



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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STAFF REPORT

The Deschutes County Hearings Officer will hold a Public Hearing on October 20, 2015 at 2:00 p.m. in the Barnes and Sawyer Rooms of the Deschutes Services Center, located at 1300 NW Wall Street in Bend, to consider the following request:

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: 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:** 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 App 150, 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). TRC appealed 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. (A158835).

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.

III. CONCLUSIONARY FINDINGS:

SCOPE OF PROCEEDINGS ON REMAND

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

1. Chapter 22.34, Proceedings on Remand

a. 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.

b. 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.

c. 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.

d. 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. Staff summarizes and includes as an attachment, the applicant's remand burden of proof.

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."

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 findings regarding fish mitigation; and rejected her challenge to the sufficiency of the evidence concerning "cool patches" in the Deschutes River basin.

Court of Appeals Petition for Judicial Review

Gould petitioned the Court of Appeals for judicial review. She asserted three assignments of error, contending that LUBA's order is unlawful in substance because (1) LUBA misinterpreted DCC 18.113.070(D); (2) LUBA erroneously determined that the conditions of approval are sufficient to identify and require fish mitigation; and (3) LUBA erred in determining that the Hearings Officer's findings regarding mitigation of fish resources were adequate.

Thornburgh cross-petitioned, arguing that LUBA erred by concluding that Thornburgh's mitigation plan was not specific enough to satisfy the standard described by this court in Gould II.

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

LUBA sustained Gould's assignments of error concerning the adequacy of Thornburgh's Terrestrial WMP and M&M Plan. Regarding Thornburgh's plan to restore 4,501 acres of juniper woodlands on BLM land, LUBA found that 'the no net loss' standard [has] not yet been determined, and will not be determined until a future date at which [Gould] may or may not have any right to comment on the adequacy of the proposed mitigation. LUBA did 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. We also do not know what particular mix of restoration techniques will be provided to those 4,501 acres. [Gould] has a right to confront the mitigation plan that Thornburgh intends to rely on to comply with DCC 18.113.070(D).

Without specific identification of the acres where restoration will occur, LUBA noted, one cannot assess the existing habitat and its value, know the particular mix of restoration techniques to be used, or determine the post-restoration habitat value. In light of those uncertainties, we cannot conclude that LUBA erred in exercising its review authority and concluding that Thornburgh's proposed mitigation efforts are not likely and reasonably certain to result in compliance with DCC 18.113.070(D).

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.

Attachments (2 through 8 are available on the Deschutes County website due to volume):

1. Applicant's Remand Burden of Proof
2. Court of Appeals Decision A143430
3. Final Master Plan Court of Appeals TRC Brief
4. Final Master Plan Gould TRC Brief
5. LUBA Decision No. 2008-203
6. Final Master Plan LUBA TRC Brief
7. Final Master Plan LUBA Gould Brief
8. County FMP Record on LUBA Appeal (Volumes 1-7)

Dated this 14th day of October, 2015

Mailed this 14th day of October, 2015

BEFORE THE HEARINGS OFFICER FOR DESCHUTES COUNTY

File Numbers: 247-15-000529-A/M-07-2/MA-08-6

Applicant: Central Land and Cattle Company, LLC

Application: Review on remand of Final Master Plan

Submitted by: Liz Fancher (Attorney for Applicant)
644 NW Broadway Street
Bend, Oregon 97701
541-385-3067 (telephone)
liz@lizfancher.com

Subject Properties: Assessor's Map 15-12-00, Tax Lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900 and 8000

REMAND OF FINAL MASTER PLAN FOR THORNBURGH RESORT APPLICANT'S SUMMARY OF REMAINING ISSUES

I. BACKGROUND

Thornburgh Resort Company, LLC obtained approval of a Conceptual Master Plan for the Thornburgh Resort from Deschutes County on May 11, 2006 in File No. CU-05-20. This approval was appealed to LUBA in *Gould v. Deschutes County*, 54 Or LUBA 205 (2006)(*Gould I*) and the Oregon Court of Appeals in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (*Gould II*) and the CMP was remanded to Deschutes County. On April 9, 2008, the County issued a revised approval which was appealed to and affirmed by LUBA in *Gould v. Deschutes County*, 57 Or LUBA 403 (2008)(*Gould III*) and by the Oregon Court of Appeals in *Gould v. Deschutes County*, Or App 601, 206 P3d 1106, *rev den*, 347 Or 258, 218 P3d 540(2009)(*Gould IV*). The County's 2008 approval found that Thornburgh's wildlife plan complied with DCC 113.070(D) and its "no net loss" standard and imposed Condition of Approval 38 which is the condition that is the basis of Gould's primary unresolved objections to approval of the FMP. Condition of Approval 38 requires:

"Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for Final Master Plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing."

In August 2007, Thornburgh Resort Company, LLC applied for approval of the Final Master Plan (FMP) in M-07-2. Rec. 2843. After this application was filed, it was modified by MA-08-6. On October 8, 2008, after LUBA's decision in *Gould III*, the County approved the FMP. That approval was appealed to LUBA by Gould and Thornburgh Resort Company, LLC in *Gould v. Deschutes County*, 59 Or LUBA 435 (2009)(*Gould V*) and *Gould v. Deschutes County*, 233 Or App 623 (2009)(*Gould VI*). On August 17, 2010, LUBA remanded the FMP to Deschutes County. On August 11, 2011, Thornburgh Resort Company LLC requested that the County proceed to decide

the FMP on remand. A copy of the e-mail request is included as **Exhibit A** of this document. The County advised Thornburgh that it should file an application form and filing fee but neither is required by ORS 215.435(1) to initiate a review on remand. On September 25, 2015, Central Oregon Land and Cattle Company, LCC again requested, as successor in interest to Thornburgh Resort Company, LLC, that the County make a decision on remand. That request is identified by Deschutes County as 247-15-000529-A.

II. SCOPE OF REVIEW

The scope of review of the application on remand is set out in DCC 22.34.040. Review by the hearings officer is limited to those issues that the Court of Appeals required to be addressed. If additional testimony is required to comply with the remand, parties may raise new, unresolved issues that relate to new evidence directed to the issue on remand. Other issues resolved on appeal or that were not appealed are deemed waived and may not be reopened.

III. PARTIES TO REMAND

Only persons who were parties to the proceedings before the County are entitled to participate in the hearing on remand. DCC 22.34.030.

IV. ISSUES ON REMAND

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

V. 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.

VI. ISSUE #2 – CORRECTION OF FINDINGS RE WHYCHUS CREEK MITIGATION

LUBA's Decision

The hearings officer, in Condition 39 of the FMP, required that Thornburgh provide funding to complete a conservation project by Three Sisters Irrigation District to restore 106 acre-feet of instream water to Whychus Creek to mitigate a potential increase in stream temperatures in Whychus Creek. LUBA remanded the decision to the County for “addition[al] 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.” *Gould V* at 457. Specifically, LUBA faulted the hearings officer for failing to recognize or to address conflicting testimony about the efficacy of relying on mitigation water from Three Sisters Irrigation to address this issue.

Action to Address Remand Issue

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.

Consumptive Use Issue Resolved by LUBA

Consumptive use is the amount of water pumped from groundwater that is used and that does not return to the aquifer. It is expressed as a percentage of the total water right granted. In the Deschutes River basin, all persons granted groundwater rights must mitigate for all impacts caused by their projected consumptive use of water in order to obtain a water rights permit. Consumptive use was used by experts for the applicant and opponents to estimate the potential impacts of groundwater pumping to springs, creeks and rivers and to develop mitigation plans that meet the “no net loss” to wildlife resources requirement of DCC 18.113.070(D).

