40.030.

Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

From these conclusions, the Board enters this

DECISION

The Board orders the valuation shown in the table on page two of this decision.

The Grant County Assessor ~~is~~ and Treasurer are hereby directed that the assessment and tax rolls of Grant County are to accord with, and give full effect to, the provisions of this decision.

~~DATED this 12th day of September, 2014.~~

DATED this 15th day of January, 2016.

BOARD OF TAX APPEALS

_____
MARTA B. POWELL, Chair

_____
MARK J. MAXWELL, Vice Chair

_____
CAROL A. LIEN, Member

Right of Reconsideration of a Final Decision

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board within 10 business days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record. The Board may deny the petition, modify its decision, or reopen the hearing.

[123] 125 Wn.2d 332, 833 P.2d 1380 (1994).

Please be advised that a party petitioning for judicial review of a Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript are payable separately to the court reporter.

GSB:7806829.2

GARVEY SCHUBERT BARER

March 21, 2019 - 4:42 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52975-1
Appellate Court Case Title:	Rec Solar Grade Silicon, LLC, Appellant v. Laure Gammer, et al, Respondents
Superior Court Case Number:	14-2-01810-7

The following documents have been uploaded:

- 529751_Briefs_20190321161623D2721975_7535.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Appellants Opening Brief.pdf

A copy of the uploaded files will be sent to:

- ckerley@ecl-law.com
- ldavis@ecl-law.com
- nbruns@gsblaw.com
- sboutz@ecl-law.com
- stracht@ecl-law.com
- wfreese@gsblaw.com

Comments:

Sender Name: Michelle DeLappe - Email: mdelappe@gsblaw.com
Address:
1191 2ND AVE STE 1800
SEATTLE, WA, 98101-2939
Phone: 206-464-3939 - Extension 1403

Note: The Filing Id is 20190321161623D2721975