

HEARINGS OFFICER'S DECISION

FILE NUMBERS: 247-15-000529-A; M-07-2; MA-08-6

REQUEST: Applicant requests a proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application M-07-02/MA-08-6.

This hearing is scheduled pursuant to the Oregon Land Use Board of Appeals decision, after review by the Oregon Court of Appeals, remanding the Deschutes County Hearings Officer decision approving the applications.

OWNER:

Loyal Land LLC	Agnes DeLashmutt
78340 Birkdale Court	2447 NW Canyon
La Quinta, CA 92253	Redmond, OR 97756

APPLICANT: Thornburgh Resort Co., Central Land and Cattle Co., LLC

LOCATION: The properties subject to this application are identified on County Assessor's map 15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000

STAFF CONTACT: Peter Gutowsky; Peter.Gutowsky@deschutes.org

I. STANDARDS AND APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, Zoning Ordinance:

Chapter 18.16, Exclusive Farm Use Zone (EFU-SC)

*Section 18.16.035, Destination Resorts

Chapter 18.113, Destination Resort Zone (DR)

*Section 18.113.070, Approval Criteria

*Section 18.113.090, Requirements of Final Master Plan

*Section 18.113.100, Procedure or Approval of Final Master Plan

Title 22, of the Deschutes County Code, Development Procedures Ordinance

Chapter 22.08. General Provisions

*Section 22.08.010, Application Requirements

Chapter 22.20, Review of Land Use Action Applications

*Section 22.20.040, Final Action in Land Use Actions

Chapter 22.24, Land Use Action Hearings

*Section 22.24.080, Standing

Chapter 22.28, Land Use Action Decisions

*Section 22.28.010, Decision

Proceedings on Remand

*Section 22.34.010, Purpose

*Section 22.34.020, Hearings Body

*Section 22.34.030, Notice and Hearing Requirements

*Section 22.34.040, Scope of Proceeding

II. BASIC FINDINGS:

- A. LOCATION:** The subject property consists of approximately 1,970 acres of land located west of Redmond, Oregon, on the south and west portions of a geologic feature known as Cline Buttes. The property is bordered on three sides by Bureau of Land Management (BLM) land, and is also in close proximity to Eagle Crest, another destination resort development. The subject property is identified on County Assessor's Index Map15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000.
- B. LOT OF RECORD:** As part of the CMP approval (CU-05-20), the Hearings Officer found the subject property consists of several legal lots of record based on previous county determinations (LR-91-56, LR-98-44, MP-79-159, CU-79-159 and CU-91-68).
- C. ZONING AND PLAN DESIGNATION:** The subject properties are zoned Exclusive Farm Use (EFU-TRB) within a Destination Resort (DR) Overlay Zone. The property is designated Agriculture on the Deschutes County Comprehensive Plan Map.
- D. PROPOSAL:** Applicant requests a proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application M-07-02/MA-08-6.
- E. SITE DESCRIPTION:** The subject property is approximately 1,970 acres in size and has vegetation consisting of juniper woodland. The property covers the south and west portions of the geologic feature known as Cline Buttes. The property currently is developed with three dwellings and a barn, access to which is from Cline Falls Highway. The property is engaged in farm use consisting of low-intensity livestock grazing.
- F. SURROUNDING LAND USES:** The subject property is surrounded by public land primarily owned and managed by the BLM. A portion of the public land is owned and managed by the Oregon Department of State Lands (DSL). The Eagle Crest Destination Resort is located near the northern portion of the subject property.
- G. PUBLIC COMMENTS:** Notice of this application was provided to all property owners who received the Certificate of Mailing of the Hearings Officer Decision issued on October 8, 2008, relating to M-07-2; MA-08-6.
- H. LAND USE HISTORY:** As described by staff, with minor edits, the Thornburgh Destination Resort has a long history. The conceptual master plan (CMP) application submitted by Thornburgh Resort Company, LLC (TRC) was denied by the Deschutes County Hearings Officer in a decision dated November 9, 2005 (CU-05-20). That decision was appealed by Nunzie Gould (hereafter Gould) and Steve Munson (Munson) to the Deschutes County Board of Commissioners (Board). (A-05-16). By a decision dated May 10, 2006, the Board approved the CMP. Gould and Munson appealed the Board's decision to the Land Use Board of Appeals ("LUBA"). (Nos. 2006-100 and 101). LUBA remanded the Board's decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 2005 (2007). Opponent and Munson appealed LUBA's decision to the Court of Appeals seeking a broader remand scope. (A135856). On November 7, 2007, the Court of Appeals reversed and remanded LUBA's decision. *Gould v. Deschutes County*, 216 Or App150, 171 P3d 1017 (2007). The result of this decision was that the Board's decision in CU-05-20 approving the CMP was remanded to the county for further proceedings.

On April 15, 2008 the Board issued its decision on remand again approving the CMP (Document No. 2008-151). Gould and Munson appealed the Board's decision to LUBA on May 6, 2008 (No. 2008-068). On September 11, 2008, LUBA affirmed the Board's decision. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008). Opponent and Munson appealed LUBA's decision to the Court of Appeals (A140139). On April 22, 2009 the Court of Appeals affirmed LUBA's decision. *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009). Gould and Munson appealed the Court of Appeals' decision to the Oregon Supreme Court (S057541). On October 9, 2009, the Supreme Court denied review. *Gould v. Deschutes County*, 347 Or 258, 218 P3d 540 (2009). On December 9, 2009 the Court of Appeals issued its appellate judgement. The result of these decisions was the CMP received final approval as of December 9, 2009.

Based on the Board's April 15 2009 decision approving the CMP for the Thornburgh Destination Resort, TRC submitted an amended application for approval of the final master plan (FMP) on April 21, 2008 (M-07/MA-08-6). By a decision dated October 8, 2008, the Hearings Officer approved the FMP. Gould and Munson appealed to the Board, who declined to hear it. Gould and Munson then appealed that decision to LUBA (No. 2008-203). On September 9, 2009 LUBA remanded the County's decision for further proceedings. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009). The parties LUBA's decision to the Court of Appeals (A143430). On February 24, 2010 the Court of Appeals affirmed LUBA's decision. *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 759 (2010). LUBA issued its notice of appellate judgment on August 17, 2010 remanding the County's decision. On September 25, 2015, the FMP was initiated.

On November 1, 2011, TRC sought a declaratory ruling that the April 15, 2008 CMP had been timely initiated. The hearings officer found the CMP was timely initiated. The Board declined to exercise discretionary review and the opponent appealed to LUBA. On appeal, LUBA remanded that decision (LUBA No 2012-042, January 8, 2013). LUBA's decision was affirmed by the Court of Appeals, without opinion. *Gould v. Deschutes County*, 256 Or App 520, 301 P3d 978 (2013). On remand, the hearings officer found the CMP was not timely initiated. TRC appealed the hearings officer's decision to the Board, which issued a declaratory ruling that the April 15, 2008 CMP decision was "initiated" before the two-year deadline for doing so expired. Gould appealed the decision to LUBA. On appeal, LUBA remanded the declaratory ruling of the Board that a CMP for destination had been "initiated" within the county code's time limitations. (LUBA No 2015-080, January 30, 2015). Gould appealed to the Court of Appeals, contending that LUBA erred by deferring to the county's implausible interpretation of a code provision that addressed whether a CMP had been "initiated." The Court reversed and remanded stating that the express language of the county code requires Defendant substantially exercise the permit conditions as a whole, and any failure to initiate development by fully complying with the conditions should not be the fault of the applicant, a determination of which must be based on more than just the complexity of the process. The Court also held that the County could not interpret the county code contrary to a prior LUBA order in this same litigation, as the lower tribunal was bound to follow the appellate court's ruling. *Gould v Deschutes County*, 272 Or App 666 (2015)

I. REVIEW PERIOD:

Deschutes County Code (DCC 22.34.030), states a final decision must be made within 90 days of the date the remand order becomes effective. The ninetieth (90th) day is December 24, 2015.

