



For Recording Stamp Only

Deschutes County Board of Commissioners
1300 NW Wall St., Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

MINUTES OF BUSINESS MEETING
DESCHUTES COUNTY BOARD OF COMMISSIONERS
WEDNESDAY, FEBRUARY 10, 2016

Commissioners' Hearing Room - Administration Building - 1300 NW Wall St., Bend

Present were Commissioners Alan Unger, Tammy Baney and Anthony DeBone. Also present were Tom Anderson, County Administrator; Erik Kropp, Deputy County Administrator; Dave Doyle and John Laherty, County Counsel; Peter Russell and Anthony Raguine, Community Development; Chris Doty and George Kolb, Road Department; and seven other citizens. No representatives of the media were in attendance.

1. CALL TO ORDER

Chair Alan Unger called the meeting to order at 10:00 a.m.

2. PLEDGE OF ALLEGIANCE

3. CITIZEN INPUT

None was offered.

Before the Board was Consideration of Approval of the Consent Agenda.

BANEY: Move approval of the Consent Agenda, excluding the minutes, which she has not had a chance to review.

DEBONE: Second.

VOTE: BANEY: Yes.
DEBONE: Yes.
UNGER: Chair votes yes.

Consent Agenda Items

4. Board Signature of Order No. 2016-008, Authorizing the Disposal of Surplus Vehicles (Sheriff's Office)
5. Board Signature of Document No. 2015-692, an Agreement between PacificSource and Deschutes County regarding Mental Health Services
6. Board Signature of Resolution No. 2016-004, Appropriating a New Grant in the Health Services Fund
7. Board Signature of Resolution No. 2016-002, Transferring Appropriations in the Road Fund
8. Board Signature of Resolution No. 2016-003, Transferring Appropriations from the General Fund Contingency to Capital Outlay in the Campus Improvement Fund
9. Board Signature of Minutes:
 - Work Session: February 3, 2016
 - Business Meetings: February 3, 2016
 - Board/Administration Annual Retreat: January 22, 2016

ACTION ITEMS

10. **Before the Board was Consideration of Second Reading by Title Only, and Adoption of Ordinance No. 2016-007, Amending the Comprehensive Plan to Add an Exception to Statewide Planning Goal 11, to Allow for Sewers in Unincorporated Lands in Southern Deschutes County.**

Commissioner DeBone said they have been and continue to work with citizens, the DEQ and others to maintain the good water now in the area. He thanked the citizens for their long-term commitment to addressing this issue, while raising good questions; and staff for their hard work over the years.

Commissioner Baney noted that it has been a long journey, and thanked staff for working through it. She said that this is one more tool for the toolbox for citizens to do what they feel is right for their community.

DEBONE: Move second reading by title only of Ordinance No. 2016-007.

BANEY: Second.

VOTE: DEBONE: Yes.

BANEY: Yes.

UNGER: Chair votes yes.

Chair Unger conducted the second reading of the Ordinance, by title only.

BANEY: Move adoption of Ordinance No. 2016-007.

DEBONE: Second.

VOTE: BANEY: Yes.

DEBONE: Yes.

UNGER: Chair votes yes.

11. Before the Board was a Hearing on the Community Development Department Director's Report regarding Abatement of a Dangerous Building, and Consideration of Board Signature of Order No. 2016-009.

Chair Unger opened the hearing. John Laherty provided an overview of the issue, which does not often come before the Board. The County needed to abate a dangerous building situation and can recuperate the costs of same. The costs are to be charged to the property owner.

Move approval of the Community Development Department Director's abatement report and recommendation that the costs be collected in this manner.

Commissioner Baney asked if the property owner was involved in a hardship situation. Mr. Laherty said the property owner could present his case today if desired. Notice was sent to the property owner and was published per law. He has not attempted to contact the County but the owner did receive notice, per his attorney.

No public testimony was offered.

BANEY: Move approval of staff recommendation and signature of Order No. 2016-009.

DEBONE: Second.

VOTE: BANEY: Yes.

DEBONE: Yes.

UNGER: Chair votes yes.

CONVENED AS THE DESCHUTES COUNTY CONTRACT REVIEW BOARD

12. Before the Board was a Public Hearing on a Bid Protest from JAL Construction regarding a Notice of Intent to Award Contract for the Powell Butte Roundabout Project.

Chair Unger opened the public hearing. Chris Doty gave an overview of the project and the bid process through a staff report. The bid from JAL Construction was felt to be non-responsive since not all documents were submitted. He explained a typical bid process, what documents are required from all bidders, and details on this particular bid.

There is a mandatory pre-bid meeting to include all potential bidders to get everyone on the same page and to be clear about who needs to be kept informed of any changes or to clarify any issues. This helps to get the same information out to everyone equally. An addendum was included and was required to be in the bid documents, signed and dated. It provided clarifying information, adjusted quantities and other details, and is an important part of the bid package. It is imperative that all bidders make it clear that they know this is part of the package to be submitted. Addendum #1 was issued two days after the pre-bid meeting, listing 25 key points for clarification and changes to the original bid. It is a complex project.

JAL did not submit a written acknowledgment of this addendum, which is an irregularity and considered non-responsive. Staff can set aside some minor irregularities but not in regard to key documents. JAL did submit one revised bid sheet that accounts for pricing and unit quantities. They accounted for the revised bid sheet but did not return the addendum with the signature of the bidder as required.

In order to consider this bid as responsive, staff would have to speculate that they accepted the entire bid document and not just portions of it. They did not acknowledge the 25 different points and they may have assumed that they did so, based on a few submissions addressing a few of the 25 points. This violates the integrity of the bid process that is meant to be equal to all.

There are a few other legal elements in this determination. There is an item within the standards of specifications if not all addendums are acknowledged. ORS says that addenda are the only mechanism to make changes, and acknowledgement by signature and date is required.

These are the reasons staff felt they should go with the second bidder.

Tyler Storti, attorney for JAL, said he had several points to make. The protest includes other things that were not addressed in the staff report. Competitive bidding statute is meant to promote fairness, as well as keeping costs as low as possible for the taxpayers. Every effort is supposed to be made to obtain the lowest cost. ORS 279(c).375 says they shall award to the lowest responsible bidder. He feels the bid was responsive and responsible.

The bid documents had certain requirements, and nowhere in the original bid documents does it say that addenda need to be signed in the future. It says they are to use all required forms. There were multi-pages in the bid document which JAL completed, and the bid documents were submitted as required.

The only additional requirement, section 18(a), the notice of intent to award, refers to returning the bid form. Contract documents are referred to as documents that are 'bound herewith', which did not include addendum 1. The only thing he can think of is that at the bidder acknowledges receipt of addendum 1, and it is indisputable that JAL did receive this since one page was replaced, 53A, which JAL returned. So, therefore, it was acknowledged by the properly filled out bid form even if they did not receive the acknowledged addendum.

He feels it is mandatory to award this contract to JAL because they had the lowest bid, as a matter of law. Several other things in Oregon law and the bid forms require this, even if something was slightly irregular.

Section 16 of the instructions includes 'failure of any bidder to receive such addendum or interpretation shall not relieve such bidder from any obligation under his bid as submitted. All addenda so issued are to be covered in the bid for such addenda to become part of the agreement'. He feels this says that if you don't get the addenda, you are not relieved of the requirement to comply with it. This is saying it is the bidder's problem, not the County's.

Even more persuasive is 18(h) that deals with missing pages. It says some pages can be missing but shall be deemed as incorporated in the bid anyway. Even if this addendum was required, it is mandatory for the County to conclude that the missing pages are included.

Their bid was fully compliant and they had the lowest price. This could be implied as incorporated by reference. OAR 137.049 gives discretion to accept minor informalities, and he believes this includes failure of acknowledgment of an addendum when it is clear that they intend to be bound by it. The County has discretion under Rule to overlook this.

There is a reference in staff/s report to ODOT standard specifications applicable to work on the project. It does not refer to the bid paperwork but the actual work. Standard specs on bidding would be inconsistent regarding this.

Staff's report dated February 3 refers to OAR 137-47, goods and services. He believes that OAR 137-49 applies to this. It is a matter of fairness to bidders, following the law and trying to get the lowest price.

Mike Levesque, one of the owners of JAL Construction, was seated with Mr. Storti, but said he had nothing to add.

Ian Woodford of Shamrock NW Construction said that there are multiple circumstances that set precedence in Oregon and relate to being non-responsive. He has also had this happen to him. JAL is a good company. But the addendum clearly states in bold, capital letters that it is required to be signed and submitted. There is a lot of information that is acknowledged by this addendum.

Deschutes County clearly follows ODOT's requirements. The argument that ODOT specs do not pertain to this document is incorrect. The main thing he would say is that the County has to preserve the integrity of its bid process.

All other bidders submitted this document, so it was very clear. The savings to the taxpayers on this big project is \$3,000, not large enough to ruin the integrity of the bid process.

Chair Unger said that there has been no written information submitted today, so he asked the Board if it is ready for a decision. Commissioner Baney stated that she appreciates the comments made. These companies are both good partners. The integrity of the bid process is critical to contracting regardless of the amount. This form was clearly required and not one that might be considered as being okay being left out.

Commissioner DeBone agreed. They cannot make assumptions on all the different parts and pieces, and if it is not signed, much of the detail would be left open-ended and could cause problems later. Chair Unger said all bidders returned the addendum. JAL has been in business for a long time and knows the process.

BANEY: Move denial of the protest and that the appropriate documents be prepared in this regard.

DEBONE: Second.

VOTE: BANEY: Yes.
DEBONE: Yes.
UNGER: Chair votes yes.

CONVENED AS THE GOVERNING BODY OF THE 9-1-1 COUNTY SERVICE DISTRICT

13. Before the Board was Consideration of Approval of Weekly Accounts Payable Vouchers for the 9-1-1 County Service District in the Amount of \$23,766.89.

BANEY: Move approval, subject to review.

DEBONE: Second.

VOTE: BANEY: Yes.
DEBONE: Yes.
UNGER: Chair votes yes.

CONVENED AS THE GOVERNING BODY OF THE EXTENSION/4-H COUNTY SERVICE DISTRICT

14. Before the Board was Consideration of Approval of Weekly Accounts Payable Vouchers for the Extension/4-H County Service District.

There were no expenses for this District.

RECONVENED AS THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

15. Before the Board was Consideration of Approval of Weekly Accounts Payable Vouchers for Deschutes County in the Amount of \$818,323.41.

Tom Anderson noted that the remodel at 1340 NW Wall Street is moving along well, and this amount includes a payment to the contractor.

BANEY: Move approval, subject to review.

DEBONE: Second.

VOTE: BANEY: Yes.

DEBONE: Yes.

UNGER: Chair votes yes.

16. OTHER ITEMS

Before the Board was Consideration of Whether to Hear Appeals of Decisions on the KCDG/TID Reservoirs and Ski Lake Project (Order No. 2016-010).

This issue was continued for discussion at the Board work session on February 8, due to time restraints then. Anthony Raguine said the Board was given options on whether to hear or not to hear the appeals. He noted that Tim Ramis submitted a sheet to speak today, but another person was told that the public was not allowed to speak during this process.

Chair Unger indicated testimony is at the discretion of the Board but needs to be fair, and it was not recognized that speakers would be allowed to testify. David Doyle said allowing testimony could be a procedural problem since it is not a contested, adversarial matter.

Commissioner DeBone feels he does not want to hear these appeals. Commissioner Baney said it is rare for them to deny hearing an appeal. However, after reviewing the documents further, she feels the information in the record is clear and she would rather not hear this. This issue will probably go to a higher body, but is up to the applicants on what they wish to do next.

Chair Unger said this was not a typical issue, and he has some concerns with the Hearings Officer's decision on some points. He is concerned about statements made regarding characteristics of wildlife, ponds and recreation. He feels the applicants should continue forward with whatever process they choose.

BANEY: Move signature of Order No. 2016-010, declining review of the appeals.

DEBONE: Second.

VOTE: BANEY: Yes.
DEBONE: Yes.
UNGER: Chair votes yes.


17. ADJOURN

Being no further discussion, the meeting was adjourned at 10:55 a.m.

DATED this 17th Day of February 2016 for the Deschutes County Board of Commissioners.




Alan Unger, Chair



Tammy Baney, Vice Chair

ATTEST:



Recording Secretary



Anthony DeBone, Commissioner



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Subject: JAL Bid Protest Date: 2/10/16

Name Tyler Storti

Address 2300 SW First Ave. Ste 200
Portland, OR 97201

Phone #s 503-221-0699

E-mail address tstorti@lawssl.com

In Favor Neutral/Undecided Opposed

Submitting written documents as part of testimony? Yes No
If so, please give a copy to the Recording Secretary for the record.



BOARD OF COMMISSIONERS' MEETING

REQUEST TO SPEAK

Subject: JAL Bid Protest Date: 2/10/16

Name Ian Woodford

Address 61282 Splendor Ln
Bend, OR 97702

Phone #s (541)639-7545

E-mail address shamrocknwconst@gmail.com

In Favor Neutral/Undecided Opposed

Submitting written documents as part of testimony? Yes No
If so, please give a copy to the Recording Secretary for the record.



BOARD OF COMMISSIONERS' MEETING
REQUEST TO SPEAK

Subject: Appeal of Order No. 2016-010 Date: 2-10-2016

Name Tim Ramis

Address 360 S.W. Bond #1510
Bond 97702

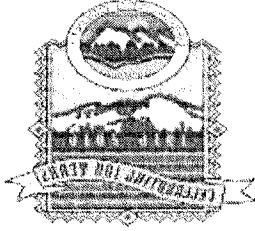
Phone #s _____

E-mail address Tim.ramis@jordanramis.com

In Favor Neutral/Undecided Opposed

Submitting written documents as part of testimony? Yes No
If so, please give a copy to the Recording Secretary for the record.

(did not testify)



Deschutes County Board of Commissioners
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BUSINESS MEETING AGENDA

DESCHUTES COUNTY BOARD OF COMMISSIONERS

10:00 A.M., WEDNESDAY, FEBRUARY 10, 2016

Commissioners' Hearing Room - Administration Building - 1300 NW Wall St., Bend

Pursuant to ORS 192.640, this agenda includes a list of the principal subjects anticipated to be considered or discussed at the meeting. This notice does not limit the ability of the Board to address additional subjects. Meetings are subject to cancellation without notice. This meeting is open to the public and interested citizens are invited to attend. Business Meetings are usually recorded on video and audio, and can be viewed by the public live or at a later date; and written minutes are taken for the record.

1. CALL TO ORDER

2. PLEDGE OF ALLEGIANCE

3. CITIZEN INPUT

This is the time provided for individuals wishing to address the Board, at the Board's discretion, regarding issues that are not already on the agenda. Please complete a sign-up card (provided), and give the card to the Recording Secretary. Use the microphone and clearly state your name when the Board Chair calls on you to speak. PLEASE NOTE: Citizen input regarding matters that are or have been the subject of a public hearing not being conducted as a part of this meeting will NOT be included in the official record of that hearing.

If you offer or display to the Board any written documents, photographs or other printed matter as part of your testimony during a public hearing, please be advised that staff is required to retain those documents as part of the permanent record of that hearing.

CONSENT AGENDA

4. **Board Signature** of Order No. 2016-008, Authorizing the Disposal of Surplus Vehicles (Sheriff's Office)
5. **Board Signature** of Document No. 2015-692, an Agreement between PacificSource and Deschutes County regarding Mental Health Services
6. **Board Signature** of Resolution No. 2016-004, Appropriating a New Grant in the Health Services Fund
7. **Board Signature** of Resolution No. 2016-002, Transferring Appropriations in the Road Fund
8. **Board Signature** of Resolution No. 2016-003, Transferring Appropriations from the General Fund Contingency to Capital Outlay in the Campus Improvement Fund
9. **Board Signature** of Minutes:
 - Work Session: February 3, 2016
 - Business Meetings: February 3, 2016
 - Board/Administration Annual Retreat: January 22, 2016

ACTION ITEMS

10. **CONSIDERATION of Second Reading** by Title Only, and Adoption of Ordinance No. 2016-007, Amending the Comprehensive Plan to Add an Exception to Statewide Planning Goal 11, to Allow for Sewers in Unincorporated Lands in Southern Deschutes County – *Peter Russell, Community Development*

Suggested Actions: Move second reading by title only; move adoption of Ordinance No. 2016-007.
11. **A HEARING** on the Community Development Department Director's Report regarding Abatement of a Dangerous Building, and Consideration of Board Signature of Order No. 2016-009 – *John Laherty, County Counsel*

Suggested Actions: Open hearing; take testimony; move Board signature of Order No. 2016-009.

CONVENE AS THE DESCHUTES COUNTY CONTRACT REVIEW BOARD

12. **A PUBLIC HEARING** on a Bid Protest from JAL Construction regarding a Notice of Intent to Award Contract for the Powell Butte Roundabout Project

Suggested Actions: Open hearing; take testimony; deliberate and make a decision.

CONVENE AS THE GOVERNING BODY OF THE 9-1-1 COUNTY SERVICE DISTRICT

13. **CONSIDERATION of Approval** of Weekly Accounts Payable Vouchers for the 9-1-1 County Service District

CONVENE AS THE GOVERNING BODY OF THE EXTENSION/4-H COUNTY SERVICE DISTRICT

14. **CONSIDERATION of Approval** of Weekly Accounts Payable Vouchers for the Extension/4-H County Service District

RECONVENE AS THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

15. **CONSIDERATION of Approval** of Weekly Accounts Payable Vouchers for Deschutes County

16. **OTHER ITEMS**

These can be any items not included on the agenda that the Commissioners wish to discuss as part of the meeting, pursuant to ORS 192.640.

At any time during the meeting, an executive session could be called to address issues relating to ORS 192.660(2)(e), real property negotiations; ORS 192.660(2)(h), litigation; ORS 192.660(2)(d), labor negotiations; ORS 192.660(2)(b), personnel issues; or other executive session categories. Executive sessions are closed to the public; however, with few exceptions and under specific guidelines, are open to the media.

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-15-000226-CU (CU for Surface Mining for Reservoirs)
247-15-000227-CU (CU for Recreation Facility)
247-15-000228-LM (LM for Recreation Facility)
247-15-000383-MA (Modification)
247-15-000384-SP (Site Plan for Recreation Facility)
247-15-000385-V (Setback Variance for Reservoir)

APPLICANT: Hurley Re, PC
747 Millview Way
Bend, Oregon 97702¹

PROPERTY OWNERS: KC Development Group, LLC
63560 Johnson Road
Bend, Oregon 97703
(Tax Lots 601, 820, 823, 824, 825, 826, 827, 828, 829, 11401, 11600)

Cadwell Family Trust
63560 Johnson Road
Bend, Oregon 97703
(Tax Lot 819)

Harris and Nancy Kimble
63570 Johnson Road
Bend, Oregon 97703
(Tax Lot 822)

Tumalo Irrigation District
64697 Cook Avenue
Bend, Oregon 97701
(Holder of Easement on Tax Lots 824 and 828)

PROPERTY OWNERS' ATTORNEY: Elizabeth Dickson and Ken Katzaroff
Hurley Re, PC
747 Millview Way
Bend, Oregon 97702
Attorneys for TID and KCDG

OPPONENTS' ATTORNEYS: Jennifer Bragar
Garvey Schubert Barer
121 S.W. Morrison Street
Portland, Oregon 97204-3141
Attorney for Opponents Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust

¹ The applicant is the law firm representing the property owners and Tumalo Irrigation District.

Paul J. Dewey and Carol Macbeth
Central Oregon LandWatch
50 S.W. Bond Street, Suite 4
Bend, Oregon 97702
Attorneys for Opponent Central Oregon LandWatch

REQUEST: The applicant requests conditional use approval to make lawful previous surface mining that created two reservoirs on the subject property, which is located west of Bend and zoned RR-10, SMIA, LM and WA. The applicant also requests approval of a variance to the yard setbacks for one of the reservoirs. The applicant requests conditional use and site plan approval to establish a recreation-oriented facility requiring large acreage, consisting of private motorized boating and water skiing on one of the reservoirs.

STAFF REVIEWER: Anthony Raguine, Senior Planner

HEARING DATES: July 1 and September 29, 2015

RECORD CLOSED: November 3, 2015

I. APPLICABLE STANDARDS AND CRITERIA:

A. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

1. Chapter 18.56, Surface Mining Impact Area Combining Zone (SM)

- * Section 18.56.020, Location
- * Section 18.56.050, Conditional Uses Permitted
- * Section 18.56.070, Setbacks
- * Section 18.56.080, Use Limitations

2. Chapter 18.60, Rural Residential Zone (RR-10)

- * Section 18.60.030, Conditional Uses Permitted
- * Section 18.60.040, Yard and Setback Requirements
- * Section 18.60.050, Stream Setback
- * Section 18.60.060, Dimensional Standards
- * Section 18.60.070, Limitations on Conditional Uses
- * Section 18.60.080, Rimrock Setback

3. Chapter 18.84, Landscape Management Combining Zone (LM)

- * Section 18.84.020, Application of Provisions
- * Section 18.84.040, Uses Permitted Conditionally
- * Section 18.84.050, Use Limitations

4. Chapter 18.88, Wildlife Area Combining Zone (WA)

- * Section 18.88.020, Application of Provisions
- * Section 18.88.040, Uses Permitted Conditionally
- * Section 18.88.060, Siting Standards
- * Section 18.88.070, Fence Standards

5. **Chapter 18.116, Supplemental Provisions**
 - * **Section 18.116.020, Clear Vision Areas**
 - * **Section 18.116.030, Off-Street Parking and Loading**
 - * **Section 18.116.031, Bicycle Parking**
 6. **Chapter 18.124, Site Plan Review**
 - * **Section 18.124.030, Approval Required**
 - * **Section 18.124.060, Approval Criteria**
 - * **Section 18.124.070, Required Minimum Standards**
 7. **Chapter 18.128, Conditional Use**
 - * **Section 18.128.015, General Standards Governing Conditional Uses**
 - * **Section 18.128.280, Surface Mining of Resources Exclusively for On-Site Personal, Farm or Forest Use or Maintenance of Irrigation Canals**
 8. **Chapter 18.132, Variances**
 - * **Section 18.132.020, Authority of Hearings Body**
- B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance**
1. **Chapter 22.08, General Provisions**
 - * **Section 22.08.010, Application Requirements**
 - * **Section 22.08.020, Acceptance of Application**
 2. **Chapter 22.20, Review of Land Use Action Applications**
 - * **Section 22.20.055, Modification of Application**
 3. **Chapter 22.24, Land Use Action Hearings**
 - * **Section 22.24.140, Continuances and Record Extensions**
- C. Deschutes County Comprehensive Plan**
1. **Former Chapter 23.100, Surface Mining**
 - * **Former Section 23.100.080, Non-significant Inventory**
- D. Oregon Revised Statutes (ORS)**
1. **Chapter 197, Comprehensive Land Use Planning**
 - * **ORS 197.763, Conduct of Local Quasi-Judicial Land Use Hearings**

II. FINDINGS OF FACT:

- A. Location:** The subject property is located west of Bend. It is east of Johnson Road, north of Fawn Lane, south of Klippel Road, and west of Tumalo Creek. The original applications identified the subject property as Tax Lots 824 and 828 on Deschutes County Assessor's Map 17-11-13 with an assigned address of 19210 Klippel Road, Bend. The modified applications describe the property as thirteen tax lots, including Tax Lots 824 and 828 and the following contiguous tax lots and associated addresses:

Tax Lot	Address
Tax Lot 601, Map 17-11-13	63344 Palla Lane
Tax Lot 819, Map 17-11-13	63560 Johnson Road
Tax Lot 820, Map 17-11-13	19436 Klippel Road
Tax Lot 822, Map 17-11-13	63570 Johnson Road
Tax Lot 823, Map 17-11-13	19275 Klippel Road
Tax Lot 825, Map 17-11-13	63410 Palla Lane
Tax Lot 826, Map 17-11-13	63380 Palla Lane
Tax Lot 827, Map 17-11-13	63280 Palla Lane
Tax Lot 829, Map 17-11-13	No situs address
Tax Lot 11401, Map 17-11-14	63566 Johnson Road
Tax Lot 11600, Map 17-11-14	19190 Klippel Road

- B. Zoning and Plan Designation:** The subject property is zoned Rural Residential (RR-10). Portions of the property are located within the Landscape Management (LM) Combining Zones associated with Tumalo Creek to the east and Johnson Road to the west. All of the property is within the Wildlife Area (WA) Combining Zone protecting the Tumalo Deer Winter Range. Portions of the property are located in a Surface Mining Impact Area (SMIA) Zone due to the property's proximity to two active surface mines. The property is designated Rural Residential Exception Area (RREA) on the Deschutes County Comprehensive Plan map.

- C. Site Description:** Assessor's data indicate the subject property consists of approximately 155 acres in thirteen contiguous tax lots described in the findings above. Tax Lots 824 and 828 were the site of the Klippel Surface Mine (former SM Site 294) previously zoned Surface Mining (SM). When mining and reclamation of Site 294 was completed, the mine was rezoned to RR-10. The property has approximately 55 acres of irrigation water rights administered by the Tumalo Irrigation District (TID). The property is developed with two man-made, lined reservoirs filled with water. A dwelling, garage, and outbuildings are located on the property. Access to the subject property is from a gravel drive off Fawn Lane on the south, a gravel drive off Klippel Road on the north, and a private driveway off Johnson Road on the north that provides access to the dwelling. There also is a "ditch rider" road near the western boundary of the subject property providing access to TID's irrigation facilities.

The smaller of the two reservoirs ("northern reservoir") is located in the northwestern portion of Tax Lot 828, is round in shape, and has a capacity of approximately 57 acre-feet of water. The larger reservoir ("southern reservoir") is located on Tax Lots 824 and 828 and has a capacity of approximately 68 acre-feet of water. The southern reservoir is long and narrow and has two round man-made gravel and dirt islands, one at each end, to facilitate waterskiing. At its north end, the southern reservoir has a small marina consisting of a boat ramp, dock, and pilings to support a boat house. Near the southern end of the southern reservoir are a weir and a head gate regulating the flow of water from TID's piped irrigation canal ("Tumalo Feed Canal") into the southern reservoir. In addition, there is a

pipe connecting the two reservoirs. The undeveloped portion of the property has a vegetative cover of scattered pine and juniper trees and native brush and grasses.

- D. Surrounding Zoning and Land Uses:** The subject property is adjacent to the Klippel Acres Subdivision which is zoned RR-10 and WA and developed with rural residences. Approximately 350 feet to the east is Tumalo Creek. To the west are Johnson Road and the Saddleback Subdivision zoned RR-10 and WA and developed with rural residences. Also to the west is TID's piped Tumalo Feed Canal and the "ditch rider" road. Two active surface mines are located within a quarter mile of the subject property. Approximately 1,700 feet to the north is SM Site 293. Approximately 350 feet to the east is SM Site 308. Land zoned Exclusive Farm Use-Tumalo/Redmond/Bend Subzone (EFU-TRB) is located approximately 1,000 feet to the north and is engaged in small-scale farming consisting of hay production and livestock grazing on irrigated pasture. Approximately 900 feet to the northwest are lands zoned Forest Use (F-2) that are primarily undeveloped. Tumalo Creek adjoins the property to the east along tax lots 601 and 827. Aerial and ground-level photographs in the record show surrounding land is characterized by a moderate to dense tree cover as well as more open pasture areas.²
- E. Land Use/Code Enforcement History:** The land use history of the subject property is extensive. The following chronology provides context for these applications.³

Klippel Surface Mine. The record indicates former SM Site 294 was fully mined and reclaimed, and received reclamation approval from the Oregon Department of Geology and Mineral Industries (DOGAMI) on September 27, 2005. In May of 2007, Harris Kimble applied for a plan amendment, zone change and goal exception to redesignate SM Site 294 from Surface Mining and Agriculture to RREA, and to rezone the site from SM and Exclusive Farm Use-Tumalo/Redmond/Bend Subzone (EFU-TRB) to RR-10. In a decision dated November 8, 2007, this Hearings Officer approved the plan amendment, zone change and goal exception (PA-07-2, ZC-07-2).⁴ In my decision, I described the rezoned property as follows:

"The subject property is approximately 160 acres in size and very irregular in shape. A significant portion of the property has been disturbed due to previous surface mining and reclamation activities. The disturbed area consists of reclaimed extraction pits and berms created from overburden removed from the extraction sites. The undisturbed portions of the property have varying topography and a mixture of native vegetation including scattered stands of pine and juniper trees, as well as native brush and grasses, and pasture grasses seeded as part of the surface mine reclamation. Part of the eastern border of the subject property is located in the canyon of Tumalo Creek and includes steep slopes and rock outcrops.

² See, e.g., the applicant's site plan/aerial photograph included in the record as Hearing Exhibit 5.

