



Deschutes County Board of Commissioners  
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## **AGENDA REQUEST & STAFF REPORT**

### **For Board Business Meeting of January 28, 2015**

*Please see directions for completing this document on the next page.*

**DATE:** January 14, 2015

**FROM:** Paul Blikstad                      Department CDD                      Phone # 6554

#### **TITLE OF AGENDA ITEM:**

Board review and possible signature of Document No. 2015-041, the decision on a plan amendment to add the applicant's property to the County's Goal 5 surface mining inventory of mineral and aggregate resources; and a Zone Change from Exclusive Farm Use (EFU-HR) to Surface Mining (SM), for approximately 365 acres. File numbers PA-04-8/ZC-04-6

**PUBLIC HEARING ON THIS DATE?** No

#### **BACKGROUND AND POLICY IMPLICATIONS:**

The applications have been approved locally three different times through written decisions by the Board of County Commissioners (BOCC), in December 2006 (Document 2006-609), October 2008 (Document No. 2008-536), and September 2010 (Document No. 2010-570). Each decision resulted in an appeal and subsequent remand by the Land Use Board of Appeals (LUBA). The BOCC's third decision was appealed to LUBA by Keith and Janet Nash (LUBA No. 2010-082). LUBA issued a Final Opinion and Order on February 5, 2011 remanding the decision for further findings on impacts to grazing on the Flat Pasture..

4-R Equipment, on September 25, 2014, requested the Planning Division initiate the remand process and schedule a public hearing. The Board conducted a public hearing on the remand on November 12, 2014. The Board deliberated on the remand decision on December 15, 2014 and unanimously approved the applications. The Board is required to issue a written decision and submit the decision to LUBA within 90 days of the date the applicant initiates the remand proceedings. The applicant extended that 90-day period to January 30, 2015.

The applicant provided County CDD and Legal staff with a draft of the Board decision. Staff has reviewed the decision and made minor changes to the draft. The document before the Board is the staff's recommended draft decision.

#### **FISCAL IMPLICATIONS:**

The Board's hearing costs are factored into the remand hearing fee.

#### **RECOMMENDATION & ACTION REQUESTED:**

Staff recommends approval of the decision as drafted and requests Board signature of the decision (Document No. 2015-041) no later than January 28, 2015 in order for staff to have time to mail the decision and comply with the January 31, 2015 deadline.

**ATTENDANCE:** Paul Blikstad, Laurie Craghead

**DISTRIBUTION OF DOCUMENTS:**

Planning Division staff will distribute to all parties the Board's written decision on these applications.

**DECISION OF THE BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY**

**FILE NUMBER:** PA-04-8/ZC-04-6  
(LUBA 2010-082, LUBA 2008-189, LUBA 2007-014)

**APPLICANT:** 4-R Equipment, LLC  
c/o Bryant, Lovlien & Jarvis, P.C.  
591 SW Mill View Way  
Bend, OR 97702

**PROPERTY OWNER:** 4-R Equipment, LLC  
P.O. Box 5006  
Bend, Oregon 97708

**REQUEST:** Plan Amendment and Zone Change for 365 acres  
from Exclusive Farm Use (EFU-HR/FP/LM/WA) to  
Surface Mining (SM).

**PROPERTY:** 57720, 57750 and 57600 Spencer Wells Road,  
Deschutes County Assessor's Tax Map 19-15-00,  
Tax Lots: 902, 1000, and 1001, Deschutes County,  
Oregon.

**STAFF CONTACT:** Paul Blikstad, Senior Planner

**HEARING DATE:** November 12, 2014

**I. SUMMARY OF DECISION:**

In this decision, the Board of County Commissioners of Deschutes County, Oregon ("Board") resolves two issues remanded by the Oregon Land Use Board of Appeals ("LUBA") through its decision in LUBA 2010-082 concerning the above referenced zone change and plan amendment application.