J. HEARING:

The hearing on remand was conducted on Oct. 20, 2015. At the outset, I stated that I had had no ex parte contacts and had not conducted a site visit. I offered an opportunity to object to my participation or to jurisdiction and none were received. Paul Dewey, counsel for Gould, raised several objections to the process and introduction of new evidence as discussed below. At the request of the opponents, I kept the record open to October 27, for any submittals, including evidence, responsive to the issues with an additional week to November 6, "for either party to submit a response to what was submitted during the first period." The applicant declined to grant an extension to the 90 day remand deadline. I was not as clear as I should have been about the scope of that response and there was disagreement among the parties. As I was unclear, I am accepting into the record all the submittals, subject to my ruling below regarding new evidence.

On November 10, I received a request from the applicant to reopen the record, including an offer to extend the 90 day deadline. I denied the request on Nov. 15, except for purposes of receiving the objections to the post-hearing submittals. On Nov. 16, I received Mr. Dewey's response, which similarly is received solely for purposes of responding to Ms. Fancher's objections.

On November 19, Mr. DeLashmutt submitted a letter following up on Ms. Fancher's request and Mr. Dewey's response, including objections to various submittals. That submittal was untimely and is not accepted for any purpose. On November 23, I received a "conditional" request from Ms. Fancher to reopen the record, expressly declining to toll the 90 day clock, and an email response from Mr. Dewey. That request also is denied.

III. SCOPE OF PROCEEDINGS ON REMAND:

Incorporated herein are the staff findings from the staff report, my findings are labeled: Hearings Officer.

A. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

Chapter 22.34, Proceedings on Remand

1. Section 22.34.010, Purpose

DCC 22.34 shall govern the procedures to be followed where a decision of the County has been remanded by LUBA or the appellate courts or a decision has been withdrawn by the County following an appeal to LUBA.

FINDINGS: This matter is before the Hearings Officer on remand from LUBA and the Court of Appeals. Therefore, the procedures in Chapter 22.34 are applicable.

2. Section 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 FMP was heard by a Hearings Officer. The Board of County Commissioners did not hear the appeal. A Hearings Officer under contract is reviewing this matter; therefore it is being processed properly.

3. Section 22.34.030, Notice and hearing 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: As discussed in the Findings of Fact above, written notices of the remand initiation request and public hearing were provided to the parties to the original FMP proceedings, and only those parties are allowed to participate in the hearing on remand. The procedures for the public hearing comply with the requirements for hearings in Chapter 22.24 of the county's development procedures ordinance. A final county decision on remand will be made within 90 days of the date the applicant requested initiation of the remand proceedings.

4. Section 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.**
- 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.

- 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 Hearings Officer will need to determine the scope of the remand proceedings as testimony will likely be received from others expressing disagreement. Determining the proper scope involves an examination of Land Use Board of Appeals (LUBA) and the Court of Appeals decisions.

Background

The Court of Appeals petition and cross-petition for judicial review arise from a LUBA decision that remanded Deschutes County's approval of the final master plan (FMP) for development of a destination resort by Thornburgh Resort Company, LLC (Thornburgh). The issues on review concern Thornburgh's fish and wildlife mitigation plans.

Thornburgh's wildlife management plan contains two components. The first addresses terrestrial wildlife and is described in the "Thornburgh Resort LLC Wildlife Mitigation Plan for Thornburgh Resort" ("Terrestrial WMP") and the "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project," dated August 2008 ("M&M Plan"). The second component addresses off-site fish habitat and is described in the "Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat" ("Fish WMP") and an August 11, 2008, letter proposing additional mitigation for Whychus Creek.

After a public hearing, a county Hearings Officer approved the FMP with conditions. In proceedings before the county, as on appeal, significant portions of the argument focused on Deschutes County Code (DCC) 18.113.070(D), sometimes referred to as the "no net loss" standard, which provides:

"In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:

"* * * * *

"D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource."

The Hearings Officer concluded that, although the standard is difficult to quantify, it "requires an analysis of species on the site, the likely impacts of development, and the applicant's plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio." The Hearings Officer went on to agree with Thornburgh's argument that "the modified Habitat Evaluation Procedures (HEP) analysis

adequately quantifies the impacts and provides a workable methodology to compensate for the impact" and decided that Thornburgh had demonstrated that the mitigation plan was reasonably likely to succeed. The Hearings Officer concluded that Thornburgh's mitigation plan "is adequate to ensure that the impact of the development on fish and wildlife habitats results in no net loss" with a condition of approval requiring diversion of water to Whychus Creek, as discussed below.

LUBA Remand

After the Board of County Commissioners declined to hear Gould's appeal, Gould appealed to LUBA. LUBA rejected her challenges to the hearings officer's construction of DCC 18.113.070(D); sustained her challenge to the adequacy of the Terrestrial WMP and M&M Plan under Gould II; sustained her challenge to the sufficiency of the Hearings Officer's findings regarding the efficacy of mitigation of thermal impacts on Whychus Creek; rejected her challenges to the sufficiency of the other findings regarding fish mitigation; and rejected her challenge to the sufficiency of the evidence concerning "cool patches" in the Deschutes River.

Court of Appeals Petition for Judicial Review

Gould petitioned the Court of Appeals for judicial review.

Assignments of Error

Gould's First Assignment of Error

The Court of Appeals ruled that LUBA's order is not unlawful in substance.

Gould's Second Assignment of Error

The Court of Appeals ruled that LUBA did not err in concluding that the conditions of approval included compliance with the Fish WMP and the August 11, 2008, letter.

Gould's Third Assignment of Error

The Court of Appeals ruled the record does not support Gould's argument, and the Court rejected it without further discussion

Thornburgh's Cross-Petition for Judicial Review

On cross-petition, Thornburgh challenged LUBA's determination that the wildlife mitigation plan was not specific enough to meet the requirements of DCC 18.113.070(D) as interpreted by the Court in *Gould II*.

The Court of Appeals affirmed on Gould's petition and TRC's cross-petition, as discussed below.

Applicant's Remand Burden of Proof

The applicant submitted a twenty-three page burden of proof, which is attached with this Staff report. According to the applicant, there are three issues on remand. The first two issues were resolved by LUBA and were not appealed. The third issue was appealed to LUBA and was resolved by the Court of Appeals. The remaining issues are:

1. Correction of Typographical Error in FMP Approval
2. Correction of Finding regarding Evidence of Whychus Creek Mitigation
3. Adequacy of Terrestrial WMP and M&M Plan

Issue #1 – Correction of Typographical Error in FMP Approval

The hearings officer's FMP approval included a typographical error that LUBA found "the hearings officer should correct." Gould V at 464. The hearings officer erroneously referred to "developed recreational facilities" as "developed residential facilities" in Condition 33 of the FMP. The relevant part of Condition 33 should be revised as follows to comply with LUBA's order:

33. "The Resort shall, in the first phase, provide for the following:"

* * *

D. At least \$2,000,000 (in 1984 dollars) shall be spent on developed ~~residential~~ recreational facilities.

Central Land and Cattle Company, LLC asks that the county correct Condition of Approval 33 to require that at least \$2,000,000 (in 1984 dollars) be spent on developed recreational facilities. This will address the issue as required by LUBA.

Issue #2 – Correction of Finding Regarding Evidence of Whychus Creek Mitigation

Central Land and Cattle Company, LLC asks that the hearings officer make additional findings that recognize and address the conflict in evidence related to impacts on the lower part of Whychus Creek from Thornburgh's use of groundwater and Thornburgh's proposed Whychus Creek mitigation and to explain why the mitigation water from the Three Sisters Irrigation District will address the hearings officer's concerns that summer water use by the resort could have adverse thermal impacts on Whychus Creek.

Issue #3 – Adequacy of Terrestrial WMP and M&M Plan

Central Land and Cattle Company, LLC requests that the Terrestrial WMP and M&M Plan be approved, with the exclusion of those provisions that provide for payments by Thornburgh to ODFW for mitigation on lands other than BLM lands. This method of mitigation was rejected by the Oregon Court of Appeals and LUBA as causing the plan to be too uncertain to allow opponents to have an opportunity to confront the plan.

IV. FINDINGS & SUPPORT OF DECISION:

A. Initiation and Prosecution of Remand

Gould objects to this remand proceeding on the grounds that it was not initiated by the proper person or entity and that the August 5, 2011 email was insufficient to initiate a remand. See e.g. Oct. 20, Nov. 6, letters from Paul D. Dewey. Central Oregon Land Watch also contends that Central Land and Cattle (CLCC) is not the successor in interest to Thornburgh Resort Co. (TRC). Oct. 20, 2015 letter.

