

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

ANNUNZIATA GOULD,	)	
	)	
Petitioner,	)	LUBA Case No. 2008-203
	)	
v.	)	
	)	
DESCHUTES COUNTY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
THORNBURGH RESORT COMPANY,	)	
Intervenor-Respondent.	)	
	)	
	)	

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INTERVENOR-RESPONDENT'S RESPONSE BRIEF

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3.	The standards do not use the term “overall” or suggest that all fish and wildlife resources can be lumped together to assess satisfaction of the standards. ....	13
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1                                   **I.       STANDING OF PETITIONER**

2                   Intervenor-respondent Thornburgh Resort Company, LLC (“Thornburgh”)  
3 acknowledges that petitioner Annunziata Gould (“Gould”) has standing to appeal to LUBA.

4                                   **II.       STATEMENT OF THE CASE**

5                   **A.       Nature of the Land Use Decision**

6                   The challenged decision, which was made by the Deschutes County  
7 (“County”) Hearings Officer, approves Thornburgh’s final master plan (“FMP”) application  
8 for a destination resort.

9                   **B.       Summary of Argument**

10                   **1.       Response to First Assignment of Error**

11                   Thornburgh’s wildlife mitigation plan is consistent with standard approaches  
12 to wildlife mitigation developed by the United States Fish and Wildlife Service and the  
13 Oregon Department of Wildlife. The Hearings Officer correctly concluded that DCC  
14 18.113.070(D) does not require “one to one” mitigation of individual species; as urged by  
15 Gould. The requirements for a substantial financial contribution and concrete action by  
16 Thornburgh are spelled out in the agreements reviewed and approved by the Hearings  
17 Officer.

18                   **2.       Response to Second Assignment of Error**

19                   The record shows that Thornburgh offered additional mitigation specifically  
20 to address the potential impacts to Whychus Creek. There was substantial evidence in the  
21 record to support the Hearings Officer’s conclusion that the additional mitigation was  
22 adequate to assure that water temperatures in Whychus Creek would not be affected by the  
23 proposed development.

24                   **3.       Response to Third Assignment of Error**

25                   The wildlife mitigation plans reviewed by the Hearings Officer identify a  
26 clear path for wildlife mitigation, even though the specific location of off-site mitigation was  
27 impossible to identify. The plans list specific actions to be taken by Thornburgh and provide  
28 opportunities for compliance enforcement by the County. The plans are clear enough and

1 specific enough to satisfy County notice and hearing requirements, so that no future hearings  
2 on the plan will be required. Condition 38 assures that Thornburgh will implement the  
3 wildlife mitigation plans.

4 The fish mitigation plan is also sufficiently implemented through conditions,  
5 including Condition 10, Condition 38 and Condition 39. The Hearings Officer specifically  
6 addressed the adequacy of mitigation measures designed to address impacts to fish in  
7 Whychus Creek and the Deschutes River. Condition 39 is adequate to ensure the completion  
8 of the Three Sisters Irrigation District mitigation project in Whychus Creek.

9  
10 **4. Response to Fourth Assignment of Error**

11 The Hearings Officer addressed all of the specific issues raised by Gould in  
12 connection with fish mitigation. These include the consumptive use of groundwater, cool  
13 habitat patches, COID water and Whychus Creek.

14 **5. Response to Fifth Assignment of Error**

15 Gould's objection that there is a lack of specific information on (a) use and  
16 location of open space; (b) recreation facilities; (c) location of buildings; and (d) failure to  
17 describe all commercial uses is without merit. As the Hearings Officer correctly found,  
18 Thornburgh provided enough information on these issues.

19 **6. Response to Sixth Assignment of Error**

20 Gould's assignment of error is based on what was clearly a mistake on the part  
21 of the Hearings Officer – the use of “residential” in place of “recreational” in Condition 33D.  
22 Because Thornburgh's application addressed the proper criterion, the mistake provides no  
23 basis for remand.

24 **7. Response to Seventh Assignment of Error**

25 This assignment of error preserves an issue that has already been decided by  
26 the Oregon Court of Appeals for an appeal to the Oregon Supreme Court. It provides no  
27 basis for reversal or remand at this time.

1           **C.     Summary of Material Facts**

2                   **1.     The Subject Property**

3                   The challenged decision contains a description of the property:

4                   “The subject property comprises 1,970 acres of land located west of  
5                   Redmond, Oregon, on the south and west portions of a geologic feature  
6                   known as Cline Buttes. The property is bordered on three sides by [United  
7                   States Bureau of Land Management] BLM land, and is also in close proximity  
8                   to Eagle Crest, another destination resort development.

9                   “The subject properties are zoned Exclusive Farm Use (EFU-TRB). The  
10                  subject properties are also mapped within the Destination Resort (DR) overlay  
11                  zone for Deschutes County.” (R 11-12)

12                   **2.     The Development Proposal**

13                  The proposed development is adequately described in LUBA’s order in *Gould*  
14                  *v. Deschutes County*, 54 Or LUBA 205, 208-209, *rev’d in part and remanded*, 216 Or App  
15                  156, 171 P3d 1017 (2007).

16                   **3.     Procedural History**

17                  Thornburgh’s Conceptual Master Plan (CMP) application was approved by  
18                  the Deschutes County Board of County Commissioners (BOCC) on May 11, 2006. After an  
19                  appeal to LUBA and the Oregon Court of Appeals, the decision was remanded to the County,  
20                  which again approved the application on April 1, 2008, subject to three new conditions.  
21                  (R 2745-54). One of these, Condition 37, provides:

22                  “[Thornburgh] shall demonstrate compliance with DCC 18.113.070(D) by  
23                  submitting a wildlife mitigation plan to the County as part of its application  
24                  for Final master plan approval. The County shall consider the wildlife  
25                  mitigation plan at a public hearing with the same participatory rights as those  
26                  allowed in the CMP approval hearing.” (R 2754)

27                  Under the scheme established by Deschutes County Code (DCC)  
28                  18.113.040(B), the FMP must comply with the approved CMP and all conditions of approval  
29                  of the conditional use permit. As described in the challenged decision (R 12-13),  
30                  Thornburgh submitted an application for FMP approval on August 1, 2007. (R 2843-3133)  
31                  In response to the Court of Appeals’ decision requiring the public presentation of a wildlife  
32                  mitigation plan, Thornburgh submitted a modified application for FMP approval on April 21,  
33                  2008, which restarted the 150-day clock. (R 2465-2744)

1 The County gave notice of hearing on April 29, 2008. (R 2463) The first of  
2 two public hearings was held before the County Hearings Officer on June 17, 2008, at which  
3 both Thornburgh and resort opponents submitted additional evidence and comment (R 1794-  
4 2087). On July 7, 2008, the Hearings Officer sent the parties a memorandum requesting  
5 additional evidence and briefing in response to specific questions. (R 1764-66). Prior to the  
6 second hearing, on July 15, 2008, Thornburgh delivered a response to the questions  
7 (R 1217-29) and submitted additional rebuttal materials, which are listed at R 1230. (R 1230-  
8 1420). Gould's attorney delivered a Supplemental Memorandum (R 1421-29), accompanied  
9 by numerous exhibits (R 1430-56). Gould herself submitted substantial additional material  
10 to accompany her testimony. (R 1744-1760) The hearing was closed to public testimony on  
11 July 15, 2008.

12 In response to the direction of the Hearings Officer, Gould submitted  
13 additional material to the Hearings Officer on July 29, 2008, including a Second  
14 Supplemental Memorandum (R 781-839), and Thornburgh submitted rebuttal evidence on  
15 August 12, 2008. (R 347-770) Gould then contended that she was entitled to respond to  
16 "new evidence" contained in Thornburgh's rebuttal evidence. (R 332) With Thornburgh's  
17 acquiescence (R 326), the Hearings Officer issued an order permitting project opponents,  
18 including Gould, to submit additional evidence by August 28, 2008, and allowing  
19 Thornburgh to respond by September 11, 2008, with Thornburgh's final written argument  
20 due on September 18, 2008. (R 323-25). On August 28, 2008, Gould submitted a Third  
21 Supplemental Memorandum, with attachments. (R 279-311). Thornburgh responded with  
22 additional rebuttal evidence on September 11, 2008. (R 122-259)

23 Gould again requested permission to respond to "new evidence" (R 114), but  
24 this time, on September 26, 2008, the Hearings Officer refused permission. (R 41) By then,  
25 Thornburgh had already submitted its final argument, as required, on September 18, 2008.  
26 (R 43-113)



1 The Hearings Officer issued her decision on October 8, 2008. (R 11-40)  
2 Gould appealed the decision of the BOCC (R 4-8), but the BOCC decided not to hear the  
3 appeal. (R 3) This appeal followed.  
4

### 5 III. LUBA'S JURISDICTION

6 This appeal is subject to LUBA's jurisdiction under ORS 197.015(10) and  
7 ORS 197.825, because the challenged decision applied the County's land use regulations.

