

**ANNUNZIATA GOULD.**

**V.**

**Respondent,**

and

**THORNBURGH RESORT COMPANY,  
LLC,**

**Respondent/Cross-Petitioner.**

**LUBA No. 2008-203**

CA A143430

## PETITIONER GOULD'S OPENING BRIEF AND EXCERPT OF RECORD

**Judicial Review of a Final Opinion and Order  
of the Land Use Board of Appeals  
Expedited Processing Under ORS 197.850 and 197.855**

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## **I. STATEMENT OF THE CASE**

### **A. NATURE OF THE PROCEEDING AND THE RELIEF SOUGHT**

This is an appeal from a LUBA Final Opinion and Order which remanded Deschutes County's approval of the final master plan ("FMP") for a destination resort. Review is sought in this Court in order to obtain a more extensive remand to the County.

Petitioner seeks a reversal of LUBA's decision on the County Hearings Officer's interpretation and application of the Deschutes County Code ("DCC") fish and wildlife "no net loss" criteria, of LUBA's decision on the adequacy of the Hearings Officer's conditions of approval for fish mitigation and of LUBA's decision on the adequacy of the Hearings Officer's findings of compliance on the fish mitigation criteria.

### **B. NATURE OF AGENCY ORDER FOR WHICH REVIEW IS SOUGHT**

The agency order from which review is sought is the "Final Opinion and Order" of the Land Use Board of Appeals affirming, in part, the Deschutes County Decision.

### **C. BASIS OF APPELLATE JURISDICTION**

ORS 197.850(1) and 197.850(3)(a) confer judicial review jurisdiction in the Court of Appeals over proceedings by LUBA undertaken pursuant to ORS 197.830 to 197.845.

### **D. EFFECTIVE DATE OF ORDER FOR PURPOSE OF APPEAL**

LUBA's decision was issued and served on September 9, 2009. (LUBA Rec. 245, ER-1)<sup>1</sup> The Petition for Judicial Review, with the appropriate fee, was timely filed with the Court of Appeals and served on the required parties September 29, 2009. (LUBA Rec. 282)

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<sup>1</sup> In this brief, Petitioner shall cite to items in the record document prepared by LUBA of its own proceedings as "LUBA Rec. \_\_\_\_." Items in the Local Record document prepared by Deschutes County and submitted to this Court by LUBA as an exhibit are cited as "Local Rec. \_\_\_\_." The LUBA decision at issue in this appeal, excerpts from the Hearings Officer's Decision, relevant Deschutes County Code provisions and a map of the affected Deschutes River system have been attached to this brief in the Excerpt of Record paginated as "ER-\_\_\_\_," and will be cited as such in the brief.

**E. JURISDICTIONAL BASIS FOR AGENCY ACTION**

The Deschutes County decision was a land use decision which LUBA had jurisdiction to review pursuant to ORS 197.015(11) and ORS 197.825(1).

**F. QUESTIONS PRESENTED ON APPEAL**

The questions presented on appeal include:

- 1) whether LUBA erred in determining that the Hearings Officer's findings of compliance with the DCC "no net loss" standard for fish and wildlife mitigation did not impermissibly involve substitution of species and a failure to maintain or replace species at less than a 1:1 ratio;
- 2) whether LUBA erred in determining that the conditions of approval were adequate to ensure compliance with the requirement of "no net loss" of fish resources; and
- 3) whether LUBA erred in determining that the Hearings Officer made adequate findings of compliance with DCC 18.113.070(D) on fish resources and adequately addressed issues raised by Petitioner.

**G. SUMMARY OF ARGUMENTS**

The Deschutes County Code requires that 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 interpreted this standard as permitting Thornburgh destination resort mitigation plans which allow that species may be substituted and that each species need not be maintained or replaced with an equivalent species on a 1:1 or better ratio.

While suggesting that it disagreed with this interpretation of the "no net loss" criteria, at least with regard to threatened and endangered species or Goal 5-protected species, LUBA found that the wildlife habitat plans did not actually propose species substitution and apparently assumed the fish mitigation plans did not do so. This is clear error not based on substantial evidence where the Applicant admitted that its proposed plans would allow new species substituting for current ones. In fact, the Applicant

adamantly argued that the “no net loss” standard applied to the wildlife resource as a whole, not to individual species. LUBA’s decision is not based on substantial evidence where the resort development and the mitigation plans would allow species substitution, including new species to replace current ones and the provision of habitat mitigation for species other than those whose habitat is being impacted, and reduced populations of certain species.

The “no net loss” standard is not limited to “habitat” but applies to fish and wildlife “resources” and complete mitigation is required for “any negative impact” on “the resource.” Accordingly, there should be no net loss of species and populations as well as habitat. Starlings cannot be substituted for songbirds or mountain whitefish for bull trout. Impacts to a species cannot be mitigated by providing habitat to other species. Additionally, the maintenance/replacement of species at less than a ratio of 1:1 constitutes a net loss in violation of the Code.

LUBA also erred in determining that the conditions of approval for compliance with the “no net loss” standard for fish resources are adequate to establish compliance with the County Code. Only three of the mitigation measures proposed by Thornburgh are included in the Hearings Officer’s conditions of approval and they do not include the primary mitigation measures proposed, including acquisition of 836 acre-feet of water from Big Falls Ranch and 520 acre-feet of water from Central Oregon Irrigation District (“COID”) to be returned to flows in the Deschutes River. The Thornburgh fish mitigation plans that were proposed to establish compliance with the “no net loss” standard for fish resources are neither identified nor adopted in the Hearings Officer’s conditions of approval.

LUBA’s assumption that a reference to “wildlife mitigation plans” in the Hearings Officer’s conditions of approval necessarily include fish mitigation plans is not supportable where the fish and wildlife mitigation plans address different subjects, where the plans are in separate documents with different dates and where the Hearings Officer

includes some of the fish mitigation measures in her conditions, suggesting that the rest are omitted. Where conditions of approval are to incorporate an applicant's plans necessary to establish compliance with Code criteria, they need to clearly identify the documents and what in those documents constitute the requirements to meet the Code criteria.

LUBA further erred in determining that the Hearings Officer's findings on compliance with the no net loss standard were adequate where the Hearings Officer made no findings on impacts to fish species in Whychus Creek and the Deschutes River. While she made a finding on mitigation needed for water quality/temperature on Whychus Creek, she made no findings on mitigation water quality/temperature for the Deschutes River. LUBA also erred and lacked substantial evidence to support its conclusions in finding that the loss of cool habitat patches in the mainstem Deschutes River due to the resort's groundwater withdrawals was adequately addressed. These cool habitat patches provide critical refugia for bull trout, anadromous steelhead and spring Chinook salmon and the negative impacts to this habitat should not be allowed to be mitigated by providing cool habitat patches for resident redband trout and mountain whitefish upriver on the Deschutes. The Hearings Officer should have been required to address this issue which was clearly raised by the Petitioner.

## **H. SUMMARY OF MATERIAL FACTS**

### **1. The Proposed Destination Resort.**

A description of the proposed destination resort is provided in earlier LUBA and Court of Appeals decisions. *Gould v Deschutes County*, 54 Or LUBA 205, 208-209 ("Gould I"), *rev'd and remanded*, 216 Or App 150, 153, 171 P3d 1017 (2007) ("Gould II"). The Court described the resort, 216 Or App at 153:

"The resort, to be located on about 1,970 acres of land west of the City of Redmond, is proposed to contain 1,425 dwelling units, including 425 units for overnight accommodations and a 50-room hotel. The resort plans also include three golf courses, two clubhouses, a community center, shops, and meeting and dining facilities."

The elevation of the property is from 3,100 to 3,800 feet and includes juniper woodlands and sagebrush steppe habitats. (Local Rec. 2610)

## 2. Procedural History.

The County's approval of the destination resort's conceptual master plan ("CMP") was remanded back to the County on several issues, including compliance with the County fish and wildlife standards. *Id.*, 216 Or App at 163. The Court decided that too many details about the mitigation plans remained to be resolved to be able to determine compliance with the Code and that the public was entitled to the opportunity to address the actual plans. *Gould II*, 216 Or App at 163.

On remand, the County again approved of the CMP but deferred compliance with the Code's "no net loss" fish and wildlife mitigation criteria to the final master plan ("FMP") stage. That deferral decision was affirmed by LUBA and the Court of Appeals. *Gould v Deschutes County*, 57 Or LUBA 403 (2008) ("*Gould III*"), 227 Or App 601, 206 P3d 1106 ("*Gould IV*"), *rev den*, \_\_\_\_ Or \_\_\_\_ (2009).

Thornburgh applied for an FMP and the County's approved it, including a determination that the "no net loss" fish and wildlife mitigation criteria had been satisfied. LUBA has now remanded the County's decision on a number of issues primarily concerning the Code's fish and wildlife standards. *Gould v Deschutes County*, \_\_\_\_ Or LUBA \_\_\_\_ (2009). (LUBA Rec. 245, ER-1)

LUBA affirmed Petitioner's 4<sup>th</sup> – 7<sup>th</sup> sub-assignments of error of its First Assignment of Error and sub-assignments A.1 through A.6 of its Third Assignment of Error on the basis that a number of important parts of the wildlife plans have not yet been determined (including the location of the proposed restoration, the particular mix of restoration techniques, and the habitat values of the acres) and that the public has a right

to confront the actual mitigation plan that will be used. (LUBA Rec. 263-264, ER-19-20)<sup>2</sup>

LUBA also affirmed Petitioner's Second Assignment of Error, sub-assignment of error B.2 under the Third Assignment of Error, and sub-assignment of error 4 under the Fourth Assignment of Error, that findings and evidence were inadequate to show that proposed mitigation for Whychus Creek would address adverse thermal impacts due to the resort groundwater withdrawals. (LUBA Rec. 268-269, ER-24-25)

Additionally, LUBA affirmed Petitioner's Sixth Assignment of Error that the Hearings Officer erred in failing to require the requisite investment on recreational facilities at the proposed resort as required by statute. (LUBA Rec. 276, ER-32)

### **3. The Fish and Wildlife Mitigation Plans.**

As described by LUBA, Thornburgh proposed both on-site and off-site wildlife mitigation because it is undisputed that the proposed resort would destroy or damage some terrestrial wildlife habitat. (LUBA Rec. 254, ER-10)

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<sup>2</sup> LUBA noted that it was not addressing additional issues raised in these sub-assignments of error beyond the argument that the wildlife mitigation plans are inadequate. (LUBA Rec. 264, ER-20, n.11) The issues not addressed by LUBA include sub-assignments 5 (that providing money to agencies for "studies," as opposed to actual mitigation on the land or in the water, does not constitute mitigation), 6 (that providing funding to federal and state agencies or participating in studies does not equate to actual mitigation on the land and in the water) and 7 (that it is improper to defer interpretation of the County Code to ODFW and BLM) of the First Assignment of Error and sub-assignments A.2 (that reference to agreements with the BLM and ODFW in the conditions of approval are not identified), A.3 (that there is no condition of approval requiring future compliance in perpetuity with which ODFW qualified its approval of the mitigation plans), A.4 (that the Thornburgh wildlife plans adopted in the conditions of approval contain internal inconsistencies and inconsistencies with the Code), and A.5 (that any approval based on feasibility of future compliance cannot be made where no provision is made for the County to approve whatever mitigation is eventually decided upon by BLM and ODFW). (LUBA Rec. 128-130, 136-140) Since LUBA ordered an extensive remand, Petitioner will again raise these issues at that time.

A modified Habitat Evaluation Procedures ("HEP") analysis was proposed by Thornburgh to satisfy the requirements of the Code. As part of this HEP process, seven species were selected to represent all species on the site. The seven species selected include the northern flicker, American kestrel, red-tailed hawk, mountain bluebird, western fence lizard, small mammals (a generic group), and mule deer. (LUBA Rec. 255, ER-11) LUBA stated:

"The before-development HSI [Habitat Suitability Index] was multiplied by the number of acres of habitat for each species, on-site and within one mile of the site, to determine the HUs [Habitat Units] for each species. Post-development, post on-site mitigation HSIs were determined and applied to those same acreages." (LUBA Rec. 255, ER-11)

A total of 8,474 HUs was determined to be needed in off-site mitigation. Restoration and enhancement of approximately 4,501 acres of juniper woodlands would be needed to mitigate the loss of 8,474 HUs. (LUBA Rec. 256, ER-12) This off-site mitigation would include 1) a weed control program, 2) thinning of young junipers and unwanted woody debris, 3) reduction of off-road vehicle impacts, 4) maintenance of two water guzzlers, and 5) \$20,000 for traffic speed monitoring. (LUBA Rec. 254, ER-10, n.5)

The specific areas and rehabilitation actions would be determined by the BLM, Thornburgh and ODFW depending on the condition of the mitigation site and the agreed amount and type of enhancement. (LUBA Rec. 256, ER-12) The management plans also called for an adaptive approach to what vegetative management would actually occur. (LUBA Rec. 257, ER-13)

In addition to wildlife mitigation plans, Thornburgh also proposed fish mitigation plans to address hydrological issues as described by LUBA:

"Several tributaries of the Deschutes River, including Whychus Creek and Deep Canyon Creek are located a number of miles north of the proposed resort. The proposed destination resort will use deep wells to supply water. The aquifers that will provide that water are hydrologically connected to off-site down-gradient surface waters and the aquifer water is cooler than

the receiving surface waters of the Deschutes River and its tributaries. While Thornburgh has been required to acquire and retire water rights to mitigate for its planned volume of water use, that mitigation water will not necessarily offset thermal impacts of its withdrawal of cool water from the aquifers under the destination resort if the mitigation water is warmer than the ground water that is removed from the system." (LUBA Rec. 265, ER-21)

The Hearings Officer found that the Applicant admitted that the resort wells will affect basin water flows. (LUBA Rec. 177, ER-42) ODFW explained the connection between the groundwater and fish resources:

"The Oregon Water Resource Department and United States Geological Service's groundwater model indicates that groundwater in the Deschutes Groundwater Study Area is hydro-geologically connected to the surface water within the basin; therefore, any groundwater pumping within the study area will have an effect on local springs.

Springs and seeps are important groundwater dependent ecosystems in the Deschutes Groundwater Study Area providing unique habitat for a number of plant and animal species including fish. Springs provide natural relative constancy of water temperature. Spring and seep flows especially in the summer and fall, are typically cooler than the water flowing in the main stream. This cooler water provides thermal refuge [sic] for salmonid which thrive in cooler water." (Local Rec. 900)

Among the fish species dependent on this cool water is bull trout, a species listed as threatened under the Endangered Species Act, plus anadromous steelhead and spring Chinook salmon. (Local Rec. 1081, 1511-1512)

For the mainstem Deschutes, Thornburgh proposed retirement of irrigation water rights owned by Big Falls Ranch associated with Deep Canyon Creek (836 acre-feet) and acquisition of water from Central Oregon Irrigation District in Bend (520 acre-feet). (LUBA Rec. 175, ER-40) For impacts to Whychus Creek, Thornburgh proposed helping to fund the return of 106 acre-feet of water from the Three Sisters Irrigation District to the Creek. (LUBA Rec. 175, ER-40) See the map at ER-48 for the location of the proposed resort, the Deschutes River, Deep Canyon Creek, Big Falls, Steelhead Falls and Whychus Creek.

## II. FIRST ASSIGNMENT OF ERROR

**LUBA's Order is unlawful in substance because it incorrectly determined without substantial evidence that the Hearings Officer's finding of compliance with the DCC "no net loss" standard for fish and wildlife mitigation did not impermissibly involve substitution of species and maintenance/replacement of species at less than a 1:1 ratio.**

### A. CHALLENGED DECISION AND PRESERVATION OF ERROR.

Petitioner in her First Assignment of Error in the LUBA appeal challenged the Hearings Officer's approval of the Thornburgh fish and wildlife plans and interpretation of the Deschutes County Code "no net loss" standard for fish and wildlife mitigation as impermissibly allowing substitution of species and maintenance/replacement of species at less than a 1:1 ratio. (LUBA Rec. 126-128)

Petitioner in the first four sub-assignments of the First Assignment of Error asserted:

"1. 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." (LUBA Rec. 126)

"2. The standards do not contemplate substitution of existing species with new species or providing mitigation to species other than the ones affected." (LUBA Rec. 126)

"3. Mitigation cannot result in less than a 1:1 ratio." (LUBA Rec. 127)

"4. The standard is not satisfied by mere 'improvement' of 'habitat.'" (LUBA Rec. 128)

In response, LUBA ruled that though the Hearings Officer's findings could be read as suggesting that the Code allowed species substitution and treatment of the resources as a whole, the wildlife plan she approved did not do so. (LUBA Rec. 259, ER-15) LUBA suggested that it would not approve an interpretation or plan that allowed substitution of species that were threatened or endangered or protected by Goal 5. It concluded that no species had been identified that would not be covered by the habitat mitigation plan. (LUBA Rec. 260-261, ER-16-17)

LUBA did not address these sub-assignments of error with regard to fish resources, stating that it would address fish resource issues elsewhere in its decision. (LUBA Rec. 261, n.9, ER-17, n.9) LUBA's subsequent fish resource discussion, however, does not address these code interpretation issues or facts surrounding species substitution. (LUBA Rec. 265-272, ER-21-28)

#### **B. STANDARD OF REVIEW.**

The Court's standard of review of LUBA's decision here is established by ORS 197.850(9)(a) and (c) which provide that the Court may reverse or remand LUBA's Order if it finds the Order to be unlawful in substance or if the Order is not supported by substantial evidence in the whole record as to facts found by the board under ORS 197.835(2).

ORS 215.416(9) requires that a county decision include a statement that "explains the criteria and standards considered relevant to the decision," states the facts relied upon and explains the justification for the decision. A county should explain its interpretation of undefined terms. *Just v Lane County*, 50 Or LUBA 399, 409 (2005).

A local governing body's interpretation of its code may be entitled to some deference, but the test to be applied for a Hearings Officer's interpretation is whether it is "reasonable." The meaning of local legislation is a question of law which must be decided by the courts and other reviewing bodies to which it is presented. *McCoy v Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988). A prerequisite for application of the deferential standard of review under ORS 197.829(1) is a written decision by a governing body containing an interpretation of a local provision that is adequate for review. *West Coast Media v City of Gladstone*, 44 Or LUBA 503, 519 (2003).<sup>3</sup>

<sup>3</sup> There has been no written decision by the Deschutes County Board of Commissioners interpreting the criteria of DCC 18.113.070(D). Though Thornburgh argued to LUBA that the County had approved other destination resorts where HEP analyses had been used, it appears the decisions were based on the evidence in each case and no opposing biological opinions had been presented.