The subject application proposes a zone change and comprehensive plan amendment to re-zone and re-designate approximately 365 acres in the Millican Valley from Exclusive Farm Use-Horse Ridge Subzone ("EFU-HR") to Surface Mining ("SM"). The Subject Property is also subject to a Flood Plain ("FP"), Landscape Management ("LM"), and Wildlife Area Combing Zone. The Applicant intends to develop a surface mine for the production of aggregate from basalt deposits on the Subject Property.

This is the fourth time that this application has come before the Board. The Board first approved the application in December 27, 2006. It was then subject to three separate appeals to and remands from LUBA. The LUBA appeals concerned a host of issues including effects on agriculture, effects on wildlife, sage grouse leks, and cultural resources. In the most recent LUBA appeal, which was filed by adjacent ranchers Keith and Janet Nash, LUBA remanded the Board's third approval of the application and provided the following directive:

To summarize, remand is again necessary for (1) the county to expand the impact area to include the Flat Pasture or to identify substantial evidence in the record that supports its decision to limit the impact area to one-half mile from the proposed mine; and (2) to evaluate any conflicts with [the Nashs'] agricultural operations in the impact area that the county designates, including whether the proposed mine would cause sage grouse to abandon the area and seek winter habitat on [the Nashs'] other allotments. (LUBA 2010-082 at p.11-12)

As is set out below, the Board once again approves the application on remand.

## **II. APPLICABLE CRITERIA:**

The applicable criteria are set out in prior Board decisions, which are incorporated herein by reference. The procedural requirements for a LUBA remand are set out in DCC Chapter 22.34.

## **III. PROCEDURAL HISTORY:**

As briefly noted above, the subject application has been approved locally three different times through the following written decisions by the Board: (1) Document No. 2006-609 (December 27, 2006), (2) Document No. 2008-536 (October 1, 2008), and (3) Document No. 2010-570 (September 1, 2010). Each decision resulted in an appeal and subsequent remand by LUBA. The BOCC's third decision was appealed to LUBA by the Nashs (LUBA No. 2010-082). LUBA issued a Final Opinion and Order on February 5, 2011 remanding the County's third approval.

On September 25, 2014, the Applicant requested the Planning Division to initiate the remand process and schedule a public hearing. At its November 5, 2014 work session, staff briefed the Board on the application and remand process. The Board then held a public hearing on the LUBA remand on November 12, 2014. The Board kept the record open until November 24, 2014 for additional testimony and provided the Applicant until December 1, 2014 to submit final argument. On December 15, 2014, the Board conducted deliberations on the Application.

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#### **IV. FINDINGS OF FACT AND CONCLUSION OF LAW SPECIFIC LEGAL ISSUES:**

##### **CHAPTER 22.34 PROCEEDINGS ON REMAND**

###### **22.34.020. Hearings Body.**

The Hearings Body for a remanded or withdrawn decision shall be the Hearings Body from which the appeal to LUBA was taken, except that in voluntary or stipulated remands, the Board may decide that it will hear the case on remand. If the remand is to the Hearings Officer, the Hearings Officer's decision may be appealed under DCC Title 22 to the Board, subject to the limitations set forth herein.

**FINDINGS:** The remand originated from an appeal of a decision of the Board. Therefore, the Board is the Hearings Body for this remand.

###### **22.34.030. Notice and Hearings Requirements.**

- A. The County shall conduct a hearing on any remanded or withdrawn decision, the scope of which shall be determined in accordance with the applicable provisions of DCC 22.34 and state law. Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand.**
- B. The hearing procedures shall comply with the minimum requirements of state law and due process for hearings on remand and need comply with the requirements of DCC 22.24 only to the extent that such procedures are applicable to remand proceedings under state law.**
- C. A final decision shall be made within 90 days of the date the remand order becomes effective.**

**FINDINGS:** The hearing on appeal was conducted before the Board in accordance with the applicable provisions of DCC Chapters 22.24 and 22.34 and the requirements of due process and state law although several parties participated in the proceedings on remand that had not participated in the prior proceedings before the Board. All parties to the proceedings on Applicant's application prior to remand were given adequate notice of, and were allowed to participate in, the remand. A final decision is being made within 90 days of the date the remand order became effective, as extended by Applicant pursuant to ORS 215.435(2)(b).