### 8 IV. ARGUMENT

#### 9 A. Background of Assignments of Error on Fish and Wildlife Resource 10 Issues

11 Gould includes a discussion that serves as a "pre-argument" to the first four  
12 assignments of error. It is not clear whether this is intended as a factual summary.  
13 Thornburgh presented its mitigation plan with two components, one addressing terrestrial  
14 wildlife and the other addressing fish. The first assignment of error and part of the third  
15 assignment of error focus on alleged deficiencies in the terrestrial wildlife mitigation plan.  
16 The second and fourth assignments of error and part of the third assignment of error focus on  
17 alleged deficiencies in the fish mitigation plan.

18 Gould states that Thornburgh will argue that there is substantial evidence to  
19 support the challenged decision, but maintains that she does not rely on issues of evidence or  
20 credibility of witnesses in making her assignments of error. Gould Petition for Review  
21 (GPR) 7. Yet most of the discussion that follows *is* about evidence: It is Gould's summary  
22 of the evidence related to wildlife resource issues and fish resource issues.

#### 23 B. Standard of Review

##### 24 a. Statutory Interpretation

25 Gould contends the Hearings Officer interpreted DCC 18.113.070(D) "in  
26 ways directly contrary to the Code language." (GPR 11) However, Gould's discussion of  
27 the applicable standard of review (GPR 11-12), makes no distinction between cases  
28 applicable to the interpretation of a hearings officer and cases applicable to the interpretation  
of a local governing body. Since the challenged decision was made by a hearings officer,

1 LUBA must determine if her interpretation of the DCC is “reasonable.” The weight that  
2 LUBA must accord local interpretations is “instructive rather than binding in nature.”  
3 *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988).  
4

5 The Hearings Officer must follow the approach to statutory construction taken  
6 in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified  
7 by ORS 174.020 and *State of Oregon v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). See  
8 *Glorybee Foods, Inc. v. City of Eugene*, 56 Or LUBA 729 (2008). The same approach must  
9 be taken to the construction of language in a County ordinance. *City of Hillsboro v. Housing*  
10 *Devel. Corp.*, 61 Or App 484, 489, 657 P2d 726 (1983). First, she must examine the text and  
11 the context of the ordinance and consider the legislative history of the ordinance. Second, if  
12 the meaning of the ordinance is not clear, she must apply “general maxims of statutory  
13 construction.” *PGE*, 317 Or at 612.

14 b. Substantial Evidence

15 As a review body, LUBA is authorized to reverse or remand the challenged  
16 decision if it is “not supported by substantial evidence in the whole record.” ORS  
17 197.835(9)(a)(C). Substantial evidence exists to support a finding of fact when the record,  
18 viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood*  
19 *River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence is conflicting, a  
20 review body should defer to the County's choice between conflicting evidence. *Mazeski v.*  
21 *Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995).

22 C. Response to First Assignment of Error

23 1. Thornburgh’s Wildlife Mitigation Plan

24 Thornburgh’s wildlife mitigation plan is presented in two documents:  
25 “Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort (WMP),” April 15,  
26 2008 (R 2609-33); and “Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh  
27 Destination Resort Project” (MM Plan), August 12, 2008 (R 416-32). In addition to these  
28

1 documents, Thornburgh submitted third-party documents describing and endorsing the plan,  
2 including the following:

- 3 a) Letter and emails from the Oregon Department of Fish and Wildlife (ODFW)  
4 (R 1800-05);
- 5 b) Letters and emails from the United States Department of the Interior, Bureau  
6 of Land Management (BLM) (R 415, 470);
- 7 c) A Memorandum from Lynn Sharp, a consultant at Tetra Tech EC, Inc. (Tetra  
8 Tech), to the Hearings Officer called "Response to Wildlife Mitigation Plan  
9 Questions 2-5 dated July 7, 2008 (R 1287);
- 10 d) An August 12, 2008 letter from Ms. Sharp, in question and answer format,  
11 addressing specific arguments raised by opponents (R 732-44);
- 12 e) Response by Ms. Sharp to Gould Third Supplemental Memorandum (R 126-  
13 33).

14 The WMP will be implemented in part on-site and in part off site, on BLM  
15 land. Its goal is to avoid a net loss in wildlife habitat value occurring within the resort  
16 boundary and an area within one mile of the resort property. (R 2610) The proposed  
17 development will include (1) 615 acres of managed grassland and juniper shrub-steppe (i.e.,  
18 golf course); (2) 426 acres of residential use; (3) 316 acres of resort facilities; (4) 45 acres of  
19 golf course water features, streams and lakes; (5) 568 acres in native condition. (R 2611-12).

20 ODFW suggested a habitat modeling approach that uses a modification of the  
21 USFWS Habitat Evaluation Procedures ("HEP") analysis. With ODFW's backing, this  
22 approach has been taken in connection with other Deschutes County destination resort  
23 approvals, including, most recently, Eagle Crest III. A full description of the habitat  
24 modeling approach is included at R 2612-14. As explained there, HEP is an accounting  
25 method that looks at conditions before and after development, using Habitat Units (HUs) as a  
26 measurement of habitat value. At the suggestion of ODFW, Thornburgh selected seven  
27 evaluation species, which were the same (with one exception) as those used in the Eagle  
28 Crest III HEP analysis. Then, as explained in the WMP, the HUs for each species were  
calculated (1) before development; (2) after development; and (3) after development and

1 mitigation. In order to compare the impacts of development and enhancement, Thornburgh's  
2 technical consultants, Tetra Tech EC, Inc. ("Tetra Tech") estimated Habitat Suitability  
3 Indices ("HSIs") for each species, sub-area (i.e., undeveloped, residential, facilities, golf  
4 course and lakes), and stage of development. The HSIs were multiplied by the acreages  
5 associated with the sub-areas to come up with HUs for each species. The pre- and post-  
6 development HSIs were determined collaboratively with ODFW, using best professional  
7 judgment. (R 2613)

8 The WMP includes a discussion of the mitigation techniques that will be  
9 implemented onsite and offsite. (R 2614-21) The onsite mitigation will reduce the loss of  
10 HUs to 6,414 onsite. Approximately 8,474 HUs (6,414 HUs onsite plus 2,060 HUs in the  
11 area within one mile offsite) must be mitigated through the offsite mitigation process. As  
12 explained at R 2620, the mitigation ratio for the property will be approximately 2.3 acres of  
13 mitigation per acre of habitat developed. As illustrated in the WMP, Table 2 (R 2623), the  
14 anticipated cost of mitigation will be a total of \$863,190, plus an additional \$20,000 for  
15 mitigation of traffic impacts, for a grand total of \$883,190 (in 2009 dollars). As described in  
16 the WMP (R 2621-22), the funding will be provided in phases to meet the no-net-loss and  
17 no-net degradation standard on the resort property. A property transfer fee shall be collected  
18 in perpetuity and used to fund ongoing mitigation. By making an annual report to Deschutes  
19 County, BLM and ODFW by December 31 of each year, Thornburgh can demonstrate  
20 compliance with the mitigation requirement. (R 2621-22) Condition 38 requires Thornburgh  
21 to follow the steps described in the WMP. (R 40)

22 The MM Plan complements the WMP by clarifying how offsite mitigation  
23 will be implemented on whatever BLM land is ultimately decided upon as the receiving site  
24 for mitigation. As explained, the object of the MM Plan is to:

25 "1) outline the methods that will be used to characterize existing habitat  
26 conditions in the area proposed for mitigation; 2) specify the types of habitat  
27 treatments used to enhance habitat for wildlife, and 3) develop a monitoring  
28 plan that will monitor the effectiveness of the habitat treatments through either  
direct or indirect means. The methods used in this Plan have been structured  
such that they could be applicable to any parcel of land within the Cline

1 Buttes Recreation Area (CBRA) that the BLM is suitable for mitigation once  
2 the [Cline Buttes Recreation Area Plan] CBRAP has been finalized.” (R 418)

3 The MM Plan provides a clear path for successful mitigation even though,  
4 because the CBRAP still has not been finalized, it is not yet possible to identify the exact site  
5 where mitigation will occur. The MM Plan does not substitute BLM priorities for those of  
6 the County as expressed through the WMP. Rather, it acknowledges the effect the BLM  
7 priorities will have on the sites on which mitigation will occur. Because offsite mitigation  
8 will occur on BLM land, it is essential that the BLM approve of that mitigation.

