Exhibit 22: Asset Transfers–DeLashmutt letter to J. Sauter

12/2011

EXHIBIT 22

Thornburgh Utility Group, LLC

December 9, 2011

Mr. Jerry Sauter
Water Rights Program Analyst
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem OR 97301

Re: Loyal Land's Request for Assignment of Applicant Thornburgh Utility Group's Interest in Application G-16385

Dear Mr. Sauter,

Per our discussion of yesterday, this letter will serve to further confirm the opposition of applicant Thornburgh Utility Group, LLC (TUG) to Loyal Land, LLC's (Loyal) Request for Assignment of December 5, 2011. Application G-16385 (Application) was made by me on behalf of TUG which is the sole owner of the Application. As I explain below, Loyal does not own any interest in the Application and therefore the assignment must be treated as invalid.

In its request, Loyal represented to you that it acquired the land "covered by the Application" from TUG through foreclosure. This isn't true. Loyal foreclosed on a portion of the land identified under the Application that was owned by Thornburgh Resort Company, LLC (TRC). The foreclosure itself is deeply contested (as reference in the legal filings I sent yesterday). But in any case, TRC is a separate legal entity from the applicant TUG. TUG never had any dealings with Loyal, nor were any of TUG's assets subject to the contested foreclosure. Therefore, since TUG remains the sole owner of the Application, Loyal possesses no right to seek assignment of all or any portion of TUG's interest in the Application.

Loyal also states in its request for assignment that TUG has been administratively dissolved. Loyal apparently saw such status as an opportunity to allow it to submit a form request for assignment when the water right holder is considered "not available." While it is true that TUG had not yet filed its annual report with the Oregon Secretary of State's office as of the date of Loyal's request for assignment, mere administrative dissolution does not divest TUG of its assets nor does it allow for such assets to be simply assumed by any third party who wishes to claim them as Loyal attempts to do here. TUG is a lawfully operating entity. With this letter, I include a copy of TUG's submittal for administrative reinstatement filed with the Oregon Secretary of State's office. Once TUG's administrative reinstatement is confirmed, I will send a copy for your records.

Finally, Loyal is well aware that I filed the Application in my capacity as the representative of TUG. Loyal, as well as its counsel knows how to reach me. There have been extensive communications between myself, TUG and TRC attorneys with Loyal's members Mr. Larsen and Mr. Parker, and their attorneys, in some cases spanning 5 years. For Loyal to submit

a request for assignment under the auspices it could not reach me on behalf of TUG, the sole holder of the Application, is troubling at best. They know a dozen ways to reach the "Holder," but apparently chose not to do so.

In consideration of our prior discussion, and based on the information I have provided here and in earlier emails, I request the department confirm in writing that the Application for partial assignment is invalid and that TUG remains the sole owner of the Application.

I appreciate your time yesterday and look forward to receiving the requested confirmation as discussed.

Sincerely,

Kameron DeLashmutt
Thornburgh Utility Group, LLC

Exhibit 23: Asset Transfers–DeLashmutt letter to D. French

01/2012

EXHIBIT 23

Thornburgh Utility Group, LLC

January 2, 2012

Mr. Dwight French
Oregon Water Resources Department
Salem, OR

Dear Mr. French,

I appreciate your time and consideration over the last 10 days as we have worked through issues pertaining to Loyal Lands' efforts to obtain a portion of TUG's water rights application. Pursuant to our discussion last week, I understand your office will issue an order this week rescinding the existing partial assignment of the application to Loyal Lands.

We had also discussed the need to address a clerical error on TUG's application which I indicated I would be happy to address in writing. The error concerns TUG's response to the question of access to the lands where the water will be applied to beneficial use. TUG responded by checking the box that it owned such property. As I mentioned to you, the appropriate box should have been checked to confirm that TUG did not own such land but possessed access to provide water to such property. At the time the application was submitted, the subject lands were owned by Harry Kem, Trail Crossing Trust, Charlie and Cheryl Price, Bill and Roberta Bennet and Agnes DeLashmutt. Later the lands were purchased by Thornburgh Resort Company except Agnes DeLashmutt's property, which I have long been the agent for As you know, Thornburgh Resort Company's ownership interests in these lands have since been subject to a foreclosure proceeding resulting in the conveyance of such property to Loyal Lands. And as we discussed this foreclosure and the resulting conveyance of title remains contested within the courts.

Again, thank you for your time and consideration and I look forward to receiving the order rescinding the partial assignment of the application into Loyal Lands. Should you have any questions in the interim, please do not hesitate to contact me.

Sincerely,

Kameron DeLashmutt
Manager, Thornburgh Utility Group, LLC

035992/00001/3294419v1

RECEIVED
APR 02 2018
OWRD

Exhibit 24: Asset Transfers–OWRD rescinds transfer to Loyal

09/2012

EXHIBIT 24

Oregon
John A. Kitzhaber, MD, Governor

Water Resources Department
North Mall Office Building
725 Summer St. NE, Suite A
Salem, OR 97301
Phone 503-986-0900
FAX 503-986-0904
www.wrd.state.or.us

January 9, 2012

Perkins Coie, LLP
Attn: Lawrence H. Reichman
1120 NW Couch Street, Tenth Floor
Portland, Oregon 97209-4128

Reference: Application G-16385

The partial assignment by proof from Thornburgh Utility Group, LLC to Loyal Land, LLC dated December 6, 2011 is hereby rescinded. Upon review of the assignment, and statements provided by the previous applicant, the Department has determined that the previous applicant was, and is available. The Assignment was made by proof in absence of the applicant of record. In addition, as this application is for quasi-municipal use, as defined in OAR 690-300-0010(40), the assignee must be a corporation other than a public entity, created for the purpose of operating a water supply system, for those uses usual and ordinary to municipal water use. It is unclear if Loyal Land, LLC is such a corporation.

The Department does not usually assign rights held by public entities such as municipalities or water districts without their consent.

The Department has been made aware of pending legal action and will take no further action regarding assignments on the application until these issues are resolved.

Sincerely,

Jerry Sauter
Water Rights Program Analyst
Water Right Services Division

cc: Watermaster 11
Kameron Delashmutt
Martha O. Pagel
Adam Sussman – GSI Water Solutions
Data Center, OWRD (Complete Copy of Assignment Request)
Hydrographics
File

Exhibit 25: Asset Transfers-Complaint Loyal vs. TRC/BLM

03/2012

EXHIBIT 25

Stephen F. English, OSB No. 730843
SEnglish@perkinscoie.com
Erick J. Haynie, OSB No. 982482
EHaynie@perkinscoie.com
Stephen A. Raher, OSB No. 095625
SRaher@perkinscoie.com
PERKINS COIE LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Plaintiff
Loyal Land, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

LOYAL LAND, LLC, an Oregon limited liability company, Plaintiff, v. **THORNBURGH RESORT COMPANY, LLC**, an Oregon limited liability company, and **FEDERAL BUREAU OF LAND MANAGEMENT**, a division of the United States Department of the Interior, Defendants.	Case No. CV '12 -409- AA **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** JURY DEMAND

COMES NOW, Loyal Land, LLC ("Loyal Land"), to allege its Complaint as follows:

PARTIES

1. Plaintiff Loyal Land is an Oregon limited liability company.

Exhibit 26: Asset Transfer-Complaint Loyal vs. TRC/TUG

04/2012

EXHIBIT 26

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF DESCHUTES

LOYAL LAND, LLC, an Oregon limited liability company, Plaintiff, v. **THORNBURGH RESORT COMPANY, LLC**, an Oregon limited liability company, and **THORNBURGH UTILITY GROUP, LLC**, an Oregon limited liability company, Defendants.	Case No. 12-CV-0254 **PLAINTIFF'S FIRST AMENDED COMPLAINT** (Quiet Title; Injunctive Relief) CLAIM NOT SUBJECT TO MANDATORY ARBITRATION JURY DEMAND

COMES NOW, Loyal Land, LLC ("Loyal Land"), to allege its First Amended Complaint as follows:

PARTIES

1. Plaintiff Loyal Land is an Oregon limited liability company.

RECEIVED
APR 02 2018

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Exhibit 27: Settlement-Agreement between Loyal & TRC

12/2013

EXHIBIT 2

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Settlement Agreement" or "Agreement") has been entered into by the Parties identified below. This Settlement Agreement shall be effective as provided in Section 1 below.

PARTIES

The parties to this Settlement Agreement (the "Parties") are as follows and are grouped as follows:

A. **LOYAL LAND, LLC**, an Oregon limited liability company ("Loyal Land"), and **TERRY LARSEN**, an individual ("Larsen") (Loyal and Larsen are referred to collectively herein as the "Loyal Parties");

B. **KAMERON DELASHMUTT**, an individual ("Kameron"); **THORNBURGH RESORT COMPANY, LLC**, an Oregon limited liability company ("TRC"); **THORNBURGH UTILITY GROUP, LLC**, an Oregon limited liability company ("TUG"); **THORNBURGH PROPERTIES, LLC**, an Oregon limited liability company ("TP") **GENESIS DEVELOPMENT GROUP, LLC**, an Oregon limited liability company ("Genesis"); and **CENTRAL RESORT COMPANY, LLC**, an Oregon limited liability company ("Central Resort"); (Kameron, TRC, TP, TUG, Genesis, and Central Resort are referred to collectively herein as the "Kameron DeLashmutt Parties"); and

C. **AGNES DELASHMUTT**, an individual ("Agnes").

RECITALS

A. Beginning in approximately 2004, TRC began planning to develop and market a destination golf resort to be called "Thornburgh" (the "Project"). The Project was, and is, to occur on certain unimproved real property generally known as TBD Cline Falls Road, Redmond, Oregon 97756 (the "Development Property"). The Development Property is more particularly described in Exhibit A hereto.

B. TRC acquired the Development Property between 2005 and 2007.

C. Loyal Land maintains that the Project was financed in part by a loan from a commercial lending affiliate of Sterling Savings Bank ("Sterling") in the principal amount of $10,956,000 (the "Sterling Loan"). The Sterling Loan was secured by a first position Deed of Trust on the Development Property (the "Trust Deed"). Loyal Land maintains that the Trust Deed was duly recorded on November 26, 2007, Book 2007, Page 61125 of Official Records in the office of the Recorder of Deschutes County.

D. Loyal Land further maintains that it is the successor to the Sterling Loan and Trust Deed. Loyal Land also maintains that on August 31, 2011, with a credit bid of $8,000,000, Loyal Land validly foreclosed the Sterling Loan and became the owner of fee simple title to the

Exhibit 28: Settlement-Memorandum of Purchase and Sale Agr

12/2013

EXHIBIT 28

Exhibit M-1

(Memorandum of Purchase and Sale Agreement)

After recording return to:

Joseph West
Garvey Shubert Barer
121 SW Morrison Street, Suite 1100
Portland, OR 97209

Until a change is requested,
all tax statements shall be
sent to the following address:
No Change

MEMORANDUM OF PURCHASE AND SALE AGREEMENT

THIS MEMORANDUM OF PURCHASE AND SALE AGREEMENT (this "Memorandum") is entered into effective as of 12/16, 2013 ("Effective Date"), by and between LOYAL LAND, LLC, an Oregon limited liability company (collectively, "Loyal"), and KAMERON DELASHMUTT, an individual ("Kameron") or his assigns.

W I T N E S S E T H:

Loyal and Kameron are the parties to that certain Purchase and Sale Agreement of even date herewith (the "PSA"). Under the PSA, Loyal and Kameron have entered into a contract for the purchase and sale of Loyal's interest in certain real property, which is further described on the attached ***Exhibit A*** (the "Development Property"). Loyal and Kameron desire to enter into and record this Memorandum to give notice of the PSA.

1. **Notice of PSA**. This Memorandum shall be recorded in the Deschutes County, Oregon land records.

2. **Terms and Conditions of PSA**. This Memorandum shall not be deemed or construed to define, limit, or modify the PSA or any provision thereof, in any manner. The terms and conditions on which Loyal has agreed to sell the Development Property to Kameron are contained in the PSA to which reference is hereby made for all purposes. The outside closing date for sale of the Development Property under the PSA, including extensions, is _____, 2016.

3. **Agent of Record.** Kameron DeLashmutt is hereby Loyal's Agent of Record for Land Use actions on the Development Property.

[The remainder of page was intentionally left blank.]

IN WITNESS WHEREOF, the parties have executed this Memorandum of Purchase and Sale Agreement as of the Effective Date.

LOYAL LAND, LLC,
an Oregon limited liability company

By: _____

Its: _____

By: _____
Kameron DeLashmutt

STATE OF CALIFORNIA)
) ss.
County of _____)

This instrument was acknowledged before me on the ___ day of _____ 2013, by Terry Larsen who is the _____ of LOYAL LAND, LLC.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first written above.

_____
Notary Public in and for the State of California

STATE OF OREGON)
) ss.
County of Deschutes)

This instrument was acknowledged before me on the 14th day of December 2013, by KAMERON DELASHMUTT, an individual.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first written above.

OFFICIAL SEAL
SAMANTHA D FARINACCI
NOTARY PUBLIC-OREGON
COMMISSION NO. 451134
MY COMMISSION EXPIRES JULY 29, 2014

_____
Notary Public in and for the State of Oregon

IN WITNESS WHEREOF, the parties have executed this Memorandum of Purchase and Sale Agreement as of the Effective Date.

LOYAL LAND, LLC,
an Oregon limited liability company

By: _____

Its: SOLE MEMBER

By: _____
Kameron DeLashmutt

STATE OF CALIFORNIA)
) ss.
County of RIVERSIDE)

This instrument was acknowledged before me on the 16 day of DEC 2013, by Terry Larsen who is the SOLE MEMBER of LOYAL LAND, LLC.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first written above.

JOSE VALENZUELA
COMM. # 1926973
NOTARY PUBLIC - CALIFORNIA
RIVERSIDE COUNTY
COMM. EXPIRES FEB. 27, 2015

_____
Notary Public in and for the State of California

STATE OF OREGON)
) ss.
County of _____)

This instrument was acknowledged before me on the ___ day of _____ 2013, by KAMERON DELASHMUTT, an individual.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first written above.

_____
Notary Public in and for the State of Oregon

Exhibit A

Legal Description

PARCEL 1:
The Southeast Quarter of the Southeast Quarter (SE1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 2:
The Northwest Quarter of the Southeast Quarter (NW1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 3:
In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Twenty-nine (29): Northeast Quarter, East Half of the Southeast Quarter, Southeast Quarter of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Northeast Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter (NE1/4, E1/2 SE/1/4, SE1/4 NW1/4, SW1/4 NW1/4, NE1/4 SW1/4, NW1/4 SW1/4).

EXCEPTING THEREFROM the Southeast Quarter of the Southeast Quarter (SE1/4SE1/4).

TOGETHER WITH:

In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Thirty (30): The Southeast Quarter of the Northeast Quarter (SE1/4NE1/4) and the Northeast Quarter of the Southeast Quarter (NE1/4SE1/4).

PARCEL 4:
The East Half of the Northwest Quarter (E1/2NW1/4), the South Half of the Southwest Quarter (S1/2SW1/4) and the West Half of the East Half (W1/2E1/2) of Section Seventeen (17):

The Northwest Quarter (NW1/4), the West Half of the Northeast Quarter (W1/2NE1/4), the North Half of the Southwest Quarter (N1/2SW1/4), the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian.

EXCEPTING THEREFROM:

TRACT A:
Beginning at the center one-quarter (1/4) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, the true point of beginning; thence North 88°44'26" West along the center line 653.40 feet, thence North 00°06'54" East 200.00 feet. Thence South 88°44'26" East 653.40 feet to the North-South center line: thence South 00°06'54" West 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center one-sixteenth (1/16) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, thence North 00°06'54" East along the North-South center line 179.75 feet to the true point of beginning: Thence North 89°53'06" West 208.71 feet. Thence North 00°06'54" East 208.71 feet; thence South 89°53'06" East 208.71 feet to the said center line; thence South 00°06'54" West along said center line 208.71 feet to the true point of beginning.

PARCEL 5:
The Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) and the South Half of the Southeast Quarter (S1/2SE1/4) of Section Twenty (20); the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty-one (21); the North Half (N1/2) and the North Half of the South Half (N1/2S1/2) of Section Twenty-eight (28), all in Township Fifteen (15) South, Range Twelve (12), East, of the Willamette Meridian, Deschutes County, Oregon.

EXCEPTING:

TRACT C:
Beginning at the East 1/4 corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.

PARCEL 6:

TRACT A:
Beginning at the center 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence North 88°44'26" West along the centerline, 653.40 feet; thence North 00°06'54" East, 200.00 feet; thence South 88°44'26" East, 653.40 feet to the North-South centerline; thence South 00°06'54" West, 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center 1/16 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon; thence North 00°06'54" East along the North-South centerline, 179.75 feet to the true point of beginning; thence North 89°53'06" West, 208.71 feet; thence North 00°06'54" East, 208.71 feet; thence South 89°53'06" East, 208.71 feet to the said centerline; thence South 00°06'54" West along said centerline, 208.71 feet to the true point of beginning.

TRACT C:
Beginning at the East 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.

IN WITNESS WHEREOF, the parties have executed this Memorandum of Purchase and Sale Agreement as of the Effective Date.

LOYAL LAND, LLC,
an Oregon ~~limited~~ liability company

By: _____

Its: SOLE MEMBER

By: _____
Kameron DeLashmutt

STATE OF CALIFORNIA)
) ss.
County of Riverside)

This instrument was acknowledged before me on the 16 day of Dec 2013, by Terry Larsen who is the Sole Member of LOYAL LAND, LLC.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first written above.

JOSE VALENZUELA
COMM. # 1926973
NOTARY PUBLIC - CALIFORNIA
RIVERSIDE COUNTY
COMM. EXPIRES FEB. 27, 2015

_____
Notary Public in and for the State of California

STATE OF OREGON)
) ss.
County of _____)

This instrument was acknowledged before me on the ___ day of _____ 2013, by KAMERON DELASHMUTT, an individual.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first written above.

_____
Notary Public in and for the State of Oregon

PDX_DOCS:510816.1 [38119.00100]

Exhibit 29: CMP Initiation-Application to Initiate Remand

12/2013

EXHIBIT 29

Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
http://www.co.deschutes.or.us/cdd/

LAND USE APPLICATION

INCOMPLETE APPLICATIONS WILL NOT BE ACCEPTED

1. Complete the application form and provide appropriate original signatures.
2. Include a copy of the current deed showing the property owners.
3. Attach correct fee.
4. Include a plot plan that shows all property lines and existing and proposed structures, parking, landscaping, lighting, etc.
5. If this application includes oversized plans a single, reduced-size plan no larger than 11" x 17" with graphic scale shall also be included. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.
6. All applicable standards and criteria must be addressed in writing prior to acceptance of the application. Detailed descriptions, maps and other relevant information must be attached to the application.

TYPE OF APPLICATION (check one): **FEE:** $3,000

Conditional Use (CU) ___ **Temporary Use (TU)** ___ **Setback Exception (SE)** ___
Partition (MP) ___ **Site Plan (SP)** ___ **Other** Declaratory Ruling after remand from LUBA
Subdivision (TP) ___ **Variance (V)** ___

Applicant's Name (print): Loyal Land, LLC Phone: (___) ___

Mailing Address: 80908 Hermitage City/State/Zip: La Quinta, CA 92253

Applicant's Email Address: ___

Property Owner's Name (if different)*: same Phone: (___) ___

Mailing Address: ___ City/State/Zip: ___

1. Property Description: Township 15S Range 12E Section 29, 30 Tax Lot 8000 5,000,5001,5002,7700,7701,7800,7801,7900,
2. Property Zone(s): EFU-TBR (DR overlay) Property Size (acres or sq. ft.): 1,970 acres
3. Lot of Record? (State reason): Yes, per County permits LR-91-56, LR-98-44, CU-79-159, CU-91-68 and MP-79-159
4. Property Address: N/A
5. Present Use of Property: Low-intensity grazing and open space
6. Existing Structures: Three dwellings and barn
7. Request: Declaratory ruling that applicant has initiated the use approved in the CMP
8. Property will be served by: Sewer On-site Onsite Disposal System ___
9. Domestic Water Source: On-site

Applicant's Signature: [signature] for Loyal Land, LLC Date: 12-23-2013

Property Owner's Signature (if different)*: ___ Date: ___

Agent's Name (if applicable): David J. Petersen Phone: (503) 802-2054

Mailing Address: Tonkon Torp, 888 SW 5th Avenue, Suite 1600 City/State/Zip: Portland, OR 97204

Agent's Email Address: david.petersen@tonkon.com

***If this application is not signed by the property owner, a letter authorizing signature by the applicant must be attached. By signing this application, the applicant understands and agrees that Deschutes County may require a deposit for hearings officers' fees prior to the application being deemed complete; and if the application is heard by a hearings officer, the applicant will be responsible for the actual costs of the hearings officer.**

3/13

RECEIVED
APR 02 2018
OWRD

0008522 | 11-24
Office AU # | 1210(8)

CASHIER'S CHECK

SERIAL #: 0852200461

ACCOUNT#: 4861-512747

Purchaser: KAMERON K DELASHMUTT
Purchaser Account: 2862966609
Operator I.D.: u243753 port1358

December 23, 2013

PAY TO THE ORDER OF ***DESHUTES COUNTY***

Three thousand dollars and no cents **$3,000.00**

WELLS FARGO BANK, N.A.
617 SW 6TH ST
REDMOND, OR 97756
FOR INQUIRIES CALL (480) 394-3122

NOTICE TO PURCHASER–IF THIS INSTRUMENT IS LOST, STOLEN OR DESTROYED, YOU MAY REQUEST CANCELLATION AND REISSUANCE. AS A CONDITION TO CANCELLATION AND REISSUANCE, WELLS FARGO & COMPANY MAY IMPOSE A FEE AND REQUIRE AN INDEMNITY AGREEMENT AND BOND.

VOID IF OVER US $ 3,000.00

NON-NEGOTIABLE

Purchaser Copy

FB004 M4203 13112610

PRINTED ON LINEMARK PAPER - HOLD TO LIGHT TO VIEW. FOR ADDITIONAL SECURITY FEATURES SEE BACK.

0008522 | 11-24
Office AU # | 1210(8)

CASHIER'S CHECK

0852200461

Operator I.D.: u243753 port1358

December 23, 2013

PAY TO THE ORDER OF ***DESHUTES COUNTY***

Three thousand dollars and no cents **$3,000.00**

WELLS FARGO BANK, N.A.
617 SW 6TH ST
REDMOND, OR 97756
FOR INQUIRIES CALL (480) 394-3122

VOID IF OVER US $ 3,000.00

Richard Leroy
CONTROLLER

⑈0852200461⑈ ⑆121000248⑆4861 512747⑈

Exhibit 30: CMP Initiation-Hearing Officers decision

03/2014

EXHIBIT 30

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS:	A-13-8, DR-11-8
APPLICANT:	Loyal Land, LLC 27333 N. 96th Way Scottsdale, Arizona 85262
PROPERTY OWNERS:	Loyal Land, LLC (Tax Lots 5000, 5001, 5002, 7700, 7701, 7800 and 7900) Agnes DeLashmutt 4048 N.W. Xavier Redmond, Oregon 97756 (Tax Lot 8000)
APPLICANT'S ATTORNEY:	David Petersen Tonkon Torp LLP 1600 Pioneer Tower 888 S.W. Fifth Avenue Portland, Oregon 97204
OPPONENT'S ATTORNEY:	Paul D. Dewey 1539 N.W. Vicksburg Avenue Bend, Oregon 97701
REQUEST:	The applicant requested and the county issued a declaratory ruling that the use approved through the Thornburgh Destination Resort CMP had been initiated (DR-11-8). Opponent appealed the county's decision and LUBA remanded the decision for further proceedings. The applicant requested that the remand proceedings be initiated (A-13-8).
STAFF REVIEWER:	Kevin Harrison, Principal Planner
ORIGINAL HEARING:	February 7, 2012
ORIGINAL DECISION:	April 12, 2012
LUBA REMAND:	January 8, 2013
REMAND INITIATION:	January 3, 2014
REMAND HEARING:	February 4, 2014
REMAND RECORD CLOSED:	February 21, 2014

I. APPLICABLE STANDARDS AND CRITERIA:

when "viewed as a whole" must include an evaluation of all the remaining conditions of approval and portions thereof. As discussed in the findings above, I have found four additional conditions were fully complied with – Conditions 1, 14E, 23 and 32. I find these conditions also did not require significant action by the applicant. Two require new land use approvals if the approved CMP or open space are changed. The other two simply put the applicant on notice of what was not approved by the CMP.

Based on the discussion above, the Hearings Officer finds a majority of the 19 conditions of approval and portions thereof with which I have found the applicant fully complied – 11 conditions or portions thereof -- did not require significant action relative to the overall destination resort development. The condition the applicant "substantially exercised" – Condition 38 – did require the applicant to take significant action consisting of submitting the wildlife mitigation plan with its application for FMP approval and demonstrating compliance with the destination resort wildlife protection provisions.

The Hearings Officer finds the remaining 22 conditions of approval and portions thereof with which the applicant either failed to fully comply with or did not "substantially exercise" required the majority of significant actions necessary to develop the Thornburgh Destination Resort – i.e., securing subdivision plat and site plan approval and constructing the resort elements and amenities. For that reason, I find that when "viewed as a whole" the CMP conditions of approval have not been "substantially exercised." Therefore I find the use permitted by the CMP approval – the Thornburgh Destination Resort -- was not initiated before the CMP approval became void.

IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **DECLARES** the applicant did not initiate the Thornburgh Destination Resort approval before it became void.

Dated this 17th day of March, 2014.

Mailed this _____ day of March, 2014.

Karen H. Green

_____
Karen H. Green, Hearings Officer

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPEALED BY A PARTY.

Exhibit 31: CMP Initiation-BOCC Approval on Appeal

08/2014

EXHIBIT 31

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

DECISION OF THE BOARD OF COUNTY COMMISSIONERS FOR DESCHUTES COUNTY

FILE NUMBER:	A-14-1 (Related File Nos.: A-13-8, DR-11-8)
APPLICANT/APPELLANT:	Loyal Land, LLC
PROPERTY OWNER:	Loyal Land, LLC (tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7900) 80908 Hermitage La Quinta, CA 92253-6939 Agnes DeLashmutt (tax lot 8000) 4048 NW Xavier Redmond, OR 97756
REQUEST:	Appeal of Decision of County Hearings Officer denying a declaratory ruling that the use approved by the Thornburgh Resort Conceptual Master Plan (CMP) has been initiated.
PROPERTY:	County Assessor's Map 15-12, tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7900, 8000
STAFF CONTACT:	Kevin Harrison, Principal Planner
HEARING DATE:	June 4, 2014

I. SUMMARY OF DECISION:

In this decision, the Board of County Commissioners ("Board") is asked to decide an appeal by Loyal Land, LLC ("Loyal") of the March 17, 2014 decision of the County Hearings Officer ("Hearings Officer's Decision") on Loyal's request for a declaratory ruling that the use approved by the Thornburgh Resort CMP has been initiated under Deschutes County Code ("DCC") 22.36.020.A. The Hearings Officer found that the CMP had not been initiated. By Order No. 2040-010 dated April 9, 2014, the Board agreed to hear Loyal's appeal *de novo* on the issue of whether or not the CMP was initiated pursuant to DCC 22.36.020(A)(3). After full consideration of the arguments, admissible evidence and administrative record in this matter, the Board grants Loyal's appeal and finds that the CMP has been initiated under DCC 22.36.020(A)(3).

RECEIVED
APR 02 2018
DC 2014-431

II. APPLICABLE CRITERIA:

The following standards and criteria from the DCC are applicable to this appeal:

- **Chapter 22.32 - Appeals**
  - **Section 22.32.010, Who May Appeal**
  - **Section 22.32.015, Filing Appeals**
  - **Section 22.32.020, Notice of Appeal**
  - **Section 22.32.024, Transcript Requirement**
  - **Section 22.32.027, Scope of Review**
  - **Section 22.32.030, Hearing on Appeal**
- **Chapter 22.34 – Proceedings on Remand**
  - **Section 22.34.020, Hearings Body**
  - **Section 22.34.030, Notice and Hearings Requirements**
  - **Section 22.34.040, Scope of Proceeding**
- **Chapter 22.36 – Limitations on Approvals**
  - **Section 22.36.010, Expiration of Approval**
  - **Section 22.36.020, Initiation of Use (subsection A.3 only)**

III. FINDINGS OF FACT:

The Board adopts as its findings of fact the findings that were made by the Hearings Officer in Sections II (A) through (K) of the Hearings Officer's Decision, except as modified below.

F. PROCEDURAL HISTORY: The procedural history is amended to add the following:

The January 8, 2013 decision of LUBA in LUBA Case No. 2012-42 was appealed by Nunzie Gould ("opponent") to the Oregon Court of Appeals, which issued an order on June 12, 2013 affirming LUBA's decision without written opinion.

Pursuant to ORS 215.435(2)(b), Loyal granted extensions of the 90-day period for issuance of a final local decision on remand, so that the County's final decision now is required no later than August 20, 2014.

The Hearings Officer issued the Hearings Officer's Decision on March 17, 2014 denying the requested declaratory ruling application, and which was mailed on March 18, 2014. Loyal timely filed an application to appeal the Hearings Officer's Decision to the Board on March 31, 2014. The Board held a work session with Staff on the appeal application on April 2, 2014. By Order No. 2040-010 dated April 9, 2014, the Board agreed to hear Loyal's appeal *de novo* on the issue of whether or not the CMP was initiated pursuant to DCC 22.36.020(A)(3).