³ This chronology is taken largely from this Hearings Officer's December 15, 2014 decision on appeal from the county's issuance of a Land Use Compatibility Statement (LUCS) (247-14-000-238-PS, 247-14-00274-A).

⁴ A copy of this decision is included in the record as Exhibit "QQ" to the applicant's burden of proof. The applicant submitted two burden of proof statements: the original burden of proof and the burden of proof in support of the modified applications. However, the applicant's exhibits are numbered in one unified sequence. Therefore, for purposes of clarity this decision refers to a single burden of proof.

The record indicates the subject property has 58.91 acres of irrigation water rights administered by TID

The record indicates some of these water rights currently are leased for in-stream use. There is a small irrigation ditch that traverses the subject property within an easement.”

2013. KC Development Group (hereafter “KCDG”) purchased the majority of the subject property in October of 2013. On October 8, 2013, staff from the county’s Community Development Department (CDD) met with representatives of KCDG and their then-attorney Tia Lewis to discuss development of the subject property with a residential cluster development. No development proposal was submitted at that time.

2014. On March 18 and 19, 2014, CDD received three code violation complaints alleging that rock crushing, construction of a lake with a boat dock and fuel tanks, and use of a private road were occurring on the subject property without required land use approval. These complaints were investigated by Deschutes County Code Enforcement Technician Tim Grundeman who concluded that no code violations had occurred. KCDG applied for a temporary use permit to allow rock crushing on the subject property in association with private road maintenance and landscaping. On April 2, 2014, CDD issued a temporary use permit for such use (TU-14-8).⁵ On June 4, 2014, CDD received another code violation complaint related to “unpermitted activities” on the property.

On June 13, 2014, CDD staff, Deschutes County Assistant Legal Counsel John Laherty, representatives of TID, TID’s attorney William Hopp, and TID’s and KCDG’s attorney Elizabeth Dickson met to discuss the need and process for obtaining a Land Use Compatibility Statement (LUCS) for TID’s request to the Oregon Water Resources Department (WRD) for permission to transfer the place of use of TID’s water storage right from Upper Tumalo Reservoir to the subject property. Ms. Dickson advised CDD staff that an application for a residential cluster development on the subject property would be submitted in the future, potentially within six months. On or about June 16, 2014, CDD Director Nick Lelack determined to treat any request for a LUCS submitted by TID as a “land use action” and to process it according to the county’s procedures therefor.

On June 11, 2014, TID submitted to WRD an application (T-11833) to transfer the place of use of a portion of TID’s water storage right from Upper Tumalo Reservoir to the two reservoirs on the subject property.

On June 17, 2014, KCDG submitted applications for a building permit (247-14-003315-STR) and an electrical permit (247-14-003315-ELEC-01) for a boat house and boat slip on the southern reservoir. CDD staff advised KCDG that the county could not sign off on the building or electrical permit while any LUCS request was pending. On June 19, 2014, CDD received a letter from Ken Rieck, TID Manager, explaining the need for the transfer in place of use of its water storage right and TID’s belief that the proposed transfer is a use permitted outright in the RR-10 Zone.

On July 25, 2014, John Laherty sent a letter to Elizabeth Dickson stating in relevant part:

⁵ A copy of the TU is included in this record as Exhibit “I” to the applicant’s burden of proof.

“ . . . [T]o the extent KC Development Group LLC has expended, or intends to expend, resources to create reservoirs, install footings for a dock or boathouse, or otherwise perform work on the subject property that does not [sic] require County approval, it does so at its own risk and without any guarantee that future County permits or approvals – including, without limitation, land use approval for construction of a cluster development or recreational lake, or building division approval for construction of a boat house or dock – will be granted.

The County has encouraged KC Development Group LLC and its principals to apply for necessary land use approvals first – before devoting significant resources to improving the property – so as to avoid the risk of commencing projects it will ultimately be unable to complete. Your client has chosen to disregard this advice.

Please inform your client (again) that Deschutes County will review any future land-use or building permit application on its own merits, and the County's decision on such application will be governed solely by consideration of appropriate criteria. Your client's decision to expend resources on improvements prior to obtaining necessary County approval for his intended development project will not be given undue weight or consideration in this process.”

On July 25, 2014, CDD staff and county legal counsel conducted a site visit to the subject property at the request of neighboring property owners.

On August 4, 2014, TID submitted its LUCS request on a form provided by WRD. The form stated TID intended to submit to WRD an application for a “water right transfer – storage,” and described the intended use of the water in relevant part as follows:

“This is an intra-district transfer in place of use of 108 a.f. [acre feet] of Tumalo Creek Water. TID to TID (Storage water). The transfer of this storage water is necessary for the operation and maintenance of our irrigation system, and allowed as an outright use in the RR-10 zone. The current site was built in the 1920's and no longer serves TID's needs. The new site is a significant upgrade that will enable TID to reduce dependence on Tumalo Creek for natural flow, provide emergency water supplies for the District and Emergency Services responders, and provide increased efficiency in the operations and maintenance of the TID system overall.”

Attached to the LUCS form was a two-page letter dated June 19, 2014 from Ken Rieck, to Nick Lelack describing the reason for the LUCS request.

By a letter dated August 6, 2014, Deschutes County Building Official Dave Peterson issued a stop work order to KCDG for work performed on the boat house foundation on the southern reservoir without a building permit. The previously submitted building and electrical permit applications were withdrawn by KCDG.

On August 13, 2014, Mr. Lelack completed and issued the WRD LUCS form by checking the box stating:

"Land uses to be served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by your comprehensive plan. Cite applicable ordinance section(s)."

Mr. Lelack attached to the form a three-page "Notice of Decision" dated August 13, 2014. The decision cited Section 18.60.020(l) listing "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District," and included the following findings:

"According to information provided by Tumalo Irrigation District, TID 'has decided to move its Regulation Pond storage to [the Klippel Mining Pit] a site upstream from our current in-district storage at Tumalo Reservoir.' TID states that the existing Reservoir 'was designed and built in the 1920's and does not adequately serve TID's needs,' and that the new site 'will be a significant upgrade to operations and maintenance.' The Planning Director finds that transferring in-district storage from the Tumalo Reservoir upstream to the Klippel Acres Mining Pit in order to improve the operations of TID's existing irrigation system is a use permitted outright in this zone."

On August 22, 2014, opponents Thomas and Dorbina Bishop, Trustees for the Bishop Family Trust (hereafter "Bishops"), filed an appeal from the LUCS. The appeal was referred to this Hearings Officer for hearing.

On September 16, 2014, CDD received a code violation complaint for construction of a new road on the subject property. The complaint was again investigated by Tim Grundeman who found no code violation. On September 22, 2014, CDD received a code violation complaint regarding waterskiing occurring on the southern reservoir.

On September 25, 2014, TID filed with WRD a notice of intent to change the location of a portion of its water right to the reservoirs on the subject property (T-11951).

On October 3, 2014, the Hearings Officer conducted a site visit to the subject property and vicinity accompanied by Senior Planner Anthony Raguine. On October 7, 2014, the Hearings Officer held a public hearing on the appeal. At that hearing, the Hearings Officer disclosed her observations and impressions from the site visit.⁶

On October 10, 2014, CDD issued a Notice of Violation to KCDG for operating a "recreation-oriented facility requiring large acreage" without land use approval.

On December 15, 2014, the Hearings Officer issued a final decision on the LUCS appeal, holding in relevant part that:

- "1. The county incorrectly categorized TID's proposed use on the WRD LUCS form as a use allowed without review.*
- 2. The county erred in issuing a LUCS decision finding TID's proposed use was allowed without review.*

⁶ At the continued public hearing on the subject applications, the Hearings Officer requested that the portion of the LUCS hearing recording that included my site visit observations be included in the record for the subject applications. However, that recording was inadvertently omitted from this record.

3. *The county's LUCS decision is reversed and remanded for the CDD Director to reissue the WRD LUCS form and the LUCS decision to categorize TID's proposed use as one involving discretionary land use approval(s) that have not yet been obtained – i.e., the conditional use of surface mining for reservoirs in conjunction with operation and maintenance of irrigation systems under Section 18.60.030(W), and/or a recreation-oriented facility requiring large acreage under Section 18.60.030(G)."*⁷

Both TID and the Bishops appealed the Hearings Officer's decision to the Deschutes Board of County Commissioners (hereafter "board").

2015. On January 7, 2015, by Order No. 2015-009, the board accepted the TID's and the Bishops' appeals of the Hearings Officer's LUCS decision and elected to consolidate them into a single *de novo* proceeding. On January 29, 2015 the board held a public hearing on the appeals. On April 8, 2015, the board issued its decision affirming the Hearings Officer's decision.⁸ On April 24, 2015, Nick Lelack re-issued the WRD LUCS form and checked the box stating:

*"Land uses to be served by the proposed water uses (including proposed construction) involve discretionary land use approvals as listed in the table below. (Please see attached documentation of applicable land use approvals which have already been obtained. Record of Action/land use decision and accompanying findings are sufficient.) **If approvals have been obtained but all appeal period have not ended, check "Being pursued."** (Bold emphasis in original.)*

The table on the LUCS form listed conditional use permits as required to establish a recreation facility and for surface mining. The board's and the Hearings Officer's decisions were attached to the re-issued LUCS.

On April 29, 2015, WRD issued two orders concerning TID's request for permission to transfer the place of use of part of its water right from Upper Tumalo Reservoir to the reservoirs on the subject property. WRD denied TID's application (T-11833) for a temporary transfer in place (Special Order Volume 95, Pages 1018-1025). It also denied TID's request for approval of a permanent transfer in place (Special Order Volume 95, Pages 1026-1032).⁹ The stated reason for WRD's denials was that land use approval was required for the transfer and TID had not obtained it.

In May of 2015, KCDG, TID and the Bishops filed appeals with the Land Use Board of Appeals (LUBA) from the board's LUCS decision, and from Nick Lelack's re-issuance of the WRD LUCS form, stating additional land use review was required for the reservoirs.

⁷ A copy of the Hearings Officer's LUCS decision is included in this record as Exhibit "XX" to the applicant's burden of proof.

⁸ A copy of the board's decision is included in this record as Exhibit "PP" to the applicant's burden of proof.

⁹ Copies of these orders are included in the record as attachments to the Bishops' May 26, 2015 memorandum.

On May 14, 2015, a code violation complaint was filed alleging unpermitted construction on the subject property including piping and concrete work. On May 15, 2015, TID's and KCDG's attorney Ken Katzaroff submitted an affidavit from Robert Varco, TID's Field Supervisor, describing the nature and purpose of the construction work. According to the affidavit, the construction was to replace an existing concrete weir in order to improve TID's existing water delivery system. Mr. Varco stated TID installs approximately 20 new or replacement weirs in its system each year. On May 18, 2015, Senior Planner Anthony Raguine and Code Enforcement Technician John Griley met with Harris Kimble on the subject property to investigate the construction. Based on the investigation and Mr. Varco's affidavit, the county determined this construction work did not require building or electrical permits, and that the work was allowed outright under Section 18.60.020(l) of the Deschutes County Code as the "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District." The code enforcement case was closed.

On September 9, 2015, LUBA issued its decision on TID's/KCDG's and the Bishops' appeals from the county's LUCS decisions. *Bishop v. Deschutes County*, ___ Or LUBA ___ (LUBA No. 2015-027, 2015-028, and 2015-030; September 9, 2015).¹⁰ TID's/KCDG's appeals included motions to dismiss all appeals, and the Bishops' appeals included a motion to transfer its appeals to the Deschutes County Circuit Court on the basis that LUBA lacked jurisdiction to hear the appeals. In its decision, LUBA held: (1) the board correctly found both TID/KCDG and the Planning Director mischaracterized the nature of the use for which the LUCS was requested; (2) the Planning Director did not err in re-issuing the LUCS stating land use approval for the reservoirs was required; (3) LUBA lacked jurisdiction to hear the appeals because they are excluded from LUBA jurisdiction under ORS 197.015(10)(b)(H)(iii);¹¹ (4) the Bishops' LUBA appeals were transferred to the Deschutes County Circuit Court based on the Bishops' motion for transfer; and (5) TID's/KCDG's appeals were dismissed because they did not timely file a motion for transfer to the circuit court.

- F. Procedural History:** Based on the board's April 8, 2015 LUCS decision and Nick Lelack's April 24, 2015 re-issuance of the LUCS, the applicant submitted applications on April 29, 2015 for conditional use approval for the surface mining that created the reservoirs, and for the recreation-oriented facility requiring large acreage on the southern reservoir. The applications were accepted by the county as complete on May 29, 2015. Therefore, the 150-day period for issuance of a final local land use decision under ORS 215.427 would have expired on October 26, 2015. A public hearing on the applications was scheduled for July 1, 2015. By a letter dated June 26, 2015, the applicant requested a continuance of the hearing in order to submit modified applications addressing the site plan review criteria and questions raised by planning staff about the number of guests using the subject property for recreation and a guest parking plan. The letter included the applicant's agreement to toll the 150-day period for decision on the original applications to November 23, 2015. Because the request for continuance was submitted after notice of the public hearing was published, pursuant to Section 22.24.140 of the county's land use procedures ordinance, the Hearings Officer opened the public hearing on July 1, 2015, received limited evidence and argument, and continued the hearing to September 29, 2015.

¹⁰ A copy of LUBA's decision is included in this record as Exhibit "YY" to the applicant's burden of proof.

¹¹ ORS 197.015((10)(b)(H)(iii) excludes from LUBA's jurisdiction a decision by a local government that a state agency action could be compatible with the county's acknowledged comprehensive plan and zoning ordinance but requires future land use review.

On July 17, 2015, the applicant submitted modified applications adding eleven tax lots, requesting conditional use approval for the recreation-oriented facility requiring large acreage to allow use thereof by up to twenty accompanied guests of the property owners, site plan approval for the recreation-oriented facility including access and parking for such guests, and approval of a variance to the minimum setbacks in the RR-10 Zone to allow the southern reservoir to cross a property line. Under Section 22.20.055(B) of the procedures ordinance, filing the modification application restarted the 150-day period on July 17, 2015. Therefore, the 150-day period on the modified applications would have expired on December 14, 2015.

By an electronic mail message dated July 30, 2015, Elizabeth Dickson requested county approval to operate a motorized boat on the southern reservoir in order to conduct audio testing of boat noise. By an electronic mail message dated August 3, 2015, Senior Planner Raguine advised Ms. Dickson the county would give permission for the audio testing. At the county's request, on August 12, 2015 the applicant mailed written notice of the audio testing to the owners of record of all property located within 500 feet of the subject property, notifying these owners that testing would take place on August 20, 22, 23, and 24 at various times.

At the continued public hearing on September 29, 2015, the Hearings Officer received testimony and evidence, left the written evidentiary record open through October 27, 2015, and allowed the applicant through November 3, 2015 to submit final argument pursuant to ORS 197.763. The record closed on November 3, 2015. Because the applicant agreed to extend the written record from the hearing on September 29, 2015 through November 3, 2015, under Section 22.24.140 of the procedures ordinance the 150-day period was tolled for 35 days and would have expired on January 19, 2016.¹²

By a letter dated December 22, the applicant agreed to extend the 150-day period to January 27, 2016. By a letter dated January 4, 2016, the applicant agreed to further extend the 150-day period to February 17, 2016, and requested that its December 22, 2015 letter be withdrawn. As of the date of this decision, there remain 27 days in the extended 150-day period.

- G. Proposal:** The applicant requests conditional use approval to make legal KCDG's previous surface mining that created the two reservoirs on the subject property. The applicant proposes that the primary use of the reservoirs would be storage and re-regulation of TID irrigation water. The applicant also requests a variance to the minimum setbacks in the RR-10 Zone to allow the southern reservoir to cross a lot line.

The applicant requests conditional use and site plan approval to establish a recreation-oriented facility requiring large acreage on the southern reservoir, consisting of motorized boating, waterskiing and wakeboarding thereon. The applicant proposes that this use would be secondary to the water storage use of the southern reservoir. The requested conditional use and site plan approval would include approval of related facilities at the north end of the southern reservoir consisting of the existing dock, and proposed 952-square-foot boathouse and ten-space guest parking area.

As part of the proposed recreation-oriented facility requiring large acreage, the applicant requests approval for use thereof by up to 20 guests in addition to the property owners. Guests would access the subject property via a private, gated driveway from Johnson

¹² January 18, 2016, was a holiday and therefore not counted in the time calculation.

Road to the proposed guest parking area. The applicant proposes that guests would congregate in the "harbor area" at the north end of the southern reservoir.

The applicant proposes that motorized boating, waterskiing and wakeboarding on the southern reservoir would not occur from December 1 through March 31 to protect the deer winter range. The applicant also proposes a number of restrictions for operation of the motor boat and waterskiing/wakeboarding activity, discussed in detail in the findings below.

- H. Public/Private Agency Comments:** The Planning Division sent notice of the applicant's original and modified applications to a number of public and private agencies, and received responses from: the Deschutes County Building Division (building division), Road Department (road department), and Senior Transportation Planner; and the Oregon Department of Fish and Wildlife (ODFW). These comments are set forth verbatim at pages 6-7 of the staff report and are included in the record. The following agencies did not respond to the request for comments, or submitted a "no comment" response: the Deschutes County Assessor, Environmental Health Division, and Code Enforcement; DOGAMI; and the U.S. Fish and Wildlife Service.
- I. Public Comments:** The Planning Division mailed individual written notice of the applicant's original and modified applications and the initial public hearing to the owners of record of all property located within 250 feet of the subject property. In addition, notice of the initial public hearing was published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign. As of the date of the record in this matter closed, the county had received 92 letters in response to these notices. In addition, 32 members of the public testified at the initial and continued public hearings. Public comments are addressed in the findings below.
- J. Lot of Record:** The staff report states Tax Lot 601 is a legal lot of record pursuant to a 1990 lot-of-record determination (LR-90-158). The staff report also states the remaining tax lots that comprise the subject property were determined to be separate legal lots of record pursuant to a 2005 lot-of-record determination (LR-05-8). The staff report states these legal lots subsequently were modified through several property line adjustments (LL-06-7, LL-08-75, LL-08-76, LL-11-4, LL-11-5, LL-11-7, LL-11-18, LL-13-46, LL-13-47, LL-13-48, LL-13-49, LL-13-51 and LL-13-52).

III. CONCLUSIONS OF LAW:

A. Summary. The Hearings Officer finds I cannot approve the applicant's proposal for the following reasons.

Reservoirs. With respect to the two new reservoirs on the subject property, I have found the surface mining to create the reservoirs is a conditional use in the RR-10 Zone as surface mining "in conjunction with" the operation and maintenance of TID's irrigation system under Section 18.60.030(W). However, I have found I cannot grant conditional use approval for this surface mining because under Section 18.128.280 it is not permitted unless and until the subject property is placed on the county's comprehensive plan inventory of non-significant mineral and aggregate resource sites. I also have found the surface mining to create the southern reservoir does not comply with all applicable site plan and conditional use approval criteria. In particular, I have found the southern reservoir is not compatible with the surrounding natural environment and rural residential development considering its scale, the steepness of its banks, and the lack of vegetation adjacent to and surrounding the reservoir.

Recreational Use of Southern Reservoir. I have found the proposed recreational use of the southern reservoir is a conditional use in the RR-10 Zone as a "recreation-oriented facility requiring large acreage" under Section 18.60.030(G). I have found this use is not prohibited in the WA Zone under Section 18.88.040(B)(7). However, I have found the proposed recreational does not comply with all applicable site plan and conditional use approval criteria because it is not compatible with the surrounding natural environment and existing rural residential uses due to its scale, intensity and duration.

Because the Hearings Officer anticipates this decision will be appealed to the board, and the board may elect to hear the appeal, I have included in this decision recommended findings and conclusions on all applicable approval criteria, as well as recommended conditions of approval.

B. Preliminary Issues. The Hearings Officer has identified, and the parties have raised procedural questions and several issues that have little if any relevance to the applicable approval criteria for the applicant's proposal. Because these issues may be raised in an appeal to the board, I address each of them in the findings below.

1. Property Owner Authorization. Section 22.08.010(B) allows a land use application to be submitted by the property owner or a person who has written authorization from the property owner to submit the application. Under Paragraph (C) of that section, land use applications submitted by public entities or utilities having the power of eminent domain need not satisfy the "written authorization" requirement. These applications were submitted by Hurley Re, PC, the law firm representing KCDG and TID. In the Hearings Officer's LUCS decision, I held that because TID is an irrigation district with the power of eminent domain, and because the subject property is located within TID's boundaries and includes TID's irrigation facilities, TID did not need to provide written property owner authorization for submission of the LUCS application. Nevertheless, both TID and KCDG submitted letters authorizing Hurley Re, PC to submit the subject applications on their behalf.

The original applications identified the subject property as consisting of only Tax Lots 824 and 828. As discussed in the Findings of Fact above, the modified applications include a total of thirteen tax lots. Assessor's data and the applicant's burden of proof show that two of those thirteen tax lots are owned by two entities in addition to KCDG: the Cadwell Family Trust (Tax Lot 819), and Harris and Nancy Kimble (Tax Lot 822). The record does not include letters from these two property owners authorizing the applicant to submit the applications on their behalf.

Section 22.08.020(A) states the county shall not accept a land use application until the planning director determines the requirements of Section 22.08.010 have been met, including the written owner authorization requirement. However, the record indicates the modified applications were accepted by the county on July 17, 2015. The Hearings Officer finds it is not clear from this record whether the county was aware of the lack of authorization from the Cadwells and Kimbles when the modified applications were accepted. In any case, because both Eric Cadwell and the Kimbles participated in these proceedings, I find it likely the applicant had their authorization to appear on their behalf.¹³ Therefore, I find the lack of written authorization can be remedied by the applicant's submission of the required authorization letters from the Cadwell Family Trust and from Harris and Nancy Kimble prior to the date this decision becomes final.

2. Retroactive Rule Change. The property owners and their supporters argue at length that the county has improperly changed and/or reinterpreted the applicable code provisions to their detriment, requiring them to obtain conditional use approval for the surface mining creating the

¹³ In addition, in this Hearings Officer's LUCS decision I found Mr. Kimble is a partner in KCDG.

reservoirs, and for the proposed recreational use of the southern reservoir, contrary to previous county direction. Specifically, the property owners assert they were told by former Principal Planner Kevin Harrison that they did not need any permits or approvals for either use.

Mr. Harrison did not submit testimony in this matter. Therefore, the Hearings Officer cannot determine from this record what information Mr. Harrison had when he consulted with the property owners and their attorneys. However, in light of TID's material misrepresentation of the nature of its proposal when it sought a LUCS from the county, I find it likely Mr. Harrison was not aware of the full panoply of uses the property owners contemplated for the subject property. In any case, I find Mr. Harrison could not authorize the property owners to undertake any use of the subject property without necessary land use approval.¹⁴ Moreover, as noted in the Findings of Fact above, in July of 2014, Assistant County Counsel John Laherty advised the property owners' attorney Elizabeth Dickson that KCDG should obtain necessary land use approval before undertaking development work on the reservoirs "in order to avoid the risk of commencing projects it will ultimately be unable to complete." Mr. Laherty's communication with Ms. Dickson stated KCDG had "chosen to disregard this advice."

In the Hearings Officer's LUCS decision, I found TID, KCDG and the Planning Director mischaracterized the nature of the proposed uses on the subject property when the applicant requested, and the Planning Director issued, a LUCS for TID's request to WRD for permission to transfer the place of water storage from Upper Tumalo Reservoir to the reservoirs on the subject property. I found both the surface mining to create the reservoirs and the recreational use of the southern reservoir require conditional use approval. My characterization of these uses was appealed to, and affirmed by, the board and LUBA. The property owners' attorney acknowledged the nature of the county's LUCS determination in its October 20, 2015 memorandum, stating in relevant part:

"The County's position changed when it re-interpreted the law at a higher level. Despite Staff interpretations, a closer look by Hearings Officer Green and the BOCC yielded a different decision." (Emphasis added.)

For the foregoing reasons, the Hearings Officer finds there is no merit to claims the county has improperly changed or re-interpreted code provisions applicable to the applicant's proposal, or is bound by prior verbal representations made by county planning staff.

3. Retroactive Approval. Opponents argue the Hearings Officer should deny the subject applications because TID and the property owners failed to obtain the necessary state water permit and county land use approvals *before* undertaking the surface mining for the reservoirs and recreational use thereon. They contend county approval of their proposal after the fact will encourage property owners to ignore the county's land use regulations. I find the extensive process TID and the property owners have been required to follow in order to make the activities on the subject property lawful is not likely to encourage anyone to avoid obtaining land use approval. In any case, nothing in the county code prohibits an applicant/property owner from

¹⁴ Section 22.20.005 provides:

Any informal interpretation or determination, or any statement describing the use to which a property may be put, made outside the declaratory ruling process (DCC 22.40) or outside the process for approval or denial of a land use permit (DCC 22.20-22.28) shall be deemed to be supposition only. Such Informal interpretations, determinations, or statements shall not be deemed to constitute final County action effecting a change in the status of a person's property or conferring any rights, including any reliance rights, on any person.

obtaining after-the-fact approval. To the contrary, the county's land use regulations and code enforcement process are intended to facilitate bringing nonconforming land uses into compliance when possible. That is precisely what the applicant and property owners are seeking to do through these applications. Accordingly, I find no merit to opponents' argument.

4. Regulation of Private Use on Private Property. The property owners and their supporters also argue at length that the county's land use regulations are not applicable to, and exceed the county's regulatory authority for, private uses on private property – i.e., recreation on the southern reservoir. They also claim it is unconstitutional for the county to impose a limit on the number of persons who may use the southern reservoir for recreation. The Hearings Officer finds no merit to these claims. The county's land use regulations clearly apply to land uses listed in the county's zoning ordinance on land over which the county has land use authority – i.e., non-federal land within the county's borders. The property owners and their supporters have not identified, nor have I found, any provision in the county code that generally exempts private use on private land from applicable land use regulations.¹⁵

The Hearings Officer also rejects the claim made by the property owners and their supporters that they are being singled out for disparate treatment. To the contrary, the surface mining and recreational use at issue in these applications are subject to the same conditional use approval criteria applicable to any other conditional use proposed for private property. Moreover, the applicant's proposal is not materially different from other proposed private uses on private land the county's hearings officers previously have considered.¹⁶

Finally, the property owners' supporters argue the county cannot impose "commercial" regulations on private use of private property. Again, the Hearings Officer finds this argument is without merit. Neither the surface mining to create the reservoirs nor the proposed recreational use of the southern reservoir constitutes "commercial" activity, but both have been found to constitute conditional uses in the RR-10 Zone. Among other requirements, the applicable site plan and conditional use criteria state the proposed uses must be compatible with surrounding uses considering access, design, operating characteristics, and impacts on natural resources and existing development.

5. Degree of Support. The applicant argues its proposal enjoys wide support in the community in general and within the surrounding neighborhood in particular. The applicant submitted a color-coded diagram entitled "Project Supporters Map," included in the record as Hearing Exhibit 6, purporting to show that a majority of adjacent and nearby property owners support the applicant's proposal. The Hearings Officer finds the degree of community support is not relevant to any applicable approval criteria for the applicant's proposal.

6. Residential Cluster Development. The Bishops and other opponents argue the Hearings Officer cannot approve the applicant's proposal because the reservoirs constitute the first phase of a residential cluster development on the subject property for which the applicant has not sought or received approval. The Bishops also argue I should preemptively deny cluster development

¹⁵ The property owners' attorney acknowledged the legitimate purpose for limitations on the intensity of the proposed recreational in the applicant's October 20, 2015 submission as follows:

"Applicant has also voluntarily proposed a 20 guest limit. Applicant suggested such limit in conversations with Deschutes County Staff in order to provide a way to quantify impacts of the proposed use." (Emphasis added.)

¹⁶ For example, this Hearings Officer granted conditional use approved for a private paintball park on private property (*Dorsett*, CU-07-79). Hearings Officer Dan Olsen granted conditional use approval to modify a private park used for private shooting sports (*High Desert Shooting Sports Foundation*, (247-15-000263-CU, 247-15-000264-SP).

approval through these applications because, in their opinion, the property owners cannot meet the applicable cluster development approval criteria.

The Hearings Officer addressed these arguments in my LUCS decision in relevant part as follows:

"The record includes evidence that KCDG's predecessor in title, Harris Kimble, stated his intent to develop the subject property with a residential cluster development featuring the new reservoirs. [Footnote omitted.] Both TID and KCDG disavow any representations made by Mr. Kimble as the plans of a 'previous owner.' However, the record indicates Mr. Kimble is a partner in KCDG. [Footnote omitted.] Accordingly the Hearings Officer finds TID's and KCDG's position somewhat disingenuous. The record also includes similar representations made by KCDG representatives. As noted in the Findings of Fact above, at a June 13, 2014 meeting with CDD staff, Ms. Dickson stated KCDG planned to submit an application for a residential cluster development within six months. In addition, Paragraph (15) of the June 14, 2014 contract between TID and KCDG states:

'KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of residential lots in the development to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Contract.' (Emphasis added.)