9 The August 12, 2008 letter from Molly M. Brown, BLM Field Manager for  
10 the Deschutes Resource Area indicates that the proposed mitigation “would meet the wildlife  
11 and habitat resource objectives of the UDRMP, and would help to ensure successful  
12 implementation of the CBRAP.” (R 415) Better yet, the BLM “anticipates the possibility  
13 that any support of funding provided for mitigation actions [i.e., Thornburgh’s contribution  
14 to mitigation] may be used as a match for additional grant funding, to allow larger scale  
15 benefits for public land management in the area.” Id. These benefits would be in addition to  
16 the mitigation required of Thornburgh by DCC 18.113.070(D). Three areas are identified for  
17 possible mitigation: The Maston Allotment (Primary Wildlife Emphasis Area), Canyons  
18 Region (Secondary Wildlife Emphasis Area); and the Deep Canyon Region (General  
19 Wildlife Emphasis Area). (R 420)

20 Consistent with the WMP, a baseline survey will be conducted to select the  
21 appropriate treatments within the area chosen for mitigation. The general methods used to  
22 collect baseline habitat conditions will follow methods used by the BLM to perform  
23 Ecological Site Inventory assessments but will be altered, based on site-specific conditions.  
24 (R 420) This will be a substantial effort: Thornburgh has submitted an example of such an  
25 Ecological Site Inventory. (R 475-601)

26 Then the mitigation techniques described in Section 4.0 of the MM Plan  
27 (R 421-30), which are consistent with the less specific discussion of approaches discussed in  
28 the WMP, will be selectively employed. Finally, an annual monitoring plan, as described in

1 Section 5.0 of the MM Plan (R 430-31), will be implemented to determine the effectiveness of  
2 the habitat treatments and to monitor progress. "Adaptive management," as defined in the  
3 MM Plan (R 430), will be used to ensure the desired outcomes are reached. In layperson's  
4 terms, this means that if a particular strategy requires amendment because of unsatisfactory  
5 results, the strategy will be amended until it works.

6  
7 **2. Response to Gould's Complaints about the Wildlife Mitigation Plan**

8 Gould complains that in applying DCC 18.113.070(D), which is a criterion for  
9 CMP approval, the Hearings Officer "failed to examine the actual language of the standards"  
10 and "interpreted the standards in ways directly contrary to the Code language." (GPR 11)  
11 DCC 18.113.070(D) states:

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

14 The Hearings Officer carefully set forth the arguments made by Thornburgh  
15 and by Gould and other opponents as to the interpretation and application of  
16 DCC 18.113.070(D). (R 29) She then interpreted the standard to require "an analysis of  
17 species on the site, the likely impacts of development, and [Thornburgh's] plan to address  
18 those impacts." (Id.) She specifically disagreed with Gould that the standard "requires that  
19 each species be maintained or replaced with an equivalent species on a 1:1 or better ratio."  
20 That is because "such a standard would be difficult, if not impossible to satisfy." (Id.)

21 The Hearings Officer's interpretation is consistent with the text of  
22 DCC 18.113.070(D), which requires that "any negative impact on fish and wildlife resources  
23 will be completely mitigated" and then describes what is meant by complete mitigation, i.e.,  
24 that there will be "no net loss or net degradation of the resource." The standard applies to  
25 fish and wildlife resources in the aggregate, not to individual species. The words "*net* loss or  
26 *net* degradation" indicate that an applicant should assess the overall impacts to fish and  
27 wildlife resources and provide mitigation to ensure that there is no net loss to those resources  
28 as a whole, not that the applicant must meet the "no net loss" standard for each individual

1 fish and wildlife species that may be impacted. The strict species-by-species standard  
2 advocated by Gould, as noted by the Hearings Officer, may very well be “impossible to  
3 satisfy.” (Rec. 29-30) It is also unclear where the study of individual species and the effort to  
4 preserve them at a 1:1 ratio would or could end, whether with mammals, birds, amphibians,  
5 or primitive organisms. To interpret the standard as Gould wishes would not be reasonable.

6 Thornburgh agrees that any negative impacts must be completely mitigated,  
7 but disagrees with Gould’s assertion that “the resource” for which no net loss must be shown  
8 is each individual species or habitat location that may be impacted. There is no textual basis  
9 for interpreting the standard to apply to specific species or habitat locations. Rather, “the  
10 resource” for which mitigation must be provided is the fish resource or wildlife resource in  
11 general.

12 This is the only possible interpretation consistent with past practices of the  
13 ODFW in reviewing and recommending mitigation plans in connection with  
14 DCC 18.113.070(D). In a February 5, 2008 letter to County planner Ruth Wahl, ODFW  
15 Wildlife Habitat Biologist Glenn Ardt stated:

16 “Thornburgh is currently putting information together that will enable ODFW  
17 to help Thornburgh assess potential fish and wildlife impacts caused by  
18 development of the destination resort. Once the assessments are complete,  
19 ODFW will help Thornburgh develop or refine mitigation measures that  
20 should meet the intent of the Deschutes County Code [DCC 18.113.070(D)].”  
(R 2770)

21 In a letter dated June 13, 2008, ODFW commented:

22 “The wildlife habitat impact assessment (WHIA) submitted by the Resort  
23 [Thornburgh] in their Final Master Plan is the most complete WHIA  
24 conducted for the siting of a destination resort in central Oregon. ODFW  
25 recommended the Resort use a modified Habitat Evaluation Procedures (HEP)  
26 methodology to assess projected impacts on the wildlife resource. ODFW has  
27 recommended the use of a modified HEP to all proposed destination resort  
28 sitings in Central Oregon since 1994.” (R 1801-02)

29 In a subsequent email, dated June 16, 2008, Steven George, Deschutes District  
30 Wildlife Biologist at ODFW commented further: “[T]he wildlife habitat mitigation plan, if  
31 followed as outlined, should address the mitigation requirements for Deschutes County.”  
32 (R 1804) Mr. Ardt supplemented that comment in a June 17, 2008 email, in which he stated:

1       “The intent of the wildlife mitigation section was to point out that  
2       implementation of the mitigation plan, if followed as outlined, should address  
3       the mitigation requirements for Deschutes County. Likewise, the plan is  
4       conceptual until implemented, yet there are checks in the plan to help assure

5       implementation will be implemented as intended.” (R 1800)ODFW and the  
6       BLM participated from the outset in working with Ms. Sharp, a biologist at Tetra Tech.<sup>1</sup>  
7       (R 1806-07) In her Memorandum dated July 15, 2008 to the Hearings Officer, Ms. Sharp  
8       explained the HEP methodology and provided a summary of the “iterative history of  
9       development of the mitigation plan.”<sup>2</sup> (R 1287-88) The summary shows ongoing  
10      coordination with ODFW and the BLM, beginning in September-October 2004 and  
11      continuing through April 2008, when the plan was submitted.

12             The Hearings Officer’s interpretation is also consistent with the past practice  
13      of Deschutes County in approving wildlife mitigation plans submitted in response to  
14      DCC 18.113.070(D). As Mr. Ardt explained in a letter to resort developer Kameron  
15      DeLashmutt:

16             “Deschutes County relies on ODFW’s review of Thornburgh’s fish and  
17      wildlife mitigation plan relative to the plan’s adequacy of meeting the intent  
18      of the Deschutes County Code that ‘*Any negative impact on fish and wildlife  
19      resources will be completely mitigated so that there is no net loss or net  
20      degradation of the resource (DCC 18.113.070(D)).*’ (R 2785, emphasis in  
21      original)

22             To make the County’s past approach to wildlife mitigation clear, Thornburgh  
23      submitted relevant materials (wildlife studies and application approvals) from a number of  
24      previous County destination resort files. (R 602-731). They show a substantial, in some  
25      cases complete, reliance on ODFW and an approval of the HEP method of wildlife  
26      mitigation analysis (*See, e.g.,* R 621-22, 645-46, 673-74, 678). Given that ODFW is an  
27      impartial voice and is charged by OAR 635-415-0015 with making recommendations to local  
28      agencies regarding development activities for which mitigation for impacts to fish and  
29      wildlife habitat is authorized by land use regulations, the County’s reliance is appropriate.

30             

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31      <sup>1</sup> Ms Sharp’s resume is at R 1808-24.

32      <sup>2</sup> Ms. Sharp also described the collaboration with ODF in a June 17, 2008 letter to the Hearings Officer.  
33      (R 1806-07)



1  
2 Contrary to Gould's allegations (GPR 12-13), the Oregon Court of Appeals  
3 did not make the mitigation standard stricter in *Gould v. Deschutes County*, 216 Or App 150,  
4 171 P3d 1017 (2007). The court addressed the timing of the mitigation plan's presentation  
5 and noted that the County could not evaluate whether the plan would completely mitigate any  
6 negative impacts without a specific description of required mitigation measures. 216 Or App  
7 at 159-160.