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**22.34.040. Scope of Proceeding.**

- A. On remand, the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, the Board shall have the discretion to reopen the record in instances in which it deems it to be appropriate.**

**FINDINGS:** The Board limited its review to only those issues required to resolve the LUBA remand. However, this decision addresses several unrelated or previously resolved issues only to demonstrate that such issues were not within the scope of the remand or, to the extent such issues might be construed as within the scope of the remand, to demonstrate that they do not prevent approval of the application on remand. The Board deemed it appropriate to reopen the record to resolve the remand.

- B. At the Board's discretion, a remanded application for a land use permit may be modified to address issues involved in the remand or withdrawal to the extent that such modifications would not substantially alter the proposal and would not have a significantly greater impact on surrounding neighbors. Any greater modification would require a new application.**

**FINDINGS:** The application has not been modified. The Applicant did address instances in the record that suggested mining activities would only take place from November to February. According to the Applicant, references to this time period were meant to indicate when mining operations are most likely to occur because this is when workers, who are usually employed in construction activities for the remainder of the year, are generally available. The Board considers Applicant's submission to constitute a mere clarification and not a modification.

- C. If additional testimony is required to comply with the remand, parties may raise new, unresolved issues that relate to new evidence directed toward the issue on remand. Other issues that were resolved by the LUBA appeal or that were not appealed shall be deemed to be waived and may not be reopened.**

**FINDINGS:** The Board found that additional testimony was appropriate to address the issues on remand. As identified above, many issues unrelated to the remand or previously resolved were raised by participants in the instant remand proceedings both on their own initiative and in apparent response to the new evidence provided by the Applicant. Such unrelated or previously resolved issues are only addressed in this decision to demonstrate that such issues were not within the scope of the remand or, to the extent such issues might be construed as within the scope of the remand, to demonstrate that they do not prevent approval of the application on remand.

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## **FIRST REMAND ISSUE:**

LUBA described the first issue on remand as follows:

[T]he county [must decide] to expand the impact area to include the Flat Pasture or [] identify substantial evidence in the record that supports its decision to limit the impact area to one-half mile from the proposed mine. (LUBA 2010-082 at p.11-12)

Prior LUBA decisions have expressly determined that the half mile impact area need not be expanded on account of sage grouse leks, sage grouse flight paths to leks, the Walker residence, and un-surveyed archaeological resources.<sup>1</sup> With the exception of potential conflicts with agriculture beyond the half mile impact area, all other bases to expand the impact area beyond one-half mile have been previously resolved or have been waived. Moreover, as the Board understands LUBA's directive, potential conflicts with agriculture outside of the impact area are specifically limited to whether or not to expand the impact area based on conflicts with agricultural practices on the Flat Pasture.<sup>2</sup> As discussed herein, the Board finds that there are no potential conflicts with agriculture beyond the impact area that justify an expansion of the impact area to include the entire Flat Pasture.

As a preliminary matter, it must be acknowledged that there are two Flat Pastures in the general vicinity of the proposed mine. The Leslie Ranches Coordinated Resource Management Plan is an overarching plan that governs grazing on BLM property in and around the Millican Valley. The plan governs several "allotments," which are in turn comprised of several pastures. Documentation submitted by the Applicant indicates that one Flat Pasture is located within the Millican allotment and a second Flat Pasture is located within the Horse Ridge allotment. It appears that the two Flat Pastures have been conflated at various times throughout the record, particularly with regard to grazing seasons. The Horse Ridge Flat Pasture is the only Flat Pasture that shares a common boundary with the subject property. The Nashes held grazing rights on the Horse Ridge Flat Pasture and were permitted to graze cattle on that property from November 1 to December 15<sup>3</sup> of each year. The Nashes' grazing rights on the Horse Ridge Flat Pasture have since been conveyed to Stephen Roth, who is subject to the same grazing season. The Board understands the Horse Ridge Flat Pasture as the Flat Pasture

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<sup>1</sup> The ODFW letter dated November 24, 2014 appears to only address these issues as the letter makes little to no connections to its concerns and agricultural practices.