TID and KCSG argue that since no land use application for residential cluster development approval has been submitted by KCDG, there is no basis to conclude the new reservoirs constitute the unpermitted 'first phase' of such a development as claimed by appellants. Although the Hearings Officer finds there clearly is some basis to suspect the new reservoirs are planned to be part of a future residential cluster development, I agree with TID and KCDG that it is not reasonable to characterize the new reservoirs as the first phase of such development. That is because the cluster development conditional use in the RR-10 and WA Zones under Section 18.60.030(F) and 18.88.040(A), respectively, includes numerous components in addition to open space and amenities therein, such as dwellings, utility infrastructure, streets, and water and sewer systems. Therefore, I find the county did not err in failing to identify the cluster development conditional use in categorizing TID's proposal on the LUCS form or in its LUCS decision.

Because the Hearings Officer has found the county's LUCS decision was in error and must be reversed and remanded, I do not address the parties' extensive arguments concerning whether the new reservoirs would satisfy the conditional use approval criteria for "recreation-oriented facility requiring large acreage" or for a residential cluster development."

The Hearings Officer finds the question concerning the nature and scope of the applicant's proposal is somewhat similar to that considered by LUBA in *Truth in Site v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2015-098, June 8, 2015). There, Oregon State University (OSU) sought approval to establish a branch campus on a 10-acre parcel. OSU had an option to purchase an adjacent 46-acre parcel, and indicated in public statements its intent ultimately to expand the campus onto the 46-acre site. Opponents argued that in light of OSU's stated intent to develop a much larger campus of which the 10-acre parcel would be a component, the city erred in not

requiring OSU to submit a master development plan for the entire 56-acre area. In affirming the city's decision not to require such a master plan, LUBA held in relevant part:

*"OSU does not own the adjacent property and the property's owner did not sign the application for site plan and design review. Accordingly, the city found that 'the project' is the 10.44 acre project * * *." The city imposed a condition of approval that requires OSU to comply with the provisions of BDC Chapter 4.5 11 [master development plan] if OSU seeks to develop the 46 acres. * * **

*A portion of petitioners' third assignment of error argues that the second sentence of BDC 4.5.300(A) requires OSU to seek Master Neighborhood Development Plan approval because OSU's own submissions to the record demonstrate that OSU plans to develop a 56-acre campus, beginning with the subject 10.44-acre property, and then expanding onto the adjacent 46-acre property that it currently has an agreement to purchase. Therefore, according to petitioners, OSU is proposing a 'project' consisting of one or more properties totaling 20 acres or larger' under BDC 4.5.300(A). * * **

LUBA is required to affirm the city council's interpretation of BDC 4.5.300 unless that interpretation is 'inconsistent with' the express language of 4 the BDC or inconsistent with the purpose of the BDC. ORS 197.829(1)(a) and 5 (b). While there is evidence in the record that supports a conclusion that OSU eventually plans to develop a larger campus than the 10.44-acre proposal, we agree with respondents that the city's interpretation of the word 'project' as used in BDC 4.5.300(A) in context with the phrase 'one or more properties' in the same code section as limiting the 'project' to the property that an applicant controls is not inconsistent with the operative language of BDC 4.5.300 or inconsistent with the purpose of BDC Chapter 4.5. The city's interpretation of BDC 4.5.300(A) is affirmed."

The Deschutes County code does not define "project" or include analogous terminology for identifying the scope of land use review. Rather, Section 22.08.020 of the procedures ordinance appears to give the Planning Director broad discretion in identifying the scope of the proposed development when determining whether to accept a land use application.¹⁷ Moreover, LUBA noted in its decision dismissing the LUCS appeals that the county was not obligated to accept the property owners' characterization of the proposed use for purposes of a LUCS determination, and suggested the county also did not err in rejecting the Bishops' characterization of the proposed uses as requiring approval as a cluster development.

The record indicates that when Planning Director Nick Lelack accepted the subject conditional use and site plan applications as complete, he was aware of opponents' assertions that the reservoirs are the first phase of a residential cluster development. Nevertheless, Mr. Lelack concluded the proposed land uses were as represented by the applicant – i.e., surface mining to create the reservoirs and recreational use on the southern reservoir. The Hearings Officer finds that in this context, the question is whether the Planning Director abused his discretion in not characterizing the applicant's proposal as the first phase of a residential cluster development,¹⁸ and in not finding

¹⁷ That section states the Planning Director may accept a land use application as complete if he finds the application requirements have been met and that all applicable issues have been addressed.

¹⁸ Section 18.04.030 defines "cluster development" as:

that the applications failed to adequately address the cluster development conditional use approval criteria under Section 18.128.200 and the applicable subdivision standards under Title 17.

The Hearings Officer finds the evidence in this record strongly suggests KCDG intends ultimately to develop the subject property with some type of residential subdivision of which the reservoirs would be a component, such as recreational amenities and required open space for a residential cluster development. In particular, the size and design of the southern reservoir are more consistent with a community facility that with one serving a single property owner. Nevertheless, I again find that where, as here, the applicant has not applied for cluster development approval, and the proposed uses do not include all requirement elements of a residential cluster development, the Planning Director did not err in concluding the applicant's proposal is limited to its stated request for conditional use approval for surface mining for the reservoirs and recreational use of the southern reservoir. I also find it would not be appropriate for me to issue what in effect would be an advisory opinion as to whether a cluster development on the subject property would satisfy the applicable approval criteria.

7. TID Board Decisions. The Bishops and other opponents are highly critical of the actions of the TID Board of Directors (TID board) concerning the creation and use of the reservoirs, and in particular the TID board's decision to contract with KCDG for use of the reservoirs for water storage. Opponents accuse the TID board of violating its fiduciary duty to water users within TID's system. The Hearings Officer finds the legitimacy and correctness of the TID board's decisions related to the reservoirs and the transfer of water storage thereto are not before me in this matter. The TID board's decisions may be relevant to the subject applications *only* insofar as they relate to the question of whether and to what extent TID operates the reservoirs, as discussed in the findings below.

8. Contents of Record.

a. Applicable Statutory and Ordinance Provisions. Records in the county's land use proceedings are governed by ORS 197.763 and by Chapter 22.24 of the land use procedures ordinance. ORS 197.763 provides in pertinent part:

- (6) (a) **Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection, or by leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.**

* * *

- (c) **If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.**

* * * a development permitting the clustering of single or multi-family residences on part of the property, with individual lots of not less than two acres in size and not exceeding three acres in size. No commercial or industrial uses not allowed by the applicable zoning ordinance are permitted.

* * *

(9) For purposes of this section:

- (a) Argument means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed to be relevant by the proponent to a decision. Argument does not include facts.
- (b) Evidence means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. (Emphasis added.)

Section 22.24.140 of the procedures ordinance essentially mirrors the above-quoted statutory language, but includes the following additional language in Paragraph (D) addressing rebuttal:

If at the conclusion of the initial hearing the Hearings Body leaves the record open for additional written evidence or testimony, the record shall be left open for at least 14 additional days, allowing at least the first seven days for submittal of new written evidence or testimony and at least seven additional days for response to the evidence received while the record was held open. Written evidence or testimony submitted during the period the record is held open shall be limited to evidence or testimony that rebuts previously submitted evidence or testimony. (Emphasis added.)

Although the county code language does not expressly authorize the submission of argument during the open record period, the Hearings Officer finds such submission clearly is authorized under ORS 197.763.

b. Bishops' Rebuttal Submission. At the close of the public hearing, the Hearings Officer established a schedule for the post-hearing submission of evidence and argument. Pursuant to Section 22.24.140(D), I left the written record open through October 20, 2015, for submission of new evidence and argument, through October 27, 2015, for submission of rebuttal evidence and argument, and through November 3, 2015, for submission of the applicant's final argument.

In its final argument, the applicant identified and objected to several parts of the Bishops' October 26, 2015 submission on the grounds that they constitute new evidence and argument. The applicant asked the Hearings Officer to strike these materials.¹⁹ I address each of the applicant's record claims in the findings below.

(1) DOGAMI Surface Mining Regulations. The applicant argues the Bishops' presentation of argument concerning application of DOGAMI regulations violates the Hearings Officer's post-

¹⁹ On November 5, 2015, the Bishops submitted a response to the applicant's request to strike. The record includes an electronic mail message dated November 5, 2015, from Senior Planner Raguine to the Bishops' attorney Jennifer Bragar stating that because the Bishops' submittal was made after the close of the record, it would not be forwarded to the Hearings Office. Therefore, the Bishops' November 5, 2015 response is not before me.

Ms. Bragar could have requested that the Hearings Officer reopen and extend the written record to allow the Bishops to respond to any new evidence they believed the applicant submitted during the rebuttal period, and/or to submit their response to the request to strike. However, she did not do so. Ms. Bragar may be able to submit her response to the request to strike in a *de novo* appeal before the board.

hearing schedule. I disagree. There is nothing in Section 22.24.140(D) or ORS 197.763 that prohibits the submission of new *argument* during the rebuttal period.

The applicant also argues that as a matter of fairness, the Hearings Officer should not allow *any* new argument during the rebuttal period because to do so would prevent the applicant and other parties from adequately responding to it, and would prevent the applicant from submitting rebuttal evidence. I also find no merit to this argument. As noted above, ORS 197.763(6)(c) provides that any party, including the applicant, may request that the written record be reopened and extended in order to respond to new evidence submitted during the rebuttal period. No requests to reopen the record were filed.²⁰ Moreover, the applicant could have requested that the period for submission of its final argument be extended in order to address new arguments presented during the rebuttal period. The applicant did not make such a request.

The applicant argues the Hearings Officer should not consider the DOGAMI surface mining statutes and administrative rules, and related argument, submitted by the Bishops in their rebuttal because they constitute *new* evidence and argument. I find no merit to this argument. Nothing in ORS 197.763 or the county's procedures ordinance prohibited the Bishops from submitting new evidence and argument during the rebuttal period. The pertinent question is whether this evidence and argument constitutes rebuttal. I find it clear from the Bishops' October 26, 2015 memorandum that the evidence and argument concerning the DOGAMI rules were submitted to rebut the applicant's argument that the surface mining that created the reservoirs does not constitute "surface mining."

For the foregoing reasons, the Hearings Officer finds no basis to strike the Bishops' arguments or evidence concerning DOGAMI surface mining regulations submitted during the rebuttal period.

(2) Tree Debris Photos. The applicant appears to object to the Bishops' submission of photographs of tree cuttings the Bishops argue are relevant to the question of whether or not a "ditch rider" road on the subject property was abandoned. The Bishops' October 26, 2015 memorandum, to which the photographs are attached, states they were presented to rebut photographs the applicant submitted as Exhibit "WW" to its burden of proof. For this reason, the Hearings Officer finds the Bishops' tree debris photos were in rebuttal of evidence submitted by the applicant during the first open record period, and therefore should not be stricken.

(3) Post LUCS Submittals. The applicant objects to inclusion in the record of the Exhibit 4 to the Bishops' October 26, 2015 memorandum. That exhibit consists of a one-page summary of what the Bishops believe is KCDG's unpermitted conduct on the subject property, as well as a three-page letter dated February 6, 2015 from Ms. Bragar to the board stating it is "additional evidence" in support of the Bishops' LUCS appeal to the board. The Bishops claim these documents are not "new information" but rather are summaries of previous information placed in the record. I agree with the Bishops' characterization of their Exhibit 4. I also find these documents constitute rebuttal to evidence submitted by the applicant during the first open record period, and therefore should not be stricken.

(4) Oregon Health Authority Rules. The applicant objects to the Bishops' submission of evidence and argument concerning application of Oregon Health Authority (OHA) rules to the reservoirs on the subject property. As discussed above, the Hearings Officer has found nothing in ORS 97.763 or the county's procedures ordinance prohibited the Bishops from submitting new

²⁰ At the close of the public hearing during the discussion of the post-hearings schedule, the Hearings Officer stated all parties have the right to request that the record be reopened to respond to new evidence. (September 29, 2015, Hearing Video, 4:21:50.)

evidence and argument in their October 26, 2015 memorandum. Again, the pertinent question is whether the evidence and argument are rebuttal.

The OHA evidence submitted by the Bishops includes: (a) Exhibit 9 which consists of copies of OHA rules; (b) Exhibits 6 and 7 which consist of information about Klippel Water Company's wells and the Klippel Water Company's system, as well as copies of water right certificates and related documents issued by WRD for the Klippel Water Company (Certificate of Water Right 89406 dated July 24, 2014 and "Claim of Beneficial Use Map for Klippel Water, Inc." with an WRD "received" stamp date of February 12, 2013); and (c) Exhibit 7 consisting of well logs kept by WRD for the Klippel Water Company. Finally, the Bishops' October 26, 2015 memorandum includes statements regarding the percentage of Klippel Water Company's capacity represented by one of its wells. The Bishops October 26, 2015 memorandum states the above-described evidence and argument was submitted to rebut the applicant's evidence and argument concerning potential impacts from the reservoirs on the Klippel facilities. The Hearings Officer agrees with the Bishops' characterization of this evidence and argument and therefore finds it should not be stricken.

(5) Minutes of Klippel Water Inc. Board. The applicant objects to inclusion in the record of the discussion in Footnote 26 to the Bishops' October 26, 2015 memorandum, and Exhibits 10 to the memorandum, which address possible trespass by Harris Kimble on Klippel Water Company property. The applicant argues this submission was impermissible in the rebuttal period because it was the first time the Bishops argued KCDG was on notice of alleged trespass. Footnote 26 refers to Exhibit 6 to the Bishops' September 29, 2015 memorandum. That exhibit consists of two letters dated May 29, 2014 and July 7, 2014, from an attorney for the Klippel Water Company to Eric Cadwell and Harris Kimble putting them on notice of trespass by construction on behalf of K-C Development Group, LLC. The footnote also states Klippel Water Company was aware of trespass by Harris Kimble in 2007, based on the minutes of the Klippel Water Company in Exhibit 10 to the Bishops' October 26, 2015 memorandum.

According to Footnote 26, the Bishops' stated reason for submitting Exhibit 10 is to show the 2014 trespass on Klippel Water Company's property "was particularly egregious because this was not the first time it had happened." The Hearings Officer finds this statement is insufficient to explain how Exhibit 10 rebuts evidence submitted by the applicant in the first open record period that ended on October 20, 2015. Therefore, I find Exhibit 10 to the Bishops' October 26, 2015 memorandum, and all discussion thereof in the memorandum, should be stricken from the record as not constituting rebuttal, and I will not consider them.

(6) New Arguments and Evidence for So-Called "One-Fill Rule." The applicant argues the Bishops submitted new argument including case law in Exhibit 12 to their October 26, 2015 memorandum, concerning the so-called "one-fill rule." The Hearings Officer understands this "rule" to constitute an alleged prohibition against TID emptying and filling the reservoirs on the subject property more than once. As discussed above, there is nothing in the statute or the county's procedures ordinance that prohibited the Bishops from submitting new evidence and argument in the rebuttal period. Again, the pertinent question is whether this evidence and argument constitutes rebuttal. The Bishops' memorandum states their Exhibit 12 and supporting argument were submitted to challenge TID's statements in its October 20, 2015 memorandum that it was not aware of the "no fill rule."

The applicant also argues Exhibit 13 to the Bishops' October 26, 2015 memorandum should be stricken. Exhibit 13 is a three-page WRD form entitled "Water Master Review Form: Water Right Transfer," dated July 11, 2014, that addresses TID's proposed water right transfer to the reservoirs on the subject property. Again, the Hearings Officer finds nothing prohibited the Bishops from submitting this evidence and argument about it during the rebuttal period. And I find

this evidence constitutes rebuttal because it also addresses TID's claim not to have been aware of the "no fill rule."

For the foregoing reasons, the Hearings Officer finds both Exhibits 12 and 13 to the Bishops' October 26, 2015 memorandum, and the discussion thereof in the memorandum, constitute rebuttal and therefore should not be stricken from the record.

(7) Bishops' Arguments on Seepage. The applicant asserts the Bishops' arguments in their October 26, 2015 memorandum about calculation of water seepage, and Exhibit 14 to the memorandum, constitute impermissible new argument and evidence. As discussed above, the Hearings Officer has found nothing in the statute or the county's procedures ordinance prohibits the submission of new evidence and argument during the rebuttal period. Exhibit 14 is a four-page "Administrator's Memorandum" from a staff member of the Idaho Department of Water Resources addressing how reservoir seepage should be calculated. The Bishops' memorandum states Exhibit 14 was submitted to rebut the applicant's evidence and argument in its October 20, 2015 memorandum about the proper way to measure seepage. For this reason, I find Exhibit 14 and the Bishops' discussion thereof constitute rebuttal and should not be stricken.

For the foregoing reasons, the Hearings Officer finds the only evidence and argument submitted by the Bishops during the rebuttal period that does not constitute rebuttal and therefore must be stricken is Exhibit 10 to the Bishops' October 26, 2015 memorandum, and all discussion thereof in the memorandum.

c. LUBA Record. The record for the subject applications consists of several thousand pages of written testimony, documents, and video recordings of the two public hearings. The Bishops have proposed to add to that record the entire 5,600-page LUBA record for the LUCS appeals, submitted as Exhibit 79 to the Bishops' September 29, 2015 memorandum as a compact disk (CD). Footnote 57 to the Bishops' September 29, 2015 memorandum states the LUBA record was submitted "for purposes of creating a complete record."

In its October 20, 2015 memorandum, the applicant objected to inclusion of the LUBA record for the following reasons:

*"OARs 661-010-0025 and 661-010-0026 [LUBA's administrative rules] govern how land use records can be used in land use decisions. * * * Records that do not conform to such standards cannot be used or relied upon when making decisions. In Mar-Dene v. City of Woodburn, LUBA opined that a record cannot be used or relied upon unless it has been 'settled' pursuant to these OARs. See Mar-Dene v. City of Woodburn, 32 Or LUBA 481, * * *"*

*In this case, Attorney Bragar attempts to submit a Record that has not been settled. In fact, Attorney Bragar herself signed off on a Stipulated Motion that asked LUBA to consider a Motion to Dismiss before it ruled on the Record, because both Attorney Bragar and TID/KCDG believed there were substantial issues with the Record. LUBA granted the Stipulated Motion and the Motion to Dismiss, without ordering the Record settled. Therefore, it cannot be used and should not be considered in this decision. * * *"*

The Bishops responded in their October 26, 2015 memorandum in relevant part as follows:

"Under ORS 197.763, the Bishops have the right to present any evidence they believe addresses approval criteria, including the disk of documents prepared as a record for LUBA. The status of the record before LUBA during the appeal of the LUCS decision does not provide grounds to reject documentation that the Bishops

submitted as evidence in the record for this Application.⁴² *The Bishops raised many pertinent arguments and presented much responsive information in the LUCS matter and simply brought that information into the current record as Exhibit 79 to their September 29, 2015 [sic] because such information continues to apply.*

⁴² *In any event, the only disputes remaining in the record objection were the County's incorrect inclusion of evidence submitted by the Applicants that was rejected by the Board of Commissioners, and the County's omission of a few documents that should have been produced in the record in color.*" (Underscored emphasis added.)

The Hearings Officer finds LUBA's administrative rules and the *Mar-Dene* decision pertain to records *before* LUBA and not to records in local government proceedings. Therefore, I find nothing in these rules or *Mar-Dene* supports the applicant's objection to the LUBA record. Nevertheless, I find the Bishops must demonstrate the relevance of the LUBA record to the subject applications. That is because the definition of "evidence" in ORS 197.763(9) – i.e., facts *believed by the proponent to be relevant to the decision* -- effectively places the burden of demonstrating the relevance of proffered evidence on the party submitting it. The Bishops assert the LUBA record is relevant because they submitted "many pertinent arguments and ... much responsive information" in the LUCS proceeding and the LUBA appeal. I find this vague "description" is not sufficient to demonstrate the relevance in this proceeding of *any*, let alone *all*, of the LUBA record. Moreover, I am not obligated to search the LUBA record to identify relevant evidence. For these reasons, I will not consider the LUBA record submitted as the Bishops' Exhibit 79.

The Hearings Officer anticipates this decision will be appealed to the board by both the applicant and the Bishops, and the board may elect to hear the appeal. If the board elects to hear any appeal *de novo*, the Bishops will have the opportunity to identify specific components of the LUBA record they believe are relevant to this decision and that the board should consider.

9. Bishops' Motivation. Several of the property owners' supporters assert the Hearings Officer should ignore the Bishops' submittals, and approve the applicant's proposal, because they believe the Bishops' reasons for opposing the applicant's proposal are not legitimate. Specifically, these parties claim the Bishops object to the reservoirs and recreation thereon *solely* because Harris Kimble allegedly refused to let the Bishops purchase some of the subject property and/or invest in a residential cluster development thereon.²¹ I find these claims -- and the countless other aspersions in this record cast against the Bishops, Cadwells, Kimbles, TID, other parties, attorneys, county staff, and the Hearings Officer -- have no relevance whatsoever to the question of whether the applicant's proposal satisfies the applicable approval criteria.²²

²¹ E.g., Affidavit of Darrin Kelleher, included in the record as an attachment to an electronic mail message from Judy Campuzano dated October 4, 2015.

²² For example, the record includes correspondence submitted by the property owners' supporters about a complaint to the Oregon State Bar filed by a TID board member against the Bishops' attorney Jennifer Bragar, and the Bar's official response finding no merit to the complaint, submitted by Ms. Bragar. None of this material is relevant.

C. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

RURAL RESIDENTIAL ZONE STANDARDS

1. Chapter 18.60, Rural Residential Zone – RR10

a. Section 18.60.020, Uses Permitted Outright

The following uses and their accessory uses are permitted outright.

* * *

- (l) Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in Section 18.120.050.^[23]

b. Section 18.60.030, Conditional Uses Permitted

The following uses may be allowed subject to DCC 18.128:

* * *

- G. Recreation-oriented facility requiring large acreage such as off road vehicle track or race track, but not including a rodeo grounds.

* * *

- W. Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material.

FINDINGS: Pursuant to the board's April 5, 2015 LUCS decision and the Planning Director's April 23, 2015 re-issuance of the LUCS, the applicant applied for conditional use approval to make lawful the prior surface mining creating the two reservoirs and to establish on the southern reservoir a recreation-oriented facility requiring large acreage.

At the outset, the applicant argues the excavation and grading creating the new reservoirs is not "surface mining" subject to county regulation. In the alternative, the applicant argues such surface mining is permitted outright under Section 18.60.020(l). The Bishops argue KCDG's surface mining was prohibited based on previous land use decisions affecting the subject property. The Hearings Officer addresses these arguments in the findings below.

A. Surface Mining.

1. **Definitions.** Section 18.04.030 includes the following definition:

"Surface mining" means:

²³ Section 18.120.050 addresses fill-and-removal exceptions and is not relevant to these proceedings.

A. Includes:

1. All or any part of the process of mining by removal of the overburden and extraction of natural mineral deposits thereby exposed by any method including open pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for access roads; and
2. Mining which involves more than 1,000 cubic yards of material or excavation prior to mining of a surface area of more than one acre.

B. Does not include:

1. The construction of adjacent or off-site borrow pits which are used for access roads to the surface mine.
2. Excavation and crushing of sand, gravel, clay, rock or other similar materials conducted by a landowner, contractor or tenant on the landowner's property for the primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and other on-site construction, or nonsurface impacts of underground mines; and . . . (Emphasis added.)

The Hearings Officer found in my LUCS decision that KCDG engaged in "surface mining" on the subject property, and that such surface mining did not constitute an outright permitted use under Section 18.16.020(l) because excavation for reservoirs is specifically authorized as a conditional use under Section 18.60.030(W). I also found KCDG's surface mining did not fall within the exclusions in Section 18.04.030(B)(2) based on my analysis of the text, context and legislative history of the surface mining conditional use authorized in the RR-10 Zone under Section 18.60.030(W). In particular, I found surface mining in conjunction with the operation and maintenance of irrigation district systems does not fall within the exclusion from the definition of "surface mining" in Section 18.04.030 for "on-site construction" on a landowner's property.²⁴ Finally, I found the temporary use permit KCDG obtained for rock crushing within the new reservoirs was limited to crushing for road construction and did not authorize excavation and grading for the reservoirs.

The board's April 5, 2015 LUCS decision affirmed the Hearings Officer's decision. The board also held the new reservoirs on the subject property are not part of TiD's "existing irrigation system"

²⁴ As discussed in the findings above, the Bishops' October 26, 2015 memorandum includes copies of DOGAMI's administrative rules, as amended in 2009, which no longer include the exception to surface mining for landowner on-site construction. The Bishops' memorandum also cites ORS 517.780(1)(a) for the proposition that DOGAMI's surface mining rules preempt the county's "surface mining" definition. Because of the Hearings Officer's resolution of the definitional issue, I find I need not reach the preemption question.

and therefore do not constitute an outright permitted use in the RR-10 Zone. With respect to the nature of KCDG's surface mining, the board's decision stated:

"The Board finds that the excavation, grading, and related activities conducted on-site to create the new reservoirs constituted surface mining. The Board adopts and incorporates herein by reference the Hearings Officer's findings on this issue, as set forth in pages 18-20 of the Hearings Officer's Decision. Therefore, TID's LUCS request mischaracterized the proposed use of the Property, by omitting any reference to the construction of the reservoirs. This omission was material to the LUCS request and decision, because the surface mining required to construct the reservoirs is a conditional use in the RR-10 Zone under DCC Title 18."

LUBA's decision dismissing the Bishops' and TID's/KCDG's appeals for lack of jurisdiction affirmed the board's categorization of KCDG's surface mining to create the new reservoirs as a use requiring conditional use approval under Section 18.60.030(W). *Bishop v. Deschutes County*, Slip Opinion at 17. For these reasons, the Hearings Officer finds the question of whether KCDG's excavation to create the reservoirs constituted "surface mining" and was permitted outright or required conditional use approval under Section 18.60.030(W) has been settled and is not before me in these proceedings.

Finally, the Bishops argue KCDG's surface mining to create the reservoirs was prohibited by the approved reclamation plan for the former Klippel Surface Mine. If the Hearings Officer understands this argument correctly, the Bishops believe the findings in my 2007 decision rezoning the Klippel mine from SM to RR-10 precluded any further surface mining on the subject property. The Bishops rely in particular on my findings that the Klippel site had been fully mined and reclaimed and that no significant resource remained thereon. I find this argument is without merit. As discussed in the findings above, I found in my LUCS decision that KCDG's surface mining to create the reservoirs was authorized under Section 18.60.030(W), and the board affirmed my finding. The Bishops have not identified, nor have I found, anything in Title 18 that precludes a previously SM-zoned site from being mined in conjunction with the operation and maintenance of irrigation systems which, and/or being mined under Section 18.128.280 authorizing mining for non-Goal 5 mineral and aggregate resources and discussed in detail in the findings below under Chapter 18.128.

2. Section 18.60.030(W). This section authorizes as a conditional use in the RR-10 Zone:

Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material.

The Bishops argue here, as they did in the LUCS proceedings, that KCDG's surface mining to create the reservoirs was not "in conjunction with the operation and maintenance of" TID's irrigation systems, but rather constitute construction by KCDG of private lakes that would be central features in a planned residential cluster development. In the Hearings Officer's LUCS decision, I made the following relevant findings:

"Such surface mining need only be performed 'in conjunction with' the irrigation district's operation and maintenance of its systems for it to fall within the parameters of the conditional use. There is no dispute in this record that the new reservoirs were created in coordination with TID and, at least in part, in order to facilitate TID's operation of its irrigation systems."¹⁶

¹⁶ *The Hearings Officer finds that whether the new reservoirs were excavated by TID or by KCDG on TID's behalf is irrelevant. There is no requirement that the excavation actually be conducted by the irrigation district.*

Assuming for purposes of discussion that the Hearings Officer's LUCS findings, affirmed by the board, did not resolve this question adversely to the Bishops, I again find KCDG's surface mining for the reservoirs was performed "in conjunction with" TID's operation and maintenance of its irrigation system.

The phrase "in conjunction with" is not defined in Title 18. The ordinary definition of the term "conjunction" includes "coincidence." *Webster's New World Dictionary and Thesaurus, Second Edition* (hereafter "*Webster's*"). *Webster's* defines "coincidence" as "a coinciding" and defines "coincide" as "to occur at the same time." Thus, use of the phrase "in conjunction with" in Section 18.60.030(W) suggests the conditional use consists of surface mining coinciding with the irrigation district's operation and maintenance activities.

