



## MEMORANDUM

**TO:** Deschutes County Board of Commissioners

**FROM:** Jacob Ripper, AICP, Principal Planner

**DATE:** May 7, 2025

**SUBJECT:** Public Hearing: Remand of a Thornburgh Destination Resort Modification, application 247-22-000678-MC (remand ref. 247-25-000229-A).

On May 7, 2025, the Board of Commissioners (Board) will hold a public hearing to consider the remanded decision of the Oregon Land Use Board of Appeals (LUBA) regarding an amendment to the Final Master Plan (FMP) for the Thornburgh Destination Resort by amending the Fish and Wildlife Management Plan (2022 FWMP) and imposing limitations on the scope of development and water use allowed by the Thornburgh Destination Resort. The record associated with this remanded review is located on the project webpage<sup>1</sup>. This hearing is a continuation of an existing application (247-22-000678-MC), with the full record located on the project webpage<sup>2</sup>.

### I. BACKGROUND

The original application was received by the Planning Division on August 17, 2022. A public hearing was conducted by a Deschutes County Hearings Officer on October 24, 2022. On December 19, 2022, the Hearings Officer denied the Applicant's request.

Two appeals of the Hearings Officer's decision were received. The Applicant filed an appeal on Friday, December 30, 2022 (ref. 247-22-000984-A) and an appeal was filed by A. Gould on Tuesday, January 3, 2023 (ref. 247-23-000003-A). The Board of County Commissioners conducted a public hearing on February 1, 2023.

The Board held deliberations on Wednesday, March 29, 2023, and voted 2-1 to approve the Applicant's request. The Board's final decision was approved and mailed on April 17, 2023. All decisions and recordings of those meetings are available on the project websites.

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<sup>1</sup> [bit.ly/0425ThornburghRemand](https://bit.ly/0425ThornburghRemand)

<sup>2</sup> <https://www.deschutes.org/cd/page/247-22-000678-mc-thornburgh-destination-resort-modification-cmpfmpfwmp>

On January 12, 2024, the Land Use Board of Appeals (LUBA) issued their Final Opinion and Order remanding the County's decision back to the County for further review (ref. LUBA Nos. 2023-038, 2023-039, 2023-041). On May 1, 2024, the Oregon Court of Appeals reversed and remanded to LUBA for further review on petition of The Confederated Tribes of the Warm Springs Reservation of Oregon (Tribe). On February 25, 2025, LUBA remanded to the County again, adding an additional remand topic for the County to address at the local level. On April 7, 2025, the Applicant requested that the County initiate remand proceedings.

## **II. REMAND TIMELINE**

Pursuant to Deschutes County Code (DCC) 22.34.030(C) and state law, the County must issue a final decision within 120 days from the date the applicant requests to initiate remand proceedings, and this time period cannot be extended unless the parties enter into mediation. The Applicant initiated the remand proceedings on April 7, 2025, making the final County decision due by August 5, 2025.

## **III. LUBA REMAND**

LUBA, in its first Final Opinion and Order, remanded the County decision to address the follow issues summarized below:

1. *Additional findings to explain why the submittal of the 2022 Fish and Wildlife Management Plan (FWMP) to the Oregon Water Resources Department is sufficient to satisfy the “no net loss” standard with respect to groundwater sources for fish habitat mitigation.*

On pages 64-65 of the first LUBA remand, LUBA discusses that Appellant Bishop argued that the 2022 FWMP groundwater rights compliance provisions are inadequate to support a conclusion that the 2022 FWMP will result in no net loss to fish habitat. On this sub-assignment of error, LUBA sustained Bishop's assignment of error in part:

We agree with Bishop that the county's findings are inadequate to explain why *submittal* to OWRD is sufficient to satisfy the no net loss standard with respect to groundwater sources for fish habitat mitigation. Indeed, Thornburgh and the county rely upon OWRD processes to ensure that voluntary cancellation of water rights consistent with OWRD rules and review processes will result in improved fish habitat. ... The county has failed to explain how simple submittal of an application to OWRD permits the county to rely on those OWRD processes.

Thornburgh has not pointed to any evidence supporting a conclusion that ground water right certificate ownership, cessation of pumping, and OWRD submittal is sufficient to ensure fish mitigation water will be provided as assumed in the 2022 FWMP.

2. *That the FWMP was a substantial change with respect to the required economic analysis and LUBA required further findings addressing DCC 18.113.070(C)(3) and*

*(4) and that the County will either need to consider those changes or explain why that consideration is not required.*

LUBA analyzed the question of whether the 2022 FWMP would materially affect the findings of fact on which the original approval was based and whether the changes resulting from the 2022 FWMP are not “substantial changes that require a new application addressing those criteria,” in four subsections: (A) Economic Analysis; (B) Open Space; (C) Water Supply, Consumption, and Conservation; (D) Water System and Wastewater Disposal Plans.

Under economic analysis, considering the proposed change to the number of golf courses, LUBA agreed with Appellant Lipscomb that the reduction in the number of golf courses is a substantial change to the resort development that materially affects the facts underlying the resort’s economic analysis that the county relied upon to find that DCC 18.113.070(C) is satisfied. LUBA found there is an impact to the underlying findings of fact for the CMP approval – namely that the developed golf courses will provide 125 newly created jobs and 3.9 million dollars in employee compensation (p. 71). LUBA disagreed with the argument that a general change in rental cost and availability is a “substantial change” (p. 75):

On remand, the county will need to consider whether, with the changes proposed in the 2022 FWMP, those criteria [DCC 18.113.070(C)(3) and (4)] are satisfied. On remand, the county will need either to consider changes to employee housing demands based on the changes in the 2022 FWMP or explain why that consideration is not required.