<sup>2</sup> LUBA specifically rejected attempts to argue that areas outside of the half mile impact area other than the Flat Pasture because such arguments could have been raised in prior proceedings, but were not. (LUBA 2010-082 at p.10)

<sup>3</sup> There is prior testimony for Nashs that the BLM curtailed grazing on the Flat Pasture to provide additional winter sage grouse habitat. Mr. Borine has asserted that the Nashs voluntarily adjusted the season of use for the Flat Pasture to allow for logical movements of cattle as they transition between pastures. Whatever the reason for the change, it is apparent from Mr. Roth that he is not concerned that sage grouse will lead to a reduction of grazing rights on the Horse Ridge Flat Pasture. As the current holder of the grazing rights on the Horse Ridge Flat Pasture, and without the BLM indicating their opinion, we find Mr. Roth's testimony more compelling than conflicting testimony.

referenced by LUBA. However, as indicated below, it makes no difference which Flat Pasture is at issue because the Board finds that there are no conflicts with agriculture that justify expanding the impact area beyond the one-half mile radius.

In prior testimony, the Nashs indicated that noise and other impacts from mining operations would cause cattle to move to more distant locations from the proposed mine thus over-grazing those areas and resulting in increased costs. The Nashs also previously provided testimony suggesting that noises and other impacts comparable to those potentially produced by the proposed mine have resulted in livestock either losing weight or impeding normal weight gain thus producing a financial loss or decreased profits. Other participants have also suggested that noise, dust, traffic, and other potential externalities may conflict with agriculture outside of the half-mile area.

Neither Keith nor Janet Nash participated in the present remand proceedings. Moreover, the Nashs have since transferred their grazing rights on the Horse Ridge Flat Pasture to Stephen Roth. Mr. Roth, a full-time rancher, testified at the November 12, 2014 hearing and also provided prior written testimony. His testimony indicates that he has prior experience grazing cattle in proximity to mining operations including another mine operated by the Applicant. From these experiences, Mr. Roth does not find any conflicts between surface mining and agricultural practices and in particular his use of the Horse Ridge Flat Pasture. Further, he has entered into an agreement to graze cattle on buffer property adjoining the Subject Property owned by the Applicant.<sup>4</sup>

While the Nashs' prior testimony, and certain other testimony in the record, conflicts with Mr. Roth's testimony, the Board finds Mr. Roth credible and that his testimony constitutes substantial evidence. The Board further finds that Mr. Roth's testimony is more compelling than all other conflicting testimony because he is the current holder of Horse Ridge Flat Pasture grazing rights and appears to be the closest agricultural operator on both public and private property to the proposed mine site.<sup>5</sup> As Mr. Roth's testimony indicates there are no conflicts between agricultural operations either in close proximity to the proposed mine or outside of the half mile impact area on either the Horse Ridge Flat Pasture or other lands. Furthermore, the Board has imposed several conditions of approval to mitigate noise, dust, traffic and other impacts such that the proposed mine should not conflict with agricultural practices beyond the half mile impact

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<sup>4</sup> Clay and Tammie Walker question whether this testimony is permissible because noise effects on livestock were resolved in prior proceedings. The Board is unaware of when that issue was resolved and the Walkers do not point to anything specific in the record. In any event, Mr. Roth's testimony in regards to noise impacts at close proximity is responsive to the issue of whether the impact area should be expanded. Specifically, if there is no conflict at close proximity, it follows that there is no conflict at greater distances as impacts should decline with distance.