8 The mitigation requirement must be interpreted in the context of other  
9 provisions regarding the development of destination resorts. To interpret the standard in the  
10 manner suggested by Gould would almost certainly prevent the development of destination  
11 resorts in the County. It would thwart the main purpose of the County's destination resort  
12 zone, which is "to provide for properly designed and sited destination resort facilities which  
13 enhance and diversity the recreational opportunities and the economy of Deschutes County."  
14 DCC 18.113.010(B). The Hearings Officer's interpretation is reasonable and correct given  
15 the existence of the Destination Resort Overlay in the County, the presence of DCC chapter  
16 18.113 in the DCC, the text and context of DCC 18.113.070(D) and the history of its  
17 application by the County.

18 Thornburgh responds to petitioner's specific arguments regarding the  
19 Hearings Officer's interpretation of DCC 18.113.070(D) as follows:

- 20 3. The standards do not use the term "overall" or suggest that all fish  
21 and wildlife resources can be lumped together to assess  
22 satisfaction of the standards.
- 23 4. The standards do not contemplate substitution of existing species  
24 with new species or providing mitigation to species other than the  
25 ones affected.
- 26 5. Mitigation cannot result in less than a 1:1 ratio.
- 27 6. The standard not satisfied by mere "improvement" of "habitat."

28 These all go to the same issue and have been addressed above. In spite of her  
statement that she will not do so (GPR 7), Gould argues the evidence to fault the Hearings  
Officer for not reaching the same conclusions she would reach. (GPR 15-16). In her July 7,

1 2008 memorandum to the parties, the Hearings Officer invited them to explain the actual  
2 meaning of the standard. (R 1765)

3 Thornburgh responded as follows:

4  
5 "Thornburgh understands 'the resources' to mean fish and wildlife resources  
6 as a whole. To 'completely mitigate,' a proper mitigation plan must avoid  
7 'net loss or net degradation of the resource,' meaning that while there may be  
8 some loss to one species or habitat location, it will be compensated for by an  
9 equivalent gain to another or others. The best way to achieve mitigation, and  
10 the way that has been approved by the County and the Oregon Department of  
11 Fish and Wildlife ('ODFW') in all previous destination resort applications, is  
12 to calculate damage to habitat as a result of development and then work on  
13 habitat improvement on- and off-site. This approach, which is standard in  
14 both federal and state mitigation plans, is intended to use habitat improvement  
15 to increase the opportunities for wildlife by an amount commensurate to the  
16 lost opportunities resulting from development. That way there will be no net  
17 loss or net degradation of the resource." (R 63)

18 The County's interpretation of DCC 18.113.070(D) has always relied on HEP  
19 analysis, which focuses on the entire fish and wildlife resource. Not only is this approach  
20 routinely recommended by ODFW, but it is also recommended by the United States Fish and  
21 Wildlife Service (USFWS). (R 472-74). The Hearings Officer carefully considered the  
22 arguments in opposition to and support of this approach, and agreed with Thornburgh.  
23 (R 33)

24 **7. A mere proposal to "contribute financially" or "to participate" in  
25 studies or programs does not constitute mitigation; there must be  
26 actual mitigation in the land or in the water.**

27 This contention ignores the existence of the concrete mitigation measures  
28 proposed by Thornburgh in its WMP (R 2609-2629), which the Hearings Officer  
summarized (R 30-31); and in its fish mitigation plan (described at R 30-38), which the  
Hearings Officer also summarized (R 32). The financial contributions and participation in  
studies or programs, such as thermal modeling, are a way to monitor the success of the  
mitigation measures taken and allow adjustments to assure success in the future. They are  
not a substitute or replacement for the other mitigation Thornburgh is obliged to complete.

1                   **8.     Funding habitat improvement work on federal land or ODFW**  
2                   **Mitigation Programs that the government was already going to do**  
3                   **cannot constitute mitigation.**

4                   Thornburgh's WMP divides mitigation activities into onsite activities  
5 (R 2615-19) and offsite activities (R 2619-21). Thornburgh is committed to providing  
6 \$863,190 (in 2009 dollars) for the implementation of wildlife habitat enhancement on lands  
7 within the Cline Buttes Planning Area, to mitigate Resort development impacts to existing  
8 wildlife values that occur within the property boundary and within one mile of the property  
9 boundary, plus an additional \$20,000 to compensate for increased traffic on Cline Falls  
10 Highway, for a total of \$883,190 (in 2009 dollars). (R 2621). These amounts were estimated  
11 and set forth in a detailed chart. (R 2623). Thornburgh repeatedly explained its  
12 contributions to wildlife mitigation. (See R 25-26).

13                   Thornburgh's fish mitigation also calls for specific measures, as detailed by  
14 the Hearings Officer (R 22), all of which will be paid for by Thornburgh.

15                   There is no evidence in the record to support Gould's contention (GPR 18),  
16 that Thornburgh's contributions will be for mitigation measures "that the government was  
17 going to do anyway."

18                   **9.     It is the County responsibility, not ODFW's or BLM's to interpret**  
19                   **the Code.**

20                   Neither ODFW nor BLM interpreted the DCC. As she was required to do, the  
21 Hearings Officer carefully and thoughtfully interpreted DCC 18.113.070(D). (R 29-30). She  
22 weighed the evidence presented by Thornburgh and by opponents, as well as the testimony of  
23 ODFW and the BLM, (R 30-35), before concluding that, "as conditioned,  
24 DCC 18.113.070(D) is satisfied." (R 35)

25                   **D.     Response to Second Assignment of Error**

26                   Gould's Second Assignment of Error relates to the "fish" component of the  
27 Thornburgh's fish and wildlife mitigation plans. The argument focuses on asserted water  
28 quality impacts to Whychus Creek and asserts the Hearings Officer's decision on the FMP  
must be reversed because, according to Gould, no water quality mitigation was proposed for

1 the water quality impact found by the Hearings Officer. (GPR 19) To the contrary, the  
2 record shows that Thornburgh offered additional mitigation specifically to address the  
3 potential impacts to Whychus Creek asserted through the public comment process, and there  
4 was substantial evidence from Thornburgh's experts to support the Hearings Officer's  
5 conclusion that the additional mitigation was adequate to assure that water temperatures in  
6 Whychus Creek would not be affected by the proposed development. (R 34)

7  
8 The basis for Gould's argument is testimony from a hydrogeologist, Mark  
9 Yinger, who concluded that Thornburgh's proposal to provide additional mitigation in  
10 Whychus Creek would affect water quality by increasing, rather than decreasing, temperature  
11 in Whychus Creek. (GPR 20) Gould asserts that Thornburgh failed to respond to this point  
12 in its final argument and rebuttal and that the additional mitigation offered by Thornburgh for  
13 Whychus Creek would address only the potential impacts to water quantity. In fact,  
14 Thornburgh addressed these issues directly, both in final argument and rebuttal evidence.  
15 Thornburgh first argued there would be no adverse impact to Whychus Creek as a result of  
16 its proposed ground water use. However, the record shows Thornburgh offered the  
17 additional mitigation project on Whychus Creek in the event that the Hearings Officer  
18 determined it was necessary "to meet the county approval standard." (R 378-79)  
19 Thornburgh made no distinction between potential water quality or water quantity benefits  
20 that may be derived from the additional mitigation. Thornburgh had previously provided  
21 rebuttal evidence of expert analysis concluding that any additional flow in Whychus Creek  
22 would have the effect of reducing stream temperature by providing dilution. Accordingly,  
23 there was substantial evidence in the whole record to support the Hearings Officer's  
24 conclusion that the additional mitigation action would assure that water temperatures in  
25 Whychus Creek were not adversely affected.

26 The starting point for evaluating the Hearings Officer's decision regarding the  
27 requirement for additional mitigation on Whychus Creek is an understanding of the nature  
28 and extent of the overall plan for mitigating potential fish impacts. This component of the

1 mitigation plan is comprised of two documents: 1) "Thornburgh Resort Fish and Wildlife  
2 Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on  
3 Fish Habitat", dated April 21, 2008 (R 2690-2744); and 2) a letter dated August 11, 2008 to  
4 the Hearings Officer that modified the original Addendum/Plan and included a proposal for  
5 the additional mitigation, if needed, on Whychus Creek. (R 378-79) At the first public  
6 hearing on the FMP and mitigation plan, Thornburgh submitted into the record a letter from  
7 ODFW confirming its determination that "providing the proposed mitigation outlined above  
8 [summarizing the original Thornburgh plan in the April 21 Addendum] should mitigate for  
9 potential impacts on springs and seeps and provide a net benefit to the resource." (R 899-  
10 901) The ODFW letter specifically addressed water quality concerns relating to temperature  
11 and concluded the plan would result in a net benefit for the resource. (R 901) The ODFW  
12 letter did not identify a need for any additional mitigation on Whychus Creek or elsewhere.  
13 (R 899-901) Therefore, the ODFW letter provides a sound basis upon which the Hearings  
14 Officer could determine that the mitigation plan was sufficient to meet the County's approval  
15 standard.