On August 15, 2011, the County received an email from Kameron DeLashmutt stating that "Thornburgh Resort Company, LLC would like to initiate the remand process for the LUBA

remand of Thornburgh's Final Master Plan as of today. This is LUBA case 2008-203." Ex. 'A' to Oct. 30 submittal from Liz Fancher. Counsel for CLCC argues that the email is sufficient and the only action required.

ORS 215.435 (1) provides that a county has 90 days to take final action on an application that had been remanded from LUBA. The 90 days clock does not begin until "the applicant requests in writing that the county proceed with the application on remand". ORS 215.435 (2). The statute seems fairly clear that, as counsel for CLCC argues, the remand is effectively self-executing or, perhaps, to the extent it is initiated, that is done by the entity to which the remand is issued. The "applicant" merely triggers the 90 day clock, which further supports the conclusion that state law does not require a land use application.

In any event, TRC was the applicant for the FMP approval remanded by LUBA, resulting in the present proceeding. Deschutes County Planning staff responded that an application and payment of a \$3000 fee was required to initiate the remand. The testimony was that this was objected to and it appears that the County relented, at least as to the application form, as no such application was submitted, but the County processed the remand request.

As Gould notes, DCC 22.08.010(B) requires that "applications for development or land use actions shall" be submitted by the owner or a person with written authorization of the owner. Gould also asserts that the application for remand was not complete under DCC 22.08.020. Deschutes County Code 22.34, however, states that it "shall govern the procedures to be followed where a decision of the County has been remanded..." Nothing in DCC 22.34 requires that an application be filed, nor have I been cited to any other provision requiring an application. See also, *Rutigliano v. Jackson County*, 47 Or LUBA 628 (2004) (local government proceedings on remand represent a continuation of the application, not a new application.).

Gould argues that CLCC is not the applicant of the FMP as "required by ORS 215.483" (which I take to mean ORS 215.435) and therefore could not initiate the remand. But CCLC did not initiate the running of the 90 day clock; that was done by Thornburgh Resort Co. LLC., which was the applicant for the FMP.

Gould also appears to assert that CCLC cannot pursue the remand. I could find nothing in which Gould asserted that CCLC is not or cannot be a party to the remand. Kameron DeLashmutt asserts that he is the Manager of Thornburgh Resort Company (as well as Central Land and Cattle) and that TRC was administratively dissolved on Sept. 2, 2011, after the remand was initiated. He contends that it continues to exist for purposes of winding up its affairs pursuant to ORS 63.637(1). He also asserts that he was a party to the FMP process and that CLCC is acting on his behalf. Finally, although I could not locate it in the record, he states that pursuant to a memorandum of sale with Loyal Land, he is the agent of record for Loyal Land for all land use matters. Agnes DeLashmutt, the owner of TL 8000, also states that Kameron DeLashmutt is her agent of record for all land use matters. No contrary evidence or legal argument was asserted.

Further, Gary Underwood Sharff submitted an Oct. 28, letter stating that he is counsel of record for TRC. He states that all development rights held by TRC were transferred to Kameron DeLashmutt who in turn sold those rights to CLCC "including the FMP remand". As counsel for TRC, he asserts that CLCC "stands in the shoes of TRC".

Finally, it is worth noting that neither of the apparent owners, Loyal Land or Agnes DeLashmutt, nor the original FMP applicant, TRC, have objected to the remand proceeding or to CLCC (or Kameron DeLashmutt) representing that it is acting on their behalf.

I find that the remand was properly initiated and is properly before me for a decision on the record herein. The objection is denied.

B. Initiation of the CMP

Gould argues that this Final Master Plan (FMP) remand may not be initiated because the Concept Master Plan (CMP) on which it is based has “expired” due to not having been timely “initiated”. Oct. 20, memo at 7. In *Gould v Deschutes County*, 272 Or App 666 (2015) (Gould X), the court stated that the CMP was approved on Oct. 15, 2008. The two-year limit on expiration of the CMP was November 11, 2011. It reversed the County’s conclusion that the CMP had been initiated prior to that date. Under DCC a CMP is “initiated” if “the conditions of a permit or approval have been substantially exercised”. DCC 22.36.010 B.1. provides that a land use permit is “void” if not initiated within two years. It is not clear if that decision has been appealed, counsel for the applicant simply states that “the case that addresses that issue is pending.” CLCC Oct. 30 response at 3.

First, I find that DCC 22.34.040 A. controls and that this issue is beyond the scope of the issues that LUBA and the Court of Appeals “required to be addressed”. I addressed the authority to initiate the remand only because it goes to authority to hear this matter. That is different from Gould’s request that I rule on the validity of the FMP or its legal significance based on evidence that the CMP “expired”. That is, in my view, essentially a collateral attack on the validity of the FMP which, as discussed below, has been affirmed with the exception of the remanded issues. It may be that, assuming my decision is appealed, the Board has authority to consider this collateral attack under the second sentence of DCC 22.34.040 B, and therefore could deny the FMP on grounds other than those that the Court of Appeals and LUBA “required to be addressed”. I, however, do not have that authority.

Nevertheless, I will address the argument to avoid a remand for failing to do so if it is held that I erred in my conclusion as to my authority.

The relationship between the CMP and the FMP is complex. DCC 18.113.040 B states that the FMP must comply with the approved CMP. The CMP version at issue was approved by the County on April 15, 2008 and the approval ultimately was affirmed in *Gould v Deschutes County*, 227 Or App 601 (2009). (Gould IV) That approval properly deferred a determination of compliance with the fish and wildlife mitigation standards to the FMP (with a public hearing required).

Meanwhile, the FMP was approved on Oct. 8, 2008. That FMP approval was appealed. Gould argued before LUBA that “a complete and final CMP decision” is required before the county can grant FMP approval. Gould Petition for Review at 38. That argument appears to have been in the context of whether deferring the mitigation standards to the FMP was proper. LUBA rejected this assignment of error on the grounds that it either was made, or could have been made, in Gould’s appeal of the county’s second CMP decision. *Gould V* at 465. Gould apparently otherwise did not challenge the FMP approval on the grounds that it was improper or premature because the CMP was on appeal or had not been initiated. Nor did Gould contend that the FMP was not consistent with the CMP. In any event, the FMP approval was affirmed, except for the two issues present in this remand.

Thus, we have a CMP which is not effective, but which was properly structured to not have to address the issues present in this remand. We have an FMP that has been affirmed as being consistent with and containing all the required elements of the CMP, with the exception of the issues deferred to the FMP and remanded to this proceeding. The FMP was filed pursuant to a CMP that ultimately was affirmed. Under these circumstances, I conclude that the status of the CMP essentially is irrelevant, at least for purposes of this remand. Finally, I also adopt the reasoning of the Hearings Officer in the Oct 6, 2008 decision on this issue at page 4.

The objection is denied.

C. Correction of typographical Error in FMP Approval

LUBA identified an apparent typographical error in the FMP approval. *Gould V* at 464. No objection to this correction has been raised and the correct wording is evident. Accordingly Condition No. 33 of the Hearings Officer decision dated Oct. 6, 2008 is amended to read:

33. The Resort shall, in the first phase, provide for the following: ...

D. At least \$2,000,000 (in 1984 dollars) shall be spent on developed ~~residential~~ recreational facilities.

D. Terrestrial Wildlife Management Plan (TWMP) and Off-Site Habitat Mitigation and Monitoring Plan (M&M Plan).

1. Remand

DCC 18.113.070 provides, in relevant part, that: "In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that: ...D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource..."

In *Gould V.*, LUBA denied several assignments of error challenging the methodology and other aspects of the TWMP and M&M Plan. It sustained other challenges, however, stating generally that it agreed with petitioner that the plans cannot constitute substantial evidence in support of the finding of compliance with DCC 18.113.070(D) "until a number of unresolved factors are resolved" as part of a public hearing process. *Gould V* at 18. LUBA stated: "We do not know the location of the 4,501 acres that will be restored to provide the required mitigation....Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is...do not know what particular mix of restoration techniques will be provided...do not know that habitat value of those 4,501 acres will be after restoration. We therefore cannot know if that restoration effort will result in the needed 8,474 HU's."