The Board held a public hearing on the appeal on June 4, 2014 following a Notice of Public Hearing sent April 11, 2014. The only parties to appear at the hearing were Loyal and opponent. At the hearing, the written record was held open through June 25, 2014 for additional argument and evidence from Loyal and opponent. Loyal submitted final

written argument on June 25, 2014 and the record closed on that date. The Board then held a work session on June 30, 2014 and public deliberations on July 2, 2014 and July 7, 2014 concerning the appeal. On July 7, 2014, the Board voted 2-1 to overturn the Hearings Officer's Decision and held that the CMP had been initiated pursuant to DCC 22.36.020(A)(3). The Board directed Staff to prepare this written decision.

H. **REQUEST:** Loyal appealed the Hearings Officer's Decision to the Board by Notice of Appeal filed March 31, 2014, and by Order No. 2040-010 dated April 9, 2014, the Board agreed to hear Loyal's appeal *de novo* on the issue of whether or not the CMP was initiated pursuant to DCC 22.36.020(A)(3).

J. **PUBLIC NOTICE AND COMMENTS:** The description of public notice and comments is amended to reflect the additional public notice given of the appeal hearing held on June 4, 2014, as described above in the additional findings of fact regarding procedural history.

IV. FINDINGS OF FACT AND CONCLUSION OF LAW SPECIFIC LEGAL ISSUES

CHAPTER 22.32 APPEALS

22.32.010.Who may appeal.

A. The following may file an appeal:

1. **A party;**
2. **In the case of an appeal of an administrative decision without prior notice, a person entitled to notice, a person adversely affected or aggrieved by the administrative decision, or any other person who has filed comments on the application with the Planning Division; and**
3. **A person entitled to notice and to whom no notice was mailed. A person who, after such notices were mailed, purchases property to be burdened by a solar access permit shall be considered a person to whom notice was to have been mailed; and**
4. **A city, concerning an application within the urban area for that city, whether or not the city achieved party status during the proceeding.**

B. A person to whom notice is mailed is deemed notified even if notice is not received.

FINDINGS: This appeal was filed by Loyal, the applicant in the underlying declaratory ruling proceedings. As a party, Loyal was eligible to appeal under DCC 22.32.010.A.1.

22.32.015. Filing appeals.

A. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.

B. Unless a request for reconsideration has been filed, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 5:00 PM on the twelfth day following mailing of the decision. If a decision has been modified on reconsideration, an appeal must be filed no later

than 5:00 PM on the twelfth day following mailing of the decision as modified. Notices of Appeals may not be received by facsimile machine.

C If the Board of County Commissioners is the Hearings Body and the Board declines review, a portion of the appeal fee may be refunded. The amount of any refund will depend upon the actual costs incurred by the County in reviewing the appeal. When the Board declines review and the decision is subsequently appealed to LUBA, the appeal fee may be applied toward the cost of preparing a transcript of the lower Hearings Body's decision.

D. The appeal fee shall be paid by cash or check or money order, except that local, state or federal governmental agencies may supply a purchase order at the time of filing.

22.32.020. Notice of Appeal.

Every notice of appeal shall include:

A. A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute.

B. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons why the Board should review the lower Hearings Body's decision.

C. If the Board of County Commissioners is the Hearings Body and de novo review is desired, a request for de novo review by the Board stating the reasons why the Board should provide de novo review as provided in DCC 22.32.030.

FINDINGS: On March 31, 2014, Loyal filed a completed notice of appeal on the Planning Department's prescribed form which contained the information required by DCC 22.32.020, and paid the appeal fee. This was within twelve days after mailing of the Hearings Officer's Decision on March 18, 2014. The appeal therefore met the requirements of DCC 22.32.015 and 22.32.020.

22.32.024. Transcript Requirement.

A. Except as otherwise provided in DCC 22.32.024, appellants shall provide a complete transcript of any hearing appealed from, from recorded magnetic tapes provided by the Planning Division.

B. Appellants shall submit to the Planning Division the transcript no later than the close of the day five days prior to the date set for a de novo appeal hearing or, in on-the-record appeals, the date set for receipt of written arguments. Unless excused under DCC 22.32.024, an appellant's failure to provide a transcript shall cause the Board to decline to consider the appellant's appeal further and shall, upon notice mailed to the parties, cause the lower Hearings Body's decision to become final.

C. An appellant shall be excused from providing a complete transcript if appellant was prevented from complying by: (1) the inability of the Planning Division to supply appellant with a magnetic tape or tapes of the prior proceeding; or (2) defects on the magnetic tape or tapes of the prior proceeding that make it not reasonably possible for

applicant to supply a transcript. Appellants shall comply with the maximum extent reasonably and practicably possible.

FINDINGS: At least five days before the June 4, 2014 hearing, Loyal submitted a transcript of the Hearings Officer's February 4, 2014 hearing on remand, as required by DCC 22.32.024.

22.32.027. Scope of Review.

A. Before Hearings Officer or Planning Commission. The review on appeal before the Hearings Officer or Planning Commission shall be de novo.

FINDINGS: The above provision is not applicable to this appeal.

B. Before the Board.

1. **Review before the Board, if accepted, shall be on the record except as otherwise provided for in DCC 22.32.027.**
2. **The Board may grant an appellant's request for a de novo review at its discretion after consideration of the following factors:**
   a. **Whether hearing the application de novo could cause the 150-day time limit to be exceeded; and**
   b. **If the magnetic tape of the hearing below, or a portion thereof, is unavailable due to a malfunctioning of the recording device during that hearing, whether review on the record would be hampered by the absence of a transcript of all or a portion of the hearing below; or**
   c. **Whether the substantial rights of the parties would be significantly prejudiced without de novo review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review; or**
   d. **Whether in its sole judgment a de novo hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action.**

   For the purposes of DCC 22.32.027, if an applicant is an appellant, factor DCC 22.32.027(B)(2)(a) shall not weigh against the appellant's request if the applicant has submitted with its notice of appeal written consent on a form approved by the County to restart the 150-day time clock as of the date of the acceptance of applicant's appeal.
3. **Notwithstanding DCC 22.32.027(B)(2), the Board may decide on its own to hear a timely filed appeal de novo.**
4. **The Board may, at its discretion, determine that it will limit the issues on appeal to those listed in an appellant's notice of appeal or to one or more specific issues from among those listed on an applicant's notice of appeal.**

FINDINGS: In Order 2014-010, the Board granted Loyal's request for a *de novo* hearing pursuant to DCC 22.32.027.B.3. The Board specifically found that the appeal presented a significant County Code interpretation issue related to expiration and initiation of conceptual master plans for destination resorts, and a *de novo* hearing was necessary to fully and properly evaluate the code interpretation issue. The Board exercised its discretion under DCC

22.32.027.B.4 to limit the appeal specifically to whether or not the CMP was initiated under DCC 22.36.020(A)(3).

22.32.030. Hearing on Appeal.

A. The appellant and all other parties to the decision below shall be mailed notice of the hearing on appeal at least 10 days prior to any de novo hearing or deadline for submission of written arguments.
B. Except as otherwise provided in DCC 22.32, the appeal shall be heard as provided in DCC 22.24. The applicant shall proceed first in all de novo appeals.
C. The order of Hearings Body shall be as provided in DCC 22.24.020.
D. The record of the proceeding from which appeal is taken shall be a part of the record on appeal.
E. The record for a review on the record shall consist of the following:
1. A written transcript of any prior hearing;
2. All written and graphic materials that were part of the record below;
3. The Hearings Body decision appealed from;
4. Written arguments, based upon the record developed below, submitted by any party to the decision;
5. Written comments submitted by the Planning Commission or individual planning commissioners, based upon the record developed below; and
6. A staff report and staff comment based on the record.
No oral evidence, argument or comment other than staff comment based on the record shall be taken. The Board shall not consider any new factual information.

FINDINGS: Notice of the June 4, 2014 appeal hearing was mailed on April 11, 2014, more than 10 days prior to the hearing. The hearing was conducted as provided in DCC Chapters 22.24 and 22.32. Because the appeal was heard *de novo*, the Board considered the record submitted to LUBA and additional factual evidence submitted by the parties and specifically finds that all additional evidence submitted by the parties to the Hearings Officer and this Board is admitted into the record on appeal.

CHAPTER 22.34 PROCEEDINGS ON REMAND

22.34.020. Hearings Body.

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

FINDINGS: The decision of the Hearings Officer following remand from LUBA has been appealed to this Board under DCC Title 22, as provided in DCC 22.34.020.

22.34.030. Notice and Hearings Requirements.

A. The County shall conduct a hearing on any remanded or withdrawn decision, the scope of which shall be determined in accordance with the applicable provisions of DCC 22.34 and state law. Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand.

B. The hearing procedures shall comply with the minimum requirements of state law and due process for hearings on remand and need comply with the requirements of DCC 22.24 only to the extent that such procedures are applicable to remand proceedings under state law.

C. A final decision shall be made within 90 days of the date the remand order becomes effective.

FINDINGS: The hearing on appeal was conducted in accordance with the applicable provisions of DCC Chapters 22.24 and 22.34 and the requirements of due process and state law. All parties to the County's proceedings on Loyal's application prior to remand were given adequate notice of, and were allowed to participate in, the remand and on appeal thereof. No objections or challenges to notice or procedures were raised. A final decision is being made within 90 days of the date the remand order became effective, as extended by Loyal pursuant to ORS 215.435(2)(b).

22.34.040. Scope of Proceeding.

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

FINDINGS: The Board agreed to hear the appeal *de novo* for the reasons set forth in the findings above with respect to DCC 22.32.027. For the same reasons, the Board exercised its discretion to reopen the record in appropriate instances under DCC 22.34.040(A). When accepting review on DCC 22.36.020(A)(3), the Board determined and now finds that its review was limited to that code provision because that was the only issue remanded by LUBA. All other applicable code provisions were either resolved by LUBA or not appealed. Therefore, the Board concurs with the Hearings Officer's findings regarding the case law analysis on Page 9 of her decision in A-13-8 and, as a result, did not hear those issues.

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

FINDINGS: The application was not modified. Thus, this provision is not applicable.

C. If additional testimony is required to comply with the remand, parties may raise new, unresolved issues that relate to new evidence directed toward the issue on remand.

Other issues that were resolved by the LUBA appeal or that were not appealed shall be deemed to be waived and may not be reopened.

FINDINGS: None of the other provisions under DCC 22.36.020(A) were appealed to LUBA nor do they relate to the issue that LUBA remanded, which was whether or not the CMP was initiated per DCC 22.36.020(A)(3). Because this provision does not allow a hearing on remand on issues not appealed to LUBA or unrelated to the remanded issue, the Board interprets this code provision as preventing it from applying any other criteria other than DCC 22.36.020(A)(3). The Board found, however, additional testimony on the remanded issue was necessary in order to fully understand the issue and render a decision. Therefore, the Board chose to hear the matter *de novo* but only on the issue remanded by LUBA.

CHAPTER 22.36 – LIMITATIONS ON APPROVALS

22.36.010. Expiration of Approval.

B. Duration of Approvals

1. **Except as otherwise provided under DCC 22.36.010 or under applicable zoning ordinance provisions, a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period.**

FINDINGS: It was previously determined by LUBA in this matter that the CMP expired on November 18, 2011 if not initiated by that date. That ruling was not appealed and is therefore final. Accordingly, the question before this Board on appeal under DCC Chapter 22.36 is whether or not the CMP was initiated prior to November 18, 2011.

22.36.020. Initiation of Use.

A. For the purposes of DCC 22.36.020, development action undertaken under a land use approval described in DCC 22.36.010, has been "initiated" if it is determined that:

...

(3) Where construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant.

FINDINGS: Order 2014-010 limited this appeal to a determination of whether or not the Hearings Officer's Decision is correct that the CMP was not initiated pursuant to DCC 22.36.020(A)(3) prior to November 18, 2011. Based on the findings of fact and conclusions of law set forth below, the Board overturns the Hearings Officer's Decision on that conclusion and holds that the CMP was initiated pursuant to DCC 22.36.020(A)(3) – as interpreted by this Board - prior to November 18, 2011.

Board's Right to Independently Interpret the DCC

As an initial matter, the Board first considered the permissible scope of its interpretation of DCC 22.36.020(A)(3). In the first decision on Loyal's application dated April 12, 2012, prior to the LUBA appeal, the Hearings Officer found that for purposes of DCC 22.36.020(A)(3), not all conditions of approval of the CMP were relevant to determining whether or not the CMP was initiated. Rather, the Hearings Officer found that only those conditions that required compliance before final master plan (FMP) approval or concurrently with a FMP application were relevant to whether or not the CMP was initiated (a total of 16 conditions).

After the Board declined to hear an appeal of that decision, opponent appealed the Hearings Officer's decision to LUBA, which interpreted DCC 22.36.020(A)(3) to require consideration of all the conditions of approval, not just those the Hearings Officer found relevant. Over Loyal's objection, the Hearings Officer applied LUBA's interpretation on remand. In this appeal, Loyal argued that the Board, as the ultimate arbiter of the meaning of the DCC, can and should adopt an interpretation of DCC 22.36.020(A)(3) that differs from the interpretation given by LUBA in its January 8, 2013 decision and applied by the Hearings Officer in the Hearings Officer's Decision. Opponent, on the other hand, argued that the Board is bound by LUBA's interpretation.

The Board agrees with Loyal, to an extent. The Board finds that interpretation of the DCC is ultimately the responsibility of the Board, and since the Board has not previously interpreted DCC 22.36.020(A)(3) it is empowered and may do so now. . The Board finds that the CMP is the "framework" of a destination resort approval under DCC 18.113.050, and ultimately any development under a destination resort approval requires completion of all three steps of the permitting process under DCC 18.113.040. None of the three steps is elevated in importance over the others; they are all of equal importance in developing a destination resort under DCC Chapter 18.113. Approval of a CMP alone does not authorize any construction on the land subject to the CMP; all it authorizes is the right of the applicant to proceed to the FMP stage of the process. The FMP then incorporates all the requirements of the CMP and becomes the guiding approval document for the project pursuant to DCC 18.113.040.B.

Therefore, in light of that three-step process in which the actual construction of the resort does not occur until after the FMP approval, the Board interprets the CMP conditions that were not completed by November 18, 2011 such that the failure was not the fault of the applicant. The Board finds this despite the CMP conditions not having been written "as notices of future conditions of approval" as LUBA would have preferred, Thus, the CMP is initiated under the Board's interpretation of DCC 22.36.020(A)(3).

Other Preliminary Findings

The Board considered Loyal's argument that the terms "exercise" and "compliance" as used in DCC 22.36.020(A)(3) have different meanings. The terms were used interchangeably in the Hearings Officer's Decision, and opponent argued that they have the same meaning. The Board rejects Loyal's argument and finds that as used in DCC 22.36.020(A)(3), the words have the same meaning.

The definitions applied in the Hearings Officer's Decision to the terms "substantial exercise" and "fault" were not challenged on appeal, and the Board agrees with and adopts the definitions given by the Hearings Officer. Specifically:

- "Substantial exercise" of a condition of approval pursuant to DCC 22.36.020(A)(3) means performing or carrying out the condition of approval to a significant degree but not completely;
- "Substantial exercise" of the conditions of approval pursuant to DCC 22.36.020(A)(3) requires an examination of the conditions viewed as a whole. In order to view the conditions as a whole, however, the Board agrees with LUBA that the Board must initially conduct an examination of whether or not each individual condition has been substantially exercised "*and* that for any of the 38 conditions of approval where there has been a failure to fully exercise the condition, the applicant is not at fault." (*Gould v. Deschutes County*, LUBA No. 2012-042 at 20) Substantial exercise of the conditions can exist, however, even if some of the conditions have not been substantially or fully exercised and perhaps have not been exercised at all. Moreover, "some" of the conditions does not necessarily mean a majority of the conditions or some other specific number or percentage, but instead is determined on a case-by-case basis; and
- "Fault" as used in DCC 22.36.020(A)(3) means reasons for which the applicant was not responsible, including but not limited to, delay by a state or federal agency in issuing a required permit, or premature applicability of the condition.

The original developer of the Thornburgh Resort was Thornburgh Resort Company, LLC. The current applicant, Loyal, acquired its interest in the project by foreclosure on August 30, 2011. For purposes of evaluating the acts or omissions of the "applicant" under DCC 22.36.020(A)(3) in relation to the Thornburgh project, the Board finds that the acts or omissions of Thornburgh Resort Company, LLC are imputed to Loyal.

Application of DCC 22.36.020(A)(3)

The Board finds that DCC 22.36.020(A)(3) has three determinations that must be made regarding this CMP: (1) that construction is not required by the CMP; (2) that the conditions of approval of the CMP have been substantially exercised when viewed as a whole; and (3) any failure to fully comply with the conditions of the CMP is not the fault of the applicant. The Board finds as follows:

Construction is Not Required

As noted above, the Board finds that this particular CMP, standing alone, does not authorize or require construction. Rather, any construction of a destination resort on land subject to this CMP cannot occur until (at the earliest) the second and third steps of the three-step destination resort process under DCC 18.113.040 have occurred – approval of a final master plan and either a site plan review application or a tentative plat. Thus, construction was not required by this CMP.

Substantial Exercise / Failure to Fully Comply is Not the Fault of the Applicant

The Board finds that the CMP has conditions numbered to 38, but condition 14 has five parts. Viewing the five parts of condition 14 as separate conditions, the CMP has 42 conditions (37 stand-alone conditions + 5 conditions in condition 14 = 42 conditions). Based on its review of the evidence in the record, and applying the definitions of "substantial exercise" and "fault" adopted above, the Board makes the findings set forth below as to each condition, followed by cumulative findings applying the second and third requirements of DCC 22.36.020(A)(3). Where the Board finds below that the failure to substantially comply is not the fault of the applicant, that finding is based on the Board's finding that those conditions have an implied contingency that is unique to the destination resort approval process.

Condition 1

The Hearings Officer's finding in A-13-8 regarding this condition was not challenged in this appeal. Therefore, the Board agrees with and adopts the finding of the Hearings Officer in the Hearings Officer's Decision that the applicant fully complied with condition 1 prior to the November 18, 2011 deadline.

Condition 2

The Board finds that condition 2 was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 2 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure of the applicant to fully comply with the condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 3

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 4

The Board finds that condition 4 requiring improvement of secondary emergency ingress/access roads across BLM road land to certain standards was not substantially exercised prior to the November 18, 2011 deadline. Although the applicant argues that the road built across BLM land to the north is the road required by this condition, the Board finds the opponents' argument regarding this road to be persuasive such that there is insufficient evidence at this time that the road built is the one that would meet this condition. Thus, the Board further finds that condition 4 was not fully complied with by November 18, 2011. The Board further finds that full compliance with condition 4 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with the condition is not the applicant's fault for that reason and for the reasons

explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 5

The Board finds that condition 5 was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 5 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure fully comply with the condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 6

The Board finds that condition 6 was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 6 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with the condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 7

The Board finds that condition 7 was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 7 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with the condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 8

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 9

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 10

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 11

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 12

The Board finds that condition 12 was not substantially exercised nor fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 12 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with the condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 13

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 14A

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 14B

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 14C

The Board finds that condition 14C was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 14C cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 14D

The Board finds that condition 14D was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 14D cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 14E

The Hearings Officer's finding in A-13-8 regarding this condition was not challenged in this appeal. Therefore, the Board agrees with and adopts the finding of the Hearings Officer in the Hearings Officer's Decision that the applicant fully complied with condition 14E prior to November 18, 2011.

Condition 15

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 16

The Board finds that condition 16 has not been substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 16 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 17

The Board finds that condition 17 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 17 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 18

The Board finds that condition 18 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 18 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 19

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 20

The Board finds that condition 20 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 20 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 21

The Board finds that condition 21 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 21 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 22

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 23

Although the finding was not challenged in this appeal, the Board agrees with and adopts the finding of the Hearings Officer in the Hearings Officer's Decision that the applicant fully complied with condition 23 prior to November 18, 2011. The Board further finds that because the condition was fully complied with, it was also substantially exercised. The Board further finds that because the condition was fully complied with, no evaluation of fault is required.

Condition 24

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 25

The Board finds that condition 25 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 25 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 26

The Board finds that condition 26 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 26 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 27

The Board finds that condition 27 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 27 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault

for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 28

The Board finds that condition 28 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 28 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 29

The Board finds that condition 29 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 29 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 30

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 31

The Board finds that condition 31 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 31 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 32

Although the finding was not challenged in this appeal, the Board agrees with and adopts the finding of the Hearings Officer in the Hearings Officer's Decision that the applicant fully complied with condition 32 prior to November 18, 2011. The Board further finds that because the condition was fully complied with, it was also substantially exercised. The Board further finds that because the condition was fully complied with, no evaluation of fault is required.

Condition 33

The Board finds that condition 33 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 33 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 34

The Board finds that condition 34 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 34 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 35

The Board finds that condition 35 has not been substantially exercised nor has it been fully complied with. The Board further finds that full compliance with condition 35 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Condition 36

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 37

In the first round decision, DR-11-8, the Hearings Officer found this condition was fully complied with by the applicable expiration deadline and LUBA upheld that finding. Therefore, this condition was not subject to review by the Board. Thus, the Hearings Officer's decision in DR-11-8 regarding this condition, as reiterated in her decision in A-13-8, stands.

Condition 38

Although the finding was not challenged in this appeal, the Board agrees with and adopts the finding of the Hearings Officer in the Hearings Officer's Decision that the applicant substantially exercised but did not fully comply with condition 38 prior to November 18, 2011. The Board

further finds that full compliance with condition 38 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure to fully comply with this condition is not the applicant's fault for that reason and for the reasons explained below under the heading "Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant."

Cumulative Findings – Substantial Exercise

As explained above with respect to each condition, the Board has found that 19 of the 42 conditions were fully exercised and, therefore also substantially exercised,[1] and one additional condition (38) was substantially but not fully exercised, before November 18, 2011. The Board also finds that substantial exercise of each of the 22 remaining conditions required the occurrence of a contingency that did not occur by November 18, 2011. The Board also finds, however, that the applicant has substantially exercised 100% of the conditions of approval that were relevant and necessary to initiation of the CMP, as set forth in the Hearings Officer's April 12, 2012 decision in DR-11-8. The Board finds that these facts, taken together, constitute substantial exercise of the conditions of approval of the CMP as a whole.

Cumulative Findings – Failure to Fully Comply is Not the Fault of the Applicant

Under LUBA's January 8, 2013 interpretation of DCC 22.36.020(A)(3), applied by the Hearings Officer in the Hearings Officer's Decision in A-13-8, the CMP was not initiated unless a finding is made that for any of the conditions of approval that were not fully complied with prior to November 18, 2011, the applicant is not at fault. The Hearings Officer further interpreted LUBA's decision to require that, when a condition of approval is subject to a contingency before it can be fully exercised, and the contingency has not occurred, the applicant must not be at fault for the failure of the contingency to occur.

As discussed above, the Board found that 19 of the conditions were fully complied with by the November 18, 2011 deadline. As to the remaining 23 conditions,[2] the Board considered the evidence as to the applicant's fault (or lack thereof) in failing to achieve full compliance prior to November 18, 2011. Based on the evidence in the record, the Board finds that in all 23 instances, the failure to fully comply with the condition prior to November 18, 2011 (including the failure to cause any contingency to full compliance to occur) is not the fault of the applicant because of the three-step process for approving destination resorts in Deschutes County as further elaborated below.

Therefore, the failure to fully comply with the conditions was not the fault of the applicant and initiation has occurred in compliance with DCC 22.36.020(A)(3).

Three-Step Destination Resort Approval Process. The Board finds as follows. The two-year expiration of land use approvals under DCC 22.36.010.B.1 must be applied to a destination resort CMP in a manner consistent with the three-step approval process for destination resorts created under DCC Chapter 18.113. The three-step process was consciously created by the

[1] Conditions 1, 3, 8, 9, 10, 11, 13, 14A, 14B, 14E, 15, 19, 22, 23, 24, 30, 32, 36 and 37.
[2] Conditions 2, 4, 5, 6, 7, 12, 14C, 14D, 16, 17, 18, 20, 21, 25, 26, 27, 28, 29, 31, 33, 34, and 35.

Board to provide a mechanism for meaningful review and oversight of very complex development projects, and in doing so the Board never intended that the general two-year expiration of land use permits under DCC 22.36.010.B.1 would require full compliance with all conditions of a CMP within two years of approval of the CMP (tolled only for appeals of the CMP). To find otherwise would effectively dismantle the three-step approval process of DCC Chapter 18.113 and make meaningful review and oversight of destination resorts impossible. It would also negate the express power of the Board under DCC 18.113.050.B.8 to approve multi-year phasing plans for destination resorts that exceed two years, such as the phasing plan approved for the Thornburgh Resort. Accordingly, the applicant is not at fault for failing to achieve something (full compliance with all CMP conditions within two years) that: (a) was never intended by the Board; (b) would require the applicant to violate the approved phasing plan in the CMP; and (c) would be practically impossible to achieve for a complex project such as the Thornburgh Resort under the three-step approval process created by DCC Chapter 18.113.

V. DECISION:

Based on the findings of fact, interpretations and conclusions of law set out above, the Board holds that the Thornburgh Resort CMP was initiated prior to November 18, 2011, and therefore has not expired pursuant to DCC 22.36.010.B.1.

DATED this 13th day of August, 2014.

MAILED this 13th day of August, 2014.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

- absent -
TAMMY BANEY, CHAIR

ANTHONY DEBONE, VICE CHAIR

ATTEST:
Bonnie Baker
Recording Secretary

Alan Unger
ALAN UNGER, COMMISSIONER

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

Community Development Department
Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
http://www.co.deschutes.or.us/cdd/

CERTIFICATE OF MAILING

FILE NUMBER: A-14-1

DOCUMENTS MAILED: Board Decision

MAP/TAX LOT NUMBERS: 15-12, Tax Lots 5000, 5001, 5002, 7700, 7701, 7800, 7900 and 8000

I certify that on the 14th day of August, 2014 the attached notice(s)/report(s), dated August 14, 2014, was/were mailed by first class mail, postage prepaid, to the person(s) and address(es) set forth on the attached list.

Dated this 14th day of August, 2014.

COMMUNITY DEVELOPMENT DEPARTMENT

By: Sher Buckner

Loyal Land, LLC 80908 Hermitage La Quinta, CA 92253-6939	David J. Petersen Tonkon Torp, LLP 1600 Pioneer Tower 888 SW Fifth Avenue Portland, OR 97204
Belinda Kachlein 66440 Gerking Market Road Bend, OR 97701	Paul D. Dewey 1569 NW Vicksburg Avenue Bend, OR 97701
Bob and Laurie VanderBeek 66364 Gerking Market Road Bend, OR 97701	

Exhibit 32: CMP Initiation-LUBA Remand

01/2015

EXHIBIT 32

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

LOYAL LAND, LLC,
Intervenor-Respondent.

LUBA No. 2014-080

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.

David J. Petersen, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Tonkon Torp LLP.

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

REMANDED 01/30/2015

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

Exhibit 33: CMP Initiation-Court of Appeals Reversal & Remand

08/2015

EXHIBIT 33

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Annunziata GOULD,
Petitioner
Cross-Respondent,
v.
DESCHUTES COUNTY,
Respondent,
and
LOYAL LAND, LLC,
Respondent
Cross-Petitioner.
Land Use Board of Appeals
2014080; A158835

Argued and submitted May 7, 2015.

Paul D. Dewey argued the cause and filed the briefs for petitioner-cross-respondent.

Robyn Ridler Aoyagi argued the cause for respondent-cross-petitioner Loyal Land, LLC. With her on the briefs were David J. Petersen and Tonkon Torp LLP.

Laurie E. Craghead for respondent Deschutes County joined the opening brief of respondent-cross-petitioner Loyal Land, LLC, Robin Ridler Aoyagi, David J. Peterson, and Tonkon Torp LLP.

Before Ortega, Presiding Judge, and Haselton, Chief Judge, and Sercombe, Judge.*

ORTEGA, P. J.

Reversed and remanded on petition; affirmed on cross-petition.

---

* Haselton, C. J., *vice* Wollheim, S. J.

Exhibit 34: FMP Remand-Hearing Officers Denial

12/2015

EXHIBIT 34

HEARINGS OFFICER'S DECISION

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

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

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

OWNER:

Loyal Land LLC
78340 Birkdale Court
La Quinta, CA 92253

Agnes DeLashmutt
2447 NW Canyon
Redmond, OR 97756

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

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

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

I. STANDARDS AND APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, Zoning Ordinance:
- Chapter 18.16, Exclusive Farm Use Zone (EFU-SC)
  - *Section 18.16.035, Destination Resorts
- Chapter 18.113, Destination Resort Zone (DR)
  - *Section 18.113.070, Approval Criteria
  - *Section 18.113.090, Requirements of Final Master Plan
  - *Section 18.113.100, Procedure or Approval of Final Master Plan

Title 22, of the Deschutes County Code, Development Procedures Ordinance
- Chapter 22.08. General Provisions
  - *Section 22.08.010, Application Requirements
- Chapter 22.20, Review of Land Use Action Applications
  - *Section 22.20.040, Final Action in Land Use Actions
- Chapter 22.24, Land Use Action Hearings
  - *Section 22.24.080, Standing
- Chapter 22.28, Land Use Action Decisions
  - *Section 22.28.010, Decision

Proceedings on Remand
- *Section 22.34.010, Purpose
- *Section 22.34.020, Hearings Body
- *Section 22.34.030, Notice and Hearing Requirements
- *Section 22.34.040, Scope of Proceeding

II. BASIC FINDINGS:

A. LOCATION: The subject property consists of approximately 1,970 acres of land located west of Redmond, Oregon, on the south and west portions of a geologic feature known as Cline Buttes. The property is bordered on three sides by Bureau of Land Management (BLM) land, and is also in close proximity to Eagle Crest, another destination resort development. The subject property is identified on County Assessor's Index Map15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000.