16  
17 During the public hearings, Gould alleged potential additional impacts to  
18 Whychus Creek that she argued were not otherwise addressed in the April Addendum  
19 describing Thornburgh's fish mitigation plan. In response, Thornburgh's experts, an  
20 interdisciplinary team from Tetra Tech, submitted a memorandum into the record that  
21 specifically responded to the asserted impacts on Whychus Creek. (R 1245-1248) In order to  
22 directly rebut information contained in the report prepared by Mark Yinger on behalf of the  
23 project opponents, Tetra Tech assumed the quantity of potential impact to Whychus Creek  
24 estimated in the Yinger Report – 106 acre-feet per year -- as the basis for this additional  
25 analysis. (R 1246, 1248) Tetra Tech concluded that the maximum potential impact on  
26 temperature would be an increase of less than 0.01° C. (R 1246) This slight potential for  
27 water quality/temperature impact was based on the assumed reduction of 106 acre-feet in  
28 quantity drawn from Yinger's conclusions and a "conservative assumption" that there would

1 be no additional water contributing to the flow in lower Whychus Creek other than the flow  
2 emanating from Alder Springs. (R 1246, 1248) Significantly, the report also states:

3  
4 “It should be noted that if there is flow in Whychus Creek that is not from  
5 Alder Springs, *whether warmer than Alder Springs or not*, the resulting  
6 increase in temperature at the mouth would be even less than the estimated  
7 maximum of 0.01° C determined in this analysis *because additional flow*  
8 *would provide dilution.*” (R 1248)(emphasis added).

9 The conclusions of Tetra Tech were supported by additional expert testimony  
10 of Newton Consultants, Inc. (NCI) in a letter submitted on behalf of Thornburgh. (R 1249-  
11 1286) Again, using Mr. Yinger’s estimate of a 0.15 cfs (106 acre-feet per year) asserted  
12 reduction in Alder Springs due to Thornburgh ground water use, NCI concluded the  
13 predicted resulting stream temperature would be virtually identical to previously measured  
14 temperature data. (R 1252) This expert analysis was augmented in the record by the practical  
15 experience of the Three Sisters Irrigation District Manager who submitted a letter explaining  
16 that the proposed conservation measures are part of an effort by the District “to restore and  
17 enhance stream flow” in Whychus Creek under the state’s Allocation of Conserved Water  
18 Program. (R 410) The letter explains that the district’s project will provide water for  
19 instream flow restoration by implementing water-saving conservation practices. As a result,  
20 natural flow waters in Whychus Creek that would otherwise have been diverted for irrigation  
21 purposes will remain instream, and will be protected as a state instream water right. (R 410)

22 With this body of evidence in the record, Thornburgh first argued that even  
23 assuming Mr. Yinger was correct in asserting a potential reduction of 106-acre feet of flow in  
24 Whychus Creek, there would be no adverse impact to the creek because the potential  
25 reduction would not result in a measurable or significant increase in water temperature that  
26 would affect water quality habitat for fish. (R 80, 88, 101, 378-79, 1248-53, 2141-49)  
27 However, to avoid being “caught short” if the Hearings Officer found a need for additional  
28 mitigation, Thornburgh offered to provide the additional 106 acre-feet of mitigation water in  
Whychus Creek through the conservation project. (R 378-79)

1 Gould now argues that the Applicant's proposal of additional mitigation to  
2 provide 106 acre-feet of instream flow specific to Whychus Creek was made solely for *water*  
3 *quantity* purposes , and therefore cannot be used to offset any perceived impact to *water*  
4 *quality*. Nothing in the Applicant's proposal regarding the Three Sisters Irrigation District  
5 project would suggest this narrow and limited purpose.  
6

7 Gould quotes from the letter submitted to the Hearings Officer by Applicant's  
8 attorneys as proposing the additional Whychus Creek mitigation water "only in terms of  
9 providing additional 'flow,' not water quality." (GPR 21) In fact, the letter states that it is  
10 intended to "respond to comments received during the public hearing process about the  
11 possible need for additional mitigation on Whychus Creek." (R 378) The letter notes that the  
12 "Yinger Report" indicates a potential annual reduction of 106 acre-feet of flow in Whychus  
13 Creek and re-affirms Thornburgh's strong disagreement with the contention "as described in  
14 detail in other materials we have submitted for the record." (R 379) However, the letter goes  
15 on to state that *if* the Hearings Officer determines additional mitigation is needed "for  
16 *possible impacts* to Whychus Creek," it would be feasible for Thornburgh to provide an  
17 additional 106 acre-feet of water per year in Whychus creek. (R 379)(emphasis added) The  
18 letter concludes, "If you are persuaded that additional mitigation is required in order to meet  
19 the county approval standard, Thornburgh can provide such mitigation by participating in the  
20 Three Sisters Irrigation District project." (R 379) Nothing in the letter suggests that the  
21 additional instream flow would be limited or used specifically for either water quality or  
22 quantity purposes; rather, it was offered by Thornburgh to address "possible impacts" to  
23 Whychus Creek and to assure compliance with the County standard.

24 The "other materials" Thornburgh previously submitted into the record -- the  
25 Tetra Tech memo and NCI letter -- directly addressed issues relating to both water quantity  
26 and quality, and recognized the interrelationship between the two. (R 1245-86) The two  
27 expert reports provided evidence that any potential increase in water temperature would be  
28 extremely slight, and the Tetra Tech memo confirms that any additional natural stream flow

1 above Alder Springs would further reduce any potential temperature impact. (R 1246, 1248,  
2 1252) Accordingly, there is no basis to suggest that the proposed mitigation measure could  
3 not be interpreted and required by the Hearings Officer to address perceived impacts to water  
4 quality.

5 Gould next argues that the proposed mitigation measure would exacerbate the  
6 perceived problem in Whychus creek by adding "warm surface water" or resulting in "hot  
7 water mixing" and that this contention was not rebutted by Thornburgh. (GPR 20-21) Gould  
8 is wrong on both counts. As described above, Thornburgh provided direct rebuttal in the  
9 form of the additional analysis by Tetra Tech, in which Tetra Tech demonstrates that  
10 providing any additional flow in Whychus Creek will, indeed, reduce water temperature.  
11 The argument therefore becomes simply an issue of conflicting evidence. Gould relies on  
12 hydro-geologist Mark Yinger, who concluded that the proposed Three Sisters mitigation  
13 project would be detrimental to fish, because the increased flow would consist of warmer  
14 water. (R 312) Thornburgh's expert, Tetra Tech, concluded that increasing natural stream  
15 flow in Whychus Creek would reduce, rather than increase, water temperatures because of  
16 the dilution effect. (R 1248) The Hearings Officer was entitled to choose between the  
17 conflicting evidence and the record supports her conclusion that providing additional flow  
18 through the Three Sisters project would assure that water temperatures in Whychus Creek are  
19 not affected by the proposed development. *See Molalla River Reserve v. Clackamas County*,  
20 42 Or LUBA 251, 268-269 (2002); (R 33-35) Accordingly, Gould's second assignment of  
21 error should be denied.

#### 22 **E. Response to Third Assignment of Error**

23 Gould maintains that Conditions 38 and 39 of the challenged decision are  
24 insufficient to assure compliance with DCC 18.113.070(D) because they: (a) do not require  
25 to be done what was identified in the findings as the basis for approval or feasibility; (b) fail  
26 to identify exactly what plans and documents they rely upon; (c) rely upon plans that contain  
27



1 provisions inconsistent with the DCC; and (d) fail to provide for any follow-up  
2 determinations by the County.<sup>3</sup> (GPR 22)

3 The Court of Appeals has stated:

4  
5 “We generally agree \* \* \* that specificity and clarity are desirable to ensure  
6 that the imposed conditions are properly understood not only by the entity  
7 responsible for complying with them but also by potential challengers of a  
8 permit subject to conditions. Adequate specificity and clarity promote the  
proper application of land use criteria and proper administration of the permit;  
conversely, they assist in avoiding unnecessary challenges to land use  
decisions.” *Sister Forest Planning Committee v. Deschutes County*, 198 Or  
App 311, 108 P3d 1175 (2005)

9 Conditions 38 and 39 easily meet this standard.

10 **1. Wildlife Resources Findings and Conditions of Approval**

11 **a. Mitigation on BLM Land**

12 The WMP and the MM Plan together address Gould’s concern that mitigation  
13 will not occur because the specific location for offsite mitigation has not been identified  
14 because the CBRAP has not been finalized. The WMP describes specific mitigation  
15 measures that will be implemented both onsite and offsite. (R 2615-21) Table 1 of the WMP  
16 shows the anticipated impacts on the seven indicator species used in the HEP analysis.  
17 (R 2614)

18 The MM Plan specifies the three areas where mitigation may occur: The  
19 Maston Allotment, the Canyons Region and the Deep Canyon region. (R 420) As described  
20 in the MM Plan and shown on Table 1 of the MM Plan (R 419), these areas are subject to

21  
22 <sup>3</sup> Conditions 38 and 39 are as follows:

23 “38. The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008  
24 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation  
25 efforts. Consistent with the plan, the applicant shall submit an annual report to the county  
26 detailing mitigation activities that have occurred over the previous year. The mitigation  
measures include removal of existing wells on the subject property, and coordination with  
ODFW to model stream temperatures in Wychus Creek.