Citing the Court of Appeals' decision in *Gould II*, LUBA ultimately held that there are "simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow petitioner a meaningful chance to confront the adequacy of that plan."

On appeal Thornburgh argued that, although the BLM could not legally commit itself to providing a specific location for mitigation, it was likely to do so and that was sufficient. Further, Thornburgh argued that "the strategy and monitoring process are sufficient to show that the

mitigation plan is reasonably likely to succeed.” 227 P.3d at 768. The court quoted the portions of the LUBA opinion noted above and then stated,

We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed.” ... If the only remaining uncertainty in Thornburgh’s mitigation plan were which portion of BLM land would be the site of habitat restoration, we would conclude that LUBA erred in its application of Gould. ...

Here, the nature of the mitigation plan proposed for BLM land is clear...Thus, the adequacy of Thornburgh’s mitigation efforts as they pertain to BLM land can be assessed now, based on the record as it exists. If some portion turns out to be unsuitable for mitigation or if some mitigation methods are inappropriate, those objections could be raised, and the county could deny approval of the FMP on that basis or could condition approval to address those objections.

LUBA also concluded, however, that it had not been determined whether Thornburgh’s restoration efforts would in fact occur on BLM land.... Further, Thornburgh’s back-up restoration plan of a dedicated fund for mitigation suffers from the same defects as the plan at issue in *Gould II*. In light of those uncertainties, we cannot conclude that LUBA erred.

CLCC focuses on the first and last sections quoted above for the proposition that it essentially only has to show on remand that the BLM sites are, in fact, available, since the court seemed to say that would satisfy the *Gould II* test. Gould focuses on the third paragraph quoted above, and the language in the LUBA decision, to argue that there now must be an assessment of the adequacy of the mitigation methods for the BLM lands in the CBRAP. If some portion of the land is unsuitable, the FMP must be denied or further conditioned.

2. Record

Neither Gould, nor any other party, has objected to the consideration of new evidence as regards this issue. (Assuming timely filed as noted above) Dewey Oct. 20, memo at 6.

3. Discussion

In an October 16, 2015 letter to Kameron DeLashmutt, the BLM confirmed that BLM has completed its Cline Buttes Recreation Area Plan. The purpose of the letter was to “communicate our intentions for coordinating wildlife mitigation needs as identified by Deschutes County in 2008”. It appears to reaffirm the earlier MOU, and states that the Maston, Dry Canyon, Fryrear Canyon and Deep Canyon areas are each a “priority for wildlife management” and available for mitigation measures, especially juniper thinning and also for weed treatment. The total area consists of approx. 10,649 acres, although approximately 440 acres of the Maston area has been thinned in the interim. It also confirms that there are two wildlife watering sites currently available for Thornburgh Resort LLC to begin maintaining. Essentially the entire area is shown as deer and/or elk wildlife winter range. The Matson portion is primary a wildlife emphasis area, Deep Canyon is a secondary. See, Oct 19 email from BLM and related maps.

Although difficult to parse, my reading of the Court of Appeals language is that the mitigation plan is now specific enough to be used to “apply the approval standards in a meaningful way” to determine whether the plan is “likely and reasonably certain to succeed.”

Previous decisions have upheld the use of the HEP approach and confirmed that it is appropriate to focus on habitat restoration/enhancement rather than each specific animal species. ODFW has advised that, “the wildlife mitigation plan, if followed as outlined, should address the mitigation requirements for Deschutes County.” R. 126, R 1800. The Certified Wildlife Biologist for TetraTech opined that the “Thornburgh Project was held to the highest standard yet of any proposed resort in the County. It is my opinion that implementation of this Plan will completely mitigate for wildlife habitat impacts of the proposed project so that there is no net loss or net degradation of the resource... R 1897

The HEP approach resulted in a determination 8,474 HU’s are needed to compensate for approximately 1000 acre of on-site habitat loss, requiring approximately 4498.7 acres of off-site enhancement. R. 732-744. This is less than one-half of the BLM area available for restoration. Modified HEP analysis, Aug. 5, 2008. This provides ample room to account for specific acreage that might for some reason be unavailable or less-desirable for enhancement.

In his August letter, Dr. Dobkin objected that extensive non-native seeding would occur. TetraTech responded that it anticipates little to no such seeding and that, to the extent used, it is a short-term measure to out-compete invasive species and give natives a chance to grow. Dobson states that mitigation benefits will be reduced greatly or nullified by livestock grazing. TetraTech responds that this conclusion is incorrect based on the Maston Allotment where grazing occurs and habitat conditions range from good to excellent, except where damaged from OHC use. R-130-131. BLM will be closing that area to OHC use. R415.

Weed management will be evaluated annually by ODFW and BLM and adjusted as necessary. The applicant will fund on-going weed management as long as the resort is operational. R 2620. Maintenance thinning of small junipers likewise will continue. LUBA Rec. 2621. The Report at R 2609-2629 dated April 15, 2008 details anticipated wildlife benefits from the proposed mitigation.

BLM indicates that the restoration funding provided by applicant may be able to be used as local “match” for grants, thereby multiplying the restoration impact. R415. The BLM now has adopted the Vegetation Management Alternative 2.1 (rather than the no action alternative), including requiring botanical, special status wildlife and cultural clearances for each specific site. Ex B to undated Fancher “Summary of Remaining Issues.”

Based on the foregoing and other materials in the record, I find that the weight of the evidence supports the conclusion that the off-site wildlife mitigation measures to be implemented in the Cline Butte Recreation Area are “likely and reasonably certain to succeed.” The most important dispute appears to center on methodology, with opponents wanting a more static or fixed point approach and the applicant, ODFW and BLM favoring the HEP iterative process approach. I agree with the applicant and the agencies, but note that success of that approach is dependent on the parties continuing to perform and to make the adjustments the ongoing process suggests. The plan calls for a re-assessment annually and projects moving to a maintenance mode in year five. There is evidence in the record that some other approved resorts have been less than successful in actually obtaining the wildlife enhancements or mitigation promised. Accordingly, I find the following condition of approval is appropriate:

During the fifth year after commencement of habitat restoration/mitigation activities conducted or funded by applicant on property within the Cline Butte Recreation Area, the applicant shall submit to Deschutes County a report evaluating the habitat mitigation. Within 90 days of receipt of the report, Deschutes County shall conduct a public hearing pursuant to Chapter 22.24 (as amended) for purposes of evaluating whether the habitat mitigation has substantially met the objectives set forth in the Terrestrial Wildlife Management Plan (TWMP) and Off-Site Habitat Mitigation and Monitoring Plan, including providing the quantity and quality of HUA's proposed. If not, the County may further condition the applicant to conduct or fund further habitat restoration/mitigation efforts as reasonably necessary to address any substantial nonconformance with the approved plans.

E. Impacts on Whychus Creek

1. Remand

LUBA remanded the Oct. 8, 2008 hearings officer decision, 'for additional findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek.'

In explaining this remand, LUBA concluded that the hearings officer must have found that the "less than .01 degree Celsius" impact was not so small as to permit it to be ignored." In doing so, however, the hearings officer did not "respond to petitioner's contention that the mitigation water will not mitigate the destination resort's thermal impacts on Whychus Creek because that mitigation will replace cool water with warmer water." Accordingly, the remand is "for additional findings to explain why the additional mitigation water... will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resource could have adverse thermal impacts on Whychus Creek." LUBA suggested in footnote 13 that "some effort to clarify the expert's statement will likely be required."

2. Record

DCC 22.34.040 d. 'Scope of Proceeding' provides:

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....

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 on appeal or that were not appealed shall be deemed to be waived and may not be reopened.

As noted previously, Gould acknowledged that new evidence was admissible pursuant to the LUBA remand regarding terrestrial mitigation. Gould, and others, however, objected to new evidence regarding Whychus Creek on the grounds that it exceeds the scope of the remand. They also suggested that, if new evidence is permitted, they should be able to introduce evidence of changed conditions in the intervening years.