OWRD approved a water rights permit and mitigation program for Thornburgh that was based on a consumptive use figure of 1,356 acre feet of water. This figure is 63.69% of the total groundwater right of 2129 acre feet obtained by Thornburgh. Thornburgh’s experts and ODFW used the figure of 1,356 acre feet of consumptive use to determine the mitigation required by the Thornburgh wildlife mitigation plans. Rec. 900, 1240, 1284, 1251, 2694. This figure is the equivalent of 1.87 cubic feet per second, the figure ODFW used when it approved Thornburgh’s mitigation plans and found that they met the County’s requirement of “no net loss” to wildlife resources. Rec. 2098-2100.

Experts for opponents, Yinger and NWLW used a figure of 2,355 acre feet (3.25 cfs) of consumptive use to project the Resort’s mitigation obligations (Rec. 1500-1501, 1530). This figure is higher than the total amount of the water right (2,129 acre feet) granted to Thornburgh by OWRD. Rec. 1239, 2723. Yinger understood that the actual volume of water authorized to be withdrawn was 2,129 acre feet “and of this amount 1,356 acre feet must be mitigated for impacts to streamflow” but he chose to use 2,355 acre feet to project the groundwater impacts and mitigation obligations of the Thornburgh Resort. Rec. 1180. The effect of Yinger’s refusal to use the correct figures was to overstate Thornburgh’s potential impacts

and mitigation obligation by 73.67%¹ over the 1.87 cubic feet per second (1,356 acre feet) as used in ODFW's assessment of impacts. Rec. 2098-2000.

Gould appealed the issue of consumptive use to LUBA. She argued that a 90% consumptive use figure – a figure lower than the Yinger/NWLW consumptive use figure that is approximately 110% of the total water right approved.² LUBA denied Gould's request and found that 1,356 acre feet agreed upon by Thornburgh, ODFW, and OWRD was the appropriate figure (*Gould V* at 460³).

The fact that the NWLW and Yinger reports and comments use a consumptive use figure that is 73.67% too high makes their conclusions about impacts to Whychus Creek wholly unreliable as it is unknown what result would apply if the correct figure had been used. The NWLW and Yinger assumption results in an overstatement of potential impacts and would necessarily affect the location and quantity of impact shown as an output of the USGS model. Rec. 386-387. At the very least, it is certain that if there is an impact, it will be significantly lower than claimed by NWLW and Yinger. This evidence, therefore, should not be used to assess the impact of the Whychus Creek mitigation measures proposed by Thornburgh.

Background Information Regarding Water Rights Permit and Wildlife Mitigation

Groundwater Permit

On February 9, 2005, Thornburgh Utility Group, LLC applied for a water rights permit as a quasi-municipal entity providing water to the Thornburgh Resort. The application requested a use of 2,355 acre feet of water and offered to provide 942 acre feet of mitigation (40%, the standard for quasi-municipal uses). The OWRD mitigation rules required the Oregon Water Resources Department (OWRD) to identify the amount and location of Thornburgh's mitigation obligation. OAR 690-505-0615(1)(b). OWRD determined that the location of Thornburgh's impact was in the General Zone of Impact which is defined as "anywhere above the Madras gage on the Lower Deschutes River." OAR 690-505-0605(5). R. 2693-2694. The definition of "General zone of impact" provides that the zone of impact for wells determined by OWRD to have a localized impact on surface water is "anywhere within the impacted sub-basin of the Deschutes River including the Metolius, Whychus Creek, Little Deschutes or Crooked River sub-basins." OAR 690-505-0605(5). In this case, OWRD did not find a localized impact so required that Thornburgh's mitigation be provided anywhere above the Madras gage. Rec 2694.

According to Kyle Gorman, OWRD Manager, "[i]n the review for determining mitigation water, where its put in place and the effects of it, the department (OWRD) goes through a rigorous evaluation. We know exactly what acre is going to be put in stream, whether or not it's going to be effective mitigation, that sort of thing, so we definitely have a very thorough and rigorous evaluation of any mitigation project." Rec. 381. Following its evaluation, on July 25, 2006, OWRD issued a proposed Final Order for the Thornburgh Water Rights permit on July 25, 2006 that increased consumptive use and Thornburgh's

¹ This is arrived at by subtracting 1,356 acre feet from 2,355 acre feet = 999 acre feet which is divided by 1,356 = 73.67%.

² This figure is rounded up from 109.65759% - 2335 acre feet/2129 acre feet.

³ LUBA and the Hearings Officer incorrectly state that OWRD used a 60 percent consumptive use figure. Rec. 22. The consumptive use negotiated in the settlement with Water Watch was 1,356 acre feet per year and the total amount of water that may be pumped is 2129 acre feet per year. Rec. 2717-2720. This is a 63.69% consumptive use figure (1356/2129).

mitigation obligation to 1,197 acre feet. Rec. 2712. Thornburgh, thereafter, submitted a mitigation proposal to provide 1,197 acre feet of mitigation water in the General Zone of Impact. Rec. 2712. The OWRD proposed final order was open to public comment. Water Watch of Oregon protested OWRD's issuance of Thornburgh's permit, objecting to the amount of consumptive use set by OWRD. Rec. 2712. There were extensive negotiations between Thornburgh and Water Watch to come to an acceptable solution. In March 2007, the parties executed a Settlement Agreement and OWRD issued a Final Order incorporating the terms of the Settlement Agreement. Rec. 2712-2721. The order was issued for a maximum volume of 2,129 acre feet of ground water of with an annual volume of consumptive use of 1,356 acre feet per year. Rec. 2713. This is a consumptive use figure of 63.69%. The OWRD Order and groundwater permit imposes mitigation obligations on Thornburgh to offset all its consumptive use of groundwater which OWRD determined to be 1,356 acre feet and to do so in the General Zone of Impact. Rec. 2714, 2729-2731.

According to Kyle Gorman of OWRD, Water Watch's staff is "on par if not better" than OWRD staff regarding their knowledge of water rights. Rec. 380. Mr. Gorman was of the opinion that Water Watch did a "fairly good job" of figuring out the amount of consumptive use and amount of water needed to mitigate Thornburgh's impact. Rec. 380.

Initial Objections to Fish Habitat Component of Wildlife Plan/Additional Mitigation

In January, 2008 Oregon Department of Fish and Wildlife (ODFW) notified Thornburgh that "Deschutes County relies on ODFW's review of Thornburgh's fish and wildlife plan relative to meeting the intent of DCC 18.113.070(D)." ODFW explained they had received a report from Mark Yinger Associates on December 28, 2007 showing potential impacts to the fisheries resource in the Middle Deschutes and Whychus Creek. Rec. 2785. ODFW was concerned that groundwater withdrawals could significantly reduce the cold water springs and seeps used by fish which are necessary for fish survival during the summer months. Rec. 2785. ODFW asked Thornburgh to provide documentation to show they would meet the 'no net loss to the resource' standard. Rec. 2786.

In February 2008, Mark Yinger Associates (Yinger) and Northwest Land and Water, Inc. (NWLW) prepared a report for project opponent Steve Munson that further elaborated their concerns about the impact that the groundwater permit would have on water temperature and potential impacts on springs and seeps. Rec. 1457 *et. seq.* In response, Newton Consultants, Inc. (Newton) with input from ODFW, prepared its "Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawal on Fish Habitat" dated April 21, 2008. Rec. 2690-2744, 2125. Thornburgh's mitigation plan for fish habitat is comprised of this document and the measures outlined in an August 11, 2008 letter from Martha Pagel to Anne Corcoran Briggs. Rec. 378-379. The fish and wildlife mitigation plan prepared by Newton Consultants, Inc. was peer reviewed and supported by Tetra Tech, Inc. in their "Evaluation of the Proposed Thornburgh Resort Project Impact on Hydrology and Fish Habitat." Rec. 2121-2151.