Also, no deference is due to a governing body's interpretation where that interpretation is contrary to the plain meaning of the words of the Code. *Greenhalgh v Columbia County*, 54 Or LUBA 626, 644 (2007). The legitimacy of an interpretation of a code depends on its consistency with the terms of the provision, its context and the purpose or policy behind it. *Church v Grant County*, 187 Or App 518, 525, 69 P3d 759 (2003). To amend legislation or to subvert its meaning in the guise of interpretation is not permissible. *Goosehollow Foothills League v City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992).

### C. ARGUMENT.

LUBA erred in upholding the Hearings Officer's interpretation of DCC 18.113.070(D) and approval of Thornburgh's fish and wildlife mitigation plans which allow substitution of species and maintenance or replacement with an equivalent species at less than a 1:1 ratio. This interpretation and approval are contrary to the language of DCC 18.113.070(D) which provides:

"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 Court of Appeals in *Gould II* described the Deschutes County Code provision DCC 18.113.070(D) as a "no net loss" requirement for fish and wildlife mitigation. 216 Or App at 155. In reversing LUBA's approval of the original Thornburgh destination resort wildlife plans, the Court emphasized that the Code requires that "[a]ny negative impact on fish and wildlife resources will be *completely mitigated*." (216 Or App at 163.) (Original emphasis.)

Despite these strict requirements of the Code's "no net loss" criteria, the Thornburgh destination resort proposed and the Hearings Officer approved of fish and wildlife mitigation plans that clearly allow for substitution of existing species with new species, substitution of habitat for one species with habitat for another and mitigation resulting in maintenance/replacement of species at less than a 1:1 ratio.

The Hearings Officer determined:

"The applicant concedes that for some species, development on the site will eliminate or degrade their habitat, but argues that its proposal, overall, will provide habitat for new species, will improve terrestrial habitat in the area, and will protect fish species... It [The standard] does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio." (LUBA Rec. 172, ER-37)

The Hearings Officer's interpretation of the "no net loss" standard as allowing substitution of species and maintenance/replacement at less than a 1:1 ratio is not reasonable and is contrary to the plain language of the Code. Anything less than achieving a 1:1 ratio violates the "no net loss" standard on its face. Furthermore, replacing songbirds with starlings or bull trout with whitefish is contrary to the requirement that any negative impact to fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of "the resource." (Emphasis added.) If negative impacts to bull trout are considered as being mitigated by habitat improvements for whitefish, then the resource being negatively impacted is not being completely mitigated for and there is a net loss to the affected resource.

Petitioner's aquatic biologist Chuck Huntington pointed out the tradeoffs being made in Thornburgh's fish and wildlife mitigation plans:

"Creation or expansion of a cool habitat patch near Deep Canyon Creek as a result of the Thornburgh mitigation plan can be expected to benefit resident redband trout and mountain whitefish found above Big Falls, but are outside the geographic distributions of some of the species of fish that may be found in the habitat within the mainstem below Big Falls or in lower Whychus Creek: bull trout and reintroduced anadromous redband trout (steelhead) or spring Chinook salmon. These below-falls species will apparently experience incrementally warmer stream-wide temperatures in the mainstem and in lower Whychus Creek, incrementally reduced availability of cool habitat patches in these areas, and no thermally beneficial mitigation." (Local Rec. 1081)

The Hearings Officer determined that the County fish and wildlife standard "does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio" because that requirement "would be difficult, if not impossible to

satisfy.” (LUBA Rec. 172-173, ER-37-38) Just because a county standard may be difficult to meet does not justify a reinterpretation of the provision contrary to its express terms. If the County wishes to have a lesser standard than its current one which requires complete mitigation for “any negative impact” to “the resource” and a “no net loss,” then it can amend the Code.<sup>4</sup>

LUBA in its decision determined that though the Hearings Officer’s findings could be read as suggesting that it might be acceptable to lump all fish and wildlife resources together, the plans the Hearings Officer actually approved did not compromise or violate the Code standard as those findings might otherwise suggest. (LUBA Rec. 258-259, ER-14-15) LUBA stated:

“Petitioner’s argument under these subassignments of error is that the hearings officer determined that one species can be destroyed and replaced with another species and can be replaced at less than a 1:1 ratio. We do not understand the terrestrial WMP and the M&M Plan to propose replacement of one species with another or to propose on-site and off-site habitat enhancements that will result in less than a complete replacement of the 8,474 HUs [Habitat Units] that Thornburgh estimates will be lost due to development of the destination resort.” (LUBA Rec. 260, ER-16)

LUBA also defined Petitioner’s main objection as whether it is appropriate to use a HEP process at all to satisfy the no net loss standard. (LUBA Rec. 258, ER-14)

These assumptions by LUBA are not correct and there is not substantial evidence to support them.<sup>5</sup> The issue is whether a HEP or any other mitigation plan can be

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<sup>4</sup> The requirement is actually not impossible to satisfy. Thornburgh attempted to portray Petitioner as calling for an impossible standard that no one could achieve on wildlife, requiring study of every possible species including “primitive organisms.” (LUBA Rec. 219) Petitioner rejected the idea of studying every wildlife species (Local Rec. 1075) but proposed that a necessary basis for determining what species to mitigate for was an on-the-ground standard survey for two field seasons. (Local Rec. 1859-1860) Petitioner’s experts also proposed doing fieldwork when the species would be present rather than rely, as did the Applicant, on a borrowed survey done in the dead of winter when many of the affected bird species would not be present. (Local Rec. 291-292)

<sup>5</sup> Note that LUBA addressed only wildlife plans here and apparently decided it did not need to address the issues of substitution of species and habitat with regard to fish

determined to meet the “no net loss” standard where the Applicant admits and the Hearings Officer finds that the plan allows for species to be substituted and allows for maintenance/replacement at less than a 1:1 ratio. If in implementing a HEP there is no net loss of “habitat,” but it is not the habitat for an affected species (like bull trout) or results in substitution of species (like starlings) and in a ratio for maintenance/replacement of species at less than 1:1, then it does not meet the standard of no net loss of “the resource.” The Code does not limit the no net loss requirement just to wildlife and fish “habitat.” It requires that “[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.” (Emphasis added.) Fish and wildlife “resources” are broader than “habitat,” and the “no net loss” must also apply to species and populations. While a habitat-oriented mitigation plan could potentially satisfy the no net loss standard if there is no net loss of the fish and wildlife resources, this plan of Thornburgh’s does not do so.

LUBA also observed that “[u]nless someone comes forward with evidence that the HEP analysis missed or inadequately addressed some aspect of the wildlife resource, we believe a reasonable person could rely on the HEP analysis.” (LUBA Rec. 259, ER-15) LUBA concluded that the Petitioner had not identified any wildlife species on the subject property that had habitat needs that go beyond or are different from the habitat needs of the seven indicator species. (LUBA Rec. 261, ER-17)

Such evidence is not necessary where the Applicant freely admitted and the Hearings Officer accepted that species substitution and lesser numbers of species would be allowed.<sup>6</sup> The burden of proof is on the Applicant to prove no net loss of the fish and

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resources. LUBA did not remand any decision regarding mitigation on the mainstem of the Deschutes which will see a loss in cool habitat patches. See the Third Assignment of Error.

<sup>6</sup> This is of particular concern where the wildlife mitigation plans, as noted by LUBA, are still so indefinite. Future decisions by Thornburgh, BLM and ODFW will determine what mitigation actions for what species will eventually be done and where.

wildlife resources, including species and populations, and if it admits that it is not providing that then it has not met its burden of proof. Furthermore, a determination of what wildlife resources may be missed or inadequately addressed by a habitat plan requires that there first be an on-site survey of what is there. However, the Applicant did not do that, and the Hearings Officer expressly rejected the Petitioner's argument that it should have done so, ruling that there was no need for such a survey.<sup>7</sup>

Additionally, Petitioner did, in fact, assert that the HEP analysis missed or inadequately addressed several aspects of the wildlife resources. Her expert witness, Dr. David Dobkin, testified that the handful of species chosen was not representative of the complete biota of the site:

"[M]uch of the [Thornburgh] report is based on numerical extrapolations and guesstimates of biological and behavioral needs for a handful of species (consisting of four birds, one lizard, mule deer, and unspecified 'small mammals'). This small subset apparently is presumed to be representative of the ecological needs and habitat requirements of the dozens of bird species and numerous small mammal, lizard, and snake species potentially inhabiting the area of the proposed Thornburgh Resort. The inappropriateness of limiting consideration to these seven entities as surrogates for the large and diverse array of species potentially present on the Thornburgh property is exemplified by the nebulous 'small mammal' group, which encompasses such disparate taxonomic and ecological groups of species as rodents and shrews – a combination that would be analogous to lumping together jack rabbits and pronghorn antelope, or bats and bison." (Local Rec. 1860)

Petitioner's consulting wildlife biologist Bret Michalski pointed out that the nesting and foraging habitats for the golden eagle and red-tailed hawk are sufficiently

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<sup>7</sup> LUBA states that Petitioner did not adequately develop the argument that the HEP was impermissibly based on a borrowed analysis from a neighboring destination resort without any on-site analysis to confirm that the sites are sufficiently similar to allow the assumptions and indices that were used in that analysis to be used in this case. (LUBA Rec. 260, ER-16) To the contrary, Petitioner did argue to LUBA that a proper survey was needed. (LUBA Rec. 119) The fundamental problem, though, is approving a wildlife mitigation plan that allows species substitution in the first place.

different that a hawk HEP analysis cannot be used to establish no negative impact on large raptors. (Local Rec. 1863)<sup>8</sup> Mr. Michalski also pointed out that the potential mitigation lands included different habitat, being at lower elevations and relatively flat, as opposed to Cline Buttes where the proposed resort would be located and where there would be the different habitat of south-facing slopes. (Local Rec. 1864) Petitioner also argued that the mitigation plans were inadequate for the impact of starlings on reducing available cavities for bluebirds and the northern flicker. (Local Rec. 1864) Thornburgh's expert acknowledged there would be an increased population of crows, ravens and starlings attracted to the area which will prey on native birds and/or compete for nest cavities. (Local Rec. 2646)

Improving habitat off-site of the resort as proposed in the Thornburgh mitigation plan would also not necessarily increase or make up for lost population numbers on-site. Vegetation habitat improvements alone cannot ensure that there would be added individuals where one also takes into consideration the territoriality of species and other factors affecting species density. (Local Rec. 301) The HEP addresses only habitat, not territoriality or capacity of species density. Even in addressing habitat, though, the HEP does not address the need for connectivity of habitat. Mr. Michalski testified:

"Yet merely enhancing existing habitat does not undo fragmentation of habitat elsewhere. If a habitat block is made smaller, enhancing another block of habitat (that may or may not be adjacent to the habitat in question) may not replace the connectivity function that the lost habitat may have provided." (Local Rec. 301-302)

The response of Thornburgh was that it was the wildlife resource as a whole that mattered, not individual species. Thornburgh's wildlife biologist testified:

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<sup>8</sup> ODFW requested the northern flicker be added to represent cavity excavators and the golden eagle was removed. (Local Rec. 2613) Though the golden eagle was removed as an indicator species, there is no dispute that golden eagles use the resort area. Thornburgh's expert stated: "Some species with very large home ranges that are more sensitive to human disturbance, such as golden eagles, may avoid the area over the long term." (Local Rec. 2646)

"The results at individual sites vary and TetraTech, the BLM and ODFW feel that the restoration and enhancement actions proposed will benefit many wildlife species and that in balance, there will be no net loss, although species composition may change." (Local Rec. 342) (Emphasis added.)

\* \* \*

"The DCC 18.113.070(D) does not suggest or imply that substituting one species for another is unacceptable in wildlife mitigation." (Local Rec. 130)

Thornburgh argued to LUBA:

"She [The Hearings Officer] specifically disagreed with Gould that the standard 'requires that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio.'...The standard applies to fish and wildlife resources in the aggregate, not to individual species. The words '*net* loss or *net* degradation' indicate that an applicant should assess the overall impacts to fish and wildlife resources and provide mitigation to ensure that there is no net loss to those resources as a whole, not that the applicant must meet the 'no net loss' standard for each individual fish and wildlife species that may be impacted.... Thornburgh agrees that any negative impacts must be completely mitigated, but disagrees with Gould's assertion that 'the resource' for which no net loss must be shown is each individual species or habitat location that may be impacted. There is no textual basis for interpreting the standard to apply to specific species or habitat locations. Rather, 'the resource' for which mitigation must be provided is the fish resource or the wildlife resource in general." (LUBA Rec. 218-219)

LUBA's decision not to address the issue of interpretation of the County Code was in error where it apparently assumed that the issue did not need to be addressed. This assumption was not based on substantial evidence where fish mitigation on the mainstem Deschutes clearly involves substituting mitigation of cool habitat patches for redband trout and mountain whitefish for impacts on cool habitat patches for bull trout, anadromous steelhead and spring Chinook salmon and where Thornburgh's wildlife habitat mitigation plans do allow for species substitution. LUBA is also wrong in suggesting that the Hearings Officer did not interpret or apply the Code as allowing

substitution of species, overall mitigation for fish and wildlife resources and maintenance/replacement of species at less than a 1:1 ratio.

LUBA did offer the suggestion that if there was evidence that the subject property contained threatened or endangered species or wildlife protected under Goal 5 that it would not be permissible for their habitat to be destroyed and instead replaced with habitat suitable for one of the seven indicator species. (LUBA Rec. 260, ER-16) LUBA is incorrect in concluding that the County standard applies only to threatened or endangered species and Goal 5 protected species, or to "destruction" of habitat. By its clear terms, the Code standard applies to all fish and wildlife resources and to "any negative impact."

Petitioner requests the Court's determination that LUBA erred in failing to require the Hearings Officer to interpret and apply DCC 18.113.070(D) consistent with the Code language, and specifically that it does not allow for species substitution, that it requires mitigation for the impacted species and that maintenance/replacement be at a ratio of 1:1 or better. The Court is also requested to decide that LUBA's assumption that the wildlife HEP does not allow species substitution and LUBA's inference that affected fish resources (bull trout, anadromous steelhead and spring Chinook salmon) in the mainstem Deschutes are mitigated for are in error and are not based on substantial evidence.

### III. SECOND ASSIGNMENT OF ERROR

**LUBA's Order is unlawful in substance and is not based on substantial evidence in its determination that the Hearings Officer's conditions of approval are adequate to ensure Code compliance with "no net loss" of fish resources or are adequate to identify the required mitigation plans.**

#### A. CHALLENGED DECISION AND PRESERVATION OF ERROR.

Petitioner in her sub-assignments of B.1, B.3 and B.4 of the Third Assignment of Error of the LUBA appeal, which addressed inadequacy of the Hearings Officer's conditions of approval for mitigation of fish resources, asserted:

"1. The Applicant's mitigation plans are not identified, found to establish compliance or even required to be done." (LUBA Rec. 141)

"3. Actual mitigation from Big Falls Ranch water is not required." (LUBA Rec. 141)

"4. No condition requires actual mitigation by Central Oregon Irrigation District water." (LUBA Rec. 142)

In response, LUBA ruled that Condition 38's requirement that the April 2008 Wildlife Mitigation Plan and August 2008 Supplement also included the fish mitigation plans. It further ruled that Condition 10 which requires compliance with OWRD mitigation requirements was sufficient to require that the mitigation come from Central Oregon Irrigation District.

#### **B. STANDARD OF REVIEW.**

See the above Standard of Review under the First Assignment of Error.

Where conditions of approval incorporate an applicant's plans to ensure compliance with Code criteria, they need to clearly identify the documents and what in those documents constitutes the requirements to meet the Code criteria. *See, Sisters Forest Planning Committee v Deschutes County*, 198 Or App 311, 315-319, 108 P3d 1175 (2005). Any plans relied upon by a decisionmaker must be included in the conditions of approval. It cannot just be assumed that everything mentioned in a land use application will be done. *Central Oregon LandWatch v Deschutes County*, 53 Or LUBA 290, 305-307 (2007).

#### **C. ARGUMENT.**

LUBA erred in ruling that the Hearings Officer's conditions of approval are adequate to ensure compliance with the "no net loss" standard for fish resources and to identify what fish mitigation plans and which requirements in those plans are to ensure compliance with the criteria of DCC 18.113.070(D). There are, in fact, no conditions identifying what fish resource mitigation plans are to be done or requiring that they be done except Condition No. 38's reference to the removal of existing wells on the subject property and coordination with ODFW to model stream temperatures in Whychus Creek,

plus Condition No. 39's requirement of more water for Whychus Creek. (LUBA Rec. 183, ER-45) Those three mitigation measures clearly do not suffice to meet the "no net loss" standard for fish resources. In fact, Thornburgh relied on more mitigation than that, including the instream return of 836 acre-feet of water from Big Falls Ranch and 520 acre-feet of water from COID (LUBA Rec. 175, ER-40), but the Hearings Officer failed to require it.

The Hearings Officer's full condition of approval No. 38 provides:

"The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county 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 Whychus Creek." (LUBA Rec. 183, ER-45)

Additionally, Condition No. 39 also requires:

"The applicant shall provide funding to complete a conservation project by the Three Sisters 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 funding agreement prior to the completion of Phase A." (LUBA Rec. 183, ER-45)

There is no basis for LUBA to conclude, based on Thornburgh's brief to LUBA (LUBA Rec. 233), that Condition No. 38's reference to the Wildlife Mitigation Plan also includes the fish mitigation plan of April 12 and a two-page letter of August 11. (LUBA Rec. 270, ER-26). The Wildlife Mitigation Plan of April 15 (Local Rec. 2609) and its August Supplement (Local Rec. 416) are different documents from the April 21 fish mitigation plan (Local Rec. 2690) and the two-page letter about Whychus Creek dated August 11 (Local Rec. 378).

It cannot be assumed that a condition that specifically refers to "wildlife" mitigation plans also includes "fish" mitigation plans where the plans regard entirely different subjects, are in different documents and have different dates. Condition No. 38

also specifically refers to the “Plan” and the “Supplement,” not to the “plans” and a “letter.”

Condition No. 38’s requirement of removal of existing wells and coordination with ODFW to model stream temperatures in Whychus Creek and Condition No. 39’s requirement of adding 106 acre-feet of water in Whychus Creek are the only three mitigation measures in the fish mitigation plans to be required by the Hearings Officer. If anything, the mention of these three mitigation measures suggests omission or exclusion of the remainder of the requirements in the fish mitigation plans, including such critical requirements of retirement of irrigation rights from Big Falls Ranch into Deep Canyon Creek. If the reference to the wildlife mitigation plans was meant to incorporate all the fish mitigation plans, why would the Hearings Officer then specifically mention only three of the fish mitigation measures in the fish mitigation plans?