The timing of KCDG's surface mining for the reservoirs raises a question about TID's involvement with the reservoirs when they were created. The record indicates excavation for the reservoirs occurred at least as early as March of 2014. The original contract between TID and KCDG for use of TID's water to fill the reservoirs wasn't signed until June of 2014, and stated KCDG's water use payments to TID would commence June 1, 2014.²⁵ In October of 2014, after the Planning Director issued the original LUCS and the Bishops filed their appeal therefrom, TID and KCDG signed an amended contract for use of the reservoirs.²⁶ Among other provisions, the amended contract modified the water use payment commencement date to March 1, 2014, closer to the time surface mining for the reservoirs commenced.

The Bishops and other opponents also argue the lack of any outflow facility for the reservoirs indicates neither reservoir could be used for "re-regulation" of irrigation water flow by returning water to the Tumalo Feed Canal. At the continued public hearing, Ken Rieck, TID's manager, testified TID intends to construct an outflow facility, but decided to delay that project and its cost until the storage of TID water in the reservoirs receives final land use approval and a permit from WRD. The Hearings Officer understands this approach, particularly since nothing in the record suggests TID could not remove water from the reservoir(s) if/when necessary simply by utilizing a portable pump.

The Bishops also argue the contract between TID and KCDG does not give TID sufficient control over the reservoirs on the subject property for them to function as part of TID's irrigation system. The Hearings Officer disagrees. I find the amended contract between KCDG and TID includes numerous provisions giving TID control over the water stored in the reservoirs as part of its irrigation system. For example:

- Paragraph (5) of the contract provides the water stored in the reservoirs remains the property of TID to be used in accordance with TID's WRD water right certificate.
- Paragraph (8) grants TID an easement across the subject property for the storage, reregulation, and delivery of TID's water, and states that TID retains "sole authority over operations and maintenance for said water delivery, storage, and redistribution."

²⁵ A copy of the original contract is included in the record as Exhibit 12 to the Bishops' September 29, 2015 memorandum.

²⁶ A copy of the amended contract is included in the record as Exhibit "A" to the applicant's burden of proof.

- Paragraph (16) states TID may use its water stored in the reservoirs “as an integral part of the operations and maintenance of its irrigation system” including removing water from the reservoirs for use by TID or emergency service providers.
- Paragraph (17) states TID does not guarantee water will be available for storage in the reservoirs and is not liable to KCDG for any loss or damage KCDG suffers resulting from TID's failure to supply, or withdrawal of, stored water.

Finally, the record includes evidence supporting TID's and KCDG's claim that the surface mining to create the reservoirs was performed specifically to provide TID with a new water storage facility. Ken Rieck and TID's Field Manager Bob Varco submitted written and oral testimony that TID had been interested for some time in finding a site for another reservoir upstream from Upper Tumalo Reservoir which is located near the end of its irrigation system, and that they had previously discussed with Jeremy Giffin, Watermaster for WRD's District 11, the benefits of providing water storage in a location and manner that would prevent seepage losses and increase the efficiency of TID's system. Mr. Varco testified that TID could not afford to construct a new reservoir because the district has only 660 water users and therefore would need to find a public/private partnership to provide new water storage facilities. Several TID water users testified they believe the new reservoirs are a much-needed component of TID's irrigation system because they will allow better storage and regulation of irrigation water within the system.

The Bishops respond that the contract between TID and KCDG is a subterfuge. The Hearings Officer disagrees. While reasonable people can differ about whether the new reservoirs are the best means of conserving and regulating delivery of TID's irrigation water to its members, I find there is nothing nefarious or deceptive about TID's collaboration with KCDG. To the contrary, the contract between TID and KCDG provides a significant benefit to TID, described in the contract recitals as follows:

“WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 76684 ('Certificate') to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, TID uses said stored water for reregulation purposes to adjust water deliveries to its patrons throughout its system; and

WHEREAS, TID's current use of the Upper Tumalo Reservoir precludes use for reregulation to a significant portion of TID's delivery system due to location; and

WHEREAS, TID's current use of the Upper Tumalo Reservoir is challenged by its porous surfaces which require additional supplement to accommodate seepage; and

WHEREAS, TID's reliance on Tumalo Creek as a reregulation source hampers its ability to accommodate fish habitat needs; and

WHEREAS, KCDG desires to assist with TID's operational challenges noted above by providing a new storage location for part of the stored water that is better placed at the head of its system and with a lined surface to significantly reduce seepage, providing TID the ability to store and reregulate approximately 125 acre feet of water (the 'Stored Water') currently stored at Upper Tumalo Reservoir, by transferring said storage to KCDG property described herein in 'Exhibit A ('Subject Property)'; and

WHEREAS, TID desires to transfer the Stored Water to the Subject Property owned by KCDG in exchange for KCDG payment to TID, KCDG grant of easement to TID, and retaining TID's access to the Stored Water for operations and maintenance, including reregulation of TID's irrigation system; . . ."

In addition, the contract provides compensation to TID for water storage in the reservoirs at the rate of \$50 per acre foot per year, or \$6,250 per year for 125 acre feet of stored water. Moreover, the contract addresses a critical need to conserve water. TID's 2000 "Water Conservation Plan," included in the record as Exhibit 18 to the Bishops' September 29, 2015 memorandum, states that at that time TID's water loss was estimated at 70 percent.

For the foregoing reasons, the Hearings Officer finds KCDG's surface mining to create the reservoirs was "in conjunction with" TID's operation and maintenance of its irrigation systems, and therefore falls within the conditional use in Section 18.60.030(W).

3. Non-Goal 5 Surface Mining. The Bishops argue that if KCDG's surface mining to create the new reservoirs was "in conjunction with" TID's operation and maintenance of its irrigation system, such surface mining is subject to the county's regulations for "non-Goal 5 mineral and aggregate resources," and therefore is prohibited under Section 18.128.280. Before turning to that section, it is useful to review the history of the county's non-Goal 5 surface mining regulations.

Pursuant to Goal 5, the county adopted and maintains a comprehensive plan inventory of significant mineral and aggregate resource sites. The county adopted Economic, Social, Environmental, and Energy (ESEE) conflict analyses for each inventoried significant site, and implemented a program to achieve the goal for these sites through the SM and SMIA Zones in Chapters 18.52 and 18.56, respectively.

Prior to 2001, surface mining on property not zoned SM was limited to "on-site personal, farm or forest use or maintenance of irrigation," a conditional use under former Section 18.128.280. In 2001, at the request of Squaw Creek Irrigation District (now Three Creeks Irrigation District) the county adopted Ordinances 2001-038 and 2001-039 amending the comprehensive plan and Title 18, respectively, to authorize irrigation districts to conduct surface mining activities related to the operation and maintenance of their facilities on non-SM zoned land.²⁷ The staff report for Ordinances 2001-038 and 2001-039 includes the following discussion:

"1. Background. The County's zoning ordinance lacks clarity regarding operations and maintenance activities conducted by Irrigation Districts in Deschutes County. In addition, operation and maintenance activities conducted by Irrigation Districts require the on-going removal of accumulated sand, silt, topsoil, and other sediment matter from their canals, ditches and reservoirs.

The applicant would like to sell this material. However, excavating more than 1,000 cubic yards to be used and sold off-site involves an extensive process that requires the site to be zoned Surface Mining (SM), be listed on the County's Goal 5 Mineral and Aggregate Resource Inventory list, and have an Economic, Social, Environmental, and Energy (ESEE) conflict analysis adopted by the Board.

Further, to be placed on the County's mineral and aggregate resource inventory list, State law requires that an applicant demonstrate that the aggregate resources is 'significant' – that is, 100,000 tons of aggregate material meeting the Oregon

²⁷ Copies of these ordinances are included in the record as Exhibit 41 to the Bishops' September 29, 2015 memorandum.

Department of Transportation's specifications for base rock, which is primarily used in road building. [Footnote omitted.]

Meeting the State's significance threshold is unlikely to occur for Irrigation Districts because the excavated material produced by Irrigation Districts predominantly consists of sand, silt and topsoil, which typically will not meet the State's significance standard to be placed on the County's Mineral and Aggregate Resource list." (Bold emphasis in original.)

The staff report goes on to state that after its review of Squaw Creek Irrigation District's proposal, the Planning Commission recommended that the board adopted ordinances and policies:

- "1. To allow the operation, maintenance, and piping of existing irrigation systems operated by Irrigation Districts as a use permitted outright in those zones.*
- 2. To adopt a non-significant mineral and aggregate resource list to accommodate surface mining activities that involve the off-site use and sale of material on sites owned and operated by Irrigation Districts in Deschutes County.*
- 3. To amend Title 18 by adding a new category specific to Irrigation Districts to the Conditional Uses permitted section in each of the base zones. The new Conditional Use category could allow Irrigation Districts to excavate and mine for facilities, ponds, reservoirs, and the off-site use and sale of excavated material subject to Conditional Use approval.*
- 4. To defer regulatory authority of piping work conducted in existing canals and ditches within jurisdictional wetlands to the Division of State Lands by adding an additional category to the fill and removal exceptions list contained in Section 18.120.050 of the Deschutes County Code."*

Based on planning staff's and the Planning Commission's recommendations, the board adopted Ordinance 2001-038 to amend the comprehensive plan to include a "Non-Significant Inventory – Mineral and Aggregate Sites." That inventory included four reservoir sites owned and operated by Squaw Creek Irrigation District. The ordinance also amended former Section 23.40.040(G) of the codified comprehensive plan to include a new Paragraph (4) providing:

- 4. Non-Goal 5 Aggregate Resources.**
 - a. The County shall develop a mineral and aggregate resource list that includes mineral resource sites exclusive of those intended for protection under Goal 5.**
 - b. A mineral and aggregate resource site may be placed on the inventory when the following conditions are met.**
 - 1. A report is provided verifying the location, type and quantity of the resource.**
 - 2. The mineral and aggregate resource does not meet the Goal 5 significance criteria listed in OAR 660-023-0180(3) for a significant mineral and aggregate site.**

- c. Mineral and aggregate resource sites listed on the non-significant inventory shall not be operated for extraction unless a conditional use permit, including mitigation measures where required, has been approved by the County. (Emphasis added.)

Title 23 of the comprehensive plan, the codified version of the comprehensive plan, was repealed in 2011 and replaced with the county's current comprehensive plan which does not include the above-quoted language. However, the plan still includes the non-significant mineral and aggregate resource inventory. The subject property is not included in that inventory.

4. Section 18.128.280. This section establishes specific conditional use criteria for "Surface Mining of Non-Goal 5 Mineral and Aggregate Resources." It was amended by Ordinance 2001-039 as part of the above-described package addressing surface mining by irrigation districts. Although neither the comprehensive plan nor Title 18 defines the phrase "non-Goal 5 mineral and aggregate resources," the Hearings Officer finds that in the context of the legislative history of Ordinances 2001-038 and 2001-039, it means surface mining sites and resources *not included* in the county's Goal 5 inventory of significant mineral and aggregate sites. Therefore, I find it applies to surface mining on the subject property.

Section 18.128.280 provides as follows with respect to "surface mining of non-Goal 5 mineral and aggregate resources:

These uses are subject to the following standards:

- A. An application shall be filed containing the following information:**
1. A detailed explanation of the project and why the surface mining activity is necessary.
 2. A site plan drawn to scale and accompanied by any drawings, sketches and descriptions necessary to describe and illustrate the proposed surface mining.
- B. A conditional use permit shall not be issued unless the applicant demonstrates at the time of site plan review that the following conditions are or can be met:**
1. The surface mining is necessary to conduct or maintain a use allowed in the zone in which the property is located.
 2. Erosion will be controlled during and after the surface mining.
 3. The surface mining activity can meet all applicable DEQ noise control standards and ambient air quality and emission standards.
 4. Sufficient water is available to support approved methods of dust control and vegetation enhancement.
 5. The surface mining does not adversely impact other resources or uses on the site or adjacent properties, including, but not limited to, farm use, forest use, recreational use, historic use and fish and wildlife habitat as designed or through mitigation measures required to minimize these impacts.

C. If the surface mining actively involves the maintenance or creation of man made lakes, water impoundments or ponds, the applicant shall also demonstrate, at the time of site plan review, that the following conditions are or can be met:

1. There is adequate water legally available to the site to maintain the water impoundment and to prevent stagnation.
2. The soil characteristics or proposed lining of the impoundment are adequate to contain the proposed water and will not result in the waste of water.
3. Where the impoundment bank slope is steeper than three feet horizontal to one foot vertical, or where the depth is six feet or deeper, the perimeter of the impoundment is adequately protected by methods such as fences or access barriers and controls.
4. The surface mining does not adversely affect any drainages, all surface water drainage is contained on site, and existing watercourses or drainages are maintained so as not to adversely affect any surrounding properties.

D. **Limitations**

1. Excavation does not include crushing or processing of excavated material.
2. A permit for mining of aggregate shall be issued only for a site included on the County's non-significant mineral and aggregate resource list.
3. Hours of operation shall be 7:00 a.m. to 6:00 p.m. Monday through Saturday. No surface mining shall be conducted on Sundays or the following legal holidays: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day. (Emphasis added.)

The Bishops argue that because the subject property is not included in the county's non-significant mineral and aggregate resource inventory, under Paragraph (D) of Section 18.128.280 KCDG's surface mining to create the reservoirs cannot be approved unless and until the subject property is added to that inventory through a text amendment to the comprehensive plan. The applicant responds in its October 20, 2015 memorandum as follows:

"Deschutes County's definition of 'surface mining' discussed above, does not appear to include Facilities Mining. [28] That said, we include it here in the interest of responding completely to Opponent allegations.

Opponents do not specifically address this [sic] criteria, except to say that any mining activity is prohibited unless TID seeks a Comprehensive Plan amendment

²⁸ The applicant uses the term "facilities mining" to refer to mining in conjunction with irrigation district operations and maintenance authorized under Section 18.60.030(W).

or KCDG seeks a zone change for individual mining. Respectfully, the code requires neither.

Applicant believes that criteria under Section 18.128.280 does [sic] not directly apply, because Facilities Mining under DCC 18.60.030.W for irrigation districts does not meet the definition of surface mining. Additionally, material was not exported from the site or sold – prerequisites for Deschutes County or DOGAMI regulation. (Underscored emphasis added.)

As discussed above, the Hearings Officer has found KCDG's excavation to create the new reservoirs constitutes "surface mining," and that categorization was affirmed by the board and LUBA. Therefore, I find this argument is without merit. .

However, the Hearings Officer finds that is not the end of the inquiry. The above-underscored language in Paragraph (D) seems unambiguously to require placement on the non-significant mineral and aggregate resources inventory as a prerequisite to surface mining approval under Section 18.128.280. However, in its context, this provision could be read to suggest placement on the inventory is required *only* if the irrigation district seeks to sell and/or use the excavated material off-site, and the record indicates neither KCDG nor TID did so. For example, the staff report for Ordinances 2001-038 and 2001-039 states Squaw Creek Irrigation District sought the proposed amendments to the comprehensive plan and Title 18 because the irrigation district wanted to sell material removed from canals, ditches and reservoirs, and understood that excavating more than 1,000 cubic yards "to be used and sold off-site" involved an extensive Goal 5 process requiring listing on the county's significant resource inventory, for which the irrigation district's sites likely would not qualify.

Other context suggests a different interpretation. Paragraph (C) of 18.128.280 makes clear the county intended to strictly regulate surface mining *to create water impoundments* without regard to whether material mined at the impoundment site is moved or sold off-site. In light of this paragraph, the Hearings Officer finds it is unlikely the intent of Section 18.128.280 was to allow significant surface mining activities to create a reservoir at any location in the county without a process to identify the site and its characteristics and to place it on the inventory of non-Goal 5 mineral and aggregate sites. As noted above, the four sites that are on the county's non-significant inventory are *reservoir* sites.

Finally, the Hearings Officer finds Section 18.60.030(W), adopted with the amendments to ORS 18.128.280, provides additional interpretive context. As discussed above, this section authorizes as a conditional use in the RR-10 Zone surface mining in conjunction with the operation and maintenance of irrigation districts' irrigation systems consisting of:

. . . the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material. (Emphasis added.)

I find from the text of this provision that it authorizes *two separate types* of surface mining activities by irrigation districts on non-SM zoned land: (1) excavation and mining of mineral and aggregate; and (2) off-site use, storage and sale of excavated materials. In other words, its authorization goes beyond what Squaw Creek Irrigation District requested (authority to sell excavated material) to allow excavation and mining for reservoirs regardless of whether it is taken off-site or sold.

For the foregoing reasons, the Hearings Officer finds the prohibition in Section 18.128.280(D) applies to the subject property. In other words, inclusion of the subject property on the county's non-significant mineral and aggregate resource list is a prerequisite to conditional use approval of surface mining on the subject property to create reservoirs. To my knowledge, neither planning

staff nor the parties in the LUCS proceedings identified this provision as applicable to the reservoirs. And I was not aware of it until it was cited by the Bishops in these proceedings. Consequently, these applications are the first cases in which I have been asked to interpret and apply Section 18.128.280. Nevertheless, I find the applicant had ample opportunity to address Section 18.128.280 once it was identified as potentially applicable.

Because the subject property is not on the county's non-significant inventory, the Hearings Officer finds I cannot grant conditional use approval for KCDG's surface mining that created the reservoirs. And because I have found the reservoirs were not legally created, I cannot approve the proposed recreation-oriented facility requiring large acreage for the southern reservoir. However, because I anticipate my decision will be appealed to the board, and the board may elect to hear the appeal, I include in this decision recommended findings and conclusions as to the remaining approval criteria applicable to the surface mining and recreation-oriented facility.

B. Recreation-Oriented Facility. The Hearings Officer found in my LUCS decision that the property owners' use of the southern reservoir for motorized boating and water skiing made the reservoir a "recreation-oriented facility requiring large acreage such as off-road vehicle track or race track, but not including a rodeo grounds," a conditional use in the RR-10 Zone under Section 18.16.030(G). The board affirmed my finding in its LUCS decision. And in dismissing the TID's/KCDG's and the Bishops' appeals, LUBA affirmed the board's categorization of the proposed recreational use of the southern reservoir as requiring conditional use approval.

The Bishops raise two issues under Section 18.16.030(G). First, they claim the northern reservoir also requires conditional use approval. The Hearings Officer finds that claim lacks merit. Neither the board nor I found the northern reservoir requires conditional use approval as a recreation-oriented facility, and LUBA affirmed that categorization in its decision dismissing the Bishops' and TID's/KCDG's appeals. Therefore, I find the question of whether the northern reservoir requires conditional use approval as a recreation-oriented facility has been settled.

Second, the Bishops argue the boathouse cannot be approved because it does not qualify as an "accessory use" to the recreation on the southern reservoir. They rely on the provisions of Section 18.116.040 which provides an exception to the requirement that an "accessory use" comply with all approval criteria for the "principal use" for buildings less than 2,000 square feet in size, no windows, only one floor, an operable garage door, and not requiring plumbing or electrical permits. The Bishops state, and I concur, that the boathouse does not meet those characteristics. However, I find boathouse is not an "accessory use" subject to the provisions of this section. Rather, I find it is an essential component of the recreational use of the southern reservoir – i.e., the use of motorized boats on the reservoir.

b. Section 18.60.040, Yard and Setback Requirements

In an RR 10 Zone, the following yard and setbacks shall be maintained.

- A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way and 50 feet from an arterial right of way.**
- B. There shall be a minimum side yard of 10 feet for all uses, except on the street side of a corner lot the side yard shall be 20 feet.**
- C. The minimum rear yard shall be 20 feet.**

- D. The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180.
- E. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.

FINDINGS: Section 18.04.030 includes the following relevant definitions:

"Building" means a structure built for the support, shelter, or enclosure of persons, animals, chattels or property of any kind.

"Setback" means an open space on a lot which is unobstructed from the ground upward except as otherwise provided in DCC Title 18.

"Setback, front" means a setback between side lot lines, measured horizontally at right angles to the front lot line and the front lot line to the nearest point of a building.

"Setback, rear" means a setback between side lot lines, measured horizontally at right angles to the rear lot line from the rear lot line to the nearest point of a building.

"Setback, side" means a setback between the front and rear yard measured horizontally at right angles from the side lot line to the nearest point of a building.

"Yard" means an open space on a lot which is unobstructed from the ground upward except as otherwise provided in Title 18.

"Yard, front" means a yard between side lot lines measured horizontally at right angles to the front lot line from the front lot line to the nearest point of a building. Any yard meeting this definition and adjoining on a street other than an alley shall be considered a front yard.

"Yard, rear" means a yard between side lot lines measured horizontally at right angles from the rear lot line to the nearest point of a building.

"Yard, side" means a yard between front and rear yard measured horizontally at right angles from the side lot lines to the nearest point of a building. (Emphasis added.)

The questions presented under this section are: (1) whether the southern reservoir and the proposed dock, pilings for the boathouse, and boathouse are subject to the setbacks in the RR-10 Zone; and (2) if so, whether they comply with the setbacks.

1. Reservoirs. The subject property consists of thirteen contiguous tax lots and lots of record. The applicant's submitted site plan shows approximately one-quarter of the southern reservoir is located on Tax Lot 828 and the remainder of the reservoir is located on Tax Lot 824, and therefore the southern reservoir crosses a lot line.

The applicant argues the southern reservoir is not subject to the minimum setbacks in this section because it is not a feature that “obstructs” from the ground upward. The applicant also argues the reservoir is not a “building” and therefore because the minimum setbacks are measured from the nearest point of a building, they do not apply to the reservoir. The applicant also argues that even if parts of the reservoirs could be considered to “obstruct” from the ground upward, there is no justification for applying the setbacks to the reservoirs and therefore the setbacks should be “waived.” Finally, the applicant argues that if the setbacks do apply to the southern reservoir, the reservoir qualifies for a variance to the setbacks.²⁹

The Bishops respond that the setbacks in the RR-10 Zone do apply to the reservoir because the uppermost portion thereof, the banks and areas where the liners are secured with gravel, project above the ground. The Bishops and other opponents also argue that both reservoirs constitute “obstructions” to the movement of wildlife across the subject property.

The Hearings Officer found in my LUCS decision that the reservoirs are “structures” for purpose of determining whether they constitutes a “reservoir and water impoundment” permitted in certain zones. That finding was affirmed by the board. However, “building” is defined as a *distinct type of structure* – i.e., one built “for the support, shelter, or enclosure of persons, animals, chattels or property of any kind.” The Bishops argue that the reservoirs are “buildings” because were constructed to enclose and support water. However, I find that interpretation stretches the meaning of “building” too far. I find the reservoirs are not “buildings” and accordingly the minimum setbacks in the RR-10 Zone do not apply to them.³⁰

For the foregoing reasons, the Hearings Officer finds the reservoirs are not subject to the minimum yards and setbacks in the RR-10 Zone.

2. Dock, Pilings and Boathouse. Photographs in the record show the dock and pilings for the boathouse project above the water level. The applicant’s burden of proof states, and the boathouse drawings included in the record as Exhibit “BP to the burden of proof, state the peak of the boathouse roof would be approximately 23 feet above the water line. The Hearings Officer finds that height also would place the roof peak above ground level. In his October 21, 2015 comments on the applicant’s proposal, Deschutes County Building Official Randy Scheid stated the dock would not require a building permit but that the boathouse and it pilings would.

The Hearings Officer finds the boathouse is a “building” as it would be designed and constructed to shelter up to two boats, and therefore both the boathouse and its pilings are subject to the minimum yards and setbacks in the RR-10 Zone. However, the applicant’s submitted site plan shows the pilings and boathouse would be located entirely on Tax Lot 828 and would be at least 250 feet from any lot line, therefore satisfying any applicable minimum setbacks. In addition, I find that because of the proposed height and location of the boathouse, it will satisfy the solar setback from the northern lot line of Tax Lot 828. Finally, I find any additional setbacks required by applicable building codes will be addressed at the time of building permit review.

c. Section 18.60.060, Dimensional Standards

In an RR 10 Zone, the following dimensional standards shall apply:

A. Lot Coverage. The main building and accessory buildings located on any building site or lot shall not cover in excess of 30 percent of the total lot area.

²⁹ Compliance with the variance criteria is discussed in the findings below under Chapter 18.132.

³⁰ The county’s building official determined the reservoirs do not require building permits.

FINDINGS: The Hearings Officer has found the reservoirs are not "buildings," but the proposed boathouse would be a building. The applicant's burden of proof states the boathouse would have a footprint of 924 square feet. The record indicates Tax Lot 828 is 63.45 acres, or 2,763,882 square feet, in size. Therefore, the boathouse will have lot coverage of less 0.03 percent, satisfying this criterion.

- B. Building Height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.**

FINDINGS: As noted previously, the proposed boathouse would have a height of approximately 23 feet above the water line which is below ground level, therefore satisfying this criterion.

- C. Minimum lot size shall be 10 acres, except planned and cluster developments shall be allowed an equivalent density of one unit per 7.5 acres. Planned and cluster developments within one mile of an acknowledged urban growth boundary shall be allowed a five acre minimum lot size or equivalent density. For parcels separated by new arterial rights of way, an exemption shall be granted pursuant to DCC 18.120.020.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant's proposal does not include creation of any new lots or parcels.

- d. Section 18.60.070, Limitations on Conditional Uses**

The following limitations shall apply to uses allowed by DCC 18.60.030:

- A. The Planning Director or Hearings Body may require establishment and maintenance of fire breaks, the use of fire resistant materials in construction and landscaping, or may attach other similar conditions or limitations that will serve to reduce fire hazards or prevent the spread of fire to surrounding areas.**

FINDINGS: The Hearings Officer finds that the nature of the proposed uses – two reservoirs, a dock and a boathouse – coupled with the minimal vegetation adjacent to the reservoirs and structures, and the limited flammable materials proposed on-site (boathouse, docks), establishment of fire breaks or use of fire resistant materials is not necessary.

- B. The Planning Director or Hearings Body may limit changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation in order to prevent or minimize erosion or pollution. (Emphasis added.)**

FINDINGS: Section 18.04.030 defines "grade" as "the average of the finished ground elevations of all walls of a building." However, Title 18 does not define "natural" grade. The Hearings Officer is aware the county has interpreted "natural grade" to mean the average of the ground level elevations *before* excavation or construction. In this case, the grade that existed before excavation of the reservoirs was not "natural." Rather, it had been significantly altered as the result of surface mining and reclamation of the Klippel mining site. Photographs in the record taken during reservoir excavation show significant excavation and grading took place to create the

reservoirs, along with removal of nearly all of the vegetation in the reclaimed mining pits. However, those photos also show the moderate tree cover that existed around the perimeter of the Klippel mine was not altered by the reservoir excavation.³¹

Nevertheless, the Hearings Officer finds the question under this criterion is whether the excavation, grading, contouring and removal of vegetation to create the reservoirs would have necessitated imposition of any limitations prior to construction "in order to prevent or minimize erosion or pollution." The staff report states, and I agree, that lining the reservoirs will minimize erosion within the reservoirs themselves. However, the parties disagree as to whether the grade of the reservoir banks, and the lack of vegetation around the reservoirs, will increase erosion such that remediation measures should be required through the subject applications. As discussed in detail in the findings below, incorporated by reference herein, I have found the banks of the southern reservoir are in some places steeper than were the banks of the reclaimed mining pits. Moreover, these banks are comprised of gravel, rocks and dirt and are not covered or anchored with any vegetation, thus susceptible to erosion into the reservoir or onto adjacent land.

For this reason, and the reasons set forth in the findings below concerning the applicable site plan and conditional use approval criteria, the Hearings Officer finds that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring the property owners to re-contour the banks of the southern reservoir so that no slopes exceed a grade of three feet horizontal to one foot vertical, and to plant native vegetation in the areas between the side of the banks facing away from the southern reservoir and the forested areas surrounding it. I find this planting will also provide suitable wildlife habitat and forage.

e. Section 18.60.080, Rimrock Setback

Setbacks from rimrock shall be as provided in DCC 18.116.160.

FINDINGS: Section 18.04.030 defines "rimrock" as

... any ledge, outcropping or top or overlying stratum of rock, which forms a face in excess of 45 degrees, and which creates or is within the canyon of the following rivers and streams: (1) Deschutes River, (2) Crooked River, (3) Fall River (4) Little Deschutes River (5) Spring River (6) Paulina Creek (7) Whychus Creek and (8) Tumalo Creek. For the purpose of DCC Title 18, the edge of the rimrock is the uppermost rock ledge or outcrop of rimrock.

Based on photographs in the record, the Hearings Officer finds there is no rimrock on the subject property, and therefore I find this criterion does not apply.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable standards in the RR-10 Zone.

³¹ For example, see the photograph at page 7 of the Bishops' Power Point presentation given at the September 29, 2015 public hearing, and the photograph at page 6 of Exhibit 9 to the Bishops' September 29, 2015 hearing memorandum.

SMIA ZONE STANDARDS

2. Chapter 18.56, Surface Mining Impact Area Combining Zone – SMIA

a. Section 18.56.020, Location

The SMIA zone shall apply to all property located within one half mile of the boundary of a surface mining zone. However, the SMIA zone shall not apply to any property located within an urban growth boundary, city or other county. The extent and location of the SMIA Zone shall be designated at the time the adjacent surface mining zone is designated.