The mitigation measures proposed by Thornburgh will increase spring and seep flows by transferring 1.97 cfs of water rights drawn from springs and used for irrigation by Big Falls Ranch directly back into Deep Canyon Creek and the Deschutes River. Rec. 2099-2100.⁴ The 1.97 cfs of spring water rights were, alone, more than sufficient to mitigate an average daily use of 1.87 cfs of groundwater by the Resort. R. 2099(ODFW letter). Thornburgh also agreed to provide an additional 1.22 cfs of mitigation water from

⁴ This mitigation is in addition to the mitigation water Thornburgh will be acquiring from Central Oregon Irrigation District (COID).

Central Oregon Irrigation District (COID). Rec. 2100. It also agreed to abandon three wells on the Thornburgh property that use approximately 3.65 acre feet of water. Rec. 2100.

TetraTech reviewed the efficacy of Thornburgh's mitigation measures to address ODFW concerns about the quality of the resource – potential impacts to cold water springs and seeps in the Deschutes River and Whychus Creek. Rec. 2125, 2130. This is the issue raised by Yinger/NWLW. TetraTech showed that there would be no net loss of either habitat quantity or quality. Rec. 2130, 2149. ODFW reviewed Thornburgh's Final Master Plan application and Wildlife Mitigation Program to determine compliance with DCC 18.113.070(D) that requires that "any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or degradation of the resource." Rec. 2098. ODFW spent hundreds of hours on this effort and in offering their expertise in assessing and mitigation impacts (Rec. 2098) and determined that Thornburgh's wildlife mitigation plans would comply with DCC 18.113.070(D). Rec. 2098-2100.

ODFW determined that Thornburgh's mitigation plan for fish resources would exceed the legal standard of "no net loss" by providing a net benefit to the fisheries resource. Rec. 2100. ODFW found that "the proposed mitigation * * should mitigate for potential impacts on springs and seeps and provide a net benefit to the resource. " This finding resolved the issue raised by the Yinger/NWLW report" because the mitigation plan addressed all water quantity and quality (water temperature) concerns. The net benefit is a benefit of .1 cfs of mitigation water from the springs in Deep Canyon Creek and an additional 1.22 cfs of mitigation water from COID for a total excess of 1.32 cfs. Rec. 2100. As a result, ODFW found that Thornburgh's mitigation plan should mitigate for potential impacts on springs and seeps (water quality) and would provide a net benefit to instream flows needed by the resource. Rec. 2098-2100.

Conflicting Evidence Regarding Impacts to Whychus Creek Claimed by Yinger/NWLW

After ODFW determined that all impacts to flows and seeps and the entire fisheries resource were fully mitigated by Thornburgh, project opponents shifted their focus to Whychus Creek claiming that Thornburgh's mitigation plan did not mitigate impacts to Whychus Creek projected by Yinger/NWLW. Mitigation was not provided because Thornburgh's experts, ODFW and OWRD found that the mitigation plan proposed would properly mitigate all impacts to fisheries resources.⁵

Overview of Whychus Creek and the Efforts Undertaken to Restore It

Whychus Creek is approximately 40 miles in length, flowing from its headwaters Southwest of Sisters to its confluence with the Deschutes River Northeast of Sisters and Northwest of Redmond. According to a report done by Watershed Sciences in 2008, on July 25, 2000, the flow of Whychus Creek at the Gage above the irrigation diversions was 152.49 cfs. Within a few miles of that point, the flow on the same day dropped to 3.15 cfs at the Sisters City Park. The dramatic drop was due to numerous irrigation diversions that occur in a short stretch of the creek, the largest of which is the Three Sisters Irrigation District diversion which, on July 25, 2000, had a flow of 114.11 cfs. Temperatures of Whychus Creek are below 14 degree C from its headwaters to just upstream of Sisters at which point temperatures start to increase, and generally rises to between 26-28 degrees just before Alder Springs at which point it begins to drop substantially. Rec. 1566. For much of the creek, from just above Sisters to Alder Springs, the

⁵ Thornburgh's experts, OWRD and ODFW all relied on a determination that groundwater impacts were focused on the Deschutes River, about 5.8 to 8.0 miles to the north of the project, an area that does not include Whychus Creek. Rec. 1284-1285.

temperature exceeds 18 degrees C, the standard for Native Redband Trout established by the State of Oregon. Rec. 1566, 1895, 1899.

This area of Whychus Creek has been the focus of a large restoration program, the most important component of which is to reduce summer stream temperatures. While many factors can influence temperature *** research has identified a very clear relationship between in-stream flow and temperature. When diversions reduce the amount of flow in Whychus Creek, water temperatures rise. As a result restoration efforts have focused on reducing irrigation diversions and increasing streamflow, which in turn reduces temperatures. Rec. 1903, 1910, 1206, 1260.

There is broad consensus regarding Whychus Creek that: i) the main issue affecting habitat is the level of irrigation diversions; and ii) the focus of restoration should be on increasing streamflow in the middle Whychus from the TSID diversion down to Alder Springs (that temperature there routinely exceeds quality standards); and iii) by reducing diversions and increasing the streamflow increases habitat quantity and improves habitat quality. Years of data confirms that when stream flows are increased in Whychus Creek temperatures drop. Restoring flows in Whychus Creek is part of a \$100 million flow restoration project by the Deschutes Resource Conservancy for the Middle Deschutes and Whychus Creek. Rec. 1910. The primary question is the level of flows needed to keep temperatures at a level acceptable to fish. Rec. 1903.

Dispute Regarding Temperature Impacts from Resort Use

NWLW claimed that TetraTech failed to analyze impacts to Whychus Creek that were set out in the Yinger/NWLW report. Rec. 1245. TetraTech responded to this claim by calculating the change in temperature to Lower Whychus Creek that would occur if Yinger/NWLW's assumptions were correct. Rec. 1246. TetraTech predicted that the impact on temperature during the summer would be less than .01 degrees C based on Yinger's approach (Rec. 2125, 2130). Rec. 1246, 1530. This figure would be no more the .0058 if the consumptive use approved by LUBA were used (1356 acre feet rather than 2335 acre feet or .58 of the figure used by Yinger). TetraTech's analysis evaluated Lower Whychus Creek – from Alder Springs to the mouth of Whychus Creek. The analysis was based on a flow of groundwater into Lower Whychus Creek at Alder Springs of 100 cfs. This figure was obtained from OWRD. Rec. 1246.

Yinger responded to the TetraTech analysis by criticizing Thornburgh for failing to provide mitigation for Whychus Creek. Rec. 896. He challenged TetraTech's temperature estimate of .01 degrees C by claiming "[i]f the groundwater discharge, at 0.15 cfs * * * occurs at Alder Springs there will be a significant increase [of .07 degrees C] in temperature of Whychus Creek." Rec. 896. This, however, is a hypothetical scenario. The total reduction in all of Lower Whychus Creek predicted by Yinger/NWLW is just .143 and .145 cfs (Rec. 1186). A number of springs, not just Alder Springs, feed into Lower Whychus Creek. Rec. 895, 1104/Table 2, 1095.⁶ Furthermore, Yinger does not claim that all flow reductions to Lower Whychus Creek will occur at Alder Springs. At least one of his scenarios suggests that this is not a reasonable assumption. Rec. 1567. Yinger's estimate, as discussed before, overstates impacts under the hypothetical scenario by using a consumptive use figure that is 73.67% too high.⁷ Rec. 895-896, 1182, 1186.