27 “39. The applicant shall provide funding to complete a conservation project by the Three Sisters  
28 Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in  
stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement  
with the irrigation district detailing [a] funding agreement prior to completion of Phase A.”

1 different BLM guidelines. Consequently, a different approach must be taken depending on  
2 where mitigation actually occurs. The mitigation treatments will use an adaptive approach to  
3 vegetation management that is consistent with the procedures outlined in the draft CBRAP.

4 (R 421) This does not mean they are presently uncertain. As explained in the MM Plan:

5  
6 “The BLM’s Land Use Planning Handbook defines adaptive management as  
7 *‘a system of management practices based on clearly identified outcomes,*  
8 *monitoring to determine if management actions are meeting outcomes, and, if*  
9 *not, facilitating management changes that will best ensure that outcomes are*  
10 *met or to re-evaluate the outcomes.’” (R 421-22) (emphasis in original)*

11 The flexibility inherent in adaptive management does not mean the plan is  
12 unformed. The methodology is explained. (R 423-29) Mitigation will occur and success or  
13 failure will be monitored to determine if new strategies for management are appropriate.  
14 Mitigation on BLM land must be consistent with the BLM’s requirements, but that does not  
15 in any way impede consistency with DCC 18.113.070(D).

16 Essentially, Gould makes a substantial evidence complaint. In her view, the  
17 evidence provided by Thornburgh is not sufficient to support a finding that  
18 DCC 18.113.070(D) is met. However, there is certainly substantial evidence, in the form of  
19 the WMP and the MM Plan, in all of the explanatory written materials, and in the oral  
20 testimony at the June 17, 2008 and July 15, 2008 hearings to justify the Hearings Officer’s  
21 finding.

22 b. Agreements with BLM and ODFW

23 Condition 38 requires Thornburgh to comply with the April 2008 WMP, the  
24 August 2008 MM Plan and “agreements with the BLM and ODFW for management of off-  
25 site mitigation efforts.” (R 40) Gould objects that there are no enforceable agreements with  
26 the BLM and ODFW. The Hearings Officer appears to have been referring generally to  
27 understandings and agreements between the parties, but her finding of compliance with  
28 DCC 18.113.070(D) does not rest on such agreements.

As discussed above, the WMP and the MM Plan commit Thornburgh to make  
the necessary expenditures to achieve mitigation and contain other precise prescriptions that,

1 if followed, will ensure complete mitigation. The Memorandum of Understanding (R 2894-  
2 98), mentioned by Gould (GPR 25), was prepared prior to CMP approval and describes the  
3 ongoing work between the Thornburgh, the BLM and ODFW as of September 2005.

4 (R 2898) It is in no way inconsistent with the MM Plan. The BLM has made it clear that it  
5 desires mitigation on BLM land, in part because "any support of funding provided for  
6 mitigation actions may be used as a match for additional grant funding, to allow larger scale  
7 benefits for public land management in the area." (R 415)

8  
9 c. Future Compliance

10 Gould objects that there is no provision made for requiring future compliance  
11 in perpetuity and no showing that such mitigation is feasible. The objection is not clear. If  
12 Gould believes that there is no provision made for compliance with Condition 38 and its  
13 stated requirements, Gould is wrong. If Gould believes that there should be a demonstration  
14 *in perpetuity* that wildlife mitigation has met the requirements of DCC 18.113.070(D), Gould  
15 is also wrong. Because of changes in the environment and surrounding area that will  
16 continue to occur "in perpetuity," there would be no way for anyone to demonstrate that  
17 wildlife mitigation will succeed as long as time itself. However, the WMP (2621-23) and the  
18 MM Plan (R 430-31) provide for ongoing monitoring. A five-year monitoring program is a  
19 common monitoring for period many environmental monitoring studies. (R 430) The WMP  
20 provides for funding of mitigation efforts for as long as the development exists and for the  
21 preparation of an annual report to the County until mitigation is fully completed. (R 2622)  
22 Condition 38 requires compliance with the WMP and the MM Plan.

23 Gould's objections to "feasibility" are simply speculation as to the ways that  
24 the WMP and the MM Plan could fail. There is substantial evidence in the record to support  
25 the Hearings Officer's conclusion that they will not fail.

26 d. Inconsistencies

27 Gould objects that "Exhibit A to the April 2008 plan is a 2005 Wildlife Report  
28 which requires as mitigation that domestic livestock grazing be removed in the off-site

1 mitigation area.” (GPR 28) The Wildlife Report is Exhibit B. It is attached to the WMP as  
2 background. (R 2609) The statement Gould mentions is a stated assumption, not a  
3 commitment. (R 2651) Since the WMP and the MM Plan are more recent and clearly  
4 supersede the Wildlife Report, the statement is not objectionable. In her August 12, 2008  
5 responses to issues raised by resort opponents, Ms. Sharp specifically addressed grazing,  
6 explaining, “Permanent cessation of grazing on BLM lands off-site of the proposed project is  
7 not included in the mitigation plan.” (R 735)

8 Gould’s objection to the process by which specific areas for mitigation will  
9 occur is unfounded. As explained in the MM Plan, because the CBRAP is still not finalized,  
10 it is impossible to say exactly where, among the specified suitable alternatives, mitigation  
11 will occur. (R 418) The BLM will select a location that is consistent with the CBRAP.  
12 However, Thornburgh, the County, ODFW and BLM will meet annually to review and  
13 confirm that mitigation is being implemented as designed. (R 431) It is clear ODFW will  
14 not be excluded from the process.

15 e. Determination by the County

16 Gould objects the County will not be able to approve whatever BLM decides  
17 is adequate, etc. Once again, Thornburgh, the County, ODFW and BLM will meet annually  
18 to review and confirm that mitigation is being implemented as designed. (R 431) The WMP  
19 requires annual reporting by Thornburgh to the County, the BLM and ODFW by December  
20 31 of each year. (R 2622) It is clear the County will be a part of the process.

21 f. Opportunity to Comment

22 The public has already commented on Thornburgh’s wildlife mitigation plan  
23 at two public hearings. The plan is not “hypothetical.” It contains detailed requirements.  
24 Substantial evidence supports the Hearings Officer’s conclusion that the plan as proposed  
25 will satisfy DCC 18.113.070(D).  
26  
27  
28

1                   **2. Fish Resources Findings and Conditions of Approval**

2                   In Part B of the Third Assignment of Error, Gould contends the Hearings  
3                   Officer also failed to include adequate findings and conditions of approval relating to the fish  
4                   component of the mitigation plan. According to Gould, the only conditions of approval  
5                   related to fish mitigation are Condition 39 and the last sentence of Condition 38. (GPR 29)  
6                   Gould claims that the Hearings Officer “did not identify any fish mitigation plans or require  
7                   compliance with them in her conditions of approval.” (GPR 30) Gould is plainly wrong.  
8                   The first portion of Condition 38 – the portion not quoted by Gould – incorporates both fish  
9                   and wildlife mitigation requirements. Additionally, the Hearings Officer imposed Condition  
10                  10, which directs Thornburgh to provide documentation of compliance with Oregon Water  
11                  Resources Department (OWRD) water right mitigation requirements. One of the main  
12                  purposes of the OWRD mitigation is “to provide a net benefit for fish habitat” (R 2698) and  
13                  the Hearings Officer expressly identified this mitigation as the first component of  
14                  Thornburgh’s “fish mitigation plan.” (R 32)

15                  The Hearings Officer required compliance with “the April 2008 Wildlife  
16                  Mitigation Plan” and “the August 2008 Supplement” to that plan, (R 40) which include an  
17                  April 21, 2008 “Addendum Relating to Potential Impacts of Ground Water Withdrawals on  
18                  Fish Habitat” (R 2690-2744) and an August 11, 2008 modification to that Addendum.  
19                  (R 378-379) Thornburgh therefore must abide by the fish mitigation measures identified in  
20                  the April 2008 Addendum and the August 2008 modification to the Addendum. By requiring  
21                  compliance with the “April 2008 Wildlife Mitigation Plan” and the “August 2008  
22                  Supplement”, Condition 38 requires implementation of the following fish mitigation  
23                  measures, as described in the referenced documents: (1) compliance with OWRD flow  
24                  mitigation requirements; (2) use of the Big Falls Ranch water rights for OWRD mitigation to  
25                  provide additional cold water benefits to fish; (3) removal of two dams on Deep Canyon  
26                  Creek, per the Oregon Department of Fish and Wildlife’s (ODFW) request; (4) abandonment  
27                  of existing wells on the resort property; and (5) funding for an ODFW thermal modeling  
28                  project on Whychus Creek. (R 378, 2698-2700) Condition 39 imposed by the Hearings

1 Officer provides additional mitigation for Whychus Creek impacts. The Hearings Officer's  
2 conditions are therefore adequate to ensure that Thornburgh will provide fish mitigation.