The distinction between 'Hearings Body' and 'Board' in the DCC is clear. One may argue that whether the DCC should preclude the hearings officer from receiving new evidence if it is thought appropriate, particularly in light of the 90 day period in which to act on remand. But my

role is to apply the DCC as written, accordingly, my analysis will be based solely on the evidence in the record on appeal, and argument at the hearing related to that evidence. All new evidence relating to the impact of the mitigation, and to changed conditions, is excluded.

3. Discussion

It appears to me that the applicant seeks to expand the scope of the remand to include the beneficial impacts of increased flow on the upper reaches of Whychus Creek. There are numerous references in the record to the need to improve flows in Whychus Creek for fish habitat. It likely is incontrovertible that this will result in a significant benefit. It might be that, starting with a clean slate, the no net loss standard could be met by a finding that this overall benefit outweighs the .01d C increase, in the same way that off-site terrestrial mitigation may offset on-site impacts. But I could find nothing making that argument to the prior hearings officer and it does not appear to have been contemplated in the finding at issue. At the hearing, the applicant quoted a statement in the record that, "Thornburgh will slightly lower habitat quantity and quality of habitat below Alder Springs if it reduces ground water inputs and does so without improving upstream conditions for fish." But actual statement is that applicant is doing so without improving upstream conditions, i.e. perhaps supporting the conclusion that upstream mitigation outweighs the impacts on lower Whychus, but not stating that it directly mitigates the thermal impact in lower Whychus, which is the issue on remand. LUBA Rec. at 1105.

This is one example of how, to a great extent, the applicant appears to be hamstrung by LUBA's characterization of the finding. But the applicant did not appeal that reasoning in an attempt to give it more latitude or get a clear remand for new evidence. My reading of the finding, and LUBA's remand, is that I am to consider whether the additional water will mitigate the impact of the .01dC temperature increase on lower Whychus Creek, i.e. from the point that the Alder Springs water enters to its mouth.

The only expert testimony/opinion directly addressing this issue I could find in the LUBA record is the August 27, 2008 analysis by Yinger. LUBA Rec. at 312-14. He concludes that it will not mitigate the thermal impact as it replaces cold groundwater with "warm" water from upstream. (my quotation marks). He asserts, and I think the record supports the conclusion that the cold groundwater discharge at Alder Springs is, at least to a fair extent, the "defining and essential factor" for fish – probably especially bull trout. He predicts a temperature increase of .12 d C "at Alder Springs". It is not clear whether this projected increase translates into warmer temperatures further down Whychus Creek but presumably that is his conclusion. Further, he contends that it would have negative impacts on the refugia. See also LUBA record at 1105, "the ecology of Whychus Creek is cold groundwater dependent." It is important to note in this regard that LUBA upheld the Hearings Officer's conclusion that the evidence satisfactorily addressed "cool patches" on the Deschutes, but LUBA expressly distinguished that from the potential impacts of the additional mitigation water on cool patches in Whychus Creek. LUBA at 28.

There is evidence in the record that the applicant's consultants considered it important to "acquire water rights from springs" to mitigate the "potential impact to springs and seeps" by "transferring cold, spring-fed flows" back into Deep Canyon. TetraTech memo, July 2, 2008, LUBA R at 1234. See also, Newton July 15, 2008 memo, LUBA R at 1251. Of course, I understand that this was in the context of their conclusion that such additions completely offset the impacts – but the Hearings Officer apparently did not entirely agree with that conclusion.

ODFW apparently considers releases of stored water as a mitigation method for groundwater loss, but notes that as of the date of its general 5-Year Program Evaluation such an approach had not been tried. LUBA Rec. at 1272.

The applicant argues that, since Yinger overstated the amount of consumptive use, as LUBA appears to have concluded, the impact on Whychus is smaller than Yinger asserts. That appears to be correct, so arguably Yinger's finding of a .12dC increase after adding the upstream water is overstated. But it does not resolve for me the fact that the Hearings Officer also apparently agreed with the applicant on that point and still found that there was a .01dC impact that needed to be mitigated. Further, the applicant did not run the numbers with the reduced consumptive use in the prior record and any such evidence now would be new. The argument, while appropriate, does not provide evidence that the addition of upstream water directly mitigates temperature or addresses impacts on refugia.

There is evidence in the record that the water temperature upstream of is 14 dC. LUBA Rec.at 1566. The creek currently exceeds 18 dC from just above Sisters to Alder Springs. LUBA Rec. 1566, 1899. It appears logical that if diversions that reduce the amount of flow in Whychus Creek cause water temperatures to rise (Ryan Houston, LUBA Rec. 1903), elimination of diversions would cause it to drop, which, at least in theory, aids lower Whychus Creek temperatures, but the addition is more than 20 miles upstream in a creek that even with the added water is severely degraded and has low flows.

The applicant contends that one must assume that the Yinger analysis started with an assumption of 26.7 degrees, using his mass balance equation, to arrive at the impact he suggests. Fancher remand memo at fn. 15. The applicant concludes that the water temperature that is being added to the creek starts out at below 14 degrees and this is not hot water. The latter statement is true but since we do not know the temperature where it meets Alder Springs, it does not adequately address whether the .1Cd found to be problematic will be increased or decreased.

The bottom line is that the offer to increase flows in Whychus Creek was made too late, with too little evidentiary basis in light of Yinger's, admittedly cursory, contrary opinion. What is needed to solve this dilemma is the new evidence submitted at the hearing addressing the temperature of the 106cfs added flow when it reaches the Alder Springs area and its resultant impact on lower Whychus Creek. Also needed, and not submitted, is evidence dealing with what, if any impact, this has on refugia or perhaps that the refugia would not be needed or needed as much.

Ultimately, given the constraints imposed by the LUBA remand and the DCC, I conclude that there is insufficient evidence in the record to conclude that the 106 cfs of added water to Whychus Creek offsets the .01dC and the possible impacts on refugia. For that reason, the application on remand must be denied.

Dated this 2nd day of December, 2015

Mailed this 2nd day of December, 2015



Dan R. Olsen
Deschutes County Hearings Officer

**NOTICE OF APPEAL
THORNBURGH RESORT FINAL MASTER PLAN
APPEAL OF 247-15-000529-A; M-07-2; MA-08-6**

DECISION APPEALED

Central Land and Cattle Company, LLC as successor in interest to Thornburgh Resort Company, LLC and Kameron DeLashmutt hereby appeal the decision of the County's hearings officer, Dan Olsen denying approval of the Thornburgh Resort Final Master Plan (FMP) in File 247-15-000529-A; M-07-2; MA-08-6. The decision is entitled "Hearings Officer's Decision." It is dated and was mailed on December 2, 2015.

REQUEST FOR REVIEW

Central Land, for the reasons listed below, requests that the Board hear its appeal on the following issues only in the following manner:

Whychus Creek Mitigation

Central Land asks the Board to hear the issue of mitigation of potential impacts of the resort's peak use of water during the summer on Whychus Creek *de novo* as allowed by DCC 22.32.027(B)(2). Central Land asks that the Board reopen the record to accept evidence on this issue as allowed by DCC 22.34.040(A) and (C).

Conceptual Master Plan

Central Land asks the Board to review the hearings officer's resolution of Nunzie Gould's claims related to the Conceptual Master Plan and to do so based on the record established below.

SUMMARY OF PRIMARY ISSUES

The Hearings Officer failed to apply the same rule regarding the scope of permissible evidence to all five issues he decided. The Whychus Creek mitigation issue was the only issue decided on the record (prior to remand). Relevant evidence and arguments relating to old evidence on this issue filed by Central Land after remand was rejected. No plausible interpretation of the County's code allows this action.

The Hearings Officer did not understand the question posed by LUBA regarding Whychus Creek mitigation – will mitigation water from the Three Sisters Irrigation District be sufficient to eliminate the hearings officer's concern that summer water use by the resort could have adverse thermal impacts on Whychus Creek. This question is plainly stated in LUBA's decision and is not answered by the hearings officer's decision. Board review is required to allow the County to answer LUBA's question.

The Board should allow the parties to submit evidence regarding the Whychus Creek mitigation issue so that the issue may be resolved on the merits and so that procedural issues will be eliminated.

These issues and other relevant issues are described in more detail, below.