⁶ Alder Springs is about 1.5 miles from the mouth of the Deschutes River.

⁷ One of the scenarios modeled by Yinger/NWLW shows possible impacts along Lower Whychus Creek in a number of different locations. Rec. 1567.

Yinger's hypothetical scenario is of little value in assessing impacts to the fisheries resource in Lower Whychus Creek because it does not account for the fact that approximately 100 cfs of cold groundwater – not just 8.7 cfs – enters Lower Whychus Creek between Alder Springs and the mouth of the Whychus Creek. Rec. 895, 1104/Table 2, 1095. This represents just .7% of the groundwater entering Lower Whychus Creek. Yinger's failure to account for this reality creates the false impression that the .07 degrees C he claims (no more than .04 degrees C impact if the correct consumptive use had been used⁸) will be experienced in the entire Lower Whychus Creek below Alder Springs when it is clear that this will not be the case.

Yinger's claim of a .07 degree change in temperature, also, is inflated because it is based on a mid-summer flow of 8.7 cfs for Alder Springs and a low 10.85 cfs flow for Whychus Creek above Alder Springs that was recorded July 26, 2000. Rec. 895. This is a worst-case scenario for flow and, as a result, temperature. Since July 2000, water mitigation programs have returned water instream and have increased the flows of Whychus Creek. With higher flows in Whychus Creek, any reduction in flows into Lower Whychus Creek will be lower based on the mass balance equation used by Yinger to make his prediction. Rec. 896.

Yinger criticized TetraTech's use of a figure of 100 cfs of groundwater it obtained from ODFW to estimate an impact of .01 to the entire Lower Whychus Creek, because TetraTech referred to this flow as 100 cfs of "stream flow from Alder Springs into lower Whychus Creek." Rec. 1246.⁹ It is unknown whether OWRD or Yinger is correct regarding the rate of flow at Alder Springs or whether OWRD was applying the term in a broad rather than narrow way (to include the complex of springs that entire Lower Whychus Creek). This issue is largely immaterial, however, because Yinger agrees that 100 cfs of flow gain occurs in the habitat area found in Lower Whychus Creek and, logically, all of this water cools the warmer upstream water in Whychus Creek. Rec. 895. TetraTech's calculations show the impact of the mixing of 100 cfs of cool water with the warmer water found above Alder Springs even if Yinger's erroneous assumptions regarding consumptive use, reductions in flows into Lower Whychus Creek and the point of impact were correct. Rec. 1248.

Thornburgh's Offer of Mitigation Water for Whychus Creek and its Benefits

Given the controversy over Whychus Creek, Thornburgh offered to mitigate for the impacts Yinger alleged, and to do so in a way that would have a direct benefit on those areas of Whychus Creek where temperatures routinely exceed the state standard.¹⁰ This same area of the creek, upstream from Alder Springs, is the focus of a major stream and fish restoration program being conducted by the DRC, the Deschutes Watershed Council and Three Sisters Irrigation District (TSID). This program is increasing the flows in Whychus Creek thereby reducing temperatures. Thornburgh's mitigation plan committed Thornburgh to participate directly in that program to fund, acquire and transfer 106 acre feet of TSID water back to Whychus Creek at the TSID diversion approximately three miles upstream of Sisters (creek mile 28). Rec. 378-379.¹¹ The 106 acre feet figure is the entire flow reduction Yinger predicted would

⁸ It is possible that if the correct consumptive use figure had been used by Yinger that no impacts on Lower Whychus Creek as the creek at the outer reaches of the zone of impact predicted by Yinger when a consumptive use figure of 2335 .

⁹ It was reasonable for TetraTech to rely on OWRD as a reliable source of information.

¹⁰ Yinger's stream temperatures shown on figure 6-26, Rec. 1566, show where temperatures are highest.

¹¹ Thornburgh made this offer while maintaining its position that OWRD, ODFW, TetraTech and Newton all agreed that Thornburgh's water use will not reduce the flows of groundwater to Whychus Creek, Rec. 379, 1285.

occur in Lower Whychus Creek based on a use of 2355 acre feet of groundwater. Rec. 1186. Yinger should have used 1,356 acre feet in assessing the need for mitigation measures – a figure that is just 58% of the figure he used. It is unknown whether Yinger’s model will show any impact on Lower Whychus Creek if the correct consumptive use is applied. If any impact is shown, however, the flow reduction should be no greater than 61.48 acre feet, a proportional reduction of impact (58% of 106 acre feet).

Conversely, the temperature of the stream starting at Alder Springs (the only the point Yinger focuses on in assessing temperature impacts) to the mouth is at or below the 18 degrees set as guidance standards for fish habitat by the EPA. The temperature in this stretch is reported at 14-16 degrees C by Yinger/NWLW (Rec. 1512) and 16 to 18 degrees C by NWLW (Rec. 1899). Temperatures just upstream of Alder Springs are roughly 10 degrees higher than the standard and stream flows are low. To create a healthy creek along its entire run the focus on restoration is, and should be on the critical area above Alder Springs where temperature is so impaired. Thornburgh’s mitigation will return 106 acre feet of irrigation water (.145 cfs) to the creek to help reduce temperatures for 28 miles of the creek above Alder Springs – the temperature-impaired and low flow sections of the creek - while removing no more than 61.48 acre feet (.083 cfs) from the latter 1.5 miles of a part of the creek with abundant flows (about 100 cfs) from springs and temperatures provide excellent fish habitat, even with a slight reduction in flow due to Thornburgh (if any).

When the whole creek and fisheries resource is considered, as it must be under the “no net impact standard, the positive impacts of the Whychus Creek mitigation offered by Thornburgh more than compensate for any impact to Whychus Creek and result in a net benefit to the resource.”¹²

Yinger’s Response to Offer of Mitigation Water for Whychus Creek

Yinger’s response to Thornburgh’s offer of mitigation water is to make a faulty claim about temperature focused solely on the point where Alder Springs empties into Whychus Creek – disregarding the beneficial impacts of mitigation upstream as well as ignoring the cooling effect of streams below Alder Springs on the temperature of Lower Whychus Creek. Yinger claims that “[r]eplacing this lost flow of 106 acre feet by reducing upstream diversions would result in more **hot water** mixing with the cold water of the lower reach of Whychus Creek.” Yinger predicts a .12 degree C change in temperature at Alder Springs assuming that mitigation water will be 26.7 degrees. Rec. 312.

To merit a finding that the County’s “no net loss” standard is violated, however, the temperature issue identified by Yinger must be shown to harm the fish resource in Whychus Creek as a whole¹³ – that by reducing irrigation diversions so that stream flows are increased will harm the creek as habitat for fish. Thornburgh strongly disagrees that this will be the case and its position is supported by a widespread expert consensus on the issue.

¹² Yinger predicted a tiny impact to Upper Whychus Creek of .021 cfs – a figure that is inflated by the use of 2335 acre feet of consumptive use. Thornburgh’s mitigation water far exceeds this figure and resolves any potential arguments about the quantity of the mitigation required.

¹³ The resource must be viewed as a whole when determining compliance with the no net loss to fish resources standard of the County code. The code does not require that there be no negative impact on the resource; just that whatever negative impact occurs be mitigated by enhancement of the resource as a whole. See, Gould VI at 631.