In a similar situation in *Central Oregon LandWatch*, *supra*, 53 Or LUBA at 306, LUBA observed:

“Indeed, the fact that the hearings officer specifically adopted certain recommendations [in a forest management plan] as conditions of approval but not others suggests that the hearings officer did not adopt those other recommendations.”

Furthermore, the fish mitigation plan of April 21 and the letter of August 11 are not all of the plans submitted by Thornburgh on fish mitigation. In June, Thornburgh submitted its May 2008 “Evaluation of the Proposed Thornburgh Resort Project Impact on Hydrology and Fish Habitat” (Local Rec. 2121) which Thornburgh stated was “a supplement” to its earlier April plan. (Local Rec. 2120)

As stated above, conditions of approval incorporating an applicant’s plans to meet Code criteria need to clearly identify the documents and what in those documents constitutes the requirements to meet the Code criteria. The Court of Appeals in *Sisters Forest Planning Committee*, *supra*, 198 Or App at 315, stated:

“We generally agree with petitioner that specificity and clarity are desirable to ensure that the imposed conditions are properly understood not only by

the entity responsible for complying with them but also by potential challengers of a permit subject to conditions. Adequate specificity and clarity promote the proper application of relevant land use criteria and proper administration of the permit...."

In addition, Petitioner pointed out to LUBA that there was no requirement by the Hearings Officer for Thornburgh actually acquiring mitigation water from Central Oregon Irrigation District ("COID"). LUBA decided that Condition 10 did require it, but that condition actually only requires that the Applicant comply with water laws administered by OWRD (LUBA Rec. 179, ER-44). The condition does not require that the specific COID water which was the basis for Thornburgh's thermal impacts analysis on fish in the Deschutes River be utilized. Elsewhere, LUBA recognized that while Thornburgh has been required to mitigate for its planned volume of water use, that water does not necessarily offset thermal impacts on fish associated with the requirements of DCC 18.113.070(D). (LUBA Rec. 265, ER-21) Where Thornburgh's analysis of thermal impacts on the Deschutes River relies on specific sources of water to be used for mitigation, there must be a condition of approval requiring those sources or something better to be used for the mitigation. A general condition only requiring compliance with OWRD mitigation rules is not sufficient. A condition of approval on water quantity does not obviate the need for a condition of approval on water quality.

Petitioner requests that the Court order that conditions of approval on mitigation for fish resources be made clear. Such clarification is necessary for a determination on the "no net loss" criteria for those fish resources.

#### IV. THIRD ASSIGNMENT OF ERROR

**LUBA's Order is unlawful in substance and is not based on substantial evidence in its determination that the Hearings Officer made adequate findings based on substantial evidence for compliance with DCC 18.113.070(D) for fish resources and on issues raised by Petitioner challenging the adequacy of fish resource mitigation.**

**A. CHALLENGED DECISION AND PRESERVATION OF ERROR.**

Petitioner in her sub-assignment B.1 of the Third Assignment of Error and sub-assignment 2 of the Fourth Assignment of Error in the LUBA appeal asserted regarding mitigation of fish resources:

“1. The Applicant’s mitigation plans are not...found to establish compliance....” (LUBA Rec. 141)

“2. The Hearings Officer did not address the need to mitigate for impacts to cool habitat patches.” (LUBA Rec. 144)

In response, LUBA ruled that the Hearings Officer’s findings were adequate to find compliance with the “no net loss” standard for fish resources regarding the Deschutes River and adequate to respond to Petitioner’s arguments on “cool habitat patches.”

**B. STANDARD OF REVIEW.**

See the above Standard of Review under the First Assignment of Error.

Adequate findings must set out the facts relied upon and explain how the facts lead to the conclusion that the approval standards are met. *See, Thomas v Wasco County*, 35 Or LUBA 173, 181 (1998). The Oregon Supreme Court in *Sunnyside Neighborhood v Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1997), decided that what is needed for adequate judicial review is a clear statement by the decision-making body of what are the relevant and important facts upon which its decision is based. Mere conclusions are not sufficient. Adequate findings must address a party’s evidence and issues. *Central Oregon LandWatch, supra*, 53 Or LUBA at 313.

**C. ARGUMENT.**

LUBA erred in determining that the Hearings Officer’s findings were adequate to determine compliance with DCC 18.113.070(D) regarding “no net loss” of fish resources and regarding specific arguments raised by Petitioner. Petitioner argued to LUBA that the Hearings Officer failed to make adequate findings to determine compliance with the Code standard. The Hearings Officer’s findings are just a repetition of various arguments

raised by the parties. (LUBA Rec. 175-177, ER-40-42) She made no actual findings of compliance to conform with ORS 215.416(9)'s requirement for a statement of approval of a permit that "states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth." *See, Thomas, supra*, 35 Or LUBA at 181.

LUBA decided here that the Hearings Officer's findings were adequate, citing generally to findings identified in Thornburgh's brief (LUBA Rec. 270, ER-26) This decision by LUBA is not based on substantial evidence. What is described by Thornburgh in its brief (LUBA Rec. 234) only refers to the Hearings Officer "addressing" or "discussing" issues, not making findings of compliance explaining justification for decisions. The Hearings Officer should not just set out each side's arguments and then give a conclusion of denial or approval. It should explain what facts led to the conclusions and how. Though the Code requires that there be no net loss of fish resources and though Petitioner raised issues on specific species and habitat, the Hearings Officer made no findings on impacts to fish species in Whychus Creek and the Deschutes River. (LUBA Rec. 175-177, ER-40-42) While she made a finding on mitigation needed for water habitat quality on Whychus Creek (LUBA Rec. 177, ER-42), she made no findings on water habitat quality for the Deschutes River.

In particular, the Hearings Officer did not address the need to mitigate for impacts to cool habitat patches in the mainstem Deschutes River. In response to Petitioner's arguments, LUBA concluded:

"With the exception of the potential for impacts on Whychus Creek, the hearings officer was satisfied that the proposed destination resort would not have adverse impacts on cool patches in the Deschutes River basin....[T]he hearings officer apparently concluded that the proposed mitigation was sufficient to resolve concerns about other cool patches, and we agree with Thornburgh that that conclusion is supported by substantial evidence."  
(LUBA Rec. 272, ER-28)

This conclusion is again not based on substantial evidence. To the contrary, the Hearings Officer never even addressed the issue of cool patches in the mainstem Deschutes (LUBA Rec. 171-179, 183, ER-36-45) and neither Thornburgh nor LUBA cited anywhere in the Hearings Officer's decision where she allegedly did so. (LUBA Rec. 272, ER-28; LUBA Rec. 237-238) The "cool habitat patches" are specific habitat points where groundwater comes into the river and provides critical habitat for sensitive fish species. The evidence that was ignored by LUBA and the Hearings Officer was from Petitioner's aquatic biologist Charles Huntington who testified:

**"Issue 3.** The stream-wide effects on summer water temperatures estimated for the project by TtEC [Thornburgh's expert] (2008b, 2008c, and 2008d) do not consider the localized consequences of reduced groundwater inputs, specifically the reductions of cool habitat patches and of the coldest water in the affected stream sections at that time of year. This is something about which I gave oral testimony in Bend on 15 July. As was described in that testimony, TtEC's mass-balance analyses are at a coarse spatial scale that obscures these localized effects because the thermal consequences of Thornburgh-related reductions in groundwater inputs are being examined only after the cold groundwater has fully mixed with warmer water. The analyses do not account for the value of the cold groundwater, and the size of associated cool habitat patches, prior to such mixing. Per page 10 of my memorandum of 15 July (Huntington 2008), logic embedded in mass-balance analyses described by TtEC (2008d) suggests that the Thornburgh Resort's impact on cool habitat patches within the affected sections of the mainstem Deschutes would be to reduce existing patches by about 0.6%. The significance of this effect would be expected to increase as additional groundwater pumping within areas contributing to the affected sections of stream accumulated." (Local Rec. 1080-1081) (Original emphasis.)

Thornburgh claimed that it responded to this issue at Rec. 97, 101, 106-107, and 899-901, 1251, 2135-2139, 2698-2700. (LUBA Rec. 237) None of these citations are to any evidence in response to Mr. Huntington's testimony. They include legal arguments by Thornburgh's attorneys, mainly to the effect that changes in temperature of the overall river are small enough that they won't impact fish.<sup>9</sup> Elsewhere, Thornburgh's experts

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<sup>9</sup> DCC 18.113.070(D)'s "no net loss" standard protects all aspects of the fish resources, including habitat, species and populations. Unlike its wildlife mitigation argument where

addressed temperature of the overall river (where the cold habitat patch water had mixed into the rest of the river water), but they did not address the cool habitat patches themselves. References to ODFW's approval of Deep Canyon Creek as mitigating for "springs and seeps" cannot be relied upon because it predates Thornburgh's analyses of impacts that Mr. Huntington's analysis is based on. These analyses were done in July. (Local Rec. 1079) The ODFW letter addressing mitigation for "springs and seeps" was written in June. (Local Rec. 899)

Even if the ODFW letter could be considered relevant, it would only be so if the "no net loss" standard were interpreted as allowing substitution of species. Though bull trout, anadromous steelhead and spring Chinook salmon cool habitat patches are being impacted, the proposed mitigation at Deep Canyon Creek would benefit cool habitat patches for resident redband trout and mountain whitefish further upstream on the Deschutes. See the Huntington quote from Local Rec. 1081 at page 12 of this brief.

As described by the Thornburgh experts, bull trout habitat exists on the Deschutes River only up to Big Falls, a fish passage barrier. (Local Rec. 2142) The upstream limit of summer steelhead and spring Chinook salmon is also Big Falls. (Local Rec. 2142) The proposed Deep Creek Canyon mitigation water enters the Deschutes River above Big Falls. (Local Rec. 1094, ER-48) Habitat patches provided above Big Falls will thus not provide cool habitat patch mitigation for bull trout, anadromous steelhead and spring Chinook salmon to compensate for the negative impacts to their downstream cool habitat patches caused by the Thornburgh groundwater withdrawals.

As explained by Mr. Huntington, the mitigation evidence presented by Thornburgh for the Deschutes downstream of Big Falls only concerns mixed water temperatures, or the overall temperature of the River after the cool habitat patch water

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it asserts that only habitat and not populations need be considered, Thornburgh here argues that negative impacts to habitat can be ignored if it looks like the fish population isn't affected. That approach inappropriately ignores the language of the Code and the cumulative effect such habitat impacts can have. Moreover, there is no evidence that loss of the cool habitat patches won't impact the affected populations.

has blended into the rest of the River. Thornburgh's experts gave temperatures for groundwater and for the mainstem Deschutes<sup>10</sup>, including the temperature of groundwater that enters the cool habitat patches of 11° C, the River itself of 26° C at Lower Bridge (near where Deep Creek Canyon enters the River), 18.3° C above Steelhead Falls and 15.1° C at the mouth of Whychus Creek. (Local Rec. 2137)

Thornburgh's experts also acknowledged that the proposed Deep Canyon Creek water would be 13° C upon entry into the Deschutes River even if its spring temperature was 11° C. It would warm 2° C before entering the Deschutes mainstem. (Local Rec. 2137) So even to the extent Deep Canyon Creek water is mitigation for cool habitat patches, its water is 2° C warmer than the springs in the River.

Again according to Thornburgh's experts, the mixed mainstem Deschutes River water would see a .1° C increase at Steelhead Falls and below there during the irrigation season. (Local Rec. 2138) They termed this to be a "negligible reduction in habitat quantity" and no change in quality. (Local Rec. 2149)

While Petitioner believes that any measurable (.1° C) increase in temperature and acknowledgment of a "negligible" impact constitutes "any" negative impact under the Code, the negative impacts on cool habitat patches for bull trout, anadromous steelhead and spring Chinook salmon downstream of Big Falls clearly violate the "no net loss" standard. There is not substantial evidence to support LUBA's decision that the no net loss standard is met for the mainstem Deschutes.

Even if there had been responsive evidence by Thornburgh, though, that does not excuse LUBA allowing the Hearings Officer not to address the issue in her findings. A decision-maker must address the issues raised in a proceeding. *LeRoux v Malheur County*, 30 Or LUBA 268, 271 (1995). Petitioner presented a specific, quantitative measure of negative effects on special fish habitat, "cool habitat patches" for bull trout,

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<sup>10</sup> The mainstem Deschutes River temperatures are the maximum seven-day average of the daily maximum temperatures for June through September 2007.

anadromous steelhead and spring Chinook salmon, and the Hearings Officer did not even mention the issue. This is not a case where despite a county's failure to make findings that its conclusion may be affirmed where a party points to evidence in the record that "clearly supports" the County's decision. That is a demanding standard that is met only where the relevant evidence is such that it is "obvious" or "inevitable" that the decision is consistent with applicable law. *Oregon Natural Desert Assoc. v Grant County*, 42 Or LUBA 9, 24 (2002).

Petitioner requests the Court to reverse and remand LUBA's Decision that the "no net loss" standard was met for fish resources on the mainstem Deschutes and to require adequate evidence and findings by the County on compliance with the "no net loss" criteria for the fish resources.

#### V. CONCLUSION

LUBA erred in failing to find that the Hearings Officer's approval of fish and wildlife mitigation plans impermissibly involved substitution of species and maintenance/replacement at less than a 1:1 ratio in violation of DCC 18.113.070(D). LUBA also erred in not ruling that the conditions of approval and findings are inadequate and in not basing its decision on substantial evidence regarding mitigation for impacts to fish resources.

DATED this 20<sup>th</sup> day of October, 2009.

Respectfully submitted,



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

ANNUNZIATA GOULD,  
*Petitioner,*

vs.

DESCHUTES COUNTY,  
*Respondent,*

and

THORNBURGH RESORT COMPANY, LLC,  
*Intervenor-Respondent.*

LUBA No. 2008-203

FINAL OPINION  
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

Peter Livingston, Portland, filed the response brief. With him on the brief was Schwabe, Williamson & Wyatt PC. Peter Livingston and Martha Pagel argued on behalf of intervenor-respondent.

HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED

09/09/2009

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

## NATURE OF THE DECISION

Petitioner appeals county approval of a final master plan for Thornburgh Resort, a destination resort.

## INTRODUCTION

### A. Prior Appeals

Under the Deschutes County Code (DCC), destination resorts are subject to a three-step approval process. The first step is approval of a conceptual master plan (CMP), which is processed as though it were a conditional use permit. DCC 18.113.040(A). There is a right to a public hearing at the CMP stage of approval, and the county decision approving a CMP must be based on evidence that is submitted during that public process. As explained below, the county's CMP decisions have been challenged at LUBA and at the Court of Appeals and Supreme Court. The second step in approving a destination resort is approval of a final master plan (FMP). DCC 18.113.040(B). A county decision to grant FMP approval is not required in all cases to include a public hearing. The decision that is before LUBA in this appeal is the county's decision that grants FMP approval for the Thornburgh Resort. The final step in the county's three-step approval process is site plan or land division approval. DCC 18.113.040(C). Presumably those decisions will be rendered once the appeals concerning the county's CMP and FMP decisions have been finally resolved.

A central issue in petitioner's appeals challenging the county's CMP decision, and the central issue in this appeal of the county's FMP decision, concerns one of the CMP approval criteria, DCC 18.113.070(D). DCC 18.113.070 provides, in relevant part:

"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.

1       “\* \* \* \* \*”

2       In this opinion we sometimes refer to DCC 18.113.070(D) as the “no net loss” standard.

3       The county’s initial decision granting CMP approval was appealed to LUBA. We  
4       sustained three of the petitioner’s 13 assignments of error, in part, and remanded the county’s  
5       CMP decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007)  
6       (*Gould I*). In one of the assignments of error that LUBA denied in *Gould I*, LUBA rejected  
7       petitioner’s argument that the county erroneously found that Thornburgh’s proposed wildlife  
8       mitigation plan was adequate to allow the county to make the “no net loss” finding required  
9       by DCC 18.113.070(D). Petitioner Gould appealed our decision to the Court of Appeals,  
10      assigning error to our rejection of her challenge to the county’s DCC 18.113.070(D) finding.  
11      The Court of Appeals reversed and remanded our decision in *Gould I*, finding that  
12      Thornburgh’s wildlife mitigation proposal was not sufficiently developed to allow the county  
13      to make the required DCC 18.113.070(D) “no net loss” finding. *Gould v. Deschutes County*,  
14      216 Or App 150, 171 P3d 1017 (2007) (*Gould II*). As particularly relevant here, the Court of  
15      Appeals in its *Gould II* decision determined that the county must either require that  
16      Thornburgh’s wildlife mitigation proposal be adequately developed as part of the CMP  
17      approval process, or defer consideration of that more fully developed wildlife mitigation  
18      proposal to the FMP approval stage and allow a full right of public participation in rendering  
19      the FMP decision. We set out the Court of Appeals’ reasoning in its *Gould II* decision in  
20      some detail later in this opinion.

21      After the Court of Appeals’ decision in *Gould II*, the county granted CMP approval  
22      for a second time on April 1, 2008. In doing so the county chose the second option set out in  
23      *Gould II* and deferred its finding regarding DCC 18.113.070(D) to the FMP stage of approval  
24      and imposed a condition requiring a full public process for FMP approval.<sup>1</sup> The county’s

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<sup>1</sup> That condition is set out below:

1 second CMP approval decision, which deferred the required finding on DCC 18.113.070(D)  
 2 to the FMP stage, was also appealed to LUBA. LUBA affirmed that decision on September  
 3 11, 2008. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008) (*Gould III*). Petitioner  
 4 appealed LUBA's *Gould III* decision to the Court of Appeals. The Court of Appeals  
 5 affirmed LUBA's decision on April 22, 2009. *Gould v. Deschutes County*, 227 Or App 601,  
 6 206 P3d 1106 (2009) (*Gould IV*). A petition for Supreme Court review of the Court of  
 7 Appeals' decision in *Gould IV* is presently pending before the Supreme Court.

8 On August 11, 2007, Thornburgh submitted its application for FMP approval. On  
 9 April 21, 2008, Thornburgh submitted an amended application for FMP approval. On  
 10 October 8, 2008, after LUBA's decision in *Gould III* but before the Court of Appeals'  
 11 decision in *Gould IV*, the county hearings officer granted FMP approval. That FMP approval  
 12 decision, which includes the county's finding that Thornburgh's modified proposal complies  
 13 with DCC 18.113.070(D), is the decision that is before us in this appeal.