3 Gould claims that the Hearings Officer "made no findings on water quality for  
4 the Deschutes River or on impacts to fish species in Whychus Creek and the Deschutes  
5 River." (GPR 30) To the contrary, the Hearings Officer specifically addressed the adequacy  
6 of mitigation measures designed to address impacts to fish in the Deschutes River and  
7 Whychus Creek. Her findings include a discussion of potential flow and temperature impacts  
8 and the measures designed to mitigate those impacts. (R 32-35) The impacts to flow and  
9 temperature in the Deschutes River are addressed by the requirement for Thornburgh to  
10 provide mitigation as required under the water right issued by the Oregon Water Resources  
11 Department (OWRD), the specific requirement for mitigation water to be provided from the  
12 Big Falls Ranch water rights on Deep Canyon Creek, and the removal of dams in Deep  
13 Canyon Creek. (R 32-34, 2698-2699) Likewise, the Hearings Officer made findings  
14 regarding potential impacts to Whychus Creek. (R 32, 34)

15 Although Gould argues otherwise, Condition 39 is adequate to ensure the  
16 completion of the Three Sisters Irrigation District mitigation project in Whychus Creek. The  
17 condition specifically requires Thornburgh to provide funding "to complete a conservation  
18 project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water" in  
19 Whychus Creek. (R 40) This condition of approval is not so "imprecise or hypothetical" as  
20 to be inadequate. *See Sisters Forest Planning Committee v. Deschutes County*, 198 Or App  
21 311, 319, 108 P3d 1175 (2005).

22 Gould next asserts that the Hearings Officer "provided no condition of  
23 approval actually requiring that the necessary water be returned to Deep Canyon Creek" and  
24 failed to require dam removal as a condition of approval. (GPR 31) As shown above, the  
25 Hearings Officer did, in fact, impose Condition 38 requiring compliance with the April and  
26 August fish mitigation plans as part of the Thornburgh's overall mitigation plan for fish and  
27 wildlife resources. Those plans, in turn, unequivocally state that Thornburgh will return the  
28

1 Big Falls Ranch water to Deep Canyon Creek and will remove two dams on the creek.  
2 (R 378, 2699) The condition of approval is adequate to ensure that water will actually be  
3 returned to Deep Canyon Creek and that the dams will be removed.  
4

5 Finally, Gould argues that the Hearings Officer should have imposed a  
6 condition of approval requiring Thornburgh to acquire mitigation water from the Central  
7 Oregon Irrigation District (COID). To the extent that COID water is needed to comply with  
8 OWRD mitigation requirements, Condition 10 requires Thornburgh to provide  
9 documentation that the mitigation water has been acquired for each individual phase of  
10 development. (R 36) Additionally, Condition 38 requires compliance with the fish mitigation  
11 plan, which provides that COID water will be used for Phases A and B of the resort  
12 development. (R 40) As for Gould's suggestion that the Hearings Officer was required to  
13 make a finding of feasibility regarding the future availability of COID mitigation water,  
14 LUBA put that issue to rest in *Gould v. Deschutes County*, 54 Or LUBA 205, 266-267  
15 (2007):

16 "We also agree with the county that even if it is obligated under  
17 DCC 18.113.070(K) to require that Thornburgh demonstrate that it is feasible  
18 for Thornburgh to secure the mitigation credits as they are needed, there is  
19 substantial evidence in the record to establish such feasibility....[W]hile  
20 Thornburgh may have to compete with these other entities at the time it seeks  
the mitigation credits that it will need to allow individual phases of  
Thornburgh Resort to go forward, there is no reason to believe that  
Thornburgh will not be able to purchase water rights directly from willing  
sellers or from banks that acquire such water rights and make the resulting  
mitigation credits available to willing purchasers."

21 For the reasons above, subpart B of Gould's third assignment of error should  
22 be denied.

23 **F. Response to Fourth Assignment of Error**

24 Gould asserts the Hearings Officer erred in failing to address specific issues  
25 raised by Gould regarding mitigation for fish resources. (GPR 32-35) This is not the case.  
26 The Hearings Officer's findings are adequate even though they do not address each and every  
27 aspect of Gould's evidence. If LUBA is able to determine that a reasonable decision maker  
28 would rely on the evidence the Hearings Officer chose to rely on, findings that specifically

1 address conflicting evidence are not required. *Tallman v. Clatsop County*, 47 Or LUBA 240,  
2 246-247 (2004); *Angel v City of Portland*, 22 Or. LUBA 649, 656-657 (1992) *aff'd* 113 Or  
3 App 169, 831 P2d 77 (1992).

4 Gould argues that the findings do not adequately address the following  
5 specific issues:

6 **1. Percentage of Consumptive Use**

7 Gould argues that the Hearings Officer did not address arguments that  
8 “consumptive use” of groundwater (as it relates to determining potential impacts of ground  
9 water use) should be calculated in the manner proposed by Gould and other project  
10 opponents in the hearings process. Gould incorrectly states that Thornburgh asserted that a  
11 60% consumptive use amount should be used, and argues the Hearings Officer should have  
12 used a 90% consumptive use amount, based on Gould’s own analysis. (GPR 32) In fact,  
13 Thornburgh argued that the Hearings Officer and County could and should rely on  
14 consumptive use findings made by Oregon Water Resources Department (OWRD) in  
15 connection with the process of approving Thornburgh’s water right application. (R 77-79,  
16 1250) The Hearings Officer did address Gould’s argument regarding consumptive use and  
17 expressly chose to rely on the OWRD analysis in determining the potential impacts to water  
18 quantity. (R 32-33) The Hearings Officer identified Gould’s argument as one of the  
19 opponents’ “main points” regarding impacts to fish and wildlife. (R 32) Nevertheless, upon  
20 considering the parties’ evidence regarding consumptive use, the Hearings Officer concluded  
21 that “[t]he OWRD mitigation requirement adequately addresses water quantity” impacts.  
22 (R 34)

23 The record contains sufficient evidence for a reasonable decision maker to  
24 find that the OWRD mitigation requirement, with its underlying consumptive use factor, is  
25 adequate to completely mitigate for water quantity impacts under DCC 18.113.070(D).  
26 (R 77-79, 408, 2146) Thornburgh’s expert specifically responded to Gould’s argument that  
27 sewer water will not recharge the aquifer by showing that the DEQ sewer permit expressly  
28



1 “allows for effluent to seep into the ground” and thus to recharge the aquifer. (R 391) OWRD  
2 staff also testified regarding the basis for the department’s consumptive use factors. (R 380-  
3 381) The Hearings Officer found that Thornburgh’s water rights “were granted upon a  
4 finding [by OWRD] that the applicant was responsible for providing 1,356 acre-feet of  
5 mitigation water” and that the mitigation water would be obtained from Big Falls Ranch and  
6 the Central Oregon Irrigation District. (R 32) These findings are based on the mitigation plan  
7 supported by Thornburgh’s experts. (R 2694-2697) Given the substantial evidence relied  
8 upon by the Hearings Officer, it was not necessary to make findings addressing all of the  
9 conflicting expert testimony regarding consumptive use and sewer recharge. *Tallman v.*  
10 *Clatsop County*, 47 Or LUBA 240, 246-247 (2004).