How Can Restoring Stream Flows be a Bad Thing?

At the heart of the claims Yinger makes about Thornburgh's mitigation plan is the basic premise that restoring stream flows at Whychus Creek is a bad thing. To support his position, Yinger has adopted a laser-like focus on Alder Springs, as if to say "if it's good for Alder Springs then it's good for Whychus Creek." Taken to its logical extreme, Yinger's approach would dictate that all of the water in Whychus Creek should be diverted from the creek and placed to other uses (irrigation use) so that the creek is dry just above Alder Springs. Under this scenario, no water from upstream would be allowed to mix with the spring water from Alder Springs thus insuring that the temperatures in Lower Whychus Creek would be at or near 11 degrees – approximately the temperature of the 100 cfs of flow that enters the creek in this location. But, this would obviously be done at great expense, the destruction of Whychus Creek. Thornburgh and the rest of the environmental community disagree with such an approach. Certainly if asked, Yinger would readily admit that stream flow restoration is a critically positive event driving substantial benefits to Whychus Creek.

Yinger's claims are misleading. The water added to Whychus Creek will, in fact, be cold water as shown by Figure 6-26 of the Yinger/NWLW report. Rec. 1566. The Three Sisters Irrigation District diversion – the location where water will be returned to the creek – is located upstream from Sisters where water temperatures are 14 degrees C and lower. Rec. 1566.¹⁴ As stated by Yinger, "in Whychus Creek, temperature is below 14 degrees C from its headwaters to just upstream of Sisters [below the TSID diversion]." Rec. 1496. Furthermore, Yinger assumed in his use of the mass balance equation that the temperature of the water being left in stream is 26.7 degrees rather than seeking to determine the true temperature of the water and its actual impact on the entire creek from the point of the diversion down.¹⁵

It has also been shown that Yinger's prediction is too high because it is based on 2335 acre feet of consumption use rather than the correct figure of 1356 acre feet. This means that a figure of 58% of the figure predicted by Yinger or .07 degrees C is the highest possible impact at Alder Springs. Below Alder Springs where over 100 cfs of groundwater enters Lower Whychus Creek, the impact will drop to the level no higher than predicted by TetraTech and as adjusted by use of the correct figure for consumptive use – no more than an impact of .0058 degrees C.

These very slight temperature impacts, most significantly, have not been shown to create a negative impact on the wildlife resource so do not violate the no net loss requirement of the County's code. The Yinger/NWLW report's discussion of habitat fails to make the case that the tiny changes in temperature Yinger predicts will raise the temperature of Lower Whychus Creek to the point where it is too hot for any of the fish that rely on the habitat. The Yinger/NWLW study reports a temperature in Lower Whychus Creek, the habitat area, of 12 to 14 degrees C. Rec. 1511. Yinger/NWLW claim that bull trout can occupy streams from zero to 22 degrees C but are most frequently found where temperatures are 2 to 15 degrees C. Rec. 1511. The very small temperature changes projected will not cause the temperature to exceed the ideal temperature range of 2 to 15 degrees C.¹⁶

¹⁴ The water that will be returned to the stream at the TSID diversion will enter the creek upstream of Sisters and many miles upstream of the mouth of Whychus Creek on the Deschutes River (Rec. 379, 410, 1904).

¹⁵ This fact was determined by use of the mass balance equation used by Yinger on Rec. 896. It must be assumed that the 106 cfs added to the creek will be 26.7 degrees to arrive at the result claimed by Yinger.

¹⁶ Yinger/NWLW does not provide any temperature information for Native Redband Trout or for salmon and steelhead fish that are being reintroduced to the Upper Deschutes Basin. Rec. 1512.

As shown by our analysis above, there are a number of problems with this statement and approach: First, Yinger's approach is too narrow to apply to Lower Whychus Creek. It looks at one point only and fails to account for the other cold water springs that create the favorable fish habitat. Second, it assumes that all flow reductions will occur at Alder Springs and not elsewhere in Lower Whychus Creek where other springs enter the creek despite the fact Yinger knew about these flows. Rec. 895. Third, Yinger uses a consumptive use that is far higher than the appropriate figure set by the OWRD permit and upheld by LUBA. Fourth, Yinger's report shows that the temperature of the water that will remain in the creek due to Thornburgh's 106 cfs mitigation plan is below 14 degrees. Water below 14 degrees is not hot water.

Even if Yinger were correct, which we dispute, the change he claims is immaterial. According to Yinger the temperature in lower Whychus Creek is substantially below the desired standard for fish habitat. Rec. 1512. Even IF there was a change of .12 degrees the impact to habitat quality would be negligible. By contrast, Yinger's data shows the temperature above Alder Springs to be as much as 10 degrees above the standard and in need of mitigation by increasing stream flows. Rec. 1895, 1566. Thornburgh's mitigation plan will provide a part of the stream flows needed to correct the temperature problems experienced in Whychus Creek above Alder Springs with little or no impact on the habitat quality below Alder Springs.

Hearings Officer's Decision and Condition of Approval

The hearings officer, in Condition 39 of the FMP, required that Thornburgh Resort Company, LLC provide funding to complete a conservation project by Three Sisters Irrigation District to restore 106 acre-feet of instream water to Whychus Creek. The hearings officer imposed this condition because she found OWRD's mitigation requirements did not account for higher summer water consumptions so mitigation would be required in Whychus Creek "to assure that water temperatures in Whychus Creek are not affected by the proposed development. Rec. 34. The Hearings Officer's findings acknowledge the fact that the mitigation program, as proposed, fully mitigates Thornburgh's projected impacts for a typical day in spite of the arguments presented by Yinger about water temperature impacts to Whychus Creek.

Resolution of Issues Identified by LUBA

LUBA was concerned that the hearings officer did not acknowledge the conflict between TetraTech's evidence that increasing the flow in Whychus Creek is beneficial to the quality of the stream as habitat for fish and Yinger's claims of slight increases in the temperature of the water in Whychus Creek at the point where it starts to mix with the first of a complex of springs in Lower Whychus Creek. The Hearings Officer understood that Thornburgh, ODFW and OWRD all agreed that Thornburgh's plans mitigated water quality and quantity issues and that the opponents (Yinger) had argued that the mitigation plan would take cold water out of the aquifer where it seeps into Whychus Creek and replace it with warm water (the 106 cfs of mitigation water). Rec. 34.

The Hearings Officer did not discuss the differences in the results of Yinger's projections regarding creek temperature and the results of the TetraTech analysis that were based on assumptions by Yinger that Tetratech and Thornburgh contested. A discussion and resolution of those differences have been provided above. Essentially, Yinger and TetraTech answer different questions – Yinger confines his analysis to one point in the Lower Whychus Creek that supplies only about 8.7% of the cold water that

enters this part of the creek to show a number that is as high as possible. TetraTech's analysis considers flows that are over 10 times higher than Yinger's – flows that occur in the last 1.5-mile stretch of the Lower Whychus Creek before it joins the Deschutes River. Any thermal impact to the much larger amount of water considered by TetraTech – water found in Lower Whychus Creek – would, logically and scientifically, be very minor (if any occur). Furthermore, the projected impacts by Yinger and TetraTech (based on Yinger's claimed flow reduction) would have been significantly smaller (no more than 58%) if the correct consumptive use figures had been used by Yinger.

All of these facts provide the hearings officer with a basis to find that any impact to the temperature of Whychus Creek are too minor to have an impact on the fisheries resource in Lower Whychus Creek. Additionally, the fact that ODFW found that Big Falls water rights fully mitigate water quantity and quality issues was a reasonable basis to find that there will be no net impact to the resource based on the level of water use by Thornburgh relied on in assessing project impacts.