FINDINGS: The record indicates that with the exception of the southern two-thirds of Tax Lot 824 and the southern half of Tax Lot 828, the subject property is located within the SMIA Zone associated with SM Sites 293 and 308, and therefore the provisions of Chapter 18.56 apply to the applicant's proposal.

b. Section 18.56.050, Conditional Uses Permitted

Uses permitted conditionally shall be those identified as conditional uses in the underlying zone(s) with which the SMIA Zone is combined and shall be subject to all conditions of the underlying zone(s) as well as the conditions of the SMIA Zone.

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs and the use of the southern reservoir as a recreation-oriented facility requiring large acreage constitute conditional uses in the RR-10 Zone. Therefore, I find these uses also constitute conditional uses in the SMIA Zone. However, as discussed in the findings above, I have found the surface mining to create the reservoirs was prohibited under Section 18.128.280.

c. Section 18.56.070, Setbacks

The setbacks shall be the same as those prescribed in the underlying zone, except as follows:

- A. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within 250 feet of any surface mining zone, except as provided in DCC 18.56.140; and**
- B. No noise sensitive or dust sensitive use or structure established or constructed after the designation of the SMIA Zone shall be located within one quarter mile of any existing or proposed surface mining processing or storage site, unless the applicant demonstrates that the proposed use will not prevent the adjacent surface mining operation from meeting the setbacks, standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively.**
- C. Additional setbacks in the SMIA Zone may be required as part of the site plan review under DCC 18.56.100.**

- D. An exception to the 250 foot setback in DCC 18.56.070(A), shall be allowed pursuant to a written agreement for a lesser setback made between the owner of the noise sensitive or dust sensitive use or structure located within 250 feet of the proposed surface mining activity and the owner or operator of the proposed surface mine. Such agreement shall be notarized and recorded in the Deschutes County Book of Records and shall run with the land. Such agreement shall be submitted and considered at the time of site plan review or site plan modification.

FINDINGS: The Hearings Officer has found the reservoirs are not subject to the minimum yard and setback requirements in the RR-10 Zone, and the pilings and proposed boathouse are subject to, and satisfy, those minimum setbacks.

With respect to the SMIA Zone setbacks, Section 18.04.030 includes the following relevant definitions:

"Dust sensitive use" means real property normally used as a residence, school, church, hospital or similar use. Property used in industrial or agricultural activities is not "dust sensitive" unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages and workshops do not constitute dust sensitive uses.

"Noise sensitive use" means real property normally used for sleeping or normally used as schools, churches, hospitals or public libraries. Property used in industrial or agricultural activities is not "noise sensitive" unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages or workshops do not constitute noise sensitive uses.

The Hearings Officer finds the reservoirs, dock, pilings and boathouse, and recreational use of the southern reservoir are not dust- or noise-sensitive uses, and therefore the SMIA Zone setbacks do not apply to the applicant's proposal.

d. Section 18.56.080, Use Limitations

No dwellings or additions to dwellings or other noise sensitive or dust sensitive uses or structures shall be erected in any SMIA Zone without first obtaining site plan approval under the standards and criteria set forth in DCC 18.56.090 through 18.56.120.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose dwellings or other noise- or dust-sensitive use.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies all applicable standards in the SMIA Zone.

LM ZONE STANDARDS

3. Chapter 18.84, Landscape Management Combining Zone – LM

a. Section 18.84.020, Application of Provisions

The provisions of DCC 18.84 shall apply to all areas within one fourth mile of roads identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. The provisions of DCC 18.84 shall also apply to all areas within the boundaries of a State scenic waterway or Federal wild and scenic river corridor and all areas within 660 feet of rivers and streams otherwise identified as landscape management corridors in the comprehensive plan and the County Zoning Map. The distance specified above shall be measured horizontally from the centerline of designated landscape management roadways or from the nearest ordinary high water mark of a designated landscape management river or stream. The limitations in DCC 18.84.020 shall not unduly restrict accepted agricultural practices.

FINDINGS: The record indicates the northwest portion of the subject property is located within the LM Zone associated with Johnson Road, a designated LM roadway, and the southern portion of the subject property is located within the LM Zone associated with Tumalo Creek, a designated LM stream. The record indicates the only part of the applicant's proposal located within the LM Zone boundaries is the southern portion of the southern reservoir located within one-quarter mile of Tumalo Creek. The dock, pilings, and proposed boathouse on the southern reservoir, and all of the northern reservoir, are or will be located outside the LM Zone boundary. Therefore, the Hearings Officer finds the LM Zone applies only to the portion of the southern reservoir within the LM Zone boundary.

b. Section 18.84.040, Uses Permitted Conditionally

Uses permitted conditionally in the underlying zone with which the LM Zone is combined shall be permitted as conditional uses in the LM Zone, subject to the provisions in DCC 18.84.

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs and the recreational use on the southern reservoir constitute conditional uses in the RR-10 Zone. Therefore, I find they also are conditional uses in the LM Zone. However, as discussed above, I have found the surface mining to create the reservoirs is prohibited under Section 18.128.280.

c. Section 18.84.050, Use Limitations

A. Any new structure or substantial alteration of a structure requiring a building permit, or an agricultural structure, within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

FINDINGS: The county's Building Official Randy Scheid determined the reservoirs and the dock at the north end of the southern reservoir do not require building permits, but that the boathouse and its pilings do. For this reason, the Hearings Officer finds LM site plan approval for the reservoirs is not required. And because the pilings and proposed boathouse are located outside the LM Zone boundaries, they do not require LM site plan review.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies all applicable standards in the LM Zone.

WA ZONE STANDARDS

4. Chapter 18.88, Wildlife Area Combining Zone – WA

a. Section 18.88.020, Application of Provisions

The provisions of DCC 18.88 shall apply to all areas identified in the Comprehensive Plan as a winter deer range, significant elk habitat, antelope range or deer migration corridor. Unincorporated communities are exempt from the provisions of DCC 18.88.

FINDINGS: The record indicates the entire subject property is located within the WA Zone associated with Tumalo Deer Winter Range. Therefore, the Hearings Officer finds the WA Zone provisions apply to the applicant's proposal.³²

b. Section 18.88.040, Uses Permitted Conditionally

A. Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title.

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs and the recreational use of the southern reservoir constitute conditional uses in the RR-10 Zone. Therefore, they also are conditional uses in the WA Zone. However, as discussed above, I have found the surface mining to create the reservoirs is prohibited under Section 18.128.280.

B. The following uses are not permitted in that portion of the WA Zone designated as deer winter ranges, significant elk habitat or antelope range:

1. Golf course, not included in a destination resort;
2. Commercial dog kennel;
3. Church;
4. Public or private school;
5. Bed and breakfast inn;

³² In its final argument, the applicant questions the "strict imposition of the WA Zone standards" to its proposal because, according to the applicant, ODFW "no longer considers this area to be of critical importance" and "has recently re-drawn the boundary within the Tumalo Winter Deer Range that it regulates as critical range habitat" so that it no longer includes the subject property. The Hearings Officer finds no merit to this argument. If the applicant believes the county's WA Zone boundaries should be modified to exclude the subject property, it can apply for a plan amendment and zone change to do so. Otherwise, the WA Zone applies to the subject property.

The applicant also argues in its October 20, 2015 memorandum that the Tumalo Winter Deer Range is not a Goal 5 resource. The applicant is wrong. The county's comprehensive plan Goal 5 inventory of significant fish and wildlife habitat includes this winter range.

6. Dude ranch;
7. Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization;
8. Timeshare unit;
9. Veterinary clinic;
10. Fishing lodge. (Emphasis added.)

FINDINGS: The Bishops and other opponents argue recreational use of the southern reservoir is prohibited under Paragraph (B)(7) of this section. As discussed above, in my LUCS decision I categorized the southern reservoir and the applicant's proposed recreational use thereon as the conditional use of "recreation-oriented facility requiring large acreage" under Section 18.60.030(G) of the RR-10 Zone. That categorization was affirmed by the board and by LUBA.

The Hearings Officer finds the prohibited use in the WA Zone under Paragraph (B)(7) is a *different* conditional use in the RR-10 Zone from "recreation-oriented facility requiring large acreage." The "recreation" use prohibited in Paragraph (B)(7) is "playground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." That language is virtually identical to the conditional use authorized in the RR-10 Zone under Section 18.60.030(A) – "public park, playground, recreation facility or community center owned and operated by a government agency or nonprofit community organization." The only difference between the prohibition in Paragraph (B)(7) and the conditional use in Paragraph (A) is that the prohibition does not include "public park."

The "recreation-oriented facility" use has been a conditional use in the RR-10 Zone since PL-15 was adopted in 1979. The parties have not identified, and the Hearings Officer has not found, any legislative history that would explain why the drafters of PL-15 elected to create two separate "recreation" uses. It may be that use of the term "recreation-oriented facility" was intended to authorize a distinct use like that proposed by the applicant – i.e., a facility providing for recreation along with one or more non-recreation uses. In any case, I find that because the "recreation-oriented facility" authorized under Section 18.60.030(G) is described very differently from the use prohibited by Section 18.88.040(B)(7), the prohibition does not apply to it. While I find it odd that the drafters of Section 18.88.040(B)(7) did not include the "recreation-oriented facility requiring large acreage" in the list of uses prohibited in the WA Zone protecting winter deer range, I cannot read into the prohibition paragraph language that is not there.

Even assuming for purposes of discussion that the applicant's proposed "recreation-oriented facility requiring large acreage" *also* constitutes a "recreation facility" under Section 18.60.030(A), the Hearings Officer finds an examination of the text and context of the prohibition in Section 18.88.040(B)(7) does not support opponents' position.

1. **Text.** The use prohibited in Subparagraph (B)(7) is:

Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization.

This subparagraph lists three uses – playground, recreation facility and community center – and includes the descriptive phrase "owned and operated by a government agency or a nonprofit

community organization.” The county’s hearings officers consistently have treated the descriptive phrase as applying to all three uses. In other words, they have considered only government-owned and operated recreation facilities to be prohibited in the WA Zone.³³ In this Hearings Officer’s decision in *Shepherd* (MA-13-3, CU-13-13),³⁴ I held a proposed private park did not fall within the prohibition in Subparagraph (B)(7) because:

*“The plain language of Subsection (7) limits the prohibited recreational uses to those ‘owned and operated by a government agency or nonprofit community organization,’ neither of which applies to the applicant. While it is odd that the prohibition on recreation uses in this section does not include private parks which could have similar impacts on wildlife habitat, I cannot read into this section language that is not there.”*³⁵

In *Bend Trap Club* (MA-07-12, CU-07-63, SP-07-32) I held a private shooting club facility located in an antelope range was not prohibited under Section 18.88.040(B)(7) because it was a private park not owned or operated by a “nonprofit community organization.” However, I noted the proposed shooting range “could have impacts on the antelope range similar to or even greater than those from some of the prohibited uses listed in” the section.³⁶

In its October 20, 2015 memorandum, LandWatch argues the county’s interpretation of Subparagraph (B)(7) is not correct under the “doctrine of last antecedent,” citing *Liberty Northwest Ins. Corp. v. Watkins*, 347 Or 687, 227 P3d 1134 (2010) and *State v. Webb*, 324 Or 380, 927 P2d 79 (1996). In *Webb*, the Oregon Supreme Court explained the “last antecedent” rule as follows:

*“Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence. Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. * * **

Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma.”

LandWatch argues the “last antecedent” in Paragraph (B)(7) is “community center” because it is the provision immediately preceding the descriptive clause. Accordingly, LandWatch argues the phrase “owned and operated by a government agency or nonprofit community organization” applies only to “community center,” and therefore a private recreation facility is prohibited. The Hearings Officer notes that only “playground” is separated from the referential phrase by a

³³ E.g., *Shepherd* (MA-13-3, CU-13-13); *Dorsett*, CU-07-79 (private paintball park); *Bend Trap Club*, MA-07-12, CU-07-63, SP-07-32 (private trap club shooting range).

³⁴ A copy of this decision is included in the record as an attachment to an electronic mail message from Senior Planner Anthony Raguine to the applicant’s attorney Ken Katzaroff dated October 13, 2015.

³⁵ The Hearings Officer’s *Shepherd* decision was not appealed. LUBA’s subsequent decision reversing the board’s later approval of a smaller private park in *Shepherd*, ___ Or LUBA ___ (LUBA No. 2015-034, August 17, 2015) did not address the application of Section 18.88.040(B)(7).

³⁶ The applicant argues the Hearings Officer is required to follow the county’s precedent interpreting this criterion to apply only to facilities that are both owned and operated by a government agency. Assuming for purposes of discussion that prior hearings officer decisions constitute precedent in subsequent cases, I find prior decisions implicating this ordinance language do not provide meaningful assistance because they contain little or no analysis of the text and context of the language at issue.

comma. "Recreation facility" and "community center" are joined by the conjunction "and." For this reason, I find it is unclear whether "recreation facility" is part of the "last antecedent." In any case, I find the court acknowledged in *Webb* that the relevant issue is the drafters' intent. I find the language of Paragraph (B)(7) does not reveal a clear intent with respect to how the referential phrase is to be applied.

2. Context. LandWatch asserts the context of Section 18.88.040(B)(7) includes two documents attached to its October 20, 2015 memorandum: (a) a July 2009 document entitled "Updated Wildlife Information and Recommendations for the Deschutes County Comprehensive Plan Update" prepared by an interagency working group; and (b) a January 2011 document entitled "Oregon Mule Deer Initiative" prepared by ODFW. With respect to the first document, LandWatch states the "working group specifically considered" the existing language in Section 18.88.040(B)(7). The Hearings Officer finds these documents are not relevant interpretive context. LandWatch has not identified, nor have I found, any recommendations in either document concerning the interpretation or application of Section 18.88.040(B)(7). And the "Mule Deer Initiative" does not address mule deer habitat in the Upper Deschutes Wildlife Management Unit where the subject property is located. Most important, both of these documents were prepared long after Section 18.88.040(B)(7) was adopted in 1992.

LandWatch also asserts the relevant context for interpreting Section 18.88.040(B)(7) includes what it claims is the source of the prohibition language in Section 18.88.040(B)(7) – i.e., provisions in ORS Chapter 215.283 establishing uses permitted in the EFU Zones. ORS 215.283(2)(d) and (e), respectively, authorize as separate conditional uses in the EFU Zone "public parks," and "community centers owned by a government agency or nonprofit community organization." LandWatch argues that this language indicates the government ownership modifier in the WA Zone was intended to apply only to community centers. The applicant responds in its final argument that EFU statutory language by definition cannot be relevant context for interpreting the county's WA Zone provisions.

The Hearings Officer finds the EFU statutory language relied upon by LandWatch cannot be categorically excluded as a source of context for interpreting language in the WA Zone inasmuch as it is similar to the referential phrase in Section 18.88.040(B)(7). Nevertheless, because the statutory language does not include "recreation facility," and it allows as a separate conditional use "private park and playground," I find the EFU statutory language does not support the conclusion that the applicant's proposed private "recreation-oriented facility" would not be permitted in the EFU Zones.

The county's EFU Zone provisions in effect in 1992 when the WA Zone prohibition was adopted through Ordinance 92-042 were identical to the statutory language relied upon by LandWatch. In 1992, Section 18.16.030 and 18.16.031 *separately* authorized as conditional uses *private* parks and playgrounds, and *government-operated* parks and playgrounds. However, when the county adopted Section 18.88.040(B)(7) in 1992, it combined "playground" and "recreation facility" with "community center." And, the RR-10 Zone provisions in effect in 1992 authorized "recreation-oriented facility" as a separate conditional use.

The legislative history of Section 18.88.040(B)(7) does not explain the county's choice of terminology and syntax, or address whether the county considered the EFU Zone provisions when it adopted the prohibition in (B)(7). The recitals in Ordinance 92-042 indicate the prohibition was adopted as part of Deschutes County's required "periodic review" to assure compliance with Goal 5 with respect to fish and wildlife habitat. Exhibit "C" to the ordinance contains the board's supportive findings. Paragraph (9) of the findings states "ODFW provided information to support zoning ordinance provisions to resolve conflicts between fish and wildlife resource protection and development." However, none of the findings addresses the language in Section 18.88.040(B)(7).

Based on the foregoing analysis, the Hearings Officer finds neither the text nor the context of Section 18.88.040(B)(7) supports LandWatch's argument that this provision was intended to prohibit a "recreation-oriented facility requiring large acreage" in the WA Zone.

3. Governmental Agency. The Bishops, LandWatch, and other opponents argue that if the southern reservoir is not prohibited as a *private* recreation facility under Section 18.88.040(b)(7), it is prohibited as a government-owned and operated recreation facility because TID is a quasi-governmental entity organized under ORS Chapter 545.³⁷ The Hearings Officer finds this argument is without merit. In the first place, TID does not own the southern reservoir. It is owned by KCDG, a private entity that has granted TID a non-exclusive easement to store water in the southern reservoir, to move water into and out of the reservoir as part of its irrigation system, and to come onto the subject property to operate and maintain its irrigation facilities. This easement is not tied to KCDG's use of the reservoir for recreation. Because the text of Section 18.88.040(B)(7) describes the prohibited recreation facility as one owned *and* operated by a government agency, I find TID's lack of ownership of the reservoir takes it out of the prohibition.

Second, even assuming for purposes of discussion that TID "owns" the southern reservoir based on its easement, the Hearings Officer finds TID does not "operate" the southern reservoir as a "recreation-oriented facility." The term "operate" is not defined in Title 18. Its ordinary definition is "to direct; manage." *Webster's*. Nothing in this record indicates TID directs or manages the southern reservoir *as a recreation-oriented facility*. To the contrary, TID's contract with KCDG authorizes TID to operate the southern reservoir *as part of its irrigation system*. As discussed in the findings above, TID has authority under its contract with KCDG to remove water from the reservoir, and TID is not required under the contract to keep sufficient water in the reservoir to permit boating and water skiing. I know of no legal prohibition against operating the southern reservoir for more than one purpose like other reservoirs throughout the state that provide water for hydroelectric generation, provide flood control, and allow for boating and other water-related uses.

For the foregoing reasons, the Hearings Officer finds the applicant's proposed "recreation-oriented facility requiring large acreage" is not prohibited in the WA Zone under Section 18.88.040(B)(7).

c. Section 18.88.060, Siting Standards

A. Setbacks shall be those described in the underlying zone with which the WA Zone is combined.

FINDINGS: The applicable setbacks of the underlying RR-10 Zone are addressed in the findings above.

B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that: * * *

FINDINGS: The Hearings Officer finds this standard is not applicable because the applicant does not propose any new dwellings.

3. Section 18.88.070, Fence Standards

³⁷ *Withers v. Reed*, 194 Or 541, 243 P2d 283 (1952).

The following fencing provisions shall apply as a condition of approval for any new fences constructed as a part of development of a property in conjunction with a conditional use permit or site plan review.

A. New fences in the Wildlife Area Combining Zone shall be designed to permit wildlife passage. The following standards and guidelines shall apply unless an alternative fence design which provides equivalent wildlife passage is approved by the County after consultation with the Oregon Department of Fish and Wildlife:

1. The distance between the ground and the bottom strand or board of the fence shall be at least 15 inches.
2. The height of the fence shall not exceed 48 inches above ground level.
3. Smooth wire and wooden fences that allow passage of wildlife are preferred. Woven wire fences are discouraged.

B. Exemptions:

1. Fences encompassing less than 10,000 square feet which surround or are adjacent to residences or structures are exempt from the above fencing standards.
2. Corrals used for working livestock.

FINDINGS: The Hearings Officer finds these fencing standards are not applicable because the applicant does not propose any new fencing. However, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring that any future fencing be installed in conformance with the standards in this section.

The Bishops argue the applicant is required to fence the perimeter of the reservoirs – and with fencing that cannot comply with the WA Zone fencing standards -- because the reservoirs constitute public swimming pools regulated by the Oregon Health Authority, Public Health Division, under Oregon Administrative Rules Chapter 333-060. In its final argument, the applicant responds as follows:

*“ * * * Deschutes County Environmental Health Division ('EHD') is the local agency that is responsible for regulating public swimming pools. The EHD did not provide comments, and so it would seem that they do not consider the New Reservoir to be a facility that requires regulation. Second, LandWatch cites to OAR 333-060-015(25)(k), which provides definitions for public swimming pools. [Footnote omitted.] LandWatch then misreads the rule. By its plain text, examples given for 'water recreation' are for things such as 'waterslide plunge pools, lazy or slow rivers, tubing pools, and wave pools.' OAR 333-060-0015(25)(k). Motorized boating and waterskiing is [sic] not included in this list and is wholly distinguished from activities mentioned.*

Further, OAR 333-060-0015 states that the authority of such rules comes from ORS 448.011. That statute authorizes regulations for public swimming pools only, no expressly private uses. Therefore, LandWatch's argument that this is a public swimming pool fails because it is without support in the law."

The Hearings Officer concurs with the applicant's analysis. I also find the definition of "public swimming pool" in OAR 333-060-0015(19) clearly does not include the southern reservoir because it is not "open to the public." In addition, as discussed in the conditional use findings below under Section 18.128.280, incorporated by reference herein, I have found the property owners are not required to fence the reservoirs where other access control measures are in place. Therefore, I find there is no legal or factual basis for me to find the applicant is required to fence the southern reservoir at all, let alone in a manner inconsistent with the WA Zone standards.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies all applicable standards in the WA Zone.

SUPPLEMENTARY PROVISIONS

5. Chapter 18.116, Supplementary Provisions

a. Section 18.116.020. Clear Vision Areas.

- A.** In all zones, a clear vision area shall be maintained on the corners of all property at the intersection of two streets or a street and a railroad. A clear vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction exceeding three and one-half feet in height, measured from the top of the curb or, where no curb exists, from the established street centerline grade, except that trees exceeding this height may be located in this area provided all branches and foliage are removed to a height of eight feet above the grade.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property does not contain an area within two intersecting streets or an intersecting street and a railroad.

b. Section 18.116.030, Off Street Parking and Loading

- A. Compliance.** No building or other permit shall be issued until plans and evidence are presented to show how the off street parking and loading requirements are to be met and that property is and will be available for exclusive use as off-street parking and loading. The subsequent use of the property for which the permit is issued shall be conditional upon the unqualified continuance and availability of the amount of parking and loading space required by DCC Title 18.

FINDINGS: The applicant proposes to provide ten off-street parking spaces to accommodate up to twenty invited guests recreating on the southern reservoir. Compliance with the applicable approval criteria for these parking spaces is addressed in the findings below.

- B. Off-Street Loading.** Every use for which a building is erected or structurally altered to the extent of increasing the floor area to equal a minimum floor area required to provide loading space

and which will require the receipt or distribution of materials or merchandise by truck or similar vehicle, shall provide off-street loading space on the basis of minimum requirements as follows:

* * *

2. Restaurants, office buildings, hotels, motels, hospitals and institutions, schools and colleges, public buildings, recreation or entertainment facilities and any similar use which has a gross floor area of 30,000 square feet or more shall provide off street truck loading or unloading berths subject to the following table:

Sq. Ft. of Floor Area	No. of Berths Required
Less than 30,000	0
30,000-100,000	1
100,000 and Over	2

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant's proposal does not include any buildings with a gross floor area of 30,000 square feet or more. As noted above, the proposed boathouse would have a floor area of only 924 square feet.

- C. **Off-Street Parking.** Off-street parking spaces shall be provided and maintained as set forth in DCC 18.116.030 for all uses in all zoning districts. Such off-street parking spaces shall be provided at the time a new building is hereafter erected or enlarged or the use of a building existing on the effective date of DCC Title 18 is changed.

FINDINGS: The applicant proposes to provide a ten-vehicle parking area to accommodate up to twenty invited guests recreating on the southern reservoir. The Hearings Officer finds that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the applicant to construct the parking area concurrent with completion of the boathouse and prior to commencing recreational use on the southern reservoir.

- D. **Number of Spaces Required.** Off-street parking shall be provided as follows:

* * *

9. Other uses not specifically listed above shall be provided with adequate parking as required by the Planning Director or Hearings Body. The above list shall be used as a guide for determining requirements for said other uses.

FINDINGS: The proposed recreation-oriented facility is not a use specifically listed in this section. The applicant proposes to provide a ten-space parking area to accommodate up to twenty invited guests recreating on the southern reservoir. The Hearings Officer finds this number of parking spaces will be adequate to accommodate the proposed use.

- E. **General Provisions. Off-Street Parking**

1. **More Than One Use on One or More Parcels.** In the event several uses occupy a single structure or parcel of land, the total requirement for off-street parking shall be the sum of requirements of the several uses computed separately.
2. **Joint Use of Facilities.** The off-street parking requirements of two or more uses, structures or parcels of land may be satisfied by the same parking or loading space used jointly to the extent that it can be shown by the owners or operators of the uses, structures or parcels that their operations and parking needs do not overlap at any point of time. If the uses, structures or parcels are under separate ownership, the right to joint use of the parking space must be evidenced by a deed, lease, contract or other appropriate written document to establish the joint use.

FINDINGS: The southern reservoir is located on two tax lots (Tax Lots 824 and 828), and the reservoir will accommodate two uses – a water storage facility as part of TID's irrigation system, and a recreation-oriented facility requiring large acreage. The Hearings Officer finds the water storage use will generate few TID maintenance vehicle trips, and there is sufficient space near the reservoirs to accommodate TID vehicles. For this reason, I find parking for TID's maintenance vehicles likely will not overlap with parking for guests using the recreation-oriented facility. Therefore, I find the applicant's proposed off-street parking area will be sufficient for both uses of the southern reservoir.

3. **Location of Parking Facilities.** Off-street parking spaces for dwellings shall be located on the same lot with the dwelling. Other required parking spaces shall be located on the same parcel or another parcel not farther than 500 feet from the building or use they are intended to serve, measured in a straight line from the building in a commercial or industrial zone. Such parking shall be located in a safe and functional manner as determined during site plan approval. The burden of proving the existence of such off-premise parking arrangements rests upon the applicant.

FINDINGS: The applicant proposes to locate the ten off-street parking spaces for the recreation-oriented facility on Tax Lot 828, one of the two tax lots on which the southern reservoir is located, therefore satisfying this criterion.

4. **Use of Parking Facilities.** Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring that all parking spaces on the subject

property be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

5. **Parking, Front Yard. Required parking and loading spaces for multi-family dwellings or commercial and industrial uses shall not be located in a required front yard, except in the Sunriver UUC Business Park (BP) District and the La Pine UUC Business Park (LPBP) District and the LaPine UUC Industrial District (LPI), but such space may be located within a required side or rear yard.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a multi-family dwelling, commercial or industrial use.

- F. **Development and Maintenance Standards for Off-Street Parking Areas. Every parcel of land hereafter used as a public or private parking area, including commercial parking lots, shall be developed as follows:**

1. **Except for parking to serve residential uses, an off-street parking area for more than five vehicles shall be effectively screened by a sight obscuring fence when adjacent to residential uses, unless effectively screened or buffered by landscaping or structures. (Emphasis added.)**

FINDINGS: Section 18.04.030 defines "fence, sight obscuring" as:

. . . a continuous fence, wall, evergreen planting or combination thereof constructed and/or planted to effectively screen a particular use from view.

The proposed guest parking area would be located on Tax Lot 828 near the north end of the southern reservoir. The applicant states the proposed parking area is adequately screened from the nearest residences by existing trees and other vegetation. The staff report states that based on staff's site visit, a band of trees located on the perimeter of the reservoir will provide "some screening" of the proposed parking area from adjacent residential uses. However, staff questions whether that screening is sufficient to satisfy the requirement of this subsection. The Hearings Officer finds that in light of the location of the proposed guest parking area in the center of the subject property, and the presence of moderate tree cover to the north, west and east of this location, existing vegetation will adequately screen vehicles in the parking area from surrounding residential uses.

2. **Any lighting used to illuminate off-street parking areas shall be so arranged that it will not project light rays directly upon any adjoining property in a residential zone.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any illumination for the parking lot. However, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring that any parking area lighting installed in the future will not project light rays directly on any adjoining property in a residential zone.

3. **Groups of more than two parking spaces shall be located and designed to prevent the need to back vehicles into a street or right of way other than an alley.**

FINDINGS: The applicant's submitted site plan shows the proposed guest parking area will be located over 150 feet from Klippel Road and over 2,000 feet from Johnson Road. For these reasons, the Hearings Officer finds the location and design of the guest parking area will prevent the need to back vehicles onto a street or right-of-way, therefore satisfying this criterion.