## 11 2. Cool Habitat Patches

12 Gould claims that Thornburgh “never provided a response” to the cool patch  
13 habitat issue raised by Gould’s expert. (GPR 34) The record clearly shows that Thornburgh  
14 did, in fact, respond to the issue. (R 97, 101, 106-107, 899-901) This is not an instance in  
15 which Gould presented un-rebutted expert testimony that was ignored by both Thornburgh  
16 and the Hearings Officer, as occurred in the case of *Central Oregon Landwatch v. Deschutes*  
17 *County*, 53 Or LUBA 290, 313 (2007), cited by Gould. Rather, this is another issue for  
18 which the parties presented conflicting expert testimony. The Hearings Officer relied upon  
19 substantial evidence in the whole record in concluding that Thornburgh’s mitigation plans  
20 would provide complete mitigation under DCC 18.113.070(D) and, therefore, her findings  
21 were not required to address all of the parties’ conflicting testimony regarding temperature  
22 impacts. *Tallman v. Clatsop County*, 47 Or LUBA 240, 246-247 (2004). Further, as  
23 described above, a substantial component of Thornburgh’s fish mitigation plan was designed  
24 to address the potential impacts to seeps and springs that contribute to such so-called “cool  
25 patches.” (R 899-901, 1251, 2135-2139, 2698-2700) The proposal for using the Big Falls  
26 Ranch water rights as a key component of the original fish mitigation plan was included to  
27  
28

1 address ODFW concerns about the need to provide cooler water habitat and was deemed by  
2 ODFW to be adequate for that purpose. (R 899-901)

### 3                   **3.       COID Water**

4               Gould next claims that the Hearings Officer did not address Petitioner's  
5 arguments regarding the availability of water from COID. In fact, the County previously  
6 made a finding of feasibility concerning the COID water in its decision approving  
7 Thornburgh's Conceptual Master Plan. LUBA upheld that finding of feasibility in *Gould v.*  
8 *Deschutes County*, 54 Or LUBA 205, 266-267 (2007):

9               "We also agree with the county that even if it is obligated under  
10 DCC 18.113.070(K) to require that Thornburgh demonstrate that it is feasible  
11 for Thornburgh to secure the mitigation credits as they are needed, there is  
substantial evidence in the record to establish such feasibility."

12 The feasibility determination is *res judicata* and Gould has no basis for demanding that the  
13 Hearings Officer revisit the issue.

14               As for the related conditions of approval, they are adequate to ensure that  
15 Thornburgh will obtain the proposed mitigation water from COID. Condition 10 requires  
16 Thornburgh to provide documentation that the required mitigation water has been acquired  
17 for each individual phase of development (R 36) and Condition 38 requires compliance with  
18 the fish mitigation plan, which states that Thornburgh will use the COID mitigation water for  
19 Phases A and B of the resort development. (R 40)

### 20                   **4.       Whychus Creek**

21               As discussed in Thornburgh's response to Gould's second assignment of  
22 error, Thornburgh responded to Gould's "warm water" argument, (R 108-109), and the  
23 Hearings Officer made a reasonable choice between conflicting evidence regarding the issue.

### 24                   **G.       Response to Fifth Assignment of Error**

25               Gould objects that Thornburgh failed to provide specific information on the  
26 proposed development as required by the DCC.

1                   **1.      Use and Location of Open Space**

2                   As required by DCC 18.113.090(A), Thornburgh provided a graphic showing  
3                   the use, location and size of open space, showing Common Area Open Space, Lake and Golf  
4                   Open Space, and Buffer Open Space. (R 1232) Thornburgh explained that Common Area  
5                   Open Space is the same as natural open space. (R 1217-18) Thornburgh also provided a  
6                   rough graphic showing the refinements in the open space designation in the FMP as  
7                   compared to the CMP. (R 770) (*See also* R 45-47, discussing compliance with  
8                   DCC 18.113.090(A).) The Hearings Officer properly concluded this was sufficient. (R 15)

9                   **2.      Recreation Facilities**

10                  In addition to furnishing lists of proposed recreational facilities (R 2500,  
11                  2879), Thornburgh explained:

12                  “The common areas within the resort will include the common open space  
13                  areas (i.e., those that do not alter the existing or natural landscape, except as  
14                  permitted by DCC 18.113.030(E)). Common areas within the resort will also  
15                  include many of the amenities and facilities listed in the Amenities  
16                  Description attached as revised Ex. A8d [R 2879]: the community center,  
17                  amphitheater, game rooms, libraries, stables and equestrian facilities,  
18                  swimming pools, sports fields, vista view points and a cultural and  
19                  interpretive center. These amenities will be located in the areas depicted as  
20                  “visitor oriented” and “recreational” on the revised Master Development Plan,  
21                  FMP, Ex. A3.1[R 2495].” (R 47)

22                  **3.      Failure to Show Buildings**

23                  The precise boundaries of each specific use, the use and location of buildings,  
24                  the building elevations and the size and floor area of commercial uses are all details that are  
25                  properly dealt with during site plan review, which is the next stage of destination resort  
26                  approval. DCC 18.113.040(C). (R 47-48) DCC 18.113.040 states, “Each element or  
27                  development phase of the destination resort must receive additional approval through the  
28                  required site plan review (DCC 18.124) or subdivision process (DCC Title 17).” Under  
29                  DCC 18.124.040(D), a site plan must indicate the following: (1) Access to site from adjacent  
30                  rights of way, streets and arterial; (2) Parking and circulation areas; (3) Location, dimensions  
31                  (height and bulk) and design of buildings and signs; (4) Orientation of windows and doors;  
32                  (5) Entrances and exits; (6) Private and shared outdoor recreation spaces; (7) Pedestrian

1 circulation; (8) Public play areas; (9) Service areas for uses such as mail delivery, trash  
2 disposal, above ground utilities, loading and delivery; (10) Areas to be landscaped; (11)  
3 Exterior lighting; (12) Special provisions for disabled persons; (13) Existing topography of  
4 the site at intervals appropriate to the site, but in no case having a contour interval greater  
5 than 10 feet; (14) Signs; (15) Public improvements; (16) Drain field locations; (17) Bicycle  
6 parking facilities, with location of racks, signage, lighting, and showing the design of the  
7 shelter for long term parking facilities; (18) Any required bicycle commuter facilities; (19)  
8 Other site elements and information which will assist in the evaluation of site development.  
9 From the detailed list of requirements in DCC 18.124.040, it is clear that less precision is  
10 required at the FMP approval stage.

11 Showing the location of uses by category, as is done in FMP, Ex. 1, A.3  
12 (R 2872), and providing a list of recreational amenities, as is done in FMP, Ex. 5, A.8.d.1  
13 (R 2915), is consistent with this approach. The recreational structures will be located in the  
14 areas depicted as "recreational" on the revised Master Development Plan. (R 307)

#### 15 **4. Failure to Describe All Commercial Uses**

16 As Gould acknowledges (GPR 37), Thornburgh provided a list of potential  
17 commercial uses and overall square footage estimates. (R 2498) Given an uncertain  
18 economy and the likelihood of subsequent changes, it is impossible and pointless to do more  
19 at the FMP stage.

#### 20 **5. Conclusion**

21 Thornburgh provided a reasonable amount of detail in response to  
22 DCC 18.113.090(B). The Hearings Officer interpretation and application of this requirement  
23 was reasonable.

#### 24 **H. Response to Sixth Assignment of Error**

25 Gould objects that the Hearings Officer failed to comply with ORS  
26 197.445(3), which requires that one-third of the \$7 million (in 1984 dollars) be spent on  
27 recreational facilities.  
28

1 The Hearings Officer inadvertently substituted the word "residential" for  
2 "recreational" in Condition 33D. (R 39) All of Thornburgh's submissions addressed the  
3 proper standard, which is stated as Condition 33 in the CMP approval and carried forward by  
4 the FMP approval. (R 2862, 2487) The Hearings Officer's error does not justify remand.

5  
6 **I. Response to Seventh Assignment of Error**

7 Gould objects that the Hearings Officer erred in considering CMP  
8 18.113.070(D) together with the FMP application. The Hearings Officer followed the  
9 direction in Condition 37 of the BOCC's April 1, 2008 CMP approval decision.

10 This objection has been addressed by LUBA (*Gould v. Deschutes County*,  
11 \_\_\_ Or LUBA \_\_\_ (LUBA No. 2008-068, September 11, 2008)) and the Court of Appeals  
12 (*Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009)), both of whom affirmed  
13 the County. It is now the subject of an appeal to the Oregon Supreme Court (Supreme Court  
14 No. 5057541).

15 **V. CONCLUSION**

16 Gould's assignments of error should be denied. Thornburgh asks respectfully  
17 that LUBA affirm the County's decision.

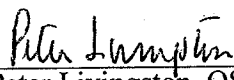
18 DATED this 20 day of July, 2009.

19  
20 SCHWABE, WILLIAMSON & WYATT, P.C.

21 By: Peter Livingston  
22 Peter Livingston, OSB # 823244  
23 Of Attorneys for Intervenor-Respondent  
24  
25  
26  
27  
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1  
2  
3 **CERTIFICATE OF FILING**

4 I hereby certify that I filed the original of the INTERVENOR-  
5 RESPONDENT'S RESPONSE BRIEF, together with four (4) copies thereof, with the Land  
6 Use Board of Appeals, Public Utility Commission Building, 550 Capitol Street NE, Salem,  
7 OR 97310-2552, on July 20, 2009, by first class mail, postage prepaid, to the Board at the  
8 above address.

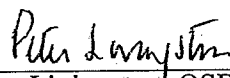
9   
Peter Livingston, OSB # 823244  
Of Attorneys for Intervenor-Respondent

10  
11  
12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on July 20, 2009, I served a true and correct copy of this  
14 INTERVENOR-RESPONDENT'S RESPONSE BRIEF on the persons listed below by first  
15 class mail, postage prepaid:

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