The reason the hearings officer accepted Thornburgh's proposal to provide mitigation water for Whychus Creek was not due to her acceptance of Yinger's temperature impact projections. Rather, she accepted the mitigation due to her concern that the OWRD mitigation requirement might not mitigate high summer water use levels. The requirement to place 106 cfs of cold water into Whychus Creek will obviously offer a significant positive benefit to Whychus Creek by improving water quality (temperatures) in a significant stretch of the creek and will help return the creek to the "natural hydrograph" that the opponents argue is so important to the health of Whychus Creek. It was reasonable for the hearings officer to have reached this conclusion based on the evidence in the record before her and for the County to do so on remand.

VII. ISSUE #3 – TERRESTRIAL WMP AND M&M PLAN

Requested Action

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.

Discussion

LUBA and the Court of Appeals have reviewed Thornburgh's wildlife management plan on a number of occasions – during two reviews of the CMP and during review of the FMP. The CMP approval required that the plans be reviewed at a public hearing during the County's review of the FMP. This requirement was imposed because "the mitigation plan was not yet composed" and, therefore, could not be reviewed for compliance with DCC 18.113.070(D)'s "no net loss or net degradation of resource" approval criterion as determined in *Gould II*.

Thornburgh filed the Terrestrial Wildlife Mitigation Plan (Rec. 2609-33) and M&M Plan (Rec. 416-32) to support approval of its FMP and to demonstrate compliance with DCC 18.113.070(D) and the no net loss standard. It also filed third party documents that endorsed the plans. Rec. 1800-05(ODFW), Rec. 415, 470 (BLM), Rec. 126-33, 732-44, 1287(Lynn Sharp, TetraTech). The plans call for Thornburgh to restore 4,501 acres of juniper woodlands on land in the Canyons Region, Deep Canyons Region and Maston

Allotment. Rec. 420. The M&M Plan explains how off-site mitigation will be implemented on whatever BLM land is ultimately decided upon as the receiving site for mitigation.

On appeal, LUBA found that the Terrestrial Wildlife Mitigation Plan and M&M Plan “provide a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of 4,501 acres of BLM land to be selected in the future for mitigation. LUBA also noted that BLM, ODFW and Thornburgh’s consultant were confident that the plan will achieve compliance with DCC 18.113.070(D). LUBA held that important parts of the proposal were not yet known, including the location where the mitigation will occur and, therefore, remanded the decision.

LUBA’s decision was appealed by Gould and Thornburgh filed a cross-appeal. The Court of Appeals found, when resolving the cross-appeal, that:

*“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 II. There, no mitigation plan has been composed. Thornburgh was required only to complete a plan and to obtain ODFW and BLM approval of it. *** Here, the nature of the mitigation plan proposed for BLM land is clear: the Terrestrial WMP provides that Thornburgh will restore and enhance about 4,501 acres of juniper woodlands within the Cline Buttes Recreation Area, and the M & M Plan sets out mitigation methods that could be applied to any parcel of land within the area. 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. ” Gould VI at 642-643.*

The Court of Appeals remanded the decision because it was unknown whether restoration efforts would in fact occur on BLM land because BLM was still finalizing the CBRAP. It also remanded the decision because the wildlife plan included a back-up plan for mitigation that would apply if the CBRAP was not adopted and BLM lands were, therefore, not available for mitigation. *Gould VI* at 642-643. These were the only reasons that the plan was remanded.

The BLM has adopted the Cline Butte Recreation Area Plan so restoration may now occur on BLM lands. This fact is confirmed by the part of the BLM website that discusses the plan, **Exhibit B** of this document. A copy of the Decision Record regarding the plans for vegetation management methods, management and monitoring signed August 26, 2010 is attached as **Exhibit C**. As all mitigation work described in the Terrestrial Wildlife Mitigation Plan and M&M Plan will occur on BLM land, the “back up” plan rejected by the Court of Appeals is moot and can be stricken from the plans. With this uncertainty resolved, the plans should, again, be approved by the County.

From: Kameron DeLashmutt [<mailto:kameron@bendcable.com>]
Sent: Monday, August 15, 2011 10:30 PM
To: Tom Anderson
Cc: Laurie Craghead (Laurie_Craghead@co.deschutes.or.us)
Subject: Thornburgh's initiation of the FMP remand

Mr. Anderson,
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.

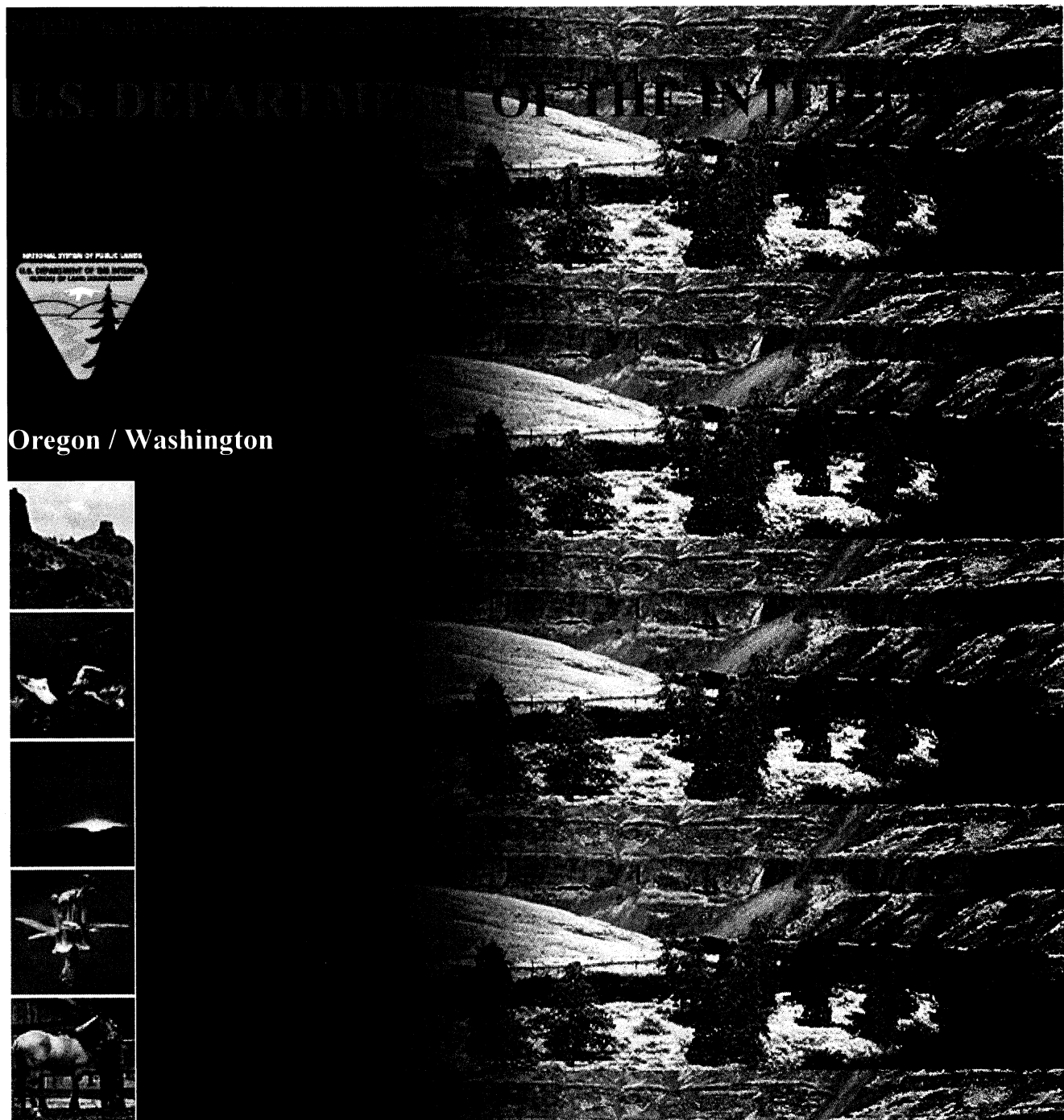
Please confirm receipt of this email and also inform me as to what planner will be handling this process so that we can discuss it with them.