B. LOT OF RECORD: As part of the CMP approval (CU-05-20), the Hearings Officer found the subject property consists of several legal lots of record based on previous county determinations (LR-91-56, LR-98-44, MP-79-159, CU-79-159 and CU-91-68).

C. ZONING AND PLAN DESIGNATION: The subject properties are zoned Exclusive Farm Use (EFU-TRB) within a Destination Resort (DR) Overlay Zone. The property is designated Agriculture on the Deschutes County Comprehensive Plan Map.

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

E. SITE DESCRIPTION: The subject property is approximately 1,970 acres in size and has vegetation consisting of juniper woodland. The property covers the south and west portions of the geologic feature known as Cline Buttes. The property currently is developed with three dwellings and a barn, access to which is from Cline Falls Highway. The property is engaged in farm use consisting of low-intensity livestock grazing.

F. SURROUNDING LAND USES: The subject property is surrounded by public land primarily owned and managed by the BLM. A portion of the public land is owned and managed by the Oregon Department of State Lands (DSL). The Eagle Crest Destination Resort is located near the northern portion of the subject property.

G. PUBLIC COMMENTS: Notice of this application was provided to all property owners who received the Certificate of Mailing of the Hearings Officer Decision issued on October 8, 2008, relating to M-07-2; MA-08-6.

H. LAND USE HISTORY: As described by staff, with minor edits, the Thornburgh Destination Resort has a long history. The conceptual master plan (CMP) application submitted by Thornburgh Resort Company, LLC (TRC) was denied by the Deschutes County Hearings Officer in a decision dated November 9, 2005 (CU-05-20). That decision was appealed by Nunzie Gould (hereafter Gould) and Steve Munson (Munson) to the Deschutes County Board of Commissioners (Board). (A-05-16). By a decision dated May 10, 2006, the Board approved the CMP. Gould and Munson appealed the Board's decision to the Land Use Board of Appeals ("LUBA"). (Nos. 2006-100 and 101). LUBA remanded the Board's decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 2005 (2007). Opponent and Munson appealed LUBA's decision to the Court of Appeals seeking a broader remand scope. (A135856). On November 7, 2007, the Court of Appeals reversed and remanded LUBA's decision. *Gould v. Deschutes County*, 216 Or App150, 171 P3d 1017 (2007). The result of this decision was that the Board's decision in CU-05-20 approving the CMP was remanded to the county for further proceedings.

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

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

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

I. REVIEW PERIOD:

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

J. HEARING:

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

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

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

III. SCOPE OF PROCEEDINGS ON REMAND:

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

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

Chapter 22.34, Proceedings on Remand

1. Section 22.34.010, Purpose

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

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

2. **Section 22.34.020, Hearings Body**

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

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

3. **Section 22.34.030, Notice and hearing Requirements**

A. **The County shall conduct a hearing on any remanded or withdrawn decision, the scope of which shall be determined in accordance with the applicable provisions of DCC 22.34 and state law. Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand.**

B. **The hearing procedures shall comply with the minimum requirements of state law and due process for hearings on remand and need comply with the requirements of DCC 22.24 only to the extent that such procedures are applicable to remand proceedings under state law.**

C. **A final decision shall be made within 90 days of the date the remand order becomes effective.**

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

4. **Section 22.34.040, Scope of Proceeding**

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

B. **At the Board's discretion, a remanded application for a land use permit may be modified to address issues involved in the**

remand or withdrawal to the extent that such modifications would not substantially alter the proposal and would not have a significantly greater impact on surrounding neighbors. Any greater modification would require a new application.

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

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

Background

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

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

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

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

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

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

LUBA Remand

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

Court of Appeals Petition for Judicial Review

Gould petitioned the Court of Appeals for judicial review.

Assignments of Error

Gould's First Assignment of Error

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

Gould's Second Assignment of Error

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

Gould's Third Assignment of Error

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

Thornburgh's Cross-Petition for Judicial Review

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

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

Applicant's Remand Burden of Proof

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

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

Issue #1 – Correction of Typographical Error in FMP Approval

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

33. "The Resort shall, in the first phase, provide for the following:"
* * *
D. At least $2,000,000 (in 1984 dollars) shall be spent on developed ~~residential~~ recreational facilities.

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

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

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

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

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

IV. FINDINGS & SUPPORT OF DECISION:

A. Initiation and Prosecution of Remand

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

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

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

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

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

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

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

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

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

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

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

B. Initiation of the CMP

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

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

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

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

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

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

The objection is denied.

C. Correction of typographical Error in FMP Approval

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

> 33. The Resort shall, in the first phase, provide for the following: ...
>
> D. At least $2,000,000 (in 1984 dollars) shall be spent on developed ~~residential~~ recreational facilities.

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

1. Remand

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

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

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

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

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

> We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed." ... If the only remaining uncertainty in Thornburgh's mitigation plan were which portion of BLM land would be the site of habitat restoration, we would conclude that LUBA erred in its application of Gould. ...
>
> Here, the nature of the mitigation plan proposed for BLM land is clear...Thus, the adequacy of Thornburgh's mitigation efforts as they pertain to BLM land can be assessed now, based on the record as it exists. If some portion turns out to be unsuitable for mitigation or if some mitigation methods are inappropriate, those objections could be raised, and the county could deny approval of the FMP on that basis or could condition approval to address those objections.
>
> LUBA also concluded, however, that it had not been determined whether Thornburgh's restoration efforts would in fact occur on BLM land.... Further, Thornburgh's back-up restoration plan of a dedicated fund for mitigation suffers from the same defects as the plan at issue in *Gould* II. In light of those uncertainties, we cannot conclude that LUBA erred.

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

2. Record

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

3. Discussion

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

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

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

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

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

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

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

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

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

E. Impacts on Whychus Creek

1. Remand

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

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

2. Record

DCC 22.34.040 d. 'Scope of Proceeding' provides:

> A. On remand the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, the Board shall have the discretion to reopen the record in instances in which it deems it to be appropriate....
>
> C. If additional testimony is required to comply with the remand, parties may raise new, unresolved issues that relate to new evidence directed toward the issue on remand. Other issues that were resolved by the LUBA on appeal or that were not appealed shall be deemed to be waived and may not be reopened.

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

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

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

3. Discussion

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

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

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

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

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

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

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

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

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

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

Dated this 2nd day of December, 2015 Mailed this 2nd day of December, 2015

Dan R. Olsen
Deschutes County Hearings Officer

Exhibit 35: FMP Remand-LUBA Remand

09/2016

EXHIBIT 35

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL LAND AND CATTLE COMPANY, LLC,
and KAMERON DELASHMUTT,
Petitioners,
Cross-Respondents,

vs.

DESCHUTES COUNTY,
Respondent,

and

ANNUNZIATA GOULD,
Intervenor-Respondent,
Cross-Petitioner.

LUBA No. 2015-107

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Liz Fancher, Bend, filed a petition for review, a reply brief, and a response to the cross-petition for review and argued on behalf of petitioners, cross-respondents.

No appearance by Deschutes County.

Paul D. Dewey, Bend, filed a response brief, a cross-petition for review and a reply brief and argued on behalf of intervenor-respondent, cross-petitioner.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 09/23/2016

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

In this appeal petitioners and cross-petitioner Gould challenge a county hearings officer decision that denies final master plan approval for Thornburgh Resort, a proposed destination resort in Deschutes County. For simplicity and clarity, we generally refer to petitioners/cross-respondents Central Land and Cattle Company and DeLashmutt collectively as petitioners and refer to intervenor-respondent/cross-petitioner Gould as Gould.

INTRODUCTION

In Deschutes County, a destination resort must receive conceptual master plan (CMP) and final master plan (FMP) approval. The county's CMP and FMP approval decisions concerning Thornburgh Resort have both been the subject of a number of appeals. This appeal concerns the county's second approval of a FMP for Thornburgh Resort. The approval standard at issue in this appeal is Deschutes County Code (DCC) 18.113.070, which 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."

In this opinion we refer to the DCC 18.113.070(D) standard as the no net loss/degradation standard. In the decision on appeal, a county land use

hearings officer attempted to respond to our remand of the county's first FMP approval decision in *Gould v. Deschutes County*, 59 Or LUBA 435 (2009), *aff'd* 233 Or App 623, 227 P3d 758 (2010). For simplicity we will simply refer to our decision remanding the first FMP decision as *Gould (FMP)*.

A detailed discussion of all the appeals in this case would serve no useful purpose. We therefore simply identify those appeals in the margin and briefly describe the key consequences of those appeals, before moving directly to consider our remand decision in *Gould (FMP)*.[1] We do discuss some of those prior appeals at some length later in this decision. As things now stand, the county's CMP approval was affirmed on appeal. One of the questions in this appeal is whether the county may grant FMP approval if Thornburgh's approved CMP expired before the county approved the FMP for a second time. Both the appeal and cross-appeal also challenge the county hearings officer's attempt to respond to the two errors regarding the no net loss/degradation

---

[1] *Gould v. Deschutes County*, 51 Or LUBA 493 (2006) (LUBA dismissed a premature challenge to CMP approval); *Gould v. Deschutes County*, 54 Or LUBA 205, *rev'd and rem'd* 216 Or App 150, 171 P3d 1017 (2007) (LUBA remanded the first CMP approval); *Gould v. Deschutes County*, 57 Or LUBA 403 (2008), *aff'd* 227 Or App 601, 206 P3d 1106 (2009) (LUBA affirmed second CMP approval and LUBA's decision was affirmed on appeal); *Gould v. Deschutes County*, 59 Or LUBA 435 (2009), *aff'd* 233 Or App 623, 227 P3d 758 (2010) (LUBA remanded first FMP approval); *Gould v. Deschutes County*, 67 Or LUBA 1 (2013) (LUBA remanded county decision that CMP had been initiated before the CMP expired); *Gould v. Deschutes County*, 71 Or LUBA 78 (2015), *aff'd in part*; *rev'd in part* 272 Or App 666, 362 P3d 679 (2015) (LUBA remanded county's second decision that CMP had been initiated before it expired; Court of Appeals broadened LUBA's remand).

standard that led to LUBA's remand of the county's first FMP decision in *Gould (FMP)*.

The two errors identified by LUBA in *Gould (FMP)* concern the adequacy of Thornburgh Resort's wildlife management plan to demonstrate that Thornburgh Resort will comply with the no net loss/degradation standard. As we explained in *Gould (FMP)*:

> "Thornburgh's wildlife management plan has two components; one component addresses terrestrial wildlife impacts and the other component addresses off-site fish habitat impacts. According to Thornburgh, the terrestrial wildlife plan is made up of two documents, the 'Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort' (Terrestrial WMP) and the 'Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project' (M&M Plan). The fish component is also made up of two documents, the "Thornburgh Resort Fish and Wildlife Mitigation Plan relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat," dated April 21, 2008 (Fish WMP) and an August 11, 2008 letter that proposes additional mitigation if needed for Whychus Creek. * * *" *Gould (FMP)*, 59 Or LUBA at 444-45 (record citations and footnote omitted).

One of the errors identified in *Gould (FMP)* concerns the fish component of the wildlife plan and Lower Whychus Creek, and one of the errors concerns the terrestrial wildlife component. The parties have very different understandings of the scope and nature of the errors that LUBA identified in *Gould (FMP)*. We turn first to the Whychus Creek issue and the petition for review.

THE PETITION FOR REVIEW

To resolve the assignments of error in the petition for review we turn first to our decision in *Gould (FMP)*, where we discussed the water temperature

issues and identified the hearings officer's error in finding that the Thornburgh's proposed mitigation to address the thermal impact of Thornburgh's use of groundwater on lower Whychus Creek satisfies the no net loss/degradation standard. We do that by setting out the relevant findings below, and then clarifying some ambiguities in our *Gould (FMP)* decision.

A. *GOULD (FMP)*

Our decision in *Gould (FMP)* began with a description of the relationship between Thornburgh Resort and waterways that would be impacted by the resort's use of groundwater and then proceeded to describe the parties' arguments and the hearings officer's decision before discussing the error that we found in the appeal of the hearings officer's first FMP decision:

> "The main stem of the Deschutes River is located approximately [two] miles to the east of the eastern boundary of the proposed resort. 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. During the proceedings below, ODFW [the Oregon Department of Fish and Wildlife] submitted a letter in which it specifically recognized the value of groundwater fed springs and seeps for cooling waters in the main stem of the Deschutes River and its tributaries. ODFW recognized that this cooling groundwater "provides thermal refuge[] for salmonid

which thrive in cooler water." However, ODFW ultimately concluded that

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

"The opponents' expert expressed concerns that the proposed mitigation would not be adequate to off-set the diversion of cool groundwater from Alder Springs, which drains into Whychus Creek, a tributary of the Deschutes River that provides habitat for the federally listed bull trout and other fish species. Thornburgh's experts submitted rebuttal testimony in which they took the position that any thermal impact on Whychus Creek would be negligible. One of those experts took the position that the thermal impact would be less than .01 degree Celsius. In an August 11, 2008 letter to the county, Thornburgh's attorney noted that Thornburgh disagreed with some of the assumptions that led the opponents' expert to conclude the proposed destination resort would have a damaging thermal impact on Alder Springs and Whychus Creek. But Thornburgh's attorney offered to provide additional mitigation if the hearings officer determined that additional mitigation was necessary to address concerns about thermal impacts on Whychus Creek:

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

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

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

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

"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. * * *'

"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; [but] 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.'" *Gould (FMP)*, 59 Or LUBA at 454-57 (record citations omitted; italics added).

We pause at this point to emphasize one important issue that is at the heart of the parties' disagreement in this appeal. The hearings officer's decision in *Gould (FMP)* could have been clearer, but we understand the *Gould (FMP)* hearing officer to have found the enhanced in-stream flow to be achieved by Thornburgh's initial proposal to retire irrigation rights, leaving that water in-stream, was sufficient to "fully address" the thermal impact on lower Whychus Creek, with only one stated exception.[2] That exception, which is stated in the italicized language quoted above, is that the initially proposed mitigation "does not account for the higher water consumption that will likely occur during the summer months." That is why the hearings officer accepted Thornburgh's offer to provide an additional 106 acre-feet of mitigation water. Our *Gould (FMP)* decision goes on to explain:

> "*From the above findings, it appears the hearings officer was not persuaded by Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that it could be ignored.* To ensure that there would be no adverse thermal impact, the hearings officer took Thornburgh up on its offer to secure additional mitigation water from the Three Sisters Irrigation

---

[2] To avoid possible confusion, we attempt in this opinion to be clear about which hearings officer we are talking about when we refer to the hearings officers: the hearings officer in the first FMP decision, which was at issue in *Gould (FMP)*, or the hearings officer that issued the second FMP decision, which is the subject of this appeal.

> District. Unfortunately, in doing so, the hearings officer either did not recognize or for some other reason failed to respond to petitioner's contention that the mitigation water from the Three Sisters Irrigation District that will be generated by eliminating upstream irrigation diversions will not mitigate the destination resort's thermal impacts on Whychus Creek because that mitigation will replace cool water with warmer water. There may be a simple answer to the opponents' concern, but it is lacking in the hearings officer's decision. *Without that explanation, the decision must be remanded for addition findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek*." *Gould FMP*, 59 Or LUBA at 457 (italics and underscoring added).

As a second point of clarification, the first italicized sentence above is ambiguous and can be read to say that LUBA understood the *Gould FMP* hearings officer was concerned about the thermal impact on Whychus Creek that might result from *average daily use* of water by the resort, which Thornburgh's expert estimated would be less than .01dC.[3] However if that sentence is read context with the balance of the quoted text, particularly the last emphasized sentence, it is clear that in *Gould (FMP)*, LUBA understood the hearings officer only to be concerned with the *additional* thermal impact of increased summer water use at Thornburgh Resort, not average daily water use. As we noted earlier, the hearing officer found, at least implicitly, that the

---

[3] As we explain later, the hearings officer that rendered the second FMP decision that is before us in this appeal appears to have understood our decision to take that position.

proposed mitigation was sufficient to "fully address" thermal impact of average daily water use on lower Whychus Creek, with the exception of the additional summer water use impact. The hearings officer required the 106 acre-feet of additional mitigation that Thornburgh offered only to address the impact of additional summer water usage. The hearings officer did not require the 106 acre-feet of additional mitigation to address the very small thermal impact of the resort's average daily water use with the initially proposed mitigation, which Thornburgh's expert estimated would be less than .01dC.

Having required the additional 106 acre-feet of mitigation to off-set the potential thermal impacts from additional summer water usage at Thornburgh, it remained for the first hearings officer to determine if the relatively warmer mitigation water would be effective to mitigate the loss of the relatively colder water at Alder Springs that would be diverted and used by the resort during summer months. In *Gould (FMP)* we concluded the hearings officer failed to adopt any findings addressing that question:

> "Thornburgh points to the following statement by its expert:
>
> > "'It should be noted that if there is flow in Whychus Creek that is not from Alder Springs, whether warmer than Alder Springs or not, the resulting increase in temperature at the mouth would be even less than the estimated maximum of 0.01 [degree Celsius].'
>
> "Citing *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002), Thornburgh contends that the hearings officer was entitled to choose which expert testimony she found more believable.

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

> "'The findings make clear that the county considered the issue to be a battle of the experts and chose to believe the opponents' experts. A local government may rely on the opinion of an expert if, considering all of the relevant evidence in the record, a reasonable person would have chosen to rely on the expert's conclusion.'

"In this case the hearings officer either did not recognize or for some other reason failed to address the conflicting expert testimony about the efficacy of relying on the mitigation water from the Three Sisters Irrigation District to address the hearings officer's concern about the thermal impacts water use at the destination resort would have on Whychus Creek during the summer months. Without some attempt by the hearings officer to resolve that conflict or to identify which expert testimony she found more persuasive, remand is required." *Gould (FMP)*, 59 Or LUBA at 457-58 (footnote and citations omitted).[4]

---

[4] In the omitted footnote we attempted to explain our understanding of at least one aspect of the analysis that would be required to resolve the experts' competing positions on the efficacy of leaving relatively warmer water instream to mitigate for the loss of relatively cooler water that would be diverted by the resort during summer months:

> "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

We restate below the Whychus Creek issues that were resolved by *Gould (FMP)* and the reasons for our remand of the first FMP decision:

1. In the first FMP decision the hearings officer found that the initially proposed mitigation was sufficient to fully address the no net loss/degradation standard with regard to water quality and water habitat quality, with one exception that affected Lower Whychus Creek.

2. The exception to the adequacy of the initially proposed mitigation identified by the hearings officer in *Gould (FMP)* was the additional potential thermal impact on Lower Whychus Creek from increased summer water use at the Resort. This was the reason the *Gould (FMP)* hearings officer accepted Thornburgh's offer to provide an additional 106 acre-feet of mitigation.

3. The hearings officer, in accepting the additional 106 acre-feet of mitigation failed to address the disagreement between the experts regarding whether the mitigation water would be ineffective as mitigation because the mitigation water is warmer than the cooler water that will be diverted by the resort in summer months.

4. In remanding for the hearings officer to address the issue identified in paragraph 3 above, LUBA stated that in assessing Thornburgh's expert's contention that even though the mitigation water is warmer than the water that is being diverted in the summer the mitigation water is still

---

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." *Gould (FMP)*, 59 Or LUBA at 458, n 13.

> cool water, "[s]ome effort to clarify the expert's statement will likely be required."

We note at this point that the opponents' point that the mitigation water is warmer than the cooler diverted groundwater almost certainly applies equally to the adequacy of the initially proposed mitigation that the *Gould (FMP)* hearings officer found fully addressed the possible thermal impact attributable to average daily resort water use, with the exception of the higher water use summer months. Nevertheless we conclude that the *Gould (FMP)* hearings officer found the initially proposed mitigation was sufficient to mitigate thermal impacts due to average daily use, with the exception of increased summer usage, with the result that the no net loss/degradation standard is satisfied with regard to the resort's average daily use. Since that aspect of the first hearings officer's decision was not disturbed by LUBA's *Gould (FMP)* decision or the Court of Appeals, that issue is now a resolved issue under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992).

With the above review and clarification of our decision in *Gould (FMP)* we turn to petitioner's assignments of error.

B. Petitioners' Assignments of Error

The scope of county proceedings to respond to a LUBA remand is set out at DCC 22.34.040, which provides in relevant part:

"Scope of Proceeding.

> "A. On remand, the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, *the Board* shall have the discretion

to reopen the record in instances in which it deems it to be appropriate.

"* * * * *

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

The second hearings officer first addressed his understanding of the scope of the remand in this matter regarding both the scope of the evidentiary record on remand and the scope of the legal issues he was to resolve on remand. We set out portions of the second hearings officer findings below, before turning to petitioners' assignments of error.

"As noted previously, Gould acknowledged that new evidence was admissible pursuant to the LUBA remand regarding terrestrial mitigation. Gould, and others, however, objected to new evidence regarding Whychus Creek on the grounds that it exceeds the scope of the remand. * * *

"The distinction between 'Hearings Body' and 'Board' in [DCC 22.34.040] is clear. One may argue that whether the DCC should preclude the hearings officer from receiving new evidence if it is thought appropriate, particularly in light of the 90 day period in which to act on remand. But my role is to apply the DCC as written, accordingly, my analysis will be based solely on the evidence in the record on appeal, and argument at the hearing related to that evidence. *All new evidence relating to the impact of the mitigation, and to changed conditions, is excluded.*

"* * * * *

"It appears to me that the applicant[5] seeks to expand the scope of the remand to include the beneficial impacts of increased flow on the upper reaches of Whychus Creek. There are numerous references in the record to the need to improve flows in Whychus Creek for fish habitat. It likely is incontrovertible that this will result in a significant benefit. It might be that, starting with a clean slate, the no net loss standard could be met by a finding that this overall benefit outweighs the .01d C increase, in the same way that off-site terrestrial mitigation may offset on-site impacts. But I could find nothing making that argument to the prior hearings officer and it does not appear to have been contemplated in the finding at issue.* * *

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

"The only expert testimony/opinion directly addressing this issue I could find in the LUBA record is the August 27, 2008 analysis by Yinger. He concludes that it will not mitigate the thermal impact as it replaces cold groundwater with 'warm' water from upstream. [second hearings officer's quotation marks]. He asserts, and I think the record supports the conclusion that the cold groundwater discharge at Alder Springs is, at least to a fair extent, the 'defining and essential factor' for fish – probably especially bull trout. He predicts a temperature increase of .12 d C 'at Alder Springs'. It is not clear whether this projected increase translates into warmer temperatures further down Whychus Creek but presumably that is his conclusion. * * *

---

[5] The second hearings officer's references to the "applicant" are a reference to petitioner Central Land and Cattle Company (CLCC).

"The applicant argues that, since Yinger overstated the amount of consumptive use, as LUBA appears to have concluded, the impact on Whychus is smaller than Yinger asserts. That appears to be correct, so arguably Yinger's finding of a .12dC increase after adding the upstream water is overstated. But it does not resolve for me the fact that the Hearings Officer also apparently agreed with the applicant on that point and still found that there was a .01dC impact that needed to be mitigated. Further, the applicant did not run the numbers with the reduced consumptive use in the prior record and any such evidence now would be new. The argument, while appropriate, does not provide evidence that the addition of upstream water directly mitigates temperature or addresses impacts on refugia.[6]

"* * * * *

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

---

[6] There are numerous references to "cool patches," and "refugia" in the record. While there may be cool patches in Lower Whychus Creek, and fish apparently use the cooler water in Lower Whychus Creek as a refuge, it is the cooling effect of the groundwater from Alder Springs as it discharges into Whychus Creek that is the issue in this appeal. Specifically the issue is whether the 106 acre-feet of additional mitigation water will mitigate the loss of cooling waters at Alder Springs that is attributable to the increased summer groundwater usage at Thornburgh during summer months, such that the no net loss/degradation standard will be met.

"* * * * *." Record 106-108 (italics and underscoring added; citations omitted).

1. Failure to Consider Relevant Evidence in the *Gould (FMP)* Record (First Assignment of Error)

Petitioners first argue the second hearings officer erroneously found the *only* evidence on the issue on remand regarding the efficacy of the 106 acre-feet of mitigation water to ensure the additional water usage at Thornburgh Resort does not violate the no net loss/degradation standard was the testimony by Yinger, one of the opponents' experts. We understand petitioners' challenge to focus on the following finding by the second hearings officer:

> "* * * The only expert testimony/opinion directly addressing this issue I could find in the LUBA record is the August 27, 2008 analysis by Yinger. He concludes that it will not mitigate the thermal impact as it replaces cold groundwater with 'warm' water from upstream. * * *." Record 107 (record citation omitted).

Petitioners contend that LUBA specifically recognized in *Gould (FMP)* that their expert TetraTech took the position that even though the mitigation water may be slightly warmer than the lost spring flow at Alder Springs, the mitigation water is still cool water and would reduce Yinger's projected thermal impacts. *Gould (FMP)*, 59 Or LUBA at 457.

One of the main points of our remand in *Gould (FMP)* was that the hearings officer failed to resolve the inconsistent positions by opponents' expert Yinger and the applicant's expert TetraTech. While the hearings officer may have meant to say that he found Yinger's testimony more detailed or credible than TetraTech's contrary testimony, the second hearings officer's

finding without further explanation says Yinger's testimony was the only relevant testimony.

We agree with petitioners that remand is required for the second hearing officer to provide a better explanation for why he found TetraTech's contrary testimony unpersuasive. We do not attempt here to decide whether Yinger's estimates of thermal impact at Alder Springs are overstated, as petitioners argue they are. That is something the hearings officer will need to address on remand, assuming Yinger's overstatement of average daily use, if it is an overstatement, would be relevant to the narrow legal and factual issue on remand, which is limited to whether the thermal impact of the additional water use by the resort in summer months and whether the additional mitigation will result in compliance with the no net loss/degradation standard.

Finally, petitioners also contend the second hearings officer failed to consider other relevant evidence from the record in *Gould (FMP)* that was called to his attention. This evidence includes a study submitted by the applicant, and evidence submitted by opponents as well, that shows well water withdrawal by Thornburgh has no immediate effect on nonadjacent waterways like Whychus Creek, but rather creates a cone of depression in groundwater and that over time that cone stabilizes so that increased seasonal pumping by Thornburgh might have no increased effect on the cool water discharge at Alder Springs, as LUBA and the hearings officer in *Gould (FMP)* seemed to assume. Record 2995. Petitioners contend this evidence was called to the

second hearings officer's attention. Record 172-73; 230-31. That evidence does appear to be relevant to the issue on remand, but it is for the hearings officer to consider in the first instance. On remand the hearings officer needs to consider any evidence from the *Gould (FMP)* record that is called to his attention if it is relevant to the Whychus Creek remand issue.

The first assignment of error is sustained.

2. The Hearings Officer Misunderstood the Question to be Resolved on Remand (Second Assignment of Error)

Petitioners contend the hearings officer misunderstood the question to be resolved on remand. There are statements in the second hearings officer's decision that appear to accurately state the Whychus Creek question to be resolved following our remand in *Gould (FMP)*.[7] But in other parts of the decision (quoted above and underlined) the second hearings officer erroneously appears to believe the 106 acre-feet of additional mitigation water, which the second hearings officer in several places mistakenly describes as 106 cfs (cubic feet per second) of mitigation water, must be sufficient to mitigate the .01dC

---

[7] For example at one point the second hearings officer stated the issue on remand as follows:

> "LUBA remanded the Oct. 8, 2008 hearings officer decision, 'for additional findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek.'" Record 106.

increase that the applicant's expert estimated would result from the initially proposed mitigation:

> "My reading of the finding, and LUBA's remand, is that I am to consider whether the additional water will mitigate the impact of the .01dC temperature increase on lower Whychus Creek, i.e. from the point that the Alder Springs water enters to its mouth." Record 107.
>
> "[T]he Hearings Officer also apparently agreed with the applicant on that point and still found that there was a .01dC impact that needed to be mitigated." Record 108.

As we explained earlier in this opinion, while our decision in *Gould (FMP)* could have been clearer on this issue, the question of whether the initially proposed mitigation was sufficient to mitigate the average daily water use of the resort was resolved by the first hearings officer in *Gould (FMP)* in favor of the applicant. The first hearings officer apparently agreed with TetraTech that with the initially proposed mitigation the thermal impact of resort water use on Lower Whychus Creek below Alder Springs would be less than .01dC and that extremely minor impact would not violate the no net loss/mitigation standard. But notwithstanding that conclusion of the first hearings officer, an additional issue arose regarding increased summer water use by Thornburgh Resort. The question for the second hearings officer on remand was whether that increased summer water usage would result in a violation of the no net loss/degradation standard. Because the second hearings officer apparently was confused about the question to be resolved on remand, we sustain the second assignment of error.

On remand the question to be resolved by the hearings officer is not whether the projected average daily water use of Thornburgh Resort will violate the no net loss/degradation standard. That question was resolved in *Gould (FMP)*. The question on remand is whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow.

The second assignment of error is sustained.