4. **Areas used for standing and maneuvering of vehicles shall be paved surfaces adequately maintained for all weather use and so drained as to contain any flow of water on the site. An exception may be made to the paving requirements by the Planning Director or Hearings Body upon finding that:**
 - a. **A high water table in the area necessitates a permeable surface to reduce surface water runoff problems; or**
 - b. **The subject use is located outside of an unincorporated community and the proposed surfacing will be maintained in a manner which will not create dust problems for neighboring properties; or**
 - c. **The subject use will be in a Rural Industrial Zone or an Industrial District in an unincorporated community and dust control measures will occur on a continuous basis which will mitigate any adverse impacts on surrounding properties.**

FINDINGS: The subject property is located outside of any unincorporated community. The applicant proposes to maintain the gravel surfacing of the vehicle standing and maneuvering areas in a dust free manner. The applicant notes the area proposed for guest parking has been graveled since at least the summer of 2014 and that it has not been the subject of any dust complaints. The applicant also states there is adequate water available on the subject property to allow the property owners to maintain the vehicular standing and maneuvering areas in a dust free condition. For these reasons, the Hearings Officer finds the applicant's proposal qualifies for an exception to the paving standard in this subsection for all areas used for standing and maneuvering of vehicles. I further find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to maintain the guest parking area in a dust-free condition.

5. **Access aisles shall be of sufficient width for all vehicular turning and maneuvering.**

FINDINGS: Table 1 of Section 18.116.030 provides the minimum aisle width for two-way travel is 24 feet. The applicant's submitted site plan shows a 26-foot-wide access aisle to the guest parking area and fire apparatus turnaround. The Bishops argue this turnaround is not adequate. The applicant responds that the turnaround was designed by the applicant's engineer to conform to the applicable requirements in the Oregon Fire Code. The applicant also notes that although the Bend Fire Department, which provides fire protection services to the subject property, was

sent notice of the applicant's proposal, it did not submit any comments, indicating the department had no concerns about the fire apparatus turnaround. For these reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion.

6. **Service drives to off-street parking areas shall be designed and constructed to facilitate the flow of traffic, provide maximum safety of traffic access and egress and maximum safety of pedestrians and vehicular traffic on the site. The number of service drives shall be limited to the minimum that will accommodate and serve the traffic anticipated. Service drives shall be clearly and permanently marked and defined through the use of rails, fences, walls or other barriers or markers. Service drives to drive in establishments shall be designed to avoid backing movements or other maneuvering within a street other than an alley.**
7. **Service drives shall have a minimum vision clearance area formed by the intersection of the driveway centerline, the street right of way line and a straight line joining said lines through points 30 feet from their intersection.**

FINDINGS: The applicant's submitted site plan shows the proposed service drive to the guest parking area will be the existing driveway from Johnson Road, and will be separated from any public pedestrian walkways or public rights-of-way. The applicant's submitted site plan shows this service drive would be surrounded by irrigated and other undeveloped lands and would be clearly marked. The staff report states that based on staff's site visit, the required clear vision areas will be met. For these reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion.

8. **Parking spaces along the outer boundaries of a parking area shall be contained by a curb or bumper rail placed to prevent a motor vehicle from extending over an adjacent property line or a street right of way.**

FINDINGS: The applicant's submitted site plan shows the proposed parking area will be located over 300 feet from any property line, and over 150 feet from the southern reservoir. For these reasons, the Hearings Officer finds vehicles parked in the guest vehicle parking area will not extend over an adjacent property line or street right-of-way, therefore satisfying this criterion.

- G. **Off-Street Parking Lot Design. All off-street parking lots shall be designed subject to County standards for stalls and aisles as set forth in the following drawings and table:**

(SEE TABLE 1 AT END OF CHAPTER 18.116)

1. **For one row of stalls use "C" + "D" as minimum bay width.**
2. **Public alley width may be included as part of dimension "D," but all parking stalls must be on private property, off the public right of way.**

3. For estimating available parking area, use 300-325 square feet per vehicle for stall, aisle and access areas.
4. For large parking lots exceeding 20 stalls, alternate rows may be designed for compact cars provided that the compact stalls do not exceed 30 percent of the total required stalls. A compact stall shall be eight feet in width and 17 feet in length with appropriate aisle width.

FINDINGS: The applicant's submitted site plan shows the proposed guest parking area includes stalls nine feet wide and twenty feet long, meeting the minimum standards for 90-degree parking in Table 1 of DCC 18.116. As discussed above, the two-way aisle will be 26 feet in width, meeting the minimum 24-foot-wide drive aisle width. For these reasons, the Hearings Officer finds the applicant's proposal satisfies these standards.

c. Section 18.116.031, Bicycle Parking

New development and any construction, renovation or alteration of an existing use requiring a site plan review under DCC Title 18 for which planning approval is applied for after the effective date of Ordinance 93-005 shall comply with the provisions of DCC 18.116.031.

A. Number and Type of Bicycle Parking Spaces Required.

1. General Minimum Standard.

- a. All uses that require off-street motor vehicle parking shall, except as specifically noted, provide one bicycle parking space for every five required motor vehicle parking spaces.
- b. Except as specifically set forth herein, all such parking facilities shall include at least two sheltered parking spaces or, where more than 10 bicycle spaces are required, at least 50 percent of the bicycle parking spaces shall be sheltered.
- c. When the proposed use is located outside of an unincorporated community, a destination resort, and a rural commercial zone, exceptions to the bicycle parking standards may be authorized by the Planning Director or Hearings Body if the applicant demonstrates one or more of the following:
 - i. The proposed use is in a location accessed by roads with no bikeways and bicycle use by customers or employees is unlikely.
 - ii. The proposed use generates less than 50 vehicle trips per day.

- iii. No existing buildings on the site will accommodate bicycle parking and no new buildings are proposed.
- iv. The size, weight, or dimensions of the goods sold at the site makes transporting them by bicycle impractical or unlikely.
- v. The use of the site requires equipment that makes it unlikely that a bicycle would be used to access the site. Representative examples would include, but not be limited to, paintball parks, golf courses, shooting ranges, etc. (Emphasis added.)

FINDINGS: The applicant argues bicycle parking should not be required because its proposal is for a private use on private property. As discussed above, the Hearings Officer has found the applicant's proposal is not exempt from the county's land use regulations. And as noted in the staff report, in *Dorsett* (CU-07-79), I found that in the absence of express authorization to approve exceptions the bicycle parking requirements, they apply to private parks.

With respect to exceptions, the subject property is located outside of any unincorporated community, destination resort and rural commercial zone. And because the applicant proposes to limit to 20 the number of guests using the southern reservoir for recreation at the same time, traveling in ten vehicles, the proposed recreational use will generate only 20 vehicle trips.³⁸ Finally, the Hearings Officer finds that given the location of the subject property and the nature of the proposed recreational use, it is unlikely guests will travel to the facility via bicycle. For these reasons, I find the applicant's proposal qualifies for an exception to the bicycle parking requirements under subparagraphs (i) and (ii) of this paragraph.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies, or with imposition of conditions of approval will satisfy, all applicable supplementary provisions in this chapter.

SITE PLAN REVIEW

6. Chapter 18.124, Site Plan Review

a. Section 18.124.030, Approval Required

A. No building, grading, parking, land use, sign or other required permit shall be issued for a use subject to DCC 18.124.030, nor shall such a use be commenced, enlarged, altered or changed until a final site plan is approved according to DCC Title 22, the Uniform Development Procedures Ordinance.

B. The provisions of DCC 18.124.030 shall apply to the following:

- 1. All conditional use permits where a site plan is a condition of approval;**

³⁸ The staff report notes the county considers a vehicle trip to consist of any in or out movement to or from a property, and therefore ten vehicles coming to and leaving the site would generate 20 vehicle trips.

2. **Multiple family dwellings with more than three units;**
3. **All commercial uses that require parking facilities;**
4. **All industrial uses;**
5. **All other uses that serve the general public or that otherwise require parking facilities, including, but not limited to, landfills, schools, utility facilities, churches, community buildings, cemeteries, mausoleums, crematories, airports, parks and recreation facilities and livestock sales yards; and**
6. **As specified for Flood Plain Zones (FP) and Surface Mining Impact Area Combining Zones (SMIA).**
7. **Non-commercial wind energy system generating greater than 15 to 100 kW of electricity. (Emphasis added.)**

FINDINGS: The applicant requests conditional use approval for the surface mining to create the reservoirs on the subject property, and for a recreation-oriented facility requiring large acreage consisting of motorized boating, water skiing and wakeboarding on the southern reservoir. The applicant also requests conditional use approval for a dock, boathouse, and ten-vehicle guest parking area as part of the recreation-oriented facility.

The Hearings Officer finds the provisions of Chapter 18.60 governing the RR-10 Zone do not expressly require site plan review *under Chapter 18.124* for either of these conditional uses. Section 18.128.280 requires an applicant to submit a site plan for non-Goal 5 surface mining and establishes specific site plan approval criteria for such mining, but makes no reference to site plan review under Chapter 18.124. Therefore, I find the specific surface mining site plan approval criteria in Section 18.128.280 supersede the general site plan approval criteria in Chapter 18.124. In addition, I find none of the use categories listed in this section as requiring site plan approval encompass the surface mining to create the reservoirs. Therefore, I find the site plan approval criteria in Chapter 18.124 do not apply to the surface mining to create the reservoirs.

The Hearings Officer finds site plan review under Chapter 18.124 does apply to the proposed recreation-oriented facility on the southern reservoir because it requires parking under Chapter 18.116. Compliance with the applicable site plan approval criteria in this chapter for the recreational use is discussed in the findings below.³⁹

b. Section 18.124.060, Approval Criteria

Approval of a site plan shall be based on the following criteria:

- A. The proposed development shall relate harmoniously to the natural environment and existing development, minimizing**

³⁹ Opponents argue site plan approval is also required for recreational use of the northern reservoir. However, as discussed in the findings above, the Hearings Officer has found the northern reservoir does not require conditional use approval as a recreation-oriented facility, and therefore I find it also does not require site plan review.

visual impacts and preserving natural features including views and topographical features.

FINDINGS: The applicant's modified burden of proof describes the applicant's proposed recreation-oriented facility requiring large acreage as follows:

"Per DCC 18.60.030.E and Board of County Commissioner determinations, Applicant seeks approval for a 'recreation-oriented facility requiring large acreage such as off-road vehicle track or race track, but not including rodeo grounds.' This approval is being sought for motorized boating activity including waterskiing and wakeboarding on the South Pond of the New Reservoir. Motorized activity is limited to the South Pond of the New Reservoir and so conditional use approval regulation is only required for the South Pond.

The recreation-oriented facility requiring large acreage is for private use only by the owners of KCDG and limited accompanied guests. It is not and will not be open to the public. Access to the recreation-oriented facility is via the private, gated driveway that also serves the Cadwell residence on tax lot 819.

*The Cadwells, members of KCDG, are social people who enjoy their church and the broader Central Oregon community. They would like to share the recreational benefits of the South Pond with limited guests. To that end, Applicant seeks approval to host up to 20 accompanied guests of the Subject Property owners at the harbor area. Guests at the recreation-oriented facility will park and congregate in areas marked on the Site Plan, **Exhibit C**.*

*Applicant believes that regulation of motorized boating activity is beyond the scope and jurisdiction of Deschutes County's authority. Motorized boating regulation is under the sole jurisdiction of the Oregon State Marine Board. **Exhibit P**. Nevertheless, Subject Property characteristics dictate, and the Applicant has voluntarily agreed, to logical restrictions on use as it relates to impacts on adjoining residents.*

The South Pond's configuration dictates that it will be used by one boat at a time. KCDG will limit the motorized boating activity to daylight hours. Use of the recreation-oriented facility will be restricted to protect mule deer during the critical winter deer range season which extends from December 1st of one year through March 31st of the following year.

Other proposed conditions to be recorded against adjacent KCDG, Cadwell and Kimble properties as CC&Rs [covenants, conditions and restrictions] restricting uses on the South Pond are:

- 1. Prohibit motorized activity during Winter Deer Range season;*
- 2. Only one motorized boat may operate on the South Pond at a time;*
- 3. No jet skis allowed;*
- 4. Operational hours limited to daylight hours;*
- 5. Adhere to all Deschutes County noise ordinance standards, found currently at DCC Chapter 8.08;*

6. *Boat restrictions include:*
 - a. *Inboard engines only;*
 - b. *Self-contained engines with internal oil lubrication systems;*
 - c. *Stock mufflers or muffled noise equivalent;*
 - d. *Direct drive or V-drive transmission;*
 - e. *No two-stroke motors (prevents oil contamination);*
7. *No alcoholic consumption to be allowed on boats or by skiers; and*
8. *All motor boat operators must carry the Oregon mandatory boater education card.*

*TID's use of the New Reservoir will be the primary and dominant use of the New Reservoir. TID may restrict any conflicting uses. See executed and recorded Irrigation Contract, **Exhibit A**. This contract has been recorded against the Subject Property, and so is binding upon subsequent landowners, and will be incorporated into surrounding property CC&Rs belonging to KDCG, the Cadwells, and the Kimbles upon approval.*" (Bold emphasis in original.)

In addition, the applicant seeks site plan approval for the existing dock and the proposed boathouse to be constructed on existing pilings at the north end of the southern reservoir. As discussed above, the design drawings for the boathouse show its roof peak would be 23 feet above the water line, and the building would have a footprint of 924 square feet, sufficient to enclose two boats. The applicant also requests site plan approval for the 10-vehicle guest parking area. Finally, as discussed above, the Hearings Officer has found the "recreation-oriented facility" includes the southern reservoir itself. Therefore, I find that for purposes of site plan review under this section, the "proposed development" consists of both the completed southern reservoir and its recreational use as proposed by the applicant.

Section 18.124.060 requires the Hearings Officer to find that the reservoir and recreational use thereof:

- relate harmoniously to the natural environment;
- relate harmoniously to existing development;
- minimize visual impacts; and
- preserve natural features including views and topographical features.

Each of these factors is discussed in the findings below. However, before turning to those factors, the Hearings Officer finds I must determine the meaning of the phrase "relate harmoniously." Title 18 does not define either of these terms. However, I find *Webster's* states the ordinary meaning of the terms includes the following:

- relate: "to have some connection or relation;" and
- harmonious: "having parts arranged in an orderly or pleasing way; agreeable; in harmony with; well matched."

Applying these definitions, the Hearings Officer finds that to “relate harmoniously,” the southern reservoir and the proposed recreational use thereon must relate to the surrounding natural environment and existing development in a pleasing and agreeable way – i.e., they must be compatible with the surrounding area.

1. Natural Environment. As discussed in the Findings of Fact above, the subject property was the site of the former Klippel surface mine. The record indicates that over 1 million cubic yards of mineral and aggregate material were removed from the Klippel mine before mining ceased. Consequently, mining dramatically altered the previous environment on the subject property. The Klippel mining pits were reclaimed through a combination of grading, re-contouring, and reseeded with native grasses. The record includes a number of photographs depicting the reclaimed mine and vegetation thereon, and showing that vegetation took hold on the majority of the reclaimed site. In 2007, the former Klippel mine received a “Mined Land Reclamation Award” from DOGAMI.⁴⁰

Because the portion of the subject property on which the reservoirs are located was mined and reclaimed, and because KCDG conducted additional, unpermitted, surface mining on the reclaimed site to create the reservoirs, the Hearings Officer finds that for purposes of this site plan approval criterion, the relevant “natural environment” is the condition of the subject property and surrounding land as it existed prior to KCDG’s mining for the reservoirs. The question, then, is whether the changes to the subject property to create the southern reservoir and to facilitate the recreation thereon are harmonious with that “natural environment.”

a. Reservoir Appearance. The Hearings Officer finds the best photographs depicting the subject property before and after KCDG’s mining for the reservoirs are the two “Google Earth” photographs dated 2012 and 2014 and included in the record as Exhibit 3 to the Bishops’ September 29, 2015 memorandum. These photographs show the vegetative cover (trees, shrubs and grasses) that existed on the majority of the subject property, and in particular around the perimeter of the reclaimed mining pits, remained intact following mining for the reservoirs. However, the photographs also show that much of the vegetation planted for reclamation was removed during excavation. As a result, the ground surrounding the southern reservoir, including its banks and the land between the banks and the forested areas, now consists of vast gravel and dirt areas devoid of vegetation. These barren areas can be seen in ground-level photographs that also show steep gravel, rock and dirt banks.⁴¹ The slopes of these banks appear much steeper in places than the sloped edges of the reclaimed mining pits.⁴² Moreover, the southern reservoir is long, narrow, and linear in shape and has two man-made dirt and gravel islands to facilitate waterskiing.

The Hearings Officer finds the southern reservoir has a distinctly unnatural look that contrasts unfavorably with the surrounding natural environment and is much less harmonious with that environment than were the reclaimed mining pits. The southern reservoir is less natural looking

⁴⁰ A summary of that award is included in this record as Exhibit “F” to the applicant’s burden of proof and includes a photograph of the reclaimed land with what appears to be a healthy cover of grass.

⁴¹ For example, see the photographs in: (a) Exhibit “DDD” to the applicant’s burden of proof; (b) Exhibit 21 to the Bishops’ 9-29-15 memorandum; and (c) Exhibit 38 to the Bishops’ 9-29-15 memorandum.

⁴² Exhibit 10A to the Bishops’ 9-29-15 memorandum is a letter from DOGAMI to Hap Taylor and Sons, the company that completed the Klippel mine reclamation, confirming that all reclaimed mining pit slopes were “3H:1V or flatter.”

than the northern reservoir which is round in shape and vegetation closer to its banks.⁴³ I understand that man-made reservoirs may not always have the look of a natural water body.⁴⁴ Nevertheless, I find that where, as here, the southern reservoir is surrounded by a natural environment that consists of forest -- much of which is undisturbed -- and irrigated pasture, the reservoir's stark appearance and unnatural shape simply are not harmonious with the natural environment. I find it is not reasonable to expect the property owners to modify the shape of the southern reservoir to make it more natural looking. However, I find the reservoir's appearance may be made more natural looking by re-contouring its steepest banks and revegetating the area between the banks and the surrounding forested areas. Therefore, I find that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring that any of the southern reservoir's slopes that are greater than three feet horizontal to one foot vertical be re-contoured so that they do not exceed that degree of slope, and that the areas between the side of the banks facing away from the southern reservoir and the surrounding forested areas be planted with native vegetation. Finally, as discussed in the findings below concerning wildlife habitat, incorporated by reference herein, I have found the property owners also should be required as a condition of approval to replant the barren areas in a manner consistent with ODFW's Fish and Wildlife Habitat Mitigation Policies.

b. Wildlife Habitat. The parties strongly disagree about the impact on wildlife from the southern reservoir and the proposed recreational use thereon. Opponents rely on ODFW staff comments in the record Nancy Breuner, ODFW Deschutes Habitat Biologist, submitted a letter dated June 29, 2015 in response to the original applications. Sara Gregory, Wildlife Habitat Biologist, submitted a letter dated September 17, 2015 in response to the modified applications. In her letter, Ms. Breuner identified ODFW's concerns with:

- (i) recreational use on the southern reservoir during the winter range closure period;
- (ii) disruption of deer migration corridors by the presence of two reservoirs and their proximity to one another;
- (iii) the steepness of and lack of vegetation on the reservoirs' banks;
- (iv) the loss of native wildlife habitat due to the reservoirs' construction; and
- (v) the denuding of upland areas adjacent to the reservoirs.

Ms. Breuner recommended that to address these concerns, the county require actions to improve habitat conditions for wildlife on the subject property, including:

- (i) prohibiting recreational use during the winter range closure period (December through March);
- (ii) limiting fencing and structures in the area between the two reservoirs;
- (iii) planting native riparian vegetation along the perimeters of both reservoirs; and

⁴³ Photographs of the northern reservoir are included in this record as Exhibit 45 to the Bishops' 9-29-15 memorandum.

⁴⁴ The record includes numerous photographs of reclaimed mines filled with water and man-made waterski lakes that do not resemble natural water bodies. See, e.g., photographs in Exhibit 39 to the Bishops' 9-29-15 memorandum.

- (iv) providing habitat mitigation pursuant to ODFW's policies, including planting native upland plants and restoring native habitat lost to reservoir construction.

Ms. Gregory's letter added the following recommendations:

"ODFW's primary concern regarding KCDG's July 17, 2015 modification of their application is the addition of a parking lot for ten vehicles and request to allow use of the area by up to 20 people. Construction of a parking lot has the potential to eliminate wildlife forage and cover where the lot sits and reduce wildlife use of the surrounding area. Increasing vehicle traffic may increase noise, spread noxious weeds, increase the potential for wildlife vehicle collisions and further diminish wildlife habitat values."

Ms. Gregory again recommended KCDG be prohibited from recreational use on the reservoirs during the deer winter range closure period, and be required as a condition of any approval to restore native wildlife habitat lost to construction of the reservoirs.

The applicant relies on the written and oral testimony of Paul Valcarce to rebut ODFW's concerns. At the continued public hearing, Mr. Valcarce testified that he is a wildlife biologist and conservationist, as well as a long-time friend of Harris Kimble who has seen the subject property on a regular basis over the last eight years. In a letter dated April 4, 2015, Mr. Valcarce stated that in his opinion, the reclaimed Klippel mining pits did not have suitable wildlife forage, that mule deer are extremely adaptable to human occupation, that "isolated small ponds and lakes have not been shown to have any major impacts on deer movements," and that construction of the reservoirs "provides an opportunity to increase the productivity of the mule deer winter range." Mr. Valcarce did recommend that "the disturbed areas" should be planted with forage plants such as Triticale or other high value cereal grains. In addition, supporters of the applicant's proposal submitted numerous photographs of deer, elk and waterfowl using the subject property and the reservoirs in particular.⁴⁵

The Bishops and other opponents argue the Hearings Officer should discount Mr. Valcarce's opinion because he is a friend of Harris Kimble. I disagree. I find Mr. Valcarce is qualified to give an expert opinion on wildlife habitat on the subject property. His letter indicates he has a degree in wildlife and fisheries science from the University of Utah, and that he has been employed by both the U.S. Fish and Wildlife Service and the Idaho Fish and Game Department in a variety of wildlife management capacities. Although Mr. Valcarce may well be motivated to testify in favor of the applicant's proposal to support his friend, I find his opinion is consistent with the opinion and recommendations of ODFW's wildlife experts for restoring destroyed wildlife habitat on the subject property through replanting unvegetated areas with suitable forage plants. In addition, I agree with Mr. Valcarce that the fact wildlife are using the reservoirs on the subject property does not signify they provide suitable wildlife habitat compared to what was removed by reservoir construction.

The Hearings Officer has found the banks of the southern reservoir and the area between the banks and the forested areas on the subject property now are devoid of vegetation. In addition, photographs in the record suggest that in some places the banks of the southern reservoir are steeper than the sloped edges of the reclaimed mining pits. I find these site conditions clearly show construction of the southern reservoir removed wildlife habitat and forage. For this reason, I find the southern reservoir is not harmonious with the natural environment. I find that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring the property owners to: (i) develop and submit to the Planning Division a wildlife habitat mitigation plan providing for replanting of all barren areas between the side of the banks facing away from

⁴⁵ See, e.g., photographs in Exhibits "AA" and "CC" to the applicant's burden of proof.

the southern reservoir and the surrounding forested areas on the subject property with native plants providing suitable forage for deer and elk, and consistent with ODFW's Fish and Wildlife Habitat Mitigation Policies; (ii) replant all such barren areas in accordance with the habitat mitigation plan; (iii) following such replanting, submit to the Planning Division written documentation from ODFW that such replanting is consistent with its habitat mitigation policies; and (iv) retain all existing vegetation on the subject property.

2. Existing Development. The area surrounding the subject property consists primarily of rural residential subdivisions (Klippel Acres and Saddleback) developed with dwellings and outbuildings on large lots. The surrounding area also includes two active surface mines, Tumalo Creek, and the Tumalo Feed Canal. Existing development on the subject property consists of a single family dwelling and outbuildings.

The staff report states, and the Hearings Officer agrees, that neither the southern reservoir nor the proposed recreational use thereon will have any impact on nearby surface mining uses. With respect to existing rural residential development, opponents argue the applicant's proposal is not harmonious considering several factors, each of which is addressed in the findings below.

a. Reservoir Size and Appearance. Opponents argue the large size and unnatural appearance of the southern reservoir are not harmonious with their rural residential neighborhood. With respect to size, the Hearings Officer understands that it is not unusual for rural areas to include man-made bodies of water such as irrigation ponds that provide water to irrigate adjacent pastures and landscaped areas. However, the size, shape, and appearance of the southern reservoir are quite different from the typical rural irrigation ponds. The southern reservoir, along with its associated disturbed and developed areas, dominates the southern half of the subject property and is much larger than the vast majority of surrounding lots. The record indicates adjacent and nearby lots in the Klippel Acres Subdivision average five acres in size. And all but three of the thirteen lots comprising the subject property are ten acres or smaller in size, with a mean size of approximately five acres. For these reasons, I find the size of southern reservoir is out of character with the size of the surrounding residential lots.

With respect to appearance, for the reasons discussed in the findings above concerning the "natural environment," incorporated by reference herein, the Hearings Officer finds the unnatural shape of the southern reservoir, its steep and denuded banks, and the lack of vegetation between the reservoir and the surrounding forested areas also renders the southern reservoir inharmonious with existing rural residential development.

b. Scale of Recreational Use. Opponents argue the scale, intensity, and duration of the proposed recreational use of the southern reservoir are not harmonious with existing rural residential development. The proposed recreational use consists of motorized boating, waterskiing and wakeboarding on the southern reservoir by the property owners and up to 20 invited guests, during daylight hours, seven days per week, and eight months per year. The Hearings Officer finds the RR-10 Zone allows as conditional uses other large-scale recreational and similar uses that could occur with such frequency and duration, such as golf courses, dude ranches, and personal use landing strips. However, only the latter use is permitted in the RR-10 Zone within a deer winter range. And I am aware that in at least one previous decision, the county conditioned approval of a personal use landing strip with specific limits on the number of total aircraft landings and takeoffs in order to assure compatibility with surrounding uses.⁴⁶ The applicant argues impacts on surrounding rural residences from recreational use on the southern reservoir would be no worse than the impacts from previous surface mining on the site.

⁴⁶ *Kennel* (CU-99-117, MA-99-8).

However, the staff report correctly notes this criterion does not include a "no greater adverse impact" standard. Rather, it requires a determination of whether the proposed recreational use would relate harmoniously to the existing rural residential development. And although it is unlikely the property owners and their invited guests would engage in motorized boating, waterskiing and wakeboarding on the southern reservoir all day, every day, for eight months, that is precisely what they are seeking permission to do. When that potential duration and intensity of use are combined with the large scale of the southern reservoir, the Hearings Officer finds the proposed use looks like the residential cluster development amenity the Bishops and other opponents suspect it is. For that reason, I agree with opponents that the southern reservoir appears out of scale with surrounding rural residential development.

Conditional uses are presumed to be compatible, or capable of being made compatible, through imposition of conditions of approval. The applicant has proposed conditions of approval that would have some effect on the impact of the proposed recreational use, including prohibiting motorized boating during the winter deer range season (December through March) and limiting recreational use to daylight hours. The applicant also has proposed "boat restrictions" addressing noise impacts, water pollution, and the fitness of boat operators and skiers. Nevertheless, the Hearings Officer finds these limitations would do little to reduce the overall impact of the proposed recreational use on the surrounding rural residential neighborhood given the scale of the southern reservoir and the proposed duration of the recreational use.

The applicant has the burden of demonstrating the proposed recreational use of the southern reservoir will relate harmoniously to existing development in the surrounding area. For the reasons set forth above, the Hearings Officer finds the applicant has not met that burden because of the scale, intensity and duration of the proposed use.

c. Noise. Opponents have expressed concern that the noise generated by motorized boating on the southern reservoir will disturb the quiet enjoyment of their rural lifestyle. The applicant has proposed several limitations on the recreational use related to boat noise, including using only one boat at a time on the reservoir, and using only boats with the following characteristics; (i) inboard engines;(ii) self-contained engines with internal oil lubrication systems; (iii) stock mufflers or muffled noise equivalent; and (iv) direct drive or V-drive transmissions.

In addition to the proposed limitations above, the applicant submitted a noise study measuring and evaluating noise generated by a motorized ski boat operating on the southern reservoir. The noise study is dated September 28, 2015, and was prepared by Kerrie G. Standlee of Daly Standlee & Associates, Inc. ("DSA").⁴⁷ At the outset, the Bishops' argue the Hearings Officer should not consider the noise study because operation of a motorized boat on the southern reservoir during the noise testing violated the county's land use regulations and was illegal, and therefore the results of the testing are not admissible under the doctrine of "fruit of the poisonous tree." I disagree. In the first place, that doctrine applies to criminal proceedings. Second, the doctrine makes inadmissible evidence that was secured through illegal means. However, the boat operation for the noise testing was approved by the county. The record includes an electronic mail message dated August 3, 2015 from Senior Planner Anthony Raguine to the property owners' attorney Liz Dickson authorizing the applicant to operate a motorize boat on the southern reservoir for purposes of conducting a noise study. The record indicates the applicant mailed notice of the dates and times the boat would be operating to the owners of record of all property located within 500 feet of the subject property. For these reasons, I find there is no legal basis for me to exclude the applicant's noise study.