LUBA disagreed with the arguments that a “new application” means an entirely new CMP/FMP application and deferred to the county’s interpretation of DCC 22.36.040. LUBA ruled (pp. 79-80):

Here, the identified error may be corrected by the county accepting a new economic analysis that demonstrates that “[t]he destination resort will provide a substantial financial contribution which positively benefits the local economy throughout the life of the entire project, considering changes in employment, demands for new or increased levels of public service, housing for employees and the effects of loss of resource land” and that “[t]he natural amenities of the site considered together with the identified developed recreation facilities to be provided with the resort, will constitute a primary attraction to visitors, based on the economic feasibility analysis.” DCC 18.113.070(C)(3), (4). Accordingly, we conclude that the established error should result in remand in this case.

*3. Whether the 2022 Fish and Wildlife Management Plan violates the Treaty with the Tribes of Middle Oregon, dated June 25, 1855.*

In its 2024 decision, LUBA ruled that the Tribe’s argument that the challenged decision improperly construes applicable law by failing to address whether the 2022 Fish and Wildlife Management Plan violates the Treaty with the Tribes of Middle Oregon, dated June 25, 1855 (Treaty), was not raised during the local proceeding and was therefore waived. LUBA also ruled that several other arguments were not adequately raised and were thus waived.

Petitioners further appealed to the Oregon Court of Appeals. The Court of Appeals remanded to LUBA in its decision, *Confederated Tribes of Warm Springs v. Deschutes County*, 332 Or App 361, 550 P3d 443 (2024). On judicial review, the Court of Appeals agreed with the Tribe that the question of whether the 2022 FWMP violates the Treaty was sufficiently raised and that the County was obligated to make findings addressing it.

Therefore, following remand from the Court of Appeals, LUBA remanded the decision to the County to address this issue (number 3 above), as well as the other issues it remanded in its January 12, 2024, decision (numbers 1 and 2 above). The Appellants' other assignments of error were denied.

Staff notes that the Applicant, in their initiation of remand materials and as of the date of drafting this report, has not yet provided additional testimony to address the remanded issue areas summarized above. Staff anticipates additional information may be submitted prior to or at the public hearing for Board consideration, or potentially during an open record period, should the Board choose to leave the written record open. Any materials received by the applicant ahead of the public hearing will be timely incorporated into the official record.

#### **IV. HEARING PROCEDURE**

##### *Participation*

Per DCC 22.34.030(A), only those persons who were parties to the proceedings before the County as part of the File Number(s) listed above are entitled to notice and participation in the remand hearing. Per County hearing procedures, the entirety of the record must be before the Board and can be found at the project websites listed above.

Pursuant to DCC 22.24.070 the Board may set reasonable time limits on oral testimony. In the Notice of Public Hearing mailed to all parties with standing, typical testimony time limits were listed, being:

- Applicant Testimony: 30 Minutes
- Agency Testimony: 10 Minutes
- Public Testimony: 3 Minutes
- Applicant Rebuttal Testimony: 10 Minutes

The Confederated Tribes of Warm Springs requested 30 minutes to speak at the hearing. The Board has the discretion to modify or eliminate the above suggested standard time limits if it wishes to do so.

##### *Reopened Record*

Per DCC 22.32.040 notes that the scope of the proceeding for an application on remand must be limited to review of the issues that LUBA requires to be addressed, although the Board may use its discretion to reopen the record where it seems necessary.

The applicant requested the record be reopened to address a single remand issue, being the economic analysis (number 2 above). The Confederated Tribes of Warm Springs requested that the record be reopened to address all remand issues. In either case the hearings body must limit its review to the remanded issues.

Pursuant to Board Order No. 2025-014, signed April 16, 2025, the Board reopened the record and limited new evidence to be only directed to the economic analysis required pursuant to DCC 18.113.070 (C)(3) and (4).

## **V. PUBLIC COMMENT**

Staff has received several public comments since the Notice of Public Hearing was mailed. All comments received as of the date of drafting this memo are uploaded to the record. To the extent additional comments are received prior to the hearing, staff will enter them into the record in a timely manner.

## **VI. NEXT STEPS AND TIMELINE**

Following the hearing the Board may choose to:

- Continue the hearing to a date certain;
- Close the oral portion of the hearing and leave the written record open to a date and time certain;
- Close the hearing and commence deliberations; or
- Close the hearing and schedule deliberations for a date and time to be determined.

Staff notes that a final County decision on the remand is required within 120 days of the date the applicant initiates the remand. The applicant initiated the remand on April 7, 2025; therefore, a final County decision is due no later than August 5, 2025.

Due to the short time period for remand proceedings, if an open record period is requested and granted, staff recommends a standard open record period of seven days for new written testimony, seven days for rebuttal, and seven days for final legal argument by the Applicant only. In addition, the Confederated Tribes requested that the hearing be continued to the first week of June. If the Board were to grant the continuance, and with the open record period outlined above, this would put a likely and realistic decision date beyond the 120-day due date.

### **Attachment(s):**

Attachment A: Final Opinions and Orders

Attachment B: Oregon Court of Appeals Opinion