ISSUES ADDRESSED BY HEARINGS OFFICER ON REMAND OF FMP

The Thornburgh FMP was remanded to the County by LUBA and the Oregon Court of Appeals. The County code requires that the FMP remand be reviewed by the County's hearing officer on three issues, including:

1. Will Whychus Creek mitigation address concerns regarding peak summer water use by the resort?
2. Are the Terrestrial Wildlife Mitigation Plan and M&M Plan sufficiently certain to allow review by LUBA and the Court of Appeals?
3. A clerical error in a condition of approval should be corrected.

In addition, opponent Nunzie Gould raised two new issues that Hearings Officer Olsen decided. These issues were not remanded to the County for review by Mr. Olsen, including:

4. Does expiration of the CMP approval render the FMP application filed in 2008 void?
5. Was the remand properly initiated and can Central Land and Cattle Company participate?

Gould argued that new evidence should be allowed on issues 2 through 5 but that issue 1 should be confined to the record developed in 2008. Central Land argued that evidence should be allowed on issues 1 and 2 because these issues (issue 3 didn't require evidence) and that issues 4 and 5 were issues outside of the scope of review allowed by DCC 22.34.040(A) because they were not issues LUBA or the Court of Appeals required the County to address.

The Hearings Officer accepted new evidence on issues 2, 3, 4 and 5 and ruled in favor of Central Land on these issues. The Hearings Officer refused to consider Central Land's evidence on issue 1, Whychus Creek mitigation, even though he stated it was needed and denied the FMP, primarily, because this evidence was not in the record. The Hearings Officer also failed to consider evidence in the existing record specific to the issue of summer water use and Central Land's arguments about that issue.

STATEMENT OF SUBSTANTIVE ISSUES RAISED BY APPEAL

- A. The hearings officer did not answer the question LUBA remanded to the County which is:

"The decision must be remanded to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the resort could have adverse thermal impacts on Whychus Creek."

Instead Hearings Officer Olsen focused on the following question:

"[W]hether the additional water [from TSID] will mitigate the impact of the .01dC temperature increase on lower Whychus Creek."

LUBA's decision did not determine that there would be a less than .01dC temperature increase in Whychus Creek and it did not require that a less than .01dC increase in temperature be mitigated. Instead, LUBA required the County to explain why mitigation water will address possible impact of peak summer water use by the resort. This is a different impact than the .01dC impact considered by Hearings Officer Olsen. The .01dC impact is the impact projected by TetraTech to project the less than .01dC impact based on the steady state modeling (impacts equalized over the year) conducted by TetraTech and Yinger/Strauss.

- B. The hearings officer's decision is reversible because it fails to address the "summer water use" issue.
- C. The hearings officer's decision is reversible because it failed to consider Central Land's arguments about the "summer water use" evidence provided by the Yinger/Strauss report that opponents included in the record in 2008. The Yinger/Strauss report claims that streamflow reductions caused by groundwater pumping occur gradually over decades with 90% of the impact finally being felt 42 years after pumping begins and that most impacts occur to groundwater "after about 7 years." The Yinger/Strauss report also explains that by year ten the impacts to streamflow will be equalized (the same each month) "even if pumping is greater in the summer and less in the winter." LUBA Rec. 1501.
- D. The hearings officer erred in finding that Mark Yinger's "admittedly cursory" and overstated claims of an alleged temperature impact of mitigation water (.05dC increase claimed by Yinger) is the only evidence in the record on the issue of Whychus Creek mitigation. LUBA's decision contradicts that finding:

"In this case the hearings officer either did not recognize or for some other reason failed to address the conflicting expert testimony about the efficacy of relying on the mitigation water from the Three Sisters Irrigation District to address the hearings officer's concern about the thermal impacts water use at the destination resort would have on Whychus Creek during the summer months."

The conflicting evidence on temperature impacts of mitigation water was provided by TetraTech. TetraTech's expert opinion was that increasing the flow of water in Whychus Creek will reduce the extremely minor impact that groundwater pumping might have on Whychus Creek temperatures (less than .01dC based on the overstated amount of groundwater use projected by the Yinger/Strauss report). The hearings officer's failure to recognize and address TetraTech's evidence that mitigation water (increased flow) will reduce stream temperature is reversible error.

- E. The hearings officer should have found in favor to Central Land on the mitigation water issue based on Tetra Tech's evidence because the hearings officer found Yinger's claim of a .12dC increase "arguably ... overstated" and Yinger's review of the issue "cursory" and Hearings Officer Olsen accepted TetraTech's expert opinion that the impact of groundwater pumping on lower Whychus Creek of less than .01dC (without mitigation) rather than Yinger's competing claim of a .07dC increase (without mitigation).
- F. The hearings officer erred in finding that Mark Yinger claimed that the increased temperature he predicted "would have negative impact on the refugia." Page 15, Decision. He did not make that claim. Yinger's projected temperature impacts, also, were viewed as "small" and slight by Gould's fish biologist, Charles Huntington. Rec. 1105- 1106.
- G. The hearings officer erred in finding that Central Land was asking to expand the scope of the water issue on remand to include the beneficial impacts of increased flow on upper Whychus Creek and in disregarding evidence on that issue. The issue remanded by LUBA is the impact of summer water use on Whychus Creek; not the impact of summer water use on lower Whychus Creek.
- H. Central Land's new evidence regarding Whychus Creek mitigation, which should have been considered by the hearings officer, explains and resolves the summer water use issue and shows that mitigation water will reduce Whychus Creek temperatures. This is the only Whychus Creek issue remanded by LUBA. The FMP, therefore, should have been approved by Hearings Officer Olsen.

REASON FOR BOARD TO REVIEW SUBSTANTIVE ISSUES

The Board should review the substantive issues presented by this appeal to avoid a remand by LUBA based on the County's failure, for a second time, to recognize and resolve the conflict in the record on the Whychus Creek mitigation issue. The Board should also accept review to support an existing, established and well-respected Whychus Creek streamflow restoration program by requiring Thornburgh Resort to participate in the program. This program as documented by the Upper Deschutes Watershed Council is beneficial to Whychus Creek. It is not, as claimed by opponents, harmful to fish habitat in Whychus Creek or in lower Whychus Creek.

STATEMENT OF PROCEDURAL ISSUES

- I. The hearings officer erred by excluding probative new evidence on the Whychus Creek mitigation issue offered by Central Land and Cattle Company while accepting new evidence on all other issues, including issues that were not remanded to the County by LUBA and the Court of Appeals. The hearings officer did so:
 - (a) without interpreting the code language in question; and
 - (b) without demonstrating that his disparate treatment of evidence regarding Whychus Creek is allowed by the code; and
 - (c) without addressing all relevant provisions of DCC Chapter 22.34; and
 - (d) without addressing Central Land's arguments that the County code prohibits reopening the record to consider issues not remanded to the County by LUBA (rather than prohibiting reopening the record to receive new evidence while allowing reopening to accept arguments on remanded issues – the interpretation applied by Hearings Officer Olsen).

The exclusion of this evidence violates DCC 22.34.040(A) and (C) which, under the most restrictive plausible reading of the code, allows Central Land to file new evidence that is required to comply with the remand. The hearings officer found that the additional testimony is required to address the issue remanded and, therefore, he should have accepted it.

This error is prejudicial to Central Land because the summertime use issue was raised for the first time by Hearings Officer Briggs in her 2008 approval of the FMP and Central Land has not yet had an opportunity to address the issue.

Central Land believes that the correct interpretation of the County's scope of review on remand when a decision of a hearings officer is remanded is as follows and should be adopted by the Board on appeal:

- DCC 22.34.020 makes the hearings officer the hearings body on remand.
- DCC 22.34.030(A) requires the hearings officer to conduct a hearing on the remanded decision. Parties are "entitled to participate" in the hearing.
- DCC 22.34.040(A), together with DCC 22.34.030(A), requires the hearings officer to conduct a hearing and to "review issues LUBA or the Court of Appeals required to be addressed." These issues are the issues remanded to the County for further consideration.
- DCC 22.34.040(A) allows the Board to reopen the record to receive evidence and arguments on additional issues – issues not remanded to the County. The hearings officer may not reopen the record to allow consideration of new issues. Only the Board has this right.
- The term "reopen the record" means "reopen the record for the receipt of new evidence and arguments" not "reopen the record for the receipt of new evidence." In the context of DCC 22.34.040(A), the term relates to reopening the record for new evidence and arguments regarding issues outside the scope of issues remanded.
- DCC 22.34.040 (C) specifically allows parties the right to raise new issues "if additional testimony is required to comply with the remand." This language recognizes the fact that new testimony is allowed on the issues remanded by LUBA and the Court of Appeals. It is not a limit on the scope of additional evidence. To the extent it is read as such, the term "if required to comply with the remand" means that new evidence relevant to the issue remanded is admissible. Evidence about the impact of Three Sisters Irrigation District "mitigation water" on Whychus Creek temperatures and fish habitat, the nature of peak summertime water use by the Resort and the efficacy of mitigation water is all required to resolve the Whychus Creek issue that LUBA required be resolved on remand.