3. Whether the Additional Mitigation Will Have Benefits to Upper Whychus Creek that Should be Considered on Remand (Third Assignment of Error)

Petitioners contend the second hearings officer erred by refusing to consider benefits to upper Whychus Creek that will result from the additional 106 acre-feet of mitigation, in determining whether the increased water usage at Thornburgh Resort during summer months will violate the no net loss/degradation standard. While our remand perhaps should have been broad enough to allow the hearings officer to consider benefits to Upper Whychus Creek that may result from the additional mitigation, even if those benefits are unrelated to thermal impacts on Lower Whychus Creek, our exclusive focus in *Gould (FMP)* was on the thermal impact of increased resort water use in the summer and the efficacy of the initial mitigation, as supplemented by the additional mitigation, to ensure that any thermal impact that might result from that additional summer water use would be sufficiently mitigated to ensure the

no net loss/degradation standard will not be violated in Lower Whychus Creek. The second hearings officer did not err by refusing to consider or balance unrelated benefits from the additional mitigation to Upper Whychus Creek.

The third assignment of error is denied.

4. The Second Hearings Officer Erred by Refusing to Consider New Evidence (Fourth Assignment of Error)

In the initial portion of the second hearings officer's findings quoted above, he interpreted DCC 22.34.040(A) to limit his consideration on remand to the evidentiary record in *Gould (FMP)* unless additional evidence "is required to comply with the remand." The hearings officer interpreted the language that states "the Board [of Commissioners] shall have the discretion to reopen the record in instances in which it deems it to be appropriate" to give the Board of Commissioners discretion to reopen the record on its own motion, but found no similar grant of discretion to separately referenced "Hearings Bod[ies]," like the hearings officer.

Petitioners first argue the hearings officer's interpretation is not adequate for review. We reject that argument. The hearings officer's interpretation is adequate for review. Moreover, the hearings officer's interpretation is consistent with the text of DCC 22.34.040(A). We conclude the hearings officer did not "[i]mproperly construe[] the applicable law[.]" ORS 197.835(9)(a)(D).

Petitioners also argue the hearings officer was inconsistent in allowing additional evidence on remand when considering the Terrestrial WMP and

M&M Plan issue but not allowing additional evidence when considering the Lower Whychus Creek issue. Our remand regarding the Terrestrial WMP and M&M Plan clearly required additional evidence and all parties agreed that additional evidence was required to resolve the Terrestrial WMP and M&M Plan remand issue.[8] Whether our remand on the Lower Whychus Creek thermal impact issue required consideration of evidence beyond the *Gould (FMP)* record was much less clear.

Once again, our decision in *Gould (FMP)* is unfortunately ambiguous. In describing TetraTech's statement that even though the additional mitigation water is slightly warmer than the cool water that will be diverted by the resort it is still cool water and will reduce any thermal impact of the additional summer resort water use below the .01dC impact of average daily water use, we said "[s]ome effort to clarify the expert's statement will likely be required." *See* n 4; 59 Or LUBA at 458 n 13.

We now clarify that on remand the hearings officer will need to have TetraTech clarify his contentions regarding the efficacy of the warmer 106 acre-feet of mitigation water to avoid violation of the no net loss/degradation standard at Lower Whychus Creek. That testimony, which we set out in *Gould (FMP)* and set out again earlier in this opinion, was not even specifically directed at the increased water use during summer months. Moreover, we

---

[8] We address the terrestrial Wildlife Management Plan remand issue in our discussion of the cross-petition for review.

agree with petitioners that, because the hearings officer's concern with the potential thermal impact of increased resort water usage during summer months appears to have arisen for the first time in the first hearings officer's decision in *Gould (FMP)*, after the evidentiary record had closed, the second hearings officer should have allowed and considered additional evidence on remand regarding that concern.

On remand all parties submitted additional evidence to the second hearings officer concerning whether the additional mitigation will be sufficient to fully mitigate impacts of the resort's additional summer water usage so that the no net loss/degradation standard will be met. While the hearings officer received that evidence, he determined that he could not consider that additional evidence under DCC 22.34.040(A), because LUBA's remand did not require that he do so. While the hearings officer's erroneous conclusion that our remand did not require additional testimony is largely attributable to ambiguities in our *Gould (FMP)* decision, we conclude that the second hearings officer erred in concluding that LUBA's remand did not require that he consider new evidence to the extent it was relevant to his inquiry regarding Lower Whychus Creek on remand. And again, that inquiry is whether the additional 106 acre-feet of additional mitigation will be effective to mitigate any thermal impact that additional water use by the resort during summer months may have on Lower Whychus Creek such that the proposed resort will comply with the no net loss/degradation standard.

The fourth assignment of error is sustained.

THE CROSS PETITION FOR REVIEW

In the cross petition for review, Gould asserts five cross-assignments of error and one contingent cross-assignment of error. Three of the cross-assignments of error allege that the county's proceedings following our remand in *Gould (FMP)* were not properly initiated. One cross-assignment of error alleges the FMP remand proceedings were improper because the CMP approval decision has expired. The remaining cross-assignment of error challenges the hearings officer's finding that the Terrestrial WMP and M&M Plan provide sufficient detail to ensure that the no net loss/degradation standard will be met for terrestrial wildlife. Finally, in the contingent cross-assignment of error, Gould argues that if the decision is remanded for any reason under the petition for review that the second hearings officer should consider whether changed conditions warrant requiring the applicant to submit a new application for destination resort approval.

A. FMP Remand Proceedings Should Not Have Been Initiated Because the CMP Approval Has Expired (First Cross Assignment of Error).

CMP approval for Thornburgh Resort became final on April 15, 2008. Under DCC 22.36.010(B)(1) "a land use permit is void two years after the discretionary decision becomes final if the use approved in the permit is not initiated within that time period." Gould contends DCC 22.36.010(B)(1) applies to the CMP decision and that the county CMP approval became void on

November 18, 2011, because the use approved in the CMP, the destination resort, was not initiated prior to November 18, 2011.[9]

DCC 18.113.040(B) requires that a FMP must comply with the CMP, and when approving a destination resort FMP, DCC 18.113.100(A) requires that the county find that "all standards of the CMP have been met * * *." We understand Gould to argue the county cannot find the FMP complies with the CMP or that "all standards of the CMP have been met * * *" if the CMP is now void. But Gould may also be arguing that if the CMP becomes void, prior to FMP approval, further action on the destination resort is simply not permissible. Whatever the case, Gould contends it was error for the county to proceed to grant the second FMP approval on remand in 2015 when the CMP approval became void in 2011.

Under DCC 22.36.020(A), there are three ways a development action can be "initiated," and one of those ways is "[w]here construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant." DCC 22.36.020(A)(3). The question of whether the destination resort was "initiated" before the CMP became "void" under DCC 22.36.010(B)(1) was presented in *Gould v. Deschutes County*, 71 Or LUBA 78

---

[9] Under DCC 22.36.010(E) the two-year initiation deadline is tolled by the filing of a LUBA appeal. The April 15, 2010 two-year deadline under DCC 22.36.010(B)(1) to initiate Thornburgh Resort was tolled by the LUBA appeal that challenged the county's final CMP decision.

(2015), *aff'd in part*; *rev'd in part* 272 Or App 666, 362 P3d 679 (2015) and *Gould v. Deschutes County*, 67 Or LUBA 1 (2013). In our decision following the Court of Appeals decision that reversed one aspect of our 2015 decision, we sustained assignments of error challenging the county's findings that the "conditions of a permit or approval have been substantially exercised" and that "any failure to fully comply with the conditions is not the fault of the applicant," and the county's decision was remanded. *Gould v. Deschutes County*, 72 Or LUBA 258 (2015). As far as we are informed, the county has not taken further action to determine whether the destination resort has been initiated so that the CMP approval is not void.

The hearings officer rejected Gould's "void CMP" argument for several reasons. We only consider one of them. The hearings officer explained:

> "The relationship between the CMP and the FMP is complex. DCC 18.113.040 B states that the FMP must comply with the approved CMP. The CMP version at issue was approved by the County on April 15, 2008 and the approval ultimately was affirmed in *Gould v Deschutes County*, 227 Or App 601 (2009). (*Gould IV*) That approval properly deferred a determination of compliance with the fish and wildlife mitigation standards to the FMP (with a public hearing required).
>
> "Meanwhile, the FMP was approved on Oct. 8, 2008. * * * [T]he FMP approval was affirmed, except for the two issues present in this remand.
>
> "Thus, we have a CMP which is not effective, but which was properly structured to not have to address the issues present in this remand. We have an FMP that has been affirmed as being consistent with and containing all the required elements of the CMP, with the exception of the issues deferred to the FMP and

> remanded to this proceeding. The FMP was filed pursuant to a CMP that ultimately was affirmed. Under these circumstances, I conclude that the status of the CMP essentially is irrelevant, at least for purposes of this remand. * * *" Record 56-57.

We are not sure what the hearings officer meant when he said the CMP "is not effective." For purposes of this appeal we will assume without deciding that the CMP approval has become "void" under DCC 22.36.010(B)(1). However, even if we assume the County's CMP approval became void on November 18, 2011, we conclude below in addressing the third cross-assignment of error that the FMP remand proceedings were initiated by Thornburgh Resort on August 15, 2011, which was before the CMP became void. The county's first FMP approval decision found, with only two exceptions, that the FMP fully complies with the CMP. Those two exceptions have to do with the no net loss/degradation standard that normally applies at the time of CMP approval. The county's decision to defer its finding on the DCC 18.113.070(D) no net loss/degradation standard until FMP approval was affirmed in *Gould v. Deschutes County*, 57 Or LUBA 403 (2008), *aff'd* 227 Or App 601, 206 P3d 1106 (2009).

As Gould correctly notes, the CMP potentially remains a relevant source of FMP approval considerations because at least some of the CMP conditions of approval effectively cannot be performed until after FMP approval. But those conditions of approval were carried forward in the county's first FMP approval decision and remain part of the current FMP approval decision. All requirements of the CMP approval are now requirements of the county's FMP

approval. The FMP approval has effectively incorporated and displaced the CMP approval. In these unusual circumstances, where the only remaining questions on appeal concern two issues that were expressly deferred to the FMP decision, we conclude it was not error for the county to proceed to determine on remand whether the errors identified by LUBA in the FMP could be corrected and the FMP approved for a second time, even though the CMP approval has become void.[10]

We briefly address one additional issue the parties dispute. Gould contends that CLCC should not be allowed to assert a legal position in this appeal (that it is legally irrelevant that the CMP approval may be void given the current state of the FMP approval) when its predecessor Loyal Land took a contrary position in the appeals we describe above in seeking a county determination that the CMP is not void because the destination resort has been initiated. The short answer to that contention is that the two positions, while perhaps somewhat related, can be viewed as alternative rather than

---

[10] Citing our decision in *Gould v. Deschutes County*, 67 Or LUBA 1 (2013), the appeal of the county's first determination that the destination resort has been initiated, Gould argues that LUBA has already determined that the CMP and FMP decisions cannot be viewed as "functionally separate." All we determined in that case was that the hearings officer could not disregard as "irrelevant" all CMP conditions of approval that effectively could not be satisfied until FMP approval had been granted, when determining whether CMP conditions of approval have been "substantially exercised" under DCC 22.36.020(A) so that the CMP is not void. That determination is not inconsistent with our resolution of this cross-assignment of error.

inconsistent. The position that the CMP approval is not void is not inconsistent with the position that a void CMP does not preclude further action on the FMP. Success in arguing the first position might have made taking the second position unnecessary, but it is not inconsistent with the second position.

Finally, the parties engage in other arguments under this cross-assignment of error, which we elect not to address, because no matter how those arguments are resolved, they would not affect our ultimate conclusion under this cross-assignment of error.

The first cross-assignment of error is denied.

B. Petitioner DeLashmutt Does Not Have Standing to Appeal to LUBA (Second Cross Assignment of Error)

This cross-assignment of error is not really a cross-assignment of error. It is a challenge to petitioner DeLashmutt's standing to participate in this LUBA appeal.[11] To have standing to appeal to LUBA, a petitioner generally must appear personally or in writing during the proceedings below and must file a timely notice of intent to appeal with LUBA. Gould argues that petitioner DeLashmutt did not comply with the appearance requirement. According to Gould, all of petitioner DeLashmutt's appearances below were on behalf of LLCs, in his capacity as manager.

Petitioners respond that petitioner DeLashmutt appeared in his personal capacity on two occasions. Record 122-23, 154-57. Petitioners also point out

---

[11] Gould does not challenge CLCC's standing.

the board of county commissioners recognized petitioner DeLashmutt as a party in its notice declining to review the second hearings officer's decision. We conclude petitioner DeLashmutt made the required personal appearance to have standing to appeal to LUBA.

The second cross-assignment of error is denied.

C. Thornburgh Did Not Initiate The Remand Proceedings And Central Land And Cattle Company Is Not A Proper Party To Initiate Or Pursue The FMP Remand (Third And Fourth Cross Assignment of Error).

On August 15, 2011, petitioner DeLashmutt sent an e-mail message on behalf of Thornburgh Resort to the county with the following text:

> "Thornburgh Resort Company, LLC would like to initiate the remand process for the LUBA remand of Thornburgh's Final Master Plan as of today. This is LUBA case 2008-203." Record 671.

One day later, on August 16, 2011, the county sent the following response:

> To initiate the process you will need to submit a formal application on our generic land use application form (attached). There is also a $3,000 application fee (fee schedule attached), which is primarily to cover the cost of the Hearings Officer issuing the new decision. Obviously your application should include your legal arguments pertaining to the issues described in the remand decision." Record 670.

Apparently nothing more happened with regard to the August 15, 2011 request until September 15, 2015 when CLCC's attorney sent a letter with attached application and fee. The letter includes the following text:

> "I am writing on behalf of Central Land and Cattle Company, LLC to provide you with information that supplements the request it

> has made pursuant to ORS 215.435 on the enclosed County application form asking Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application M-07-2/MA-08-6. The Oregon Land Use Board of Appeals, after review by the Oregon Court of Appeals, remanded the case to the County on August 17, 2010. Central Land and Cattle Company, LLC is the successor to Thornburgh Resort Company, LLC and its rights related to the final master plan approval."
>
> "On August 11, 2011 Thornburgh Resort Company, LLC requested in writing that the county proceed with the review of the above-referenced applications on remand in an email from Kameron DeLashmutt to former Deschutes County Community Development Director Tom Anderson. Central Land and Cattle Company, LLC reiterates that request. Central Land and Cattle Company, LLC has prepaid the remand hearings fee shown in the County's current fee schedule and has made its request on a Deschutes County land use application form but does not agree that either is required by ORS 215.435(1)." Record 4667.

Gould contends that Thornburgh's August 15, 2011 request was ineffective to "initiate" the remand proceedings.

One of the second hearings officer's theories for conducting the remand proceedings is that DeLashmutt's request on August 15, 2011, on behalf of Thornburgh Resort, was sufficient to initiate the appeal under ORS 215.435.[12] Thornburgh Resort was not administratively dissolved until September 2, 2011.

---

[12] ORS 215.435 establishes deadlines for local governments to take action following a LUBA remand. In 2011, ORS 215.435(2)(a) provided, in part, that the statutory deadline for a local decision following a LUBA remand "shall not begin until the applicant requests in writing that the county proceed with the application on remand."

While the county might be able to insist that an appeal be accompanied by any locally required fee and application form before the remand proceedings will be initiated, we cannot say the second hearings officer's conclusion that DeLashmutt's August 15, 2011 request was sufficient to initiate the remand proceedings "[i]mproperly construe[s] the applicable law[.]" ORS 197.835(9)(a)(D). ORS 215.435(2)(a) says nothing about required forms or fees.

Gould also contends that there is not substantial evidence in the record to show that CLCC is the successor in interest to Thornburgh Resort and DeLashmutt's interests in the FMP. The letter that appears at Record 650-51 demonstrates just how complicated this matter has become, when it comes to figuring out who owns what parts of this proposed destination resort and the permits that will be required to construct it.[13] But we agree with petitioners,

---

[13] That letter provides, in part:

> "TRC [Thornburgh Resort Company] lost its resort land property -- its primary asset -- in an August 31, 2011 foreclosure sale. (TRC has since been dissolved.) After the foreclosure TRC began to liquidate its remaining business assets and proceeded to wind up its affairs pursuant to Oregon law. In a two-stage sale (the 'Sale'), TRC sold its rights in and to the development of the Thornburgh Resort to Kameron DeLashmutt and Mr. DeLashmutt, in turn, sold those rights to CLC [Central Land and Cattle Company]. The transferred rights included TRC's rights in various permits (including the FMP remand, sewer permits, and drinking water permits), as well as planning documents, and intellectual property items that TRC had developed in furtherance of the resort project. In connection with the sale of assets to Mr. DeLashmutt and CLC.

that that letter is evidence a reasonable hearings officer could rely on to conclude that CLCC is entitled to pursue this matter on remand from LUBA as the successor in interest to the FMP applicant Thornburgh Resort.

The third and fourth cross assignments of error are denied.

E. The Terrestrial WMP and M&M Plan Lack Necessary Specificity (Fifth Cross Assignment of Error).

Thornburgh's initial terrestrial wildlife management plan called for it to abide by a memorandum of understanding with the Bureau of Land Management and develop a plan to fully mitigate any loss of wildlife habitat, which would be approved by BLM and the Oregon Department of Fish and Wildlife (ODFW). Although LUBA found that initial plan to be adequate, the Court of Appeals concluded that the necessary details of the terrestrial wildlife

---

> CLC now stands in the shoes of TRC as its successor in interest as to the assets TRC sold in that Sale. At the time of that asset sale, another sale occurred: TUG [Thornburgh Utility Group] sold its rights in the Water Rights Permit to Kameron DeLashmutt who in turn sold those rights to Pinnacle Utilities, LLC ('Pinnacle').
>
> "* * * * *
>
> "In short, CLC owns the development rights related to the resort project (rights in various permitting, FMP remand, sewer, and drinking water permits, as well as planning documents and intellectual property items and the DSL Lease and Big Falls Ranch water rights entitlement). To assure ownership of the TUG Water Rights Permit materials in an entity other than the developer (CLC), those assets are owned by Pinnacle. Any oral or written statements of [petitioner's attorney] contrary to this ownership structure are mistaken." Record 650-51.

management plan were lacking and their development had been impermissibly deferred to a stage where the public would not be allowed to participate. *Gould v. Deschutes County*, 54 Or LUBA 205, *rev'd and rem'd* 216 Or App 150, 171 P3d 1017 (2007). Thornburgh later expressly deferred development of its wildlife management plans to the FMP approval stage, and provided that the public would be allowed to participate fully at that later stage. That deferral was upheld on appeal. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008), *aff'd* 227 Or App 601, 206 P3d 1106, *rev den* 347 Or 258, 218 P3d 540 (2009).

In our decision in *Gould (FMP)* we provided the following description of the Terrestrial WMP and M&M Plan that was developed by Thornburgh, BLM and ODFW:

> "* * * Thornburgh's off-site mitigation obligation would be 8,474 HUs [habitat units]. The Terrestrial WMP proposes to satisfy that mitigation obligation on 'public land managed by the BLM.' 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. * * *.'

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

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

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

> "'The proposed mitigation plan will use an adaptive approach to vegetation management that is consistent with the procedures outlined in the draft CBRAP. * * * The BLM's Land Use Planning Handbook

> defines adaptive management as '*a system of management practices based on clearly identified outcomes, monitoring to determine if management actions are meeting outcomes, and, if not, facilitating management changes that will best ensure that outcomes are met or to re-evaluate the outcomes.*' An adaptive approach to vegetation management in the Cline Buttes Area is appropriate because, in some situations, there is a lack of information available to assist in accurately predicting the response of the existing plant communities to different types and levels of ground disturbing activities related to thinning woody plants, understory shrub enhancement and reducing fuel loadings * * *.'" *Gould (FMP)*, 59 Or LUBA 447-48 (text alterations and italics in original; footnote and record citations omitted).

In *Gould (FMP)* we ultimately concluded that the Terrestrial WMP and M&M Plan were insufficient to assure compliance with the no net loss/degradation standard, primarily because the specific properties where the off-site mitigation would be carried out remained unknown and that lack of information made it impossible to provide the kind of plan details that we understood the Court of Appeals to require in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*):

> "The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of the 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh's consultant and BLM and ODFW staff are confident that those restoration efforts will be successful and result in compliance with DCC 18.133.070(D). But what our description and the hearings officer's description of the Terrestrial WMP and M&M Plan make clear is that a number of important parts of Thornburgh's proposal to comply with the DCC 18.133.070(D)

"no net loss" standard have not yet been determined, and will not be determined until a future date at which petitioner may or may not have any right to comment on the adequacy of the proposed mitigation. We do not know the location of the 4,501 acres that will be restored to provide the required mitigation. They may be located in the Canyons Region, the Deep Canyons Region or the Maston Allotment. Or they may be located somewhere else in Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is. We also do not know what particular mix of restoration techniques will be provided to those 4,501 acres. We do not know what the habitat value of those 4,501 acres will be after restoration. We therefore cannot know if that restoration effort will result in the needed 8,474 HUs. The question for us is whether given all of these uncertainties, the confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that the proposed mitigation plan will result in compliance with DCC 18.133.070(D). The answer to that question under the principles articulated in *Gould II* is no.

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

> mitigation plan will not be known until some undetermined future date. Under the Court of Appeals' holding in *Gould II*, that is not a permissible approach for demonstrating compliance with DCC 18.133.070(D)." *Gould (FMP)*, 59 Or LUBA 452-54.

Our decision in *Gould (FMP)* was appealed to the Court of Appeals and affirmed. *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 758 (2010). However, in rejecting Thornburgh's cross-petition for judicial review, the Court of Appeals set out its understanding of the scope of its decision in *Gould II*, and after quoting the portion of our decision in *Gould (FMP)* quoted immediately above, appears to have identified what must be done to make the Terrestrial WMP and M&M Plan sufficiently detailed for opponents to challenge and LUBA to review for compliance with the no net loss/degradation standard:

> "As we explained in *Gould IV* [*Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009)], a final adjudication of compliance requires a showing that compliance with DCC 18.113.070(D) is 'likely and reasonably certain to succeed.' 227 Or App at 610 (quoting *Meyer*, 67 Or App at 280 n 5). *We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed. To the contrary, LUBA noted that it had 'no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW*.' However, as LUBA noted, it remained uncertain whether the habitat restoration would in fact occur on BLM land or, rather, elsewhere in Deschutes County, through Thornburgh's back-up plan of a dedicated fund to be used by ODFW for mitigation."

> "*If the only remaining uncertainty in Thornburgh's mitigation plan were which portion of BLM land would be the site of habitat*

restoration, we would conclude that LUBA erred in its application of Gould II. There, no mitigation plan had been composed; Thornburgh was required only to complete a plan and to obtain ODFW and BLM approval of it. 216 Or App at 156–57 * * *. *Here, the nature of the mitigation plan proposed for BLM land is clear: the Terrestrial WMP provides that Thornburgh will restore and enhance about 4,501 acres of juniper woodlands within the Cline Buttes Recreation Area, and the M&M Plan sets out mitigation methods that could be applied to any parcel of land within that area. Thus, the adequacy of Thornburgh's mitigation efforts as they pertain to BLM land can be assessed now, based on the record as it exists.* If some portion of BLM land turns out to be unsuitable for mitigation or if some mitigation methods are inappropriate, those objections could be raised, and the county could deny approval of the FMP on that basis or could condition approval to address those objections.

"LUBA also concluded, however, that it had not yet been determined whether Thornburgh's restoration efforts would in fact occur on BLM land. The BLM was still finalizing the CBRAP and so had not yet committed to allowing Thornburgh's proposed habitat restoration to occur on BLM land. Further, Thornburgh's back-up plan of a dedicated fund for mitigation suffers from the same defects as the plan at issue in *Gould II*. In light of those uncertainties, we cannot conclude that LUBA erred in exercising its review authority and concluding that Thornburgh's proposed mitigation efforts are not likely and reasonably certain to result in compliance with DCC 18.113.070(D)." *Gould*, 233 Or App at 642-43 (underscored italics in original; italics and underscoring added).

A. The *Gould II* Issue

The impediments identified by the Court of Appeals to a sufficiently certain and detailed Terrestrial WMP and M&M Plan for LUBA review have now been eliminated. The CBRAP (Cline Buttes Recreation Area Plan) has been completed, and over 10,000 acres of BLM land is potentially available for

mitigation to supply the estimated 4,500 acres of off-site mitigation needed. The backup plan that could have led to mitigation on other unidentified, non-BLM property has been withdrawn.

Gould's fifth cross-assignment of error is that "[t]he Hearings Officer erred in finding that the wildlife plan was specific enough to assure that complete mitigation would be achieved." Cross-Petition for Review 30. However most of the argument that is presented in support of the fifth cross-assignment of error relies on LUBA's reasoning in *Gould (FMP)*, where LUBA said that until the precise location of where the habitat restoration will occur is known we cannot know the "beginning habitat value," "kind of habitat," the "particular mix of restoration techniques," or "what the habitat value * * * will be after restoration." *Gould (FMP)*, 59 Or LUBA at 453. The difficulty with arguments that rely on that part of our decision in Gould *(FMP)* is that we understand the italicized language in the Court of Appeals decision quoted above to have expressly adopted a contrary position, provided the mitigation is limited to the BLM property within the CBRAP.

The meaning of the underscored language quoted above is less clear to us. But we think it should be understood to take the position that following LUBA's remand in *Gould (FMP)*, opponents would remain free to argue to the second hearings officer that the mitigation proposal contained in the Terrestrial WMP and M&M Plan for the BLM property is inadequate to satisfy the no net loss/degradation standard, even if it is sufficiently detailed to pass muster under

Gould II so that it can be reviewed by LUBA. The court specifically mentions that opponents would remain free to argue the BLM lands are "unsuitable for mitigation or * * * some mitigation methods are inappropriate." But now that the proposed mitigation is limited to BLM property within the CBRAP, we understand the Court of Appeals to have already determined that is sufficient to solve any lack of specificity problem under our decision in *Gould (FMP)* and the Court of Appeals' decision in *Gould II*.

B. The No Net Loss/Degradation Standard

We turn to the remaining disagreement between the parties, which is closely related to cross-petitioner's larger "lack of specificity" argument. We understand cross-petitioner to take the position that until the specific CBRAP lands that will be subject to mitigation are known, it is not possible to know what mitigation techniques will be used, not possible to know how many HUs that mitigation will produce and therefore not possible to know if it will be adequate to satisfy the no net loss/degradation standard. Gould's expert Dobkin took precisely that position below. Record 316.

Petitioners offer the following response to that position:

> "Gould argues that Thornburgh's mitigation plan calls for a [future] determination of specific areas for rehabilitation based on current conditions and argues this supports its position that the mitigation plan for CBRA land is too uncertain to be reviewed. * * * Thornburgh's plan does call for a determination of areas before the mitigation required by the plan is commenced; not before the County approves the wildlife plans. *Gould V*, 59 Or LUBA at 453,

> fn 10; Rec 4116 * * *.[14] The Court of Appeals found the wildlife mitigation plan to be adequate for review with this provision a part of the plan. The Court did not require Thornburgh to select specific mitigation areas and do a 'current conditions' assessment prior to review by Gould. Such an assessment, as noted by Gould, is not a part of the plan the Court of Appeals believes is sufficient for review now that the specified uncertainties have been resolved. * * * Furthermore, BLM has assessed current conditions and identified lands where Thornburgh's mitigation measure may occur." Petitioners' Response to Cross-Petition 43.

As explained, the Court of Appeals has determined that if the mitigation sites are limited to BLM land within the CBRAP the Terrestrial WMP and M&M Plan are sufficiently specific for review. But it does not necessarily follow that those plans are sufficient to comply with the no net loss/degradation standard, simply because they are now sufficiently developed to allow LUBA review. Nevertheless, the Court of Appeals was aware that the Terrestrial WMP and M&M Plan for which Thornburgh was seeking FMP approval did not identify the particular 4,500 acres within the CBRAP that will be enhanced or restored to achieve the required 8,474 HUs, and that those lands would be

---

[14] That footnote is set out below:

> "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 on current conditions of the mitigation site and the agreed amount and type of enhancement.'" (Record citation omitted.)

identified after FMP approval. Moreover, the Court of Appeals specifically stated:

> "* * * We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed. To the contrary, LUBA noted that it had 'no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW.' * * *" *Gould*, 233 Or App 642 (2010).

The Court of Appeals' awareness that the Terrestrial WMP and M&M Plan do not call for identifying and assessing mitigation lands prior to FMP approval and the Court of Appeals' understanding that the Terrestrial WMP and M&M Plan approach "was likely and reasonably certain to succeed," viewed alone, lends some support to petitioners' contention that the issue of the adequacy of the Terrestrial WMP and M&M Plan to assure compliance with the no net loss/degradation standard was resolved by the Court of Appeals in its review of our *Gould (FMP)* decision.

But the Court of Appeals also stated that opponents remain free to argue that the BLM lands are "unsuitable for mitigation or * * * some mitigation methods are inappropriate." That language would be meaningless if the Court of Appeals had already decided that the Terrestrial WMP and M&M Plan are sufficient to comply with the no net loss/degradation standard. But any such arguments must go beyond arguing that the particular BLM, CBRAP lands must be known before it can be determined if the Terrestrial WMP and M&M

Plan ensure compliance with the no net loss/degradation standard. In particular, it was not sufficient for opponents to argue on remand that it is necessary that the particular BLM, CBRAP lands be identified before it can be determined if the Terrestrial WMP and M&M Plan are adequate to ensure compliance with the no net loss/degradation standard. Record 316. The Court of Appeals was fully aware that the particular BLM, CBRAP lands were not known when it affirmed our *Gould (FMP)* decision and stated the Terrestrial WMP and M&M Plan possessed the requisite detail if potential mitigation sites were limited to the CBRAP area.[15]

The BLM has identified over 10,000 acres of BLM CBRAP lands that it believes are suitable for mitigation. The Terrestrial WMP and M&M Plan has determined that only approximately 4,500 of those acres will be needed to achieve the required mitigation. It has been established in prior appeals that a variety of restoration and enhancement measures suitable for the CBRAP area are available to achieve the desired mitigation. Given the current state of the Terrestrial WMP and M&M Plan it now falls to Gould, under the reasoning adopted by the Court of Appeals in affirming our *Gould (FMP)* decision, to show that the candidate BLM lands are for some reason "unsuitable for mitigation," or that the proposed mitigation measures are "inappropriate."