14 With the above review of the appeals of the county's CMP and FMP decisions, we  
 15 return now to the Court of Appeals' decision in *Gould II*. Because we believe that decision  
 16 in large part dictates the outcome of this appeal, we quote extensively from the portion of that  
 17 opinion that addresses the DCC 18.133.070(D) "no net loss" standard before turning to the  
 18 parties' arguments:

19 "The county's findings on the submission requirements of DCC  
 20 18.113.050(B)(1) with respect to wildlife note the preparation of a 'Habitat  
 21 Evaluation Procedures' analysis for the site that described 'project impacts  
 22 and corresponding mitigation measures.' The [county's] findings list the types  
 23 of wildlife on the site and the short-term and long-term impacts on wildlife  
 24 and fish by the proposed development. The explanation concludes:

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"37. 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 [FMP] 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." Record 2754.

1           “According to Tetra Tech [respondent’s consultant],  
2 approximately 2,149 off-site acres will be needed to offset loss  
3 of habitat values on the subject property by virtue of the  
4 proposed development. \* \* \* As discussed under DCC  
5 18.113.070 M., the BLM MOU [(Bureau of Land Management  
6 memorandum of understanding)] requires [Thornburgh] to  
7 complete a wildlife mitigation plan. [Thornburgh] and BLM  
8 are currently evaluating the viability of implementing the  
9 agreed mitigation measures on federal property in the vicinity  
10 of the resort that is commonly known as the ‘Masten  
11 Allotment.’”

12           “The [county’s] findings on compliance of the plan with the DCC  
13 18.113.070(D) ‘no net loss’ requirement conclude:

14           “‘The HEP analysis will be used to guide mitigation activities.  
15 Due to the size and scope of the project and the related impact  
16 from cessation of some cattle-grazing activities, [Thornburgh]  
17 is participating with a multi-agency group to finalize the  
18 mitigation area. This includes representatives of ODFW  
19 [(Oregon Department of Fish and Wildlife)], BLM, Tetra Tech  
20 and [Thornburgh].

21           “\* \* \* \* \*

22           “‘In a letter to the County dated February 9, 2005, Steven  
23 George, Deschutes District Wildlife Biologist with ODFW,  
24 states that ODFW is working with [Thornburgh] to develop an  
25 acceptable wildlife report with mitigation measures and  
26 expresses the view that ‘[Thornburgh] will be able to develop  
27 an acceptable program to mitigate the impacts.’ \* \* \*”

28           “\* \* \* \* \*

29           “‘The Board [of County Commissioners] finds that, as stated  
30 by ODFW, it is feasible to mitigate completely any negative  
31 impact on identified fish and wildlife resources so that there is  
32 no net loss or net degradation of the resource. The MOU  
33 between the BLM and [Thornburgh] requires [Thornburgh] to  
34 complete a wildlife mitigation plan that will be reviewed and  
35 approved by both ODFW and BLM. \* \* \* The Board imposes  
36 as a condition below that the mitigation plan adopted by  
37 [Thornburgh] in consultation with Tetra Tech, ODFW and the  
38 BLM be adopted and implemented throughout the life of the  
39 resort.’”

1 "In addressing a related requirement that the 'resort mitigate any demands that  
2 it creates on publicly-owned recreational facilities on public lands in the  
3 surrounding area,' the county decision details the content of the Bureau of  
4 Land Management (BLM) memorandum of understanding (MOU):

5 "In Section II.7 of the MOU, [Thornburgh] and BLM agree to  
6 work cooperatively to complete a wildlife mitigation plan to  
7 compensate for impacts related to the resort. The MOU  
8 outlines specific mitigation measures to be undertaken by  
9 [Thornburgh] to mitigate the impacts of resort development on  
10 surrounding federal recreation facilities. \* \* \* [The] BLM  
11 identified federal property located to the south and east  
12 (commonly known as the 'Masten Allotment') as an area to be  
13 managed with an emphasis on the preservation and  
14 enhancement of wildlife habitat. [Thornburgh], BLM and  
15 ODFW are working together to evaluate whether  
16 [Thornburgh's] wildlife mitigation obligation can be  
17 implemented in this location. \* \* \*

18 "The record contains a report \* \* \* from Tetra Tech, which  
19 describes habitat, land uses and mitigation measures to be  
20 implemented on the federal lands surrounding the resort. The  
21 Tetra Tech report, the BLM MOU and the AAC Agricultural  
22 Assessment identify surrounding land uses and potential  
23 conflicts between the resort and adjacent uses within 600 feet.  
24 The data, analysis and mitigation measures contained in the  
25 Tetra Tech report have been incorporated into the final MOU  
26 between [Thornburgh] and BLM.'"

27 "Consistently with those findings, the county approved the conceptual master  
28 plan conditionally, requiring among other things that

29 "[Thornburgh] shall abide at all times with the MOU with  
30 BLM, dated September 28, 2005, regarding mitigation of  
31 impacts on surrounding federal lands, to include wildlife  
32 mitigation and long-range trail planning and construction of a  
33 public trail system. The mitigation plan adopted by  
34 [Thornburgh] in consultation with Tetra Tech, ODFW and the  
35 BLM shall be adopted and implemented throughout the life of  
36 the resort.'

37 "The memorandum of understanding requires Thornburgh to complete a  
38 wildlife impact mitigation plan that 'will specify mitigation measures that are  
39 sufficient to insure that there is no net loss of wildlife habitat values as a result  
40 of the proposed development.' The agreement requires approval of the plan  
41 by ODFW and BLM and commits Thornburgh to 'work cooperatively with

1 ODFW and BLM to determine the specific locations where the mitigation plan  
2 will be implemented.' The agreement provides that certain mitigation  
3 measures may be undertaken within the Masten Allotment, and those  
4 measures 'may include' trail construction, removal of old trails, fencing,  
5 vegetation thinning and management, and noxious weed controls.

6 "Gould sought review of the county's land use decision by LUBA. Gould's  
7 petition for review set out 13 assignments of error by the county. \* \* \* Gould  
8 asserted that the county's findings on the feasibility of complying with the fish  
9 and wildlife protection criteria were not supported by substantial evidence and  
10 that the 'deferral of compliance with a criterion and reliance on an agency to  
11 decide compliance with the [c]ounty's requirements is not permissible.'"

12 "LUBA determined that the local government record contained substantial  
13 evidence to support the county's findings on compliance with DCC  
14 18.113.070(D). [LUBA] concluded:

15 "Where the county finds that it is feasible to satisfy a  
16 mandatory approval criterion, as the county did here with  
17 regard to DCC 18.113.070(D), the question is whether that  
18 finding is adequate and supported by substantial evidence.  
19 *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999).  
20 Here, Thornburgh supplied the Wildlife Report to identify the  
21 negative impacts on fish and wildlife that can be expected in  
22 developing Thornburgh resort. The report also describes how  
23 Thornburgh proposes to go about mitigating that damage, both  
24 on-site and off-site. In response to comments directed at that  
25 report, Thornburgh has entered into discussions with ODFW  
26 and a MOU with the BLM to refine that proposal and come up  
27 with better solutions to ensure that expected damage is  
28 completely mitigated. ODFW and BLM have both indicated  
29 that they believe such solutions are possible and likely to  
30 succeed. We conclude that the county's finding regarding  
31 DCC 18.113.070(D) is supported by substantial evidence and is  
32 adequate to explain how Thornburgh Resort will comply with  
33 DCC 18.113.070(D).

34 "Had Thornburgh not submitted the Wildlife Report, we likely  
35 would have agreed with petitioners that a county finding that it  
36 is feasible to comply with DCC 18.113.070(D) would likely  
37 not be supported by substantial evidence. Even though ODFW  
38 and BLM have considerable expertise on how to mitigate  
39 damage to fish and wildlife, bare assurances from ODFW and  
40 BLM that solutions are out there would likely not be the kind  
41 of evidence a reasonable person would rely on to find that the  
42 damage that Thornburgh resort will do to fish and wildlife

1 habitat can be completely mitigated. But with that report, the  
2 dialogue that has already occurred between Thornburgh,  
3 ODFW and BLM, the MOU that provides further direction  
4 regarding future refinements to ensure complete mitigation, and  
5 the optimism expressed by the agencies involved, we believe a  
6 reasonable person could find that it is feasible to comply with  
7 DCC 18.13.070(D).'

8 "On review, Gould complains that LUBA erred 'in determining that the  
9 County's findings and evidence concerning feasibility of mitigation for the  
10 project's negative impacts on fish and wildlife satisfy the applicable approval  
11 standard.'" Gould contends that the approval standard was not met because  
12 there was insufficient evidence in the record to show that any particular  
13 wildlife impact mitigation plan was feasible and that LUBA erred in not  
14 requiring the county to specify a particular mitigation plan and subject that  
15 plan to public notice and county hearing processes. \* \* \*

16 " \* \* \* \* "

17 "LUBA's opinion and order was unlawful in substance for the reasons that  
18 follow. First, the county's findings were inadequate to establish the necessary  
19 and likely content of any wildlife impact mitigation plan. Without knowing  
20 the specifics of any required mitigation measures, there can be no effective  
21 evaluation of whether the project's effects on fish and wildlife resources will  
22 be 'completely mitigated' as required by DCC 18.113.070(D). ORS  
23 215.416(9) requires that the county's decision approving the CMP explain 'the  
24 justification for the decision based on the criteria, standards and facts set  
25 forth' in the decision. The county's decision is inconsistent with ORS  
26 215.416(9) because the decision lacks a sufficient description of the wildlife  
27 impact mitigation plan, and justification of that plan based on the standards in  
28 DCC 18.113.070(D). Second, that code provision requires that the content of  
29 the mitigation plan be based on 'substantial evidence in the record,' not  
30 evidence outside the CMP record. In this case, the particulars of the  
31 mitigation plan were to be based on a future negotiation, and not a county  
32 hearing process. Because LUBA's opinion and order concluded that the  
33 county's justification was adequate despite those deficiencies, the board's  
34 decision was "unlawful in substance." *Gould II*, 216 Or App at 154-60  
35 (footnotes omitted).

36 As the above-quoted language from *Gould II* makes reasonably clear, the primary  
37 problem with Thornburgh's wildlife report was that many of the details of the ultimate  
38 mitigation plan remained to be resolved by Thornburgh, in conjunction with BLM and  
39 ODFW. Given that state of uncertainty regarding those details, the Court of Appeals

1 concluded it was simply not possible for a reasonable person to conclude that the wildlife  
2 mitigation plan would ensure compliance with the DCC 18.113.070(D) "no net loss"  
3 standard. To summarize, in the Court of Appeals' view, the county's and LUBA's decisions  
4 in *Gould I* were erroneous for two related reasons. First, a reasonable person could not make  
5 the "no net loss" finding required by DCC 18.113.070(D) until the uncertainties that were  
6 present in Thornburgh's wildlife report and the BLM MOU were resolved. Second, allowing  
7 those uncertainties to be resolved *after* the finding required by DCC 18.113.070(D) was  
8 adopted and *after* the county public planning process ended violated ORS 215.416(9),  
9 because the "facts" necessary to make the required "no net loss" finding could not be set out  
10 in the decision.<sup>2</sup> With that understanding of the problems with the initial findings and  
11 evidence concerning DCC 18.113.070(D) we next describe Thornburgh's wildlife  
12 management plan, and then turn to petitioner's challenge to the county's findings regarding  
13 DCC 18.113.070(D) in its FMP decision.

#### 14 B. Thornburgh's Wildlife Management Plan

15 Thornburgh's wildlife management plan has two components; one component  
16 addresses terrestrial wildlife impacts and the other component addresses off-site fish habitat  
17 impacts. According to Thornburgh, the terrestrial wildlife plan is made up of two documents,  
18 the "Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort" (Terrestrial WMP)  
19 and the "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination  
20 Resort Project" (M&M Plan). Record 2609-33; 416-32.<sup>3</sup> The fish component is also made

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<sup>2</sup> ORS 215.416(9) provides:

"Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, *states the facts relied upon in rendering the decision* and explains the justification for the decision based on the criteria, standards and facts set forth." (Emphasis added.)

<sup>3</sup> Thornburgh also points out there are communications from the Oregon Department of Fish and Wildlife and Bureau of Land Management that express support for the Terrestrial WMP and M&M Plan and

1 up of two documents, the "Thornburgh Resort Fish and Wildlife Mitigation Plan relating to  
2 Potential Impacts of Ground Water Withdrawals on Fish Habitat," dated April 21, 2008 (Fish  
3 WMP) and an August 11, 2008 letter that proposes additional mitigation if needed for  
4 Whychus Creek. Record 2609-2744; 378-79. We describe the key features of the Terrestrial  
5 WMP and M&M Plan here and discuss the Fish WMP and August 11, 2008 letter in our  
6 discussion of the second assignment of error.

7 It is undisputed that development of the proposed destination resort will destroy or  
8 damage some existing terrestrial wildlife habitat, making that existing terrestrial habit  
9 unavailable for wildlife or less suitable for wildlife. Thornburgh proposes to mitigate for that  
10 loss in two ways, on-site mitigation and off-site mitigation. The on-site mitigation will  
11 reduce the amount of habitat loss that would otherwise result from construction of the  
12 destination resort; the off-site mitigation is to compensate for the habitat loss that cannot be  
13 avoided when the destination resort is constructed. Presumably because Thornburgh owns  
14 the on-site property, a large number of on-site mitigation measures are proposed.<sup>4</sup> A shorter  
15 list of mitigation measures is proposed for off-site property.<sup>5</sup> The Terrestrial WMP explains  
16 how Thornburgh went about assessing how much mitigation will be required:

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communications from Tetra Tech EC, Inc., Thornburgh's environmental consultant, that respond to alleged deficiencies in those plans. Record 126-33, 415, 470, 732-34, 1287-95, 1800-05.

<sup>4</sup> Those mitigation measures include: (1) eliminate livestock grazing, (2) implement a noxious weed control program, (3) remove young junipers to return areas to old growth juniper habitat, (4) remove invasive species and enhance herbaceous vegetation to achieve conditions prior to white settlement of the area, (5) eliminate unregulated off-road vehicle use, (6) generally prohibit feeding of wildlife, (7) prohibit unrestrained outdoor pets, (8) install and maintain bluebird boxes, install and maintain kestrel nests and bat boxes, (9) retain snags over 12 inches in diameter, (10) preserve downed logs, (11) install animal underpasses, (12) encourage native landscaping, (13) preserve at least 80 percent of total acreage of rock outcrops, (14) control use of poisonous baits, (15) obtain waivers of remonstrance concerning wildlife damage control activities, and (16) implement a wildlife educational program. Record 2615-2619.

<sup>5</sup> Those mitigation measures include: (1) implement a weed control program consistent with BLM's Upper Deschutes Resource Management Program, (2) thin young junipers and manage unwanted woody debris in old-growth juniper habitats, (3) work with BLM to reduce unauthorized off-road vehicle impacts, (4) maintain two existing water supplies (guzzlers) on BLM land, (5) contribute \$20,000 towards traffic speed monitoring devices. Record 2620-2621.

1 "ODFW suggested a habitat modeling approach that uses a modification of the  
2 U.S. Fish and Wildlife Service's (1981) Habitat Evaluation Procedures (HEP)  
3 analysis. This describes existing habitat values and estimates impacts. HEP is  
4 an accounting method, in which the value of each habitat type for each of a  
5 series of evaluation species is expressed in terms of habitat units (HUs) These  
6 are calculated as the number of acres of that habitat multiplied by an index of  
7 its quality, and expressed as a number between 0 and 1, which is termed the  
8 Habitat Suitability Index (HSI). One HU is the equivalent of one acre of the  
9 best habitat available for a species. Two acres of habitat half as good would  
10 also equal one HU, and so on. In the HEP analysis, to make the process  
11 manageable, an 'evaluation species' is chosen to represent a number of species  
12 with similar lifestyles and habitat requirements (USFWS 1980, 1981).

13 "Eagle Crest in collaboration with ODFW conducted a modified HEP for the  
14 proposed Eagle Crest III development in 2004, and ODFW provided Tetra  
15 Tech with a Tabulation of the results of that modified HEP. Eagle Crest and  
16 ODFW used best-judgment estimates of the HSIs for baseline habitat quality  
17 and post-development habitat quality, rather than calculating it from  
18 quantitative data (from field and office measurements of vegetation and  
19 habitat characteristic) and running it through formal mathematical models.  
20 This estimation method is similar to the HEP process that was used by the  
21 USFWS prior to their developing quantitative models for individual wildlife  
22 species. The evaluation species used in the Eagle Crest III modified HEP  
23 analysis were: golden eagle, American kestrel, red-tailed hawk, mountain  
24 bluebird, small mammals (a generic group), western fence lizard, and mule  
25 deer." Record 2612-2613.

26 The Terrestrial WMP goes on to explain that the northern flicker was substituted in  
27 place of the golden eagle as one of the indicator species, at ODFW's request. The before-  
28 development HSI was multiplied by the number of acres of habitat for each species, on-site  
29 and within one mile of the site, to determine the HUs for each species. Post-development,  
30 post on-site mitigation HSIs were determined and applied to those same acreages. The  
31 results are displayed in a table in the Terrestrial WMP, which is reproduced below.

Summary of Impacts by Species and Total Habitat Units						
Evaluation Species	Pre-development HUs		Post-development HUs		Net Change	
	Onsite	Offsite	Onsite	Offsite	Onsite	Offsite
Northern flicker	2,466	10,958	487	10,877	-1,979	-82
American kestrel	487	2,159	317	2,071	-171	-88
Red-tailed hawk	630	2,651	118	2,270	-512	-381
Mountain bluebird	1,142	5,063	926	4,939	-216	-125
Small mammals	2,491	10,746	1,127	9,974	-1,364	-772
Western fence lizard	2,309	10,035	946	9,422	-1,363	-612
Mule deer	983	4,298	173	4,298	-810	0
<b>Total</b>	<b>10,508</b>	<b>45,910</b>	<b>4,094</b>	<b>43,851</b>	<b>-6,414</b>	<b>-2,060</b>

Based on the above, the Terrestrial WMP determined that onsite total HUs would be reduced from 10,508 to 4,094 (a reduction of 6,414 HUs) and off-site total HUs within one mile of the proposed destination resort would be reduced from 45,910 to 43,851 (a reduction of 2,060 HUs). Thornburgh's off-site mitigation obligation would be 8,474 HUs (6,414 +2,060). The Terrestrial WMP proposes to satisfy that mitigation obligation on "public land managed by the BLM." Record 2614. The Terrestrial WMP explains:

"[Thornburgh] shall restore and enhance approximately 4,501 acres of juniper woodlands on public lands administered by the BLM in the Clines Buttes Sub-Area to mitigate the loss of 8,474 HUs. The specific areas, subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement. [Thornburgh] shall maintain rehabilitated areas through ongoing efforts as needed, such as reduction of weeds, thinning of junipers, and reclosing unwanted travel routes. BLM will manage public land on which this mitigation will be implemented, to comply with BLM's rangeland health standards to maintain desirable habitat for wildlife. \* \* \*"<sup>6</sup> Record 2620.