J. The hearings officer deprived Central Land and Cattle Company and Mr. DeLashmutt due process of law in violation of the 14th Amendment of the United States Constitution and ORS 197.763(6)(c) by failing to allow Central Land to rebut new evidence filed by opponents on the last day of the last post-hearing comment period. Central Land asked to be allowed to rebut this new information but its requests, on two occasions, were denied. This right is set out in ORS 197.763(6)(c):

"(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for seven

*days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority **shall reopen the record** . . .” [emphasis added]¹*

- K. The hearings officer erred by failing to exclude the evidence described in paragraph I, above from the record because it was not rebuttal evidence. It was not admissible because it should have been filed earlier during the first post-hearing comment period.
- L. The hearings officer erred by failing to consider and decide Central Land’s objection that new evidence filed by opponents on the last day of the rebuttal period (November 6, 2015) was not admissible because it was outside the scope of review allowed by DCC 22.34.040 and DCC 22.34.030(A). The new evidence should have been excluded for that reason.

Central Land’s objections described in paragraphs J-L, above are set out in a November 19, 2015 letter from Kameron DeLashmutt to Hearings Officer Dan Olsen and in Central Land’s Request to Reopen Record dated and filed November 10, 2015. Those objections are incorporated by reference herein.

REASON FOR BOARD REVIEW OF PROCEDURAL ISSUES

The Board of Commissioners should hear this case to afford Central Land and Cattle Company, LLC the right to rebut last-minute evidence filed by opponents and to accept evidence on the Whychus Creek mitigation issue that was not considered by the hearings officer.

Board review of this appeal will allow it to correct procedural errors and to render a decision on the merits of the Whychus Creek mitigation water issue now rather than after a remand by LUBA. Furthermore, if the hearings officer’s decision stands it will be appealed and LUBA will determine the meaning of the County’s code. That interpretation will bind the County in future proceedings regarding this application even if the Board disagrees with the interpretation.

¹ While ORS 197.763 (6) applies to initial hearings, it also provides guidance to Oregon courts regarding the process required to assure the due process rights of parties, including Central Land.

BOARD REVIEW NEEDED TO CLARIFY THE RECORD

The Board should accept review of this appeal to correct record issues that were created by the hearings officer's decision. This will reduce the amount of time that County staff will need to spend to prepare the record and to respond to record objections. The hearings officer's decision creates doubt about the status of the following evidence:

- Is new evidence related to Whyhus Creek a part of the record or was it rejected by the hearings officer? The hearings officer said he was "accepting into the record all the submittals" from opponents regarding the irrelevant declining groundwater issue subject to his ruling on new evidence. The decision then says that "all new evidence relating to the impact of the mitigation, and to changed conditions, is excluded." Whether those documents and the groundwater decline arguments in those documents are excluded is not clear. The hearings officer should have, but did not, say which documents or parts thereof were excluded by this ruling.
- OAR 660-010-0025(1)(b) says that all written testimony placed before and not rejected by the hearings officer is a part of the record. Where the hearings officer both accepts evidence into the record and then claims to exclude it, it is unclear whether that evidence is in the record.
- Is written testimony submitted to the County in a November 20, 2015 letter from Curtis E. Melcher, Director of ODFW to Deschutes County transmitted to County staff by Mr. Melcher and then sent to the hearings officer by County staff a part of the record? This letter was placed before the hearings officer by staff and it was not rejected. OAR 660-010-0025(1)(b) makes this letter a part of the record.²

REASONS BOARD SHOULD GRANT REVIEW OF WHYCHUS CREEK ISSUE *DE NOVO* AND SHOULD LIMIT ITS CONSIDERATION OF OTHER ISSUES

The Board should consider the issue of Whyhus Creek mitigation *de novo* so that evidence regarding the benefits of Whyhus Creek mitigation can be considered by the County and so that Central Land will be afforded its due process right to rebut and provide legal arguments responding to opponents' last minute evidence. Central Land was denied both the right to rebut this evidence and the right to present final argument. See, ORS 197.763 (6)(c) and (e).

The Board should "reopen the record" to allow parties to resubmit evidence excluded by Hearings Officer Olsen on the issue whether "the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that

² The hearings officer denied Central Land's request to open the record to include the Melcher letter in the record but he did not reject the Melcher letter.

summer water use by the resort could have adverse thermal impacts on Whychus Creek.” Hearings Officer Olsen’s decision makes it clear that evidence is required to address the issue presented on remand and should not have been rejected. Hearings Officer Olsen found that the new evidence which shows that “[i]t is likely incontrovertible that [improved flow in Whychus Creek] *** will result in a significant benefit” to the creek and that it might be that the “no net loss standard could be met by a finding that this overall benefit outweighs the .01dC increase.” Page 15, Decision.

The Board should consider the “Initiation of the CMP” issue addressed on pages 10 and 11 of the hearings officer’s decision on the record so that it may explain the relation of the CMP to the FMP in the same way it did in its decision of the CMP initiation of use application filed by Loyal Land – that the purpose of the CMP is to allow the applicant to file the FMP.

In the event that an appeal is filed by another party on other issues, the applicant requests that the Board decline review of those issues. If review is granted, Central Land asks that those issues be decided based on the record. The hearings officer accepted and considered evidence on all other issues so a de novo hearing is not needed to gather evidence.

If the opponents ask the Board to reopen the record to consider new issues or “changed conditions,” Central Land requests that the Board decline to do so. A host of issues have been extensively litigated and resolved in the CMP and FMP case. Conditions of approval have already been imposed to address changed conditions such as reductions in groundwater levels from pumping. Conditions of approval also prevent the resort from proceeding if it promised mitigation and the agreements required by the CMP and FMP are not honored. Furthermore, there are no changed conditions relevant to the issue of whether mitigation water will lower or raise the temperature of Whychus Creek. Changed conditions regarding the terrestrial FMP have already been considered by the Hearings Officer.

Central Land anticipates that opponent Gould may ask the Board to consider evidence that groundwater levels in the Deschutes Basin are dropping. Gould filed evidence making this claim on November 6, 2015. Evidence on this issue has already been considered and addressed by the CMP and appellate decisions and were not raised in appeals of the FMP and may not be considered now due to the holding of *Beck v. Tillamook County*, 313 Or 148, 831 P2d 678 (1992) and the legal doctrine of law of the case. Central Land, therefore, requests that the Board decline to consider the declining groundwater evidence.

AGREEMENT TO EXTEND THE NINETY DAY CLOCK

If the Board agrees to hear this appeal, Central Oregon hereby agrees to extend the running of the 90-day clock that applies to the County’s review of this application on remand for a period of an additional 60 days to allow the Board to hear and decide the appeal.

STATEMENT OF SPECIFIC REASONS FOR APPEAL BY NUNZIE GOULD

Though we support the Hearings Officer's decision denying the FMP application, we are aware that Central Land may appeal that decision and may try to limit the issues on appeal to just what it wants considered. Because of that, we are also appealing the decision so that if the Board decides to hear Central Land's appeal the Board will also consider our issues. But just to be clear, we believe it is more appropriate for the Board not to hear Central Land's appeal.