---

[15] The HEP (Habitat Evaluation Procedures) analysis utilized in the Terrestrial WMP and M&M Plan were described in some detail in our decision in *Gould (FMP)*, 59 Or LUBA at 445-46.

C. Cross-Petitioner's Arguments Concerning Lands Suitability for Mitigation and Mitigation Measures

Gould's expert below argued that BLM, CBRAP lands where grazing is allowed are not suitable for mitigation. Similarly opponent experts argued that areas impacted by off highway vehicles (OHVs) and areas subject to clearing to create fire defensible space are not appropriate.

Petitioners point out that OHV use and grazing is being restricted in the Maston allotment where most of the enhancement and restoration is expected to occur. More importantly, these types of habitat degradation were taken into account during the HEP analysis that ultimately led to the conclusion that approximately 4,500 acres of mitigation will be required to fully mitigate the terrestrial wildlife impact of the resort. Record 1528.

The second hearings officer ultimately concluded:

> "* * * I find that the weight of the evidence supports the conclusion that the off-site wildlife mitigation measures to be implemented in the Cline Butte Recreation Area are 'likely and reasonably certain to succeed.' The most important dispute appears to center on methodology, with opponents wanting a more static or fixed point approach and the applicant, ODFW and BLM favoring the HEP iterative process approach. I agree with the applicant and the agencies * * *." Record 105.

We conclude the above findings are supported by substantial evidence and that the arguments advanced in the fifth cross-assignment of error provide no basis for remand.

The fifth cross-assignment of error is denied.

F. Changed Conditions Warrant Requiring A New Destination Resort Application (Contingent Cross Assignment of Error).

In a single contingent cross-assignment of error, Gould alleges that the second hearings officer erred by failing to require a new destination resort application, based on changed circumstances.

DCC 18.113.070(C) requires that an application for destination resort CMP approval must include an economic analysis and requires the county to make the following finding concerning that analysis:

> "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.
>
> "* * * * *."

In granting CMP approval in 2008, the board of commissioners adopted over four pages of findings addressing DCC 18.113.070(C) and finding that its requirements were met. Record 967-71. The first CMP condition of approval provides:

> "Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application." Record 1006.

Gould sets out the ownership structure of Thornburgh Resort at the time of CMP approval. Cross-Petition for Review 43. Suffice it to say it was a somewhat complicated ownership structure at the beginning, and it has become even more complicated following Thornburgh Resort, LLC's bankruptcy and dissolution. Loyal Land, LLC and now CLCC have become owners of most of the property, and a number of other entities have been created and assigned responsibility for aspects of the proposed resort. Based on these changes, Gould alleges the second hearings officer erred by not requiring that CLCC submit a new application.

The CMP condition quoted above states "[a]ny substantial change to the approved plan will require a new application." A change in "ownership" is not a change in the "approved plan." Gould identifies no changes in the "approved" plan. The contingent cross-assignment of error is denied.

The county's decision is remanded in accordance with our resolution of the first, second and fourth assignments of error in the petition for review.

Exhibit 36: FMP Remand-Court of Appeals Affirmed w/o Opinion

12/2016

EXHIBIT 36

FILED: December 29, 2016

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CENTRAL LAND AND CATTLE COMPANY, LLC and KAMERON DELASHMUTT,
Petitioners
Cross-Respondents,

v.

DESCHUTES COUNTY,
Respondent
Cross-Respondent,

and

ANNUNZIATA GOULD,
Respondent
Cross-Petitioner.

Land Use Board of Appeals
2015107

A163359

Argued and submitted on December 09, 2016.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

Attorney for Petitioners-Cross-Respondents: Timothy R. Volpert.

Attorney for Respondent-Cross-Petitioner: Paul D. Dewey.

No appearance for respondent-cross-respondent Deschutes County.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents on petition; Cross-Respondents on cross-petition.

[X] No costs allowed to Respondent-Cross-Respondent Deschutes County.
[X] Costs allowed, payable by Petitioners to Respondent Annunziata Gould on petition; Cross-Petitioner to Cross-Respondents Central Land and Cattle Company, LLC, and Kameron Delashmutt on cross-petition.

Exhibit 37: FMP Remand-Oregon Supreme Ct/ Denies hearing

03/2017

EXHIBIT 37

IN THE SUPREME COURT OF THE STATE OF OREGON

CENTRAL LAND AND CATTLE COMPANY, LLC and KAMERON DELASHMUTT,
Petitioners
Cross-Respondents,
Respondents on Review,

v.

DESCHUTES COUNTY,
Respondent
Cross-Respondent
Respondent on Review,

and

ANNUNZIATA GOULD,
Respondent
Cross-Petitioner,
Petitioner on Review.

Court of Appeals
A163359

S064684

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Thomas A. Balmer 03/30/2017
3:15 PM
THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

c: Timothy R Volpert
David Doyle
Paul D Dewey

lk

RECEIVED
APR 02 2018
OWRD

Exhibit 38: DEED-Land Sold to Central Land for $10.7M

10/2017

EXHIBIT 38

After recording return to:

Central Land and Cattle Company LLC
c/o Kameron DeLashmutt
2447 NW Canyon
Redmond, OR 97756

Until a change is requested, all tax statements shall be sent to the following address:

Central Land and Cattle Company LLC
c/o Kameron DeLashmutt
2447 NW Canyon
Redmond, OR 97756

STATUTORY BARGAIN AND SALE DEED

LOYAL LAND, LLC, an Oregon limited liability company, Grantor, conveys to CENTRAL LAND AND CATTLE COMPANY LLC, an Oregon limited liability company, Grantee, the following described real property situated in Deschutes County, Oregon, to wit:

See Exhibit A attached hereto.

The true consideration for this conveyance stated in terms of dollars is $10,700,000.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

[Signature page and acknowledgement follow]

DATED this 13 day of OCTOBER 2017.

LOYAL LAND, LLC,
an Oregon limited liability company

By _____
Terrence Larsen, Member

STATE OF TEXAS)
) ss.
County of DENTON)

This instrument was acknowledged before me on OCT 13, 2017 by Terrence Larsen as a member of Loyal Land, LLC, an Oregon limited liability company, on behalf of said company.

GARY MIRON
Notary Public, State of Texas
Comm. Expires 02-24-2019
Notary ID 12488043-2

_____
Notary Public of Texas

EXHIBIT A

Parcel 1

The Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 29, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon. (15-12-7801)

Parcel 2

The Northwest Quarter of the Southeast Quarter (NW1/4 SE1/4) of Section 29, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon. (15-12-7900)

Parcel 3

In Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, Section 29: Northeast Quarter, East Half of the Southeast Quarter, Southeast Quarter of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Northeast Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter (NE1/4, E1/2 SE1/4, SE1/4, NW1/4, SW1/4, NW1/4, NE1/4, SW1/4, NW1/4, SW1/4) (15-12-7800)

EXCEPTING THEREFROM the Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4).

TOGETHER WITH:

In Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, Section 30: The Southeast Quarter of the Northeast Quarter (SE1/4 NE1/4) and the Northeast Quarter of the Southeast Quarter (NE1/4 SE1/4).

Parcel 4

The East Half of the Northwest Quarter (E1/2 NW1/4), the South Half of the Southwest Quarter (S1/2 SW1/4) and the West Half of the East Half (W1/2 E1/2) of Section 17:

The Northwest Quarter (NW1/4), the West Half of the Northeast Quarter (W1/2 NE1/4), the North Half of the Southwest Quarter (N1/2 SW1/4), the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section 20, Township 15 South, Range 12, East of the Willamette Meridian.

EXCEPTING THEREFROM:

Tract A:

Beginning at the center one-quarter (1/4) corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, the true point of beginning; thence North 88°44'26" West along the center line 653.40 feet, thence North 00°06'54" East 200.00 feet, thence South 88°44'26" East 653.40 feet to the North-South center line; thence South 00°06'54" West 200.00 feet to the true point of beginning.

Tract B:

Beginning at the South Center one-sixteenth (1/16) corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, thence North 00°06'54" East along the North-South center line 179.75 feet to the true point of beginning; thence North 89°53'06" West 208.71 feet; thence North 00°06'54" East 208.71 feet; thence South 89°53'06" East 208.71 feet to the said center line; thence South 00°06'54"West along said center line 208.71 feet to the true point of beginning.

Parcel 5

The Northeast Quarter of the Southeast Quarter (NE1/4 SE1/4) and the South Half of the Southeast Quarter (S1/2 SE1/4) of Section 20; the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section 21; the North Half (N1/2) and the North Half of the South Half (N1/2 S1/2) of Section 28, all in Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon.

EXCEPTING:

Tract C:

Beginning at the East 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West center line of said Section 20; thence South 88°44'26" East along said center line, 208.71 feet to the true point of beginning.

Parcel 6 (15-12-5001, 15-12-5002, 15-12-7701)

Tract A:

Beginning at the center 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point o beginning; thence North 88°44'26" West along the center line, 653.40 feet; thence North 00°06'54" East, 200.00 feet; thence South 88°44'26" East, 653.40 feet; to the North-South center line; thence South 00°06'54" West, 200.00 feet to the true point of beginning.

Tract B:

Beginning at the South center 1/16 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon; thence North 00°06'54" East along the North-South center line, 179.75 feet to the true point of beginning; thence North 89°53'06" West, 208.71 feet; thence North 00°06'54" East, 208.71 feet; thence South 89°53'06" East, 208.71 feet to the said center line; thence South 00°06'54" West along said center line, 208.71 feet to the true point of beginning.

Tract C:

Beginning at the East 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East 208.71 feet to the East-West center line of said Section 20; thence South 88°44'26" East along said center line, 208.71 feet to the true point of beginning.

GSB:9007318.1 [38119.00200]

Exhibit 39: FMP Remand-Hearing Officers Approval

01/2018

EXHIBIT 39

HEARINGS OFFICER DECISION

FILE NUMBERS: 247-17-000761-A; 247-15-000529-A; M-07-2; MA-08-6

REQUEST: Applicant requests a proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application 247-15-000529-A; M-07-02/MA-08-6.

OWNER: Agnes DeLashmutt
Loyal Land, LLC
2447 NW Canyon
Redmond, OR 97756

APPLICANT: Central Land: Cattle Co. LLC as successor in interest to Thornburgh Resort Co., LLC

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

STAFF CONTACT: Peter Gutowsky, AICP, Planning Manager

HEARINGS OFFICER: Dan R. Olsen

SUMMARY OF DECISION: The application on remand is **approved with a revised condition.**

I. STANDARDS AND APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, Zoning Ordinance:

Chapter 18.16, Exclusive Farm Use Zone (EFU-SC)
*Section 18.16.035, Destination Resorts

Chapter 18.113, Destination Resort Zone (DR)
*Section 18.113.070, Approval Criteria
*Section 18.113.090, Requirements of Final Master Plan
*Section 18.113.100, Procedure or Approval of Final Master Plan

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

Chapter 22.08. General Provisions
*Section 22.08.010, Application Requirements

Chapter 22.20, Review of Land Use Action Applications
*Section 22.20.040, Final Action in Land Use Actions

Chapter 22.24, Land Use Action Hearings
*Section 22.24.080, Standing

Chapter 22.28, Land Use Action Decisions

*Section 22.28.010, Decision

Proceedings on Remand

*Section 22.34.010, Purpose
*Section 22.34.020, Hearings Body
*Section 22.34.030, Notice and Hearing Requirements
*Section 22.34.040, Scope of Proceeding

II. BASIC FINDINGS:

A. **LOCATION:** The subject property consists of approximately 1,970 acres of land located west of Redmond, Oregon, on the south and west portions of a geologic feature known as Cline Buttes. The property is bordered on three sides by Bureau of Land Management (BLM) land, and is also in close proximity to Eagle Crest, another destination resort development. The property is identified on County Assessor's Index Map15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000.

B. **LOT OF RECORD:** As part of the Conceptual Master Plan (CMP) approval (CU-05-20), the Hearings Officer found the subject property consists of several legal lots of record based on previous county determinations (LR-91-56, LR-98-44, MP-79-159, CU-79-159 and CU-91-68).

C. **ZONING AND PLAN DESIGNATION:** The subject properties are zoned Exclusive Farm Use (EFU-TRB) within a Destination Resort (DR) Overlay Zone. The property is designated Agriculture on the Deschutes County Comprehensive Plan Map.

D. **PROPOSAL:** Applicant requests a proceeding on remand of approval of the Thornburgh Destination Resort Final Master Plan in application 247-15-000529-A; M-07-02/MA-08-6.

E. **SITE DESCRIPTION:** The subject property is approximately 1,970 acres in size and has vegetation consisting of juniper woodland. The property covers the south and west portions of the geologic feature known as Cline Buttes. The property currently is developed with three dwellings and a barn, access to which is from Cline Falls Highway. The property is engaged in farm use consisting of low-intensity livestock grazing.

F. **SURROUNDING LAND USES:** The subject property is surrounded by public land primarily owned and managed by the BLM. A portion of the public land is owned and managed by the Oregon Department of State Lands (DSL). The Eagle Crest Destination Resort is located near the northern portion of the subject property.

G. **PUBLIC COMMENTS:** Notice of this Land Use Board of Appeals (LUBA) remand was provided to persons who received the Certificate of Mailing of the Hearings Officer Decision issued on October 8, 2008, relating to M-07-2; MA-08-6.

H. **LAND USE HISTORY:** The Thornburgh Destination Resort has a long history. The conceptual master plan (CMP) application submitted by Thornburgh Resort Company, LLC (TRC) was denied by the Deschutes County Hearings Officer in a decision dated November 9, 2005 (CU-05-20). The Board initiated a review of denial. That decision was also appealed by Nunzie Gould (hereafter Gould) and Steve Munson (Munson) to the Deschutes County Board of Commissioners (Board). (A-05-16). By a decision dated May 10, 2006, the Board approved the CMP. Gould and Munson appealed the Board's

decision to the Land Use Board of Appeals ("LUBA"). (Nos. 2006-100 and 101). LUBA remanded the Board's decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 2005 (2007). LUBA's decision was appealed to the Court of Appeals seeking a broader remand scope. (A135856). On November 7, 2007, the Court of Appeals reversed and remanded LUBA's decision. *Gould v. Deschutes County*, 216 Or App150, 171 P3d 1017 (2007). The result of this decision was that the Board's decision in CU-05-20 approving the CMP was remanded to the County for further proceedings.

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

Based on the Board's April 15, 2009 decision approving the CMP for the Thornburgh Destination Resort, TRC submitted an amended application for approval of the final master plan (FMP) on April 21, 2008 (M-07/MA-08-6). By a decision dated October 8, 2008, the Hearings Officer approved the FMP. Gould and Munson appealed to the Board, which declined to hear it. Gould and Munson appealed that decision to LUBA (No. 2008-203). On September 9, 2009 LUBA remanded the County's decision. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009). TRC appealed LUBA's decision to the Court of Appeals (A143430). On February 24, 2010 the Court of Appeals affirmed LUBA's decision. *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 759 (2010). LUBA remanded the County's decision on August 17, 2010. On August 15, 2011, the review on remand of the FMP remand was initiated by TRC.

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

county code contrary to a prior LUBA order in this same litigation, as the lower tribunal was bound to follow the appellate court's ruling. (A158835).

On September 25, 2015, Central Land and Cattle Company, LLC asked Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort FMP in application 247-15-000529-A; M-07-2; MA-08-6. The hearings officer found in favor of the applicant regarding the Wildlife Mitigation standards but denied approval of the Thornburgh Destination Resort Final Master Plan based on the no net loss/degradation standard for fish related resources. The Hearings Officer declined to accept new evidence on that issue. The Board declined to exercise discretionary review and Central Land and Cattle Company, LLC appealed to LUBA. On appeal, LUBA affirmed regarding wildlife mitigation but remanded on the issue of no net loss/degradation for fish resources. It held that the Hearings Officer should have accepted new evidence on that issue. (LUBA No 2015-107, September 23, 2016). It also determined that the FMP approval effectively incorporates and displaces the CMP approval. Gould appealed to the Court of Appeals. LUBA's decision was affirmed by the Court of Appeals, without opinion. *Central Land and Cattle Company, LLC et al v. Deschutes County and Gould*, 283 Or App 286, A163359, (2016). The Supreme Court denied review. (S064684, 2017).

I. **REVIEW PERIOD:** Deschutes County Code (DCC 22.34.030(C)), states a final decision must be made within 120 days of the date the applicant initiates the remand in accordance with state law. The applicant initiated the remand on September 18, 2017, making the 120th day for a final decision January 16, 2018.

J. **HEARING:** The hearing was held on October 30, 2017. I provided the statutorily required statements regarding the rights of the parties. I indicated that I had no conflicts of interest. I had no ex parte contacts and did not conduct a site visit. I disclosed that in the summer of 2016 my wife and I hiked along Whychus Creek just east of Sisters but that to my knowledge I was nowhere near Alder Springs. I summarized DCC 22.34.030 A and .040A regarding the procedures and scope of remand proceedings. I admitted the record of the prior proceeding into evidence. I asked for but received no objection to my participation.

I noted that the Board of County Commissioners had remanded the proceeding, citing the following from the LUBA remand decision:

> whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow.

In addition, LUBA concluded that I erred in not accepting evidence regarding this issue.

At the conclusion of testimony, I agreed to keep the written record open as follows:

October 30, 2017 – public hearing:

- November 13, 2017 – new evidence
- November 20 – Rebuttal to new evidence
- November 27 – Final argument (also objections) deadline.

On November 22, 2017, Ms. Fancher requested that the final argument deadline be extended one day. There was no objection from Mr. Dewey and the extension was granted.

III. FINDINGS and CONCLUSIONS:

SCOPE OF PROCEEDINGS ON REMAND

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

1. Chapter 22.34, Proceedings on Remand

a. Section 22.34.010, Purpose

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

STAFF: This matter is before the Hearings Officer on remand from LUBA. Therefore, the procedures in Chapter 22.34 are applicable.

b. Section 22.34.020, Hearings Body

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

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

c. Section 22.34.030, Notice and hearing Requirements

A. The County shall conduct a hearing on any remanded or withdrawn decision, the scope of which shall be determined in accordance with the applicable provisions of DCC 22.34 and state law. Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand.

B. The hearing procedures shall comply with the minimum requirements of state law and due process for hearings on remand and need comply with the requirements of DCC 22.24 only to the extent that such procedures are applicable to remand proceedings under state law.

C. **A final decision shall be made within 120 days of the date the applicant initiates the remand in accordance with state law.**

D. **In addition to the requirements of subsection (C) of this section, the 120-day period established under subsection (C) of this section shall not begin until the applicant requests in writing that the county proceed with the application on remand, but if the county does not receive the request within 180 days of the effective date of the final order or the final resolution of the judicial review, the county shall deem the application terminated.**

E. **The 120-day period established under subsection (C) of this section may be extended for up to an additional 365 days if the parties enter into mediation as provided by ORS 197.860 prior to the expiration of the initial 120-day period. The county shall deem the application terminated if the matter is not resolved through mediation prior to the expiration of the 365-day extension**

STAFF: As discussed in the findings above, written notices of the remand initiation request and public hearing were provided to the parties who participated in the Hearings Officer decision issued on October 8, 2008, relating to M-07-2; MA-08-6s, and only those parties are allowed to participate in the hearing on remand. Procedures for the public hearing comply with the requirements for hearings in Chapter 22.24 of the County's development procedures ordinance. The applicant initiated the remand on September 18, 2017, making the 120th day for a final decision January 16, 2018.

d. Section 22.34.040, Scope of Proceeding

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

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

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

STAFF: As authorized under DCC 22.34.040 above, the Board of County Commissioners (Board) issued Order 2017-036 on October 4, 2017. Specifically, Order 2017-036:

- Reopens the record of the Thornburgh FMP to allow parties to submit and its hearings officer to consider new evidence related to the issue whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow; and,

- Directs the hearings officer on remand not to accept new evidence on any other issues unless allowed by DCC 22.34.040(C).

Incorporated herein by reference is the record of LUBA Case No. 2015-107, *Central Land and Cattle Co. v. Deschutes County*. The applicant, Ms. Gould and LUBA, to the extent this matter is appealed, possess these materials. The LUBA record was also provided to the Hearing Officer.

HEARINGS OFFICER: The parties have several disagreements regarding the scope and meaning of the remand, most of which are relatively tangential and to the extent necessary are discussed below. But one fundamental disagreement must be addressed at the outset.

Ms. Fancher asserts that, "LUBA's remand only requires mitigation of impacts if there is a violation of the no net loss/degradation standard in lower Whychus Creek." And that, "LUBA ...stated the question remanded in a way to allow the county to require mitigation water if and only if a violation of the no net loss/degradation standard will occur without it." She makes it clear that the applicant is willing to provide the mitigation water either way, but seeks a determination on the "without mitigation" issue so that the development may be approved if, as opponent's assert, the mitigation water actually makes conditions worse. Nov. 28, Final Argument.

Mr. Dewey objects, contending that the "or" in the LUBA remand passage is not a presentation of two options. Rather, LUBA simply stated the same issue two ways, i.e. "whether the 106 acre-feet will fully mitigate the loss." LUBA's language should be interpreted as not being intended to disturb the first hearings officer ruling that mitigation is necessary. He objects to the applicant being "allowed to open all this up again". Nov. 13, letter at 8, November 20 letter at 5.

So, despite LUBA's concerted effort to provide clear direction, I am faced again with a fundamental interpretation issue. The statement of the issue quoted by the Board of Commissioners from the LUBA remand decision is not ambiguous. It clearly provides me with two options. But other portions of the LUBA decision and the history preceding it do raise a question regarding its meaning. As Mr. Dewey notes, the prior Hearings Officer concluded that the OWRD mitigation "does not fully address water habitat quality" because it failed to account for the higher water consumption "that likely will occur during the summer months". Therefore, she concluded that the proffered additional mitigation "is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development". LUBA record at 0034. That specific issue of necessity apparently was not appealed.

It its initial remand on this issue, LUBA stated that "it appears the hearings officer was not persuaded by Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that it could be ignored. To ensure that there would be no adverse thermal impact, the hearings officer took Thornburgh up on its offer to secure additional mitigation water from the Three Sisters Irrigation District.... the decision must be remanded for addition (sic) findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek." *Gould v Deschutes County*, 59

Or LUBA 435 (2009) (Gould FMP). This suggests that the issue in the initial remand was limited to whether the proposed mitigation would be effective – not whether it is necessary.

In the current remand decision, LUBA states that:

> We restate below the Whychus Creek issues that were resolved by Gould (*FMP*)...The exception to the adequacy of the initially proposed mitigation...was the additional potential thermal impact on Lower Whychus Creek from increased summer water use...The hearings officer in accepting the additional 106 acre-feet of mitigation failed to address the disagreement between the experts regarding whether the mitigation would be ineffective.... Page 14
>
> Yinger's overstatement of average daily use, if it is an overstatement, would be relevant to the narrow issue on remand, which is limited to whether the thermal impact of the additional water use by the resort in summer months and whether the additional mitigation will result in compliance .... Page 20
>
> Moreover, we agree with petitioners that, because the hearings officer's concern with potential thermal impact of increased resort water usage during summer months appears to have arisen for the first time in the first hearing's officer decision in *Gould* (FMP) after the evidentiary record had closed, the second hearings officer should have allowed and considered additional evidence on remand regarding that concern. Page 25

On balance, coupled with the "or" language relied on by the applicant it appears that the somewhat awkward sentence on page 20 perhaps was meant to read "whether the thermal impact" *requires mitigation.* The last quote also seems to suggest that the entire issue of summer time usage is at issue and is direction for me to address the necessity of the mitigation for summer usage/impacts that the first hearings officer assumed would occur.

I think the more prudent course is to make findings regarding the necessity for mitigation.

B. MISCELLANEOUS ISSUES RAISED BY THE PARTIES

The parties raised some issues that need to be addressed before proceeding to the merits.

1. Mr. Dewey states in a footnote to his October 30, 2017 letter, that "Mr. DeLashmutt has not established that he is authorized by the owners to pursue this remand." The application on remand is from Central Land and Cattle Co., LLC as successor in interest to Thornburgh Resort Co., LLC. Mr. DeLashmutt signed as "agent of record". The application references page 646 of the prior LUBA record – a letter from Agnes DeLashmutt stating that Kameron DeLashmutt is her agent of record for all land use matters and can sign any and all applications..." *See also,* page 1095, appointment as agent of record and page 1097 memorandum of purchase and sale agreement between Loyal Land LLC and Kameron DeLashmutt. As LUBA has noted, the various ownerships and interests involved with the subject property are complex and have evolved over time. Mr. Dewey simply states that old authorizations are not relevant but provides no evidence that they have expired or been revoked. Nothing in the record that I can find suggests that the authorizations are no longer valid. This objection is denied.

2. Mr. Dewey objects in his October 13, 2017 letter that his client was denied due process because CLCC "withheld" its analysis and evidence until the day of the remand and did not have a copy for him at the hearing. Accordingly, it was error for me to keep the record open

for two weeks rather than three as he requested. Nothing in state law or the Code requires that evidence be presented prior to the hearing. Remands are subject to a 120 day deadline. The two weeks granted is more than the seven day open record period provided by statute. I find that the opportunity to respond was reasonable and does not rise to a due process violation.

3. On November 20, 2017, CLCC submitted the 2017 USGS Study, "Simulation of Groundwater and Surface-Water Flow in the Upper Deschutes Basin, Oregon". In his November 27, 2017 letter Mr. Dewey states that he does not object to its inclusion in the record, but requests a three week extension to respond as he and his client were not aware that the report was being released. Again, the statutory timeline on remand is short. Failure of a party to be aware of new evidence published well in advance of the hearing date is not grounds for an extension barring unusual circumstances. Ms. Fancher objects to this request. The request is denied. Mr. Dewey also, however, asks that the "public release" posting of the report dated October 20 be admitted. This includes a short abstract of the report. Ms. Fancher does not expressly object to this request. The relevance of the posting is not evident, but I tend to agree that it is appropriate to include the complete record of the report, which includes the posting and the abstract. I do not see any prejudice to the applicant and the request is granted. The three page posting attached to Mr. Dewey's November 20, letter is accepted into the record.

C. CODE STANDARDS.

Title 18 Deschutes County Code

1. DCC 18.113.070

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

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

In *Gould v. Deschutes County*, 233 Or. App. 623, 227 P.3d 758, 763 (2010) the court stated:

> Thus, the context of DCC 18.113.070(D) strongly suggests that "fish and wildlife resources" refers not to species of fish and wildlife, but to the habitat that supports fish and wildlife. In light of that context, we conclude that DCC 18.113.070(D) allows a focus on fish and wildlife habitat to establish 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." That standard may be satisfied by a plan that will completely mitigate any negative impact on the habitat that supports fish and wildlife, without showing that each individual species will be maintained or replaced on a one-to-one basis.

In *Gould v. Deschutes County,* 227 Or. App. 601, 609-610, 206 P.3d 1106, (2009), the court stated:

> We agree with LUBA that a finding under *Meyer* (that the local government record shows that compliance with DCC 18.113.070(D) is "likely and reasonably certain to succeed") ... would suffice to justify final adjudication of compliance with the approval criterion, as opposed to putting that determination off for another day.

Each side in this remand has submitted multiple, highly technical and largely conflicting reports from experts on the issue of whether the proposed mitigation is adequate. It must be stated that it is very difficult for a lay person to fully understand, much less evaluate, this evidence. As an

initial matter, I would urge the County to consider retaining an independent expert to peer review such evidence in future complex cases such as this. Some other jurisdictions have found this to be a cost-effective way to address such applications.

2. Is mitigation necessary?

CLCC contends that, even without the additional water, its summer water usage has no greater adverse impact than the average daily usage that the prior hearings officer found to be fully mitigated. Newton, Oct. 30, 2017 at 5: "Newton has estimated the temperature impacts of the resort's peak use of water in the summer months and has determined that the greatest impact from the peak summer use without the TSID mitigation is less than .0077 degree Centigrade." Pumping first draws solely from the aquifer. Over time, the "cone of depression" resulting from this pumping spreads. Eventually, it will extend far enough reduce the flow of Alder Springs water, but this will occur gradually over time. Further, at some point, the cone of depression becomes so large that pumping variations no longer manifest themselves through seasonal streamflow impacts. Page 8. This is referred to as a "steady-state condition". Newton notes that the development will be phased, resulting in even more gradual impacts over time.

The parties appear to agree, however, that at some point and then until the "steady state" condition is reached, there will be increased summer time reductions in flow from Alder Springs, and likely elsewhere along lower Whychus Creek (depending on how one allocates where the decrease occurs). *See* Newton, page 2, Nov. 20, 2017 rebuttal, citing Yinger in 2008 stating that seasonal variations are "no longer discernible after 10 years." Citing a USGS simulation, and Yinger's 2008 report, Newton indicates that seasonal pumping variations increase until in year 10, when about 58% of water pumped is from reduced streamflow. Newton Nov. 20, rebuttal of Perrault. It stands to reason that increased summer pumping exacerbates that loss of streamflow more than winter time reduced pumping until the steady state is reached.