The M&M Plan elaborates on how off-site mitigation will be carried out:

<sup>6</sup> It is not clear to us how the decision was made that rehabilitation of 4,501 acres of juniper woodlands will suffice to achieve the needed 8,474 HUs to completely mitigate the impact of the destination resort on the wildlife resource. However, petitioner does not assign error to that calculation.

1 "This Mitigation and Monitoring Plan \* \* \* has been developed in  
2 coordination with the [BLM]. Currently, the BLM is in the process of  
3 finalizing the Cline Buttes Recreation Area Plan (CBRAP), which provides  
4 management direction to over 50 square miles of public land in the Cline  
5 Buttes region. Because the CBRAP is not yet final, the exact location where  
6 the proposed mitigation will take place could not be identified. However, a  
7 broad, adaptive management approach, consistent with BLM policy and  
8 management objectives was used to structure [the M&M Plan]. The objective  
9 of [the M&M Plan] is to 1) outline the methods that will be used to  
10 characterize existing habitat conditions in the area proposed for mitigation, 2)  
11 specify the types of habitat treatments used to enhance habitat for wildlife, and  
12 3) develop a monitoring plan that will monitor the effectiveness of the habitat  
13 treatments through either direct or indirect means. The methods used in [the  
14 M&M Plan] have been structured such that they could be applicable to any  
15 parcel of land within the Cline Buttes Recreation Area (CBRA) that BLM  
16 determines is suitable for mitigation once the CBRAP has been finalized."  
17 Record 418.

18 The M&M Plan goes on to explain that BLM methods will be followed to develop a  
19 baseline habitat condition assessment. The M&M Plan also describes the mitigation  
20 treatments that will be applied. The M&M Plan calls for an "adaptive approach:"

21 "The proposed mitigation plan will use an adaptive approach to vegetation  
22 management that is consistent with the procedures outlined in the draft  
23 CBRAP. \* \* \* The BLM's Land Use Planning Handbook defines adaptive  
24 management as '*a system of management practices based on clearly identified  
25 outcomes, monitoring to determine if management actions are meeting  
26 outcomes, and, if not, facilitating management changes that will best ensure  
27 that outcomes are met or to re-evaluate the outcomes.*' An adaptive approach  
28 to vegetation management in the Cline Buttes Area is appropriate because, in  
29 some situations, there is a lack of information available to assist in accurately  
30 predicting the response of the existing plant communities to different types  
31 and levels of ground disturbing activities related to thinning woody plants,  
32 understory shrub enhancement and reducing fuel loadings \* \* \*." Record 421-  
33 22 (italics in original).

1 **FIRST AND THIRD ASSIGNMENTS OF ERROR<sup>7</sup>**

2 In her first assignment of error, petitioner argues the county incorrectly or  
3 inadequately interpreted the DCC 18.113.070(D) "no net loss" standard. In six of the ten  
4 subassignments of error under the third assignment of error, petitioner alleges the county's  
5 findings and conditions of approval are inadequate to demonstrate that the Terrestrial WMP  
6 will be sufficient to ensure that development of the disputed destination resort will comply  
7 with the DCC 18.113.070(D) "no net loss" standard.

8 **A. Use of the Habitat Evaluation Procedures (HEP) Analysis**

9 In her first four subassignments of error under the first assignment of error, we  
10 understand petitioner to challenge the county's interpretation of DCC 18.133.070(D) to allow  
11 Thornburgh to use the HEP analysis, rather than conducting a more detailed on-site study to  
12 precisely identify all the wildlife now present on the proposed destination resort site and then  
13 ensure that any wildlife resource damage that is caused by the destination resort is mitigated  
14 on a one-for-one basis to ensure that there is no net loss in that resource. Specifically,  
15 petitioner argues in subassignment of error one that the hearings officer improperly lumped  
16 all fish and wildlife resources together and treated them as a whole. In subassignments of  
17 error two and three, petitioner argues the county improperly interpreted DCC 18.133.070(D)  
18 to allow existing species to be destroyed and replaced with other species at less than a 1:1  
19 ratio. Finally, in subassignment of error four, petitioner argues that Thornburgh's and the  
20 county's focus on fish and wildlife "habitat" is misplaced, since the DCC 18.133.070(D) "no  
21 net loss" standard protects "fish and wildlife resources," not just fish and wildlife habitat.

22 While some of the hearings officer's findings, viewed in isolation, can be read to  
23 suggest that the hearings officer thought it might be acceptable to lump all fish and wildlife

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<sup>7</sup> We consider subassignments of error A-1 through A-6 under the third assignment of error in our discussion and resolution of the first assignment of error. We consider subassignments of error B-1 through B-4 under the third assignments of error in our discussion below of the second and fourth assignments of error.

1 resources together into one fungible, undifferentiated wildlife resource, that is not what  
2 Thornburgh proposed and that is not the approach that the county approved in this case.<sup>8</sup> The  
3 HEP analysis that was employed by Thornburgh and approved by the county uses seven  
4 indicator species to make the job of identifying the nature, quality and extent of the wildlife  
5 resource before and after development more manageable. The indicator species are selected  
6 to simplify the task of identifying and assessing the habitat needs of all resident species. That  
7 analysis produces an estimate of the nature and extent of the off-site mitigation obligation  
8 Thornburgh must shoulder to comply with the DCC 18.133.070(D) "no net loss" standard.  
9 Unless someone comes forward with evidence that the HEP analysis missed or inadequately  
10 addressed some aspect of the wildlife resource, we believe a reasonable person could rely on  
11 the HEP analysis. There is nothing inherently improper about employing such an analysis to  
12 simplify the potentially exceedingly complicated task of assessing how much damage the  
13 proposed destination resort would cause to the wildlife resource and how much mitigation  
14 should be required to ensure there is no net loss to that wildlife resource. To the extent  
15 petitioner's first subassignment of error suggests otherwise, we reject the suggestion.

16 We reject petitioner's second and third subassignments of error for similar reasons.  
17 The HEP analysis that was used in this case is admittedly a less than perfect way to  
18 demonstrate compliance with the DCC 18.133.070(D) "no net loss" standard. In addition to  
19 using seven indicator species in place of an inventory of and explicit consideration of all

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<sup>8</sup> For example, the hearings officer adopted the following findings:

"While the 'no net loss' mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard 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. Such a requirement would be difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed, conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time." Record 29-30.

1 species present on the subject property, the HSIs that were used apparently were borrowed  
2 from another analysis that was done for a neighboring destination resort without any on-site  
3 analysis to confirm that the sites are sufficiently similar to allow the assumptions and indices  
4 that were used in that analysis to be used in this case. But petitioner does not develop a  
5 reviewable challenge to the "borrowed" nature of the HEP analysis. Petitioner's argument  
6 under these subassignments of error is that the hearings officer determined that one species  
7 can be destroyed and replaced with another species and can be replaced at less than a 1:1  
8 ratio. We do not understand the Terrestrial WMP and the M&M Plan to propose replacement  
9 of one species with another or to propose on-site and off-site habitat enhancements that will  
10 result in less than a complete replacement of the 8,474 HUs that Thornburgh estimates will  
11 be lost due to development of the destination resort.

12 At oral argument we questioned whether a proposal to develop and thereby damage or  
13 destroy wildlife habitat that is currently occupied by a threatened or endangered species could  
14 be replaced with enhanced habitat that is suitable only for small mammals that are not  
15 endangered or threatened. If there was evidence that the subject property contains threatened  
16 or endangered species, we seriously doubt that habitat needed for those threatened or  
17 endangered species could be destroyed and replaced under DCC 18.133.070(D) with an  
18 equivalent amount of enhanced off-site habitat that is suitable for one or more of the seven  
19 indicator species but is not suitable for the threatened or endangered species. But there are no  
20 threatened or endangered species on the subject property, and there is no wildlife on the  
21 subject property that the county has determined must be protected under Statewide Planning  
22 Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Neither has

1 petitioner identified any wildlife species on the subject property that have habitat needs that  
2 go beyond or are different from the habitat needs of the seven indicator species.<sup>9</sup>

3 Petitioner's second and third subassignments of error under the first assignment of  
4 error are denied.

5 Finally, petitioner's challenge to the county's focus on wildlife *habitat* rather than the  
6 wildlife itself, while a literally plausible criticism based on the words of DCC 18.133.070(D),  
7 ignores the reality of wildlife resource protection. Development rarely if ever is carried out  
8 in a way that purposefully causes harm to the wildlife that may actually be present on a  
9 development site. The wildlife typically is gone before construction equipment shows up.  
10 The harm is caused by altering or destroying the habitat that the wildlife requires for  
11 continued existence, so that the habitat is no longer available for the wildlife to use or is less  
12 suitable for wildlife use. The county's focus on wildlife habitat does not constitute error.

13 Petitioner first four subassignments of error under the first assignment of error are  
14 denied.

15 **B. The Terrestrial WMP is Inadequate**

16 Whereas petitioner's first through fourth subassignments of error under the first  
17 assignment of error present what is a largely abstract or philosophical dispute about the  
18 county's interpretation of DCC 18.133.070(D), petitioner's fifth, sixth and seventh  
19 subassignments of error under the first assignment of error and the first through sixth  
20 subassignments of error under the third assignment of error, collectively, present a more  
21 direct challenge to the adequacy of the Terrestrial WMP and the M&M Plan that the county  
22 relied on to find that the proposed destination resort complies with the DCC 18.133.070(D)  
23 "no net loss" standard. We will not attempt to labor through each of those subassignments of

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<sup>9</sup> Petitioner does argue the Fish WMP does not adequately address possible damage to off-site fish habitat that might result from withdrawal of cold water from the aquifer below the destination resort site. We address those arguments in our discussion below concerning fish resources.

1 error individually. The unifying and underlying theme of those seven subassignments of  
2 error is that the Terrestrial WMP and M&M Plan fail to provide the specificity that is  
3 required under the Court of Appeals' decision in *Gould II* and therefore do not constitute  
4 substantial evidence that the damage that will be caused to the wildlife resource by the  
5 proposed destination resort will be "completely mitigated so that there [will be] no net loss or  
6 net degradation of the resource," as DCC 18.133.070(D) requires. We understand petitioner  
7 to argue that the Terrestrial WMP and M&M Plan cannot constitute substantial evidence in  
8 support of the finding required by DCC 18.133.070(D) until a number of unresolved factors  
9 are resolved and that contrary to the Court of Appeals' *Gould II* decision, these unresolved  
10 factors will be resolved after petitioner's chance to object to the adequacy of the Terrestrial  
11 WMP and M&M Plan in the County FMP proceeding has passed. For the reasons that  
12 follow, we agree with petitioner.

13 We earlier described the Terrestrial WMP and M&M Plan in some detail. The  
14 hearings officer's description of those plans is set out in part below:

15 "The applicant has agreed to restore 4,501 acres of juniper woodlands in the  
16 Cline Buttes sub-area to mitigate the loss of the 8,474 HUs. The specific  
17 BLM land on which the restoration [will be carried out] is subject to the  
18 adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to be  
19 finally identified. However, the applicant and BLM have identified three  
20 areas where wildlife and habitat restoration is likely to occur under the  
21 CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston  
22 Allotment. Restoration includes weed management, vegetation enhancement,  
23 reduction of unauthorized off-road motor vehicle use, creation of wildlife  
24 water sources ('guzzlers') and traffic speed monitoring devices. The specific  
25 activities and monitoring program for the BLM land are identified in [the  
26 M&M Plan], included in the applicant's August 12, 2008 rebuttal \* \* \*.

27 "If, at the time of development, [sufficient] off-site areas are not available, the  
28 applicant proposes to provide funding for implementing mitigation in a  
29 dedicated fund for use by ODFW to use to improve or purchase mitigation  
30 sites *within Deschutes County*. After the mitigation is established, the  
31 applicant will provide continuing funding for the lifetime of the development  
32 through a real estate transfer fee." Record 31-32 (emphasis added; footnote  
33 omitted).

1       The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds  
2 of habitat restoration activities that might be employed to improve the habitat value of the  
3 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh's  
4 consultant and BLM and ODFW staff are confident that those restoration efforts will be  
5 successful and result in compliance with DCC 18.133.070(D). But what our description and  
6 the hearings officer's description of the Terrestrial WMP and M&M Plan make clear is that a  
7 number of important parts of Thornburgh's proposal to comply with the DCC 18.133.070(D)  
8 "no net loss" standard have not yet been determined, and will not be determined until a future  
9 date at which petitioner may or may not have any right to comment on the adequacy of the  
10 proposed mitigation. We do not know the location of the 4,501 acres that will be restored to  
11 provide the required mitigation. They may be located in the Canyons Region, the Deep  
12 Canyons Region or the Maston Allotment. Or they may be located somewhere else in  
13 Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat  
14 those 4,501 acres provide, and we cannot know what the beginning habitat value of those  
15 4,501 acres is. We also do not know what particular mix of restoration techniques will be  
16 provided to those 4,501 acres.<sup>10</sup> We do not know what the habitat value of those 4,501 acres  
17 will be after restoration. We therefore cannot know if that restoration effort will result in the  
18 needed 8,474 HUs. The question for us is whether given all of these uncertainties, the  
19 confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that  
20 the proposed mitigation plan will result in compliance with DCC 18.133.070(D). The answer  
21 to that question under the principles articulated in *Gould II* is no.

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<sup>10</sup> As we noted earlier, the Terrestrial WMP explains:

"The specific areas subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement." Record 2620.

1 While we have no reason to doubt the professional judgment of Thornburgh's  
2 consultant and the staff at BLM and ODFW, under the Court of Appeals' decision in *Gould*  
3 *II*, petitioner has a right to confront the mitigation plan that Thornburgh intends to rely on to  
4 comply with DCC 18.133.070(D). While we know more about what that mitigation plan  
5 might ultimately look like than we did when *Gould I* and *Gould II* were decided, there are  
6 simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow  
7 petitioner a meaningful chance to confront the adequacy of that plan. See *Gould II*, 216 Or  
8 App 159-60 ("Without knowing the specifics of any required mitigation measures, there can  
9 be no effective evaluation of whether the project's effects on fish and wildlife resources will  
10 be 'completely mitigated' as required by DCC 18.113.070(D). \* \* \* [T] hat code provision  
11 requires that the content of the mitigation plan be based on 'substantial evidence in the  
12 record,' not evidence outside the CMP record.") The details that must be supplied before  
13 petitioner can be given that meaningful chance to confront the proposed mitigation plan will  
14 not be known until some undetermined future date. Under the Court of Appeals' holding in  
15 *Gould II*, that is not a permissible approach for demonstrating compliance with DCC  
16 18.133.070(D).

17 Petitioner's first through fourth subassignments of error under the first assignment of  
18 error are denied. Petitioner's fifth through sixth assignments of error under the first  
19 assignment of error and first through sixth assignments of error under the third assignment of  
20 error are sustained.<sup>11</sup>

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<sup>11</sup> Again we sustain those subassignments of error only to the extent that they express the argument challenging the adequacy of the Terrestrial WMP and M&M Plan that we describe in the text of this opinion. To the extent those subassignments of error include additional arguments, we do not address those arguments.

## 1 SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR<sup>12</sup>

### 2 A. Whychus Creek

3 The main stem of the Deschutes River is located approximately 2 miles to the east of  
4 the eastern boundary of the proposed resort. *Gould* 154 Or LUBA at 262. Several tributaries  
5 of the Deschutes River, including Whychus Creek and Deep Canyon Creek are located a  
6 number of miles north of the proposed resort. The proposed destination resort will use deep  
7 wells to supply water. The aquifers that will provide that water are hydrologically connected  
8 to off-site down-gradient surface waters and the aquifer water is cooler than the receiving  
9 surface waters of the Deschutes River and its tributaries. While Thornburgh has been  
10 required to acquire and retire water rights to mitigate for its planned volume of water use, that  
11 mitigation water will not necessarily offset thermal impacts of its withdrawal of cool water  
12 from the aquifers under the destination resort if the mitigation water is warmer than the  
13 ground water that is removed from the system. During the proceedings below, ODFW  
14 submitted a letter in which it specifically recognized the value of groundwater fed springs and  
15 seeps for cooling waters in the main stem of the Deschutes River and its tributaries. ODFW  
16 recognized that this cooling groundwater "provides thermal refuge[] for salmonid which  
17 thrive in cooler water." Record 900. However, ODFW ultimately concluded that

18 "In this particular case the potential impact to springs and seeps will likely be  
19 mitigated by transferring springs flows used for irrigation directly back into  
20 Deep Canyon Creek and the Deschutes River. These springs should provide  
21 similar habitat and help with water temperatures in the Deschutes River." *Id.*

22 The opponents' expert expressed concerns that the proposed mitigation would not be  
23 adequate to off-set the diversion of cool groundwater from Alder Springs, which drains into  
24 Whychus Creek, a tributary of the Deschutes River that provides habitat for the federally

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<sup>12</sup> As we noted earlier, we consider subassignments of error A-1 through A-6 under the third assignment of error in our discussion and resolution of the first assignment of error. We consider subassignments of error B-1 through B-4 under the third assignments of error in our discussion of the second and fourth assignments of error.

1 listed bull trout and other fish species. Thornburgh's experts submitted rebuttal testimony in  
2 which they took the position that any thermal impact on Whychus Creek would be negligible.  
3 Record 1245-1253. One of those experts took the position that the thermal impact would be  
4 less than .01 degree Celsius. Record 1246. In an August 11, 2008 letter to the county,  
5 Thornburgh's attorney noted that Thornburgh disagreed with some of the assumptions that  
6 led the opponents' expert to conclude the proposed destination resort would have a damaging  
7 thermal impact on Alder Springs and Whychus Creek. Record 379. But Thornburgh's  
8 attorney offered to provide additional mitigation if the hearings officer determined that  
9 additional mitigation was necessary to address concerns about thermal impacts on Whychus  
10 Creek:

11        "\* \* \* Thornburgh does not want to be caught short if you determine that  
12        additional mitigation is required for possible impacts on to Whychus Creek.  
13        Therefore, we are providing evidence to demonstrate that it would be feasible  
14        for Thornburgh to provide additional flow of 106 acre-feet per year in  
15        Whychus Creek, if needed to meet the county approval standard. This would  
16        be in addition to the amount of mitigation water already described in  
17        Thornburgh's Addendum. \* \* \*" Record 379.