<sup>5</sup> There is argument from the Walkers that seems to imply that the BLM is an agricultural operator, presumably because it owns the land on which agriculture occurs. While arguably so, there is no testimony from the BLM indicating that the proposal conflicts with its agricultural operations. Moreover, to the extent that future grazing lease holders may be harmed by the proposed mine because it may cause a future reduction in grazing rights, the Board finds that argument too speculative. This theory also conflicts with the testimony of Mr. Roth who, besides from the BLM, is in the best position to evaluate potential consequences to grazing rights in the area as the current lease holder.



area. Accordingly, the Board finds no justification to expand the impact area on account of agricultural conflicts.

The Board also finds support for its determination not to expand the impact area on account of potential conflicts with agriculture in the testimony provided by Roger Borine. Mr. Borine submitted additional written testimony in the instant proceedings pertaining to grazing practices on the Horse Ridge Flat Pasture and the effects of sound on livestock. The letter submitted by Mr. Borine indicates that certain management techniques are not used on the portion of the Horse Ridge Flat Pasture adjacent to the proposed mine to attract cattle to that location. Rather, techniques such as watering and the feeding of hay occur on the southwestern portion of the Horse Ridge Flat Pasture, a considerable distance from the proposed mine. Accordingly, impacts from the mine should not cause cattle to over utilize other portions of the Horse Ridge Flat Pasture because existing management techniques already draw cattle away from the mine and the feeding of hay mitigates overgrazing of natural vegetation.

Relying on a site-specific sound study previously submitted by the Applicant, Mr. Borine notes that noise from blasting activities reaches near ambient noise levels at 1,500 feet. Accordingly noise impacts should be negligible outside of the half-mile impact area. Some testimony in the record indicates that colder weather and the geological makeup of the Millican Valley will amplify and/or cause noise to carry further than it might in other settings. This testimony lacks the empirical data supplied by the Applicant's noise study and thus the Board finds such testimony less compelling. Accordingly, the Board finds that noise impacts, whether to agriculture or any other uses, resources, structures, or people, do not justify an expansion of the analysis area beyond the one-half mile impact area. The Board notes that noise impacts within the impact area have already been addressed and several conditions of approval have been imposed to mitigate such impacts. These conditions further support the Board's decision to not expand the impact area beyond one half mile.

## ***SECOND REMAND ISSUE:***

LUBA described the second remand issue as follows:

On remand, the county should consider, in determining whether the proposed mine conflicts with *petitioners'* agricultural operations, effects of the proposed mine on sage grouse that winter in the impact area and the possibility that such effects could lead to a reduction in lands available for grazing for *petitioners'* cattle. (LUBA 2010-082 at p.11).

At the outset, the Board finds that only the Nashs or Stephen Roth have standing to address this issue given DCC 22.34.030 and LUBA's specific reference to impacts on the Nashs in its directive to the County. Neither Keith nor Janet Nash participated in the instant proceedings and most other parties testifying on sage grouse had not participated in the prior proceedings. In the alternative, the issue may be moot because the Nashs did not participate in the instant proceedings, the Nashs sold most of their

land interests to Stephen Roth (including the disputed Horse Ridge Flat Pasture), there is no evidence in the record that the Nashs still own cattle or run an agricultural operation, and Mr. Roth has expressed support for the proposal.

In any event, the Board finds that the proposed mine does not conflict with agricultural practices, of any kind or location, on account of the possibility that the proposed mine could cause sage grouse to relocate to areas that create conflicts with agricultural practices.