I think it important to note that, apparently, steady state does not mean that increased reductions in streamflow stop. They continue until 90% of the water pumped comes from diminished stream flow. The primary disagreement appears to be the degree of streamflow reduction and whether this occurs after 16 years or more like 30 to 40+ years. *See e.g.,* Newton, Nov. 20 Yinger rebuttal at 16; Nov. 20 Perrault rebuttal at 19.

The Newton, Nov. 20 Yinger rebuttal posits numerous "mass balance" analyses of summer time impacts on temperature. The "worst case" is scenario 7B. This uses Yinger's allocation of impacts at 50% to the Alder Springs reach and 50% to the lower area, assuming 2129 AF (full use – no deduction for recharge) on day 1 (no phasing) for Whychus Creek and no additional mitigation. It uses the .2cfs reduction in flow calculated by Yinger and Perrault at 2129 FA. It shows a .0184° Centigrade increase in year 10 (when stabilization is reached so summer time impacts merge with average impacts) at RM .62 with an average increase over years 1-10 at RM 62 of .0129°C. These increases are based on flows between 20-40 cfs for Whychus Creek, with generally lower increases for greater flows.

Newton suggests this worst case scenario is unrealistic because there is, for example, no recognition of lower consumptive use (recharge) and that the reductions in flow are more spread out over lower Whychus.

Newton took several steps to isolate the impact of increased summer pumping. *See generally*, Nov. Nov 20, report at 2. Yinger 2017 calculates an increase of .037 to .054°C from 2014 to 2016 at Alder Springs and .003 to .014°C to the Alder Springs reach and from RM.062 to the mouth of Whychus Creek. The report uses stream flow data from the hottest days in each of the

three years but unlike Newton, does not appear to isolate the increase from increased summer pumping. So it seems to be reasserting average daily impacts that were found in favor of the applicant by the prior hearings officer. Further, it does not explain, at least in a manner I can follow, how these impacts are allocated. On one hand, it states that Alder Springs will be the most impacted, but then states that there are two stream cells below Alder Springs that are impacted. It divides the .2cfs impact from pumping over those two cells. I think what the charts, read together, mean is that the impact on lower Whychus Creek generally (as opposed to isolating Alder Springs) is .003 to .014°C. That reading appears generally consistent with the Newton analysis, although actually somewhat lower than the worst case scenario. *See also,* Yinger Nov. 6, 2015 (The volume of groundwater that discharges into Whychus Creek not at a point, but distributed over a distance of 1.5 miles from Alder Springs, the mixing of groundwater with the stream does not occur at any specific point.)

The Perrault November 11, 2017 report is clearer, stating that Table 2 prorates the impact .1cfs to Alder Springs proper and .1cfs to lower Whychus, showing mean daily impacts of .024 to .028°C at the confluence of Alder Springs and Whychus on the three hottest days in 2015 and 2016, and .013 to .002°C for the remainder of Whychus. His allocation of impacts only to Alder Springs shows an increase on those dates of .034 to .040°C. But he states that the losses would be dominantly split between Alder Springs and the reach from RM .062 to the mouth. Page 7.

It appears that the rather large (on a micro-scale) difference in temperature impacts on the creek between Perrault and Yinger is because Perrault focused on the three hottest days in two low flow years and disregarded, for example, 2016 and 2017 which he states were "aberrantly wet." Although he used three summer days, his report does not separate out the impact from increased summer use pumping, as opposed to total average daily use. Finally, the applicant argues that I should disregard his analysis completely as he is not licensed in Oregon. I am not willing to go that far; he is a hydrologist with significant experience. On the other hand, his experience primarily appears to be in Hawaii so he is the least experienced in the hydrology of Central Oregon. In short, I find that his analysis is the outlier. Newton went to great lengths to replicate Yinger's work and they largely agree as regards the creek itself. Accordingly, I think it appropriate not to place significant weight on Perrault's more significant temperature impacts.

Finally, I find that the more credible evidence is that the impacts from summer pumping will not occur solely, or significantly disproportionately, at Alder Springs. Both Yinger and Perrault acknowledge that two cells, one of which is downstream from Alder Springs, are impacted, so it is hard to see the justification for attributing all of the impact to Alder Springs. The November 20, 2017 Farallon memo notes that the Yinger 2008 report appears to show flow reductions across several stream cells. Newton asserts the impacts will be spread along much of lower Whychus. The subject property is 14 miles from Whychus Creek. Newton October 30 at 6. Groundwater discharges in lower Whychus are roughly 100.6 cfs of which only 8.7 cfs enters at Alder Springs. I find that relying on the "two-cell" impact is appropriately conservative and more likely to occur than the impacts being limited to Alder Springs. *Cf.* Yinger 2008 Report, Figures 7-1, 7-2 showing numerous points of groundwater impact along Whychus Creek. Mr. Dewey states in his Nov. 13, letter that the determination of adequacy of the mitigation "applies to Alder Springs, not just below Alder Springs." If he is arguing that the reduction in groundwater flow at Alder Springs must be taken into account, the applicant has done so while disagreeing that all of the impact occurs there. If he is arguing that impacts on Alder Springs, independent of Whychus Creek must be mitigated, I disagree. No one has noted, nor have I found, any evidence that the springs in and of themselves are fish habitat. All of the studies address the springs in the context of their contribution to the fish habitat resource in Whychus Creek, not as themselves being habitat.

The October 30, 2017 TetraTech Technical Memorandum addresses the impact on fish of temperature changes in fish habitat, apparently based on a draft of the Newton calculations referenced above. It notes that fish are "highly sensitive" to temperature changes and, depending on species, may be able to detect temperature differences of .05 to.2°C. It notes that the scientific literature typically reports to the nearest .01°C, at the "very lowest", suggesting that lesser changes are not functionally meaningful. TetraTech also notes that the Environmental Protection Agency considers increases on the order of .025°C above natural background would not impair the designated uses and, therefore, "might be regarded as *de minimus*". The opponents did not submit biological evidence addressing summer pumping or the effectiveness of the proposed mitigation. *Cf.* Clearwater BioStudies, Inc., 2008 report. Prior LUBA Record at 2587.

ODFW concluded that mitigation to Whychus Creek is not needed to meet its "No Net Loss Standard" although mitigation would provide additional benefits to the creek and to the fisheries resource.

The applicant contends that mitigation is unnecessary because the temperature increases modeled are very small, under the levels harmful to fish and overstated by not taking into account such things as groundwater recharge (consumptive use.) This is a close call, but I think the potential for negative impacts warrants mitigation. First, it is not clear that the .01°C impact that the first hearings officer found to be acceptable in the context of annual average impacts is applicable to summer time impacts associated with increased pumping. There is no doubt the summertime water flowing through Whychus Creek above Alder Springs will be warmer than the annual average and flows are lower. It seems logical that temperature impacts have at least marginally greater significance when those conditions exist. Fish no doubt are under greater stress. The County standard may well be stricter than that applied by ODFW and the EPA. Although I highlighted the "worst-case" scenario, all of the scenarios posit some increase and for several the potential impacts in year 10 that approach .01°C and per TetraTech likely would be rounded up to .01°C. *See, e.g.* 5B, 6B, 7A. Other variables include whether Newton accurately calculated summer usage at 2.6 times the average. Newton Oct. 30 at 9. In short, there are simply too many variables and the tolerances are so low that I find that one must look at the trend. The trend is that summer usage has some greater impact than average daily usage at least until stabilization and, under certain (albeit atypical) conditions may impact fish resources. I find that the first hearings officer did not err when requiring that the applicant address this potential through mitigation.

3. Is the mitigation adequate/effective?

The record is clear that, in general, the thermal mass from increased flow results in lower creek temperatures and improved fish habitat. Whychus Creek is the subject of a long-term, multi-entity effort to increase creek flows by keeping water in the creek that otherwise would be diverted for irrigation or other uses. In short, it appears that the applicant is proposing mitigation of the type that advocates and regulatory bodies say is needed and appropriate. *See e.g.* Golden & Wymore, Whychus Creek Stream Flow at 17, "Increasing [late summer and early fall base flows] should remain a priority for restoration partners..." UDWC prior LUBA record at 554. Indeed, Yinger adjusted his calculations of temperature impact downward partly because of "increased flows in Whychus Creek over the past 10 years." Yinger, Nov. 12, page 7.

Yet, the opponents contend that this additional water not only will not mitigate summer time project impacts, but actually will degrade the habitat value of lower Whychus Creek. They do not contend that the efforts by other entities to restore Whychus Creek through increased flow are

misguided. One explanation for this seeming contradiction is that, as I previously decided and LUBA upheld, the applicant's must address lower Whychus Creek in isolation. In contrast, the other entities are willing and able to trade off some degradation in lower Whychus for improvements in the middle reaches. But I have not found, nor been pointed to, any evidence that those entities are engaged in such a trade-off. The literature in the record contains no mention of potential adverse impacts to lower creek habitat. Rather, it uniformly touts the benefits of flow restoration on habitat, including stream temperatures.

The other explanation is that there is something unique about this proposal and its impact on Whychus Creek that causes the mitigation proposed to have the opposite and negative effect from that of similar restoration efforts. In his Nov. 12, 2017 report, Yinger phrases it this way: "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."

First, I think it important to restate that the issue in this remand is limited to whether the incremental increase in usage during the summer is adequately mitigated. It has been established that the impact of average daily use and the resulting loss of spring water either simply is not sufficient to violate the no degradation standard or is adequately mitigated by the purchase of water rights, dam removal and other steps proposed by the applicant.

Neither the Yinger nor the Perrault reports clearly delineate that distinction. They use the hottest summer time temperatures and summer stream flows, but otherwise do not segregate average and peak pumping. They use steady-state conditions rather than transient, so by definition the summer time withdrawal peaks are not discernible. Newton asserts that they actually are showing results for average daily groundwater withdrawal and so are not responsive to the issue on remand.

As discussed above, the calculations performed by Newton and Yinger to assess the loss of spring water are not that far apart when using the same assumptions (which the applicant asserts overstate the risk). But they are on opposite poles when performing similar calculations regarding the impact of restoring previously diverted stream flow.

Yinger asserts that the water left in the stream by the proposed diversion is much warmer than the springs. He cites a seven day moving average maximum stream temperature from July 23, 2016 to August 2, 2016 of 18.2 to 19.6°C upstream from the diversion. He cites to Mork (2016), which I think is the undated report titled "Whychus Creek Water Quality Status." He states that the water increases to as high as 23.7°C as if flows downstream. Yinger Nov. 12, at 3. The Alder Springs water ranges from 9° to 11°C, with all parties generally using 11°C as the standard. The stream itself appears to be in the 13°C range below Alder Springs. The creek is substantially cooled by springs upstream of Alder Springs, but primarily from Alder Springs and springs further downstream. Yinger concludes that the temperature increase with mitigation from the Alder Springs reach to the mouth ranges from .021 to .045°, vs .003 to .013°. (As noted above, I find that attributing all impacts solely to the confluence of Alder Springs and the creek as shown on page 7 is not realistic). Yinger, Nov. 12 at 8. It is not clear what temperature Perrault assigns to the non-diverted water input, but for flow he uses June 2015 and 2016, which he notes are the two lowest flow periods between 2013 and 2017. Ultimately, he finds a prorated mean daily temperature with mitigation of .023 to .042°, depending on location.

Scott Yankey, Farallon November 20, 2017 memo, contests Yinger's temperature input data. He cites Oregon Water Resources Data for station 1407500, above the proposed diversion site showing the daily mean temperatures from 9.3 to 12.3°C, with moving average maximum

stream temperatures for July 23-Aug.2, 2016, as ranging from 12.3 to 14.3°C. He contends that the moving average mean temperatures of 10.0 to 11.4°C are the best indicator of temperature. He also states that the Mork (2016) report does not, in fact, contain the temperature numbers that Yinger assigns. I also cannot find the temperatures cited by Yinger. Appendix A to the Mork report shows temperatures at Sisters City Park ranging from 20.8°C to 11.7°C, depending on flows with somewhat warmer temperatures at Road 6360. But these are several miles downstream from the diversion. I do not see any temperature measurements at the diversion point in the Mork report. The 2014 Mork report contains a graph that is hard to decipher but she states that stream temperature exceeded 18°C at five sites, all substantially downstream from the diversion site. Page 30, Whychus Creek Water Quality Status. She calls for flow restoration and states that "small gains in stream flow restoration that result in similarly small reductions in temperature are nonetheless likely to improve habitat conditions for some fish in some locations. " Page 38. Newton asserts that the water is 13°C "according to Yinger's data" but does not provide a reference to support that assertion.

Newton's Oct. 30, 2017 Report contains the OWRD data for Gage 14075000, showing July 2016 temperatures ranging from 9.6 to 15.2°C. Figure 64 shows Whychus Creek at roughly 13-14°C for July 2000 in the vicinity of the diversion. The temperatures generally spike significantly after that point until the vicinity of Alder Springs and below. DEQ/Watershed Sciences Stream Temperature Simulations (2008) page 80, LUBA 2015-107 Page 443, 504. Whychus Creek just upstream of Alder Springs was measured at 23-27°C in July, 2000. Id., at 443,

Virtually all, if not all, of the studies in the record support the concept that increasing stream flows is beneficial and lowers water temperatures. *See e.g.* Mork, page 39, "Stream flow restoration that has increased the minimum flow delivered instream…corresponding to lower observed temperatures." LUBA 2015-107 page 553. Upper Deschutes Watershed Council, priorities include "increased summer streamflow".) LUBA No 2017-107, page 653. The Deschutes River Conservancy has been working on streamflow restoration in Whychus Creek since the late 1990's, and is working to protect 7 cfs of new flow. LUBA No 2015-107 page 655. The concept is relatively straight forward, a greater mass of water heats more slowly than a larger mass of water. In contrast, with the exception of the opponent's experts I can find no support for the notion that adding water that otherwise would be diverted somehow increases water temperatures or otherwise is harmful. *See e.g.* TetraTech Oct. 30 memorandum.

Ms. Fancher asserts that Yinger models the effect of adding "warm" water at Alder Springs, i.e. does not reflect that restoring cool water at the diversion point lowers, or at least reduces the increase in temperature, of the water in the creek as it meets Alder Springs. It is not clear to me whether that is the case, but it would seem to explain Yinger and Perrault's results.

The preponderance of the evidence is that the water proposed to be reinstated to Whychus Creek is relatively "cold" and can be as cold as Alder Springs inflow, although generally is somewhat warmer. It is substantially colder than the water in Whychus Creek above where it meets Alder Springs. Therefore, it is logical to conclude that the additional water does not warm Whychus Creek, but rather cools it slightly (or keeps it from warming). In other words, more slightly cooler water at the point Whychus Creek meets Alder Springs is better than less, slightly warmer water. Newton both previously and in this proceeding has run numerous new mass balance calculations, representing varying scenarios, primarily using UDWC streamflow and temperature data, and reran them with USGS data. Virtually all show that the mitigation, by cooling Whychus Creek as it flows into the Alder Springs area, results in slightly lower temperatures in lower Whychus Creek than without mitigation. This includes at rates that do not account for consumptive vs permitted use and otherwise appear to be conservative.

I find that the work performed by Newton, and backed up by Farallon is more complete and persuasive. In contrast, the analysis done by Yinger generally does not attempt to focus on the summer/irrigation impacts, appears to use erroneous or perhaps an extreme outlier for temperature input and generally provides nothing comparable to the details provided by the applicant. The Yinger/Perrault work does not demonstrate why the mitigation proposed by the applicant has the opposite effect of the comparable mitigation being pursued by numerous regulatory and nonprofit groups seeking to benefit the creek. Perrault asserts, for example, that it would take adding nearly double the state water right of 33cfs to lower Whychus Creek to meet "temperature standards" (presumably 18dC and/or 12.8dC for spawning). First, that seems to confirm that more water tends to lower temperature. But more importantly, the applicant is not charged with restoring Whychus Creek. It is charged with mitigating the apparently very slight and transient temperature impact caused by the delta between its average daily pumping rate (or even lower consumptive rate) and its summer usage. Those are small numbers, so a small increase in mitigation water would seem correspondingly appropriate – the issue being whether the quantity and quality of the mitigation is adequate.

It is worth noting that, to the extent there are impacts, positive or negative, they are very minor and occur in an area of Whychus Creek that is neither flow nor temperature limited. It was a close call as to whether the summer impacts are significantly greater enough to warrant mitigation beyond that required for average daily usage, but the applicant has demonstrated that whether "necessary" or not, it slightly benefits and does not degrade the natural resource.

Finally, Perrault argues that the applicant should be required to add 146 AF rather than 106 AF based on his analysis of the updated USGS groundwater model. He does not run scenarios showing the temperature impact of an additional 40 AF. The USGS report indicates larger than anticipated groundwater reductions and expresses concern about pumping, canal lining and other influences. But there also have been flow increases over time in Whychus Creek. Perrault states that the original modeling suggested that .0145 cfs (106AF) of mitigation water was needed assuming pumping at 2355 AF and that revised modeling performed by Yinger/Tran suggest that 2cfs is needed at 2129 AF. It is not clear to me how the modeling went from .02 cfs to .0145 cfs. Yinger Nov. 12 at 5-6.

Newton appears to acknowledge this, contending primarily that the wells simulated in the USGS report are within 5 miles of Whychus Creek whereas the proposed well is 14 miles away so the timing of impacts will be longer, but acknowledges that they may be sooner than he originally envisioned. Again, the relevance of this is unclear – all parties acknowledge that steady state conditions will be reached at some point. The transient state analysis serves the purpose of parsing out the increased summer use from annual usage. In any event, Newton reran the numbers using .20 cfs and the resulting temperature reductions are those cited above. In short, the 106AF reduces temperatures from those incurred without mitigation. The only exception is a potential .0021°C increase at the RM .062 and .0003°C at the mouth at minimum flow conditions (under 18 cfs). Newton contends that these low flows are virtually impossible given the groundwater flow into lower Whychus Creek. *See also* Prior Record at 2598. These impacts only occur if there is no groundwater recharge, almost certainly overstating the impact. That appears to be correct, but in any event the potential increases under two unlikely scenarios are so nominal that they do not warrant a finding that the proposed mitigation is inadequate.

I find that the proposed 106 AF is likely and reasonably certain to succeed in mitigating any adverse impacts of the natural resource offered by lower Whychus Creek caused by increased summer time pumping. With the mitigation, there is no net loss or net degradation of the resource.

4. Miscellaneous Issues

Mr. Dewey raises several additional issues relating to the merits of the issues on remand.

- .01°C is not a hard dividing line. I agree. As discussed above, the .01°C that the original hearings officer found to be nominal is a not a hard and fast standard. Nominal temperature impacts may be more significant in the summer months. I have considered the projected impacts and the evidence in the record to conclude that the required mitigation will completely offset the small temperature increases that may occur due to summer time pumping. I am not relying on the .01° as a bright line.

- Applicant has not demonstrated TSID water is available. The issue of whether the TSID water remains available is not before me. The only new evidence in the record directly on point is the letter stating that the water is still available. In any event, the 106 AF of mitigation is required and, if unavailable, the applicant cannot proceed without a modification of the approval.

- Impact of declines in groundwater. There is evidence that Whychus Creek flows have increased and that groundwater has declined. It appears that some of this is from increased piping, which reduces groundwater recharge from open canals. But it also permits more water to be maintained in stream rather than lost to evaporation and seepage. Newton ran calculations based on a wide range of stream flows and does not appear to rely on the recent increased flows. Opponents have not demonstrated how declines in groundwater, assuming they are occurring in areas impacting Alder Springs, alter the analysis of impacts on fish habitat. Finally, again I return to the fact that the parties involved in restoring the habitat afforded by Whychus Creek appear to support increased flows that piping appears to promote, so it is unclear how piping increases the proposal's impacts on fish habitat.

5. Condition of Approval.

The condition of approval at issue in this remand states:

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.

No one has taken issue with this language. I am concerned, however, that given the issues subsequently raised, the language may not be adequate. For example, it does not expressly state when the diversion actually must take effect. For the mitigation water to be effective, it must be in place prior to the start of impacts on Alder Springs and lower Whychus Creek. The evidence as to when summer pumping impacts become discernible is unclear to me. Newton's mass balance analysis appears to suggest that small impacts become discernible in year one. Accordingly, I find that the condition needs to be revised to ensure that mitigation timely occurs.

The condition is revised as follows (new language in italics):

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 restoration shall occur as described in the applicant's submittals. The mitigation water shall be placed in stream no later than the date that*

groundwater pumping to serve the development commences (not testing). The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement prior to the completion of Phase A.

D. CONCLUSION:

Based on the foregoing findings and conclusions, and with the revised condition of approval, the proposed 106 AF of mitigation from TSID is necessary to mitigate summer pumping impacts on Whychus Creek and is adequate and likely and reasonably certain to succeed in mitigating adverse impacts, resulting in no net loss nor degradation in the resource.

Done and dated this 1st day of January, 2018

Dan R. Olsen

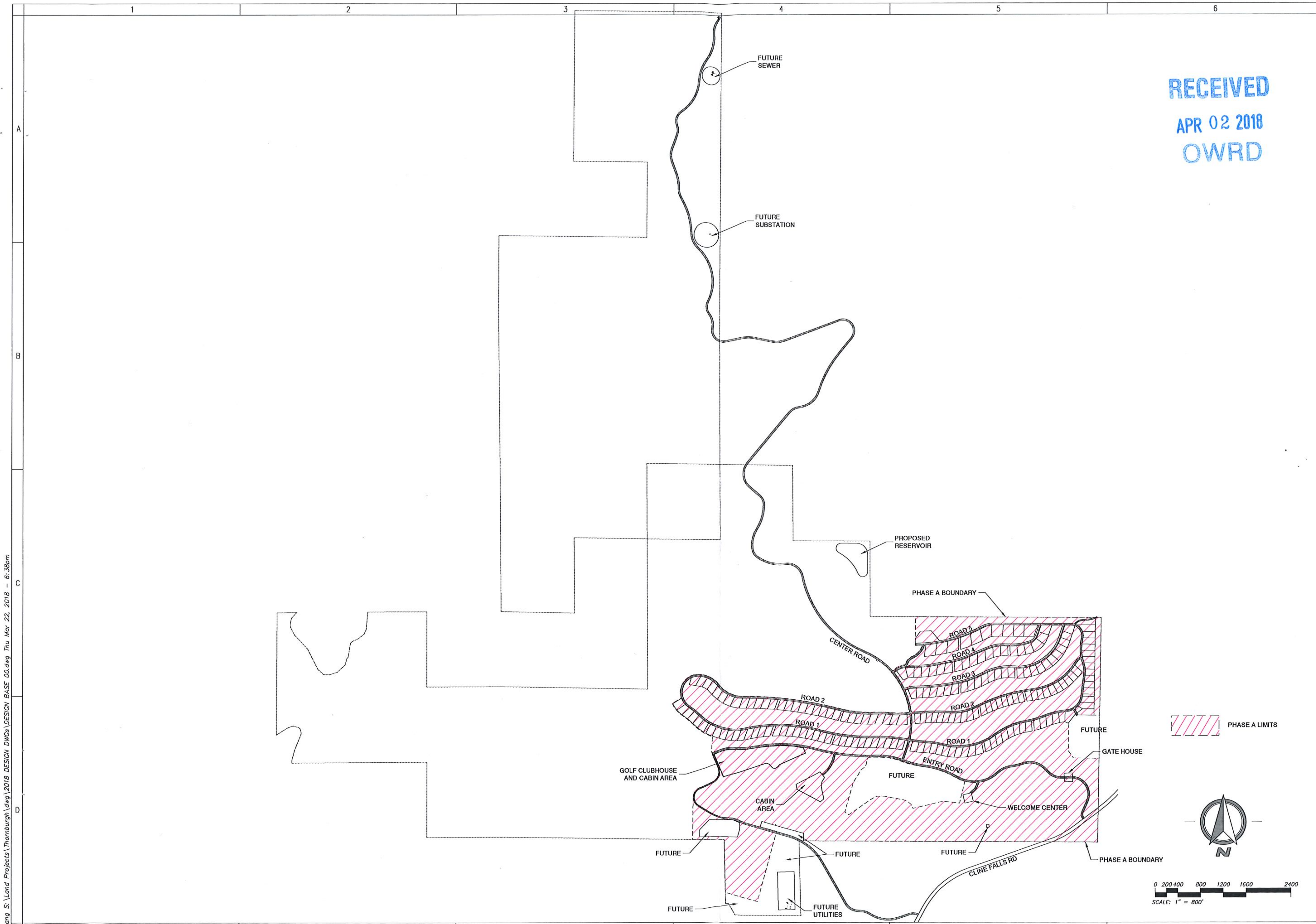
Dan R. Olsen
Hearings Officer

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPEALED.

Exhibit 40: Tentative Plans-Prelim. Maps for Phase A Submittal

03/2018

EXHIBIT 40



PRELIMINARY

THORNBURGH

PHASE A
SITE PLAN

BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62930 O.B. RILEY ROAD, STE 100, BEND, OR 97703
PH: (541)389-9351 | FAX: (541)388-5416
WEB: WWW.HWA-NC.ORG

REVISIONS

1.
2.
3.