18        We understand that the referenced 106 acre-feet of mitigation would be achieved by reducing  
19        irrigation diversion from Whychus Creek and leaving that water in-stream.

20        In response to that proposal, opponents' expert submitted a letter, which is set out in  
21        part below:

22        "[In Thornburgh's letter of] August 11, 2008, it is proposed that Thornburgh  
23        could provide mitigation for loss of groundwater discharge to lower Whychus  
24        Creek due to the pumping of its proposed wells. The mitigation would consist  
25        of 106 acre feet of water provided by Three Sisters Irrigation District through  
26        transfer of irrigation water to instream flow. This will not mitigate impact to  
27        Whychus Creek because it replaces cold groundwater with warm water from  
28        upstream during the irrigation season. It is the cold groundwater discharge at  
29        Alder Springs that is the defining and essential factor that makes the lower  
30        reach of Whychus Creek critical habitat for native bull trout, redband trout and  
31        reintroduced steelhead trout and Chinook salmon.

32        "The pumping of Thornburgh wells will reduce cold groundwater discharges.  
33        Replacing this lost flow of 106 acre feet by reducing upstream irrigation

diversions would result in more hot water mixing with the cold water of the lower reach of Whychus Creek. The proposed mitigation is harmful to critical fish habitat in two ways: first it would allow the reduction of cold groundwater discharge to the stream, and second it would increase the flow of warm water into the cold lower reach of the stream.

"Using the thermal mass balance equation, the calculated increase in stream temperature at Alder Springs due to the pumping of the Thornburgh wells would be 0.07° C. The calculated change in stream temperature due to both the reduction in cold groundwater discharge and the increased stream flow due to the proposed mitigation would result in even a greater stream temperature increase of 0.12° C at Alder Springs. It is clear that the proposed mitigation for Thornburgh's impact to Whychus Creek would only increase the impact to critical cold water habitat that native and reintroduced fish are dependant on." Record 312.

In its August 28, 2008 argument to the county hearings officer, petitioner's attorney reiterated the above:

"The Applicant in its August 12 materials for the first time proposes the addition of 106 acre feet of water to Whychus Creek to make up for the water withdrawal impacts to the Creek. This is discussed in the Applicant's Exhibit A-3 letter \* \* \* and the Exhibit A-9 letter from \* \* \* the Three Sisters Irrigation District. This is apparently in response to our argument that there needs to be some mitigation provided for Whychus Creek. Unfortunately, what is proposed would actually compound the problem by increasing temperatures in the creek. Adding more warm surface water into the creek does not compensate for withdrawals of cold groundwater. \* \* \*" Record 281.

In her decision, the hearings officer adopted findings to address the potential thermal impact on Whychus Creek, including the following findings:

"The OWRD [Oregon Water Resources Department] mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development." Record 34.

1 From the above findings, it appears the hearings officer was not persuaded by  
2 Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that  
3 it could be ignored. To ensure that there would be no adverse thermal impact, the hearings  
4 officer took Thornburgh up on its offer to secure additional mitigation water from the Three  
5 Sisters Irrigation District. Unfortunately, in doing so, the hearings officer either did not  
6 recognize or for some other reason failed to respond to petitioner's contention that the  
7 mitigation water from the Three Sisters Irrigation District that will be generated by  
8 eliminating upstream irrigation diversions will not mitigate the destination resort's thermal  
9 impacts on Whychus Creek because that mitigation will replace cool water with warmer  
10 water. There may be a simple answer to the opponents' concern, but it is lacking in the  
11 hearings officer's decision. Without that explanation, the decision must be remanded for  
12 additional findings to explain why the additional mitigation water from the Three Sisters  
13 Irrigation District will be sufficient to eliminate the hearings officer's concern that summer  
14 water use by the destination resort could have adverse thermal impacts on Whychus Creek.

15 Thornburgh points to the following statement by its expert:

16 "It should be noted that if there is flow in Whychus Creek that is not from  
17 Alder Springs, whether warmer than Alder Springs or not, the resulting  
18 increase in temperature at the mouth would be even less than the estimated  
19 maximum of 0.01 [degree Celsius]." Record 1248.

20 Citing *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002),  
21 Thornburgh contends that the hearings officer was entitled to choose which expert testimony  
22 she found more believable.

23 The problem with Thornburgh's attempt to rely on *Molalla River Reserve* is that in  
24 that case the decision maker recognized that there was a difference of opinion between the  
25 experts. As we noted in *Molalla River Reserve*:

26 "The findings make clear that the county considered the issue to be a battle of  
27 the experts and chose to believe the opponents' experts. A local government  
28 may rely on the opinion of an expert if, considering all of the relevant

1 evidence in the record, a reasonable person would have chosen to rely on the  
2 expert's conclusion." 42 Or LUBA at 268.

3 In this case the hearings officer either did not recognize or for some other reason failed to  
4 address the conflicting expert testimony about the efficacy of relying on the mitigation water  
5 from the Three Sisters Irrigation District to address the hearings officer's concern about the  
6 thermal impacts water use at the destination resort would have on Whychus Creek during the  
7 summer months.<sup>13</sup> Without some attempt by the hearings officer to resolve that conflict or to  
8 identify which expert testimony she found more persuasive, remand is required.

9 The second assignment of error, subassignment of error (B)(2) under the third  
10 assignment of error and subassignment of error 4 under the fourth assignment of error are  
11 sustained.

#### 12 **B. The Hearings Officer's Fish Mitigation Findings**

13 Petitioner's entire argument under subassignment of error B(1) under the third  
14 assignment of error is set out below:

15 "Unlike with the Applicant's wildlife plans (where the Hearings Officer in her  
16 conditions of approval at least attempted to identify the plans to be followed),  
17 the Hearings Officer did not identify any fish mitigation plans or require  
18 compliance with them in her conditions of approval. Any plans relied upon  
19 must be required in conditions of approval. It cannot just be assumed that  
20 everything mentioned in a land use application will be done. \* \* \*

21 "She also made no findings of compliance with the standards for fish  
22 resources, other than just saying that the OWRD mitigation requirement  
23 addresses water quantity and that additional mitigation is needed for water  
24 quality on Whychus Creek. She made no findings on water quality for the

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<sup>13</sup> We need not and do not decide here whether the expert statement cited by Thornburgh would be sufficient to overcome the opponents' expert's concerns. However, we note that if the water that would remain in Whychus Creek by virtue of the Three Sisters Irrigation District mitigation is only slightly warmer than Alder Springs water and significantly cooler than the in-stream water at the mouth of Whychus Creek, Thornburgh's expert's statement at Record 1248 is no doubt true. That may well be the case. But if the water that is not going to be diverted for irrigation is significantly warmer than the Alder Springs water and approximately the same temperature as the in-stream water at the mouth of Whychus Creek, it is difficult to see how leaving that water in Whychus Creek would have any material impact on the in stream water temperature at the mouth of Whychus Creek. Some effort to clarify the expert's statement will likely be required.

1 Deschutes River or on impacts to fish species in Whychus Creek and the  
2 Deschutes River." Petition for Review 30.

3 Condition of approval 38 requires that Thornburgh "abide by the April 2008 Wildlife  
4 Mitigation Plan, the August 2008 Supplement \* \* \*." Record 40. While it could certainly be  
5 clearer, we conclude that that reference includes the Terrestrial WMP dated April 15, 2008,  
6 the Fish WMP dated April 21, 2008, the M&M Plan dated August 20, 2008 and the two-page  
7 letter regarding Whychus Creek mitigation dated August 11, 2008. With regard to the  
8 findings that petitioner claims are missing, Thornburgh identifies findings that it contends are  
9 adequate. Thornburgh's Response Brief 26. Without a more developed argument from  
10 petitioner, we reject this subassignment of error.

11 Subassignment of error B(1) under the third assignment of error is denied.

12 **C. Big Falls Ranch Mitigation Water**

13 In subassignment of error B(3) under the third assignment of error, petitioner  
14 contends that the hearings officer found that groundwater impacts on the Deschutes River  
15 would be mitigated in part by acquiring Big Falls Ranch water rights and returning that water  
16 to Deep Canyon Creek. According to petitioner the hearings officer failed to condition the  
17 challenged decision to require that the Big Falls Ranch water rights be acquired and that the  
18 water be returned to Deep Canyon Creek.

19 Thornburgh responds that the Fish WMP and the August 11, 2008 letter to the  
20 hearings officer make it clear that Thornburgh is obligated to mitigate by acquiring the Big  
21 Falls Ranch water rights and returning that water to Deep Canyon Creek. Record 378, 2699.  
22 We agree with Thornburgh.

23 Subassignment of error B(3) under the third assignment of error is denied.

24 **D. Central Oregon Irrigation District Mitigation Water**

25 In subassignment of error B(4) under the third assignment of error petitioner contends  
26 the hearings officer failed to impose a condition requiring that Thornburgh acquire mitigation

1 water from the Central Oregon Irrigation District (COID) if necessary. In subassignment of  
2 error 3 under the fourth assignment of error, petitioner argues the hearings officer erred by  
3 failing to address her argument that mitigation water may not be available from COID.

4 Thornburgh responds, and we agree, that the issue of the feasibility of acquiring water  
5 rights from COID if necessary was resolved in our decision in *Gould I*, and that condition 10  
6 in the FMP approval decision is adequate to ensure that those water rights are secured if  
7 necessary. *Gould I*, 54 Or LUBA at 266-67.

8 Subassignment of error B(4) under the third assignment of error and subassignment of  
9 error 3 under the fourth assignment of error are denied.

10 **E. Ninty Percent Consumption Versus Sixty Percent**

11 Petitioner contends the county erroneously assumed that only 60 percent of the  
12 groundwater that is removed from the wells will actually be consumed and that 40 percent of  
13 that groundwater withdrawal would be returned to the subsurface hydrologic system.  
14 Although OWRD used a 60 percent consumption figure in computing Thornburgh's  
15 mitigation responsibility, petitioner contends she submitted evidence that once the destination  
16 resort is fully operational it will produce 326,000 gallons of effluent per day and that under  
17 DEQ's permit much of that water will not percolate back into the groundwater. Record 1145.

18 Thornburgh responds that its expert concluded that under the DEQ permits sewage  
19 effluent is permitted to seep into the ground. Record 391. The hearings officer specifically  
20 recognized petitioner's argument that consumption should be assumed to be 90 percent rather  
21 than 60 percent. Record 33. Thornburgh contends the hearings officer was entitled to rely on  
22 Thornburgh's rebuttal and to use the same assumptions that were used by OWRD. We agree  
23 with Thornburgh.

24 Subassignment of error 1 under the fourth assignment of error is denied.

1           **F.      Loss of Cool Patches**

2           Petitioner argues the county never responded to its concerns about the loss of "cool  
3 patches" in the Deschutes River and tributaries through withdrawal of cool ground water for  
4 use by the proposed destination resort.

5           Thornburgh responds that the record includes a fair amount of evidence that was  
6 submitted to demonstrate that any impacts on cool water patches will be mitigated through  
7 the mitigation steps Thornburgh has agreed to take. Record 97, 101, 106-107, 900-901,  
8 1251, 2135-2139, 2698-2701. With the exception of the potential for impacts on Whychus  
9 Creek, the hearings officer was satisfied that the proposed destination resort would not have  
10 adverse impacts on cool patches in the Deschutes River basin. The hearings officer  
11 concluded that with the proposed additional mitigation proposed through the Three Sisters  
12 Irrigation District, that potential adverse thermal impact on Whychus Creek would be  
13 avoided. We have already determined that the challenged decision must be remanded for a  
14 better explanation for why the hearings officer believes the additional mitigation through the  
15 Three Sisters Irrigation District will be sufficient to resolve her concerns about thermal  
16 impacts on Whychus Creek. But the hearings officer apparently concluded that the proposed  
17 mitigation was sufficient to resolve concerns about other cool patches, and we agree with  
18 Thornburgh that that conclusion is supported by substantial evidence.

19           Subassignment of error 2 under the fourth assignment of error is denied.

20           The second assignment of error is sustained. The third and fourth assignments of  
21 error are sustained in part.

22           **FIFTH ASSIGNMENT OF ERROR**

23           DCC 18.113.090 sets out the requirements for destination resort FMPs and provides  
24 in relevant part:

25           "It shall be the responsibility of the applicant to provide a Final Master Plan  
26 (FMP) which includes text and graphics explaining and illustrating:

1 "A. The use, location, size and design of all important natural features,  
2 open space, buffer areas and common areas;

3 "B. The use and general location of all buildings, other than residential  
4 dwellings and the proposed density of residential development by  
5 location;

6 "\* \* \* \* \*

7 "G. A description of all commercial uses including approximate size and  
8 floor area[.]"

9 Under her fifth assignment of error, petitioner contends the FMP lacks the information that is  
10 required by DCC 18.113.090(A), (B) and (G) and condition 13 of CMP approval, which  
11 requires that the "[a]pplicant shall specify all recreational facilities within the proposed resort  
12 as part of final master plan approval."

#### 13 A. Natural Areas

14 Petitioner first argues that "the Applicant does not identify where [the] natural areas  
15 are." Petition for Review 36. Thornburgh points to a graphic that appears at Record 1232  
16 and shows the locations and acreages of the "Common Area Open Space," "Lake and Golf  
17 Open Space," and "50' Wide Buffer Zone." In the proceedings below, Thornburgh explained  
18 that "the common [area] open space is 'natural' open space, in contrast with the golf courses,  
19 developed open spaces and buffer." Record 1218. Based on that response it appears that  
20 Thornburgh has supplied "text and graphics explaining and illustrating" "natural areas," as  
21 required by DCC 18.113.090(A).

22 This subassignment of error is denied.

#### 23 B. Recreation Facilities

24 Under CMP condition of approval 13, the applicant was to "specify all recreation  
25 facilities" that will be included in the destination resort, "as part of final master plan  
26 approval." Petitioner contends that all the applicant has done is provide a list of recreational  
27 uses that "would be allowed at Thornburgh Resort." Record 2498-2501.

28 Thornburgh responds:

1 "In addition to furnishing lists of proposed recreational facilities (R 2500,  
2 2879), Thornburgh explained

3 "The common areas within the resort will include the common  
4 open space areas (i.e., those that do not alter the existing or  
5 natural landscape, except as permitted by DCC 18.113.030(E)).  
6 Common areas within the resort will also include many of the  
7 amenities and facilities listed in the Amenities Description  
8 attached as revised Ex. A8d [R 2879]: the community center,  
9 amphitheater, game rooms, libraries, stables and equestrian  
10 facilities, swimming pools, sports fields, vista view points and  
11 a cultural and interpretive center. These amenities will be  
12 located in the areas depicted as 'visitor oriented' and  
13 'recreational' on the revised master Development Plan, FMP,  
14 Ex. A3.1 [R 2495]. (R 47)." Thornburgh's Response Brief 31.

15 Although we could be mistaken, we understand petitioner to argue that every single  
16 recreational use that will ultimately be constructed as part of the Thornburgh Resort must be  
17 precisely identified on the FMP. We understand Thornburgh to argue the supplied list of  
18 potential recreational facilities is adequate to comply with CMP condition of approval 13,  
19 even though the list that begins at Record 2498 expressly provides that "[i]t does not require  
20 that all of the following will be built, or be built to any specific standards."

21 Whatever ultimate mix of recreational facilities is selected from the list that begins at  
22 Record 2498 must comply with the ORS 197.445(3) requirement that "[a]t least \$7 million  
23 must be spent on improvements for on-site developed recreational facilities and visitor-  
24 oriented accommodations," and at least "one-third of this amount must be spent on developed  
25 recreational facilities." With the caveat that the proposal must ultimately comply with ORS  
26 197.445(3), we agree that the list at Record 2498-2501 is sufficient to comply with CMP  
27 condition 13. While that condition certainly could be interpreted to require more specificity  
28 and certainty than Thornburgh has provided, we do not believe it must be interpreted to do  
29 so.

1           **C.     Use and General Location of All Buildings**

2           Petitioner's argument under this assignment of error is similar to her argument under  
3 the previous subassignment of error. DCC 18.113.090(B) requires that Thornburgh show  
4 "the use and general location of all buildings." We understand petitioner to argue that  
5 Thornburgh failed to do so.

6           It is worth noting that DCC 18.113.090(B) does not require that Thornburgh show  
7 "buildings" on the FMP, instead DCC 18.113.090(B) requires that Thornburgh show "the use  
8 and general location of" the proposed buildings. Thornburgh argues that the Final Master  
9 Plan graphic that appears at Record 2872 shows where "Residential," "Visitor Oriented,"  
10 "Visitor Lodging," "Commercial," "Recreational," "Infrastructure," "Open Space  
11 (Common)" and "Open Space (Golf)" uses will be located and that together with the list of  
12 proposed uses is sufficient to comply with DCC 18.113.090(B). We agree with Thornburgh.

13           **D.     Approximate Size and Floor Area of Commercial Uses**

14           DCC 18.113.090(G) requires that the FMP include "[a] description of all commercial  
15 uses including approximate size and floor area[.]" We understand petitioner to argue that the  
16 exhibit list that appears at Record 2498-2501 is inadequate to comply with DCC  
17 18.113.090(G). According to that exhibit, Thornburgh Resort will include "20,000 Square  
18 Feet" of "Specialty Retail," "15,000 Square Feet" of "Real Estate Sales and Related,"  
19 "75,000 Square Feet" of "Hotel, Dining and Related," "20,000 Square Feet" of "Golf  
20 Clubhouse," "25,000 Square Feet" of "Spa Facilities," and "15,000 Square Feet" of  
21 "Recreation Center." Record 2499. We agree with Thornburgh that petitioner has not  
22 demonstrated that more is required to comply with DCC 18.113.090(G).

23           This subassignment of error is denied.

24           The fifth assignment of error is denied.

1 **SIXTH ASSIGNMENT OF ERROR**

2 We understand petitioner to argue that the version of DCC 18.113.060(A)(4) that  
3 applies in this matter requires that "[a]t least \$2,000,000 (in 1984) dollars shall be spent on  
4 developed *recreational* facilities." (Emphasis added.) To ensure compliance with DCC  
5 18.113.060(A)(4), the hearings officer imposed the following condition of approval:

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

7 "\* \* \* \* \*

8 "D. At least \$2,000,000 (in 1984 dollars) shall be spent on  
9 developed *residential* facilities.

10 "\* \* \* \* \*" (Emphasis added.)

11 Petitioner argues that because the hearings officer mistakenly calls for at least two million  
12 dollars in *residential* facilities, instead of the *recreational* facilities specified in DCC  
13 18.113.060(A)(4), the decision must be remanded.