The Board notes that the question posed by LUBA does not concern impacts to leks, migration patterns, other direct impacts on sage grouse, or impacts of relocating sage grouse to agricultural operations other than the Nashs' operation and cattle. Such issues were resolved in previous appeals or have been waived. This remand question is narrowly focused on whether the proposed mine "conflicts with agricultural practices" through the mutually intertwined relationship with sage grouse. As LUBA previously noted, this theory rests on several speculative causal links. To deny the application on this theory, the Board would have to find that all of the following are supported by substantial evidence: (1) there are sage grouse in the area at all and specifically wintering sage grouse, (2) mining activities as opposed to other activities would cause the wintering sage grouse to relocate (3) the wintering sage grouse would relocate to areas used or formerly used by the Nashs for grazing, (4) the wintering sage grouse and the Nashs' cattle grazing could not co-exist if sage grouse relocation occurred, and (5) the conflict between the wintering sage grouse and the Nashs' cattle grazing would create such a conflict that the BLM would (and not simply consider) curtail the availability of grazing lands for the Nashs.

There are several pieces of evidence in the record that undermine one or more of the links in this speculative theory. Most notably, the Nashs' sold most of their land interests to Stephen Roth and Mr. Roth does not see a conflict between sage grouse, whether wintering or otherwise, and his ability to graze on former Nash properties as he has been able to coexist with the presence of sage grouse at other locations. Second, the Applicant's wildlife study indicated there was no sage grouse activity on the Subject Property and evidence indicating sage grouse are in the vicinity primarily comes from dated studies. Third, opponents to the mine submitted a study that, if the Board can even consider it, indicates roads are a primary repellant of sage grouse. This suggests that Highway 20, which is 600 feet from the proposed mining area, has already driven sage grouse away and/or could be the actual cause of future relocation. Fourth, Mr. Borine concludes that supplemental feeding and the short grazing (only for a month and a half in the early portion of winter) season on the Horse Ridge Flat Pasture would not present a conflict between sage grouse and grazing cattle because there is sufficient forage. Finally, the BLM letter only indicates that it would have to consider the mine in evaluating future grazing. There is no indication that reduced grazing on account of the mine is likely or probable. In summary, it is far too speculative to find that the proposed mine would have the hypothesized effects on agricultural practices.

**ALL OTHER ISSUES:**

The Board finds that all other issues raised including, but not limited to new juniper species, eagles, ODFW recommendations on comprehensive plan updates, smoke, roads, smells, the Dry River Canyon, cumulative effects analysis,<sup>6</sup> dust/respiratory concerns, noise, timing of blasting, heavy equipment travel, adverse effects on humans, direct impacts on sage grouse and leks, vibrations, and antelope are outside the scope of the remand, were raised by persons who had not participated in prior proceedings, were resolved in prior proceedings, or were waived. To the extent there is a nexus between these issues and the remand issues, the Board finds that these issues have been adequately addressed by conflicting evidence in the record or were sufficiently mitigated through conditions of approval.

**PRIOR DECISIONS:**

The applicable criteria, findings, and conditions of approval contained within all prior decisions concerning this application, except where they conflict with this decision, are hereby adopted and incorporated herein by reference.

**V. DECISION:**

Based on the findings of fact and conclusions of law set out above, the Board concludes that the Applicant has met all applicable approval criteria for the requested zone change and plan amendment. The application is hereby approved.

DATED this \_\_\_\_ day of January, 2015.

MAILED this \_\_\_\_ day of January, 2015.

BOARD OF COUNTY COMMISSIONERS  
OF DESCHUTES COUNTY, OREGON

\_\_\_\_\_  
ANTHONY DEBONE, CHAIR

\_\_\_\_\_  
ALAN UNGER, VICE CHAIR

ATTEST:

\_\_\_\_\_  
TAMMY BANEY, COMMISSIONER

\_\_\_\_\_  
Recording Secretary

THIS DECISION BECOMES FINAL UPON MAILING. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.

<sup>6</sup> None of the participants who cited or requested a "cumulative effects analysis" identified any applicable approval criteria that require such an analysis.