DESIGNED BY:	RCG
DRAWN BY:	RCG
CHECKED BY:	
SCALE:	1"=800' @ 22x34
FILE:	DESIGN BASE 00
DATE:	3/22/2018

SHEET
TP1.1

HWA# 180110

rchang S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\DESIGN BASE 00.dwg Thu Mar 22, 2018 - 6:38pm

PRELIMINARY

THORNBURGH
PHASE A
SITE
BEND OREGON

PHASE A BOUNDARY
ROAD 5
ROAD 4
ROAD 3
ROAD 2
ROAD 1
DESERT ROAD
GOLF CLUBHOUSE AND CABIN AREA
CABIN AREA
FUTURE
ENTRY ROAD
GATE HOUSE
WELCOME CENTER
FUTURE UTILITIES
SECONDARY ACCESS
CLINE FALLS RD

N

0 75 150 300 450 600 900
SCALE: 1" = 300'

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62975 OB RILEY ROAD, STE 100, BEND OR 97703
PH: (541)389-4251 | FAX: (541)388-5465
WEB: WWW.HWA-NW.COM

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=300' @ 22x34
FILE: DESIGN BASE 00

DATE: 3/22/2018

SHEET
TP1.2

HWA# 180110

LINE TABLE		
LINE#	LENGTH	DIRECTION
L1	176.49	S16° 59' 05.55"W
L2	176.82	S15° 00' 41.84"W
L3	178.22	S14° 59' 48.90"W
L4	177.43	S14° 59' 48.90"W
L5	175.30	S14° 59' 48.90"W
L6	175.47	S17° 24' 19.47"W
L7	177.45	S17° 24' 40.97"W
L8	179.27	S14° 59' 48.90"W
L9	184.03	S14° 59' 48.90"W
L10	191.11	S14° 59' 48.90"W
L11	183.67	S3° 00' 22.75"W
L12	177.65	N10° 59' 16.27"W
L13	178.81	S10° 59' 16.27"E
L14	183.27	N10° 59' 16.27"W
L15	189.94	S10° 59' 16.27"E
L16	188.73	S10° 59' 16.27"E
L17	180.33	S13° 11' 25.15"E
L18	178.64	S9° 54' 46.80"E
L19	178.90	S4° 09' 26.49"E
L20	176.18	S4° 09' 26.49"E
L21	176.56	N4° 09' 26.49"W
L22	177.38	S4° 09' 26.49"E
L23	180.23	S4° 41' 24.58"E
L24	182.60	S6° 07' 07.96"E
L25	179.14	N4° 54' 59.88"W
L26	176.13	S4° 54' 59.88"E
L27	176.55	S1° 46' 52.14"W
L28	205.47	N38° 06' 13.25"E
L29	68.66	S68° 34' 12.84"E
L30	278.61	S89° 41' 30.37"E
L31	123.98	S52° 52' 51.43"W
L32	110.01	N0° 53' 26.93"E
L33	201.63	S89° 41' 30.37"E
L34	95.53	S59° 43' 56.46"E
L35	239.85	N89° 41' 30.37"W
L36	110.01	N0° 53' 26.93"E
L37	110.01	N0° 53' 26.93"E
L38	203.87	N89° 41' 30.37"W
L39	110.01	N0° 53' 26.93"E
L41	188.30	S89° 41' 30.37"E
L42	110.01	N0° 53' 26.93"E
L43	110.01	N0° 53' 26.93"E
L45	28.92	S6° 45' 43.64"W
L46	165.65	S89° 41' 23.53"E
L47	162.31	S89° 41' 30.37"E
L48	110.01	N0° 53' 26.93"E
L49	187.78	N89° 41' 30.37"W
L50	110.01	N0° 53' 26.93"E

LINE TABLE		
LINE#	LENGTH	DIRECTION
L51	217.39	S89° 41' 30.37"E
L52	110.01	N0° 53' 26.93"E
L53	230.69	S89° 41' 30.37"E
L54	110.01	N0° 53' 26.93"E
L55	228.45	S89° 41' 30.37"E
L56	110.01	N0° 53' 26.93"E
L57	210.83	N89° 41' 30.37"W
L58	110.01	N0° 53' 26.93"E
L59	220.92	S89° 41' 30.37"E
L60	120.01	N0° 53' 26.93"E
L61	326.81	N89° 41' 30.37"W
L62	175.18	S2° 33' 22.22"E
L63	176.57	N3° 47' 25.39"E
L64	176.84	N5° 44' 10.86"E
L65	178.94	N10° 47' 49.38"E
L66	180.01	N13° 36' 49.08"E
L67	179.52	N14° 17' 02.50"E
L68	179.11	N15° 01' 28.55"E
L69	181.96	N14° 35' 58.65"E
L70	181.19	N7° 06' 02.15"E
L71	183.09	N2° 39' 32.53"E
L72	179.60	N8° 11' 39.13"W
L73	184.36	N8° 11' 39.13"W
L74	183.82	S8° 11' 39.13"E
L75	177.75	N13° 46' 59.88"W
L76	176.76	N13° 46' 59.88"W
L77	175.99	N13° 46' 59.88"W
L78	175.45	N13° 46' 59.88"W
L79	175.12	N13° 46' 59.88"W
L80	175.00	N13° 46' 59.88"W
L81	175.09	N13° 46' 59.88"W
L82	175.39	N13° 46' 59.88"W
L83	175.57	S13° 46' 59.88"E
L84	176.17	N13° 46' 59.88"W
L85	175.00	N10° 29' 56.37"W
L86	175.07	N14° 14' 09.94"W
L87	175.02	N20° 28' 00.93"W
L88	175.01	N27° 39' 19.81"W
L89	175.01	S32° 57' 46.42"E
L90	175.03	N36° 40' 46.53"W
L91	175.01	N42° 35' 50.13"W
L92	175.07	N47° 06' 20.06"W
L93	176.00	N48° 35' 35.80"W

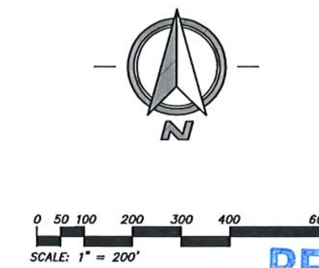
CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C1	118.12	2,491.00	2.72
C2	112.13	2,316.00	2.77
C3	112.72	2,316.00	2.79
C4	112.53	2,491.00	2.59
C5	41.22	2,316.00	1.02
C6	70.85	1,124.00	3.61
C7	79.29	2,491.00	1.82
C8	32.93	949.00	1.99
C9	110.63	1,124.00	5.64
C10	110.89	949.00	6.69
C11	65.76	1,124.00	3.35
C12	46.68	1,116.00	2.40
C13	64.93	949.00	3.92
C14	40.14	1,291.00	1.78
C15	111.27	1,116.00	5.71
C16	111.00	1,291.00	4.93
C17	110.27	1,116.00	5.66
C18	117.29	1,291.00	5.21
C19	115.64	1,116.00	5.94
C20	114.37	1,291.00	5.08
C21	120.03	1,116.00	6.16
C22	117.49	1,291.00	5.21
C23	106.04	1,116.00	5.44
C24	145.32	1,291.00	6.45
C25	109.13	1,116.00	5.60
C26	153.35	1,291.00	6.81
C27	114.31	1,116.00	5.87
C28	113.17	1,291.00	5.02
C29	118.42	1,116.00	6.08
C30	116.10	1,291.00	5.15

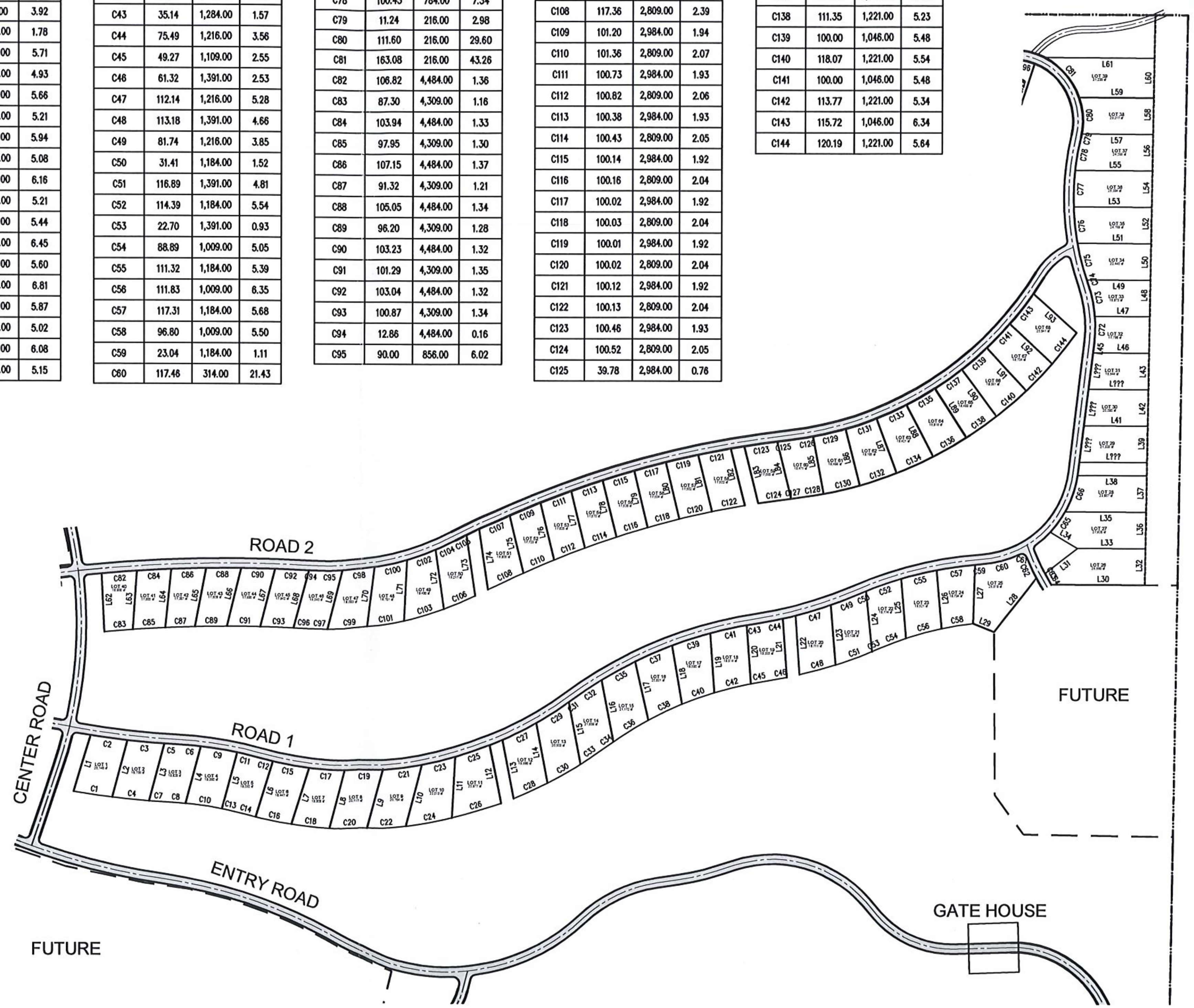
CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C31	10.29	1,116.00	0.53
C32	109.24	1,284.00	4.87
C33	91.34	1,291.00	4.05
C34	28.65	1,109.00	1.48
C35	116.41	1,284.00	5.19
C36	125.78	1,109.00	6.50
C37	122.72	1,284.00	5.48
C38	113.09	1,109.00	5.84
C39	120.76	1,284.00	5.39
C40	103.12	1,109.00	5.33
C41	111.30	1,284.00	4.97
C42	111.75	1,109.00	5.77
C43	35.14	1,284.00	1.57
C44	75.49	1,216.00	3.56
C45	49.27	1,109.00	2.55
C46	61.32	1,391.00	2.53
C47	112.14	1,216.00	5.28
C48	113.18	1,391.00	4.66
C49	81.74	1,216.00	3.85
C50	31.41	1,184.00	1.52
C51	116.89	1,391.00	4.81
C52	114.39	1,184.00	5.54
C53	22.70	1,391.00	0.93
C54	88.89	1,009.00	5.05
C55	111.32	1,184.00	5.39
C56	111.83	1,009.00	6.35
C57	117.31	1,184.00	5.68
C58	96.80	1,009.00	5.50
C59	23.04	1,184.00	1.11
C60	117.46	314.00	21.43

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C61	23.39	13.00	103.07
C62	72.15	616.00	6.71
C63	20.04	584.00	1.97
C64	20.15	616.00	1.87
C65	77.43	316.00	14.04
C66	116.75	316.00	21.17
C72	81.44	356.13	13.10
C73	105.21	416.00	14.49
C74	7.79	784.00	0.57
C75	113.73	784.00	8.31
C76	110.76	784.00	8.09
C77	110.14	784.00	8.05
C78	100.43	784.00	7.34
C79	11.24	216.00	2.98
C80	111.60	216.00	29.60
C81	163.08	216.00	43.26
C82	106.82	4,484.00	1.36
C83	87.30	4,309.00	1.16
C84	103.94	4,484.00	1.33
C85	97.95	4,309.00	1.30
C86	107.15	4,484.00	1.37
C87	91.32	4,309.00	1.21
C88	105.05	4,484.00	1.34
C89	96.20	4,309.00	1.28
C90	103.23	4,484.00	1.32
C91	101.29	4,309.00	1.35
C92	103.04	4,484.00	1.32
C93	100.87	4,309.00	1.34
C94	12.86	4,484.00	0.16
C95	90.00	856.00	6.02

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C96	49.75	4,309.00	0.66
C97	53.70	1,031.00	2.98
C98	97.54	856.00	6.53
C99	120.65	1,031.00	6.70
C100	100.72	856.00	6.74
C101	113.75	1,031.00	6.32
C102	94.33	856.00	6.31
C103	128.40	1,031.00	7.14
C104	67.50	856.00	4.52
C105	37.22	2,984.00	0.71
C106	103.42	1,031.00	5.75
C107	98.79	2,984.00	1.90
C108	117.36	2,809.00	2.39
C109	101.20	2,984.00	1.94
C110	101.36	2,809.00	2.07
C111	100.73	2,984.00	1.93
C112	100.82	2,809.00	2.06
C113	100.38	2,984.00	1.93
C114	100.43	2,809.00	2.05
C115	100.14	2,984.00	1.92
C116	100.16	2,809.00	2.04
C117	100.02	2,984.00	1.92
C118	100.03	2,809.00	2.04
C119	100.01	2,984.00	1.92
C120	100.02	2,809.00	2.04
C121	100.12	2,984.00	1.92
C122	100.13	2,809.00	2.04
C123	100.46	2,984.00	1.93
C124	100.52	2,809.00	2.05
C125	39.78	2,984.00	0.76

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C126	70.84	1,046.00	3.88
C127	17.80	2,809.00	0.36
C128	82.69	1,221.00	3.88
C129	100.00	1,046.00	5.48
C130	111.41	1,221.00	5.23
C131	100.00	1,046.00	5.48
C132	119.03	1,221.00	5.59
C133	100.00	1,046.00	5.48
C134	121.96	1,221.00	5.72
C135	100.00	1,046.00	5.48
C136	116.21	1,221.00	5.45
C137	100.00	1,046.00	5.48
C138	111.35	1,221.00	5.23
C139	100.00	1,046.00	5.48
C140	118.07	1,221.00	5.54
C141	100.00	1,046.00	5.48
C142	113.77	1,221.00	5.34
C143	115.72	1,046.00	6.34
C144	120.19	1,221.00	5.64





PRELIMINARY

THORNBURGH
PHASE A
LOT DIMENSIONS
BEND
OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62930 OB RILEY ROAD, STE 100, BEND, OR 97703
PH: (541)389-9351 | FAX: (541)388-5416
WEB: WWW.HWA-NC.ORG

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=200' @ 22x34
FILE: DESIGN BASE 00

DATE:
3/22/2018

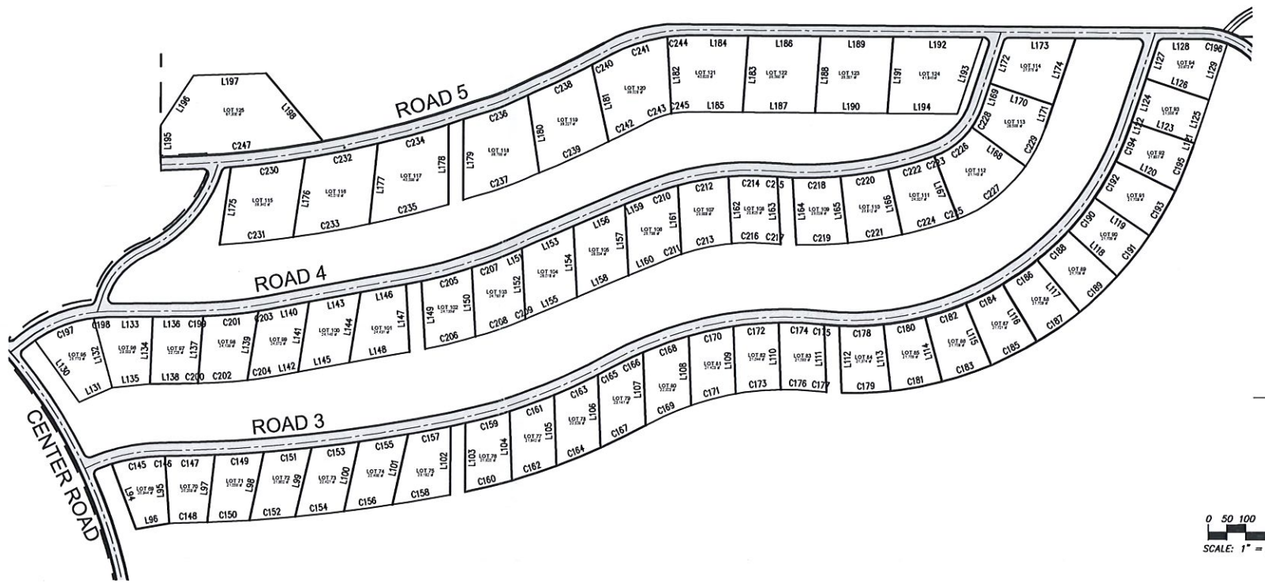
SHEET
TP2.1

HWA# 180110

rchang S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\DESIGN BASE 00.dwg Thu Mar 22, 2018 – 6:40pm

LINE TABLE		
LINE#	LENGTH	DIRECTION
L94	181.26	S20° 32' 18.58"E
L95	175.31	N3° 50' 37.70"W
L96	90.00	N80° 15' 30.49"E
L97	177.09	N6° 24' 26.20"E
L98	182.05	N11° 51' 16.63"E
L99	185.56	N13° 27' 48.43"E
L100	186.25	N12° 12' 08.41"E
L101	188.57	N12° 12' 08.41"E
L102	178.78	N0° 13' 04.97"E
L103	179.37	S0° 13' 04.97"W
L104	180.87	N2° 06' 25.23"W
L105	185.05	N2° 06' 25.23"W
L106	190.70	N2° 06' 25.23"W
L107	191.59	N2° 06' 25.23"W
L108	181.45	N2° 06' 25.23"W
L109	176.31	N2° 06' 25.23"W
L110	175.04	N2° 06' 25.23"W
L111	176.16	N2° 06' 25.23"W
L112	175.40	S2° 06' 25.23"E
L113	175.00	N6° 20' 32.34"W
L114	175.00	N14° 34' 25.21"W
L115	175.00	N22° 48' 18.08"W
L116	175.00	N31° 02' 27.97"W
L117	175.00	N39° 16' 20.83"W
L118	175.00	S47° 30' 13.70"E
L119	175.00	N55° 44' 06.56"W
L120	175.00	S63° 57' 59.43"E
L121	8.49	N18° 23' 07.68"E
L122	8.49	S18° 23' 07.68"W
L123	175.00	S71° 36' 52.32"E
L124	120.00	S18° 23' 07.68"W
L125	120.00	N18° 23' 07.68"E
L126	175.00	S71° 36' 52.32"E
L127	109.48	S18° 23' 07.68"W
L128	114.58	N89° 41' 24.57"W
L129	153.89	N18° 23' 07.68"E
L130	198.65	S35° 41' 17.25"E
L131	95.00	N66° 06' 49.16"E
L132	188.20	N15° 05' 04.26"W
L133	119.30	S89° 29' 21.56"W
L134	175.23	N2° 28' 02.77"E
L135	100.12	N84° 13' 51.44"E
L136	101.30	S89° 29' 21.56"W
L137	175.94	N4° 15' 59.12"E
L138	110.40	N89° 29' 21.56"E
L139	183.14	N9° 02' 40.02"E
L140	115.05	S79° 27' 07.95"W
L141	185.75	N9° 02' 40.02"E
L142	52.77	N79° 27' 07.95"E
L143	137.99	S79° 27' 07.95"W
L144	185.75	N9° 02' 40.02"E
L145	137.99	N79° 27' 07.95"E
L146	119.94	S79° 27' 07.95"W

LINE TABLE		
LINE#	LENGTH	DIRECTION
L147	176.50	N3° 04' 32.91"W
L148	159.28	N79° 27' 07.95"E
L149	177.06	S3° 04' 32.91"E
L150	180.92	N3° 04' 32.91"W
L151	56.84	S67° 16' 03.63"W
L152	185.82	N3° 04' 32.91"W
L153	148.66	S67° 16' 03.63"W
L154	185.83	N3° 04' 32.91"W
L155	143.00	N67° 16' 03.63"E
L156	148.77	S67° 16' 03.63"W
L157	185.83	N3° 04' 32.91"W
L158	148.77	N67° 16' 03.63"E
L159	45.26	S67° 16' 03.63"W
L160	107.77	N67° 16' 03.63"E
L161	180.09	N3° 04' 32.91"W
L162	175.08	S3° 04' 32.91"E
L163	176.18	N3° 04' 32.91"W
L164	175.55	S3° 04' 32.91"E
L165	175.04	N6° 38' 25.75"W
L166	175.00	N12° 22' 49.71"W
L167	175.00	N20° 47' 45.90"W
L168	175.00	N54° 44' 17.91"W
L169	63.06	S18° 23' 07.68"W
L170	175.00	N71° 36' 52.32"W
L171	62.93	N18° 23' 07.68"E
L172	126.16	S18° 23' 07.68"W
L173	184.08	N89° 41' 24.57"W
L174	183.28	N18° 23' 07.68"E
L175	205.00	S8° 16' 12.10"W
L176	209.45	S8° 37' 59.99"W
L177	211.25	S5° 50' 04.00"W
L178	209.43	N0° 00' 00.00"E
L179	210.48	S0° 00' 00.00"E
L180	205.99	S8° 34' 19.12"E
L181	206.02	S12° 45' 27.43"E
L182	201.02	S3° 16' 19.80"E
L183	200.42	S4° 01' 54.68"W
L184	158.24	N89° 41' 24.57"W
L185	145.23	S89° 41' 24.57"E
L186	190.43	N89° 41' 24.57"W
L187	190.37	S89° 41' 24.57"E
L188	200.43	S4° 02' 56.39"W
L189	190.44	N89° 41' 24.57"W
L190	190.37	S89° 41' 24.57"E
L191	200.43	S4° 04' 05.85"W
L192	234.30	N89° 41' 22.41"W
L194	182.16	S89° 41' 24.57"E
L195	81.57	S0° 01' 07.16"E
L196	157.60	S33° 25' 57.25"W
L197	190.02	S87° 51' 23.51"W
L198	233.21	N40° 19' 20.31"W



RECEIVED
APR 02 2018
OWRD

N

0 50 100 200 300 400 600
SCALE: 1" = 200'

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C145	132.30	454.00	16.70
C146	10.28	3,876.00	0.15
C147	131.54	3,876.00	1.94
C148	100.00	4,051.00	1.41
C149	129.21	3,876.00	1.91
C150	111.48	4,051.00	1.58
C151	128.16	3,876.00	1.89
C152	122.18	4,051.00	1.73
C153	126.35	3,876.00	1.87
C154	129.97	4,051.00	1.84
C155	128.92	3,876.00	1.91
C156	128.09	4,051.00	1.81
C157	112.56	3,876.00	1.66
C158	152.09	4,051.00	2.15
C159	121.33	1,576.00	4.41
C160	128.07	1,751.00	4.19
C161	126.03	1,576.00	4.58
C162	124.81	1,751.00	4.08

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C163	129.82	1,576.00	4.72
C164	127.77	1,751.00	4.18
C165	49.73	1,576.00	1.81
C166	82.34	934.00	5.05
C167	131.69	1,751.00	4.31
C168	126.02	934.00	7.73
C169	126.07	759.00	9.52
C170	121.95	934.00	7.48
C171	123.00	759.00	9.29
C172	120.21	934.00	7.37
C173	120.32	759.00	9.08
C174	111.68	934.00	6.85
C175	8.81	776.00	0.65
C176	87.47	759.00	6.60
C177	33.11	951.00	1.99
C178	115.68	776.00	8.54
C179	128.60	951.00	7.75
C180	111.48	776.00	8.23

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C181	136.62	951.00	8.23
C182	111.48	776.00	8.23
C183	136.62	951.00	8.23
C184	111.55	776.00	8.24
C185	136.70	951.00	8.24
C186	111.48	776.00	8.23
C187	136.62	951.00	8.23
C188	111.48	776.00	8.23
C189	136.62	951.00	8.23
C190	111.48	776.00	8.23
C191	136.62	951.00	8.23
C192	111.48	776.00	8.23
C193	136.62	951.00	8.23
C194	103.58	776.00	7.65
C195	126.94	951.00	7.65
C196	67.03	184.00	20.87
C197	166.33	336.88	28.29
C198	36.93	336.88	6.28

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C199	31.36	1,143.32	1.57
C200	16.70	1,318.32	0.73
C201	146.07	1,143.32	7.32
C202	129.92	1,318.32	5.65
C203	22.86	1,143.32	1.15
C204	84.32	1,318.32	3.66
C205	138.37	1,245.35	6.37
C206	137.57	1,420.35	5.55
C207	85.53	1,245.35	3.94
C208	140.92	1,420.35	5.68
C209	5.66	1,420.35	0.23
C210	101.27	750.99	7.73
C211	40.42	575.99	4.02
C212	136.03	750.99	10.38
C213	136.84	575.99	13.61
C214	121.32	750.99	9.26
C215	9.06	1,016.00	0.51
C216	97.79	575.99	9.73

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C217	32.68	1,191.00	1.57
C218	126.16	1,016.00	7.11
C219	137.02	1,191.00	6.59
C220	126.16	1,016.00	7.11
C221	143.69	1,191.00	6.91
C222	120.04	1,016.00	6.77
C223	6.12	212.97	1.65
C224	140.72	1,191.00	6.77
C225	11.14	387.97	1.65
C226	126.16	212.97	33.94
C227	229.83	387.97	33.94
C228	63.10	212.97	16.98
C229	114.78	387.97	16.95
C230	197.95	2,566.00	4.42
C231	195.52	2,766.00	4.05
C232	195.50	2,566.00	4.37
C233	204.71	2,766.00	4.24
C234	190.01	2,566.00	4.24

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C235	210.94	2,766.00	4.37
C236	183.23	2,566.00	4.09
C237	214.40	2,766.00	4.44
C238	188.84	2,566.00	4.22
C239	203.44	2,766.00	4.21
C240	56.08	2,566.00	1.25
C241	155.14	424.00	20.96
C242	111.79	2,766.00	2.32
C243	67.22	224.00	17.19
C244	57.60	424.00	7.78
C245	45.17	224.00	11.55
C247	430.21	2,527.87	9.75

PRELIMINARY

THORNBURGH
PHASE A
LOT DIMENSIONS
BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62535 OB RILEY ROAD, STE 100, BEND, OR 97703
PH: (541)389-9351 | FAX: (541)389-9476
WEB: WWW.HWA-INC.ORG

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=200' @ 22x34
FILE: DESIGN BASE 00

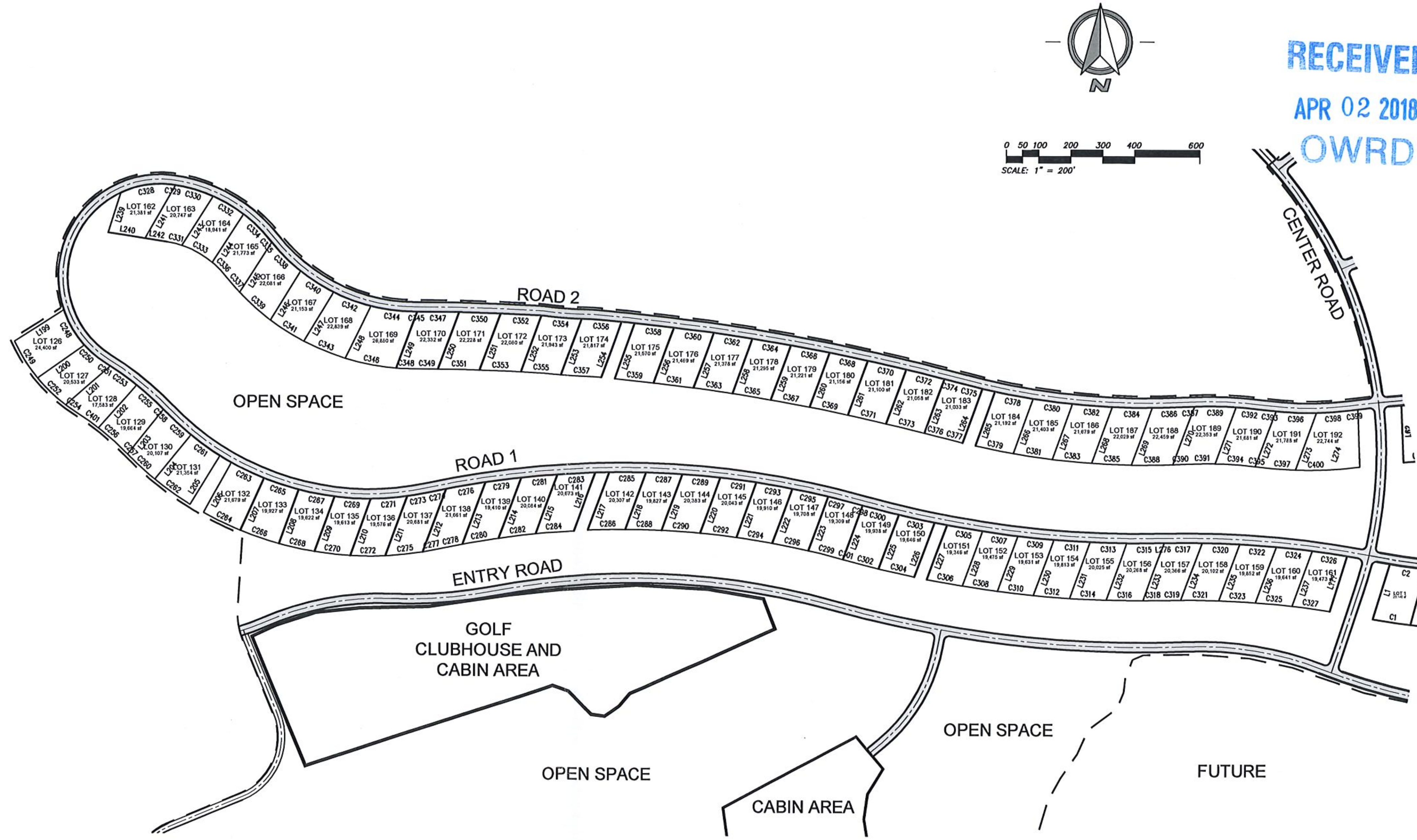
DATE: 3/22/2018

SHEET
TP2.2

HWA# 180110

LINE TABLE		
LINE#	LENGTH	DIRECTION
L???	178.23	N20° 04' 41.15"E
L199	178.07	S57° 28' 11.71"W
L200	175.90	S54° 59' 52.19"W
L201	181.54	S49° 06' 24.88"W
L202	175.34	S41° 46' 11.26"W
L203	176.08	S39° 09' 08.60"W
L204	175.00	S39° 08' 07.00"W
L205	175.00	N31° 48' 09.93"E
L206	175.00	S29° 06' 43.30"W
L207	175.19	S24° 36' 02.48"W
L208	175.74	S20° 04' 41.15"W
L209	178.94	S20° 04' 41.15"W
L210	184.88	S20° 04' 41.15"W
L211	194.02	S20° 04' 41.15"W
L212	205.40	S20° 04' 41.15"W
L213	202.25	S20° 04' 41.15"W
L214	197.67	S20° 04' 41.15"W
L215	193.49	S20° 04' 41.15"W
L216	189.72	N20° 04' 41.15"E
L217	188.47	S20° 04' 41.15"W
L218	185.43	S20° 04' 41.15"W
L219	182.88	S20° 04' 41.15"W
L220	180.67	S20° 04' 41.15"W
L221	178.87	S20° 04' 41.15"W
L222	177.43	S20° 04' 41.15"W
L223	176.35	S20° 04' 41.15"W
L224	175.61	S20° 04' 41.15"W
L225	176.19	S20° 04' 41.15"W
L226	177.00	N20° 04' 41.15"E
L227	177.33	S20° 04' 41.15"W
L228	178.41	S20° 04' 41.15"W
L229	179.71	S20° 04' 41.15"W
L230	181.26	S20° 04' 41.15"W
L231	183.07	S20° 04' 41.15"W
L232	185.16	S20° 04' 41.15"W
L233	187.51	S20° 04' 41.15"W
L234	186.08	S20° 04' 41.15"W
L235	183.59	S20° 04' 41.15"W