Sincerely,

Kameron DeLashmutt
541-350-8479 (P)
541-548-0682 (F)

The information in this email is confidential and only for the use of the recipient named. You are not allowed to forward it on without the permission of the sender. If you have received this message in error please delete it.

EXHIBIT A



[National BLM](#) > [OR/WA](#) > [Prineville](#) > [Planning](#) > [Cline Buttes](#)



Cline Buttes Recreation Area Plan

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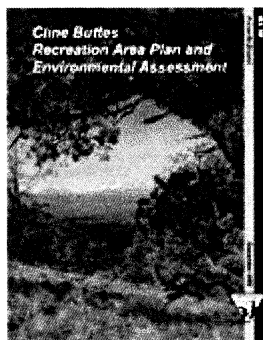
EXHIBIT B



The Deschutes Resource Area of the Prineville District, Bureau of Land Management has worked with the public to develop a Recreation Area Design/Environmental Assessment for the Cline Buttes Recreation Area.

The Cline Buttes Recreation Area design is tiered to the Upper Deschutes Resource Management Plan (UDRMP), completed in 2005. The Cline Buttes Recreation Area design will provide long-term (10 years and beyond) management actions specifically for the Cline Buttes Recreation Area, a portion of the High Desert Special Recreation Management Area (SRMA) (PDF) designated in the Upper Deschutes Resource Management Plan.

Decision Record and Finding of No Significant Impact Now Available



Cline Buttes Recreation
Area Plan EA

The Bureau of Land Management (BLM) has made a final decision that will guide future management of BLM administered lands in the Cline Buttes Recreation Area. The Cline Buttes Recreation Area plan is the culmination of over three years of inventory and collaborative planning. During this process, the BLM has worked with a variety of partners including private landowners, recreational user groups, Department of State Lands, Deschutes County, Oregon Department of Transportation and many other agencies and interested groups.

The Cline Buttes Recreation Area Plan includes (see maps below):

- Specific trail corridors for both motorized and non-motorized trail uses - Decision Record (PDF)
- Administrative roads, new right of way grants, amendments to right of way grants, and right of way corridors for future use - Decision Record (PDF)

- [Vegetation management methods, and an adaptive management and monitoring process - Decision Record \(PDF\)](#)

The decision record provides an overview of the selected action, reviews the alternatives considered and provides a rationale for the decision. The decision record also contains an attachment with all substantive comments and responses and the Finding of No Significant Impact (FONSI).

[Clarification Items \(PDF\)](#)

The CBRA Plan received a large number of comments, all of which are important contributions from the public. While some of the comments were not substantive and relevant to the analysis of the proposed action, these comments often raised important questions that the BLM felt would be useful to answer in a public setting. The following link contains the public comments that BLM felt important to address for better understanding of CBRA issues and existing setting.

Revised Maps

The following maps were revised to correct errors or to reflect changes in the proposed action made in response to public comments. Only the maps revised are show below. These maps can be differentiated from the earlier maps in the EA by the date "2010" in their title block.

- [Map 5 – Cline Buttes Recreation Area Taxlots and Rights of Way \(PDF\)](#)
- [Map 6 – Cline Buttes Recreation Area Alternative 2 Transportation \(PDF\)](#)
- [Map 9 – Cline Buttes Recreation Area Rights of Way Grants, Corridors and Amendments \(PDF\)](#)
- [Map 10 – Cline Buttes Rights of Way, Parcels 28-32 \(PDF\)](#)

For further information about BLM's Cline Buttes Recreation Area Plan or to request hardcopy versions of the Decision Record or revised maps, please contact:

Bureau of Land Management
Prineville District Office
3050 NE 3rd Street
Prineville, Oregon 97754
541-416-6700

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Decision Record

NEPA Register Number: DOI-BLM-OR-P060-2006-0014-EA

Title of Action: Cline Buttes Recreation Area Plan and Environmental Assessment

BLM Office: Prineville District Office

I. Introduction

In 2005, the BLM issued the Upper Deschutes Record of Decision and Resource Management Plan (UDRMP) for over 400,000 acres of BLM administered lands in Central Oregon. The UDRMP makes land use planning decisions that provide management direction and guide future actions. The UDRMP included overall management direction for the 32,000 acre Cline Buttes Recreation Area (CBRA).

In 2006, the BLM began to develop alternatives to implement the UDRMP direction for vegetation management in the Cline Buttes Recreation Area. The Environmental Assessment (OR-P060-2006-0014-EA) analyzed the effects of vegetation management within the 32,000 acre Cline Buttes Recreation Area, in Deschutes County, Oregon. The EA considered an adaptive management alternative that meets the UDRMP goals for vegetation management, while allowing for monitoring and adapting the methods used. The EA and the preliminary Finding of No Significant Impact (FONSI) were made available for a 45-day public review on October 16, 2009. One hundred comments were received.

The EA identified Alternative 2 as the Proposed Action. The decision is to implement the vegetation management approach for the Cline Buttes Recreation Area Plan to meet the Purpose and Need for the EA and provide for vegetation management using an adaptive process that includes monitoring to identify results of treatments and adjust methods.

II. Decision

A. Rationale for the Decision

The Bureau of Land Management, Prineville District, has analyzed the Proposed Action and alternatives contained in EA number DOI-BLM-OR-P060-2006-0014-EA. The proposed action and alternatives have been reviewed and found consistent with the UDRMP. In making this decision, I find that the vegetation management decisions in this EA would:

- Meet the Purpose and Need, and respond to existing laws, plans, strategies and direction described on pages 3 – 8 of the EA;

EXHIBIT C

- Respond substantively to other agency, governmental, and public advice and requests, as described in the EA and in response to the comments as described below;
- Be feasible and can be accomplished.

B. Compliance and Conformance with Land Use Plans

I have evaluated the actions in the EA against the goals and objectives of the relevant land use plan. My decision is consistent with the direction in the UDRMP. The UDRMP is available for review at the Prineville District BLM, 3050 NE 3rd Street, Prineville Oregon or online at:

<http://www.blm.gov/or/districts/prineville/plans/deschutesrmp/index.php>

Direction in the UDRMP that is relevant to vegetation management decisions in the EA is summarized below:

- Reduce the possibility of fire in the wildland urban interface (WUI) and manage live and dead vegetation so that a wildland fire would burn with fire behavior where firefighters can be safe and successful in suppression efforts under hot, dry summer weather conditions. Design treatments for human safety while still considering recreation opportunities, wildlife habitat and corridors, visual quality, air and water quality, and public access.
- Restore and maintain ecosystems consistent with land uses and historic fire regimes through wildland fire use, prescribed fire, and other methods to reduce areas of high fuel loading that may contribute to extreme fire behavior.
- Maintain, promote, and restore the health and integrity of old-growth juniper woodlands/savanna throughout its historic range where practicable.
- Maintain/restore large contiguous stands of healthy, productive and diverse native shrub-steppe plant communities throughout their historic range where appropriate considering current conditions and potential for success.
- Target isolated groups and individual ponderosa pine trees for protection and enhancement to maintain biodiversity and aesthetic values associated with these trees.
- Maintain, conserve (protect), and restore aquatic and riparian dependent resources, including riparian vegetation and habitat diversity.