14 We agree with Thornburgh that the hearings officer almost certainly intended to  
15 require that "at least \$2,000,000 (in 1984 dollars) shall be spent on developed recreational  
16 facilities" and that her use of the word "residential" was likely inadvertent. However, the  
17 hearings officer's decision must be remanded for other reasons. On remand, the hearings  
18 officer should correct the erroneous reference to residential facilities in Condition 33(D).

19 The sixth assignment of error is sustained.

20 **SEVENTH ASSIGNMENT OF ERROR**

21 In her seventh assignment of error, petitioner argues it was error for the hearings  
22 officer to consider the DCC 18.113.070(D) "no net loss" standard in her decision granting  
23 FMP approval rather than in her CMP approval decision. Petitioner argues that "a complete  
24 and final CMP decision" is required before the county can grant FMP approval. Petition for  
25 Review 38. Petitioner contends:

26 "It is fundamentally inconsistent for the County to have approved the CMP as  
27 a land use permit (CUP) while deferring mandatory approval criteria without

1 feasibility findings that compliance is 'likely and reasonably certain to  
2 succeed' under [*Meyer v. City of Portland*, 67 Or App 274, 280 n5, 678 P2d  
3 741, *rev den* 297 Or 82 (1984)]. However, the County's CMP approval  
4 decided to defer consideration of the standard to the FMP stage. Petitioner  
5 appealed this decision to LUBA (Petition at Rec. 3139) and the Court of  
6 Appeals which affirmed the County decision. \* \* \* A petition for review to  
7 the Supreme Court is being filed." Petition for Review 38-39.

8 Petitioner's arguments under the seventh assignment of error are arguments that either  
9 were made or should have been made in her appeal of the county's second CMP decision.  
10 They provide no independent basis for reversal or remand of the county's FMP decision.

11 The seventh assignment of error is denied.

12 The county's decision is remanded.

## Certificate of Mailing


I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2008-203 on September 9, 2009, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 9th day of September, 2009.

  
Kelly Burgess  
Paralegal

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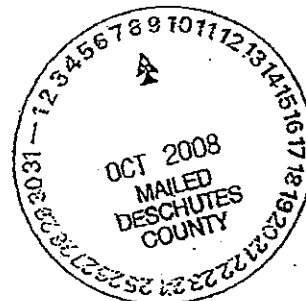
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**DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER**  
**THORNBURGH RESORT COMPANY FINAL MASTER PLAN**

**FILE NUMBER:** M-07-2; MA-08-6

**APPLICANT/  
OWNER:** Thornburgh Resort Company  
 PO Box 264  
 Bend, OR 97702

**APPLICANT'S  
REPRESENTATIVE:** Schwabe, Williamson & Wyatt, PC  
 Peter Livingston, Attorney at Law  
 1211 SW Fifth Avenue, Suite 1600  
 Portland, OR 97204



**REQUEST:** The Applicant requests approval of a Final Master Plan (FMP) and a Modification of Application (MA) for a 1,970-acre Destination Resort located near Cline Buttes, west of Redmond.

**STAFF CONTACT:** Ruth Herzer, Associate Planner

**HEARING DATES:** June 17, 2008, continued to July 15, 2008  
 Record held open for written submittals until September 11, 2008  
 Final written legal argument submitted September 17, 2008

**DECISION ISSUED:** October 6, 2008

**I. APPLICABLE CRITERIA:**

Title 18, Deschutes County Code, County Zoning Ordinance  
 Chapter 18.113.090, .100, .110

Title 22, Deschutes County Land Use Procedures Ordinance  
 Title 23, The Deschutes County Comprehensive Plan

CU-05-20 CMP, issued by the Board of County Commissioners on May 11, 2006,  
 and revised on remand from the Oregon Court of Appeals on April 9, 2008

Oregon Revised Statutes (ORS) Chapter 197.435 to 197.467

**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 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 Map 15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900 and 8000.<sup>1</sup>

<sup>1</sup> The applicant also has leased inholding parcels from the Department of State Lands for buffer and access roads. See August 12, 2008 rebuttal testimony, Ex. F-2.

37. (COA #36 in *Gould III*) Applicant shall modify the Overnight and Density Calculations chart presented to the Board at the appeal hearing on December 20, 2005 by replacing it with the Overnight and Density Calculations chart included at page 25 in Applicant's final legal argument, dated January 3, 2006, as shown below. The 75 units of overnight lodging shown in the December 20, 2005 Overnight and Density Calculations table to be developed in Phase C will actually be developed in the Phase B, for a total of 150 units in Phase B. The Overnight and Density Calculations table will be corrected to show the 50 hotel units will be developed in Phase D, where the Phasing Plan, attached to the Memorandum of Applicant in Response to Public comments, Ex. 13, Revised B-1.8, already shows the hotel will be developed. Additionally the legend in the Phasing Plan will be corrected to show hotel and residential overnight lodging uses in Phase D. Applicant shall present the corrected Phasing Plan and Overnight and Density Calculations chart, consistent with this condition, during the Final Master Plan approval process.

**FINDING:** The corrected Phasing Plan and Overnight and Density Calculations chart has been submitted as part of the FMP application. COA 37 is satisfied.

38. (COA #37 on remand). 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.

**FINDING:** In its CMP proposal, the applicant provided evidence regarding existing habitat, the types of animal species that inhabit the site, and provided documents from ODFW and the BLM that asserted that a plan to address fish and wildlife impacts could be crafted and implemented to the satisfaction of those agencies. The county relied on that evidence and testimony to conclude that DCC 18.113.070(D) could be satisfied with conditions that required the applicant to work with the state and federal agencies to provide appropriate mitigation, primarily on federal land. LUBA affirmed that conclusion in *Gould I*.

In *Gould II*, the Court of Appeals disagreed with the county and LUBA. The court noted that the county had relied on evidence that the applicant, its experts, the BLM and ODFW would work together to craft a plan to mitigate the impact of the development on fish and wildlife, but that the evidence showed that some of the mitigation alternatives proposed by the application were not acceptable to those agencies. The court held that the county's findings (1) were inadequate to describe what was needed to satisfy DCC 18.113.070(D); (2) lacked a sufficient description of the applicant's wildlife plan; and (3) lacked an explanation as to why the county believed DCC 18.113.070(D) had been met. Further, the court found that the county could not rely on conditions to satisfy the standard, because the particulars were based on a future negotiation among the agencies and applicant, and not a county hearing process. In the absence of findings explaining the applicant's proposal, and how conditions could be imposed to ensure that the mitigation measures were likely and reasonably certain to succeed, the court found that the conditions alone did not provide the opportunity for public review and comment required by the statutes and case law.

In its decision on remand, the BOCC deferred a finding of compliance with this standard to the FMP. *Gould III*, Condition 37, page 10. Thus, the meaning of the standard, and the sufficiency of the evidence to address it was the major focus of the parties in the FMP proceedings. The applicant provided a wildlife mitigation plan that had been reviewed by the BLM and ODFW, and both agencies endorse the applicant's identification of likely impacts on fish and wildlife, and conclude that the applicant's plan addresses the impact of the development on those resources such that the "no net loss" standard of DCC 18.113.070(D) is satisfied. The opponents challenge the approach used by the applicant to identify resources, the estimate impact the resort development will have on fish and wildlife, and the adequacy of the plan to mitigate the impacts on the identified resources.

1. What is required to satisfy DCC 18.113.090(D)?

The applicant argues that the standard requires a general assessment of the habitat on the site, the species that exist within those habitats, an identification of the impact of the development on the habitats and species, and a plan to ensure that fish and wildlife resources overall will not be degraded or lost. The applicant concedes that for some species, development on the site will eliminate or degrade their habitat, but argues that its proposal, overall, will provide habitat for new species, will improve terrestrial habitat in the area, and will protect fish species. The applicant notes that it has proposed to improve habitat on local public lands, will contribute financially to programs to measure and improve habitat quality and will participate in longitudinal studies to evaluate the effectiveness of the mitigation over time. Those proposals have been reviewed and accepted by the BLM and ODFW. The applicant argues that conditions can be imposed to require additional or alternative mitigation if the proposed mitigation is not sufficient to protect fish and wildlife.

The opponents argue that this standard requires a much more specific analysis of the animal species on the site, and a similarly specific program to mitigate the development's impact on those species. The opponents argue that the applicant's plan is seriously deficient because it relies on one on-site survey, and studies addressing property to the north (*Eagle Crest III*) and superficial assumptions about development on indicator species to identify the animals on the site and how the development will affect them. In addition, the opponents argue that the applicant's proposal is not sufficient to *completely* mitigate those impacts, in part because the final location for off-site mitigation has not yet been identified, and in part because it assumes public agencies and private land owners will commit to implementing the plan over time. Finally, opponents argue that the applicant's commitment to remedy deficiencies in the plan is not credible because the applicant and the agencies have yet to adopt a methodology to evaluate and quantify success/failure.

While the "no net loss" mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard 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. Such a requirement would be

difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed, conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time.

Having explained what DCC 18.113.070(D) requires, the question turns to whether the applicant's evidence demonstrates that the standard is satisfied. The applicant's wildlife mitigation plan, the mitigation and monitoring plan and the proposed conditions of approval are adequate to demonstrate that the proposal is likely and reasonably certain to succeed.

## 2. The applicant's wildlife mitigation plan<sup>3</sup>

The site includes approximately 2,000 acres. Of that total, 426 acres will be devoted to residential development, 316 acres will be devoted to resort facilities, including roads, 589 acres will be developed with golf courses, and 45 acres will be developed with artificial watercourses, streams and lakes. According to the applicant, approximately 897 acres of native vegetation will be retained in yards, buffer areas, common areas, and golf course "rough" areas.

The applicant's wildlife expert identified three major existing habitat areas on the site: juniper woodland (1,715 acres); sagebrush steppe (215 acres) and juniper woodland/outcrop (35 acres.) There are no existing wetlands, water resources, or riparian areas on the site. Further, no threatened, endangered, or sensitive species (plant or animal) or habitats have been identified on site. While the site has been identified as a deer and elk winter range by the BLM, the county has not included the site in its Goal 5 winter range habitat inventory.

After development, the applicant estimates that 615 acres will be managed grassland, juniper shrub-steppe, or golf course. This includes approximately 159 acres of retained native vegetation, of which 61 acres will be temporarily disturbed and need re-vegetation and/or restoration. The remaining 98 acres will include mature juniper and native shrubs and herbs. The applicant proposes to improve habitat by removing invasive plant species and young junipers. Habitat within the residential areas will be maintained on approximately 170 acres, of which 43 acres will need re-vegetation and/or restoration. The remaining 127 acres of native vegetation will have young junipers removed and understory vegetation, consistent with "Fire-wise community" standards.<sup>4</sup> Approximately 568 acres will be retained in native condition, of which approximately 69 acres will need re-vegetation and restoration. The 69 acres will be restored by planting native grasses, herbs, shrubs and trees.

The applicant evaluated the impact of resort development on wildlife resources by using a modified Habitat Evaluation Procedures (HEP) analysis. The HEP analysis was developed by the US Fish and Wildlife Service in the early 1990s, and Central Oregon wildlife management

<sup>3</sup> The summary of the applicant's wildlife plan is based on MA 08-6, Ex. 12, the applicant's August 12, 2008 rebuttal evidence, and supplemental evidence provided by Tetra Tech, the applicant's wildlife consultant.

<sup>4</sup> "Fire-wise communities" are developments that conform to special fire suppression avoidance standards. According to the applicant, conformance with Fire-wise standards will also improve habitat quality by removing invasive underbrush.

agencies have used it to evaluate development impacts since 1993. The applicant explains the HEP analysis as follows:

"HEP is an accounting method, in which the value of each habitat type for each of a series of evaluation species is expressed in terms of habitat units (HU). These are calculated as the number of acres of that habitat multiplied by an index of its quality, expressed as a number between 0 and 1, which is termed the Habitat Suitability Index (HSI). One HU is the equivalent of one acre of the best habitat available for a species. Two acres of habitat half as good would also equal one HU, and so on. In the HEP analysis, to make the process manageable, an 'evaluation species' is chosen to represent a number of species with similar lifestyles and habitat requirements." MA 08-6, Ex. 12 (L1), page 4 and August 12, 2008 rebuttal, Ex. B-10.

The applicant relied on a 2004 modified HEP analysis for Eagle Crest III (which is located to the north of the subject property) to estimate HSIs for baseline habitat quality and post-development habitat quality.<sup>5</sup> The applicant's experts coordinated with ODFW to identify the evaluation species for this site, which include: northern flicker, American kestrel, red-tailed hawk, mountain bluebird, small mammals (generic), western fence lizard, and mule deer. The modified HEP results were used to estimate the off-site acreage that would be required to fully mitigate development impacts and result in "no net loss" of the wildlife habitat on the site and within one mile of the site boundaries. The plan includes mitigation for the impact of increased traffic volumes to wildlife movement on Cline Falls Highway. A table summarizing the impacts is set out in MA 08-6, Ex. 12 (L1), page 6.

According to the HEP analysis, 8,474 off-site HUs would be needed to mitigate the impacts of development, resulting in an estimated \$883,190.00 investment in off-site mitigation. The HUs would be located on public land managed by the BLM and would be established on an incremental basis to correspond with the phased development of the resort.

The applicant has agreed to restore 4,501 acres of juniper woodlands in the Cline Buttes sub-area to mitigate the loss of the 8,474 HUs.<sup>6</sup> The specific BLM land on which the restoration is subject to the adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to be finally identified. However, the applicant and BLM have identified three areas where wildlife and habitat restoration is likely to occur under the CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston Allotment. Restoration includes weed management, vegetation enhancement, reduction of unauthorized off-road motor vehicle use, creation of wildlife water sources ("guzzlers") and traffic speed monitoring devices. The specific activities and monitoring program for the BLM land are identified in an "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project" (Tetra Tech, August 2008), included in the applicant's August 12, 2008 rebuttal, Ex. B3.

<sup>5</sup> The applicant's use of the Eagle Crest III HEP was suggested by ODFW staff.

<sup>6</sup> The applicant's modified HEP analysis concluded that approximately 4498.7 acres would be needed for off-site enhancement to satisfy the 8,474 HU requirement. Modified HEP analysis, August 5, 2008, page 8.

If, at the time of development, insufficient off-site areas are not available, the applicant proposes to provide funding for implementing mitigation in a dedicated fund for use by ODFW to use to improve or purchase mitigation sites within Deschutes County. After the mitigation is established, the applicant will provide continuing funding for the lifetime of the development through a real estate transfer fee.

### 3. The applicant's fish mitigation plan

The applicant obtained 2,129 acre-feet of water rights to support the proposed development year-round. The development's water supply is to be obtained from six wells that are proposed to be drilled on the property. The water rights were granted upon a finding that the applicant was responsible for providing 1,356 acre-feet of mitigation water.<sup>7</sup> The applicant proposes to obtain 836 acre-feet from Deep Canyon Creek irrigation rights that were granted to Big Falls Ranch. The remaining mitigation water is to be obtained from the Central Oregon Irrigation District (COID).

With respect to the Deep Canyon Creek water, irrigation rights involve water flowing for six months of the year (mid-April through mid-October). Based on average daily consumption for the resort, the applicant asserts that the proposal will result in more mitigation water flowing into the creek during the summer months, that the average daily consumption of water from the development. To address water temperatures that affect salmonid habitat, the applicant has entered into an agreement with Big Falls Ranch to remove two diversion dams from the creek. As a result, water will flow directly from cold water springs and seeps into the creek, rather than be impounded above ground.<sup>8</sup> In addition, the applicant proposes to abandon three on-site wells that pump approximately 3.65 acre-feet from the aquifer, and provide for thermal modeling on Whychus Creek. In the event the hearings officer concludes that the proposal will likely increase the creek water temperatures, the applicant provided evidence that it can purchase mitigation credits for 106 acre-feet of water from Three Sisters Irrigation District to increase instream water flows, and thereby mitigate the impact. The applicant asserts that the latter three measures have not been required by OWRD or ODFW, but are in addition to the required mitigation.

### 4. The Parties' Evidence

The applicant argues that the combination of on-site and off-site mitigation is sufficient to demonstrate that the proposal satisfies DCC 18.113.070(D), and continued compliance can be assured by the adoption of conditions that require continued monitoring of the habitat in the selected areas.

The opponents disagree. The opponents' evidence regarding impacts to wildlife can be reduced to three main points: (1) the applicant's use of the HEP analysis and choice of indicator species are inadequate to identify all of the impacts of development on fish and wildlife; (2) the applicant

<sup>7</sup> The Oregon Water Resources Department (OWRD) calculated the needed mitigation water based on a 60 percent consumptive use, meaning that 60 percent of the resort water supply will not be returned to the aquifer through golf course irrigation or other surface applications. The opponents dispute that ORWD used the appropriate consumption rate.

<sup>8</sup> The parties agree that surface water tends to be warmer than aquifer water during the summer months.

improperly identified the extent of impact of the proposed wells and underestimated its severity by assuming only 60 percent of the water used for the development would be consumed; and (3) the applicant has not adequately demonstrated that the proposed mitigation will compensate for the lost habitat or be successful in the long run. Further, the opponents argue that other alternatives, such as the purchase of impacted land and full restoration, are preferable to the more limited restoration efforts proposed for BLM land.

**a. Indicator Species/HEP analysis v. Extensive On-site Ground Surveys**

The opponents point out that the applicant heavily relied on species survey data from Eagle Crest III and on general habitat investigations performed in the area that were then evaluated in a modified HEP analysis. The opponents argue that these studies and the applicant's indicator species are inadequate to account for and address the complete biota on the site. They also contend that the applicant has failed to demonstrate that the modified HEP analysis adequately accounts for the impact of development on the site, suggesting that a full HEP analysis is the minimum necessary to address habitat impacts. They argue that the applicant's superficial survey is inadequate to provide essential baseline data from which to measure the success or failure of the applicant's mitigation plan. The opponents argue that at the very least, the applicant must provide a two-year survey of plant and animal specials, noting that a multi-year survey better accounts for the vast fluctuations in animal populations that can occur due to site conditions, weather and disease. Finally, opponents argue that even if the indicator species can adequately replicate habitat needs for a wider population, the applicant's studies do not address the cumulative impact of development in the Tumalo area.