LINE TABLE		
LINE#	LENGTH	DIRECTION
L236	181.48	S20° 04' 41.15"W
L237	179.70	S20° 04' 41.15"W
L239	126.69	S17° 16' 10.69"W
L240	115.05	S81° 09' 00.76"E
L241	187.52	S29° 54' 45.29"W
L242	69.72	S81° 09' 00.76"E
L243	178.74	S32° 52' 23.70"W
L244	175.75	S32° 52' 23.70"W
L245	181.97	S32° 52' 23.70"W
L246	176.07	S31° 17' 25.34"W
L247	175.51	S31° 17' 25.34"W
L248	178.27	S26° 24' 42.78"W
L249	184.20	S20° 04' 41.15"W
L250	185.76	S20° 04' 41.15"W
L251	184.47	S20° 04' 41.15"W
L252	183.28	S20° 04' 41.15"W
L253	182.19	S20° 04' 41.15"W
L254	181.19	N20° 04' 41.15"E
L255	180.87	S20° 04' 41.15"W
L256	179.99	S20° 04' 41.15"W
L257	179.18	S20° 04' 41.15"W
L258	178.45	S20° 04' 41.15"W
L259	177.80	S20° 04' 41.15"W
L260	177.22	S20° 04' 41.15"W
L261	176.71	S20° 04' 41.15"W
L262	176.27	S20° 04' 41.15"W
L263	175.90	S20° 04' 41.15"W
L264	176.29	N20° 04' 41.15"E
L265	176.68	S20° 04' 41.15"W
L266	178.19	S20° 04' 41.15"W
L267	180.22	S20° 04' 41.15"W
L268	182.83	S20° 04' 41.15"W
L269	186.09	S20° 04' 41.15"W
L270	189.67	S20° 04' 41.15"W
L271	183.76	S20° 04' 41.15"W
L272	179.82	S20° 04' 41.15"W
L273	185.94	S20° 04' 41.15"W
L274	195.01	N20° 04' 41.15"E



RECEIVED
APR 02 2018
OWRD

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C248	126.88	316.00	23.01
C249	133.98	491.00	15.63
C250	88.11	316.00	15.98
C251	14.80	884.18	0.96
C252	119.78	491.00	13.98
C253	100.44	984.00	5.85
C254	39.22	491.00	4.58
C255	112.36	984.00	6.54
C256	113.42	808.07	8.04
C257	7.03	1,041.00	0.39
C258	13.49	984.00	0.79
C259	101.42	866.00	6.71
C260	114.88	1,041.00	6.32
C261	110.83	866.00	7.33
C262	133.22	1,041.00	7.33
C263	111.99	866.00	7.41
C264	125.77	979.42	7.36

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C265	111.99	866.39	7.41
C266	125.76	1,041.00	6.92
C267	112.40	866.00	7.44
C268	111.89	1,041.00	6.16
C269	112.96	866.00	7.47
C270	111.35	1,041.00	6.13
C271	113.80	866.00	7.53
C272	110.30	1,041.00	6.07
C273	67.23	866.00	4.45
C274	53.59	2,764.00	1.11
C275	115.36	1,041.00	6.35
C276	122.58	2,764.00	2.54
C277	57.33	1,041.00	3.16
C278	66.87	2,589.00	1.48
C279	109.86	2,764.00	2.28
C280	112.07	2,589.00	2.48
C281	113.87	2,764.00	2.36

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C282	115.74	2,589.00	2.56
C283	117.39	2,764.00	2.43
C284	118.93	2,589.00	2.63
C285	115.53	2,764.00	2.39
C286	116.60	2,589.00	2.58
C287	112.92	2,764.00	2.34
C288	113.71	2,589.00	2.52
C289	116.19	2,764.00	2.41
C290	116.78	2,589.00	2.58
C291	114.33	2,764.00	2.37
C292	114.74	2,589.00	2.54
C293	113.64	2,764.00	2.36
C294	113.91	2,589.00	2.52
C295	112.54	2,764.00	2.33
C296	112.70	2,589.00	2.49
C297	104.02	2,764.00	2.16
C298	6.28	3,206.00	0.11

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C299	110.38	2,589.00	2.44
C300	113.96	3,206.00	2.04
C301	8.11	2,589.00	0.18
C302	105.80	3,381.00	1.79
C303	112.32	3,206.00	2.01
C304	112.21	3,381.00	1.90
C305	110.65	3,243.89	1.95
C306	110.46	3,419.95	1.85
C307	111.43	3,206.00	1.99
C308	111.16	3,381.00	1.88
C309	112.37	3,206.00	2.01
C310	111.99	3,381.00	1.90
C311	113.48	3,206.00	2.03
C312	112.98	3,381.00	1.91
C313	114.76	3,206.00	2.05
C314	114.11	3,381.00	1.93
C315	111.05	3,206.00	1.98

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C316	115.43	3,291.39	2.01
C317	116.04	2,984.00	2.23
C318	63.79	3,123.81	1.17
C319	52.76	2,809.00	1.08
C320	114.49	2,984.00	2.20
C321	115.29	2,809.00	2.35
C322	113.15	2,984.00	2.17
C323	113.76	2,809.00	2.32
C324	112.02	2,940.25	2.18
C325	112.46	2,770.62	2.33
C326	111.13	3,004.64	2.12
C327	111.43	2,827.13	2.26
C328	160.96	284.00	32.47
C329	12.97	462.36	1.61
C330	121.75	462.36	15.09
C331	45.52	287.36	9.08
C332	108.02	462.36	13.39

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C333	108.59	287.36	21.65
C334	118.25	462.36	14.65
C335	5.44	566.00	0.55
C336	60.74	287.36	12.11
C337	64.21	741.00	4.96
C338	124.46	566.00	12.60
C339	128.07	741.00	9.90
C340	120.94	566.00	12.24
C341	120.83	741.00	9.34
C342	123.29	566.00	12.48
C343	137.79	741.00	10.65
C344	140.61	566.00	14.23
C345	4.20	6,384.00	0.04
C346	162.61	741.00	12.57
C347	127.70	6,384.00	1.15
C348	60.37	741.00	4.67
C349	66.85	6,209.00	0.62

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C350	126.81	6,384.00	1.14
C351	127.23	6,209.00	1.17
C352	125.99	6,384.00	1.13
C353	126.36	6,209.00	1.17
C354	125.23	6,384.00	1.12
C355	125.55	6,209.00	1.16
C356	124.54	6,384.00	1.12
C357	124.81	6,209.00	1.15
C358	123.16	6,384.00	1.11
C359	123.37	6,209.00	1.14
C360	122.59	6,384.00	1.10
C361	122.78	6,209.00	1.13
C362	122.09	6,384.00	1.10
C363	122.24	6,209.00	1.13
C364	121.63	6,384.00	1.09
C365	121.75	6,209.00	1.12
C366	121.22	6,384.00	1.09

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C367	121.32	6,209.00	1.12
C368	120.86	6,384.00	1.08
C369	120.93	6,209.00	1.12
C370	120.54	6,384.00	1.08
C371	120.60	6,209.00	1.11
C372	120.27	4,802.46	1.43
C373	120.31	6,209.00	1.11
C374	44.76	6,384.00	0.40
C375	75.46	2,276.00	1.90
C376	61.02	6,209.00	0.56
C377	59.16	2,451.00	1.38
C378	121.23	2,276.00	3.05
C379	120.98	2,451.00	2.83
C380	122.53	2,276.00	3.08
C381	122.09	2,451.00	2.85
C382	124.24	2,276.00	3.13
C383	123.55	2,451.00	2.89

CURVE TABLE			
CURVE#	LENGTH	RADIUS	DELTA
C384	126.42	2,276.00	3.18
C385	125.39	2,451.00	2.93
C386	103.26	2,276.00	2.60
C387	25.70	1,284.00	1.15
C388	127.66	2,451.00	2.98
C389	126.62	1,284.00	5.65
C390	49.22	2,451.00	1.15
C391	79.45	1,109.00	4.10
C392	89.54	1,284.00	4.00
C393	33.92	1,016.00	1.91
C394	124.53	1,109.00	6.43
C395	4.92	1,109.00	0.25
C396	125.41	1,079.67	6.66
C398	102.20	988.87	5.92
C399	29.62	4,484.00	0.38
C400	128.26	1,175.67	6.25
C401	84.80	809.00	6.01

rohong S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\DESIGN BASE 00.dwg Thu Mar 22, 2018 - 6:39pm

PRELIMINARY

THORNBURGH

PHASE A
LOT DIMENSIONS

BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62930 O.B. RILEY ROAD, STE 100, BEND, OR 97703
PH: (541)389-9351 | FAX: (541)388-5416
WEB: WWW.HWA-NC.ORG

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=200' @ 22x34
FILE: DESIGN BASE 00
DATE: 3/22/2018

SHEET
TP2.3

HWA# 180110

PRELIMINARY

PHASE A BOUNDARY

OPEN SPACE

ROAD 5

ROAD 4

ROAD 3

ROAD 2

ROAD 1

CENTER ROAD

ENTRY ROAD

GATE HOUSE

WELCOME CENTER

FUTURE

GOLF CLUBHOUSE AND CABIN AREA

CABIN AREA

FUTURE UTILITIES

CLINE FALLS RD

PHASE A AREA = 490 ACRES
OPEN SPACE AREA = 345 ACRES
OPEN SPACE % = 70

0 75 150 300 450 600 900
SCALE: 1" = 300'

THORNBURGH
PHASE A OPEN SPACE
BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62420 OB RILEY ROAD, STE 300 BEND OR 97703
PH: (541)389-9351 | FAX: (541)389-9476
WEB: WWW.HWA-NW.COM

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=300' @ 22x34
FILE: DESIGN BASE 00

DATE: 3/22/2018

SHEET
TP3.1

HWA# 180110

S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\DESIGN BASE 00.dwg Thu Mar 22, 2018 - 6:46pm

PRELIMINARY

THORNBURGH
PHASE A
SEWER AND WATER PLAN
BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62930 O.B. RILEY ROAD, STE. 100, BEND, OR 97703
PH. (541)389 9351 FAX (541)388 5416
WEB. WWW.HWA INC.ORG

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=300' @ 22x34
FILE: UTILITY DESIGN 00
DATE: 3/21/2018

SHEET
INDEX

HWA# 180110

PRELIMINARY

LOT 162 21,381 sf
LOT 163 20,747 sf
LOT 164 18,941 sf
LOT 165 21,773 sf
LOT 166 22,081 sf
LOT 167 21,153 sf
LOT 168 22,839 sf
LOT 169 26,880 sf
LOT 170 22,332 sf
LOT 171 22,228 sf
LOT 172 22,080 sf
LOT 173 21,943 sf
LOT 174 21,817 sf
LOT 175 21,570 sf
LOT 176 21,469 sf
LOT 177 21,378 sf
LOT 178 21,295 sf
LOT 179 21,221 sf
LOT 180 21,156 sf
LOT 181 21,100 sf
LOT 21,05

LOT 126 24,400 sf
LOT 127 20,533 sf
LOT 128 17,583 sf
LOT 129 19,664 sf
LOT 130 20,107 sf
LOT 131 21,354 sf
LOT 132 21,679 sf
LOT 133 19,927 sf
LOT 134 19,622 sf
LOT 135 19,613 sf
LOT 136 19,576 sf
LOT 137 20,681 sf
LOT 138 21,661 sf
LOT 139 19,410 sf
LOT 140 20,084 sf
LOT 141 20,673 sf
LOT 142 20,307 sf
LOT 143 19,827 sf
LOT 144 20,383 sf
LOT 145 20,043 sf
LOT 146 19,910 sf
LOT 147 19,708 sf
LOT 148 19,309 sf
LOT 149 19,938 sf
LOT 15 19,646 sf

PROPOSED 8" GRAVITY SEWER, TYPICAL

PROPOSED WELL

PROPOSED 8" WATER MAIN, TYPICAL

ROAD 2 WEST

ROAD 1 WEST

ENTRY ROAD

FUTURE DEVELOPMENT

3330
3320
3310
3300
3290
3280
3270
3260
3250
3240

0 50 100 200 300 400 600
SCALE: 1" = 200'

N

THORNBURGH
PHASE A
SEWER AND WATER PLAN
BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
660 SW BLEY ROAD, STE. 100, BEND, OR 97702
PH: (541)389-1251 FAX: (541)389-1496
WEB: WWW.HWA-INC.COM

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=100' @ 22x34
FILE: UTILITY DESIGN 00
DATE: 3/21/2018

SHEET
C1.0

HWA# 180110

PRELIMINARY

THORNBURGH
PHASE A
SEWER AND WATER PLAN

BEND OREGON

ROAD 2 WEST

ROAD 1 WEST

ENTRY ROAD

CENTER ROAD

ROAD 2

ROAD 1

180
6 sf

LOT 181 21,100 sf
LOT 182 21,058 sf
LOT 183 21,033 sf
LOT 184 21,192 sf
LOT 185 21,403 sf
LOT 186 21,679 sf
LOT 187 22,029 sf
LOT 188 22,459 sf
LOT 189 22,353 sf
LOT 190 21,681 sf
LOT 191 21,788 sf
LOT 192 22,744 sf

148
9 sf

LOT 149 19,938 sf
LOT 150 19,646 sf
LOT151 19,346 sf
LOT 152 19,475 sf
LOT 153 19,631 sf
LOT 154 19,813 sf
LOT 155 20,025 sf
LOT 156 20,268 sf
LOT 157 20,366 sf
LOT 158 20,102 sf
LOT 159 19,852 sf
LOT 160 19,641 sf
LOT 161 19,473 sf

LOT 40 16,966 sf
LOT 41 17,665 sf
LOT 42 17,367 sf
LOT 43 17,609 sf
LOT 44 17,895 sf
LOT 45 17,842 sf
LOT 46 18,040 sf
LOT 47 19,093 sf
LOT 48 18,781 sf
LOT 49 19,499 sf
LOT 50 18,217 sf

LOT 1 20,146 sf
LOT 2 19,708 sf
LOT 3 19,629 sf
LOT 4 19,380 sf
LOT 5 19,032 sf
LOT 6 19,447 sf
LOT 7 19,909 sf
LOT 8 20,117 sf
LOT 9 20,764 sf
LOT 10 22,013 sf

PROPOSED 8" GRAVITY SEWER, TYPICAL

PROPOSED 8" WATER MAIN, TYPICAL

PROPOSED FORCE MAIN, TYPICAL

3310 3300 3290 3280 3270 3260 3250 3240 3230 3220

N

0 50 100 200 300 400 600
SCALE: 1" = 200'

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62930 OB RILEY ROAD, STE. 100 BEND, OR 97703
PH: (541)389-9251 FAX: (541)388-5410
WEB: WWW.HWA.NET/BEND

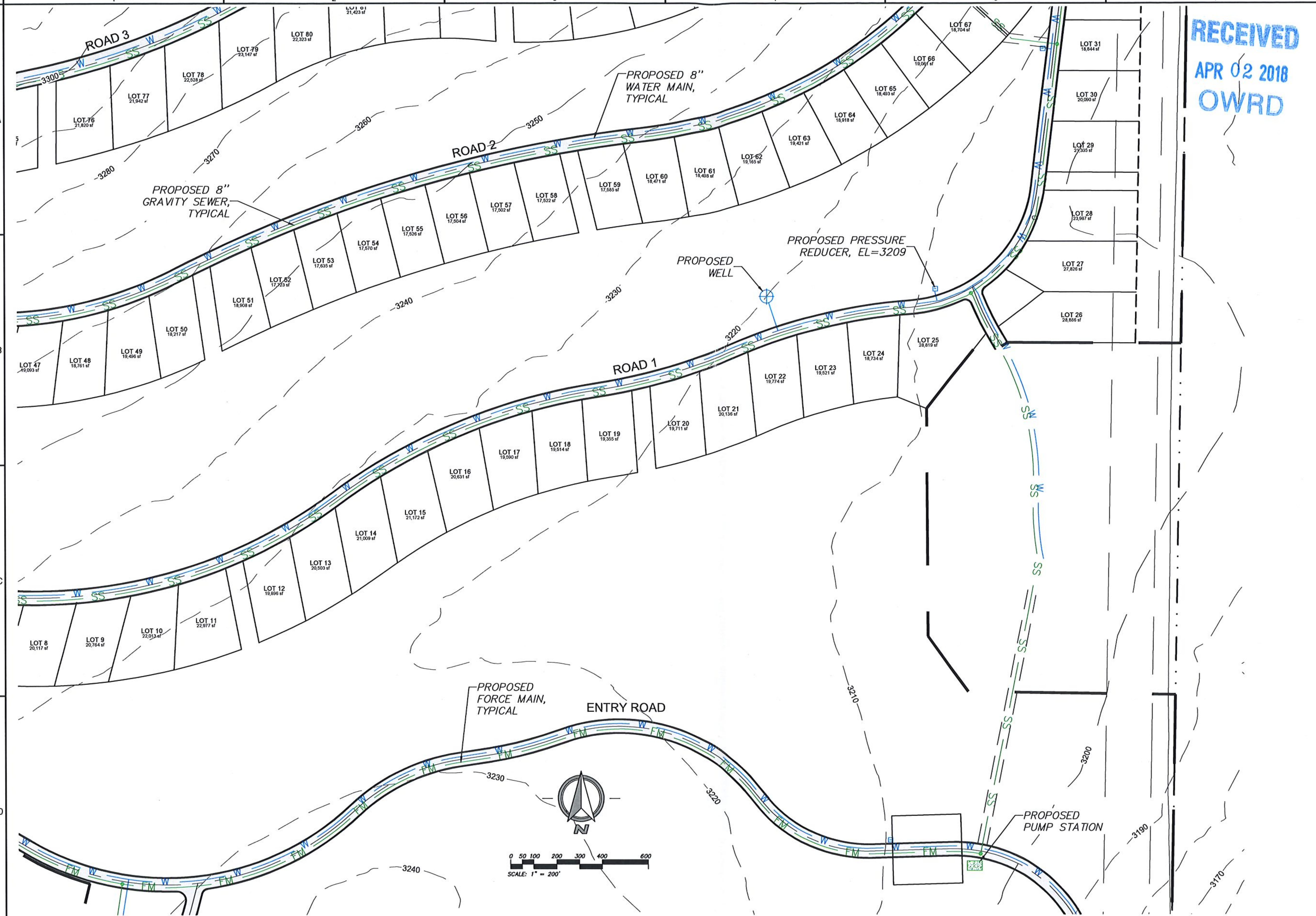
REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=100' @ 22x34
FILE: UTILITY DESIGN 00

DATE: 3/21/2018

SHEET
C2.0

HWA# 180110



RECEIVED APR 02 2018 OWRD

PRELIMINARY

THORNBURGH

PHASE A
SEWER AND WATER PLAN

BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING

REVISIONS

1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=100' @ 22x34
FILE: UTILITY DESIGN 00

DATE: 3/21/2018

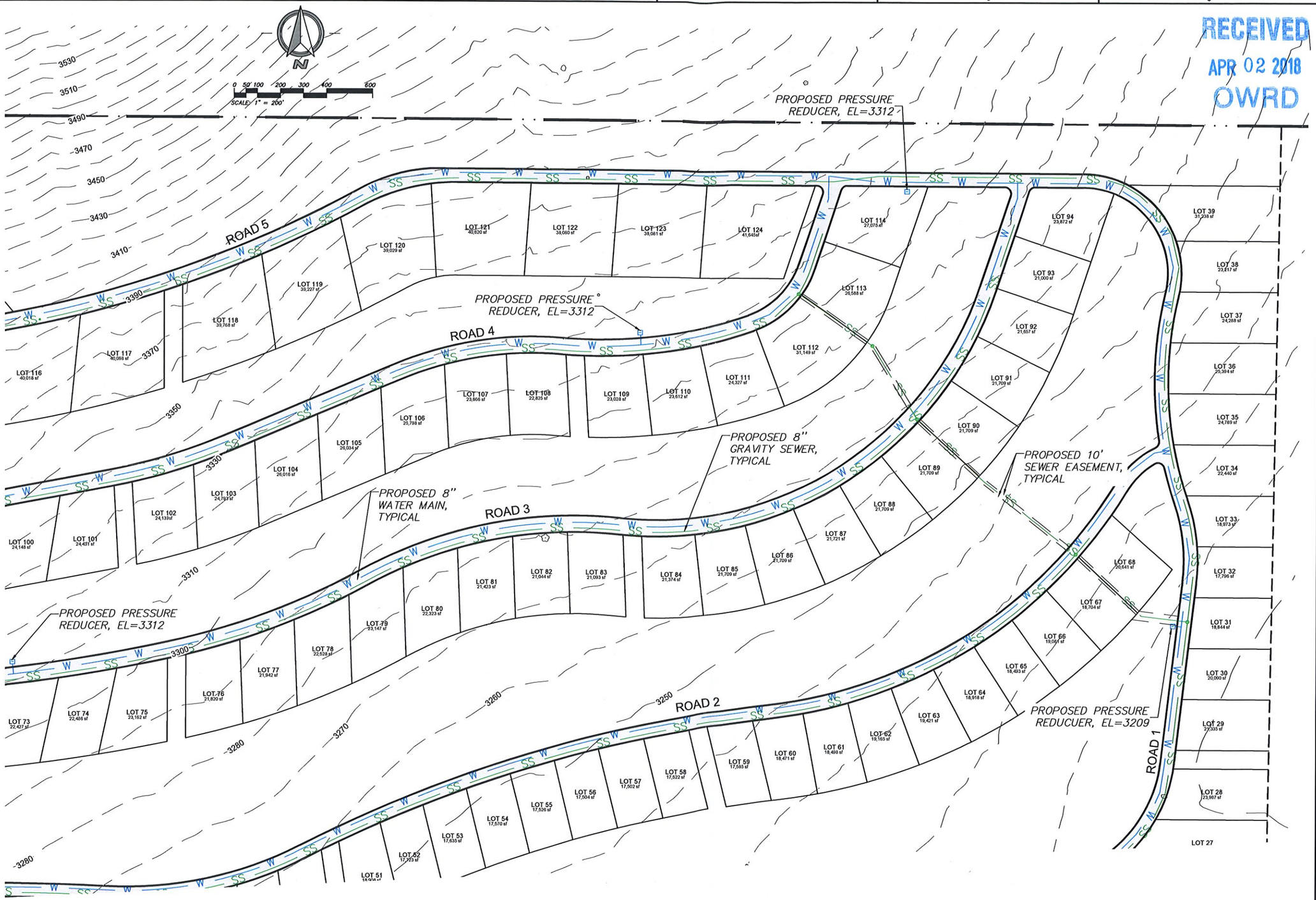
SHEET C3.0

HWA# 180110

Dani. S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\UTILITY DESIGN 00.dwg Thu Mar 22, 2018 - 4:13pm

PRELIMINARY

THORNBURGH
PHASE A
SEWER AND WATER PLAN
BEND, OREGON



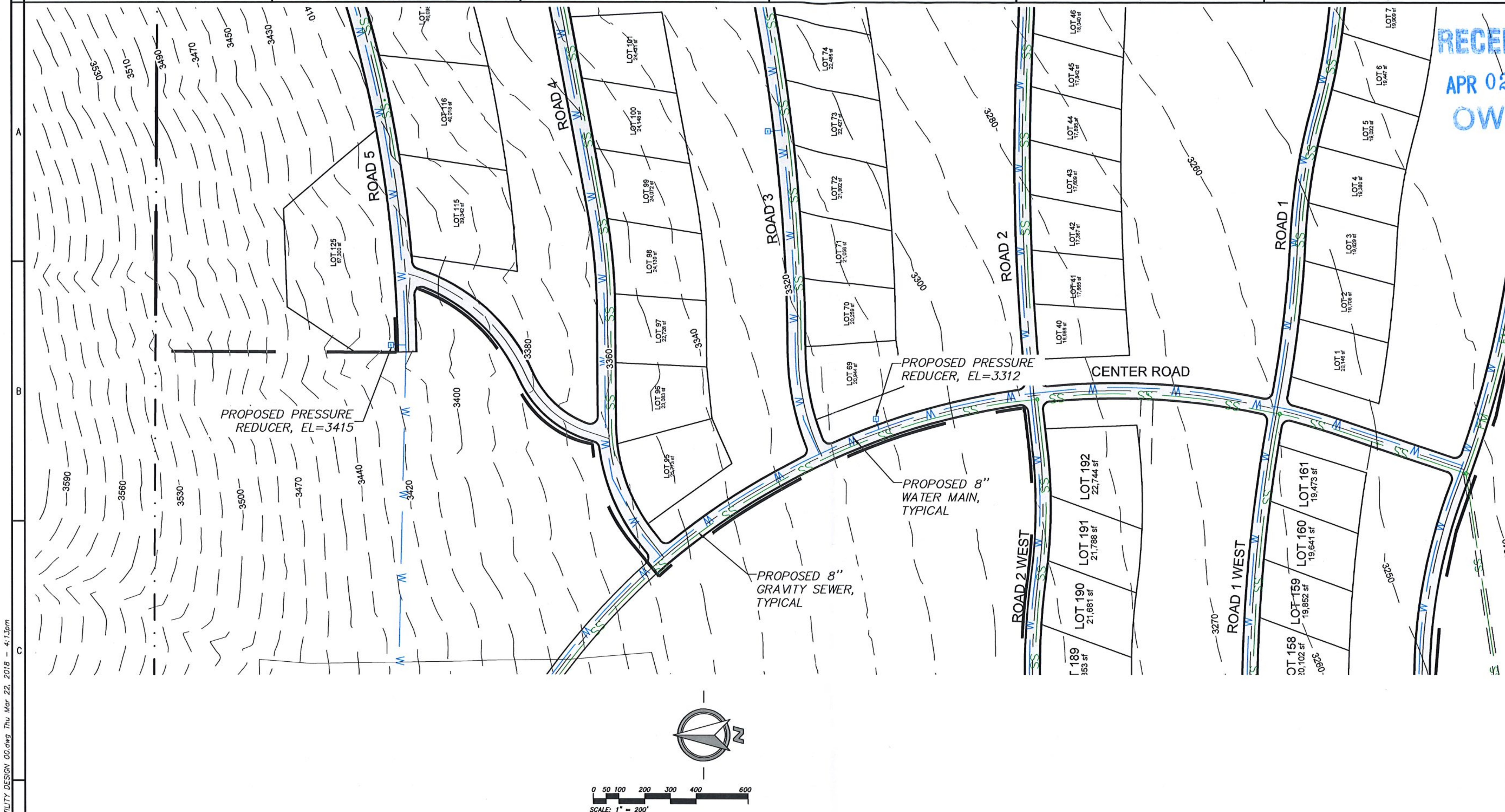
HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62230 OB RILEY ROAD, STE 100, BEND, OR 97703
PH: (541)389-9351 FAX: (541)389-5416
WEB: WWW.HWA-INC.COM

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=100' @ 22x34
FILE: UTILITY DESIGN 00
DATE: 3/21/2018

SHEET
C4.0

HWA# 180110



PRELIMINARY

THORNBURGH
PHASE A
SEWER AND WATER PLAN

BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING

REVISIONS

1.
2.
3.

DESIGNED BY:	RCG
DRAWN BY:	RCG
CHECKED BY:	
SCALE:	1"=100' @ 22x34
FILE:	UTILITY DESIGN 00

DATE: 3/21/2018

SHEET C5.0

HWA# 180110

DanL S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\UTILITY DESIGN 00.dwg Thu Mar 22, 2018 - 4:13pm

PRELIMINARY

THORNBURGH
PHASE A
SEWER AND WATER PLAN
BEND OREGON

PROPOSED RESERVOIR, 60' DIAMETER GRAVEL PAD SHOWN AT EL=3600'

PROPOSED WELL

STUB SEWER AND WATER

PROPOSED 8" WATER MAIN, TYPICAL

PROPOSED 8" GRAVITY SEWER, TYPICAL

PROPOSED PRESSURE REDUCER, EL=3415

CENTER ROAD

3900 3860 3810 3770 3730 3690 3650 3610 3580 3560 3540 3520 3500 3480 3460 3440 3420 3400 3380 3360 3340

N

0 50 100 200 300 400 600
SCALE: 1" = 200'

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
62930 OB RILEY ROAD, STE 100, BEND, OR 97703
PH: (541)388-9310 FAX: (541)388-5416
WEB: WWW.HWA.INC.COM

REVISIONS
1
2
3

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=100' @ 22x34
FILE: UTILITY DESIGN 00
DATE: 3/21/2018

SHEET
C6.0

HWA 180110

ENTRY ROAD

PROPOSED 8" WATER MAIN

FUTURE DEVELOPMENT

PROPOSED 8" GRAVITY SEWER, TYPICAL

FUTURE DEVELOPMENT

FUTURE

FUTURE

APPROXIMATE LOCATION OF PROPOSED LEACH FIELD

LOT 153 19,631 sf

LOT 154 19,813 sf

19,475 sf

3250

3240

3230

3220

3210

3200

3190

RECEIVED
APR 02 2018
OWRD

N

0 50 100 200 300 400 600
SCALE: 1" = 200'

PRELIMINARY

THORNBURGH

PHASE A
SEWER AND WATER PLAN

BEND OREGON

HWA
CIVIL ENGINEERING | SURVEYING | PLANNING
60520 OB RILEY ROAD, STE. 100, BEND, OR 97703
PH: 541.389.9233 FAX: 541.389.5416
WWW.HWAGEO.COM

REVISIONS
1.
2.
3.

DESIGNED BY: RCG
DRAWN BY: RCG
CHECKED BY:
SCALE: 1"=100' @ 22x34
FILE: UTILITY DESIGN 00

DATE: 3/21/2018

SHEET
C7.0

HWA# 180110

Dand. S:\Land Projects\Thornburgh\dwg\2018 DESIGN DWGs\UTILITY DESIGN 00.dwg Thu Mar 22, 2018 - 4:14pm