⁴⁷ A copy of the noise study is included in the record as Exhibit "SSS" to the applicant's burden of proof.

The noise study is detailed and extensive. The executive summary explains the timing and method of noise measurement as follows:

"In conducting the study, DSA measured the sound radiating from three (3) different models of ski boats, operating individually on the reservoir on Thursday, August 20, 2015, Saturday, August 22, 2015, Sunday, August 23, 2015, and Monday, August 24, 2015. In addition to measuring the boat engine sound, measurements were made of the associated sound typically experienced at properties around the reservoir. Sound measurements for the study were made at three (3) locations around the reservoir (see Figure 1):

- 1) *On the west side of the reservoir at the residence at 63394 Fawn Lane,*
- 2) *On the south side of the reservoir at the residence located at 19214 Buck Drive,*
- 3) *On the east side of the reservoir near the residence located at 63460 Palla Lane.*

Observations were made during the measurements to help establish the sources that influenced sound levels found at the three (3) measurement locations both with and without the boats in operation. Information learned during the observation periods was used in conjunction with the measured sound level data to assess the impact of allowing ski boats to operate on the TID reservoir.

Data collected during the four (4) days of measurements were analyzed to establish the amount of ski boat sound reaching residences around the reservoir and the amount of ambient sound typically found at the residences without the ski boats. The results of the analysis corroborated what was observed during the measurements: that sound generated by a ski boat operating on the reservoir, while audible at times during observation periods at each measurement location, was typically audible only when the background sound at the measurement location was low enough to allow the boat noise to be distinguished from the background sound. And, the boat sound was audible only when the boat was near the measurement location. On many occasions, ski boat noise was not audible above the background sound caused by wind blowing through leaves in the trees, airplanes and helicopters flying near and far from the site, truck and motorcycle traffic from Johnson Road and automobile traffic on streets and roads local to the neighborhood. On those occasions when the background sound was low enough for the ski boat to be heard, it was generally audible at an individual location for only 20 to 40 seconds each time it approached the measurement location. The length of time it was audible depended on the location and the type of ski boat activity."

The noise study stated testing involved three types of tow sport activities: waterskiing, surfboarding, and wakeboarding.

The study stated the noise impacts from the boating and two sports were assessed utilizing Department of Environmental Quality (DEQ) noise standards, which provide that a new noise source located on a previously unused commercial or industrial site would not be allowed to radiate noise to a point within 25 feet of a residence that caused the ambient hourly noise levels (10% and 50% of the time during an hour) to rise by more than 10 decibels (dB). The noise study includes a chart depicting the increase in ambient noise levels at measurement locations with ski

boat operations, and showing that at no time during the measurement periods did the ski boat noise exceed DEQ's allowed dB increases. The executive summary went on to state:

"Based on the results shown in the table, DSA concludes the noise radiating from ski boat operations on the TID south reservoir on the KCDG property will have an insignificant impact on the acoustic environment typically found at residences around the reservoir. While the noise radiating from boat activity on the reservoir will at times be audible at the residences, the noise will not be out of character from that already found at the residences (both from a level and tonal standpoint) caused by airplanes, helicopters, trucks and motorcycles on Johnson Road, mining operations east and south of the area and wind blowing through the trees."

The staff report states Anthony Raguine was present for a portion of the August 24th testing period and includes the following description of Mr. Raguine's observations and impressions from that test.

"Staff immediately noted the sound of back-up signals from large equipment working to the east at Surface Mining Site No. 308 and the noise of large trucks traveling up a grade at the mining site. During this testing period, two motor boats were being used. According to one of the owners, Eric Cadwell, one boat was used for water skiing and one was used for wake boarding. Based on this conversation, it is staff's understanding that the wakeboard boat travels at approximately 16 miles per hour (mph) and the water skiing boat travels at approximately 35 mph. During this conversation, staff was standing approximately 40 feet from Mr. Cadwell when the wake boat passed by my location at a distance of approximately 100-150 feet. At its closest approach, although his voice was somewhat difficult to hear, staff could still hear Mr. Cadwell's responses to my questions.

Staff then indicated a desire to go along the westerly road to observe the motorboat noise along the residences to the west and adjacent to the southern reservoir. One of the owners, Harris Kimble, offered to drive staff along the westerly road. Staff asked Mr. Kimble to stop at three locations adjacent to 63394 and 63360 Fawn Lane, and 19214 Buck Drive. The eastern property line where staff observed the boating noise at 63394 Fawn Lane is approximately 500 feet from the water associated with the southern reservoir. The eastern property line where staff observed the boating noise at 63394 Fawn Lane is approximately 420 feet from the water. The eastern property line where staff observed the boating noise at 19214 Buck Drive is approximately 250 feet from the water.

At each location staff's impression of the boating noise [from both the wakeboard boat and the water ski boat] was as a low droning or buzzing sound. During staff's stop at 63360 Fawn Lane, staff met property owner Erika Lindquist and her two children. Ms. Lindquist and her son indicated that boating noise could be heard within their house via vent pipes and in the front yard, on the other side of the house away from the reservoir. Staff noted during the conversation with Ms. Lindquist that the discussion could continue without the need to elevate voice volume even when the boat passed at its closest point.

At all three locations, it is staff's impression that it was difficult to hear the boating noise when there was concurrent backup signals at Surface Mining Site No. 308. Additionally, during one stop at 63394 Fawn Lane, wind speed increased such that the rustling of leaves and branches from nearby trees drowned out all of the boating noise. It is staff's impression that although the boating noise is not loud in

terms of volume, it does present a persistent sound that increases in volume at every pass around the reservoir.”

Opponents challenge the validity and weight of the noise study's conclusions for two reasons. First, they claim that whatever may be the decibel readings for the ski boats, opponents find the boat noise disturbing when they hear it. Second, they question the validity of the noise study's results given the seasonal and time limits on noise measurement. Specifically, they note the noise study was conducted on only four summer days, and only between the hours of 1:00 p.m. and 5:00 p.m. on two measurement days, and between 10:00 a.m. and 2:00 p.m. on the other two measurement days. Opponents argue such limited measurements do not accurately reflect ambient noise and boat operation during other seasons when the property owners proposed to use a ski boat, as well as during early morning and evening hours when many people prefer to waterski – times when ambient noise in the neighborhood might be less.

The Hearings Officer finds the DSA noise study is comprehensive and constitutes substantial, credible evidence from which I can find there would be little if any impact from motorized boat noise on surrounding rural residences during the times in which noise measurements were taken. Nevertheless, I share opponents' view that because DSA's noise measurements were limited in time and season, it is not reasonable to extrapolate the study's results, and the conclusions drawn therefrom, across the entire 8-month, daylight-hour period for which the applicant requests permission to operate a motorized boat on the southern reservoir. I have found there is not sufficient information in this record for me to craft conditions of approval that would sufficiently limit the scope, intensity and duration of the proposed recreational use of the southern reservoir to make it harmonious with the natural environment. I find a similar situation exists with respect to harmony with existing development. The exception is operational limits based on the noise study. I find that if the board approves the applicant's proposal on appeal, it should be subject to a condition of approval limiting motorized boat operations on the southern reservoir, at the very least, to the hours of 10:00 a.m. to 5:00 p.m. to correspond with the times of day during which DSA determined there would be little if any impact from boat noise.

d. Impact on Wildlife. The entire subject property is located in the WA Zone protecting the Tumalo Winter Deer Range. At the outset, the Bishops argue that because KCDG conducted surface mining operations during the winter range closure period (in March of 2014), the Hearings Officer should deny the applicant's proposal. The Bishops have not identified, nor have I found, any provision in Title 18 that would provide a basis to deny the applicant's proposal for that reason. However, as discussed in the findings above, incorporated by reference herein, I have found the southern reservoir is not harmonious with the natural environment including wildlife habitat. I have recommended imposition of conditions of approval to mitigate the loss of wildlife habitat in the event the applicant's proposal is approved on appeal.

e. Insects. Opponents argue the reservoirs on the subject property have become breeding grounds for insects, and submitted photographs of swarms of flying insects on their nearby residential properties. In response, TID Manager Ken Rieck submitted an affidavit dated June 19, 2015, and stating in relevant part:

- “3. *Both the Upper Tumalo Reservoir and the District's new reservoirs, located on KC Development Group LLC's property, receive water from the same sources, are located at similar elevations, and each are large enough to develop wind driven wave action on their surfaces;*
4. *In my 25 years of employment with the District, working in and around the Upper Tumalo Reservoir, I do not recall ever having heard a complaint with regard to nuisance mosquitos around any of the District's reservoirs, nor*

have I observed mosquitos and I would expect the new reservoirs to perform similarly.”

In addition, in a June 30, 2015 letter, Paul Valcarce stated that in his opinion the design of the reservoirs with a liner and gravel substrate provides limited breeding areas for mosquitos, and that wave action and pond water circulation will obstruct potential insect breeding areas. According to Mr. Valcarce, the owners intend to stock both reservoirs with bluegill fish which feed on mosquito larvae and can inhibit their breeding. Mr. Valcarce also stated that if the swarming insects observed by neighboring property owners are gnats, the reservoirs will not provide breeding grounds for them because gnats breed in wet, moist areas next to canals and pastures rather than in open water. Finally, Mr. Valcarce stated black flies also will not breed in the reservoirs because they prefer breeding habitat with moving water with rocks like Tumalo Creek.

Based on the applicant's evidence, the Hearings Officer finds the reservoirs will not be breeding grounds for insects and therefore will not be inharmonious with surrounding rural residential uses for that reason.

f. Impact on Local Wells. Opponents argue the reservoirs on the subject property will harm local domestic wells, including wells providing water to the Klippel Water Company. The Hearings Officer understands these arguments to suggest the reservoirs threaten both the quantity and quality of water in these wells. The applicant's submitted materials indicating there are four Klippel wells located south of the southern reservoir at depths of 450 feet and 850 feet, and with yields ranging from 4 gallons per minute (gpm) to 60 gpm.⁴⁸ The Bishops respond that there are only two Klippel wells, but agree that they are located south of the southern reservoir.⁴⁹ In addition, the applicant submitted a well log for another local well (Hampers-Waters) and argues it shows no impact to that well from either the surface mining to create the reservoirs, or the lining and filling of the reservoirs.⁵⁰

The applicant argues that given the depth of the Klippel Water Company wells, it is highly unlikely they would be affected by the reservoirs, based on the fact that logs for these wells dating before and after surface mining in the Klippel pits show no impact on the depth or capacity of these wells from that activity. The Hearings Officer agrees with the applicant that the lined reservoirs are much less likely to affect the wells than surface mining. I also agree that if, as the Bishops suggest, the general direction of groundwater flow in the area is south to north, the location of the Klippel wells south of the reservoir would strongly suggest the reservoirs would not have any effect on the quantity and quality of the groundwater from which the Klippel Water Company draws its water.

For the foregoing reasons, the Hearings Officer finds there is substantial, credible evidence in this record from which I can find the reservoirs will not have negative impacts on local domestic wells in the surrounding area.

g. Impact on Avion Water Company Resources. The Bishops argue the reservoirs will have a negative impact on the water sources for Avion Water Company because the water with which TID filled the reservoirs will no longer be stored in Upper Tumalo Reservoir, and therefore seepage from Upper Tumalo Reservoir will not be sufficient to recharge the aquifer from which Avion draws its water. The Bishops rely on a 2014 hydrogeological study performed by Newton

⁴⁸ See, Exhibit "JJJ" to the applicant's burden of proof.

⁴⁹ See, Exhibit 7 to the Bishops' October 26, 2015, memorandum.

⁵⁰ The Hampers-Waters well log is included in the record as Exhibit "KKK" to the applicant's burden of proof.

Consultants, Inc.⁵¹ The stated purpose of the study was to determine whether the hydrogeology in the vicinity of Upper Tumalo Reservoir is conducive to providing groundwater recharge from surface water resources. The study states Avion had submitted to WRD an application for an aquifer recharge permit. The study concluded that "artificial recharge to the aquifer system in the general area of Tumalo Reservoir" is occurring. Even assuming for purposes of discussion that potential impacts from the reservoirs on distant property are a relevant consideration under this site plan criterion, the Hearings Officer finds the Newton study does not provide sufficient evidence from which I can find the reduction in water stored in Upper Tumalo Reservoir will impair Avion's water supply.

h. Impact on TID Water Users. The Bishops argue the reservoirs will negatively impact TID customers who drink their irrigation water by introducing oil and other pollutants from ski boats into the reservoir and TID's water supply. The Hearings Officer understands some irrigation district customers in Deschutes County drink irrigation water. I also understand that because this is not an approved use for irrigation water, TID and other irrigation districts are not required to, and do not, filter or otherwise treat irrigation water to assure it is safe for human consumption. Again, assuming for purposes of discussion that potential impacts from the reservoirs on distant properties are relevant under this site plan criterion, I find there is nothing in this record indicating use of motorized boats on the southern reservoir presents any greater risk to the health of people drinking irrigation water than any other environmental conditions affecting surface water.⁵²

3. Visual Impacts. This site plan criterion requires the applicant to demonstrate its proposal would minimize visual impacts. As discussed in the LM Zone findings above, the Hearings Officer has found the southern reservoir will not be visible from either Tumalo Creek or Johnson Road. In addition, I have found there is sufficient existing vegetation on the subject property surrounding the southern reservoir to adequately screen the parking area, boathouse and dock from surrounding residences. For the same reasons, incorporated by reference herein, I find the applicant's proposal will minimize the visual impact of the parking area, boathouse, dock and reservoir on nearby residences.

4. Preservation of Natural Features Including Views and Topographical Features. Based on photographs in the record, the Hearings Officer finds existing views from and across the subject property are of terrain and vegetation and not of mountains or other more distance vistas. The Hearings Officer finds the southern reservoir is of such a low profile that its design minimizes visual impacts on nearby residences. With respect to the boathouse, dock, and guest parking area, I have found existing vegetation on the subject property is sufficient to adequately screen these features from surrounding residences.

With respect to topography, the Hearings Officer notes this site plan criterion in Paragraph (A) uses the term "topographical features," while the criterion in Paragraph (B), discussed in the findings immediately below, uses the term "topography." It is unclear whether there is any significance to this difference in terminology – e.g., are "features" special topographical characteristics that differ from the overall topography? Nevertheless, I find photographs in the record of the subject property prior to construction of the reservoirs show there were no special topographical features on the subject property requiring preservation.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy this sit plan criterion, but may be able to do so with imposition of recommended conditions of approval.

⁵¹ A copy of the study is included in this record as Exhibit "HHH" to the applicant's burden of proof.

⁵² The Hearings Officer notes the record indicates TID takes its water from Crescent Lake, a large lake on which people recreate and use motorized boats.

B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected.

FINDINGS: The staff report states, and the Hearings Officer agrees, that previous mining of the subject property significantly altered the subject property's landscape and topography. The record indicates over 1 million cubic yards of material were removed during the period the Klippel mine was active. As discussed above, photographs in the record taken before the reservoirs were constructed show the mining pits were reclaimed through re-contouring and revegetation. However, existing tree cover surrounding the reservoirs remained intact. Although construction of the new reservoirs took advantage of the pre-existing topography created by the reclaimed mining pits, the aforementioned construction-period photographs show the topography of the reclaimed mining pits was significantly altered to create the reservoirs. In particular, the mining pits were deepened and in places their walls were steepened.

In light of the alteration of the topography that occurred before the reservoirs were constructed, the Hearings Officer finds the question under this criterion is whether the pre-existing topography was "preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography." I find the relevant development constraints included the need to create a reservoir of sufficient size and depth to be lined and to hold the amount of water necessary to meet TID's needs as well as to facilitate the proposed recreational use of the reservoir. I further find the existence of the reclaimed mining pits made the landscape and topography suitable for the new reservoirs as it resulted in less excavation than would have been required if the pits had not existed.

The Hearings Officer finds the southern reservoir preserved the existing topography to the greatest extent possible considering development constraints and the suitability of the landscape and topography, with the exception of the steepness of the reservoir banks in some places. As discussed in the findings above, I have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to re-contour the banks of the southern reservoir so that none has a steeper slope than three feet horizontal to one foot vertical. I also have found any approval should be subject to a condition of approval requiring the property owners to retain and preserve all existing trees and shrubs.

C. The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces.

FINDINGS: Opponents have expressed concern about the potential for persons to drown in the southern reservoir, particularly if/when it ices over during winter months. The staff report states, and the Hearings Officer concurs, that the southern reservoir presents no greater hazard than is presented by any other accessible open water body such as Mirror Pond in downtown Bend, other ponds in the Bend area built and managed by the Bend Park and Recreation District, and the numerous irrigation ponds located throughout the county. Opponents also argue the reservoir must be fenced as a "public swimming pool." As discussed above, I have rejected that argument.

The Hearings Officer understands waterskiing and wakeboarding on the southern reservoir also present the potential for injury or drowning. However, again I find the risk from this activity on the subject property is no different from similar activity on other bodies of water. Moreover, I find the applicant has adequately addressed these safety concerns by proposing to limit motorized boating on the southern reservoir to a single boat at a time, to prohibit alcohol use by persons skiing and driving the boat, and to require that anyone driving the boat have an Oregon mandatory boater education card. In addition, the applicant notes the design of the marina area, which is physically

separated from the water skiing portion of the southern reservoir, will allow the safe maneuvering, loading and unloading of boats away from the water skiing area. And the applicant's site plan shows the proposed guest parking area would be located over 100 feet from the southern reservoir, providing significant separation between vehicles and pedestrians and boat operations and skiing on the reservoir. Finally, I find that because of the nature of the proposed use, there are no true "public" and "private" spaces requiring a transition area. All proposed activities will occur on Tax Lots 824 and 828, and on the access driveway, all of which would be located on private property controlled by the property owners.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies this criterion.

- D. When appropriate, the site plan shall provide for the special needs of disabled persons, such as ramps for wheelchairs and Braille signs.**

FINDINGS: The Hearings Officer finds compliance with applicable requirements of the Americans With Disabilities Act (ADA), if any, will be assured at the time of building permit review for the proposed boathouse.

- E. The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures.**

FINDINGS: The applicant proposes to provide access to the southern reservoir and its associated guest parking area via an existing private driveway off Johnson Road, as well as from the "ditch rider" road on the west side of the southern reservoir. The record indicates an approximately 10-foot-wide strip of land separates the private access driveway from the property at 63550 Johnson Road, Tax Lot 1400 on Assessor's map 17-11-13. The Hearings Officer finds this driveway, which serves the existing residence on the subject property, is sufficient to provide access to the reservoir. The staff report states, and I agree, that although this driveway is located close to the aforementioned residential property, the low volume of additional trips generated by recreational use on the southern reservoir will create minimal impacts on the nearby property.

The record indicates the private driveway and guest parking area will be located at least 300 feet from any other residences, and will not be adjacent to any pedestrian walkways. The applicant's submitted site plan shows the guest parking area will be located approximately 100 feet from the marina on the southern reservoir, and will include a fire apparatus turnaround. The applicant does not propose to remove any of the surrounding tree cover that provides screening from adjacent residences, and the Hearings Officer has found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property to retain all existing screening vegetation. For these reasons, I find the applicant's proposal satisfies this criterion.

- F. Surface drainage systems shall be designed to prevent adverse impacts on neighboring properties, streets, or surface and subsurface water quality.**

FINDINGS: The record indicates the impervious surfaces associated with the applicant's proposal are the lined reservoirs and the 924-square-foot boathouse. The staff report states, and the Hearings Officer agrees, that in light of the small size of the boathouse, and the existing topography on the subject property, will assure runoff from the boathouse and banks of the

southern reservoir will be contained on-site. As discussed in the findings above, the guest parking area would have a pervious gravel surface. Given the lack of significant areas of impervious surfaces and the existing topography on the subject property, I find surface drainage on the subject property will have no adverse impacts on neighboring properties, streets, or surface or subsurface water quality.

- G. Areas, structures and facilities for storage, machinery and equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.**

FINDINGS: The only above-ground structures the applicant proposes are the dock and the 924-square-foot boathouse which can accommodate up to two motor boats. The applicant's submitted site plan shows the boathouse and dock will be located at least 400 feet from the nearest residential use not associated with the property owners. The staff report states, and the Hearings Officer agrees, that in light of the small size of the boathouse and dock, the distance between the boathouse and dock and the adjacent properties, and the recommended condition of approval requiring the property owners to retain all existing tree cover surrounding the southern reservoir, the boathouse and dock will have no adverse impact to the site or neighboring properties.

- H. All above ground utility installations shall be located to minimize adverse visual impacts on the site and neighboring properties.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any above-ground utility installations.

- I. Specific criteria are outlined for each zone and shall be a required part of the site plan (e.g. lot setbacks, etc.).**

FINDINGS: Applicable criteria in the RR-10, LM, WA Zones are addressed in the findings above.

- J. All exterior lighting shall be shielded so that direct light does not project off site.**

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any exterior lighting. However, to assure future compliance with this criterion, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to assure any future exterior lighting is shielded so direct light does not project off site.

- K. Transportation access to the site shall be adequate for the use.**
 - 1. Where applicable, issues including, but not limited to, sight distance, turn and acceleration/deceleration lanes, right-of-way, roadway surfacing and widening, and bicycle and pedestrian connections, shall be identified.**
 - 2. Mitigation for transportation-related impacts shall be required.**

3. Mitigation shall meet applicable County standards in DCC 17.16 and DCC 17.48, applicable Oregon Department of Transportation (ODOT) mobility and access standards, and applicable American Association of State Highway and Transportation Officials (AASHTO) standards.

FINDINGS: The road department, through County Engineer George Kolb, did not express any issues with the applicant's proposal or the adequacy of transportation access to the southern reservoir. In his comments on the applicant's proposal, Senior Transportation Planner Peter Russell stated in relevant part:

"According to the applicant's burden of proof on Page 7, the reservoirs will only be used by existing property owners/members of KC Development Group (KCDG) for recreation; thus no new traffic will be generated. The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a single-family residence (Land Use 210) generates an average of approximately 10 daily weekday trips. Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis."

After these comments, the applicant submitted its modified applications, proposing that the recreational use on the southern reservoir would include up to twenty invited guests of the property owners. As discussed above, the applicant has proposed a 10-vehicle parking area to accommodate guest parking, based on a maximum of 10 projected vehicle trips. Therefore, a maximum of 20 new vehicle trips would be generated by the proposed use. Nevertheless, according to Mr. Russell's comments, even adding these 20 guest vehicle trips to the estimated 20 daily vehicle trips generated by the existing single-family residence using the private access driveway would generate a total of up to 30 daily vehicle trips, still under the 50-trip threshold for a traffic analysis. For these reasons, the Hearings Officer finds the proposed private access drive will provide adequate transportation access to the site.

c. Section 18.124.070, Required Minimum Standards

A. Private or shared outdoor recreation areas in residential developments.

FINDINGS: The Hearings Officer finds the applicant's proposed recreational use of the southern reservoir qualifies as a private outdoor recreation area. As discussed in the findings above, I have found it is not appropriate for me to review the applicant's proposal as the first phase in a residential cluster development. Therefore, I find this criterion is not applicable because the reservoir and recreational uses thereon are not associated with a "residential development."

B. Required Landscaped Areas.

1. The following landscape requirements are established for multi family, commercial and industrial developments, subject to site plan approval:

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a multi-family, commercial or industrial development.

2. In addition to the requirement of DCC 18.124.070(B)(1)(a), the following landscape requirements shall apply to parking and loading areas:

a. A parking or loading area shall be required to be improved with defined landscaped areas totaling no less than 25 square feet per parking space.

FINDINGS: The Hearings Officer finds the applicant's submitted site plan shows no defined landscaping near the guest parking area that would comply with this criterion. The staff report states, and I agree, that this criterion requires a total of 250 square feet of defined landscaping associated with the parking area (10 parking spaces multiplied by 25 square feet of landscaping). I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the property owners to install this landscaping prior to initiation of the recreational use of the southern reservoir.

b. In addition to the landscaping required by DCC 18.124.070(B)(2)(a), a parking or loading area shall be separated from any lot line adjacent to a roadway by a landscaped strip at least 10 feet in width, and from any other lot line by a landscaped strip at least five feet in width.

FINDINGS: The proposed guest parking area is not located adjacent to any roadway and is separated by at least 400 feet from all other lot lines not on lots owned by the property owners. The Hearings Officer finds that with retention of the existing tree cover surrounding the southern reservoir, there is a landscape strip between the parking area and adjacent properties that will provide screening. As discussed in the findings above, I have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to retain all existing vegetation on the subject property.

C. Non-motorized Access.

1. **Bicycle Parking.** The development shall provide the number and type of bicycle parking facilities as required in DCC 18.116.031 and 18.116.035. The location and design of bicycle parking facilities shall be indicated on the site plan.

FINDINGS: As discussed in the findings above, the Hearings Officer has found the applicant's proposal qualifies for an exception to the bicycle parking standards. Therefore, I find no bicycle parking is required under this subsection.

2. **Pedestrian Access and Circulation:**

a. Internal pedestrian circulation shall be provided in new commercial, office and multi family residential developments through the clustering of buildings, construction of hard surface pedestrian walkways, and similar techniques.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a commercial, office or multi-family residential development.

- b. Pedestrian walkways shall connect building entrances to one another and from building entrances to public streets and existing or planned transit facilities. On site walkways shall connect with walkways, sidewalks, bikeways, and other pedestrian or bicycle connections on adjacent properties planned or used for commercial, multi family, public or park use.
- c. Walkways shall be at least five feet in paved unobstructed width. Walkways which border parking spaces shall be at least seven feet wide unless concrete bumpers or curbing and landscaping or other similar improvements are provided which prevent parked vehicles from obstructing the walkway. Walkways shall be as direct as possible.

FINDINGS: The Hearings Officer finds these criteria are not applicable because the applicant does not propose any buildings with pedestrian access to another building or to a public street or transit facility.

- d. Driveway crossings by walkways shall be minimized. Where the walkway system crosses driveways, parking areas and loading areas, the walkway must be clearly identifiable through the use of elevation changes, speed bumps, a different paving material or other similar method.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any access driveway crossing any pedestrian walkways.

- e. To comply with the Americans with Disabilities Act, the primary building entrance and any walkway that connects a transit stop to building entrances shall have a maximum slope of five percent. Walkways up to eight percent slope are permitted, but are treated as ramps with special standards for railings and landings.

FINDINGS: The proposed boathouse is a "building." However, as discussed in the findings above, the Hearings Officer has found no pedestrian walkways are required for the boathouse because such walkway would not connect the boathouse to any other building or to a public street or transit facility. Therefore, I find this criterion is not applicable to the applicant's proposal.

D. Commercial Development Standards:

FINDINGS: The Hearings Officer finds this paragraph is not applicable because the applicant does not propose a commercial development.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not comply with all applicable site plan approval criteria in Chapter 18.124. However, I have found that with imposition of the conditions of approval recommended above, the proposal may comply with those criteria.

CONDITIONAL USE APPROVAL CRITERIA

7. Chapter 18.128, Conditional Uses

a. Section 18.128.015, General Standards Governing Conditional Uses

Except for those conditional uses permitting individual single family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:

FINDINGS: The applicant does not propose an individual single-family dwelling. Therefore, the Hearings Officer finds the general conditional use standards in this chapter apply to the applicant's proposed conditional uses – i.e., surface mining to create the reservoirs, and the use of the southern reservoir as a recreation-oriented facility requiring large acreage consisting of motorized boating, waterskiing and wakeboarding. As discussed above, I have found the specific conditional use criteria applicable to the surface mining creating the reservoirs under Section 18.128.280 *also* apply to the southern reservoir. The standards in that section are discussed separately in findings below.⁵³

A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:

1. Site, design and operating characteristics of the use;

FINDINGS:

1. Site. The applicant is requesting conditional use approval to make lawful the land uses TID and KCDG undertook without approval. For this reason, the Hearings Officer finds that for purposes of this approval criterion the "site" is the 155-acre subject property *as it existed prior to KCDG's excavation for the reservoirs*. As discussed above, photographs in the record show that prior to the reservoir excavation, the site consisted of the reclaimed former Klippel mining pits which had been re-contoured and planted with grasses.

2. Design. As discussed in the Findings of Fact above, the northern reservoir is round in shape, and the southern reservoir is long, narrow and linear. The southern reservoir also has two man-made islands, one at each end. Both reservoirs are lined. The banks of both reservoirs consist primarily of unvegetated gravel, rock and dirt. There is a head gate at the southern end of the southern reservoir regulating water flow into the reservoir from the Tumalo Feed Canal. There also is a pipe in the area between and connecting the two reservoirs. TID proposes to install an outflow device to facilitate the return to the Tumalo Feed Canal of water stored in the reservoirs.