This case concerns whether the Thornburgh Final Master Plan ("FMP") application from 2008 should be approved and whether it provided adequate mitigation to meet the no net loss or net degradation standard for fish and wildlife. The application should be denied where the underlying land use permit for the destination resort has expired (as of November 2011) and where the requirements of the narrow remand from LUBA have not been met. The remand was only for two matters, 1) additional findings to explain, if possible, why leaving 106 acre feet of warmer water left instream 20 miles above Alder Springs could mitigate for the loss of 106 acre feet of cold spring water and 2) additional evidence and findings to present a wildlife plan sufficiently detailed to allow meaningful public review and which addressed issues of what land and mitigation measures may be unsuitable. The wildlife issue was the only remand issue for which LUBA called for more evidence.

If the Board accepts this matter for appeal, the following issues need to be included:

1. The FMP remand proceeding should not be allowed to occur given that the underlying conditional use permit expired in 2011.

As the Board well knows, there has been extensive litigation over the past four years initiated by Loyal Land which filed a Declaratory Action to establish that the destination resort use had been initiated. This Declaratory Action proceeding was necessary because the two-year permit for the resort was about to expire. In fact, the expiration date of that two-year period as found by LUBA in *Gould v. Deschutes County*, 67 Or LUBA 1, 11 (2013), was November 18, 2011.

The Land Use Board of Appeals and the Court of Appeals have twice rejected Loyal Land's and the County's determinations that use has been initiated. Accordingly, the permit expired on November 18, 2011. Absent establishment that the use was initiated, the permit is expired.

There has been no initiation of use under DCC 22.36.020 where substantial construction toward completion of the land use approval has not taken place and conditions of the permit have not been substantially exercised and the failure to fully comply with the conditions is the fault of the Applicant.

The Hearings Officer erred in considering our objection to the FMP remand proceeding because of the expiration of the permit as just a "collateral attack" on the FMP, rather than any problem with the County's jurisdiction to hear this argument. To the contrary, it is fundamental to any county consideration of a land use application as to whether there

is, in fact, jurisdiction. Where the underlying permit expired in 2011, there is no basis for the County to be hearing a further matter on this development.

The Hearing Officer was wrong in deciding that the status of the CMP is “irrelevant.” The CMP is the conditional use permit on which the development is based and LUBA and the Court of Appeals have held that the CMP conditions of approval required final approval of the FMP before expiration of the two-year period in 2011. Two LUBA decisions and two Court of Appeals decisions have ruled that the CMP is not irrelevant and have rejected the argument that the FMP can be separately considered from the CMP.

Central Land argued below that it would be beyond the scope of LUBA’s remand to consider this issue of expiration of the permit, but that is wrong for two reasons. First of all, a jurisdictional issue may be raised at any time on any land use matter. Second of all, DCC 22.34.030(A) provides that the scope of review on remand includes “state law.” As held by LUBA in *Gould v. Deschutes County*, 67 Or LUBA at 9, DCC 22.36.010 regarding expiration of permits implements state law in OAR 660-033-0140.

2. The Hearings Officer erred in suggesting that an August 2011 email from Kameron DeLashmutt ostensibly asked for initiation of the FMP remand. That email did not actually initiate the remand where Thornburgh failed to file an application, failed to pay the fee and failed to state the reasons the FMP should be approved, as clearly pointed out by Tom Anderson in his response to that email.

The Hearings Officer erred in suggesting that email initiated the remand and erred in stating that the County “relented” on requiring the application and the payment of the \$3,000. An application was actually filed in 2015 and the \$3,000 fee was paid.

Thornburgh also could not have and did not pursue the remand where its lands were foreclosed in August of 2011 by Loyal Land. Further, Thornburgh is estopped to complain that this 2011 email initiated the FMP remand where it has waited four years to assert that position and at no time made this claim during the past four years of litigation on the Loyal Land Declaratory Action.

3. Neither that 2011 email nor the current application for initiation of remand by Central Land satisfied the requirements of DCC 22.08.010(B) or 22.08.020 that the application be complete and be with written authorization of the owners.
4. Appellant Gould was prejudiced by Central Land’s filing of an incomplete application and late submittal of its remand argument and materials since she was given inadequate time to respond.
5. Central Land is not the proper applicant of the FMP remand as required by ORS 215.435 and DCC 22.34 as it is not the successor-in-interest to Thornburgh. Thornburgh is also not a proper applicant where it was dissolved four years ago.

6. Regarding the Wildlife Management Plan, the Hearings Officer erred in failing to address our suitability objections to the land and mitigation measures regarding proposed wildlife mitigation, as required by the Court of Appeals, including unsuitability of lands for mitigation due to grazing and motorized use impacts.

The Court stated:

“If some portion of BLM land turns out to be unsuitable for mitigation or if some mitigation methods are inappropriate, those objections could be raised, and the county could deny approval of the FMP on that basis or could condition approval to address those conditions.”

Accordingly, the wildlife plan still lacks sufficient specificity for the public to comment on it. The Hearings Officer also erred in stating that all three areas of BLM land are “priority for wildlife habitat.”

7. The Hearings Officer’s proposed condition providing that the County may further condition the Applicant after five years to conduct further mitigation recognizes the uncertainty of the currently-proposed mitigation. However, the condition is inadequate, too vague and unenforceable and does not respond to the unsuitability factors. It is not explained how new conditions can be imposed after a decision becomes final.
8. Regarding the adequacy of mitigation for Whychus Creek, we do not believe it is appropriate to reopen the Record or to allow new evidence since the 2008 Record on the issue of mitigation for impacts on Lower Whychus Creek, given LUBA’s direction only for “additional findings.”

Furthermore, it would not be appropriate to allow Central Land to relitigate whether mitigation is needed and how much. The original Hearings Officer’s determination that mitigation would be needed was not appealed by Thornburgh, was affirmed by LUBA in its decision and was not appealed by Thornburgh to the Court of Appeals. It would be inappropriate for the County to reopen this issue as it is now “the law of the case.” As the Hearings Officer points out in his decision, Thornburgh failed to appeal this issue. It cannot now reopen, and the County cannot reopen, this issue of whether there will be impacts on Lower Whychus Creek and the amount and kind of needed mitigation.

DCC 22.34.040(C) provides:

“[I]ssues that were resolved by the LUBA appeal or that were not appealed shall be deemed to be waived and may not be reopened.”

If the County nevertheless reopens this issue, then Appellant Gould maintains her objection and reserves the right to respond to any proposed evidence and issues and will need adequate time to do so.

9. If the County reopens the Record and issues on Whychus Creek, then it should also do so on the adequacy of the proposed mitigation on the Deschutes River by the Big Falls Ranch Deep Canyon Creek water. This is necessary to address new information and changed circumstances since 2008 including falling groundwater levels in the area as documented in a 2011 USGS report and lack of availability of that proposed mitigation water now for mitigation.
10. Again, if the Board is going to allow updated or new evidence, then it should also do so on other aspects of the destination resort approval criteria. This destination resort approval is old and outdated on many issues. Of particular concern is who controls this application and development and whether they have the financial resources to carry out the development and whether the proposed development is still economically viable, as required by DCC 18.113.070(C). That provision requires proof that necessary financial resources are available for the applicant (now Central Land) to undertake the development and proof from lending institutions that the developer has or can reasonably obtain financial support for the proposal. The original applicant, Thornburgh, on which the County relied in its original economic analysis, filed for bankruptcy, lost the resort land to foreclosure and was dissolved four years ago.

The other approval criteria for the resort also should be updated, including traffic impacts and needed mitigation (as of 2015, not the 2006-2008 data originally relied upon), groundwater rights, agency permits, recreation mitigation, etc. Note that LUBA in the case of *Ploeg v. Tillamook County*, 43 Or LUBA 4, 9, n. 4 (2002), held that a county could decide that an application needed to be updated where there had been a substantial delay in the initiation of remand proceedings:

“Nothing we are aware of would prevent a local government from requiring additional evidentiary hearings on remand, in response to an argument that too much time had passed since the original proceedings and the pertinent facts had changed.”

De Novo Review

If the Board abides to the remand direction by LUBA, there is no need for de novo review and it would be inappropriate where Thornburgh could have but failed to present such evidence originally.

If, however, the Board does allow de novo review on any Central Land appeal issues, then it should also allow such review on our appeal issues and our substantial rights would be significantly prejudiced without that de novo review. If the Board is going to allow on approval criteria issue to be updated from 2008 to 2015, then the remainder of the approval criteria should also be updated. This is a very significant policy issue.