The applicant concedes that indicator species will not fully account for all of the many and varied species on the site and the effect the development will have on them. However, the applicant argues that such specificity is not needed to satisfy DCC 18.113.070(D). The applicant asserts that its analysis has been subject to extensive review and comment from ODFW, and is more extensive than plans for other destination resort developments in the area. The applicant argues that its assumptions are reasonable, and the modified HEP analysis adequately quantifies the impacts, and provides a workable methodology to compensate for the impact. With respect to cumulative impacts, the applicant argues that it considered and addressed reasonably foreseeable cumulative impacts. See August 12, 2008 rebuttal, Ex. B-14. The hearings officer agrees.

**b. Adequacy of Fish Mitigation Plan**

Opponents argue (1) the Deep Canyon Creek water is already pledged to mitigate development on another property or has been abandoned;<sup>9</sup> (2) the amount of mitigation water required by

<sup>9</sup> Opponents argue that the acquisition of water rights is not evidence that water will actually be returned to the rivers and streams as alleged. According to opponents, water rights are merely paper representations of water quantities and do not mean that the cool water needed to maintain instream temperatures will be available. The hearings officer understands the limitations of the water rights process, but concludes that under Oregon water law, the only way to adequately account for water in the streams is through the ORWD administration. Therefore, the hearings officer concludes that evidence

OWRD is inadequate to assure that surface water flows will be maintained year-round, as fish need more water early in the spring season; and (3) the use of surface water will degrade existing conditions by taking cold water out of the aquifer where it seeps into Whychus Creek and replacing it with warmer surface water.

The applicant acknowledges that the proposal require the development of wells on the property that will affect basin water flows. However, the applicant argues that it has addressed those impacts by purchasing mitigation credits from COID, and by acquiring irrigation water rights that will return water to Deep Canyon Creek. They argue that both OWRD and ODFW have reviewed its proposal and have agreed that the proposal mitigates both water quantity and quality that will be removed from the aquifer due to the resort development. The applicant supplied a copy of an agreement between the owners of Deep Falls Ranch and the Daniels Group showing those owners have agreed to the removal of two dams that diverted flow from Deep Canyon Creek.<sup>10</sup> In response to testimony from opponents that the proposed mitigation does not adequately address increases in water temperature in Whychus Creek, the applicant argues its proposal will have little or no impact on water temperatures on the creek. Even if water temperatures in Whychus Creek do increase incrementally, the applicant asserts that the increase can be addressed by requiring the applicant to fund a water conservation project sponsored by the Three Sisters Irrigation District to return 106 acre-feet of water to instream uses.

The OWRD mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development.

### c. Adequacy and Likely Success of the Proposed Mitigation

The opponents generally dispute that the applicant's proposed mitigation plan will result in no net loss to fish and wildlife resources. The opponents argue that the plan assumes that terrestrial animals will adapt to the built environment on the site, or will be attracted to the improved habitat that is being provided off-site. The opponents argue that such assumptions do not take into account the fragmentation of habitat, or address species recovery from the changes in the habitat. Further, opponents argue that the proposal does little to address or combat the problem of invasive species, such as starlings, who are attracted to the environment

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regarding the location and volume of water rights is substantial evidence as to the likely location and volume of water in the identified streams.

<sup>10</sup> The Daniels Group owns a former strip mine that has recently been proposed to be redeveloped for residential uses. It is this entity that the opponents assert owns or has options to the Deep Canyon Creek water. However, the opponents have not provided evidence as to the nature and extent of the conflict. The hearings officer concludes there is substantial evidence in the record to support a finding that the applicant has the authority to use water from Deep Canyon Creek, and to remove dams that would impede flows from underground seeps and springs.

that will be developed on the property, and will compete for the limited habitat that remains on the site. With respect to long term habitat improvements, the opponents argue that the applicant is unreasonably optimistic about cheatgrass eradication, and CC&Rs that limit domestic animals to indoor or leashed pets. Finally, the opponents argue that the applicant's mitigation on BLM land does not adequately account for competing BLM priorities, such as grazing, off-road vehicle recreational use, that undermine the restorative goals of the mitigation plan.

The applicant responds that the HEP analysis considered habitat degradation, including habitat fragmentation and the introduction of new non-native species. As a result, the applicant proposes mitigation activities on approximately 4,500 acres to compensate for the loss of 1,000 acres of habitat on its site. Further, the applicant asserts that while it is not certain that the "if you build it, they will come" habitat restoration efforts will be completely effective, the academic evidence supports a finding that habitat improvements will attract species that are being squeezed out by development elsewhere. With respect to the success of its cheatgrass eradication program and competing BLM priorities, the applicant argues that it does not expect that cheatgrass will be fully eradicated, but has proposed a series of measures to minimize its growth and spread, including periodic chemical applications and the introduction of more acceptable competing plant species. In addition, the applicant concedes that the BLM may adopt programs that will cause the mitigation to be less successful than if the mitigation sites were completely off-limits to those competing uses, but argues that there is substantial evidence to support its reliance on the identification of special habitat restoration areas to compensate for those competing activities, and on its mitigation efforts within those areas, to compensate for the loss of habitat on this site. The applicant also notes that it has accounted for circumstances where the BLM mitigation land is not available, by funding replacement mitigation programs through ODFW.

While the applicant's mitigation plan does rely on its program to make general habitat improvements on BLM land, it also acknowledges that BLM management priorities may reduce the success of those efforts. Its plan includes monitoring and alternatives to provide replacement mitigation in the event the anticipated BLM improvements are not successful. The hearings officer concludes that the applicant has demonstrated that the mitigation plan, as conditioned is reasonably likely to success.

#### d. Alternative Mitigation Plans

The applicant's expert explained that the proposed mitigation is consistent with current wildlife habitat restoration practices, and that the opponents' alternatives, while potentially viable, are no more restorative than the applicant's proposal. The hearings officer has concluded that its plan is adequate to ensure that the impact of the development on fish and wildlife habitats results in no net loss. Therefore, the applicant need not address or consider alternatives that would work equally well or better.

For the reasons set forth above, the hearings officer concludes that, as conditioned, DCC 18.113.070(D) is satisfied.

# **V. DECISION:**

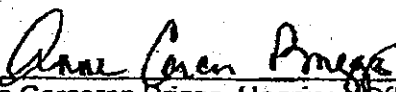
For the reasons set out above, the hearings officer concludes that the proposal satisfies all applicable criteria, or that it is feasible to satisfy the criteria through the implementation of conditions of approval. Accordingly, M 07-2/MA 08-6 are approved, subject to the following conditions. To provide consistency among the decisions, the hearings officer retains the numerical listings included in the BOCC's CMP decision, noting by the word "satisfied" those conditions that no longer apply.

1. Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.
2. All development in the resort shall require tentative plat approval through Title 17 of the County Code, the county Subdivision/Partition Ordinance, and/or Site Plan Review through Title 18 of the County Code, the Subdivision Ordinance.
3. Satisfied.
4. Subject to US Department of the Interior-Bureau of Land Management (BLM) approval, any secondary emergency ingress/egress across the BLM-owned land or roadways shall be improved to a minimum width of 20 feet with all-weather surface capable of supporting a 60,000-lb. fire vehicle. Emergency secondary resort access roads shall be improved before any Final Plat approval or issuance of a building permit, whichever comes first.
5. The developer will design and construct the road system in accordance with DCC Title 17. Road improvement plans shall be approved by the Road Department prior to construction.
6. All easements of record or right-of-ways shall be shown on any final plat. Plans shall be approved by the Road Department prior to construction.
7. All new proposed road names must be reviewed and approved by the Property Address Coordinator prior to final plat approval.
8. Satisfied.
9. Satisfied.
10. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.
11. Satisfied.
12. Commercial, cultural, entertainment or accessory uses provided as part of the destination resort shall be contained within the development and shall not be oriented to public roadways. Commercial, cultural and entertainment uses allowed within the destination resort shall be incidental to the resort itself. As such, these ancillary uses shall be permitted only at a scale suited to serve

38. The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county 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 Whychus Creek.
39. The applicant shall provide funding to complete a conservation project by the Three Sisters 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 funding agreement prior to the completion of Phase A.

Dated this 6<sup>th</sup> day of October, 2008.

Mailed this 8<sup>th</sup> day of October, 2008.

  
Anne Corcoran Briggs, Hearings Officer

**THIS DECISION IS FINAL UNLESS APPEALED IN ACCORDANCE WITH THE PROVISIONS OF DCC TITLE 22.**

# **Chapter 18.113. DESTINATION RESORTS ZONE - DR**

- 18.113.010. Purpose.
- 18.113.020. Applicability.
- 18.113.025. Application to Existing Resorts.
- 18.113.030. Uses in Destination Resorts.
- 18.113.040. Application Submission.
- 18.113.050. Requirements for Conditional Use Permit and Conceptual Master Plan Applications.
- 18.113.060. Standards for Destination Resorts.
- 18.113.070. Approval Criteria.
- 18.113.075. Imposition of Conditions.
- 18.113.080. Procedure for Modification of a Conceptual Master Plan.
- 18.113.090. Requirements for Final Master Plan.
- 18.113.100. Procedure for Approval of Final Master Plan.
- 18.113.110. Provision of Streets, Utilities, Developed Recreational Facilities and Visitor-Oriented Accommodations.

## **18.113.010. Purpose.**

- A. The purpose of the DR Zone is to establish a mechanism for siting destination resorts to ensure compliance with LCDC Goal 8 and the County Comprehensive Plan. The destination resort designation is intended to identify land areas which are available for the siting of destination resorts, but which will only be developed if consistent with the purpose and intent of DCC 18.113 and Goal 8.
- B. The DR Zone is an overlay zone. The DR Zone is intended to provide for properly designed and sited destination resort facilities which enhance and diversify the recreational opportunities and the economy of Deschutes County. The DR Zone will ensure resort development that compliments the natural and cultural attractiveness of the area without significant adverse effect on commercial farming and forestry, environmental and natural features, cultural and historic resources and their settings and other significant resources.
- C. It is the intent of DCC 18.113 to establish procedures and standards for developing destination resorts while ensuring that all applicable County Comprehensive Plan policies are achieved.
- D. It is the intent of DCC 18.113 to ensure that all elements of a destination resort which are proposed are financially secured in a manner which will protect the public's interest should the development not be completed as proposed.
- E. It is not the intent of DCC 18.113 to site developments that are in effect rural subdivisions, whose primary purpose is to serve full-time residents of the area.  
(Ord. 92-004 §13, 1992)

## **18.113.020. Applicability.**

- A. The provisions of DCC 18.113 shall apply to proposals for the development of destination resorts, as defined in DCC Title 18, in areas designated DR by the County zoning maps. The provisions of DCC 18.113 shall not apply to any development proposal in an area designated DR other than a destination resort.
- B. When these provisions are applicable, they shall supersede all other provisions of the underlying zone. Other provisions of the zoning ordinance, made applicable by specific map designations, such as the SMIA, AH, CH, FP or LM, or otherwise applicable under the terms of the zoning ordinance text shall remain in full force and effect, unless otherwise specified herein.

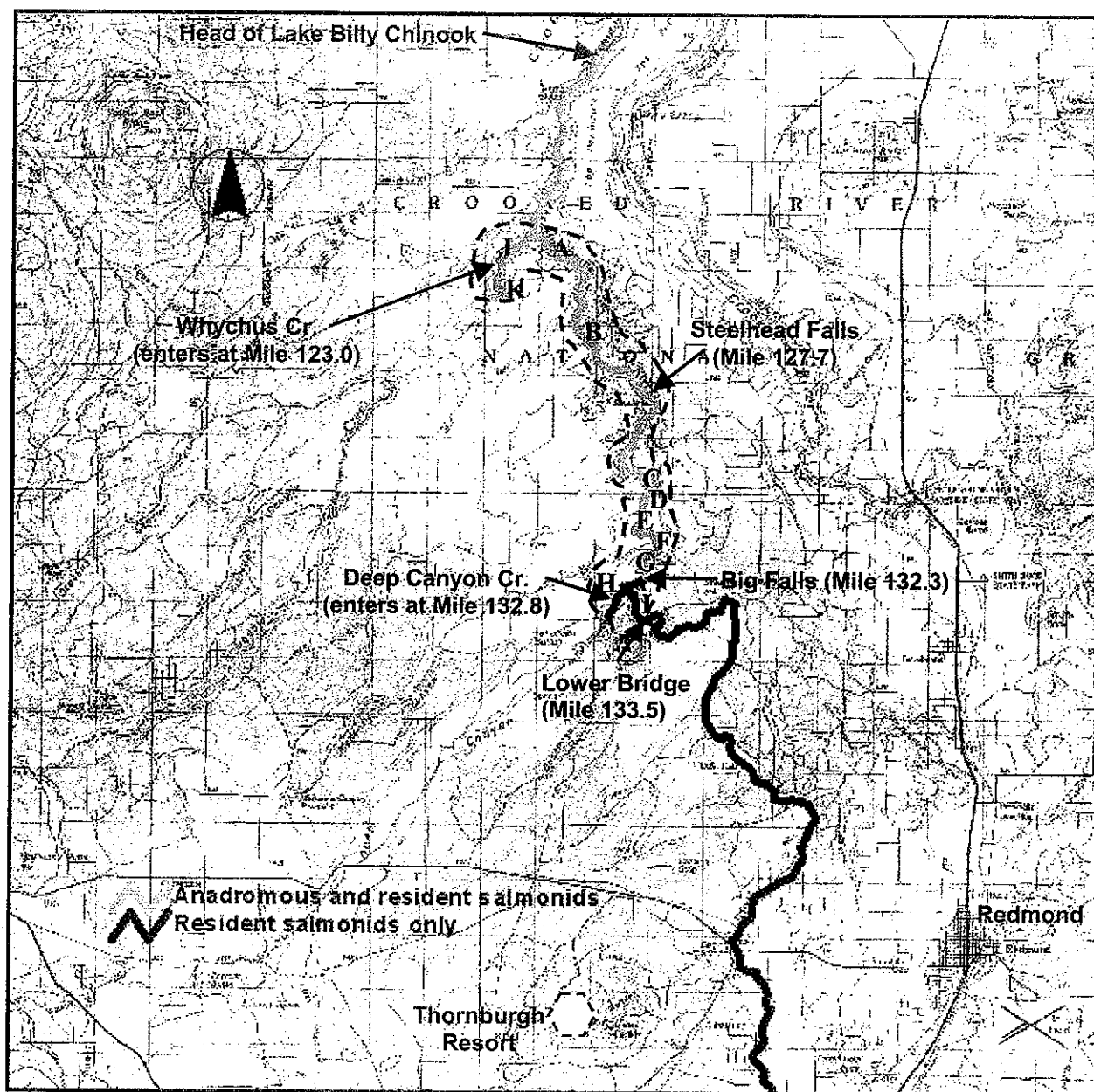
### 18.113.070. Approval Criteria.

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

- A. The subject proposal is a destination resort as defined in DCC 18.040.030.
- B. All standards established by DCC 18.113.060 are or will be met.
- C. The economic analysis demonstrates that:
  1. The necessary financial resources are available for the applicant to undertake the development consistent with the minimum investment requirements established by DCC 18.113.
  2. Appropriate assurance has been submitted by lending institutions or other financial entities that the developer has or can reasonably obtain adequate financial support for the proposal once approved.
  3. The destination resort will provide a substantial financial contribution which positively benefits the local economy throughout the life of the entire project, considering changes in employment, demands for new or increased levels of public service, housing for employees and the effects of loss of resource land.
  4. The natural amenities of the site considered together with the identified developed recreation facilities to be provided with the resort, will constitute a primary attraction to visitors, based on the economic feasibility analysis.
- 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.
- E. Important natural features, including but not limited to significant wetlands, riparian habitat, and landscape management corridors will be maintained. Riparian vegetation within 100 feet of streams, rivers and significant wetlands will be maintained. Alterations to important natural features, including placement of structures, is allowed so long as the overall values of the feature are maintained.
- F. The development will not force a significant change in accepted farm or forest practices or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
- G. Destination resort developments that significantly affect a transportation facility shall assure that the development is consistent with the identified function, capacity and level of service of the facility. This shall be accomplished by either:
  1. Limiting the development to be consistent with the planned function, capacity and level of service of the transportation facility;
  2. Providing transportation facilities adequate to support the proposed development consistent with Oregon Administrative Rules chapter 660, Division 12; or
  3. Altering land use densities, design requirements or using other methods to reduce demand for automobile travel and to meet travel needs through other modes.

A destination resort significantly affects a transportation facility if it would result in levels of travel or access that are inconsistent with the functional classification of a facility or would reduce the level of service of the facility below the minimum acceptable level identified in the relevant transportation system plan.

  - a. Where the option of providing transportation facilities is chosen, the applicant shall be required to improve impacted roads to the full standards of the affected authority as a condition of approval. Timing of such improvements shall be based upon the timing of the impacts created by the development as determined by the traffic study or the recommendations of the affected road authority.
  - b. Access within the project shall be adequate to serve the project in a safe and efficient manner for each phase of the project.
- H. The development will not create the potential for natural hazards identified in the County Comprehensive Plan. No structure will be located on slopes exceeding 25 percent. A wildfire management plan will be implemented to ensure that wildfire hazards are minimized to the greatest extent practical and allow for safe evacuation. With the exception of the slope restriction of DCC 18.113.070, which shall apply to destination resorts in forest zones, wildfire management of destination



*Figure 1. Segments of the Deschutes River and its tributaries that are a focus of effects analyses for groundwater pumping at Thornburgh Resort and mitigation measures described by NCI (2008) and TtEC (2008). Areas within these segments that provide habitat for resident and anadromous salmonids are as indicated. Locations of primary groundwater inputs to the Deschutes River and Whychus Creek within a project impact zone mapped by NCI (2008) are indicated by capital letters (A-K) shown in dark blue. Modeling by Yinger and Strauss (2008) has indicated a larger potential impact zone.*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed an original, together with 20 copies, of the attached **PETITIONER GOULD'S OPENING BRIEF AND EXCERPT OF RECORD** with the State Court Administrator by first class mail, postage prepaid, in a sealed envelope, deposited in Bend, Oregon, on October 20, 2009, to:


State Court Administrator  
Appellate Courts Records Section  
Supreme Court Building  
1163 State Street  
Salem, Oregon 97301-2563

and that on the same day, two true and correct copies of the same contained in a sealed envelope, first class mail, postage prepaid, was served on:

Laurie E. Craghead  
Deschutes County Legal Counsel  
1300 NW Wall Street, Suite 200  
Bend, Oregon 97701-1960

Peter Livingston  
Schwabe, Williamson & Wyatt, P.C.  
PacWest Center, Suites 1600-1900  
1211 SW Fifth Avenue  
Portland, Oregon 97204-3795

DATED this 20<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
Paul D. Dewey, OSB# 78178  
Attorney for Petitioner/Cross-  
Respondent Gould