At the north end of the southern reservoir is a marina that includes a boat ramp, dock, and pilings. The applicant's proposal includes construction of a boathouse on the pilings with the capacity to store two boats, and construction of a ten-space guest parking area including a fire apparatus turnaround approximately 100 feet from the marina. Access to the marina and parking area are from a gated private driveway off Johnson Road.

⁵³ The Hearings Officer finds the conditional use criteria in Section 18.128.280 add to the general conditional use approval criteria in this section because Paragraph (C) of Section 18.128.015 states the standards in Section 18.128.015 "and any other standards in DCC 18.128" may be met by the imposition of conditions of approval. I find the quoted language mean both the general and more specific conditional use standards, if any, apply.

3. Operating Characteristics.

Reservoirs. The two reservoirs together have the capacity to hold 125 acre feet of water in addition to the 55 acres of irrigation water right appurtenant to the subject property. Water from the Tumalo Feed Canal would be diverted into the southern reservoir through the head gate at the south end of the reservoir, and into the northern reservoir through the pipe connecting the two reservoirs. When installed, the proposed outflow facility would allow water stored in the reservoirs to be returned to the Tumalo Feed Canal. As discussed in the findings above, TID's contract with KCDG authorizes TID to regulate the amount of water in the reservoirs, and to remove some or all of the stored water – not including KCDG's 55 acres of water rights -- for irrigation and emergency purposes. The lining of the reservoirs is designed to minimize water loss from seepage.

Recreational Use. The applicant proposes that the southern reservoir would be used for motorized boating, waterskiing and wakeboarding by the property owners and up to twenty invited guests during daylight hours seven days a week and eight months per year (April through November). The applicant proposes that the recreational use would be subject to the following limitations:

1. no motorized boating from November 1 through March 31st;
2. only one motorized boat on the southern reservoir at a time;
3. no jet skis allowed;
4. adherence to all Deschutes County noise ordinance standards;
5. no alcohol use on boats or by skiers;
6. all motor boat operators must carry the Oregon mandatory boater education card;
7. no more than 20 invited guests will utilize the recreation facility per day; and
8. boats limited to those with the following characteristics:
 - a. inboard engines only;
 - b. self-contained engines with internal oil lubrication systems;
 - c. stock mufflers or quieter mufflers;
 - d. direct drive or V-drive transmission; and
 - e. no two-stroke motors.

4. Suitability.

Reservoirs. The Hearings Officer finds the subject property is suitable for the reservoirs considering its site because it includes the reclaimed Klippel mining pits that already had been excavated and disturbed and could be converted to reservoirs. I find the subject property also is suitable for the reservoirs considering its site because the reservoirs are located in close proximity to the Tumalo Feed Canal which allows TID to divert and store water in the reservoirs as part of its irrigation system. Similarly, I find the subject property is suitable for the use of the reservoirs as water storage facilities considering their design and operating characteristics which allow water to

be stored in lined facilities and moved within TID's irrigation system. However, as discussed in detail in the findings above, I have found the size and design of the southern reservoir are not harmonious with the natural environment or existing development in the surrounding area.

Recreational Use. The Hearings Officer finds the subject property is suitable considering its site for the proposed recreational use because the southern reservoir is large enough to accommodate motorized boating and waterskiing. However, as discussed in the findings above, I have found the size and design of the southern reservoir is not harmonious with the natural environment or existing development in the surrounding area. As also discussed above, I have found the operating characteristics of the proposed recreational use are not harmonious with existing development because they will allow the recreational use to be of a scale, intensity, and duration exceeding what is reasonable and appropriate in a rural residential area.

For the foregoing reasons, the Hearings Officer finds that while the subject property is suitable for the reservoirs and proposed recreational use in some respects considering site, design and operating characteristics, it is not suitable in other respects. Therefore, I find the applicant's proposal does not satisfy this approval criterion.

2. Adequacy of transportation access to the site; and

FINDINGS: The reservoirs and recreation-oriented facility will have access from the existing gated private driveway from Johnson Road and from the "ditch rider" road. As discussed in the findings above under the site plan approval criteria in Chapter 18.124, incorporated by reference herein, the Hearings Officer has found transportation access to the reservoirs will be adequate. For the same reasons, I find the subject property is suitable for the reservoirs and recreation-oriented facility considering the adequacy of transportation access.

3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.

FINDINGS: As discussed in the findings above, the natural and physical features of the subject property prior to excavation for the reservoirs consisted of the reclaimed Klippel mining pits, the dwelling, outbuildings and landscaping, and the undeveloped areas including native vegetation.

1. General Topography. Photographs in the record show the general topography on the subject property prior to excavation for the reservoirs consisted primarily of level areas up to the edge of Tumalo Creek Canyon, and the reclaimed Klippel mining pits which comprised a large depressed area with contoured slopes. The topography of the mining pits was altered significantly to create the reservoirs by making the pits deeper to accept a liner and hold water, and by making the banks steeper in some places. In addition, although creation of the reservoirs left the existing tree cover intact, it removed most or all of the vegetation in and around the reclaimed pits, resulting in large areas of gravel, rock and dirt completely denuded of vegetation. As discussed in the findings above, although the Hearings Officer has found the subject property was suitable for creation of the reservoirs considering the presence of the reclaimed mining pits, I have found the resulting change in topography and landscape that obliterated vegetation rendered the southern reservoir inharmonious with the surrounding natural environment and existing rural residential development.

2. Natural Hazards. The Hearings Officer finds the only natural hazard that existed on the subject property prior to creation of the reservoirs (and which exists at present) is the risk of wildfire. I find that risk is no greater on the subject property than elsewhere on the west side of Bend. And the record includes evidence that water in the reservoirs has been made available and used for wildfire suppression.

3. Natural Resource Values. The Hearings Officer finds the natural resource values that existed on the subject property before creation of the reservoirs and commencement of motorized boating and waterskiing on the southern reservoir were native vegetation and wildlife habitat. I further find the wildlife habitat consisted of vegetation providing both forage and cover, a water source from Tumalo Creek, gently rolling topography, and a relatively quiet and undisturbed rural environment

As discussed in the findings above under the site plan approval criteria in Chapter 18.124; I have found construction of the reservoirs removed most or all of the vegetation in the reclaimed Klippel mining pits and the surrounding land outside the forested areas, and thereby removed the wildlife habitat that vegetation provided. Based on those findings, incorporated by reference herein, I have found that if the applicant's proposal is approved on appeal, it should be subject to conditions of approval requiring the property owners to develop and implement a wildlife habitat mitigation plan consistent with ODFW's Fish and Wildlife Habitat Mitigation Policies, submit to the Planning Division written documentation from ODFW that the habitat mitigation plan has been completed consistent with those policies, retain all existing vegetation, and leave the area between the two reservoirs free of fencing and other physical barriers.

The Bishops and other opponents argue the proposed recreational use will negatively impact wildlife use of the subject property because the sight and sound of motorized boating on the southern reservoir and the increase in vehicular traffic from the property owners' guests will disturb wildlife. The applicant has stated no motorized boating will occur on the southern reservoir during the winter range closure period from December 1 through March 31 each year. The Hearings Officer concurs with the applicant that this limitation will eliminate conflicts between the recreation use and *wintering* deer.

The record contains conflicting evidence concerning the impacts on wildlife from recreational use of the southern reservoir *outside* the winter range closure months. The applicant's expert Paul Valcarce testified that deer adapt to human presence and activities, and for that reason in his opinion neither the reservoirs nor the recreational use on the southern reservoir will have negative impacts on wildlife. In addition, the record includes numerous photographs of wildlife including deer, elk and waterfowl utilizing the subject property and the reservoirs. However, as discussed above, ODFW expressed concern about impacts on wildlife and their habitat from the reservoirs and recreation thereon. ODFW recommended that the property owners be required to undertake several measures to address loss of habitat and the potential for the reservoirs to create barriers to deer and elk movement. The Hearings Officer has recommended that if the applicant's proposal is approved on appeal, such approval should be subject to conditions of approval requiring the property owners to mitigate for lost habitat and refrain from creating physical barriers in the space between the two reservoirs such as fencing.

The Hearings Officer finds that whether the subject property is suitable for the reservoirs and the proposed recreational use on the southern reservoir considering natural resource values – and in particular wildlife habitat -- is a close question. Construction of the reservoirs removed large amounts of vegetation that provided forage, and changed the topography on the subject property from the previous level to rolling terrain to a deeper and steeper-banked depression holding water. The applicant's proposed recreational use of the southern reservoir will generate continuous noise and human activity eight months per year of a much greater intensity and duration than existed before the reservoirs were created. I find all of these factors have and/or will adversely affect wildlife habitat. On the other hand, it appears the reservoirs have provided a new source of water for wildlife. However, on balance, I find the addition of this water source to the existing source of Tumalo Creek does not outweigh the overall negative effects on habitat from the reservoirs and recreational use on the southern reservoir. For these reasons, I find the applicant has not demonstrated the subject property is suitable for the reservoirs and the proposed recreational use on the southern reservoir considering natural resource values including wildlife habitat.

B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).

FINDINGS: The Hearings Officer has found existing uses on surrounding land include rural residences, some small-scale farming, and two active surface mines. I find projected uses on surrounding lands would be the same. As discussed in the findings above under the site plan approval criteria in Chapter 18.124, I have found the reservoirs and the proposed recreational use on the southern reservoir will not have any impact on nearby mining uses. In addition, I concur with staff's assessment that these uses also will not negatively impact residential or farm uses on the EFU- and Forest-zoned land in the surrounding area because of the distances between the reservoirs and these lands. However, I have found the reservoirs and the proposed recreational use on the southern reservoir do not relate harmoniously to rural residential uses on surrounding land because of the size and appearance of the southern reservoir, and because of scale, intensity and duration of the recreational use.

The Hearings Officer finds the site plan approval standard requiring that the proposed uses "relate harmoniously" to existing development on surrounding land is equivalent to the conditional use approval criterion that the proposed uses be "compatible with" existing and projected uses on surrounding properties considering their site, design and operating characteristics, adequacy of transportation access, and natural features and resources.⁵⁴ Therefore, for the reasons set forth in the site plan findings above, incorporated by reference herein, I find the applicant's proposal also is not compatible with existing and projected uses on surrounding properties.

C. These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to insure that the standard will be met.

FINDINGS: As discussed throughout this decision, the Hearings Officer has found that if the applicant's proposal is approved on appeal, it should be subject to a number of conditions of approval, set forth at the end of this decision.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable conditional use approval criteria in this section.

b. Section 18.128.280, Surface Mining of Non-Goal 5 Mineral and Aggregate Resources

These uses are subject to the following standards:

A. An application shall be filed containing the following information:

1. A detailed explanation of the project and why the surface mining activity is necessary.

FINDINGS: The Hearings Officer has found KCDG's surface mining to create the reservoirs constituted surface mining of non-Goal 5 mineral and aggregate resources, and therefore such surface mining is subject to the standards in this section. Because the surface mining already has taken place, I find the applicant must demonstrate that the standards in this section *were* met before, during, and after the mining, as applicable.

⁵⁴ *Webster's* lists "harmonious" as a synonym for "compatible."

The applicant's burden of proof states the purpose of the surface mining was to convert the reclaimed Klippel mining pits into two reservoirs to store TID's water, and in the case of the southern reservoir to provide a recreation facility for motorized boating and waterskiing. In particular, the applicant states the surface mining was necessary to deepen and re-contour the reclaimed mining pits to allow liners to be installed to prevent loss of stored water due to seepage. I find the applicant's burden of proof is sufficiently detailed to explain the nature and purpose of the project.

2. **A site plan drawn to scale and accompanied by any drawings, sketches and descriptions necessary to describe and illustrate the proposed surface mining.**

FINDINGS: The applicant submitted a site plan, photographs, and other materials depicting and describing the existing and pre-existing conditions on the subject property and the proposed boathouse and guest parking area for the recreation-oriented facility. Because the surface mining has been completed, this site plan is not precisely what would have been submitted before mining commenced. Nevertheless, I find the applicant's materials illustrate the size and configuration of the surface mined areas and the final grades surrounding the reservoirs.

- B. **A conditional use permit shall not be issued unless the applicant demonstrates at the time of site plan review that the following conditions are or can be met:**

1. **The surface mining is necessary to conduct or maintain a use allowed in the zone in which the property is located.**

FINDINGS: The Hearings Officer has found the surface mining to create the reservoirs, and the recreation-oriented facility on the southern reservoir, are conditional uses in the RR-10 Zone under Section 18.60.030(W) and (G), respectively. The board and LUBA affirmed these categorizations. Therefore, I find KCDG's surface mining was necessary to conduct and maintain these uses, therefore satisfying this standard.

2. **Erosion will be controlled during and after the surface mining.**

FINDINGS: As discussed in the findings above, the Hearings Officer has found the reservoirs are constructed so that they will not cause surface water runoff onto adjacent properties or streets. I also have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the banks on the southern reservoir to be re-contoured to reduce their slope to a grade no steeper than three feet horizontal to one foot vertical.

However, the staff report notes that because the reservoirs have been completed, it is not possible to determine whether this criterion – and others that follow – were satisfied *during the surface mining*. The record does not include detailed information about what, if any, erosion control measures were employed and whether they were effective. The applicant has the burden of proving compliance with this criterion. The Hearings Officer finds the applicant has not met that burden, and therefore I cannot find this criterion was met. The applicant may be able to supplement the record with evidence addressing erosion control during mining if there is a *de novo* appeal to the board.

3. The surface mining activity can meet all applicable DEQ noise control standards and ambient air quality and emission standards.

FINDINGS: Again, because the surface mining to create the reservoirs has been completed, the Hearings Officer cannot review any proposed noise and air quality control measures. The applicant states that all surface mining work was completed within the scope of the approved county temporary use permit (TU-14-8). However, as discussed above, that permit was limited to crushing for on-site road construction and did not authorize surface mining to create the reservoirs, and therefore it is not relevant. Because of the lack of evidence in this record about compliance with DEQ noise, air quality and emissions standards, I find the applicant has not met its burden of proving compliance with this criterion. However, as discussed above, the applicant may be able to provide sufficient additional evidence in a *de novo* appeal of this decision to demonstrate compliance, such as records from Taylor Northwest which conducted the surface mining.

4. Sufficient water is available to support approved methods of dust control and vegetation enhancement.

FINDINGS: Again, because the surface mining to create the reservoirs has been completed, the Hearings Officer cannot determine whether any dust control measures were employed during the surface mining and whether they were effective. Therefore, I find the applicant has not met its burden of proving compliance with this criterion. The applicant may be able to supplement the record with information from Taylor Northwest concerning dust control measures during surface mining. Photos in the record show that Taylor Northwest had water tankers on the site during construction of the reservoirs.

With respect to vegetation enhancement, the Hearings Officer has found the surface mining to create the reservoirs removed most of the vegetation planted to reclaim the Klippel mining pits and wildlife habitat thereon, leaving barren the banks of both reservoirs and much of the surrounding land between the banks and the forested areas. I have found that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to replant these areas in accordance with ODFW's wildlife habitat mitigation policies. The record indicates the subject property has 55 acres of irrigation water rights which I find can be used to irrigate any enhanced required by the board in any decision on appeal.

5. The surface mining does not adversely impact other resources or uses on the site or adjacent properties, including, but not limited to, farm use, forest use, recreational use, historic use and fish and wildlife habitat as designed or through mitigation measures required to minimize these impacts.

FINDINGS: The impacts from KCDG's *completed* surface mining are addressed in detail in the site plan and conditional use findings above, and incorporated by reference herein. For the reasons set forth in those findings, I have found the completed surface mining adversely affects wildlife habitat and rural residential uses on the subject property and adjacent properties. However, because the surface mining has been completed, the remaining question is whether evidence in the record demonstrates there were no adverse impacts of the identified uses and resources *during construction*. Again, the applicant may be able to provide sufficient information through a *de novo* appeal to demonstrate compliance with this criterion.

C. If the surface mining actively involves the maintenance or creation of man made lakes, water impoundments or ponds,

the applicant shall also demonstrate, at the time of site plan review, that the following conditions are or can be met:

- 1. There is adequate water legally available to the site to maintain the water impoundment and to prevent stagnation.**

FINDINGS: KCDG's surface mining was to create two reservoirs, and therefore the standards in this paragraph apply. This subparagraph requires the applicant to demonstrate there is water "legally available to the site" to maintain the reservoirs. As discussed in the Findings of Fact above, the lawfulness of the reservoirs first came to the county's attention when TID requested a LUCS as part of its request to WRD for permission to transfer the place of storage of water from Upper Tumalo Reservoir to the reservoirs on the subject property. The record includes permits, certificates, orders and correspondence to and from WRD concerning TID's request. These documents indicate that as of the date the record in this matter closed, TID's previous license to store water in the reservoirs had expired. The parties disagree as to the significance of that expiration and about what are TID's rights with respect to extending that license. For these reasons, the staff report recommends the Hearings Officer impose a condition of approval requiring the applicant to demonstrate TID has all necessary water permits and approvals from WRD before commencing recreational use on the southern reservoir. The Bishops and other opponents argue I must deny the applicant's proposal because, in their view, TID will not be able to secure the necessary permit from WRD.

The Hearings Officer finds that where, as here, TID must acquire a state agency permit in order to store water in the reservoirs, and there is no evidence in the record that TID is *legally prohibited* from obtaining such a permit, the county may impose a condition of approval requiring TID obtain a WRD permit without determining that it is feasible to do so. *Wal-Mart Stores v. City of Bend*, 52 Or LUBA 261 (2006); *Bouman v. Jackson County*, 23 Or LUBA 626 (1992). Therefore, I find that if the applicant's proposal is approved on appeal, it should be subject to a condition of approval requiring the property owners to submit to the Planning Division written documentation WRD that TID has all necessary permits to store its water in the reservoirs before commencing recreational use on the southern reservoir.

- 2. The soil characteristics or proposed lining of the impoundment are adequate to contain the proposed water and will not result in the waste of water.**

FINDINGS: The record indicates the reservoirs are lined with a polymer material described in Exhibit "JJ" to the applicant's burden of proof. This exhibit indicates this lining is highly effective in containing water. The Bishops and other opponents argue storage of TID water in the reservoirs is not the best way to conserve water. However, as discussed in the findings above, the Hearings Officer has found the TID board's decisions concerning how to manage its water resources are not before me in these proceedings.

- 3. Where the impoundment bank slope is steeper than three feet horizontal to one foot vertical, or where the depth is six feet or deeper, the perimeter of the impoundment is adequately protected by methods such as fences or access barriers and controls.**

FINDINGS: The applicant's burden of proof states the banks of the reservoirs have slopes no greater than three feet horizontal to one foot vertical. However, as discussed above, the Hearings Officer has found from photographs in the record that some banks appear to be steeper than that maximum grade. For that reason, I have found that if the applicant's proposal is approved on

appeal, it should be subject to a condition of approval requiring the property owners to re-contour the banks to assure they do not exceed a slope of three feet horizontal to one foot vertical.

The record indicates the depth of the reservoirs is greater than six feet. Therefore, this subsection requires "perimeter fencing, access barriers or controls." The applicant argues no perimeter fencing is necessary because "access controls" are in place – i.e., private ownership of the reservoirs and their location on private property not accessible to the public. Opponents argue the reservoirs present a drowning hazard if a trespasser should gain entry.

The Hearings Officer understands opponents' concerns. Nevertheless, I agree with the applicant that perimeter fencing is not necessary or appropriate. I am aware that reservoirs generally do not have perimeter fencing due to practical considerations. I am also aware that access to boat ramps and docks on reservoirs may be controlled through gates or other barriers on access roads. In this case, access to the reservoirs is from private roads, including the gated private access driveway to the subject property, and the "ditch rider" road utilized by TID for irrigation system management. I find these controls, coupled with the reservoirs' location on private property, adequately protect the perimeter of the reservoirs.

4. **The surface mining does not adversely affect any drainages, all surface water drainage is contained on site, and existing watercourses or drainages are maintained so as not to adversely affect any surrounding properties.**

FINDINGS: Because the surface mining to create the reservoirs has been completed, the applicant has the burden of demonstrating that while the surface mining was occurring there were no adverse effects from the mining on surface water drainage and on Tumalo Creek. The Hearing Officer finds there is not sufficient evidence in the record for me to find the applicant has met its burden. However, as discussed in the findings above, I have found the design and configuration of the *completed* reservoirs, and the existing grades and contours on the subject property, will prevent surface water drainage onto surrounding properties and streets.

D. Limitations

1. **Excavation does not include crushing or processing of excavated material.**

FINDINGS: As discussed in the Findings of Fact above, KCDG received a temporary use permit to crush excavated material for purposes of road building (TU-14-8). However, there is nothing in this record that indicates crushing was involved in the surface mining to create the reservoirs.

2. **A permit for mining of aggregate shall be issued only for a site included on the County's non-significant mineral and aggregate resource list.**

FINDINGS: As discussed in the findings above, incorporated by reference herein, the Hearings Officer has found that because the subject property is not included in the county's comprehensive plan inventory of non-significant mineral and aggregate resources, the surface mining to create the reservoirs was prohibited under this subsection.

3. **Hours of operation shall be 7:00 a.m. to 6:00 p.m. Monday through Saturday. No surface mining activity shall be conducted on Sundays or the following legal**

holidays: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day.

FINDINGS: The Hearings Officer finds that because the surface mining to create the reservoirs has been completed, the time restrictions in this subsection cannot be imposed.

- C. These standards and any other standards of DCC 18.128 may be met by the imposition of conditions calculated to insure that the standard will be met.**

FINDINGS: As discussed throughout this decision, the Hearings Officer has found that if the applicant's proposal is approved on appeal to the board, such approval should be subject to a number of conditions of approval to assure compliance with applicable approval criteria.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable conditional use criteria in Chapter 18.128.

VARIANCE STANDARDS

8. Chapter 18.132, Variances

a. Section 18.132.020, Authority of Hearings Body

A variance may be granted unqualifiedly or may be granted subject to prescribed conditions, provided that the Planning Director or Hearings Body shall make all of the following findings:

FINDINGS: The applicant has requested approval of a variance to the minimum setbacks in the RR-10 for the southern reservoir which crosses lot lines. As discussed in the findings above, the Hearings Officer has found the setbacks do not apply to the southern reservoir, and therefore no variance is required. However, because I anticipate my decision will be appealed to the board, and the board may elect to hear the appeal, I include the following findings under the applicable variance criteria.

Section 18.04.030 includes the following definitions:

"Variance" means an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance.

- A. "Area variance" means a variance which does not concern a prohibited use. Usually granted to construct, alter, or use a structure for a permitted use in a manner other than that prescribed by the zoning ordinance.**
- B. "Use variance" means a variance which permits a use of land other than that prescribed by the zoning or other applicable ordinances.**

The Hearings Officer finds the applicant's requested variance to the setbacks in the RR-10 Zone is an "area variance" subject to the criteria applicable thereto.

A. Area variance.

1. **That the literal application of the ordinance would create practical difficulties resulting in greater private expense than public benefit.**

FINDINGS: The applicant argues imposition of the minimum RR-10 Zone setbacks to the southern reservoir would result in shrinking its size to an area that would not provide TID the operational flexibility it needs, and could require additional surface mining and movement of the southern reservoir closer to western boundary of the subject property and the nearby rural residences. The applicant argues that for these reasons there would be no public benefit from imposing the setback standards. The Hearings Officer finds the applicant's argument is not persuasive because the applicant has a practical solution to the problem created by the setbacks – i.e., obtaining lot line adjustments to alter the location of the lot lines over which the southern reservoir encroaches.

2. **That the condition creating the difficulty is not general throughout the surrounding area but is unique to the applicant's site.**

FINDINGS: The applicant argues the condition creating the difficulty is unique to the subject property because of the location of the reclaimed Klippel surface mining pits within which the southern reservoir was created and the proximity of the Tumalo Feed Canal. Again, the Hearings Officer does not find this argument persuasive. The condition creating the difficulty is the location of lot lines on the lots on which the southern reservoir is located. These lots are owned and controlled by KCDG which can remove the condition creating the difficult by obtaining lot line adjustments to alter the location of the lot lines the southern reservoir crosses.

3. **That the condition was not created by the applicant. A self created difficulty will be found if the applicant knew or should have known of the restriction at the time the site was purchased.**

FINDINGS: The locations of the lot lines on the subject property were created by the applicant's predecessor in title, or by the applicant through a series of lot line adjustments described in the Findings of Fact above. Nevertheless, the Hearings Officer cannot find the applicant knew or should have known that the RR-10 setbacks might be applicable to the southern reservoir. As discussed in the findings above, the parties disagree as to whether the southern reservoir is a "building" for purposes of the setbacks, and I have found in this decision that it is not.

4. **That the variance conforms to the Comprehensive Plan and the intent of the ordinance being varied.**

FINDINGS: Staff and the applicant have not identified, and the Hearings Officer has not found, any provisions in the comprehensive plan that have a bearing on the applicant's requested variance. I find the intent of the minimum yards and setbacks in the RR-10 Zone is to assure the open space between buildings is free of obstructions. I find that although the edges and banks of the southern reservoir do project above the ground, that is not the type of "obstruction" intended to be addressed by the minimum setbacks.

Because the Hearings Officer has found that not all of the "area variance" criteria are met, I find the applicant has not demonstrated its proposal qualifies for such a variance.

IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **DENIES** the applicant's proposal.

The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be **SUBJECT TO THE FOLLOWING RECOMMENDED CONDITIONS OF APPROVAL:**

1. This approval is based on the applicant's submitted original and modified burden of proof statements and exhibits, supplemental materials, and written and oral testimony. Any substantial change to the uses approved in this decision will require new land use applications and approvals.

PRIOR TO THE DATE THIS DECISION BECOMES FINAL:

2. The applicant shall submit to the Planning Division written authorization from the Cadwell Family Trust and from Harris and Nancy Kimble for the applicant to submit the subject applications on their behalf.

PRIOR TO COMMENCEMENT OF RECREATIONAL USE ON THE SOUTHERN RESERVOIR:

3. The property owners shall construct the guest parking area concurrent with completion of the boathouse and prior to commencing recreational use on the southern reservoir.
4. The property owners shall install two hundred fifty (250) square feet of defined landscaping with the parking area.
5. The property owners shall submit to the Planning Division written documentation from the Oregon Water Resources Department that Tumalo Irrigation District has all necessary permits to store its water in the reservoirs.
6. The property owners shall:
 - a. develop and submit to the Planning Division a wildlife habitat mitigation plan providing for replanting of all barren areas between the side of the banks facing away from the southern reservoir and the surrounding forested land with native plants providing suitable forage for deer and elk, consistent with the Oregon Department of Fish and Wildlife's Fish and Wildlife Habitat Mitigation Policies;
 - b. replant all barren areas between the side of the banks facing away from the southern reservoir and surrounding forest land in accordance with the habitat mitigation plan;
 - c. following the replanting required in Paragraph (5)(b), submit to the Planning Division written documentation from the Oregon Department of Fish and Wildlife that such replanting has been completed consistent with its habitat mitigation policies;
 - d. retain all existing vegetation on the subject property; and
 - e. install no fencing or other barriers in the space between the two reservoirs.

AT ALL TIMES:

7. The property owners shall maintain all guest parking spaces for the parking of operable passenger automobiles of guests only and shall not allow these parking spaces to be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.
8. The property owners shall maintain the guest parking area in a dust-free condition.
9. The property owners shall retain and preserve all existing trees and shrubs.
10. The property owners shall conduct the approved recreational use of the southern reservoir subject to the following limitations:
 - a. no recreational activity on the southern reservoir will take place from December 1 through March 31 each year;
 - b. only one boat will operate on the reservoir at any given time;
 - c. motorized boating activity will be limited to the hours of 10:00 a.m. to 5:00 p.m.
 - d. no jet skis will be used;
 - e. all applicable Deschutes County noise ordinance standards shall be followed;
 - f. boats operating on the southern reservoir will have the following characteristics:
 - (i) inboard engines only;
 - (ii) self-contained engines with internal oil lubrication systems;
 - (iii) stock mufflers or muffled noise equivalent;
 - (iv) direct drive or V-drive transmission; and
 - (v) no two-stroke motors.
 - g. no alcoholic consumption on boats or by skiers; and
 - h. all motor boat operators will carry the Oregon mandatory boater education card.
11. The property owners will assure any future exterior lighting is shielded so direct light does not project off site.
12. The property owners will assure that any future fencing on the subject property is installed in conformance with the standards in the Wildlife Area Combining Zone.

13. The property owners will install any parking area lighting so that light rays do not project directly onto any adjoining property in a residential zone.

Dated this 21st day of January, 2016.

Mailed this 21st day of January, 2016



Karen H. Green
Karen H. Green, Hearings Officer

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