Alternative 2 was selected as the proposed action because it meets the goals of the UDRMP with regards to fuels conditions and ecosystem maintenance and restoration and best meets the Purpose and Need in the EA on pages 1 - 8. The adaptive management approach for Alternative 2 was chosen because while the potential for high intensity wildfire in the area continuously increases, in some situations insufficient information is available to assist in accurately predicting the response of the existing plant communities to different types and levels of ground disturbance in treatment actions.

Alternative 1 (No-Action) was not selected because the area's fire condition class (departure for the natural (historical) regime of vegetation characteristics, fuel composition, fire frequency, severity and pattern) would continue to be high. This condition would increase the likelihood of crown fires and the probability of intense fire behavior. The increase in crown fire potential and intensity, along with competition from young junipers would increase the vulnerability of the larger, old-growth juniper in the CBRA. The No-Action Alternative was not selected because it does not reduce the density of young juniper trees in the CBRA and would tend to result in reduced old-growth juniper woodland diversity and heath, and loss of shrub-steppe habitats.

C. Proposed or Selected Vegetation Alternative

It is my decision to implement **Alternative 2: Proposed Action**, in section 2.1 **Description of Alternatives for Vegetation Management**, with minor alterations. The description of **Alternative 2: Proposed Action** is incorporated by reference as if fully set out in this document with the alterations as shown below. Mitigation measures in **Effects Common to All Action Alternatives** under **Section 2.1 Description of Alternatives for Vegetation Management** are incorporated by reference as if fully set out in this document.

Text changes:

1. On page 12 of the EA, the first paragraph is changed (revised text shown in bold) to read:

To state the objectives in terms of vegetative composition, we would manage old growth juniper woodlands (areas where there are more than five old growth trees per acre (TPA), see Glossary) for an average of:

- 11 old growth trees per acre
- 1 to 4 young juniper trees
- 5 – 25 percent foliar (see Glossary) cover of shrubs
- 5 percent or less foliar cover cheatgrass, and
- 2 percent or less foliar cover rabbitbrush

D. Implementation and Monitoring

This project will be monitored in accordance with the UDRMP (UDRMP, pages 162-163) and through the specific adaptive management process listed in the EA on pages 11-19. The description of Adaptive Management is incorporated by reference as if fully set out in this document. The adaptive management process takes into account the ecological condition of sites to be treated, and the site's resilience in recovering from disturbance. Monitoring of sites would address ecological conditions, fuel conditions, and visual resources. Project activities on a given site will not proceed until such time as botanical, special status wildlife and cultural clearances are completed. Any measures specific in the respective clearance report will be adhered to in the design of unit treatments.

III. Alternatives Considered

There were two alternatives analyzed in the EA. Alternative 1 is the No-Action Alternative. Alternative 2 is the proposed action and represents the range of methods potentially used to achieve the vegetation management direction in the UDRMP. A description of the alternatives can be found on pages 11 – 20 of the EA.

IV. Public Involvement

A. Public Involvement Activities

The BLM held an initial public meeting, followed by field tours, and an additional public meeting was held specifically to gather input on vegetation management. BLM summarized public input from these meetings and used that input to develop the adaptive management approach proposed in the proposed action. BLM staff communicated with, and attended meetings as requested with other agencies, property owners and other interested parties as final alternatives were being developed. These included meetings with local residents, Eagle Crest Resort, Tumalo Community Association, Oregon State University and others.

The Prineville District received 100 comments for EA number DOI-BLM-OR-P060-2006-0014 from multiple parties, including Oregon Department of Transportation, The Ridge at Eagle Crest Owners Association, Central Oregon Community College, Action Committee Capital Trail Vehicle Association, Oregon Department of State Lands, Deschutes County, Wisconsin Off-Highway Association, Backcountry Hunters and Anglers, Juniper Group Sierra Club, Deschutes Environmental Consulting LLC., Deschutes County 4 Wheelers, Oregon Equestrian Trails, Bend Chapter Oregon Hunters Association, Minerals Division Zimmerlite Products, Oregon Department of Transportation Region 4, Oregon Wild, Central Oregon Trail Alliance, and many private

citizens. A summary of the substantive comments and our responses are summarized below. Opinions and comments unrelated to the decision at hand were not responded to and are not included below.

B. Coordination with Other Agencies

Coordination occurred with various other agencies throughout the planning process, including the Confederated Tribes of Warm Springs Reservation, Oregon Department of Fish and Wildlife, U.S. Fish and Wildlife Service, Deschutes Provincial Advisory Committee (PAC), Federal Aviation Administration, Oregon Division of State Lands, Oregon Department of Transportation, Deschutes County Transportation Department, State Historic Preservation Office and others.

C. Comments and Responses

The complete list of substantive comments and responses related to vegetation management is included in Attachment 1. Substantive comments received are summarized below. Comments that were not substantive, but that the BLM thought provided an opportunity to clarify the CBRA plan or existing setting are included on the Prineville District BLM website: <http://www.blm.gov/or/districts/prineville>. Comments were received that:

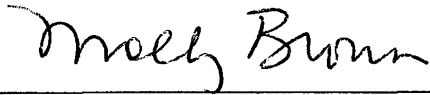
- expressed a concern over the spread of noxious weeds by OHVs.
- indicated a desire to not thin young junipers in areas with intact soils and few roads or trails.
- suggested the BLM thin junipers by hand and remove them in areas where fire hazard is a concern
- indicated a desire to not allow the use of tracked vehicles in any vegetation treatment actions, and to avoid machine piling of juniper.
- suggested leaving a greater number of young junipers for recruitment trees to assure the continued presence of old-growth juniper woodlands. In response to this comment, the EA is amended to include a larger range (1 – 4 young trees per acre) left in old-growth woodlands for recruitment purposes.

V. FONSI Reference

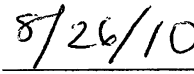
The FONSI indicating that the EA No. DOI-BLM-OR-P060-2006-0014, for a proposed action to designate a transportation system, grant ROWs, and conduct vegetation management actions in the CBRA has been analyzed and found to have no significant impacts, thus an Environmental Impact Statement (EIS) is not required.

VI. Appeal Procedures

This decision constitutes my final decision which may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the attached Form 1842-1. If an appeal is taken, your notice of appeal must also be filed in this office (3050 N.E. Third Street, Prineville, OR 97754) within 30 days from receipt of this decision. Notice of appeal must be sent certified mail. The appellant has the burden of showing that the decision appealed from is in error. Any request for stay of this decision in accordance with 43 CFR 4.21 must be filed with your appeal.



Molly Brown
Deschutes Field Manager
Prineville District, Bureau of Land Management
Prineville, OR 97754



Date

Attachments:

1. Response to Comments
2. Finding of No Significant Impact for DOI-BLM-OR-P060-2006-0014-EA
3. Map 5 – Cline Buttes Recreation Area Taxlots and Rights of Way
4. Map 6 – Cline Buttes Recreation Area Alternative 2 Transportation
5. Map 9 – Cline Buttes Recreation Area Rights of Way Grants, Corridors and Amendments
6. Map 10 - Cline Buttes Rights of Way, Parcels 28 – 32
7. Form 1842-1